Congress's Power Over Appropriations: Constitutional and Statutory Provisions

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SUMMARY

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Congress's Power Over Appropriations: Constitutional and Statutory Provisions

A body of constitutional and statutory provisions provides Congress with perhaps its most important legislative tool: the power to direct and control federal spending. Congress's "power of the purse" derives from two features of the Constitution: Congress's enumerated legislative powers, including the power to raise revenue and "pay the Debts and provide for the common Defence and general Welfare of the United States," and the Appropriations Clause. This latter provision states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Strictly speaking, the Appropriations Clause does not provide Congress a substantive legislative power but rather constrains government action. But because Article I vests the legislative power of the United States in Congress, and Congress is therefore the moving force in deciding when and on what terms to make public money available through an appropriation, the Appropriations Clause is perhaps the most important piece in the framework establishing Congress's supremacy over public funds.

The Supreme Court has interpreted and applied the Appropriations Clause in relatively few cases. Still, these cases provide important fence posts marking the extent of Congress's power of the purse. The Court's cases explain Congress's discretion to decide whether to pay, through an appropriation, asserted debts owed to third parties. The Court's cases also establish that executive branch officials may not exercise constitutional or statutory powers to compel, directly or indirectly, payments from the Treasury absent an appropriation passed by Congress, and the Court's cases also provide support for the proposition that officials in the executive branch may not refuse to obligate funds when Congress has so mandated. Congress's appropriations function has its limits, though. For one, the Court has held that the Clause does not apply to funds until they are deposited in the Treasury. The Constitution may also constrain Congress's authority to control the other branches through its appropriations power, either through particular constitutional provisions or because of the Constitution's framework of separate and coequal branches.

Congress has not rested on the text of the Appropriations Clause, alone, to guard funds meant for or contained in the Treasury. Instead, Congress has chosen to enforce the Clause through a series of generally applicable fiscal control statutes, some of which practitioners and the Courts commonly refer to by informal names. These statutes govern federal funds from initial receipt through obligation and expenditure. Included among these statutes, the Miscellaneous Receipts Act requires agencies to deposit "as soon as practicable" any "money for the Government" that they receive, so that agencies remain dependent on Congress for budget authority. The Purpose Statute limits an agency's use of appropriations to only those "objects for which the appropriations were made," and a body of decisions explains how an agency may determine the express and implied authority that flows from a given appropriation. Congress also controls agency spending in how it structures appropriations and then, through transfer and reprogramming authority, constrains the agency's authority to allocate funds between or within appropriations. The Antideficiency Act prohibits obligations or expenditures that exceed an agency's total budget authority or violate a cap, condition, or other limitation placed on the agency's use of budget authority. Finally, the Impoundment Control Act limits the executive branch's ability to withhold budget authority from being available for obligation or expenditure, ensuring that agencies implement the budget authority that Congress has conferred.

Besides these generally applicable fiscal control statutes, Congress controls Treasury funds through the text of annual, supplemental, and continuing appropriations acts themselves or in other provisions of statute that Congress passes in authorizing acts, apart from its periodic appropriations measures. Congress specifies the amount and objects of appropriations, but as important, Congress places requirements, called *conditions*, *limitations*, or *appropriation riders*, on the executive branch's use of appropriations. Because it takes money to govern, Congress's use of appropriation riders has the potential to shape executive power in important ways. As a result, the executive branch scrutinizes limits placed on appropriated funds and sometimes identifies riders that, according to the executive branch, are not controlling because the rider allegedly exceeds Congress's legislative power. An understanding of the executive branch "precedent" on appropriation riders can help identify those likely to spark constitutional objections.

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A body of constitutional and statutory provisions provides Congress with perhaps its most important legislative tool: the power to direct federal spending. Known as Congress's "power of the purse,"[1] the power flows, in part, from those legislative authorities enumerated in Article I, Section 8, including Congress's authority under the Spending Clause to raise revenue and "pay the Debts and provide for the common Defence and general Welfare of the United States."[2] The Spending Clause power complements, and in some cases enhances, Congress's other enumerated legislative authorities.[3] Congress has the authority to determine what constitutes the "general Welfare" and then allocate public money to advance the cause it has selected.[4] Because the Constitution grants Congress the spending power, the document's other provisions provide the only legal constraints upon the exercise of that power.[5]

As broad as the Spending Clause power is, it perhaps is not the most important feature of Congress's power of the purse. One could devise a system of government in which the legislature and the executive each exercise independent control over revenue and spending. At the time of the Founding, England was not far removed from the days when the monarch claimed (though not without controversy) the right to levy new taxes on his own initiative[6] and had general freedom to dispose of hereditary revenues.[7] In continental Europe, monarchs had even more freedom to tax and spend.[8] The Spending Clause power, on its own, may not have necessarily foreclosed an American President from asserting that the executive branch shares access to the federal purse strings because of the powers otherwise vested in the Executive by the Constitution. The striking feature of Congress's power of the purse is not so much that Congress has access to the purse

[1] *See* THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.").

[2] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."). This Clause is sometimes known as the Taxation Clause or the General Welfare Clause.

[3] United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."). *Butler* marked a turning point. For nearly 150 years, courts debated whether the Spending Clause permits only spending in aid of another of Congress's enumerated powers (the view perhaps most notably advanced by James Madison) or whether, more broadly, the Spending Clause is itself legislative power to raise and spend to advance the general welfare (a view prominently championed by Alexander Hamilton). *Butler* embraced the Hamiltonian view. *See* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis, at 4–5.

[4] *See* Buckley v. Valeo, 424 U.S. 1, 90 (1976) (per curiam) ("It is for Congress to decide which expenditures will promote the general welfare.").

[5] *Id*. at 91 ("Any limitations upon the exercise of [the Spending Clause] power must be found elsewhere in the Constitution.").

[6] *See, e.g.*, 1 A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE REIGN OF KING GEORGE II, 509–10 (Sollom Emyln ed., 1742) (answer of the Judges to King Charles I) (opining that in times of peril the King had unreviewable authority to levy "ship-money" taxes, including in inland counties where no prior monarch had sought ship-money, to finance the building and manning of ships of war).

[7] PAUL EINZIG, THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT'S FINANCIAL CONTROL 119 (1959) ("Apart from a few exceptions, before 1688 Kings had reasonable freedom to spend their hereditary revenue without effective interference by Parliament.").

[8] Hans Baade, *Mandatory Appropriations of Public Funds: A Comparative Study, Part I*, 60 VA. L. REV. 393, 422–23 (1974) (explaining that because the Estates General granted the kings of France permanent sources of revenue, the House of Bourbon was able to rule for 175 years, from 1614 to 1789, without once convening the Estates).

strings; it is that, as generally understood, Congress *alone* has access.[9] Thus, the "bedrock power-of-the-purse provision" is arguably the Appropriations Clause rather than the Spending Clause.[10]

The Appropriations Clause specifies that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[11] By its terms, the Clause requires legislative authorization before money may be withdrawn from the Treasury. This requirement greatly augments Congress's enumerated legislative powers.[12] Congress can craft the terms of appropriations or deny appropriations outright,[13] subject only to the President's limited constitutional role in the lawmaking process.[14]

Using this broad legislative power, for more than two centuries Congress has appropriated funds for use by the executive branch. In the process, Congress encountered various executive branch practices that tended to undermine Congress's control of the purse strings. Agencies augmented their own budgets by retaining and using public money;[15] obligated an appropriation beyond its purpose;[16] wrested greater funding from Congress by spending all that Congress had appropriated previously or obligated for purposes not permitted by the appropriation;[17] and refused to obligate funds to advance policies with which a President disagreed.[18] In response to each of these practices, Congress adopted a series of generally applicable "fiscal control" statutes designed to tighten its hold on the purse strings.

Congress has also exerted control over the purse strings through the terms of appropriations acts themselves. When providing the executive branch with statutory authority to obligate Treasury funds, Congress may attach a condition, limitation, or requirement—referred to in this report as a *rider*[19]—to this grant. The appropriation rider either requires budget authority to be obligated in a

[9] For prominent, contrasting views of the appropriations clause, compare Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988), (arguing that the Appropriations Clause institutes a "Principle of Appropriations Control" by which "[a]ll expenditures from the public fisc must be made pursuant to a constitutional Appropriation made by Law" (internal quotation marks omitted)), with George J. Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1194 (1989) (arguing that absent congressional appropriations "the President has an implied power to incur claims against the Treasury to the extent minimally necessary to perform his duties and exercise his prerogatives under article II").

[10] Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 366 (2018).

[11] U.S. CONST. art. I, § 9, cl. 7.

[12] *Cf.* Sidak, *supra* note 9, at 1165 (noting that under a broad reading of the Appropriations Clause, which Sidak rejects, one could claim that "because it takes money to make public goods, Congress is entitled to regulate" how the other branches perform their separate constitutional functions).

[13] Rust v. Sullivan, 500 U.S. 173, 195 n.4 (1991) ("We have recognized that Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

[14] U.S. CONST. art. I, § 7, cls. 2–3 (describing the presentment process by which bills, "Order[s], Resolution[s], or Vote[s]" passed by or concurred in by both houses of Congress are presented to the President for signature or disapproval through veto and the two-thirds majority of both houses required to override a presidential veto).

[15] *See infra* notes 199–200 and text.

[16] *See infra* notes 241–247 and text.

[17] *See infra* notes 339–342 and text.

[18] *See infra* notes 405–410 and text.

[19] The phrase *appropriation rider* does not have a particular statutory meaning, but the Government Accountability Office (GAO) has defined the phrase to have one of two meanings. First, the phrase may be used to refer to "a limitation or requirement in an appropriation act." *See* GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, GAO-05-734SP, at 14 (2005) [hereinafter GAO GLOSSARY] ("appropriation rider") ("Sometimes used to refer to . . . a limitation or requirement in an appropriation act."); *see also* Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1317 (2020) (referring to limitations within appropriations acts as riders). Second, the phrase may refer to "a provision that is not directly related to the appropriation to which it is attached."

particular way or for a particular purpose, or denies budget authority for particular uses. Congress's choice of appropriations rider may be as important in shaping interbranch relations as the choice to provide funds in the first place. Congress's riders may also become a source of friction between the branches.[20]

Congress's appropriations power creates a complex framework of legal rules governing the federal government's handling of public funds, from receipt through obligation and expenditure. When Congress creates new programs, provides new budget authority, or conducts oversight of existing programs and funding, this legal framework sets the extent of an agency's authority over public money. This report summarizes this critical legal framework. It begins by discussing key terms and concepts, which are collected, along with other terms defined throughout this report, in the report's glossary **Appendix**. The report then briefly traces the Appropriations Clause from its roots in the English legal tradition. Next, the report examines a selection of Supreme Court cases that have examined this important provision. The report then discusses key portions of Congress's fiscal control statutes, including the Miscellaneous Receipts Act, the Purpose Statute, transfer statutes and reprogramming authority, the Antideficiency Act, and the Impoundment Control Act.[21] The report concludes by examining the executive branch's approach to assessing whether, in the opinion of the executive branch, an appropriations rider exceeds Congress's power and the types of riders most likely to evoke an objection from the executive branch.

Overview of Key Terms and Concepts

Like many other areas of law, federal appropriations law has its special terminology. *Budget authority* is a key concept. Budget authority is "the authority provided by Federal law to incur financial obligations."[22] With budget authority, an officer or employee may incur a financial obligation on behalf of the federal government.[23] Congress provides budget authority in several forms, from borrowing authority,[24] to contract authority,[25] to an appropriation.[26] Budget authority

GAO GLOSSARY at 14. As noted above, this report uses the first meaning of the phrase and not its second meaning.

[20] See *infra* notes 487–519 and text.

[21] As explained above, this report focuses on appropriation law matters. For a discussion of the federal budget process and, more specifically, the rules and practices for the consideration of appropriations measures, see CRS Report R46240, *Introduction to the Federal Budget Process*, by James V. Saturno; and CRS Report R42388, *The Congressional Appropriations Process: An Introduction*, coordinated by James V. Saturno.

[22] 2 U.S.C. § 622(2).

[23] *See Maine Cmty. Health Options*, 140 S. Ct. at 1322 ("Budget authority is an agency's power provided by Federal law to incur financial obligations . . . . (internal quotation marks omitted)). Rather than provide budget authority to an agency, Congress may itself "create an obligation directly by statute," even if, in creating an obligation, Congress does not also appropriate funds to satisfy the obligation. *Id*. at *7 (noting that Congress need not "provid[e] details about how [an obligation] must be satisfied" in order for the text of a statute to create an obligation).

[24] 2 U.S.C. § 622(2)(A)(ii) (borrowing authority) ("authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits").

[25] *Id*. § 622(2)(A)(iii) (contract authority) ("the making of funds available for obligation but not for expenditure"). Contract authority, alone, only allows an agency to incur an obligation. Contract authority "requires a subsequent appropriation or some other source of funds before the obligation incurred may actually be liquidated by the outlay of monies." Nat'l Ass'n of Reg'l Councils v. Costle, 564 F.2d 583, 586 (D.C. Cir. 1977).

[26] *Id*. § 622(2)(A)(i). To be precise, an appropriation usually "is not a designation of any particular pile of coin or roll of notes to be set aside and held for that purpose, and to be used for no other." Hukill v. United States, 16 Ct. Cl. 562, 565 (1880). Rather, an appropriation is authority to obligate the federal government and draw sums from the Treasury to satisfy the obligation. *See* Ains, Inc. v. United States, 56 Fed. Cl. 522, 537 (Ct. Cl. 2003). This report's use of colloquial references for appropriations, such as "appropriated funds," should be understood in this light.

is typically defined according to the purposes for which it is available, its amount (i.e., a definite or indefinite sum), the time period in which it is obligated (i.e., available for obligation for one year, multiple years, or without time period limitation), and whether the authority is current-year or permanent authority.[27] Budget authority may be classified as either discretionary spending[28] or mandatory spending.[29]

An *appropriation* is authority to incur obligations and draw money from the Treasury for a particular purpose.[30] Congress has by statute provided a rule of construction to determine whether or not the language of a statute provides an appropriation: "A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . ."[31] The Government Accountability Office (GAO) has interpreted Congress's rule of construction to not require specific use of the term *appropriation* or some form of that word for a statute to function as an appropriation. Instead, GAO understands Congress to make an appropriation whenever it provides "a specific direction to pay" and "a designation of the [f]unds to be used" for the payment.[32] When a statue includes a "mere authorization," though, that is not enough to constitute an appropriation.[33] Courts have not implied or inferred appropriations from statutes that lack an express reference to the making of an appropriation or a specific direction to pay designated funds.[34]

As noted above, Congress's grant of budget authority allows an individual to obligate the United States. An *obligation* is a "definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability" as a result of the action of a third party that is beyond the United States' control.[35] In other words, the federal government incurs an obligation when it takes the last action required of the federal government to create a legal liability.[36]

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[27] *See* GAO GLOSSARY, *supra* note 19, at 23.

[28] *See id.* ("'Mandatory spending,' also known as 'direct spending,' refers to budget authority that is provided in laws other than appropriation acts and the outlays that result from such budget authority." Mandatory spending includes entitlement authority and interest payments on public debt.).

[29] *See id.* ("'Discretionary spending' refers to outlays from budget authority that is provided in and controlled by appropriation acts.").

[30] GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, GAO-16-464SP, at ch. 2, p. 2–3 (4th ed., 2016) [hereinafter GAO REDBOOK], https://www.gao.gov/assets/680/675709.pdf ("[A]n appropriation is a law authorizing the payment of funds from the Treasury."); *see also* 2 U.S.C. § 622(2)(A)(i) (defining budget authority to include "provisions of law that make funds available for obligation and expenditure (other than borrowing authority)"); *see also* 31 U.S.C. § 701(2). The GAO Redbook is a well-respected treatise on federal appropriations law matters, and courts occasionally cite the GAO Redbook when deciding cases. *See, e.g.*, Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1319 (2020) (citing the GAO Redbook for the proposition that the "authority to incur obligations by itself is not sufficient to authorize payments from the Treasury").

[31] 31 U.S.C. § 1301(d).

[32] To the Honorable Mark O. Hatfield, United States Senate, B-214196, 63 Comp. Gen. 331, 335 (Apr. 30, 1984) (concluding a statute provided a permanent appropriation of funds for military retirement and survivor benefit programs even though the statute did not use the word "appropriation").

[33] *Id*.

[34] *See* United States House of Representatives v. Burwell, 185 F. Supp. 3d 165, 169 (D.D.C. 2016) ("An appropriation must be expressly stated; it cannot be inferred or implied.").

[35] GAO GLOSSARY, *supra* note 19, at 70.

[36] For example, when an agency enters into a binding grant agreement, an obligation arises. *See, e.g.*, Obligational Practices of the Corporation for National and Community Service, B-300480, 2003 WL 1857402, at *3–4 (Comp. Gen. Apr. 9, 2003).

Generally speaking, congressional rules in the House of Representatives and the Senate establish a presumption that Congress will follow a two-step process when it allows agencies to obligate and spend funds for a given purpose, though Congress is free to take both of these general steps at the same time.[37] *First*, Congress might enact an *authorization* statute, which provides an agency with "program authority," an "authoriz[ation] [of] an appropriation," or both.[38] *Second*, Congress might enact an appropriation for that program. Typically, Congress will provide only appropriations that have already been authorized; House and Senate rules generally prohibit appropriations for purposes that have not already been authorized.[39] In both chambers, though, these rules are not self-enforcing, meaning that they only make an offending appropriation subject to a point of order. If no member raises a point of order, if the chamber does not sustain a point of order that is raised, or if the chamber waives the application of the rules, they would not impede the appropriation from being enacted into law and, later, obligated or expended by an agency.[40] Congress commonly appropriates funds where an authorization for that appropriation has lapsed,[41] and agencies are free to obligate such appropriations.[42] That said, Congress's authorization function does shape agency authority to obligate Treasury funds. An agency may perform only those functions for which it has received statutory authority in some form.[43]

Beyond these key terms, Congress has enacted a statute requiring agencies to speak a common language when addressing budget matters. The GAO is an arm of the legislative branch,[44] headed by the Comptroller General of the United States.[45] Federal law tasks GAO with establishing "standard terms and classifications for fiscal, budget, and program information of the

[37] *See, e.g.*, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, Div. A, Title V, § 5001 (2020) (authorizing the Coronavirus Relief Fund program and appropriating $150 billion for allocation to states, the District of Columbia, territories, tribal governments, and local governments).

[38] GAO GLOSSARY, *supra* note 19, at 15 (noting that the term *authorization* may describe "legislation enacting new program authority" or "legislation authorizing an appropriation").

[39] *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED SIXTEENTH CONGRESS, H.DOC. NO. 115-177, at Rule XXI, cl. 2(a)(1) (2019) ("An appropriation may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law, except to continue appropriations for public works and objects that are already in progress."); STANDING RULES OF THE SENATE, S.DOC.NO. 113-18, at Rule XVI, cl. 1 (2013) (making subject to a point of order an appropriation bill or amendment to an appropriation bill containing appropriations that are not "made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution passed by the Senate during that session").

[40] Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474, 483 (Ct. Cl. 1999) ("[T]hese rules are not self-enforcing. Rather, they merely subject the offending provision to a point of order and do not affect the legislation's validity if the point of order is not raised (or is raised and not sustained) prior to enactment.").

[41] *See, e.g.*, CONG. BUDGET OFFICE, EXPIRED AND EXPIRING AUTHORIZATIONS AND APPROPRIATIONS: FISCAL YEAR 2020, at 1–2 (2020) (estimating that Congress appropriated $332 billion in FY2020 related to 1,046 authorizations of appropriations that had expired "before the beginning of [FY] 2020").

[42] *See* Matter of Civil Rights Commission, B-246541, 71 Comp. Gen. 378, 380 (Apr. 29, 1992) ("There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act. A statute imposing substantive functions upon an agency which require funding for their performance provides the agency with the authority necessary to perform the functions.").

[43] *See* Availability of Appropriations for Soc. Sec. Admin. Grant Programs Following the Expiration of Authorizations of Appropriations, 2013 WL 11105737, at *5 (O.L.C. Feb. 4, 2013) ("[I]t is axiomatic that an agency must have legal authority to perform its functions and, if it is to spend public monies, appropriated funds.") (internal quotation marks omitted)).

[44] *See* Bowsher v. Synar, 478 U.S. 714, 746 n.11 (1986) ("[T]he Comptroller General and the GAO are functionally equivalent to congressional agents such as the Congressional Budget Office, the Office of Technology Assessment, and the Library of Congress' Congressional Research Service.").

[45] 31 U.S.C. § 702(b).

Government" in consultation with relevant legislative and executive branch agencies.[46] Before GAO's standard set of terms existed, agencies reported budget information to Congress using a "maze of classification schemes and systems," which made it difficult for Congress to understand and compare, between agencies, the information it received.[47] Agencies thus must use GAO's terms when "providing fiscal, budget, and program information to Congress."[48] GAO's standard terms appear in its publication, *A Glossary of Terms Used in the Federal Budget Process.*[49]

GAO's service in this regard is only one piece of the prominent role that it plays in the development of federal appropriations law. GAO investigates on Congress's behalf "all matters related to the receipt, disbursement, and use of public money."[50] Executive branch officials charged with disbursing public funds may also request a decision from GAO on whether the law allows a proposed expenditure.[51] GAO's investigations and decisions create an extensive body of decisions discussing and applying federal appropriations law. The executive branch and the federal courts often consider GAO's views when deciding whether (for example) an obligation is lawful.[52] But neither the executive branch nor the federal judiciary considers GAO's opinions to be controlling. When GAO's view on an appropriations law question clashes with that of the executive branch, "historically, the executive branch has not considered itself bound by" GAO's opinions.[53] And the federal courts have the "last word" when deciding the legal questions raised by the cases that come before them.[54]

[46] *Id.* § 1112(c)(1).

[47] S. COMM. ON GOV'T OPERATIONS, FEDERAL ACT TO CONTROL EXPENDITURES AND ESTABLISH NATIONAL PRIORITIES, S.REP. NO. 93-579, at 70–71 (1973).

[48] 31 U.S.C. § 1112(d).

[49] *See* GAO GLOSSARY, *supra* note 19.

[50] 31 U.S.C. § 712(1).

[51] *Id.* § 3529(a).

[52] *See, e.g.*, U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339, 1349–50 (D.C. Cir. 2012) (Kavanaugh, J.) (surveying GAO decisions on the Purpose Statute and the necessary expense doctrine); Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 52 (2001) (considering GAO's past interpretations of the Antideficiency Act).

[53] Detail of Law Enforcement Agents to Congressional Committees, 12 Op. O.L.C. 184, 185 n.3 (1988) (further noting that "[t]he Comptroller General is an officer of the legislative branch"). And in fact, GAO and the executive branch have disagreed about aspects of federal appropriations law. *See, e.g.*, *infra* notes 347–355 and text (discussing GAO-executive branch disagreements over the scope of the Antideficiency Act); *see also Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92nd Cong. 240 (1971) [hereinafter *1971 Impoundment Hearings*] (testimony of W. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice) ("Traditionally, there has been rivalry between the Comptroller General and the Attorney General.").

[54] Scheduled Airlines Traffic Offenses, Inc. v. Dep't of Def., 87 F.3d 1356, 1361 (D.C. Cir. 1996) (internal quotation marks omitted).

Key Takeaways: Terms and Concepts

- Congress grants budget authority by statute, permitting individuals to incur obligations on behalf of the United States.
- An appropriation is one type of budget authority and permits an agency to draw money from the Treasury.
- GAO often issues decisions, opinions, and other publications that contribute to the development of appropriations law. GAO's views do not bind the courts or the executive branch, but GAO's views are often consulted by the other branches.

The Appropriations Clause: Historical Background

Article I of the Constitution vests in Congress "all legislative Powers" granted by the Constitution.[55] Many of Congress's powers are set forth in the 18 clauses of Article I, Section 8, such as the power to regulate interstate and foreign commerce;[56] "borrow Money on the credit of the United States";[57] "establish Post Offices and post Roads";[58] and "declare War" and "raise and support Armies."[59] Congress also has the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not only its Article I, Section 8 powers, but also "all other Powers vested by [the] Constitution in the Government of the United States" or any of its departments or officers.[60]

The Appropriations Clause does not appear among these powers. Rather, the Appropriations Clause appears in Article I, Section 9 of the Constitution, which contains restraints on the federal government's powers. Some of Section 9's provisions are understood to apply to Congress alone, either because the particular provision refers to Congress[61] or because it concerns an action, such as levying taxes, that, given other provisions of the Constitution, only Congress may perform.[62] Other clauses of Section 9 "are expressed in general terms,"[63] and thus apply to the federal government as a whole. The Appropriations Clause is one such government-wide limitation. The Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[64]

Thus, the Appropriations Clause's fundamental rule is that Congress dictates the purposes for which money in the Treasury may be expended.[65] In adopting this fundamental rule, the Framers

[55] U.S. CONST. art. I, § 1.

[56] *Id*. art. I, § 8, cl. 3.

[57] *Id*. cl. 2.

[58] *Id*. cl. 7.

[59] *Id*. cls. 11, 12.

[60] *Id.* cl. 18.

[61] *See id.* § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to" 1808 "but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

[62] *Compare id*. § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes . . . ."), *with id*. § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

[63] Barron v. City of Baltimore, 32 U.S. 243, 248 (1833).

[64] U.S. CONST. art. I, § 9, cl. 7. This provision also states "and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* This Statements-and-Account Clause is not discussed in this report.

[65] *See, e.g.*, Office of Pers. Management v. Richmond, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. It means simply that no money can be paid out of

both continued and broke from the English tradition.[66] On the one hand, with passage of the Bill of Rights of 1689, Parliament asserted that it was supreme in directing the use of public funds.[67] Parliament claimed that among its ancient "Rights and Liberties" was the rule "that Levying Money for or to the Use of the Crowne by preten[s]e of Prerogative without Grant of Parl[i]ament for longer time or in other manner then the same is or shall be granted is Illegal."[68] In other words, Parliament asserted that any use of funds by the monarch that lacked Parliament's authorization was unlawful. The Framers recognized this was a key development in England's centuries-long progress toward representative government.[69]

On the other hand, even into the 18th century, the monarch maintained a measure of financial independence from Parliament—though far less than that claimed by monarchs of prior centuries.[70] William Blackstone, an English jurist who served as a leading authority on English law for the Founding generation,[71] divided the Crown's "fiscal prerogatives" in two.[72] The King's "ordinary" revenue included ancient rights and property, such as the royal demesne (i.e., land held by the crown and the revenues from it) that once generated significant revenue but, by the Founding, had "sunk almost to nothing."[73] More significantly, the Crown could draw on "extraordinary" revenue. Though Parliament granted the Crown this latter revenue stream, Parliament's grants could be "perpetual,"[74] lasting for the Monarch's entire reign.[75] As a legal

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the Treasury unless it has been appropriated by an act of Congress." (quotation marks omitted)); United States v. Maccollom, 426 U.S. 317, 321 (1976) (plurality opinion) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

[66] When interpreting constitutional provisions, courts and scholars often consider the English legal tradition at the time of the Founding. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 593 (2008) (examining the English legal tradition); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative,* 119 COLUM. L. REV. 1169, 1191 (2019) (noting that "the political imaginary" of "England's multicentury wobble toward parliamentary supremacy" "was deeply entrenched in the Founders' minds, by way of schoolrooms, the political press, and widely published histories from authors across the political spectrum.").

[67] The Bill of Rights formalized King William III and Queen Mary II's joint accession to the throne, formerly Prince and Princess of Orange. *See* 1 W. 3 & M. 2, c.2 (1688) (dated under the Old Style calendar), *reprinted in* 6 STATUTES OF THE REALM 143 (Alex Luders et al., eds., 1963) (declaring Parliament's resolve that "William and Mary Prince and Princess of Orange be and be declared King and Queene of England France and Ireland" and the dominions thereof). The Act mirrored the Declaration of Right, a document that members of the Convention Parliament presented, along with the crown, to the then-Prince and Princess of Orange in February 1689. *See* FREDERIC W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 281–82 (1919).

[68] 1 Will. 3 & Mary 2, c.2 (1688), *reprinted in* 6 STATUTES OF THE REALM, *supra* note 67, at 142–43. Parliament charged King James II with violating this ancient right. *Id*.

[69] *See* THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed. 1961) (describing control of the "purse" as "that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government").

[70] *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 46 (2017) ("Under the Tudors, Parliament was far more deferential to royal authority over expenditures—in [Frederic] Maitland's words, it hardly dared to meddle with such matters." (quotation marks omitted)).

[71] Alden v. Me., 527 U.S. 706, 715 (1999) (calling Blackstone "the preeminent authority on English law for the founding generation").

[72] I WILLIAM BLACKSTONE, COMMENTARIES 271 (1765).

[73] *Id*. at 296.

[74] *Id*. at 297–98.

[75] *E.g.*, 1 Ann. 1, c.1 (1702), *reprinted in* 8 STATUTES OF THE REALM 3, *supra* note 67 (providing Queen Anne "Subsidies of Tonnage and Poundage" and other sources of revenue "from and after" the first day of her reign "during Her Majesties Life").

matter, Parliament may have controlled purse strings, but as a practical matter, English monarchs enjoyed significant financial independence from Parliament.[76]

The Appropriations Clause also paralleled provisions of state constitutions that existed at the time of the Constitutional Convention. Nearly all of the states eventually heeded the Second Continental Congress's May 1776 call to "adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general" by adopting new state constitutions.[77] Rhode Island and Connecticut "retained their colonial charters with only minor modifications as their fundamental law into the nineteenth century."[78] Most state constitutions in effect in 1789 expressly assigned the appropriations power to the state legislature.[79] Other state constitutions of the period did not expressly assign an appropriations function to the legislature.[80] But no state constitution expressly allowed a person to draw money from the state treasury without legislative authorization. The framers of certain state constitutions went further still by redirecting to the state treasury funds that had been payable to the executive under the colonial system.[81] Thus, when the Framers arrived in Philadelphia in the late spring and early summer of 1787, the general rule in the states was that control over the expenditure of public funds should rest with the legislature.[82]

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[76] *See* EINZIG, *supra* note 7, at 119. Indeed, before the Founding, historians contend that the Hanoverian kings used these revenues to influence members of Parliament. Perversely, then, Parliament's grants of revenue not only lessened the Monarch's reliance on Parliament, the grants became a tool to control Parliament. *See id*. at 123–26 (concluding that "there can be little doubt that the general picture of the degree of political corruption during the 18th century was really substantially as high as contemporary claimed it to be").

[77] 1 WORKS OF JOHN ADAMS 217 (Charles Francis Adams, ed., 1856).

[78] G. ALAN TARR, UNDERSTANDING STATES CONSTITUTIONS 60 (1998). Connecticut adopted its first Constitution in 1818. *See* CONN. CONST. of 1818. Rhode Island followed suit in 1842. *See* R.I. CONST. of 1842.

[79] *See* DEL. CONST. of 1776, art. VII (providing for the appointment of a "chief magistrate" empowered to "draw for such sums of money as shall be appropriated by the general assembly, and be held accountable to them for the same"); MD. CONST. OR FORM OF GOV'T of 1776, at XX–XXI (specifying that the House of Delegates would originate all "money bills," a term defined to include all bills "appropriating money in the treasury" or otherwise providing supplies "for the support of the government"); MASS. CONST. of 1780, ch. 2, § 1, art. XI ("(No moneys shall be issued out of the treasury of this Commonwealth, and disposed of . . . but by warrant, under the hand of the Governour for the time being, with the advice and consent of the council, for the necessary defen[s]e and support of the Commonwealth; and for the protection and preservation the inhabitants thereof, agreeably to the act and resolves of" Massachusetts's state legislature, "the General Court"); N.H. CONST. of 1783, pt. 2, *reprinted in* THE PERPETUAL LAWS OF THE STATE OF NEW-HAMPSHIRE 16 (John Melcher, ed., 1789) (substantially similar language to that of Massachusetts Constitution of 1780); N.C. CONST. of 1776, § 19 ("That the governor for the time being, shall have the power to draw for and apply such sums of money as shall be voted by the general assembly for the contingencies of government, and be accountable to them for the same"); PA. CONST. of 1776, § 20 (providing that president and the president's council "may draw upon the treasury for such sums as shall be appropriated by the house"); S.C. CONST. of 1778, art. XVI (directing that no "money be drawn out of the public treasury but by the legislative authority of the state").

[80] *See* GA. CONST. of 1777; NJ. CONST. of 1776; N.Y. CONST. of 1777; VA. CONST. of 1776. That said, some of these state constitutions dealt with the issue tangentially, expressly referencing the procedure for passing "money bills." *E.g.*, N.J. CONST. of 1776, VI; Va. CONST. of 1776, VIII.

[81] *See* MD. CONST. OR FORM OF GOV'T of 1776, at LVIII ("[A]ll penalties and forfeitures, heretofore going to the King or proprietary, shall go to the State—save only such, as the General Assembly may abolish or otherwise provide for."); PA. CONST. of 1776, § 33 ("All fees, licence money, fines and forfeitures heretofore granted, or paid to the governor, or his deputies for the support of government shall hereafter be paid to the public treasury, unless altered or abolished by the future legislature."); VA. CONST. of 1776, XX ("All escheats, penalties, and forfeitures heretofore going to the King, shall go to the Commonwealth, save only such as the Legislature may abolish, or otherwise provide for.").

[82] *See* Gerhard Casper, *Appropriations of Power*, 13 UALR. L.J. 1, 4–8 (1990) (explaining that "during the founding period money matters were primarily thought of as a legislative prerogative").

Perhaps for this reason, the Appropriations Clause attracted little debate at the Constitutional Convention. When deliberating over the Clause, the Framers debated only whether the Senate—then conceived as a body whose members the states would elect—would have the power to originate or amend appropriation bills.[83] The first proposal mentioning Congress's appropriations function stated that "all Bills for raising or appropriating money . . . shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch."[84] This first proposal continued: "and that no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated in the first Branch."[85] Eventually, the delegates removed limitations on Senate origination and amendment of appropriations bills and settled on the text of the current Clause.[86]

One particular instance of Congress's appropriations power did draw debate. Early on, the Framers proposed assigning to Congress the power to raise armies.[87] Some delegates feared large standing armies in times of peace, and thus proposed ways to constrain the size of a peacetime army.[88] Other delegates noted that "preparations for war are generally made in peace," and urged colleagues to avoid unduly limiting Congress's ability to prepare for war during times of peace.[89] The delegates eventually agreed that Congress could not make an appropriation for the Army lasting longer than two years.[90] The Constitution thus provides that Congress may "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."[91] Alexander Hamilton explained that this provision, commonly referred to as the Army Clause, would require Congress "to deliberate upon the propriety of keeping a military force on foot" at least once every two years, "come to a new resolution on the point," and "declare their sense of the matter by a formal vote in the face of their constituents."[92] Thus, Congress could not abdicate to the President the decision of whether to maintain armies.[93]

Supreme Court Interpretation

The Supreme Court has construed the Appropriations Clause in relatively few cases. Still, these cases set forth important principles governing the Clause's application, marking the potential power of the Appropriations Clause as well as its potential limits. The Court's cases, a selection

[83] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 544–45 (Max Farrand ed., 1911).

[84] *Id*. at 524. In the draft text quoted above, the Framers used the terms "first Branch" and "second Branch" to refer to the House and Senate, respectively. *Id.*

[85] *Id*.

[86] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 83, at 610 & n.2, 618–19.

[87] *E.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 83, at 143.

[88] *E.g.*, *id*. at 329 (Eldridge Gerry) (proposing a numerical cap on troop strength in times of peace).

[89] *Id*. at 330 (Jonathan Dayton).

[90] *See id*. at 508–09. Criticism remained of this proposal during the Convention. *See id*. at 509 (Eldridge Gerry) (reiterating his call for a numerical cap on troop strength, urging a one-year limitation on Army appropriations, and criticizing the two-year proposal as "dangerous to liberty"). During the ratification debates that followed the Convention's close, opponents of ratification pointed to the Army Clause as one of its alleged flaws. *See, e.g.*, *Essays by a Farmer* (1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 1.42–1.43 (Herbert Storing ed., 1981) (cataloguing features of the English system of government that guarded against "the evils and dangers" of a peacetime army and arguing the then-proposed U.S. Constitution lacked similar protections) ("In England, the appropriation of money for the support of their army must be from year to year; in America it may be for double the period.").

[91] U.S. CONST. art. I, § 8, cl. 12.

[92] THE FEDERALIST NO. 26, at 171 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[93] *Id.*

of which are discussed below, provide guidance on how the Appropriations Clause affects the rights of private parties as against the federal government; how the Clause limits the powers of the executive branch; and the express and implied limits on Congress's ability to control the other branches using its appropriations power.

Effects on Private Parties

The Supreme Court has most often construed the Appropriations Clause in the context of claims against the government to compel payment of alleged debts. In its "very first Appropriations Clause decision,"[94] *Reeside v. Walker*,[95] the Court held that a private party may force the federal government to pay an asserted debt or obligation only when Congress has appropriated funds to pay the debt. There, the widow of a government contractor brought a claim for "set-off" and received a jury verdict stating that the federal government owed her deceased husband roughly $190,000.[96] Having obtained what she thought to be a judgment against the United States, the widow petitioned for a writ of mandamus in federal court, asserting that the Secretary of the Treasury had a clear legal duty to pay the debt.[97] Lower courts denied her request.

The Court affirmed, deciding that the widow had prematurely brought her petition. The jury's verdict had not led to a final judgment, and even if it had, the judgment would "merely lay[] the foundation for" further proceedings to collect on the judgment.[98] The Court then noted roadblocks to recovery that would arise even with a final judgment.[99] "[O]f peculiar importance" to the Court, no statute authorized the Secretary to pay the deceased husband's debt.[100] As a result, not only would the widow be unable to identify a clear legal duty on the government's part to pay her deceased husband's debt, the petition sought relief prohibited by the Appropriations Clause. The Court explained:

> No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the Treasury Department, the plaintiff would be as far from having a claim on the Secretary or Treasurer to pay it as now. The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.
>
> However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.[101]

[94] Keepseagle v. Perdue, 856 F.3d 1039, 1073 (D.C. Cir. 2017) (Brown, J., dissenting).

[95] 52 U.S. 272 (1850).

[96] *Id*. at 273–74.

[97] *Id*. at 274.

[98] *Id*. at 288–89 ("The petitioner and her husband have neglected to pursue the case . . . to a final judgment, and hence have offered no evidence of one, on the verdict of indebtedness to Reeside by the United States.").

[99] *Id*. at 289 (offering this added analysis to "save future expense and litigation in this case"); *see also* Office of Pers. Management v. Richmond, 496 U.S. 414, 425 (1990) (characterizing the Court's discussion in *Reeside* concerning the Appropriations Clause as an "alternative ground for decision").

[100] *Id*. at 291.

[101] *Id*.

Federal courts have since reaffirmed *Reeside*'s description of the Appropriations Clause's reach.[102]

In *Hart v. United States*,[103] the Court set forth a corollary of the principle in *Reeside*: Congress may expressly prohibit use of an appropriation to pay an obligation asserted by a private party.[104] Hart received a pardon in November 1865 for having been "in active sympathy" with the Confederate States of America during the Civil War.[105] He claimed payment for (among other things) "flour, corn, and forage" he had provided the federal government before secession.[106] But under an 1867 joint resolution of Congress, it was unlawful for any officer or employee to pay any "account, claim, or demand" held by a person who supported secession, even if the person's claim related to goods or services provided before secession.[107] The Court affirmed a decision denying Hart's claim, explaining that "[i]t was entirely within the competency of Congress to declare that the claims mentioned in the joint resolution should not be paid till the further order of Congress," and this was true even though Hart had received a full pardon from President Andrew Johnson.[108]

As *Reeside* instructs, a private party seeking payment from the United States must identify an appropriation "made by law" that permits the payment, as the officers and employees of the federal government lack general authority to pay debts "when presented to them." And as in *Hart*, Congress may specify that the appropriations it does make may not be obligated or expended to pay specified debts.[109] This congressional discretion could appear harsh, if and when Congress refuses to pay a particular claim.[110] But commentators on the Constitution argued that by

[102] *See Richmond*, 496 U.S. at 424–25; U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.). However, the practical effect of this holding is limited. Through enactment of the "Judgment Fund," Congress has permanently appropriated sums to pay "final judgments, awards, compromise settlements, and interest and costs" where (among other things) "payment is not otherwise provided for." 31 U.S.C. § 1304(a).

[103] 118 U.S. 62 (1886).

[104] The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST., amend. V. In effect, the Fifth Amendment imposes a payment obligation, that of "just compensation," if the federal government "take[s]" private property for public use. *See* First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987) ("government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation" (quotation marks omitted)). For a discussion on how this provision may intersect with the Appropriations Clause, see Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501, 505 (1996).

[105] *Hart*, 118 U.S. at 64–65.

[106] *Id*.

[107] *Id*. at 65.

[108] *Id*. at 67. The Court reached this decision while noting that Congress had separately allowed payments of obligations to mail carriers in certain states, exempting such carriers from the 1867 joint resolution's payment prohibition. *See id*.

[109] *Reeside* and *Hart* do not appear to involve an attempt by Congress to repeal an existing obligation, and this report does not address the constitutional limitations that might apply to Congress's power to void existing obligations. *See, e.g.*, Cherokee Nation v. Leavitt, 543 U.S. 631, 646 (2005) ("A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution."); United States v. Winstar Corp., 518 U.S. 839, 876 (1996) (plurality) (noting that the federal government has "some capacity to make agreements binding [on] future Congresses" but that the "extent of that capacity . . . remains somewhat obscure"). Moreover, the failure to appropriate sums to pay an obligation does not rescind that obligation. *See, e.g.*, *Maine Cmty. Health Options*, 140 S. Ct. at 1321 (explaining that appropriations that are insufficient to satisfy an obligation do "not pay the Government's debts, nor cancel its obligations" (quotation marks omitted)).

[110] In practice, even prior the Judgment Fund's creation in 1956, *see supra* note 102 (discussing the Judgment Fund), the federal government was a fairly dependable judgment debtor. "A study concluded in 1933 found only 15 instances

mandating Congress's participation in the claims-payment process, the Appropriations Clause protects the public funds. If Congress did not have to authorize the payment of claims against the United States, there would be "an opportunity for collusion and corruption in the management of suits between the claimant[] and the officers of the government."[111] Congress's role in approving claims guards against collusion and, more generally, restrains executive action. "[T]he known fact, that the subject must pass in review before congress, induces a caution and integrity in making and substantiating claims, which would in a great measure be done away, if the claim were subject to no restraint, and no revision."[112]

Key Takeaways: The Appropriations Clause's Effects on Private Parties

- To recover money from the federal government, a private party must, among other things, identify an appropriation that is available to satisfy the judgment.
- Generally, the Appropriations Clause does not require Congress to appropriate funds to pay an obligation asserted by a private party.

Effects on Executive Power

The Supreme Court has also applied the Appropriations Clause to limit the authority of executive branch officers and employees exercising either constitutional or statutory powers. In *Knote v. United States*,[113] the Court held that another branch's exercise of constitutional powers cannot compel payment of public funds unless an appropriation separately permitted the payment. During the Civil War, the federal government seized and sold Knote's personal property because he had committed treason by supporting secession.[114] The government deposited the proceeds of this sale in the Treasury.[115] Later, President Andrew Johnson granted Knote a "full pardon and amnesty" that restored Knote to "all rights, privileges, and immunities under the Constitution and the laws made in pursuance thereof."[116] Knote argued that because seizure of his property was one of the consequences of his treason, an offense for which he had received a full pardon, he was entitled to the proceeds of the sale of his property.[117]

The Court rejected Knote's claim. The Court began by noting that President Johnson's pardon did not, by its terms, call for a return of Knote's forfeited property.[118] Even if the President had framed his pardon in that way, the President would lack the power to require return of the property. The pardon power[119] does not depend on congressional authorization. The President

in 70 years when Congress had refused to pay a judgment." Glidden Co. v. Zdanok, 370 U.S. 530, 570 (1962).

[111] JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1343 (1833); *see also* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (noting that the Appropriations Clause was "intended as a restriction upon the disbursing authority of the Executive department").

[112] *Id*.

[113] 95 U.S. 149 (1877).

[114] *Id*. at 149.

[115] *Id*.

[116] *Id*. at 152.

[117] *See id*. at 153.

[118] *Id*.

[119] *See* U.S. CONST. art II, § 2, cl. 1 (conferring on the President the "Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment").

may grant a pardon without a statute authorizing one, and Congress cannot prohibit the President from granting a pardon in any case or class of cases.[120] But the government had deposited the proceeds from the sale of Knote's property in the Treasury. This deposit triggered the Appropriations Clause. "However large . . . may be the power of pardon possessed by the President," the Court explained, "there is this limit to it, as there is to all his powers[]—it cannot touch moneys in the treasury of the United States, except [as] expressly authorized by act of Congress."[121]

The Court likewise relied on the Appropriations Clause over a century later when holding, in *Office of Personnel Management v. Richmond*,[122] that when no appropriation supports a payment, the executive branch may not bind the government to make the payment based on how an agency carries out a statutory program. In 1986, Navy Department personnel advised Richmond, a retired Navy welder, that he could pursue certain part-time work without sacrificing his right under federal law to disability benefits. The Navy based its advice on an outdated version of statutory eligibility rules, which in 1982 Congress modified. In fact, the retiree's part-time work made him ineligible under the post-1982 eligibility rules, and the federal government eventually denied him benefits.[123] Richmond challenged the denial of benefits, claiming that the doctrine of equitable estoppel prevented the government from now arguing that statute made Richmond ineligible for benefits. The government had earlier made the opposite representation (i.e., that Richmond would remain eligible for benefits), and Richmond had relied on that earlier advice when accepting the part-time work that made him ineligible for benefits.[124]

Equitable estoppel may apply in litigation between private parties, limiting the arguments available to one party to avoid unfairness to that party's adversary.[125] When the Supreme Court considered Richmond's case, though, lower courts were divided over whether and when equitable estoppel applied against the government.[126] Though it refused to rule out estoppel in all cases involving the federal government,[127] the Court rejected the doctrine's application to the United States in cases involving monetary claims against the government.[128] According to the Court, this ruling was necessary given the Appropriations Clause. "Any exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."[129] Just as the President may not obligate funds

[120] *See* Schick v. Reed, 419 U.S. 256, 266 (1974) (reasoning that the President's pardon power "flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress").

[121] *Knote*, 95 U.S at 154. Though it appeared to avoid resolving the issue, the Court has suggested that *Knote*'s principle applies "regardless of whether the Government's ownership of those funds is disputed," such that an employee of the United States would need an appropriation to return funds erroneously deposited into the Treasury. Republic Nat'l Bank v. United States, 506 U.S. 80, 94 (1992) (Rehnquist, C.J.) (opinion of the Court in relevant part).

[122] 496 U.S. 414 (1990).

[123] *Id*. at 417–19.

[124] *Id*. at 419.

[125] *See, e.g*., Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 725 (2d Cir. 2001) ("The doctrine of equitable estoppel is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct.").

[126] *See Richmond*, 496 U.S. at 422.

[127] *Id*. at 423–24.

[128] *See id*. at 434 ("Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds.").

[129] *Id*. at 425.

without an appropriation, "judicial use of the equitable doctrine of estoppel cannot grant [a party] a money remedy that Congress has not authorized."[130]

The Court justified its decision by reference to the Appropriations Clause's fundamental purpose, to "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good," a judgment reflected in a statute that provides an appropriation.[131] If the Court applied estoppel, executive branch officials charged with administering government programs could effectively overrule Congress's spending decisions by administering programs as if a different set of rules applied.[132] According to the Court, the Appropriations Clause foreclosed that result.

Another case bears mentioning. Though it is not a construction of the Appropriations Clause, *Kendall v. United States*[133] is authority with implications for Congress's appropriations function. In *Kendall*, the Court recognized Congress's ability to impose, by statute, mandatory functions on subordinate executive branch officials. There, the Postmaster General credited a contractor's account for transporting the mail. After a change in Post Office leadership, though, a new Postmaster General withdrew the credits.[134] The contractor petitioned Congress for relief. Rather than itself determine credits owed, Congress empowered the Solicitor of the Treasury to decide the issue, and Congress directed the Postmaster General to credit mail contractors with whatever sum the solicitor decided was due.[135] After the Solicitor made his finding, the Postmaster General refused to give the full credit found, arguing in the lawsuit that followed that the courts could not control how the President directed execution of the laws.[136]

Drawing a distinction between the President on the one hand, and the President's subordinates on the other, the Court rejected the Postmaster General's view. "[A]s far as his powers are derived from the constitution, [t]he [President] is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."[137] But this did not mean that "every officer in every branch of th[e executive] department is under the exclusive direction of the President."[138] Rather, Congress may impose statutory duties on subordinate officers, leaving no discretion over how the agent performs the duty,[139] and the federal courts could compel the officer to perform such duties.[140] "The terms of the submission" of the disputed claim to the

[130] *Id*. at 426.

[131] *Id*. at 427–28.

[132] *See id*. at 428.

[133] 37 U.S. 524 (1838).

[134] *Id*. at 608.

[135] *Id*. at 608–09.

[136] *Id*. at 612–13 ("It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed.").

[137] *Id*. at 610.

[138] *Id*.

[139] *Id*. at 613 ("The act required by the law to be done by the postmaster general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial; and about which the postmaster general had no discretion whatever.").

[140] *Id*. at 614, 623–24.

solicitor "was a matter resting entirely in the discretion of congress," and the Postmaster General could not "control Congress, or the solicitor, in that affair."[141]

Kendall rejected the contention that a subordinate officer, such as the Postmaster General, "was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law."[142] Under *Kendall*'s reasoning, Congress may craft a statute that requires subordinate executive officers to obligate funds, or to obligate funds in a particular way.[143] This authority is important, because the executive branch can just as easily frustrate Congress's power of the purse by refusing to obligate funds (at all, or in the manner directed by Congress) as by obligating funds for a purpose not permitted by law. Writing in 1969, William Rehnquist, then-Assistant Attorney General of the Office of Legal Counsel and future Chief Justice of the United States, pointed to *Kendall* as "authority against the asserted Presidential power" to "refuse to spend funds appropriated by Congress for a particular purpose" where the statute making the appropriation "by its terms sought to require the expenditure."[144] Though other officials within the Nixon Administration soon rejected this view,[145] Rehnquist found it "extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with the Congressional directive to spend," at least when the refusal did not concern foreign affairs or national defense.[146] Later cases endorse similar reasoning.[147]

Key Takeaways: The Appropriations Clause's Effects on Executive Power

- The Supreme Court has held that an executive branch officer or employee may not obligate Treasury funds in the absence of an appropriation, including in a case involving the President's exercise of the pardon power.
- Supreme Court case law provides support for the proposition that Congress may implement spending decisions by drafting statutes to require the obligation or expenditure of funds by subordinate executive officers or employees.

[141] *Id*. at 611.

[142] *Id*. at 612–13.

[143] *See, e.g.*, Pennsylvania v. Lynn, 501 F.2d 848, 854 n. 21(D.C. Cir. 1974) (stating that Congress could set conditions in statute limiting the executive branch's discretion over expenditure of appropriated sums and that "[a] contention to the contrary would not be likely of a serious reception" (citing *Kendall*, 37 U.S. 524); Constitutional Limitations on Fed. Gov't Participation in Binding Arbitration, 19 Op. O.L.C. 208, 224 (1995) ("*Kendall* stands for the proposition that the executive must comply with the terms of valid statutes and that if a statute requires the executive to submit to binding arbitration, the executive must do so."); The President's Veto Power, 12 U.S. Op. Off. Legal Counsel 128, 167 (1988) (noting that *Kendall* "can be read to support the proposition that the executive's duty faithfully to execute the laws requires it to spend funds at the direction of Congress"); *cf*. Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes.").

[144] Memorandum for the Honorable Edward L. Morgan, Deputy Counsel to the President (Dec. 19, 1969), *reprinted in 1971 Impoundment Hearings*, note 53 at 283.

[145] *Impoundment of Appropriated Funds by the President, Joint Hearings Before the Ad Hoc Subcomm. on Impoundments of Funds of the S. Comm. on Gov't Ops. and the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 380 (1973) [hereinafter *1973 Impoundment Hearings*] (testimony of J. Sneed, Deputy Attorney General, Department of Justice).

[146] Memorandum for Edward L. Morgan, *reprinted in 1971 Impoundment Hearings*, *supra* note 53, at 283.

[147] *See, e.g*., In re Aiken Cty., 725 F.3d 255, 260 (D.C. Cir. 2013) (granting writ of mandamus against the Nuclear Regulatory Commission requiring it to "continue with the legally mandated licensing process" for opening a nuclear waste repository at Yucca Mountain) (stating that "where previously appropriated money is available for an agency to perform a statutorily mandated activity" as to which the President has not raised a constitutional objection, "we see no basis for a court to excuse the agency from that statutory mandate") (Kavanaugh, J.).

The Appropriations Clause's Limits

Despite the Supreme Court's robust reading of the Appropriations Clause, at least three features of the Court's case law bear mentioning.[148] *First*, the Court has held that the Clause does not apply to money held by the government outside the Treasury. In *United States v. Osborn*, a federal district court ordered forfeited to the United States bonds and mortgages held by Osborn, eventually netting $20,000 in proceeds.[149] None of these funds were paid into the Treasury. Some funds sat in the district court's registry.[150] After receiving a full pardon and amnesty, Osborn petitioned the district court for an order restoring the proceeds of his forfeited property,[151] and the Supreme Court held that this relief could be granted. Forfeiture was a penalty attached to Osborn's offense, but the President pardoned that offense, and the "penalty . . . must fall with the pardon of the offence itself."[152] The Court rejected the claim that "the proprietary interests of the government can only be disposed of by act of Congress."[153] As the Court explained two years later in *Knote*, until a third party received the proceeds or the government deposited the funds in the Treasury, the proceeds "were within the control of the court, and . . . no vested right to the proceeds had accrued so as to prevent the pardon from restoring them to the claimant."[154]

The Appropriations Clause did not bar an order requiring return of the forfeiture proceeds because payment to Osborn would not come from funds in the Treasury. According to the Court, Congress's exclusive control over funds extends only to those deposited in the Treasury, and it does not appear that the Supreme Court has ever held that any portion of the Constitution requires an agency to deposit the funds it receives in the Treasury.[155] Thus, a key component of the statutes that implement Congress's power of the purse is the requirement, imposed by the Miscellaneous Receipts Act, that agencies deposit public money in the Treasury.[156]

Second, the Court has constrained Congress's power of the purse by relying on express constitutional provisions that limit Congress's ability to withhold funding from another branch. Generally, "Congress has full control of salaries" provided to federal officers and employees.[157] The Framers recognized, though, that if this control extended to all members of the executive and judicial branches, Congress could use its appropriations power to erode the independence of the other branches. Writing in the *Federalist Papers*, Alexander Hamilton indirectly warned that a

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[148] The Court has also held that Congress cannot exercise its appropriations power in a way that violates constitutionally protected individual rights. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 315 (1946) (invalidating an appropriations rider because by prohibiting use of appropriated funds to pay the salaries of named government employees suspected of being communists the rider functioned as an unconstitutional bill of attainder); *see also* U.S. CONST. art I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). These individual-rights cases are beyond the scope of this report.

[149] 91 U.S. 474, 475 (1875).

[150] *Id*.

[151] *Id*. at 476.

[152] *Id*. at 477.

[153] *Id*. at 478.

[154] United States v. Knote, 95 U.S. 149, 156 (1877); *see also Osborn*, 91 U.S. at 479 ("The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid.").

[155] However, at least one scholar has argued that the term "Treasury," as used in the Appropriations Clause, should be understood as "[a]ll funds belonging to the United States[,] received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets." *See* Stith, *supra* note 9, at 1356.

[156] *See infra* notes 197–237 and text.

[157] Embry v. United States, 100 U.S. 680, 685 (1879).

Congress with full control over presidential compensation could "weaken [the President's] fortitude by operating on his necessities" or "corrupt his integrity by appealing to his avarice."[158] Hamilton separately cautioned that "the complete separation of the judicial from the legislative power" could not be achieved "in any system which leaves the [judiciary] dependent for pecuniary resources on the occasional grants of the [the legislature.]"[159] The Constitution therefore provides protections for the salary of the President and of federal justices and judges. Congress may not increase or decrease the President's salary during the President's term in office,[160] and Congress may not decrease—but may increase—the salaries of federal justices and judges during their terms in office.[161]

The Court has not applied the prohibition against changes in presidential salary, but the Court has invalidated appropriation riders that unlawfully diminished the salaries of federal judges during their terms in office. In *United States v. Will*, a class of federal judges sued the United States, claiming that Congress had unconstitutionally diminished judicial salaries.[162] Under the law then in effect, federal judges received the same annual cost-of-living provided to General Schedule employees, which the Court said was set by a statutory formula.[163] Beginning in fiscal year (FY) 1977, and continuing through FY1980, Congress enacted statutes—three of which it adopted as limitations in an appropriations act—denying a pay adjustment for justices and judges, among others.[164] Two of these blocking acts became law before the start of the fiscal year to which the statute applied, while the other two became law after the start of the relevant fiscal year.[165] In *Will*, the Supreme Court held that "a salary increase 'vests' for purposes of the Compensation Clause," and thus Congress could not block the increase, "only when it takes effect as part of the compensation due and payable to Article III judges."[166]

This dividing line, between contingent and vested salary increases, balanced Congress's discretion to increase (or not increase) the salary of judges against concerns for judicial independence. "To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress."[167] Applying this dividing line, the Court invalidated the two blocking statutes that became law after the start of the relevant fiscal year—by which time the salary increases had vested—but denied

[158] THE FEDERALIST NO. 73, at 441–42 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[159] *Id.* NO. 79, at 472.

[160] U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.").

[161] *Id*. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[162] 449 U.S. 200 (1980).

[163] *Id*. at 203–04.

[164] *See* Legislative Branch Appropriations Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 (1976) (FY1977 blocking act); Pub. L. No. 95-66, 91 Stat. 270, 270 (1977) (FY1978 blocking act); Legislative Branch Appropriations Act of 1979, Pub. L. No. 95-391, Title III, § 304(a), 92 Stat. 763, 788–89 (1978) (FY1978 blocking act); Continuing Appropriations Act of 1980, Pub. L. No. 96-86, § 101(c), 93 Stat. 656, 657 (1979) (FY1980 blocking act).

[165] *Will*, 449 U.S. at 205–08.

[166] *Id*. at 228–29.

[167] *Id*. at 228.

relief for the two blocking statutes that became law before the start of the relevant fiscal year—and thus before any salary increase had vested.[168]

Third, the Court has on at least one occasion, in *United States v. Klein*,[169] invoked separation-of-powers principles to hold that Congress may not use its appropriations power to control how another branch exercises its constitutional powers. *Klein* arose from a complex background of court decisions and congressional action.[170] In 1869, the Supreme Court held, in *United States v. Padelford*,[171] that a person pardoned for supporting the Confederacy "was as innocent in law as though he had never participated" in the rebellion.[172] Though he "certainly afforded aid and comfort to the rebellion" by acting as surety to certain bonds, because of the pardon Padelford had a right to the proceeds from the sale of his property seized during the Civil War.[173] The Court thus affirmed a judgment of the Court of Claims awarding proceeds to Padelford.[174]

The next year, using the appropriations process, Congress expressed its disapproval of *Padelford*. Congress appropriated $100,000 for "payment of judgments which may be rendered" by the Court of Claims "in favor of claimants" but limited use of the appropriation.[175] The limitation included in the appropriation prohibited proof of a pardon or amnesty from either being offered into evidence or considered by the Court of Claims *in support* of a claim.[176] The claimant had to prove loyalty to the United States "irrespective" of any pardon.[177] If an individual accepted a pardon for acts done in support of the Confederacy without denying having provided the support, the person's acceptance would be "conclusive evidence" of ineligibility.[178] Any case then before a federal court that fit this category would have to be dismissed, notwithstanding *Padelford*, as no appropriation was available to pay the judgment sought by the pardoned claimant.[179]

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[168] *See id.* at 224–30. In 1989, Congress amended the cost-of-living formula statute to its current form (the 1989 statute). In 2012, sitting en banc, the U.S. Court of Appeals for the Federal Circuit held that blocking acts passed in the 1990s "constitute[d] unconstitutional diminishments of judicial compensation." Beer v. United States, 696 F.3d 1174, 1186 (Fed. Cir. 2012) (en banc). The Federal Circuit distinguished *Will* by characterizing the 1989 statute as "provid[ing] [cost-of-living adjustments] according to a mechanical, automatic process that creates expectation and reliance when read in light of the Compensation Clause." *Id.* at 1181. Given this expectation and reliance, "all sitting federal judges are entitled to expect that their real salary will not diminish due to inflation or the action or inaction of the other branches of Government." *Id.* at 1184. "If a future Congress wishe[d] to undo" the "promises" of self-executing pay increases under the 1989 statute, the Federal Circuit reasoned, "it may, but only prospectively. Any restructuring of compensation maintenance promises cannot affect currently-sitting Article III judges." *Id.* at 1185. The Supreme Court has not granted review in a case raising questions about Congress's ability to block pay raises that would otherwise go into effect under the current statute.

[169] 80 U.S. 128 (1872).

[170] *See* Price, *supra* note 10, at 398–99 (referring to *Klein* as an "important (if famously opaque) Reconstruction-era decision").

[171] 76 U.S. 531 (1869).

[172] *Klein*, 80 U.S. at 132–33.

[173] *Padelford*, 76 U.S. at 536, 543.

[174] *See id.* at 543.

[175] Law of July 12, 1870, ch. 251, 16 Stat. 230, 235 (1870).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *See Id.*

Against this backdrop, *Klein* reached the Supreme Court. Just like Padelford, Treasury agents seized and sold Klein's[180] cotton, depositing the proceeds of the sale into the Treasury.[181] Just like Padelford, Klein had "voluntarily become the surety on the official bonds of certain officers of the rebel confederacy, and so given aid and comfort."[182] And just like Padelford, Klein received a pardon.[183] Klein sought an award of the proceeds from the sale of his property.[184]

Thus, the question before the Supreme Court in *Klein* was whether to enforce the limitation in the 1870 appropriation. If the Court enforced the limitation, a person who had performed acts in support of the Confederacy would be ineligible for a sale proceeds award. Klein's claim would have to be denied. But the Court did not enforce the limitation.[185] The Court recognized that "[u]ndoubtedly the legislature has complete control over the organization and existence of" the court of claims (the court where the case originated) "and may confer or withhold the right of appeal from its decisions."[186] The Court refused to find that this power decided the case, though, because it was the "intention of the Constitution that each of the great co-ordinate departments of the government . . . shall be, in its sphere, independent of the others."[187] Congress's appropriation limitation improperly intruded upon both of the other branches' spheres. Congress sought to modify proceedings in the federal courts for the impermissible end of "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it."[188] And Congress had tried to limit a pardon's effect.[189] The limitation could not be honored without intruding upon the finality of federal court judgments, the federal courts' independent exercise of the judicial power, or the President's pardon power.

Klein does not establish a bright-line rule for distinguishing between lawful and unlawful appropriations riders, and the Supreme Court does not appear to have disregarded an appropriations rider in any later case because of separation-of-powers concerns. This dearth of relevant case law is perhaps because, as the Court explained more than a century later, cases raising separation-of-powers questions in the appropriations context "implicate[] the fundamental relationship between the Branches."[190] If the Court can avoid weighing in on a constitutional

[180] More precisely, the cotton belonged to V.F. Wilson, who died before litigation began. Klein was the administrator of Wilson's estate and sued on behalf of the estate. *See* United States v. Klein, 80 U.S. 128, 136 (1872). For simplicity's sake, this report refers to Klein alone.

[181] *Id*. at 131–32.

[182] *Id*. at 132.

[183] *Id*. at 141–42.

[184] *See id*. at 136.

[185] *Id*. at 148 (asserting the appropriation rider must have been "inserted in the appropriation bill through inadvertence" and affirming the Court of Claims's judgment).

[186] *Id*. at 145.

[187] *Id*. at 147.

[188] *Id*. at 146; *but see* Robertson v. Seattle Audubon Soc., 503 U.S. 429, 438 (1992) (distinguishing *Klein* in a case in which changes to law did not "direct any particular findings of fact or applications of law, old or new, to fact" but rather amended existing law).

[189] *Klein*, 80 U.S. at 148.

[190] Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153, 161–62 (1989) (vacating a district court judgment that invalidated an appropriation rider related to executive branch use of confidentiality agreements, on the ground that the rider impermissibly interfered with the President's foreign affairs powers, because the district court could decide the case on statutory rather than constitutional ground).

question relating to this fundamental relationship, such as by deciding a case on another ground,[191] it likely will.

Still, two factors appear important under a *Klein* analysis. An appropriations rider must significantly affect another branch's exercise of a power conferred on that branch by the Constitution. It also appeared noteworthy to the Court that, in adopting the rider, Congress exercised its appropriations power to pursue an impermissible end. For example, in *Klein* the Court recognized that Congress could pass legislation to shape federal court jurisdiction and proceedings, but the Court appears to have decided that the rider was not a bona fide use of this authority. "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction *except as a means to an end*," which was to infringe on the President's pardon power.[192] If Congress could not nullify a pardon directly, such as by passing legislation purporting to revoke a pardon, under *Klein*'s reasoning, it could not accomplish that end indirectly by conditioning appropriated funds in a manner that denied a pardon its effect.[193]

Key Takeaways: The Appropriations Clause's Limits

- As a constitutionally conferred power, Congress's power to control the other branches through appropriations is limited only by the Constitution itself.
- The Appropriations Clause does not apply to money held outside of the Treasury. As described later in this report, this aspect of the Court's jurisprudence generally has limited practical effect, because, by statute, agencies usually must deposit in the Treasury money received for the government.
- Express provisions of the Constitution limit Congress's authority to control the compensation provided to the President or to federal justices and judges.
- The Supreme Court has refused to give effect to an appropriation rider that, in the Court's judgment, infringed on the constitutional functions of the executive and judicial branches.

Congress's Fiscal Control Statutes

The Appropriations Clause is not the only means for Congress to ensure that obligations stay within the scope of the budget authority it grants. Rather, Congress has adopted a series of fiscal control statutes that provide "the operational and definitional framework for the enactment and expenditure of appropriations."[194] These statutes govern the receipt of funds by an executive branch agency; the purposes for which appropriated funds may be obligated; the authority of an agency to shift funds between or within appropriations; and when an agency may delay the obligation or expenditure of budget authority. Departures from or variations on these rules may exist in the statutes pertaining to a specific agency or agencies, such as statutes dealing with the National Intelligence Program,[195] and may also create additional funds control measures for

[191] *Id*. at 161 ("[W]e emphasize that the District Court should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so.").

[192] *Klein*, 80 U.S. at 145 (emphasis added).

[193] *See id*. at 148 ("It is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.").

[194] Stith, *supra* note 9, 1363.

[195] *See* 50 U.S.C. § 3003(6) (defining the National Intelligence Program as "all programs, projects, and activities of the intelligence community" except for intelligence gathered solely for "tactical military operations by United States Armed Forces"); *see also, e.g., id.* § 3024(c)(5)–(6) & (d) (assigning the Director of National Intelligence responsibilities for apportionment, transfers, and reprogramming of budget authority made available for the National

particular agencies, programs, or statutory authorities. But, generally speaking, the fiscal control statutes act as a set of background rules governing agency authority to retain, obligate, and expend public money.

The Miscellaneous Receipts Act (MRA)

As noted above, the Appropriations Clause has generally been construed to establish the Treasury as a special place of deposit. Funds deposited in the Treasury may not be obligated or expended without an appropriation, while funds held outside the Treasury are not subject to the same limitation.[196] Congress does not directly administer the Treasury.[197] Nor does Congress act as the collecting agent for funds owed to the government.[198] Thus, without a requirement that federal agencies pay funds they receive into the Treasury, the executive branch could, practically speaking, narrow the Appropriations Clause's reach. Agencies might be able to avoid the need for an appropriation—and all of the control and accountability an appropriation entails—by keeping (for example) tax collections outside the Treasury and financing agency operations with such funds.

Given this potential, it is perhaps surprising that Congress did not legislate a Treasury deposit requirement until 1849, a full 60 years after the Clause's adoption. Before 1849, federal agencies commonly deducted sums from money the agency received in the ordinary course of its operations and used those deductions to pay expenses. Thus, for example, in 1845 revenue agents responsible for collecting duties on imports deposited in the Treasury only 85% of the duties they collected. The agents used the balance, 15% of all collections, to cover expenses and other payments.[199] The withheld amount was a large sum of money for the time, more than 10% of *all* federal revenues raised in a typical fiscal year.[200]

In response, Congress passed a statute requiring federal officers or employees to pay into the Treasury, "at as early a day as practicable" "the gross amount of all duties received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States."[201] Proponents justified this new statutory requirement, the forerunner of today's MRA, on varying grounds, with some arguing that it improved transparency[202] and others touting the requirement as an anti-fraud measure.[203] Congress's aim was to compel the executive branch to

Intelligence Program).

[196] *See supra* notes 149–156 and text.

[197] 31 U.S.C. § 302 ("The United States Government has a Treasury of the United States. The Treasury is in the Department of the Treasury.").

[198] *E.g.*, 26 U.S.C. § 6301 ("The Secretary [of the Treasury] shall collect the taxes imposed by the internal revenue laws.").

[199] More specifically, "the gross amount of revenue accruing from imports was $30,892,000" but only $26,326,000 of this sum was "actually paid into the treasury." CONG. GLOBE, 30th Cong., 1st Sess. 464 (Mar. 15, 1848) (Rep. McKay).

[200] During FY1845, the federal government collected $29,769,133.56 from all sources. DEP'T OF TREASURY, REPORT FROM THE SECRETARY OF THE TREASURY ON THE STATE OF FINANCES 1 (Dec. 3, 1845). During FY1846, total federal revenue collected equaled $29,499,247.06. DEP'T OF TREASURY, REPORT FROM THE SECRETARY OF THE TREASURY ON THE STATE OF FINANCES 1 (Dec. 10, 1846).

[201] Act of March 3, 1849, ch. 110, 9 Stat. 398, 398 (1849).

[202] *See* CONG. GLOBE, 30th Cong., 1st Sess. 464 (Mar. 15, 1848) (Rep. McKay) (arguing that the MRA would "give a true exposé of the whole expenses of the Government").

[203] *See id.* (Rep. Pollock) (stating that the MRA would "secure the Government from frauds on the part of those who, under existing laws, received payment of demands upon the Government without appropriations therefor by law").

place public moneys in a legally significant place, the Treasury, where "[o]nce money is deposited . . . it takes an appropriation to get it out."[204]

Congress has revised the MRA since its initial adoption, but its purpose remains to "preserve congressional control of the appropriations power."[205] The current statute appears at 31 U.S.C. § 3302(b), which provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[206] But Congress may provide exceptions to the MRA's Treasury deposit requirement and allow agencies to keep public money that they receive.[207] Common examples of MRA exceptions include an agency's authority to accept and retain gifts or other contributions[208] or to use funds received through enforcement activities to finance those activities.[209] Congress may also permit an agency to charge fees to offset the cost of providing "a service or thing of value."[210] But unless Congress additionally allows the agency to retain and spend the proceeds of its fees,[211] the agency must deposit the fees in the Treasury. Congress would need to specify (for example) that user fees collected are "available until expended" by the agency for specified purposes.[212]

Agencies must deposit public money received for the United States "not later than the third day" after receipt of the money,[213] though the Secretary of the Treasury has authority to prescribe, by

[204] 2 GAO REDBOOK, *supra* note 30, at ch. 6, p. 6-168 (3d ed., 2006), https://www.gao.gov/assets/210/202819.pdf. Despite Congress's aspirations for the statute, agency officials continued to hold public money outside the Treasury, prompting more legislation imposing penalties not provided for in the original act. *See, e.g.*, Joint Resolution of March 30, 1868, §§ 1–2, 15 Stat. 251, 251 (1868) (requiring agencies to "immediately" pay into the Treasury any money derived from the "sale of captured or abandoned property in the late insurrectionary districts" and declaring that officials who did not immediately pay such money into the Treasury would be guilty of embezzlement). Adopted during Reconstruction, the statute addressed the particular needs of that era; no criminal penalties survive in the modern MRA.

[205] Scheduled Airlines Traffic Offenses, Inc. v. Dep't of Def., 87 F.3d 1356, 1362 (D.C. Cir. 1996).

[206] 31 U.S.C. § 3302(b). Though the Act appears to apply to the federal judiciary as well as the executive branch, *see* Lee v. United States, 33 Fed. Cl. 374, 383 (Ct. Cl. 1995) (holding that the court could not order filing fees refunded to a plaintiff because the MRA required the Clerk of Courts to deposit the fees in the Treasury), other statutes separately require federal clerks of court to "pay into the Treasury all fees, costs, and other moneys collected by" the relevant clerk. *See* 28 U.S.C. § 671(d) (Supreme Court); *id.* § 711(c) (circuit courts of appeals); *id.* § 751(e) (district courts); *id.* § 156(f) (bankruptcy courts); *id.* § 791(b) (Court of Federal Claims).

[207] *See* Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts with the General Services Administration, 30 Op. O.L.C. 53, 57 (2006) (explaining that "Congress simply supersedes its own general statute," the MRA, "with a specific statute" that creates "an exception to the MRA that gives an agency statutory authority to direct funds elsewhere" (internal quotation marks omitted)).

[208] 10 U.S.C. § 2350J (authorizing for the Secretary of Defense to accept and use burden-sharing contributions from "any country or regional organization" to pay local nationals who are DOD employees, for military construction, and for DOD supplies and services).

[209] 28 U.S.C. § 524(c) (permitting DOJ to use the proceeds from forfeiture proceedings and other sources to cover specified expenses).

[210] 31 U.S.C. § 9701(b).

[211] *See* SBA's Imposition of Oversight Review Fees on PLP Lenders, B-300248, 2004 U.S. Comp. Gen. LEXIS 13, at *8–9 (Comp. Gen. Jan. 15, 2004).

[212] *See, e.g.*, 8 U.S.C. § 1356(n) ("All deposits into the 'Immigration Examinations Fee Account' shall remain available until expended . . . to reimburse any appropriation the amount paid out of such appropriation for expenses in providing immigration adjudication and naturalization services and the collection, safeguarding and accounting for fees deposited in and funds reimbursed from the 'Immigration Examinations Fee Account.'").

[213] 31 U.S.C. § 3302(c)(1).

regulation, a different deposit time frame.[214] Officers or employees who violate this prompt-deposit requirement "may be removed from office . . . [and] may be required to forfeit to the Government any part of the money held by" that person to which he or she "may be entitled."[215] Though there appears to be no case law on this point, the MRA's text could allow the government to seek forfeiture of funds, such as salary or savings, belonging to the federal custodian responsible for violating the Act.[216] Under this reading, it would be no defense to forfeiture for the employee to assert that the public money wrongfully held outside the Treasury was no longer in his or her possession because (for example) the agency had spent the funds; the government has recourse, through forfeiture, to "*any* part of the money held by that person."[217]

The MRA's prompt-deposit requirement triggers upon receipt of "money for the Government from any source."[218] Money falls within the scope of the Act if an agency will use the money to "bear[] the expenses of the administration of the Government and pay[] the obligations of the United States."[219] Actual receipt of funds is neither necessary, nor is it sufficient, for the MRA to apply. An agency violates the MRA if it requires a third party to make payments on its behalf to satisfy an agency obligation, even though no agency employee receives money from the third party.[220] But the MRA does not apply to money held by the United States for a third party (e.g., in

[214] *Id*. § 3302(c)(2).

[215] *Id*. § 3302(d).

[216] More broadly, public employees who have authority to spend public money are often accountable for funds that are improperly spent. *See, e.g.*, *id*. § 3528(a)(4) (making a "certifying official" "responsible for . . . repaying a payment" that is prohibited by law or "does not represent a legal obligation under the appropriation or fund involved"); *id.* § 3325(a)(3) (providing that a "disbursing official" may be "held accountable for" carrying out statutory responsibilities); *see also, e.g.*, O.R.C. § 117.28 (state statute authorizing a civil action "for the recovery of the money or property" that is the subject of an "audit report [that] sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated").

[217] 31 U.S.C. § 3302(d) (emphasis added).

[218] *Id*. § 3302(b).

[219] Interstate Commerce Commission—Disposition of Excess Railway Operating Income, 33 Op. Att'y Gen. 316, 321 (1922). Attorney General Daughtery derived this meaning from the phrase "[f]or *use of* the United States," which appeared in a prior version of the MRA. *See id*. at 320–21. Congress revised and recodified the MRA in 1982 so that the statute applied to moneys received "for the Government." Act of Sept. 13, 1982, 96 Stat. 877, 948 (1982). Congress did not intend this revision to change the MRA's scope. *See id*., § 4(a), 96 Stat. at 1067 (relevant sections of the 1982 Act "may not be construed as making a substantive change in the laws replaced"); *see also* Commodity Futures Trading Commission—Consistency of Real Property Leases with Miscellaneous Receipts Statute, B-327830, 2017 U.S. Comp. Gen. LEXIS 29, at *11 (Comp. Gen. Feb. 8, 2017) (construing current MRA by applying same definition).

[220] *E.g., CFTC—Consistency of Real Property Leases*, B-327830, 2017 U.S. Comp. Gen. LEXIS 29, at *19 ("The critical factor in this case . . . is that [the Commodity Futures Trading Commission (CFTC)] arranged for its landlord to make payments to pay CFTC liabilities; thus, CFTC violated the miscellaneous receipts statute when the landlords made the payments. CFTC should have deposited the amounts of these payments into the Treasury as miscellaneous receipts."); Department of Energy—December 2004 Agreement with the United States Enrichment Corporation, B-307137, 2006 U.S. Comp. Gen. LEXIS 135, at *34–35 (Comp. Gen. July 12, 2006) ("[I]f DOE itself had sold its clean uranium, rather than transferring the uranium to USEC to carry out the same task, the department admits that it could not have legally retained the sales proceeds and applied them to pay its decontamination costs," but would have instead had to deposit the sale proceeds in the Treasury. "With the December 2004 Agreement, DOE circumvented the [MRA] by its use of USEC as its sales agent [for the clean uranium] and its direct control of the disposition of the sales proceeds.").

a statutory interpleader action[221] in federal court).[222] In either case, what matters is whether the agency's action has the effect of violating the Act's "anti-augmentation principle."[223] Under this principle, an agency may not "augment its appropriations from outside sources without statutory authority."[224] Thus, when an agency has a third party pay expenses that the law considers obligations of the agency, the agency improperly augments its appropriations by relying on funds not governed by the appropriations process.[225] But when an agency receives money "not available to the United States for disposition on its own behalf," the agency need not deposit the funds in the Treasury because the agency cannot use the money to supplement its appropriations.[226]

One particular application of the MRA involves civil penalties. Congress often legislates by prohibiting certain conduct and authorizing the imposition of penalties on those who violate the prohibition. A penalty is money for the government, and thus, under the MRA, must be paid into the Treasury.[227] Two important consequences generally follow from this background rule.

First, GAO has concluded that when an agency alleges a violation of a statute that the agency enforces through civil penalties, the agency's ability to use civil penalty reductions as a bargaining chip in settlement discussions is limited. The agency may agree to reduce or forgo civil penalties paid under the settlement, but only if the settling party agrees to fund a remedial project, such as environmental cleanup, that is sufficiently related to the violation.[228] For example, GAO disapproved of the Commodity Futures Trading Commission's (CFTC's) proposal to "accept a charged party's promise to make a donation to an educational institution as all or part of a settlement agreement" resolving alleged violations of the Commodity Exchange Act otherwise punishable through civil penalties.[229] The CFTC had prosecutorial discretion and could

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[221] In a statutory interpleader action, one party who holds money or property (the stakeholder) asks a federal court to resolve the contending claims of third parties (claimants) to that money or property (the stake). The stakeholder deposits the stake "into the registry of the court," where it remains until the court renders its judgment as to which of the claimants is entitled to the stake. *See* 28 U.S.C. § 1335(a).

[222] Matter of Office of Natural Res. Revenue—Disbursement of Mineral Royalties, B-321729, 2011 U.S. Comp. Gen. LEXIS 186, at *8 (Comp. Gen. Nov. 2, 2011) ("Occasionally a government agency will receive money that is not 'money for the Government,' such as when the government has received the money for the benefit of another. In those instances, neither the miscellaneous receipts statute nor the Appropriations Clause is implicated.").

[223] As discussed below, portions of the Antideficiency Act implement a similar anti-augmentation principle. *See* 31 U.S.C. § 1342 (generally prohibiting agency acceptance of "voluntary services").

[224] Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts with the General Services Administration, 30 Op. O.L.C. at 56; *see also* Motor Coach Industries, Inc. v. Dole, 725 F.2d 958, 968 (4th Cir. 1984) (noting that the Federal Aviation Administration (FAA) had attempted an "end-run around normal appropriation channels" that effectively "supplement[ed] its budget by $3 million without congressional action" when it waived certain fees imposed on airlines in exchange for the airlines' agreement to pay into a trust controlled by the FAA for use in expanding bus transportation to Dulles International Airport).

[225] *See* Matter of Office of Federal Housing Enterprise Oversight—Settlement Agreement with Freddie Mac, B-306860, 2006 U.S. Comp. Gen. LEXIS 43, at *7 (Comp. Gen. Feb. 28, 2006) ("A 'de facto' augmentation occurs when an agency arranges for an outside source to defray an obligation of the agency.").

[226] Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 687 (1980).

[227] *E.g.*, Pub. Interest Research Grp. v. Powell Duffryn Terminals, 913 F.2d 64, 82 (3d Cir. 1990) ("Courts have consistently stated that penalties in citizen suits under the Act must be paid to the Treasury.").

[228] *See, e.g.*, Decision of Comptroller General of the United States—Environmental Protection Agency Mobile Air Source Pollution Enforcement Actions, 1992 U.S. Comp. Gen. LEXIS 1319, at *2 (Comp. Gen. July 7, 1992) (concluding the Environmental Protection Agency (EPA) lacked authority to "allow alleged violators" of the Clean Air Act's mobile source air pollution requirements "to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them"), *recon. denied by* Decision of Gen. Counsel Hinchman, B-247155.2, 1993 U.S. Comp. Gen. LEXIS 1168 (Comp. Gen. Mar. 1, 1993).

[229] Matter of Commodity Futures Trading Commission—Donations Under Settlement Agreements, B-210210, 1983

obtain relief in a settlement that it could not impose through an adjudication.[230] The statute also tasks the CFTC with "establish[ing] and maintain[ing] research and information programs" related to futures trading.[231] Still, GAO reasoned that "there are limits to what" the CFTC could accept under a settlement that reduced civil penalties.[232] The CFTC would exceed these limits by reducing civil penalties in exchange for a party's donation of fund "to an educational institution that has no relationship to the violation and that has suffered no injury from the violation."[233] That said, Congress may grant an agency more or less authority to bargain away civil penalties, and the language of the agency's enforcement statutes determines the extent of its bargaining authority.[234]

Second, the MRA limits the discretion of courts to direct the use of civil penalties, whether as part of a judgment or a settlement. While a federal statute may permit a private party to supplement the federal government's enforcement of the statute by bringing a "citizen suit," civil penalties obtained as a result of the private party's litigation belong in the Treasury.[235] This requirement constrains a federal court's ability to order that a penalty be used for a specified purpose, such as for environmental remediation, rather than be deposited in the Treasury.[236] One court has opined that "simply depositing civil penalties into the vast reaches of the United States Treasury does not seem to be the most effective way of combating" the violation that led to the enforcement action, but given the limits imposed by the MRA, "once a penalty has been assessed by the court, the penalty must be paid into the Treasury."[237]

Key Takeaways: Miscellaneous Receipts Act

- The MRA requires an official or agent of the United States to deposit money received for the federal government in the Treasury, without any deduction, as soon as practicable.
- An agency needs statutory authority to retain and obligate or expend the funds that it receives in the course of its operations.
- The MRA embodies an "anti-augmentation principle," under which an agency may not supplement the appropriations that it receives from Congress with other sources of revenue, such as by requiring a third party to pay the agency's costs.

U.S. Comp. Gen. LEXIS 544, at *1–2 (Comp. Gen. Sept. 14, 1983).

[230] *Id*. at 2.

[231] *Id*. at *1 (internal quotation marks omitted).

[232] *Id*. at *4.

[233] *Id*. at *5.

[234] Decision of General Counsel Hinchman, B-247155.2, 1993 U.S. Comp. Gen. LEXIS 1168, at *2–4 (Comp. Gen. March 1, 1993) (suggesting that under its authority to "compromise or remit" administrative penalties the EPA could reduce penalties in exchange for the violator's agreement to fund "an environmental restoration project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges" but disapproving of EPA's use of this authority to "go beyond correcting the violation at issue" by reducing penalties in exchange for the violator's support of a public outreach campaign that bore no "nexus" or "connection" to its violation).

[235] Pub. Interest Research Grp. v. Powell Duffryn Terminals, 913 F.2d 64, 81–82 (3d Cir. 1990).

[236] *Id*. at 82 (reversing district court order that required payment of civil penalties into a trust fund for use in environmental remediation).

[237] *See* United States v. Smithfield Foods, 982 F. Supp. 373, 375–76 (E.D. Va. 1997).

The Purpose Statute

Once an agency deposits funds in the Treasury, or when the Treasury receives funds from a nonfederal source, the funds may be withdrawn from the Treasury only "in Consequence of" an appropriation made by Law.[238] This phrase is not "self-defining," though, and Congress has "plenary power to give [it] meaning."[239] Congress has further defined in the Purpose Statute, 31 U.S.C. § 1301(a), how an agency may obligate appropriated Treasury funds.

Early Congresses appropriated funds with varying specificity. For example, Congress's first appropriations act provided an entire year's worth of funding for the executive branch in a single paragraph setting forth sums for the civil list,[240] the Department of War, Treasury warrants, and pensions.[241] Later acts took a more granular approach to funding. For example, in 1795 Congress set compensation for officers and employees of the Department of the Treasury on an office-by-office basis, providing one sum for the Auditor's office and a different sum for the Register's office.[242] Despite this specificity, some in Congress argued that the Secretary of the Treasury acted as if he was "at liberty to take . . . money from an item where there was a surplus"—say, from funds appropriated for the Auditor's office—"and apply it to another where it was wanted"—say, to cover a shortfall in funding for the Register's office.[243]

This perceived discretion troubled some Members of Congress. In March 1797, Congress considered appropriating funds to complete construction of the *U.S.S. Constitution* and *U.S.S. Constellation*, two of the first six frigates built for the U.S. Navy.[244] Once built, though, prominent Members of the House of Representatives did not want either frigate manned and put to sea.[245] Thus, although Congress appropriated funds for frigate construction, it further provided that amounts appropriated "shall be solely applied to the objects for which they are respectively appropriated."[246] The 1797 appropriations act marked the first time that Congress, in express terms, limited the purposes for which appropriated funds could be obligated. But this early assertion of congressional control was short lived. In 1798 the House refused to add similar language to that year's military appropriations act, with certain members voicing fear that the restriction "would embarrass the proceedings of the War Department."[247]

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[238] U.S. CONST. art. I, § 9, cl. 7.

[239] Harrington v. Bush, 553 F.2d 190, 194–95 (D.C. Cir. 1977).

[240] Congress appears to have borrowed and modified the phrase "civil list" from English fiscal practice, where it "cover[ed] the expenditure of the [Monarch's] court and of the entire central administration." EINZIG, *supra* note 7, at 119. "[E]xpenses in relation to the civil list" were "chiefly for salaries." CONTROL OF FEDERAL EXPENDITURES: A DOCUMENTARY HISTORY 1775-1894, at 199 (Fred Wilbur Powell ed., 1939).

[241] Law of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95 (1789); *see also* Law of Feb. 11, 1791, ch. 6, 1 Stat. 190, 190 (1791) (one-paragraph appropriation).

[242] *E.g.*, Law of Jan. 2, 1795, ch. 8, § 1, 1 Stat. 405, 406 (1795).

[243] 6 ANNALS OF CONG. 2350 (Mar. 2, 1797) (Rep. Gallatin).

[244] *See* IAN W. TOLL, SIX FRIGATES: THE EPIC HISTORY OF THE FOUNDING OF THE U.S. NAVY 40–44 & 61 (2006).

[245] 6 ANNALS OF CONG. 2350 (Mar. 2, 1797) (Rep. Gallatin) (warning that under the President's view of his discretion "money might be found to get the frigates to sea from the appropriations for the Military Department, if the President should it necessary so to apply it").

[246] Law of Mar. 3, 1797, ch. 17, § 1, 1 Stat. 508, 509 (1797).

[247] 8 ANNALS OF CONG. 1874 (June 7, 1798). The House took this step even though, months earlier, War Department reports had shown that the executive branch continued to use appropriations for purposes not permitted by the appropriation. *Id.* at 1544–45 (Apr. 25, 1798) (Rep. S. Smith) (commenting on estimates prepared by the Quartermaster General that showed the Army had used appropriations meant for its supply officer to build fortifications and "vessels of war and galleys") (asserting that "[u]nless Congress can get the Secretary of War to understand what they mean by

By 1809, the proponents of more narrowly constraining executive discretion over appropriated funds won out over those who preferred greater agency flexibility. That year, Congress adopted the first permanent, government-wide purpose limitation. Congress provided that "the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other."[248] Similar language survives today in the Purpose Statute, which states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[249] By requiring a connection between an appropriated purpose and a use of funds, the Purpose Statute establishes that "for appropriated funds to be legally available for an expenditure, the purpose of the obligation or expenditure must be authorized."[250]

An agency applies the Purpose Statute by first looking to the relevant appropriation, which identifies the "objects" for which sums are appropriated.[251] While an appropriation may appear in any statute, an annual appropriations act, for example, might consist of unnumbered paragraphs identifying the purpose, amount, and time period of available budget authority.[252] Each paragraph corresponds to an *appropriation account*.[253] For example, the Department of Defense Appropriations Act for FY2020 includes an appropriation for operations-and-maintenance (O&M) for the Department of the Army, consisting of roughly $39.5 billion made available "[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the Army."[254] How Congress structures appropriations affects how an agency may obligate funds, with more narrowly phrased appropriations providing less flexibility than more generally phrased

appropriations; if, instead of confining the expenditure of money to the purposes for which it is appropriated, he employ it in building ships of war and fortifications; they may vote $500,000," more than double the amount under discussion for the 1798 quartermaster appropriation, "and still be called upon to supply deficiencies"). This change in approach likely was due to a shift in party control of the House. Democratic-Republicans controlled the House up until the day the 1797 military appropriations act passed. The Federalists then assumed control, alongside the newly elected Federalist President John Adams.

[248] Law of Mar. 3, 1809, ch. 28, 2 Stat. 535, 535 (1809). At the same time that Congress adopted this purpose restriction, Congress granted the President authority to transfer funds between different "branch[es] of expenditures" during recesses of Congress, *id*. at 535–36, a form of standing transfer authority that would exist until repealed in 1868, Law of Feb. 12, 1868, ch. 8, 15 Stat. 35, 36 (1868) (repealing relevant portions of the 1809 Act and all other acts "authorizing such transfers of appropriations" and directing that "no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated").

[249] 31 U.S.C. § 1301(a).

[250] U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation marks omitted).

[251] Department of Defense—Availability of Appropriations for Border Fence Construction, B-330862, 2019 U.S. Comp. Gen. LEXIS 276, at *27 (Comp. Gen. Sept. 5, 2019) (noting that the text of an agency's appropriations is "paramount" in a Purpose Statute analysis).

[252] Alternatively, Congress may state the period of an appropriation's availability in provisions that apply generally. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, Div. B, Preamble and Title XIII, § 23002 (2020) (providing appropriations "for the fiscal year ending September 30, 2020" and further specifying 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."

[253] GAO GLOSSARY, *supra* note 19, at 2.

[254] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, Div. A, Title II, 133 Stat. 2317, 2321 (2019).

appropriations.[255] Besides the appropriations themselves, an agency identifies the purposes for which appropriated funds may be obligated by looking to its authorizing statutes.[256]

An authorizing or appropriating statute need not specifically reference a proposed expense for that expense to be permissible under the Purpose Statute.[257] The functions of the federal government are generally too varied to require this specificity. And even if this level of specificity were possible, it may be undesirable; the more prescriptive an appropriation, the less flexibility an agency has to obligate appropriations to account for unanticipated circumstances. According to GAO, "where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object."[258]

Thus, an appropriation may confer authority for an agency to obligate or expend in one of two ways: *either* the agency has express authority to obligate funds for an expense because the statute refers to an expense or object, *or* the agency has implied authority to obligate funds for an expense that while not mentioned in the text of the appropriations act is sufficiently related to those expenses that are referenced.[259] GAO has developed a three-factor "necessary expense" test to determine whether an agency's appropriations confer implied authority for a given expense.[260]

First, the expenditure must bear a logical or reasonable relationship to accomplishing an authorized agency function.[261] Whether a logical relationship exists depends on the facts of a given case, including the type of proposed expense, any limitations imposed on use of the appropriations, and the agency's statutory mission and authorities. Broad statements about this element have limited value, because "[t]he concept of 'necessary expenses' is a relative one,

[255] *See*, *e.g.*, Matter of Army—Availability of Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71, at *7–8 (Comp. Gen. Apr. 22, 2005) ("Many agencies do not have to make the distinction between procurement activities and operational activities that the Army must make, because the appropriations structure for those agencies differs from that of the Army. Instead of receiving separate appropriations, one for procurement and one for operations, those agencies may receive only one appropriation to cover all of the agency's expenses.").

[256] *Department of Defense—Availability of Appropriations*, B-330862, 2019 U.S. Comp. Gen. LEXIS 276, at *26 (noting that, along with text of the agency's appropriations act, "[o]ther statutes, such as authorizing legislation, and the agency's interpretation of its appropriations are also relevant considerations"). By contrast, an agency may not justify an obligation decision by relying on committee report directives that conflict with the text of relevant statutes. *See* Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, B-318831, 2010 WL 176608, at *3 (Comp. Gen. Apr. 28, 2010) ("While views expressed in legislative history may be relevant in statutory interpretation, those views are not a substitute for the statute itself where the statute is clear on its face.").

[257] *See* U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339, 1348–49 (D.C. Cir. 2012) (Kavanaugh, J.) (considering whether a "general appropriation for an agency's operations implicitly authorizes the purchase of bottled water").

[258] Comptroller Gen. McCarl to Maj. Gen. Stephan, Commanding Officer, D.C. Militia, A-17673, 6 Comp. Gen. 619, 621 (1927).

[259] *See Department of Defense—Availability of Appropriations*, B-330862, 2019 U.S. Comp. Gen. LEXIS 276, at*26.

[260] *See id*. The Department of Justice has similarly concluded that authority to obligate or expend may be implied, and it has provided agencies its own framework for deciding whether such implied authority exists. According to the Office of Legal Counsel, this standard "mirrors" the GAO standard. *See*, *e.g.*, State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments, 2012 WL 1123840, at *8 (O.L.C. Mar. 5, 2012) (advising that an agency may make an expenditure that it believes "bears a logical relationship to the objectives of the general appropriation" and furthers the agency's mission so long as the proposed expenditure does not offend a specific limitation imposed on the general appropriation).

[261] Matter of Implementation of Army Safety Program, B-223608, 1988 U.S. Comp. Gen. LEXIS 1582, at *5 (Comp. Gen. Dec. 19, 1988) ("Where a given expenditure is neither specifically provided for nor prohibited, the question is whether it bears a reasonable relationship to fulfilling an authorized purpose or function of the agency.").

defined in any given circumstance by the relationship of a particular proposed expenditure to the specific appropriation to be charged."[262] Still, case law and administrative decisions identify rules of thumb that bear on this element. Perhaps most importantly, an agency's decision that a proposed expense relates to one of its appropriations enjoys deference.[263] The case law justifies this deference by reasoning that the agency charged with carrying out a particular function is best placed to determine the expenses necessary to carry out that function.[264] When a reviewing body, either a court or GAO, examines an agency's spending under the Purpose Statute, the reviewing body decides whether the agency's relatedness determination is reasonable.[265] The reviewing body does not decide whether the agency's use of funds was the best way to carry out its statutory functions.[266] In other words, "the necessary expense doctrine does not require that a given expenditure be 'necessary' in the strict sense that the expenditure would be the only way to accomplish a given goal."[267] Even so, there is a point past which an agency's determination becomes untenable. The decisions commonly state the agency's articulated connection between an expenditure and the appropriation to be charged can become "so attenuated as to take [the expense] beyond the agency's legitimate range of discretion."[268] If the agency goes to this extreme, the Purpose Statute bars the use of funds.

Second, the proposed expense cannot be prohibited by law.[269] Some expenditures may have a logical relationship to achieving the agency's statutory functions, but Congress may decide that certain means to accomplish the agency's functions are off limits to the agency. These prohibitions exist in general and permanent laws. For example, Congress prohibits use of appropriated funds, "in the absence of express authorization by Congress," to lobby a "Member of Congress, a jurisdiction, or an official of any government" to adopt or oppose any "legislation, law, ratification, policy, or appropriation."[270] And with each appropriations act, Congress limits

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[262] *See* Matter of Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171, 171 (1994).

[263] *See* U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.) ("Whether an expenditure is reasonably necessary to accomplish the agency's mission, in the first instance, is a matter of agency discretion." (internal quotation marks omitted)).

[264] *E.g.*, Customs and Border Protection Relocation Expenses, B-306748, 2006 WL 1985415, at *6 (Comp. Gen. July 6, 2006) ("As the agency charged with securing U.S. borders, Customs is in the best position to determine whether foreign residency could compromise security procedures and practices.").

[265] *Cf.* Matter of Implementation of Army Safety Program, 1988 U.S. Comp. Gen. LEXIS 1582, at *6 (Comp. Gen. Dec. 19, 1988) ("When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion . . . .").

[266] J. Gregory Sidak, Esq., Covington & Burling, Counsel for Envelope Manufacturers Ass'n of Am., B-240914, 1991 WL 202594, at *2 (Comp. Gen. Aug. 14, 1991) (responding to request for an opinion from counsel for envelope manufacturing trade association who claimed the Federal Prison Industries, Inc. ("FPI"), a government corporation, violated the Purpose Statute by using prisoners to manufacture envelopes, a highly automated function that the trade association claimed conflicted with FPI's duty of engaging in labor-intensive activities that would use as many prisoners as possible) ("We do not opine, nor should we, on whether envelope manufacturing is the optimal choice of industry for FPI. Rather, we conclude only that FPI has not abused its discretion in selecting that industry and, on this basis, that expending appropriated funds to implement that choice would not violate section 1301(a).").

[267] Matter of Demolition of the Existing LaGuardia Air Traffic Control Tower, 2001 U.S. Comp. Gen. LEXIS 37, at *4 (Comp. Gen. Jan 29, 2001).

[268] Matter of Food and Drug Administration—Use of Appropriations for "No Red Tape" Buttons & Mementoes, B-257488, 1995 U.S. Comp. Gen. LEXIS 703, at *5 (Comp. Gen. Nov. 6, 1995).

[269] *See* U.S. Dep't of the Navy v. Fed. Labor Rels. Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.).

[270] 18 U.S.C. § 1913. The statute carves out certain communications from this lobbying ban, such as those made "through the proper official channels" or at the request of a Member of Congress or other official. *Id.*; *see also* Matter of The Honorable William F. Clinger Chairman Comm. on Gov't Reform and Oversight, 1996 U.S. Comp. Gen.

the use of available appropriations, both in the description of particular appropriations in the unnumbered paragraphs of the act,[271] and in the numbered general provisions that follow the act's appropriations paragraphs.[272]

Third, if the proposed expense has a rational connection to an appropriation and is not prohibited by law, the agency may incur the obligation using the appropriation that it proposes to charge, but only if the agency does not have another appropriation that more specifically relates to the expense.[273] While the first two elements of the "necessary expense" test prevent an agency from obligating Treasury funds for a purpose not authorized by law, this last element guards against an agency expending funds for an authorized purpose using the wrong appropriation account. This final requirement recognizes that Congress expresses its policy decisions not only in making budget authority available but also in setting the amount of budget authority available. The decision to make budget authority available expresses Congress's judgment that the federal government should be involved in a given function, while the decision of the amount of budget authority available expresses Congress's judgment of what the level of that involvement should be.[274] An agency therefore may not supplement the budget authority made available for a given purpose in a particular appropriation with budget authority from another, more general appropriation.[275]

That said, if Congress provides two equally available appropriations—which is "rare"[276]—the agency has discretion over which to use.[277] There is an exception to this exception. GAO has

LEXIS 489, at *3 (Comp. Gen. July 5, 1996) (noting that Section 1913 is a "criminal provision" and therefore enforced by DOJ).

[271] *E.g.*, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, 133 Stat. 13, 16 (2019) (appropriating $168 million for "the necessary expenses" of the Department of Homeland Security Office of Inspector General but capping at $300,000 the Office's expenses for "confidential operational expenses" such as payments to informants).

[272] *E.g.*, *id.*, Div. C, § 537, 133 Stat. at 138 ("None of the funds made available under this Act to the Department of Justice may be used . . . to prevent [particular states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."). For a discussion of limitations within appropriations measures, see CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by James V. Saturno.

[273] Department of Defense—Availability of Appropriations for Border Fence Construction, B-330862, 2019 U.S. Comp. Gen. LEXIS 276, at *30–31 (Comp. Gen. Sept. 5, 2019); *see also* U.S. Department of Agriculture—Economy Act Transfers for Details of Personnel, B-328477, 2017 U.S. Comp. Gen. LEXIS 272, at *9 (Comp. Gen. Sept. 6, 2017) ("if an expense falls specifically within the scope of one appropriation, *though it may be reasonably related to the purpose of a more general appropriation*, the agency must use the more specific appropriation for the expense, unless otherwise authorized by Congress" (emphasis added)).

[274] *See* Nevada v. Dep't of Energy, 400 F.3d 9, 16 (D.C. Cir. 2005) (rejecting a claim by Nevada for additional grant funding to cover the State's costs of participating in licensing proceedings for a nuclear waste repository at Yucca Mountain because even though Congress made $190 million available for grants for "nuclear waste disposal activities"; "the fact that Congress appropriated $1 million expressly for Nevada" to participate in licensing activities "indicates that is all Congress intended Nevada to get in FY04 from whatever source").

[275] *See, e.g.*, Unauthorized Legal Services Contracts Improperly Charged to Resource Management Appropriation, B-290005, 2002 WL 1611488, at *3 (Comp. Gen. July 1, 2002) (concluding that U.S. Fish and Wildlife Service improperly used its resource management appropriation for legal services provided by outside counsel as Congress had more specifically appropriated funds for "necessary expenses of" the Department of Interior's Solicitor who is responsible for all Service legal work).

[276] Matter of Commodity Futures Trading Commission—Availability of Appropriations for Inspector General Overhead Expenses, 2015 U.S. Comp. Gen. LEXIS 426, at *6 (Comp. Gen. Sept. 29, 2015); *see also* Office of the Inspector General for the Troubled Asset Relief Program—Use of Amounts for Oversight Activities, B-330984, 2020 WL 2745285, at *4 (Comp. Gen. May 27, 2020).

[277] *See* Dep't of Homeland Security—Use of Management Directorate Appropriations to Pay Costs of Component Agencies, B-307382, 2006 U.S. Comp. Gen. LEXIS 138, at *12 (Comp. Gen. Sept. 5, 2006) ("Where one can

opined that once the agency decides which of two equally available appropriations to use for a given expense, the agency must stick to that choice when obligating funds for similar expenses in the future.[278] GAO's rule appears to operate on the view that appropriators grow accustomed to seeing a particular account used to satisfy particular expenses, and thus can be expected to appropriate future sums with that practice in mind. The agency "must continue to use the same appropriation for that purpose *unless* it informs Congress of its intent to change,"[279] presumably so that appropriators can account for this change.

Key Takeaways: The Purpose Statute

- The Purpose Statute confines use of appropriations to the "object for which the appropriation was made."
- Appropriations confer express and implied authority to obligate or expend an appropriation.
- Express authority is the authority provided by the language of the appropriation.
- Implied authority is determined under the "necessary expense" test:
  - there must be a rational connection between expense and appropriation;
  - the expense must not be prohibited by law; and
  - the agency must use the appropriation that is most specific to the expense.

Transfers and Reprogramming

Congress also exerts control over agency use of appropriated funds by limiting an agency's ability to allocate funds using a transfer and reprogramming.[280] As noted above, the unnumbered paragraphs of an appropriations act reflect separate appropriations accounts.[281] Congress's approach to structuring appropriations varies by agency. Some agencies see their annual appropriations distributed across a dozen or more appropriations;[282] other agencies have only a few appropriations;[283] still others receive only one.[284] And in the unnumbered paragraphs of an

reasonably construe two appropriations as available for an expenditure not specifically mentioned in either appropriation, we will accept an administrative determination as to which appropriation to charge.").

[278] *See* Department of the Interior—Activities at National Parks During the Fiscal Year 2019 Lapse in Appropriations, B-330776, 2019 WL 4200991, at *10 (Comp. Gen. Sept. 5, 2019) ("[B]ecause [the National Parks Service (NPS)] has historically charged the ONPS appropriation for such expenses, and clearly elected to continue to charge the ONPS appropriation for such expenses in fiscal year 2019, as reflected in its congressional budget justification for fiscal year 2019, the ONPS appropriation was the only appropriation available for this purpose in fiscal year 2019").

[279] *Matter of Commodity Futures Trading Commission—Availability of Appropriations for Inspector General Overhead Expenses*, B-327003, 2015 U.S. Comp. Gen. LEXIS 426, at *6 (emphasis added).

[280] Because, as explained below, transfers and reprogramming are subject to different requirements, it is important to keep the distinction between these two actions in mind. Some courts obscure this distinction by calling a transfer a reprogramming or vice versa. *See, e.g.*, Sierra Club v. Trump, 929 F.3d 670, 676 (9th Cir. 2019) (referring to the administration's transfer of funds between appropriation accounts as an instance of "reprogramming"). DOD commonly uses the term *reprogramming* to refer to either transfers or reprogramming, as that latter term is defined by GAO. *See* Department of Defense—Availability of Appropriations for Border Fence Construction, 2019 U.S. Comp. Gen. LEXIS 276, at *14–15 n.6 (Comp. Gen. Sept. 5, 2019).

[281] See *supra* note 253 and text.

[282] *E.g.*, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. G, 133 Stat. 13, 395–400 (2019) (Department of Transportation not including departmental administrations) (12 paragraphs).

[283] *Id.*, 133 Stat. at 19 (Transportation Security Administration) (three paragraphs).

[284] *Id.*, 133 Stat. at 164–65 (Consumer Product Safety Commission).

annual appropriations act, Congress may decide to set aside budget authority by designating a portion of that paragraph's funds for a particular purpose.[285] GAO considers each of these designated sums as the equivalent of a separate appropriation for purposes of transfers.[286]

These account structures are an integral part of the federal budget process, and are used in a variety of contexts,[287] which, as relevant here, begins with the President proposing the text of appropriations to Congress—in essence, submitting a draft appropriations act for all agencies.[288] Each appropriations account typically "encompasses a number of activities or projects,"[289] but the text of the appropriations proposed by the President for inclusion in an appropriations account will not usually delineate these various programs, projects, and activities. Instead, for annually appropriated accounts, agencies provide this further detail to Congress in *justification materials*, which the agencies develop in coordination with the Office of Management and Budget (OMB).[290] To take a recent example, the President's FY2020 budget submission asked for roughly $1.1 billion for the "necessary expenses of the Management Directorate for operations and support."[291] In turn, the Department of Homeland Security (DHS) justified the President's request by explaining it planned to allocate such funds among eight programs, projects, and activities that comprised the proposed operations-and-support appropriation.[292] DHS planned to allocate roughly $100 million of the $1.1 billion total to its Office of the Chief Readiness Support Officer and another roughly $90 million to the Office of the Chief Financial Officer.[293] While agency justification materials first propose funding allocations among the programs, projects, and activities that, in the agency's view, comprise the account, Congress may weigh in on funding allocations at the program, project, and activity level through committee or conference reports

[285] Such designations, which typically appear in the provisos of an appropriation (i.e., the clauses of an appropriation that begin "provided" or "provided further"), are commonly referred to as "line items." *See* GAO GLOSSARY, *supra* note 19, at 64 (defining a "line item," as used in the context of an appropriations act, as typically referring to "an individual account or part of an account for which a specific amount is available").

[286] John D. Webster Dir., Financial Services Library of Congress, B-278121, 1997 U.S. Comp. Gen. LEXIS 381, at *7 (Comp. Gen. Nov. 7, 1997) ("The fact that an appropriation for a specific purpose, such as library materials, is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated."). Congress has adopted this same view for some of its appropriations acts. *See, e.g.*, H.R.CON.REP. NO. 116-9, at 504 (2019) (directing DHS to adhere to GAO's view when using its statutory transfer authority).

[287] For example, the Department of the Treasury uses this account structure in its annual publication of the receipts and outlays of the United States. *See* DEP'T OF THE TREASURY, COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES OF THE UNITED STATES GOVERNMENT (2019). The President's annual budget submission likewise uses this account structure.

[288] 31 U.S.C. § 1105(a)(5) (requiring submission of "estimated expenditures and proposed appropriations the President decides are necessary to support" executive branch agencies "in the fiscal year for which the budget is submitted and the 4 fiscal years after that year"); *see also id.* (b) (concerning expenditures and proposed appropriations for the legislative and executive branches).

[289] GAO GLOSSARY, *supra* note 19, at 2. As GAO explains, there is no comprehensive definition of what constitutes a "program" (or a project or an activity) in the appropriations-law context. A "program" is "[g]enerally, an organized set of activities directed toward a common purpose or goal that an agency undertakes or proposes to carry out its responsibilities. . . . It is used to describe an agency's mission, functions, activities, services, projects, and processes." *Id.* at 79.

[290] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 51.2 (rev. Dec. 2019) [hereinafter CIRCULAR NO. A-11].

[291] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES, FISCAL YEAR 2020: APPENDIX 490 (2019).

[292] DEP'T OF HOMELAND SECURITY, FISCAL YEAR 2020 CONGRESSIONAL JUSTIFICATION: MANAGEMENT DIRECTORATE at MGMT-3 (2019) (presenting program activity structure for management directorate appropriations).

[293] *Id.* at MGMT-O&S-4.

that accompany an appropriations measure.[294] (Congress could also direct funding allocations in statute.) And while committee or conference reports may reflect that the appropriations committees agree with the agency's proposed allocations,[295] the appropriations committees may also indicate their rejection, in significant ways, of the agency's proposed allocations.[296]

Thus, when Congress appropriates funds for an agency, it divides sums made available for obligation by creating one or more appropriations accounts in statute, after the agency advises Congress how it intends to allocate the funds of each account among different programs, projects, and activities. These dividing lines—between appropriations, and within appropriations—create two background mechanisms of agency control.[297] Congress is free to displace or limit either of these mechanisms by statute.

Statute generally prohibits the shifting of funds from one appropriation account to another, which is referred to as a *transfer*.[298] Specifically, "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."[299] When Congress enacts a statute that authorizes a transfer, the statute is generally referred to as *transfer authority*.[300] The specific language used in the agency's transfer authority statute determines how much flexibility the agency has to both shift and use transferred funds.[301] "Except as specifically provided by law, an amount authorized to be" transferred "is available for the same purpose and subject to the same limitations provided by the law appropriating the amount."[302] Suppose, for example, that Congress appropriates funds for Account A that are only available for one fiscal year, and the agency then validly transfers those funds to Account B, the contents of which Congress made available "until expended" (i.e., on a "no-year" basis).[303] Unless the transfer authority statute specifies otherwise, the funds transferred from

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[294] *See* GAO GLOSSARY, *supra* note 19, at 80 ("For annually appropriated accounts, the Office of Management and Budget (OMB) and agencies identify PPAs by reference to committee reports and budget justifications."). For a discussion of appropriations report language development and components, see CRS Report R44124, *Appropriations Report Language: Overview of Development, Components, and Issues for Congress*, by Jessica Tollestrup.

[295] For example, the appropriations committees largely accepted DHS's proposed allocations within the FY2020 DHS Management Directorate's Operations-and-Support appropriation. *See* 165 CONG. REC. H11,025-26 (daily ed. Dec. 17, 2019) (reflecting for the DHS Management Directorate's Offices of the Chief Readiness Support Officer and Chief Financial Officer slight increases in funding allocations from those set forth in DHS's budget justification materials).

[296] *See, e.g.*, *id*. at H11,033 (reducing, by roughly $765 million, funding allocations for the Enforcement and Removal Operations program of the U.S. Immigration and Customs Enforcement's Operations and Support appropriations account, a 14.7% reduction from the level proposed by DHS).

[297] The phrase "budget execution" describes the period during which an agency obligates appropriated funds. *See* GAO GLOSSARY, *supra* note 19, at 111 ("An agency's task during this phase is to spend the money Congress has given it to carry out the objectives of its program legislation in accordance with fiscal statutes and appropriations, while at the same time beginning" to formulate its budget request for the next fiscal year).

[298] *See id*. at 95.

[299] 31 U.S.C § 1532.

[300] *See* GAO GLOSSARY, *supra* note 19, at 96 ("Statutory authority provided by Congress to transfer budget authority from one appropriation or fund account to another."). Transfer authority may be established in an agency's authorizing statutes. *See, e.g.*, 22 U.S.C. § 2360 (providing transfer authority under the Foreign Assistance Act of 1961). Transfer authority may also be enacted in an appropriations acts. *See infra* note 301.

[301] Further Consolidated Appropriations Act, 2019, Pub. L. No. 116-94, Div. A, Title III, § 312 (2019) (providing the U.S. Department of Education (ED) with general transfer authority of up to specified amounts and subject to the proviso that the transfer authority may not be used to create a new program, project, or activity for which no funds were provided in the Act).

[302] 31 U.S.C. § 1532.

[303] *See* GAO GLOSSARY, *supra* note 19, at 22.

Account A to Account B remain available only for the one fiscal year.[304] Without transfer authority, an agency cannot "raid[] one appropriation account" to "credit another."[305] Thus, if Congress's goal is to deny agency flexibility in shifting funds between accounts, and no applicable transfer authority already exists, Congress need not take any specific action. The background prohibition already in statute[306] will tie the agency's hands.

By contrast, unless Congress directs otherwise, an agency has discretion to allocate the funds of a single appropriation among the various programs, projects, and activities that the appropriation could serve, including by allocating the funds in a way that departs from how the agency told Congress it would allocate funds. The Supreme Court described the extent of an agency's discretion in *Lincoln v. Vigil*, explaining that Congress's decision to give an agency "a lump-sum appropriation reflects a congressional recognition that an agency must be allowed flexibility to shift funds within a particular appropriation account so that the agency can make necessary adjustments for unforeseen developments and changing requirements."[307]

In *Lincoln*, Native American children sued the Indian Health Service (IHS), challenging the decision to end its Indian Children's Program (the Program), which provided direct clinical services in the southwest United States. IHS chose a model in which reassigned staff served only as consultants for nationwide programs.[308] The Supreme Court unanimously reversed a lower court decision requiring IHS to reinstate the Program. The Court explained that the IHS's "allocation of funds from a lump-sum appropriation" (i.e., its decision to discontinue the regional program and fund the nationwide program) was not subject to judicial review because it was a decision "committed to agency discretion by law."[309] Courts cannot review an agency's funding allocation decisions because they "require[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise."[310] When an agency makes an allocation decision, it makes a choice between competing policy interests, and that type of choice is not generally subject to judicial review.[311] And this was true even though the IHS had "repeatedly apprised Congress of the Program's continuing operation."[312]

The same discretion exists, more or less, in all appropriations.[313] *Lincoln* presented the case of an agency that received all of its appropriations in a single account available for all "expenses

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[304] *See* Matter of United States Capitol Police—Advance to Volpe Center Working Capital Fund, B-319349, 2010 U.S. Comp. Gen. LEXIS 109, at *8–9 (Comp. Gen. June 4, 2010).

[305] Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed Cir. 1995) (internal quotation marks omitted) (explaining that ED correctly declined to transfer funds from one appropriation account to another to make up for a funding shortfall in an "entitlement" funding stream that benefited a local school district because doing so would ignore an express congressional determination of the amounts available for the entitlement program).

[306] *See* 31 U.S.C. § 1352.

[307] 508 U.S. 182, 193 (1993) (internal quotation marks omitted).

[308] *See id*. at 185–89.

[309] *Id*. at 193 (internal quotation marks omitted).

[310] *Id*. (internal quotation marks omitted).

[311] *Id*. ("[T]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." (internal quotation marks omitted)); *see also* Int'l Union, UAW v. Donovan, 746 F.2d 855, 862–63 (D.C. Cir. 1984) (Scalia, J.) ("The distribution of public funds among competing social programs is an archetypically political task, involving the application of value judgments and predictions to innumerable alternatives, as opposed to the application of accepted principles to a binary determination.").

[312] *Lincoln*, 508 U.S. at 187.

[313] *Cf*. Kate Stith, *Rewriting the Fiscal Constitution: The Case for Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 612 (1988) (noting that the concepts of "'line-item'" and "'lump-sum'" appropriations are "relative concepts" in that

necessary" to carry out its mandate.[314] As noted above, though, Congress often divides an agency's appropriations—for example, Congress provides three appropriations related to the DHS Management Directorate.[315] The agency cannot transfer funds *between* accounts without statutory transfer authority. But when the question is how to allocate funds *within* an account and it is "impossible to tell from the face of the statute how the appropriation is to be allocated among the items for which it is available,"[316] the agency may allocate funds as it sees fit to serve permissible statutory purposes covered by the appropriation.

As noted above, an agency may even obligate funds in a manner that diverges from the representations it made when it justified its budget request or that differs from how Congress indicated it expected funds would be allocated, as expressed in a committee report accompanying the appropriations act. When an agency takes such an action, the agency engages in *reprogramming*.[317] An agency is able to reprogram because neither justification materials nor committee reports, on their own, limit the agency's authority to manage appropriated funds.[318] Rather, "[a]n agency's representation to Congress as to how it proposes to allocate appropriated funds is legally binding on the agency only to the extent that its proposed allocation finds its way into the language of the appropriation statute itself."[319] Without limitations in statute, an agency engages in reprogramming "at the peril of strained relations with Congress," but that is only a "practical" constraint, not a legal one.[320]

When Congress seeks to impose legal constraints on allocation discretion, it must do so by statute. Of course, one way is for Congress to include more prescriptive language in the text of an appropriation, to specify, with greater detail, the objects for which the appropriation is

"[e]ach 'line item' is, in turn, a 'lump sum' for all objects or activities within that line item").

[314] *See* Joint Resolution Making Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1863–64 (1984).

[315] *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, Div. D, 133 Stat. 2317, 2503 (2019) (operations and support; procurement, construction, and improvements; and the federal protective service).

[316] In the Matter of the Newport News Shipbuilding and Dry Dock Company, B-184830, 55 Comp. Gen. 821, 820–21 (1976) (single appropriated sum available for two ships could be obligated to construct only one ship despite committee report that purported to divide the amount between the two ships).

[317] GAO GLOSSARY, *supra* note 19, at 85 (reprogramming) ("Shifting funds within an appropriation or fund account to use them for purposes other than those contemplated at the time of appropriation; it is the shifting of funds from one object class to another within an appropriation or from one program activity to another. While a transfer of funds involves shifting funds from one account to another, reprogramming involves shifting funds within an account.").

[318] *See* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("Indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency." (internal quotation marks omitted)). GAO has opined, though, that when Congress expressly incorporates into an appropriations act funds allocations set forth in an accompanying committee report or explanatory statement in a manner that allows the agency and others to "ascertain with certainty the amounts and purposes for which . . . appropriations are available," the committee report allocations bind the agency. Consolidated Appropriations Act of 2008—Incorporation by Reference, 2008 U.S. Comp. Gen. LEXIS 41, at *18 (Comp. Gen. Feb. 25, 2008). Along similar lines, DOJ has argued in that such incorporated allocations are "legally binding restrictions" on an agency's use of an appropriation. *See* Brief of Defendant-Appellant United States at 20, South Carolina v. United States, No. 19-2324 (Fed. Cir. Dec. 18, 2019) (arguing that allocation tables incorporated by reference into an appropriations act "identify with certainty the amounts and purposes for which these appropriations are available and serve as legally binding restrictions on the agency's appropriations. Thus, [the Department of Energy] may not use appropriated funds for [programs, projects, or activities] not identified in the tables.")

[319] Use of Law Enf't Assistance Admin. Program Grant Funds for Admin. Purposes, 4B Op. O.L.C. 674, 675 (1980).

[320] The Honorable Lowell Weicker, Jr., Chairman, Chairman, Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, United States Senate, B-217722, 64 Comp. Gen. 359, 361–62 (1985).

available.[321] This more prescriptive approach may come at the cost of limiting the agency's ability to respond to unforeseen circumstances. Reprogramming permits an agency to make "new and better applications of funds" that become apparent only after the "long period of time that exists between an agency's justification of programs and its actual expenditure of funds,"[322] albeit at the potential cost of an agency using its discretion in a way Congress might not favor.

So to maintain the potential benefits of reprogramming while also monitoring and influencing its use, another common approach is for Congress to enact a "report-and-wait" provision. Typical report-and-wait language will state that "[n]one of the funds provided by this Act . . . shall be available for obligation or expenditure through a reprogramming of funds that creates or eliminates a program, project, or activity" or that exceeds a given dollar amount.[323] Thus, when an agency's proposed reprogramming does not meet these conditions or thresholds—because, for example, the proposed reprogramming involves a small amount of funding—the agency need not provide notice to Congress before the reprogrammed funds are available for obligation or expenditure. Congress usually phrases reprogramming provisions as conditions on the availability of appropriated funds—that is, the provisions state that no funds are "available for obligation or expenditure" unless the reprogramming is performed under the conditions set forth in the report-and-wait provision.[324] When an agency violates an applicable reprogramming provision, in GAO's view the agency has obligated funds not available for that purpose in violation of the Antideficiency Act.[325]

The Supreme Court has observed that report-and-wait provisions are permissible,[326] as has the executive branch.[327] But both the Department of Justice (DOJ) and GAO are careful to distinguish between a permissible report-and-wait provision and what could be called a "report-and-approve" provision. Under the latter provision, Congress conditions the availability of appropriated funds for certain purposes by requiring an agency to give notice to relevant committees of the proposed use *and then* receive committee approval for the use.[328] DOJ has long argued that such provisions

[321] *See, e.g.*, Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. D, 133 Stat. 2317, 2507 (2019) (appropriating $8,032,801,000 for U.S. Immigration and Customs Enforcement's Operation and Support Account "of which not less than $6,000,000 shall remain available until expended for efforts to enforce laws against forced child labor").

[322] Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW AND CONTEMPORARY POLITICS 135, 150 (1972).

[323] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, § 503(a), 133 Stat. 13, 37 (2019).

[324] *Id*.

[325] *See, e.g.*, U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection, B-319009, 2010 U.S. Comp. Gen. LEXIS 78, at *9–10 (Comp. Gen. Apr. 27, 2010) (concluding that the U.S. Secret Service violated the Antideficiency Act by spending $5.1 million more on candidate-protection activities during the 2008 presidential election than specified in the explanatory statement that accompanied the FY2009 Department of Homeland Security Appropriations Act). While DOJ does not appear to have expressly weighed in on this particular question, in line with GAO's view, agencies have reported Antideficiency Act violations after failing to follow reprogramming provisions. *See* Letter to the Honorable Gene Dodaro, Comptroller General of the United States, Government Accountability Office, from the Honorable Rebecca Blank, Acting Secretary, Department of Commerce, at 2 (Nov. 21, 2012) (observing that "where, as here, an agency incurs obligations against reprogrammed funds where proper notice was not provided, it has incurred obligations in excess of available appropriations").

[326] *See* I.N.S. v. Chadha, 462 U.S. 919, 935 n.9 (1983) (noting that the Court had approved of a "report and wait" provision that prevented court rules from taking effect for a specified period after promulgation so that Congress could review the rules and if necessary "pass legislation barring their effectiveness").

[327] Reprogramming—Legislative Committee Objection, 1 Op. O.L.C. 133, 133–34 (1977) (explaining that DOJ regards report-and-wait provisions as "constitutionally permissible").

[328] *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. B, 133 Stat. 13, 74 (2019) (permitting the transfer of unobligated funds to the Department of Agriculture's Working Capital Fund but making such funds

are unconstitutional because they "vest the power to administer [a] particular program" in both the agency and the appropriations committees, "with the overriding right to forbid action reserved to the two [Appropriations] Committees."[329] Based on this separation-of-powers objection, at least as far back as the Eisenhower Administration, Presidents of both parties have "explicitly instructed their subordinates" that report-and-approve conditions are not binding.[330] But the executive branch does not ignore such provisions altogether. When presented with a report-and-approve condition, Presidents of both parties have instructed subordinates to comply with the notice portion of the statute and then "accord the recommendations of such committee all appropriate and serious consideration."[331] Thus, agencies may strive to receive committee buy-in on a proposed use that is covered by a report-and-approve provision,[332] but the executive branch does not view committee buy-in as necessary before funds may be obligated.

GAO has taken a similar position. In 1983, the Supreme Court issued its landmark decision in *I.N.S v. Chadha*, invalidating a "one-house veto" provision of the Immigration and Nationality Act, under which either house of Congress could overturn a decision of the Attorney General to suspend an alien's deportation.[333] The Court reasoned that, having delegated authority to suspend an alien's deportation to the Attorney General, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked" through legislation passed by both houses of Congress and either signed into law by the President or enacted over the President's veto.[334] Given this holding, in 1984 GAO assessed whether commonly used conditions on appropriated funds would be permissible under *Chadha*. GAO advised that a "statutory requirement" of "committee approval of or a committee veto over reprogrammings of lump-sum appropriations" would conflict with *Chadha*.[335]

available for obligation only upon "written notification to and prior approval of the Committees on Appropriations of both Houses of Congress").

[329] Authority of Congressional Committees to Disapprove of Action of Executive Branch, 41 Op. Att'y Gen. 230, 231 (1955).

[330] Constitutionality of Comm. Approval Provision in Dep't of Hous. & Urban Dev. Appropriations Act, 6 Op. O.L.C. 591, 591–92 (1982).

[331] 1 PUB. PAPERS OF PRESIDENT BARACK H. OBAMA 217 (2009) (statement on signing the Omnibus Appropriations Act, 2009); *see also* PRESIDENT DONALD J. TRUMP, STATEMENT ON SIGNING THE FURTHER CONSOLIDATED APPROPRIATIONS ACT, 2020, DCPD201900082, at *2 (Dec. 20, 2019) (similar language).

[332] *See, e.g.*, 2A DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION 1-16, ¶ 51 ("Reprogramming is generally accomplished pursuant to consultation with and approval by appropriate congressional committees.").

[333] 462 U.S. 919, 924–25 (1983) (explaining that upon passage by one house of a resolution disapproving the Attorney General's decision to suspend deportation, statute stated that the Attorney General "shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law" (internal quotation marks omitted)).

[334] *Id.* at 954–55.

[335] The Honorable Silvio O. Conte, Ranking Minority Member, Committee on Appropriations, House of Representatives, B-196854, 1984 WL 262173, at *2 (Comp. Gen. Mar. 19, 1984).

Key Takeaways: Transfers and Reprogramming

- Each appropriation may consist of several programs, projects, or activities.
- An agency must have statutory authority to debit one appropriation to the credit of another. The movement of funds from one appropriation account to another is a *transfer*.
- An agency has implied authority to allocate funds within an appropriation, shifting funds from one program, project, or activity to another, although Congress typically requires notice of such reprogramming.

The Antideficiency Act

The statutory provisions and legal doctrines discussed so far provide structure to Congress's appropriations power, requiring agencies to deposit public money in the Treasury and draw Treasury funds only as authorized by statute. Except for the MRA,[336] though, none of these statutes or legal doctrines, on their own, authorizes penalties for agency officials who exceed their authority. The Purpose Statute, itself, sets no penalty for an executive branch official who fails to heed the requirement that "[a]ppropriations shall be applied only to the objects for which the appropriations were made."[337] Likewise, the general statutory prohibition on transferring funds between appropriations does not specify a consequence for a transfer that lacks statutory authority,[338] and limits on reprogramming authority likewise do not mete out sanctions for disregarding reprogramming notice provisions. Instead, Congress imposes penalties on those who obligate or expend funds beyond statutory authority through the collection of statutory provisions now known as the Antideficiency Act.

Limits on Obligations or Expenditures

The Antideficiency Act's prohibitions and limitations date to 1870, and grew incrementally over time as Congress dealt with two related concerns. *First*, Congress confronted the common agency practice of obligating appropriated funds to create "coercive deficiencies."[339] Congress would appropriate an agency funds intended to last the fiscal year. Later, the agency would exhaust the appropriation before the end of the fiscal year. The agency would request a deficiency appropriation from Congress, at which point, practically speaking, Congress's only choice was to provide the funds requested.[340] *Second*, agencies obligated appropriations without statutory authority. While these improper obligations may not have caused the agency to exceed its total

[336] As noted above, an officer or employee who violates the MRA's prompt-deposit requirement "may be removed from office" and "may be required to forfeit to the Government any part of the money held by the official or agent and to which the official or agent may be entitled." 31 U.S.C. § 3302(d).

[337] *See id*. § 1301(a).

[338] *See id*. § 1532.

[339] Matter of Project Stormfury—Austl.—Indemnification for Damages, B- 198206, 59 Comp. Gen. 369, 372 (Comp. Gen. Apr. 4, 1980) ("The Anti-deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations it was receiving in the 19th century and early 20th century, generated, it believed, by the lack of foresight and careful husbanding of funds by Executive branch agencies . . . . We term such commitments 'coercive deficiencies' because the Congress has little choice but to appropriate the necessary funds."); *see also* 39 CONG. REC. 3689 (daily ed. Feb. 28, 1905) (Rep. Hemenway) (noting that agencies spending into deficiency was "an abuse that has continued for many, many years"); CONG. GLOBE, 28th Cong., 1st Sess. 73 (1843) (Rep. C. Johnson) (complaining that Congress had "appropriated $1,000,000 for certain objects" but that the Secretary of the Navy "had gone on to employ hands enough to exhaust $2,000,000" to lay the groundwork for "additional expenditures to keep these men in employ, and thr[o]w the odium of refusing to continue them on Congress").

[340] *See, e.g.*, 39 CONG. REC. 3782 (daily ed. Mar. 1, 1905) (Rep. Underwood) (lamenting that, when presented with a request for a deficiency appropriation "we must pay or stop the running of the government").

available budget authority, improper obligations often contributed to deficiencies.[341] Both practices undermined congressional control over Treasury funds, because the agency effectively dictated to Congress its total funding or its allowed expenses.[342]

The Antideficiency Act responds to these related concerns.[343] The Act generally prohibits an agency from incurring obligations without available appropriations. In its central prohibition, the Act provides that

> an officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[344]

GAO and the executive branch disagree over the types of obligations that trigger an Antideficiency Act violation under its central prohibition. In line with GAO, the executive branch sees two possible violations. *First*, the agency may obligate or expend funds beyond *total* appropriations.[345] *Second*, as noted above, the Act prohibits obligations or expenditures "exceeding an amount *available* in an appropriation or fund for the expenditure or obligation."[346] According to DOJ, this important modifier, *available*, imparts a requirement of "legal permissibility" for obligations and expenditures.[347] That is, the agency must ensure that each of its obligations or expenditures are for purposes permitted by law. DOJ recognizes that Congress may constrain the scope of legally permissible spending not only in setting overall funding levels, but also by including "caps" or "conditions" in an appropriations act.[348] A cap is an appropriations act's prohibition on obligating or expending funds "in excess of a designated amount for a particular purpose," while a condition is an appropriations act's prohibition on obligating or expending funds "for a particular purpose."[349] Thus, if an officer or employee obligates or expends funds in violation of either a condition or a cap that is contained in an appropriations act,

[341] *See id*. at 3781 (Rep. Underwood) (explaining that the Department of the Navy had exhausted its FY1905 appropriation in less than six months, requiring a deficiency appropriation, in part because, without authorization, the Navy had improperly spent $500,000 on ship gun sights using funds "ordinarily used for the maintenance and care of ships").

[342] *See, e.g.*, 40 CONG. REC. 1273 (daily ed. Jan. 19, 1906) (Rep. Littauer) ("We find that whenever we cut down . . . the amounts estimated [by the agency] for any given object to what, in the judgment of Congress, is ample provision . . . those in charge of bureaus arbitrarily proceed to expend amounts under the appropriation as though their estimates had been allowed in full, giving no attention to the mandate contained in the appropriation determined by Congress.").

[343] Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 54 (2001) (explaining that through the Antideficiency Act Congress "control[s] . . . both the amount and objects of executive branch spending").

[344] 31 U.S.C. § 1341(a)(1)(A)–(B). The Act also prohibits expenditures or obligations of, or contracting for the payment of, "money required to be sequestered" under the Balanced Budget and Emergency Deficit Control Act of 1985. *See id*. (c)–(d).

[345] *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. at 37.

[346] 31 U.S.C. § 1341(a) (emphasis added).

[347] *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. at 38 ("The fact that Congress did not simply prohibit expenditures in excess of total appropriations suggests that the term 'available' should be construed more broadly to encompass the concept of legal permissibility.").

[348] *See id*. at 33–34.

[349] *Id*.

DOJ and GAO agree that that individual violates the Antideficiency Act, even if, in making the improper obligation or expenditure, the agency has not exceeded its total appropriations.[350]

DOJ's and GAO's interpretations diverge, though, on the question of whether an individual violates the Act when he or she obligates or expends funds in violation of a cap or condition that was enacted into law at a different time than the particular appropriations act that made the funds at issue available. The Act's central ban on obligations "exceeding an amount available in an appropriation or fund for the expenditure or obligation" requires an agency to determine whether an obligation or expenditure exceeds "amount[s] available." According to DOJ, to give meaning to all parts of the statute, the agency "must look [only] to the applicable legislative act making the amounts in question available for obligation or expenditure" to identify a cap or condition the violation of which leads to an Antideficiency Act violation.[351] GAO takes a broader view: "If a statute, whether enacted in an appropriation *or other law*, prohibits an agency from using any of its appropriations for a particular purpose, the agency does not have an amount available in an appropriation for that purpose," and action by the agency to obligate funds for such a purpose will violate the Antideficiency Act.[352]

This point of disagreement may be significant, because Congress often enacts caps or conditions on the obligation or expenditure of appropriations in general legislation that Congress enacts separately from its appropriations acts.[353] Congress also routinely enacts caps and conditions in one appropriations act that apply "government-wide," including to agencies funded under separately enacted appropriations acts.[354] And when it appropriates funds, Congress generally does not "incorporate . . . by reference" the caps or conditions in general law into each agency's appropriations.[355] Thus, when an agency obligates or expends funds in violation of a cap or condition not in the act providing the relevant appropriation, according to DOJ, the obligation or expenditure does not violate the Antideficiency Act.

Congress recognized that agencies could pressure Congress into making deficiency appropriations not only by directly obligating or expending funds, but also by accepting services from a person who would then expect payment for the services, even though the person may have

[350] *See id.* at 52 (noting that DOJ's view was "consistent with that of the Comptroller General").

[351] Use of Appropriated Funds to Provide Light Refreshments at EPA Conferences, 31 Op. O.L.C. 54, 67 (2007); *see also id*. at 66 ("a proper reading [of the statute] reinforces that the [Antideficiency Act] does not impose a roving requirement of 'availability' under all possibly applicable law, but rather requires 'availability' in the particular appropriation for the expenditure or obligation"); *see also* CIRCULAR NO. A-11, *supra* note 290, at § 145.2 (directing agencies to the Department of Justice Office of Legal Counsel's (OLC) 2007 opinion for guidance on obligations that violate "a funding restriction in an Act *other* than an appropriations act" (emphasis added)).

[352] Antideficiency Act—Applicability of Statutory Prohibitions on the Use of Appropriations, B-317450, 2009 U.S. Comp. Gen. LEXIS 155, at *11–12 (Comp. Gen. Mar. 23, 2009) (internal quotation marks omitted) (emphasis added).

[353] *See, e.g.*, 42 U.S.C. § 16313(c)(4) ("No funds allocated to the" Department of Energy's Solar Fuels Research Initiative "may be obligated or expended for commercial application of energy technology . . . ."), *enacted by* Department of Energy Research and Innovation Act, Pub. L. No. 115-246, § 303, 132 Stat. 3130, 3143 (2018).

[354] For example, Congress's annual Financial Services and General Government appropriations acts contains "government-wide" "general provisions." *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, Div. C, tit. VII, § 709, 133 Stat. 2317, 2486 (2019) (prohibiting use of "funds made available pursuant to the provisions of this *or any other Act*" to implement a regulation that Congress has disapproved through a joint resolution (emphasis added)).

[355] Use of Appropriated Funds to Provide Light Refreshments at EPA Conferences, 31 Op. O.L.C. at 62 n.2 (suggesting Congress could respond to DOJ's reading of the Antideficiency Act as applying to only the "internal" caps and conditions of an appropriations act through such references to general law); *see also Antideficiency Act—Applicability of Statutory Prohibitions*, B-317450, 2009 U.S. Comp. Gen. LEXIS 155, at *8 ("[DOJ] suggests that Congress would have to specifically incorporate by reference every statutory provision of general applicability in order for the restriction to be 'in an appropriation.'").

had no legal right to payment.[356] When presented with such a claim in 1884—individuals had been "temporarily employed . . . in the [Department of the Interior's] Indian Office" without funds to pay them—Congress voted a deficiency appropriation but generally prohibited agencies from accepting "voluntary services" "in excess of that authorized by law" in the future.[357] Congress added this prohibition to the Antideficiency Act itself in 1905.[358] The Act now bars agencies from accepting "voluntary services" or employing "personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."[359] The Act further specifies that its emergency exception "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[360] DOJ has interpreted the statute, though, to preserve an agency's ability to accept "gratuitous" services,[361] defined as services offered by a person who holds a position that the law allows to be uncompensated.[362]

Key Takeaways: Limits on Obligations or Expenditures Under the Antideficiency Act

- An agency may not exceed *total* available appropriations, meaning the agency may not obligate or expend a lapsed or depleted appropriation.
- An agency may not exceed a *cap* within an appropriation, meaning the agency may not incur obligations or expenditures beyond the amount available within an appropriation for a given purpose, even if funds remain for other purposes.
- An agency must comply with a *condition* attached to an appropriation.
- An agency may not accept voluntary services or accept personal services beyond the amount authorized in law, except in cases of emergency.

[356] Recess Appointment of Sam Fox, B-309301, 2007 WL 1674285, at *3–4 (Comp. Gen. June 8, 2007) (explaining that Congress felt a "moral obligation" to pay agency employees who an agency had "coerce[d]" to "volunteer" services to the agency).

[357] Law of May 1, 1884, ch. 37, 23 Stat. 15, 17 (1884). One court stated that Congress adopted the voluntary-services ban "based in part on the unsatisfactory history of the conduct of private parties delegated to exercise coercive governmental authority," offering the example of "private detective agency personnel" who served as "deputy police officers in the nineteenth century." Suss v. Am. Soc'y for the Prevention of Cruelty to Animals, 823 F. Supp. 181, 189 (S.D.N.Y. 1993). No member appears to have justified the ban in this way, and in 1893, before Congress added the voluntary services ban to the Antideficiency Act, Congress separately passed the Anti-Pinkerton Act in response to the use of private detective agencies. *See* S. REP. NO. 88-447 at 2 (noting, as background for the Anti-Pinkerton Act, the role of private detective agencies in labor disputes of the 1880s and 1890s, including railway strikes); *see also* 5 U.S.C. § 3108 ("An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.").

[358] *See* Law of Mar. 3, 1905, ch. 1484, 33 Stat. 1214, 1257–58 (1905).

[359] 31 U.S.C. § 1342.

[360] *Id*.

[361] Employment of Retired Army Officer As Superintendent of Indian Sch., 30 Op. Att'y Gen. 51, 55 (1913) ("[I]t is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress . . . .").

[362] Authority to Decline Compensation for Service on the National Council of the Arts, 13 Op. O.L.C. 113, 114 (1989) (opining that Professor Laurence Tribe could serve as Special Counsel to Independent Counsel Lawrence Walsh without compensation because the statute permitting Tribe's appointment "requires no minimum compensation but merely states a maximum compensation").

Apportionments and Reserves

Finally, before the passage of the Antideficiency Act, coercive deficiencies arose from the rate at which agencies obligated funds. In the era of frequent coercive deficiencies, Congress would appropriate funds for the fiscal year, but an agency would then exhaust its appropriations months before the fiscal year's end.[363]

The Antideficiency Act further disciplines agency spending by establishing an apportionment process. Through a delegation from the President, the Director of OMB is responsible for apportioning appropriations available to executive agencies.[364] "[A]n appropriation available for obligation for a definite period" must usually be "apportioned to prevent obligation or expenditure at a rate" that would place an agency into a deficiency.[365] In other words, OMB must phase an agency's obligations or expenditures to avoid leaving the agency without available appropriations before the end of the fiscal year.[366] The Act makes limited exceptions to this usual rule. OMB may apportion an agency's appropriations at a rate that would indicate the need for a deficiency appropriation to accommodate pay increases for civil employees or military personnel.[367] OMB may also apportion an agency's appropriations at a rate that would indicate the need for a deficiency appropriation when required by a law enacted after the agency submitted its budget request to Congress[368] or in "an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals" where necessary to support payments to individuals that are fixed by law.[369]

Apportionments must be "in writing"[370] before appropriations are obligated or expended.[371] OMB may apportion appropriations by time period (i.e., by "months, calendar quarters, operating seasons, or other time periods"), by function (i.e., by "activities, functions, projects, or objects"), or by a combination of the two.[372] After OMB makes its apportionment, the agency receiving the

[363] *See supra* note 340 and text.

[364] *See* 31 U.S.C. § 1513(b) (tasking the President with "apportion[ing] in writing an appropriation available to an executive agency (except the Commission) that is required to be apportioned"); *see also* 3 U.S.C. § 301 (permitting delegation of "any function which is vested in the President by law" to an agency head or an official "who is required to be appointed by and with the advice and consent of the Senate"); Exec. Order No. 6,166, at § 16 (1933), *as amended by* Exec. Order No. 12,066, 52 FED REG. 34,617, 34,617 at § 2 (1987) ("The functions of making, waiving, and modifying apportionments of appropriations are transferred to the Director of the Office of Management and Budget."). Officials in the legislative and judicial branches apportion appropriations for their respective branches. *See* 31 U.S.C. § 1513(a).

[365] 31 U.S.C. § 1512(a). An appropriation provided for an indefinite period must be apportioned to make the most effective and economical use of the appropriation. *See id.* The same requirement applies to authority to incur obligations by contract in advance of appropriations. *See id*.

[366] *See id*.

[367] *Id*. § 1515(a).

[368] *Id*. § 1515(b)(1)(A).

[369] *Id*. § 1515(b)(1)(B). If an official makes an apportionment that indicates the need for a deficiency appropriation, statute requires the official to immediately report the apportionment to Congress, a report that "shall be referred to in submitting a proposed deficiency or supplemental appropriation." *Id*. § 1515(b)(2).

[370] *Id*. § 1513(a)–(b).

[371] *See* Letter to Gloria Joseph, Director, Office of Administration, National Labor Relations Board, B-253164, B-253164, at 2 (Comp. Gen. Aug. 23, 1993), https://www.gao.gov/assets/670/664216.pdf (concluding an agency violated the Antideficiency Act when it obligated funds beyond an existing apportionment before receiving OMB's reapportionment in writing, even though OMB orally confirmed the reapportionment before funds were obligated and provided a written reapportionment soon after).

[372] 31 U.S.C. § 1512(b).

appropriation may then further subdivide the apportionment, so long as its subdivisions stay within the limits of OMB's apportionment.[373] Once this process of apportionment and administrative subdivision is complete, the resulting schedule constrains an agency's authority to obligate funds: an agency "may not make or authorize an expenditure or obligation exceeding an apportionment" or any administrative subdivision.[374]

Generally, OMB must apportion all executive branch appropriations.[375] However, OMB may establish a *reserve* by withholding a portion of appropriated funds from apportionment and thus from obligation.[376] OMB may create reserves "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or "as "specifically provided by law."[377] To ensure that OMB does not misuse this reserve authority, the Impoundment Control Act—which is detailed below—requires the President to report to Congress whenever a reserve is created.[378]

Key Takeaways: Apportionments and Reserves Under the Antideficiency Act

- Appropriations must generally be apportioned.
- OMB apportions an executive branch appropriation that is available for a definite period by dividing the appropriation by time period or function; an agency may further subdivide OMB's apportionment.
- An agency's obligations or expenditures cannot exceed an amount available in the relevant apportionment.
- OMB may reserve (i.e., withhold) appropriations from apportionment to provide for contingencies, achieve savings, or when specifically provided by law.

Antideficiency Act Penalties

An agency may violate the Antideficiency Act in several ways, from obligating funds in violation of an appropriations act cap or condition,[379] to accepting voluntary services beyond that authorized by law,[380] to obligating funds exceeding an apportionment or its administrative subdivision.[381] When an agency violates the Antideficiency Act, further requirements trigger.

First, "the head of the agency" "shall report immediately to the President and Congress all relevant facts and a statement of actions taken."[382] The head of agency must send a copy of this report to GAO.[383] *Second*, the Act authorizes sanctions for the officer or employee responsible for

[373] *Id*. § 1513(d).

[374] *Id*. § 1517(a).

[375] *See id*. § 1511(a) & (b) (defining the "appropriations" covered by the apportionment requirement); *id*. § 1512(a) (requiring apportionment of all covered appropriations); *id*. § 1516 (identifying funds that may be exempted from apportionment).

[376] *See* GAO GLOSSARY, *supra* note 19, at 25 ("budgetary reserves").

[377] 31 U.S.C. § 1512(c)(1).

[378] *Id*. § 1512(c)(2).

[379] *Id*. § 1341(a).

[380] *Id*. § 1342.

[381] *Id*. § 1517(a).

[382] *Id*. § 1351 (imposing reporting requirement for violations of 31 U.S.C. §§ 1341 & 1342); *see also id.* § 1517(b) (imposing reporting requirement for obligations exceeding amounts available in an apportionments or its administrative subdivision).

[383] *Id.* §§ 1351 & § 1517(b).

the violation. In the early 1900s, Congress found such consequences "imperatively necessary" because even though the Act's central prohibition had existed since 1870,[384] the "vicious and unlawful practice of exceeding appropriations by various departments [was] growing very rapidly."[385] In its current form, the Act provides that "an officer or employee of the United States Government . . . violating" the Act "shall be subject to appropriate administrative discipline including, when circumstances warrant," suspension without pay or removal from office.[386] Knowing and willful violations of the Act may earn the responsible employee a fine of not more than $5,000, up to two years' imprisonment, or both.[387] OMB requires agencies to report to DOJ any Antideficiency Act violation that it "suspect[s]" were knowing and willful,[388] and an agency has referred at least two such cases to DOJ for further review.[389]

Though the Act's administrative discipline and penalty provisions have existed for more than a century, agencies rarely employ the more severe methods of discipline referred to in the statute. Writing in 2001, DOJ stated that "no criminal or civil penalties have been sought under the Act in the almost 95 years that such penalties have been available."[390] Thus, the Act's criminal provisions have apparently never formed the basis for a criminal prosecution.[391] DOJ has even signaled that it would be reluctant to bring such a prosecution, given "very difficult considerations, such as fair warning and desuetude," that DOJ asserts such a prosecution would pose.[392] DOJ has prosecuted individuals who misuse federal funds or property under other statutes.[393]

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[384] Law of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (1870).

[385] S. REP. NO. 58-4134 (justifying legislation containing similar language to that added to the Act in March 1905).

[386] 31 U.S.C. § 1349(a) (authorizing administrative discipline for violations of 31 U.S.C. §§ 1341 & 1342); *see also id.* § 1518 (authorizing administrative discipline for obligations exceeding amounts available in an apportionments or its administrative subdivision).

[387] *Id.* § 1350 (specifying criminal penalties for violations of 31 U.S.C. §§ 1341 & 1342); *see also id.* § 1519 (specifying criminal penalties for obligations exceeding amounts available in an apportionments or its administrative subdivision).

[388] CIRCULAR NO. A-11, *supra* note 290, at § 145.7.

[389] *See* Letter to the Honorable Gene Dodaro, Comptroller General of the United States, Government Accountability Office, from the Honorable Robert Adler, Acting Chairman, Consumer Product Safety Commission (June 5, 2014) (employee who worked during a lapse in appropriations the day after signing a furlough notice directing the employee not to work) (noting that DOJ declined prosecution); Letter to the Honorable Gene Dodaro, Comptroller General of the United States, Government Accountability Office, from the Honorable Rebecca Blank, Acting Secretary, Department of Commerce (Nov. 21, 2012) (use of accounting mechanism to "move expenses" from one program, project, or activity to another).

[390] Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 54 n.22 (2001). It is unclear what DOJ means when it refers to "civil penalties," as the Act authorizes only "administrative discipline" and criminal penalties. *See, e.g.*, 31 U.S.C. §§ 1349 & 1350.

[391] Since 2005, GAO has annually compiled for Congress the information in that fiscal year's Antideficiency Act reports. None of these reports refers to an employee being prosecuted under the Antideficiency Act.

[392] Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. at 54 n.22. The Due Process Clause of the Fifth Amendment "prohibits application of a criminal statute to a defendant unless it was reasonably clear at the time of the alleged action that defendants' actions were criminal." United States v. Kanchanalak, 192 F.3d 1037, 1046 (D.C. Cir. 1999). Desuetude is a legal theory under which a court may find a criminal statute unenforceable where there is a long history of non-enforcement coupled with routine, readily apparent violations of the statute. "West Virginia alone recognizes [the theory] as a valid defense" to a criminal prosecution, *Notes, Desuetude*, 119 HARV. L. REV. 2209, 2211 (2005), so it is unclear why DOJ has suggested that this theory would impede an Antideficiency Act prosecution.

[393] These money- and property-related offenses appear in Chapter 31 of Title 18 of the United States Code. DOJ's prosecutions under Chapter 31 usually involve a defendant who personally benefited from misuse of federal funds. *E.g.*, Satterfield v. United States, 249 F.2d 608, 609 (6th Cir. 1957) (affirming embezzlement conviction of IRS official

Administrative discipline in the form of suspension or removal from office also appears rare. Officers or employees responsible for Act violations may have retired or resigned from federal employment before an agency considers the violation.[394] When an agency imposes discipline, the agency usually uses milder forms, such as a letter of censure, oral reprimand, or counseling. At times, agencies will identify an Antideficiency Act violation but decline to impose administrative discipline of any kind. Usually, though, agencies will respond to violations by committing to reform agency practices to lessen the chance of further violations occurring.[395]

Key Takeaways: Antideficiency Act Penalties

- An officer or employee who violates the Antideficiency Act is subject to appropriate administrative discipline, up to termination.
- An officer or employee who knowingly and willfully violates the Act is subject to a fine, imprisonment, or both.
- In practice, agencies tailor administrative discipline (if any) to the facts of each violation. No violation or suspected violation of the Act appears to have led to a criminal prosecution under the Act.

The Impoundment Control Act

The key statutory provisions discussed so far constrain the executive branch's ability to dispose of federal funds. The MRA prevents agencies from augmenting their appropriations with funds received from other sources; the Purpose Statute limits the ends to which an appropriation may be applied; transfer and reprogramming provisions limit an agency's discretion to manage appropriated funds; and the Antideficiency Act prevents an agency from obligating funds when none are available for a given purpose. Each constraint ensures that the executive branch does not use budget authority in ways that conflict with the policy choices embodied in statute.

But the executive branch can just as easily frustrate congressional purpose by declining to obligate appropriations. This process of "action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority" is called *impoundment*.[396] The last of Congress's key fiscal control statutes detailed in this report, the Impoundment Control Act of 1974 (ICA) addresses and controls this executive branch practice.

who had "wrongfully converted . . . to his own use" money that came into his possession in the course of his employment). In a typical Antideficiency Act violation, though, such personal gain is lacking. *See, e.g.*, Letter to the Honorable Gene Dodaro, Comptroller General of the United States, Government Accountability Office, from the Honorable Robert Wilkie, Secretary, Department of Veterans Affairs (Sept. 10, 2018) (reporting Department of Veterans Affairs Antideficiency Act violation resulting from improper obligation of FY2015 appropriations for expenses that should have been recorded as obligations in later fiscal years).

[394] *E.g.*, Letter to the Honorable Gene Dodaro, Comptroller General of the United States, Government Accountability Office, from the Honorable Janet Napolitano, Secretary, Department of Homeland Security, at 1–2 (Aug. 21, 2013) (explaining that U.S. Coast Guard (USCG) took no disciplinary action against the person deemed responsible for USCG leasing more personal vehicles than its appropriation allowed because that person had retired).

[395] *E.g.*, Letter to the Honorable Gene Dodaro, Comptroller General of the United States, Government Accountability Office, from the Honorable Lee J. Lofthus, Assistant Attorney General for Administration, Department of Justice, at 3 (Dec. 13, 2018) (explaining that in response to Antideficiency Act violations that arose when DOJ obligated funds in violation of report-and-wait provisions DOJ had revised internal policies relating to congressional reporting).

[396] GAO GLOSSARY, *supra* note 19, at 61.

Background

Unlike the other executive branch practices discussed above, through much of U.S. history impoundment of any type appears to have been relatively rare. There are early examples of a President's failure to obligate appropriated funds. Following the October 1802 decision of the Spanish intendant in New Orleans to bar the right of Americans to deposit goods in the city's port at a time when the city was still under Spanish control,[397] Congress appropriated $50,000 for the purchase of up to 15 gunboats.[398] In October 1803, after negotiating the Louisiana Purchase, President Thomas Jefferson advised Congress that gunboat funds "remain[ed] unexpended" because the "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary."[399] Actual or threatened use of impoundment was mostly absent during the 19th and early 20th centuries.[400] Congress's complaint in this period was usually that the executive branch spent too much and for the wrong purposes, not that it was failing to obligate or expend budget authority.[401] The executive branch justified actual or proposed impoundments as savings measures that still accomplished Congress's objective for the affected program,[402] and in 1950 Congress provided statutory authority to effect such savings by adding provisions to the Antideficiency Act allowing the President to create reserves in order to effect savings.[403] The executive branch seldom asserted that the President had broad authority to withhold budget authority from obligation or expenditure. Units of the executive branch even expressed doubt that such authority existed.[404]

Following the outbreak of World War II, though, impoundment became more common and attracted new justifications.[405] Presidents continued to assert that federal statutes authorized

[397] Sally K. & William D. Reeves, *Two Hundred Years of Maritime New Orleans: An Overview*, 35 TUL. MAR. L.J. 183, 186 (2010).

[398] Law of February 28, 1803, ch. xi, § 3, 7 Stat. 206, 206 (1803).

[399] 10 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES 41 (Paul L. Ford ed. 1905) (Third Annual Message to Congress).

[400] *See, e.g.*, Louis Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFF. L. REV. 141, 165 (1973) (noting an impoundment threat from President Harding in 1923 that was not carried out likely because of the President's death months later); Letter to the Honorable Sam J. Ervin, Jr., Chairman, Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, from Elmer B. Staats, Comptroller General of the United States, Government Accountability Office, B-135564 (July 26, 1973) (stating that the Nixon Administration claims of extensive historical precedent for presidential impoundments "relie[d] primarily upon impoundments occurring" after 1941); *but see* FEDERAL IMPOUNDMENT CONTROL PROCEDURE ACT, REPORT OF THE S. COMM. ON GOV'T OPS., S. REP. 93-121, at 10–11 (1973) (reciting OMB claim that "it seems likely that most if not all Presidents have impounded funds for any number of reasons" but noting that OMB did "not keep records" of all such impoundments).

[401] *See supra* notes 243–247 and 339–342 and text.

[402] *See 1971 Impoundment Hearings*, *supra* note 53, at 174, 177 (testimony of J. Cooper, Professor, Department of Political Science, Rice University) (noting that early impoundments "either had substantial congressional support or did not arouse any substantial congressional opposition").

[403] *See* General Appropriations Act of 1950, ch. 896, § 1211, 64 Stat. 595, 765 (1950) (amending the Antideficiency Act to allow for the creation of reserves to realize savings through changed program requirements or administrative efficiency).

[404] Presidential Authority to Direct Departments and Agencies to Withhold Expenditures from Appropriations Made, 1 Op. O.L.C. Supp. 12, 16 (1937) ("Further doubt regarding the existence of the power to make . . . an order . . . withholding expenditures from appropriations made . . . arises from the fact that the power would in effect enable the President to overcome the well-settled rule that he may not veto items in appropriation bills.").

[405] *See generally* Louis Fisher, *The Politics of Impounded Funds*, 15 ADMIN. SCI. QUARTERLY 361 (1970).

particular impoundments,[406] though some doubted these claims.[407] Perhaps more concerning to Congress, Presidents impounded budget authority based on policy disagreements with Congress's objective in providing budget authority.[408] In 1971, for example, President Nixon impounded $350 million appropriated for categorical grant programs, based on a policy preference for revenue sharing, which he believed represented "a much more effective way of helping local governments provide for local needs" than the more restrictive categorical grants.[409] By 1973, the Nixon Administration was withholding between $12 billion and $18 billion in budget authority from obligation.[410]

Against this backdrop, Congress enacted the ICA in 1974.[411] According to GAO, the ICA "operates on the premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds."[412] However, the ICA also provides "mechanism[s]" by which the executive branch may deviate from this requirement.[413] The ICA establishes two processes for Congress to learn of, and then weigh in on, executive branch impoundment of

[406] *1971 Impoundment Hearings*, *supra* note 53, at 156 (testimony of C. Weinberger, Deputy Director, Office of Management and Budget) (asserting that the Employment Act of 1946, coupled with the need to control inflation, "does seem to be a very sound basis for some of the fiscal decisions that" President Nixon made to impound appropriated funds); *id*. at 160 (similarly asserting that the President's need to comply with "outlay ceilings" and "debt limitations" permitted impoundments).

[407] *E.g.*, *id*. at 153 (Arthur S. Miller, Professor Emeritus, George Washington University School of Law) (arguing that it is "beyond belief" that President Nixon would rely on "rather ambiguous statutes" such as the Employment Act of 1946 to justify impoundment).

[408] *Compare supra* note 404 (opinion of Attorney General Homer Cummings expressing, in 1937, doubt concerning a broad presidential power to impound appropriated funds), *with* Fed.-Aid Highway Act of 1956-Power of President to Impound Funds, 42 Op. Att'y Gen. 347, 351 (1967) ("An appropriation act . . . places an upper and not a lower limit on expenditures. The duty of the President to see that the laws are faithfully executed, under Article II, section 3 of the Constitution, does not require that funds made available must be fully expended.").

[409] *See* Letter to Rep. Clement J. Zablocki, U.S. House of Representatives, from Caspar W. Weinberger, Deputy Director, Office of Management and Budget (Mar. 9, 1971), *reprinted in 1971 Impoundment Hearings*, *supra* note 53, at 310.

[410] *See* REP. JOE L. EVINS, CHAIRMAN EVINS RELEASES PARTIAL LISTING OF IMPOUNDMENT BY OFFICE OF MANAGEMENT AND BUDGET OF FUNDS APPROPRIATED BY CONGRESS (Jan. 15, 1973), *reprinted in 1973 Impoundment Hearings*, *supra* note 145, at 563–66 ($12 billion); CHAFETZ, *supra* note 70, at 64 ($18 billion).

[411] The Supreme Court has not applied the ICA to agency delay in making budget authority available for obligation or expenditure. A search of LexisNexis's Supreme Court opinions database reveals only two instances in which the Court mentioned the Impoundment Control Act by name. But the Court did not apply the ICA in either case. In *Train v. City of New York*, the Court considered whether, under the Federal Water Pollution Control Act Amendments (FWCPA) of 1972, the President could decline to allot to states the full amount of sums appropriated as financial assistance for municipal sewers and sewage treatment works. 420 U.S. 35, 38-40 (1975). Congress enacted the ICA during the pendency of the litigation, but the Court noted that "[o]ther than as they bear on the possible mootness in the litigation before us, no issues as to the reach or coverage of the Impoundment Act are before us." *Id*. at 45 n.10. The Court decided that the case was not moot and that the FWCPA required the President to allot the full amount of funds appropriated for the program at issue. *Id.* at 44. In other words, *Train* holds only that the particular pollution control statute in that case made allotments mandatory. In *I.N.S. v. Chadha*, in the course of arguing that one-house legislative vetoes of the type invalidated by the majority were commonplace, a dissenting justice noted that the ICA then included a one-house legislative veto. *See* 462 U.S. 919, 970-71 (1983) (White, J., dissenting). But *Chadha* did not involve any question regarding the impoundment of budget authority.

[412] Matter of Impoundment of the Advanced Research Projects Agency-Energy Appropriation, 2017 U.S. Comp. Gen. LEXIS 360, at *3 (Comp. Gen. Dec. 12, 2017).

[413] Decision of General Socolar, 1981 U.S. Comp. LEXIS 2200, at *11 (Comp. Gen. Sept. 15, 1981).

budget authority.[414] "There are two types of impoundments: deferrals and proposed rescissions,"[415] and the ICA establishes separate processes for both.

Rescissions

First, the ICA requires the President to report to Congress, using a *special message*, whenever the President proposes to rescind budget authority.[416] A *rescission* cancels budget authority, making the budget authority no longer available for obligation or expenditure.[417] The ICA's rescission provision gives "the President the opportunity to initiate reconsideration of, and Congress the opportunity to reconsider, the expenditure of program funds under circumstances that may be different from those in existence when the original program was enacted."[418]

The President may propose a rescission, either when "all or part of any budget authority will not be required to carry out the full objectives or scope" of the programs for which Congress provided the budget authority, or when there are "fiscal policy or other reasons" supporting a rescission.[419] The President may also propose to "reserve[] from obligation," for the rest of the fiscal year, budget authority "provided for only one fiscal year."[420]

In either case, the President must transmit a special message to Congress justifying cancellation.[421] The special message must describe and justify the proposed rescission or reserve.[422] A special message describing a proposed rescission triggers a 45-legislative-day clock, during which the agency may withhold the affected budget authority from obligation.[423] Given Congress's modern practice of holding pro forma sessions, the ICA's 45-legislative-day-hold provision usually equates to 45 calendar days.[424] If Congress does not rescind funds within this

[414] Importantly, the ICA does not "supersed[e] any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 2 U.S.C. § 681(4). When statute requires the executive branch to obligate budget authority, an agency may not rely on the ICA to delay the obligation. *See* Maine v. Goldschmidt, 494 F. Supp. 93, 99 (D. Me. 1980) (holding that the ICA "cannot provide an independent statutory basis for the deferral" for a program interpreted to mandate the allocation of highway funding to states).

[415] GAO GLOSSARY, *supra* note 19, at 61. Under the ICA, these categories are exclusive. To withhold budget authority from obligation, the President must transmit to Congress a special message proposing either a rescission or a deferral. *See* NASA—Constellation Program & Appropriations Restrictions, Part II, 2010 U.S. Comp. Gen. LEXIS 149, at *8 (Comp. Gen. July 23, 2010).

[416] 2 U.S.C. § 683(a).

[417] GAO GLOSSARY, *supra* note 19, at 85.

[418] Appropriations—Impounding—General Accounting Office Interpretation of Impoundment Control Act of 1974, B-115398, 54 Comp. Gen. 453, 464 (1974).

[419] 2 U.S.C. § 683(a).

[420] *Id*. (explaining, in relevant part, that "whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year . . . the President shall transmit to both Houses of Congress a special message"). "At midnight on the last day of an appropriation's period of availability, the appropriation account expires and is no longer available for incurring new obligations." 1 GAO REDBOOK, *supra* note 30, at ch. 5, p. 1-37 (3d ed., 2004), https://www.gao.gov/assets/210/202437.pdf (stating that "an appropriation 'dies' in a sense at the end of its period of obligational availability").

[421] *See* 2 U.S.C. § 683(a).

[422] *Id*. (requiring that a special message include, among other things, "the reasons why the budget authority should be rescinded or is to be so reserved").

[423] *Id*. § 683(b) ("Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.").

[424] *See* Impoundment Control Act—Withholding of Funds through Their Date of Expiration, B-330330, 2018 U.S.

period, the affected funds "shall be made available for obligation."[425] "Funds made available for obligation" after the expiration of the 45-legislative-day hold period "may not be proposed for rescission again,"[426] meaning the President may not transmit successive special messages asking for rescission of the same budget authority to create multiple 45-day hold periods.[427]

This 45-legislative-day hold period raises the prospect of so-called "pocket rescissions." To illustrate this practice, suppose that on September 1 of a fiscal year the President transmits to Congress a special message proposing the rescission of budget authority whose period of availability ends with the fiscal year. A fiscal year ends September 30.[428] The special message submitted on September 1 would permit the President to withhold budget authority for 45 legislative days.[429] If the ICA were to allow the hold to continue for the entire 45-day period, the affected budget authority's period of availability would end on September 30, while the hold period would continue. As a result, the agency could not make the funds available for obligation, even if Congress later did not enact a rescission resolution.

GAO has reasoned that because the Constitution states that the President "shall take Care that the Laws be faithfully executed,"[430] the President must make budget authority that Congress fails to rescind "available in sufficient time to be prudently obligated."[431] This requirement applies, according to GAO, "[r]egardless of whether the 45-day period for congressional consideration provided in the ICA approaches or spans the date on which funds would expire."[432] GAO reads the Act to prohibit pocket rescissions.[433] OMB disagrees, noting that the text of the ICA does not bar an agency from withholding budget authority from obligation during the 45-day hold period where the hold period spans fiscal years. In OMB's view, Congress knows how to prohibit fiscal-year-spanning holds, as the ICA contains a similar provision for deferrals.[434] According to OMB,

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Comp. Gen. LEXIS 395, at *6 n.1 (Comp. Gen. Dec. 10, 2018) ("As a result of Congress's current practice of conducting pro forma sessions, this 45-day period is likely to be 45 calendar days after the date of transmission of the special message.").

[425] 2 U.S.C. § 683(b).

[426] *Id*.

[427] H.R.CON.REP. NO. 100-313, at 68 (1987), *reprinted in* 1 H. COMM. ON THE BUDGET, THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL REAFFIRMATION ACT OF 1987: A LEGISLATIVE HISTORY, 453–54 (1993) ("The conferees intend that the president be allowed to propose one rescission for any given activity.") (conference report discussing amendment to ICA included in the Balanced Budget and Emergency Deficit Control Reaffirmation Act).

[428] 31 U.S.C. § 1102.

[429] *See supra* note 423 and text.

[430] U.S. CONST. art. II, § 2.

[431] Impoundment Control Act—Withholding of Funds through Their Date of Expiration, 2018 U.S. Comp. Gen. LEXIS 395, at *14 (Comp. Gen. Dec. 10, 2018).

[432] *Id*.

[433] *Id*. at *31–32 ("amounts proposed for rescission must be made available for prudent obligation before the amounts expire, even where the 45-day period for congressional consideration in the ICA approaches or spans the date on which the funds would expire"). In so holding, GAO recognized that its prior rulings had "intimated" the contrary conclusion, that the ICA permitted pocket rescissions. *See id.* at *25–30 (explaining that such prior GAO opinions rested on the premise that Congress could reject pocket rescissions via a one-house legislative veto later deemed unconstitutional). For example, in 1975, GAO stated the prospect of pocket rescissions was "a major deficiency" of the ICA. Letter to the Speaker of the House of Representatives and President of the Senate, from Elmer B. Stats, Comptroller General of the United States, B-115398, at *2 (Comp. Gen. Dec. 15, 1975) (noting that certain funding for community development activities that was the subject of a special message under the ICA had lapsed before the end of the 45-legislative-day hold period).

[434] Letter to Thomas Armstrong, General Counsel, Government Accountability Office, from Mark R. Paoletta, General Counsel, Office of Management and Budget, at 1 (Nov. 14, 2018) (noting that the ICA's deferral provision states that a deferral "'may not be proposed for any period of time beyond the end of the fiscal year in which the special message is

because the ICA's text does not expressly prohibit fiscal-year-spanning holds that result from proposed rescissions, the President may "propose and withhold funds at any time in a fiscal year."[435] As with many of the positions staked out by the executive branch regarding its discretion over budget authority, OMB's reading of the statute is, in practice, not applied to its fullest extent. Aware of Congress's distaste for the potential of a pocket rescission, at least some agencies appear reluctant to time a rescission proposal in a way that would permit a pocket rescission.[436]

Aside from the ICA's rescission provisions, through guidance documents, OMB has described another means for the President to request that Congress cancel budget authority. OMB defines a *cancellation proposal* as "a proposal by the President to reduce budgetary resources . . . that is not subject to the requirements" of the ICA.[437] In effect, both a special message describing a proposed rescission and a cancellation proposal make the same request of Congress: that it enact legislation canceling budget authority. A crucial distinction, though, is that while an agency may temporarily withhold from obligation budget authority that is the subject of a special message,[438] budget authority that is the subject of a cancellation proposal only must remain available for obligation.[439] A cancellation proposal is not a statutory tool created by the ICA. Rather, a cancellation proposal is merely a call for legislative action that, when made, has no effect on the availability of budget authority—at least not until Congress enacts a law cancelling the budget authority. When an agency withholds budget authority described in a cancellation proposal from obligation, and the President has not also transmitted a special message to Congress justifying the agency's action as stemming from a proposed rescission or deferral, the agency violates the ICA.[440]

transmitted'" but that the ICA's rescission provision lacks any reference to the timing of proposed rescissions) (quoting 2 U.S.C. § 684(a)).

[435] *Id*. at 4.

[436] *See*, *e.g.*, 3 DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION 2-9, at 020601(C) ("[A] rescission will be proposed prior to the beginning of the fourth fiscal quarter. Only in exceptional cases will rescissions be proposed during the fourth quarter.").

[437] CIRCULAR NO. A-11, *supra* note 290, at § 20.3.

[438] *See* 2 U.S.C. § 683(b).

[439] *See* Status of Funds Proposed for Cancellation in the President's Fiscal Year 2007 Budget, 2006 U.S. Comp. Gen. LEXIS 137, at *9–10 (Comp. Gen. Aug. 4, 2006) ("We caution that should the President choose to propose cancellations through means other than a special message under the ICA, affected agencies should be cognizant of the differences between such proposals and a special message under the ICA, and that they may not withhold budget authority from obligation in response to any proposal other than a special message under the ICA."); *see also* CIRCULAR NO. A-11, *supra* note 290, at § 112.2 (stressing that amounts proposed for cancellation only may not be withheld and are subject to normal apportionment requirements).

[440] *See*, *e.g.*, Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018, B-329092, 2017 U.S. Comp. Gen. LEXIS 360, at *11 (Comp. Gen. Dec. 12, 2017) (finding an ICA violation at the Department of Energy when the agency withheld budget authority described in a cancellation proposal); Impoundments Resulting from the President's Proposed Rescissions of October 28, 2005, B-307122, 2006 U.S. Comp. Gen. LEXIS 45, at *2–4 (Comp. Gen. Mar. 2, 2006) (describing ICA violations at 12 agencies, even though OMB had "specifically instructed [agencies] not to withhold funds in anticipation of an impending rescission" following the President's submission of a cancellation proposal).

Key Takeaways: Rescissions Under the ICA

- The President may propose a rescission by asking Congress to cancel budget authority that is no longer needed.
- The President must report all proposed rescissions to Congress using a special message.
- Budget authority that is proposed for rescission may be withheld from obligation for 45 legislative days after the President submits the proposal to Congress.

Deferrals

Second, the ICA requires the President to report to Congress, again using a special message, whenever the President, the OMB Director, or a department or agency head or employee proposes to defer budget authority.[441] As with a proposed rescission, a deferral special message must justify the deferral.[442] A *deferral* results from executive action or inaction that withholds or delays the obligation or expenditure of budget authority, whether by "establishing reserves or otherwise."[443] The President or others may defer budget authority (1) "to provide for contingencies," (2) "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or (3) "as specifically provided by law."[444] These are the same conditions under which OMB may create a reserve under the Antideficiency Act.[445] Under the ICA, "No officer or employee of the United States may defer any budget authority for any other purpose."[446]

Given the ICA's structure—a list of permissible deferrals, coupled with a catch-all restriction on deferrals for "any other purpose"[447]—the ICA does not authorize the President to defer budget authority for general policy reasons.[448] In fact, in enacting the ICA, Congress also repealed an open-ended provision of the Antideficiency Act that allowed the President to reserve funds based on "other developments subsequent to the date on which [a reserved] appropriation became available."[449] As the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) explained in *New Haven v. United States*, this amendment "sought to remove any colorable statutory basis for

[441] 2 U.S.C. § 684(a).

[442] *Id*. (explaining that a special message must describe the proposed deferral and "the reasons for the proposed deferral, including any legal authority invoked to justify the proposed deferral").

[443] *Id*. § 682(1); *see also* Matter of Impoundment of the Advanced Research Projects Agency-Energy Appropriation, 2017 U.S. Comp. Gen. LEXIS 360, at *9–10 (Comp. Gen. Dec. 12, 2017) (finding an impoundment of budget authority that had been "full apportioned" by OMB); Impoundment Control: Deferrals of Budget Authority in GSA, B-255338.2, at *4 (Comp. Gen. Nov. 5, 1993 (noting that the simply because an agency does not create a reserve does not mean that budget authority is not being deferred) (GSA memorandum directing assistant regional administrators to review new public buildings and, in the meantime, not take specified contracting actions held to be a deferral); Impoundment Control: Comments on Unreported Impoundment of DOD Budget Authority, B-246096.10, at *4 (Comp. Gen. June 3, 1992) (noting that statements of the Secretary of Defense, together with other facts, demonstrated a "clear indication on his part not to execute" the V-22 program).

[444] *Id*. § 684(b).

[445] 31 U.S.C. § 1512(c)(1).

[446] 2 U.S.C. § 684(b).

[447] *Id*.

[448] See Letter to Thomas Armstrong, General Counsel, Government Accountability Office, from Mark R. Paoletta, General Counsel, Office of Management and Budget, at 6 (Dec. 11, 2019) (noting that absent constitutional concerns "under the ICA the President may not defer funds simply because he disagrees with the policy underlying a statute").

[449] *Compare* 31 U.S.C. § 655 (1970) (containing former other-developments reserve authority), *with* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1002, 88 Stat. 297, 332 (1974) (revising 31 U.S.C. § 655 to eliminate other-developments reserve authority).

unchecked policy deferrals."[450] The President must report any reserve of budget authority as a deferral, except for a proposal to reserve one-year funds for the rest of the fiscal year, which, as noted above, the ICA treats alongside proposed rescissions.[451] "Absent the transmittal of a special message, it is improper for an agency to withhold budget authority."[452] As noted above, the President may not propose a deferral for a period extending beyond the end of the current fiscal year.[453]

In applying the ICA to delays in obligating budget authority, it is important to distinguish between a deferral—which is subject to the ICA's reporting requirement—and *programmatic delay*—which, according to GAO, the ICA does not govern.[454] GAO draws this line by examining the "reason for the delay in obligating" budget authority.[455] Generally, if budget authority is not now available for obligation because the agency is getting ready to obligate, the delay is programmatic.[456] The agency intends to carry out Congress's directive to obligate funds, so temporary delay does not raise the same concerns that prompted the ICA's adoption.[457] When an agency justifies delay in making budget authority available by pointing to factors that are not necessary steps in program execution, though, the delay is not programmatic. The delay is a deferral.[458] This assessment necessarily depends on the facts of a given case, but, generally, GAO has found a deferral, and not programmatic delay, when an agency cannot justify delay by pointing to factors outside its control that slow program execution.[459]

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[450] 809 F.2d 900, 909 (D.C. Cir. 1987).

[451] 2 U.S.C. § 684(a).

[452] U.S. Department of Homeland Security—Impoundment Control Act and Appropriations for the Tenth National Security Cutter, B-329739, 2018 U.S. Comp. Gen. LEXIS 414, at *9 (Comp. Gen. Dec. 19, 2018).

[453] 2 U.S.C. § 684(a).

[454] *See* Obligation of Funds Appropriated for "International Organizations and Programs," B-290659, 2002 WL 1799692, at *3 (Comp. Gen. July 24, 2002) ("Our decisions distinguish between programmatic withholdings outside of the reach of the Impoundment Control Act and withholdings of budget authority that qualify as impoundments subject to the Act's requirements.").

[455] Decision of Socolar, B-207374, 1982 U.S. Comp. Gen. LEXIS 1641, at *6 (Comp. Gen. July 20, 1982) (noting that "delay alone" is not proof of a deferral).

[456] *See, e.g.*, Budget Issues: Reprogramming of Federal Air Marshall Service Funds in Fiscal Year 2003, GAO-04-577R, at 8–9 (Comp. Gen. Mar. 31, 2004) (delay caused by conferring with congressional committees on proposed reprogramming of funds found programmatic delay); Funding for Technical Assistance for Conservation Programs Enumerated in Section 2701 of the 2002 Farm Bill, B-291241, 2002 Comp. Gen. LEXIS 274, at *27 (Comp. Gen. Oct. 8, 2002) (interagency deliberations prompted by uncertainty over whether a statutory cap on transfer authority prevented funds from being transferred from one agency to another considered programmatic delay).

[457] *See supra* notes 405–410 and text.

[458] *See* Reducing Redundant IT Infrastructure Related to Homeland Security, B-291063, at *5 (Comp. Gen. Sept. 19, 2002), https://www.gao.gov/assets/370/366818.pdf (explaining that an OMB memo delaying "IT and business management funding" to achieve savings fit the definition of a "reportable, but authorized, deferral under the" ICA).

[459] *See, e.g.*, Matter of Office of Management and Budget Withholding of Ukraine Security Assistance, B-331564, 2020 WL 241373, at *5 (Comp. Gen. Jan. 20, 2020) (concluding OMB's delay in making security assistance funding available was an "impermissible policy deferral" because OMB pointed to its "policy development process" as a reason for the delay which in that case was not an "external factor causing an unavoidable delay"); U.S. Department of Homeland Security—Impoundment Control Act and Appropriations for the Tenth National Security Cutter, 2018 U.S. Comp. Gen. LEXIS 414, at *19 (Comp. Gen. Dec. 19, 2018) ("Under the Constitution, a bill proposing to rescind budget authority may become a law only after both chambers of Congress pass it in identical form for presentment to the President.") (concluding DHS deferred budget authority when it "delayed the obligation of funds while it reviewed the potential consequences of a proposed lump-sum rescission in an unenacted bill"); Impoundment Control: Deferrals of Budget Authority in GSA, B-255338.2, at 4 (Comp. Gen. Nov. 5, 1993), https://www.gao.gov/assets/220/218781.pdf (GSA's order to halt "all contracting activities program-wide while it assesse[d] . . . projects not yet under construction" a deferral and not programmatic delay); Report to President of the Senate and the Speaker of the House,

Key Takeaways: Deferrals Under the ICA

- The President, OMB, or a department or agency head or employee may defer budget authority to provide for contingencies, effect savings, or as specifically provided by law. No officer or employee of the United States may defer budget authority for any other purpose.
- The President must report all deferrals to Congress using a special message.
- The ICA requires reporting of deferrals, but the ICA is understood to not require reporting of programmatic delay, which is delay in making funds available for obligation that results from necessary steps in the process of program implementation.

Congressional Action and GAO Oversight

Once the President transmits a special message to Congress, or once GAO submits a report to Congress on a deferral or reserve that should have been the subject of a special message but was not,[460] the ICA provides that Congress may use an expedited procedure for the consideration of a bill or resolution related to the message.[461] The legislative vehicle that Congress uses to respond under the ICA to the special message differs, depending on whether the special message describes a rescission or a deferral. Under the ICA, Congress may act on a rescission proposed by the President through consideration of a rescission bill, and may review deferrals through consideration of an impoundment resolution. A *rescission bill* is defined in the ICA as "a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message" passed by both houses of Congress "before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress."[462] An *impoundment resolution* is defined as "a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority."[463]

The ICA's two means for Congress to respond to proposed rescissions and deferrals have different legal effects. If enacted into law, a rescission bill, which is passed by both houses of Congress and presented to the President, has the effect of canceling budget authority.[464] By

B-241514.2 (Comp. Gen. Feb. 5, 1991) (concluding that a DOD military construction moratorium imposed during the Gulf War effected a deferral of budget authority); Impoundment Control Act: President's Third Special Impoundment Message for FY1990, B-237297.3, at *5–6 (Comp. Gen. March 6, 1990), https://www.gao.gov/assets/220/212244.pdf (decision to defer certain military spending in the waning days of the Cold War given "promising developments in the Soviet Union and Eastern Europe").

[460] *See* 2 U.S.C. § 686 (noting that when the executive branch fails to identify a reserve or deferral in a special message, GAO's reports about such reserve or deferral "shall be considered a special message").

[461] *See id*. § 688 (specifying committee discharge and expedited floor consideration rules for rescission bills and impoundment resolutions). Congress may also act on its own initiative to rescind budget authority. This has typically been the case in recent years. *See* Updated Rescission Statistics, B-330019, 2018 WL 4679596, at *2 (Comp. Gen. Sept. 27, 2018) (reporting data on proposed and enacted rescissions from 1974 through 2017). When Congress rescinds budget authority on its own initiative, the ICA's expedited procedures do not apply. *See, e.g.*, 2 U.S.C. § 682(3) (defining a "rescission bill" eligible for consideration under the expedited procedure as a bill or joint resolution "which *only* rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President" under the ICA (emphasis added)).

[462] *Id*. § 682(3).

[463] *Id*. § 682(4).

[464] *See* U.S. Department of Homeland Security—Impoundment Control Act and Appropriations for the Tenth National Security Cutter, B-329739, 2018 U.S. Comp. Gen. LEXIS 414, at *9 (Comp. Gen. Dec. 19, 2018) ("Under the Constitution, a bill proposing to rescind budget authority may become a law only after both chambers of Congress pass it in identical form for presentment to the President.").

contrast, the ICA does not require both houses of Congress to pass an impoundment resolution.[465] An impoundment resolution approved by one house of Congress might persuade the President to discontinue the deferral that is the subject of the resolution, but the resolution does not have the force of law needed to compel this result.[466] When Congress enacted the ICA in 1974, Congress attempted to use impoundment resolutions to compel the release of deferred funds. As originally enacted, the ICA provided that deferred budget authority "shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving of such proposed deferral."[467] In 1987, the D.C. Circuit, following the reasoning of the Supreme Court in *INS v. Chadha*, ruled this one-house veto provision unconstitutional.[468] Later that year, Congress removed the provision.[469] In the process, though, Congress did not substitute another legislative process for mandating the release of deferred funds,[470] and Congress has not amended the ICA since.

That is not to say that Congress cannot require deferrals to end, though. For example, Congress could enact legislation disapproving of a deferral, in which case OMB recognizes that the deferral must end.[471] In that instance, though, enactment would require bicameral passage and presentment to the President.[472] Similarly, Congress likely could pass legislation requiring the obligation of budget authority that is being deferred.[473] But such legislation would not be an "impoundment resolution" or a "rescission bill" within the meaning of the ICA, and therefore it would not likely be in order for Congress to consider such stand-alone legislation under the ICA's expedited provisions.[474] That said, an impoundment resolution might have practical effect, if not legal effect, as it might persuade an agency to end a deferral that one house has disapproved.

The ICA supplements Congress's role in monitoring and responding to impoundments by assigning oversight tasks to the Comptroller General. If an agency fails to make impounded

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[465] *See* 2 U.S.C. § 682(4). This definition of *impoundment resolution* is a vestige of the original ICA, which, as discussed below, expressly provided for single-house resolutions that would require release of deferred funds. *See infra* notes 467–470 and text.

[466] *Cf.* I.N.S. v. Chadha, 462 U.S. 919, 954–55 (1983) (explaining that for Congress to take actions that are "legislative in purpose and effect" because the actions alter "legal rights, duties, and relations of persons," including persons within the executive branch, it must comply with the bicameral passage and presentment requirements of Article I, § 7 of the Constitution).

[467] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013(b), 88 Stat. 297, 335 (1974).

[468] *See* City of New Haven v. United States, 809 F.2d 900, 905 (D.C. Cir. 1987) (noting that the federal government defendants "concede[d], as they must, that the [ICA's] legislative veto provision" was unconstitutional under *Chadha*).

[469] *See* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (1987).

[470] That said, Congress amended statute to further limit when an agency could defer funds. *See* CHAFETZ, *supra* note 70, at 65.

[471] *See* CIRCULAR NO. A-11, *supra* note 290, at § 112.16 (recognizing that Congress could "enact[]" legislation to disapprove of a deferral in which case a deferral would need to be released "not later than the day following enactment of the legislation").

[472] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 438 (1998) (explaining that "after a bill has passed both Houses of Congress, but 'before it becomes a Law,' it must be presented to the President" (quoting U.S. Const. art. I, § 7, cl. 2)).

[473] *See supra* note 143 (collecting authority for the proposition that Congress can draft statutes to require executive-branch expenditures).

[474] *See, e.g.*, 2 U.S.C. §§ 681(4) & 688 (providing for expedited consideration of an "impoundment resolution" and defining such a resolution as one that "*only* expresses . . . disapproval of a proposed deferral of budget authority" (emphasis added)).

budget authority available under the ICA, GAO may "bring a civil action in the United States District Court for the District of Columbia."[475] The relief sought in such a lawsuit would be "to require such budget authority to be made available for obligation."[476] The Act empowers the district court to enter "any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation."[477]

For nearly its entire existence, this authority has lain dormant. GAO has apparently sued under this provision only once, in 1975, one year after the ICA's enactment. GAO sued, seeking an injunction requiring President Gerald Ford's Administration to make deferred budget authority available for a low-income home ownership program.[478] The federal government asked the district court to dismiss the lawsuit, arguing that the ICA unconstitutionally conferred an executive function, the prosecution of a lawsuit to enforce the laws of the United States, on an agent of the legislative branch.[479] The district court rejected the federal government's motion to dismiss and granted the Comptroller General's request for a preliminary injunction.[480] Thereafter, the parties stipulated to dismissing the case.[481]

Despite this favorable early ruling, it remains an open question whether, under the ICA, the Comptroller General could obtain the release of impounded funds through litigation. GAO has statutory authority to sue "to require the head of the agency to produce a record" when an agency refuses to "give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency."[482] Using this authority, the Comptroller General sued Vice President Richard Cheney for documents related to the National Energy Policy Development Group, which the Vice President chaired.[483] In 2002, a district court dismissed the suit, holding that the Comptroller General had not suffered, as a result of the Vice President's refusal to produce records, the type of injury required to show constitutional standing.[484] Should GAO bring another lawsuit under its ICA authority, the executive branch would likely rely on similar arguments.

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[475] *Id*. § 687.

[476] *Id*.

[477] *Id*.

[478] Opposition of Plaintiff to Defendants' Motion to Dismiss at 5, Staats v. Lynn, No. 75-0551 (July 28, 1975), *reprinted in GAO Legislation, Part I, Hearing Before the Subcomm. on Reports, Accounting, and Management of the S. Comm. on Gov't Ops.*, 94th Cong. 199 (1975) [hereinafter *1975 GAO Legislation Hearing*].

[479] Points and Authorities in Support of Defendants' Motion to Dismiss at 11–13, Staats v. Lynn, No. 75-0551 (June 16, 1975), *reprinted in 1975 GAO Legislation Hearing*, *supra* note 478, at 178–80.

[480] Specifically, the district court ordered the government to record the deferred budget authority as obligated, so that the budget authority's period of availability would not lapse while the litigation proceeded to judgment. *See* Staats v. Lynn, No. 70-0551 (Aug. 20, 1975) (ordering defendants to "record[] as an obligation of the United States" the budget authority which was the subject of the President's deferral special message). The defendants complied with the Court's order the day after it issued. *See* Staats v. Lynn, No. 70-0551 (Nov. 26, 1975) (stipulation of dismissal).

[481] Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 67 n.39 (1983); *see also* GOV'T ACCOUNTING OFFICE, REVIEW OF THE IMPOUNDMENT CONTROL ACT OF 1974 AFTER 2 YEARS, B-115398, at 218–25 (summarizing the *Staats* litigation).

[482] 31 U.S.C. § 716(a)(2), (b)(2). Congress recently provided GAO additional such authority to oversee administration of budget authority made available to respond to the Coronavirus Disease 2019. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, Div. B, Title IX, § 19010(d) (2020).

[483] Walker v. Cheney, 230 F. Supp. 2d 51, 52–53 (D.D.C. 2002).

[484] *Id*. at 74–75 ("Here, the Comptroller General has suffered no personal injury as a private citizen, and any institutional injury exists only in his capacity as an agent of Congress—an entity that itself has issued no subpoena to obtain the information and given no expression of support for the pursuit of this action.").

Key Takeaways: Oversight Under the ICA

- Congress may act under expedited procedures on a rescission special message using a rescission bill.
- Once enacted, a rescission bill has the force of law, as it must be passed by both chambers and presented to the President before enactment.
- Congress may act under expedited procedures on a deferral special message using an impoundment resolution.
- An impoundment resolution lacks the force of law because it is passed by only one house of Congress.
- GAO reports to Congress when it identifies unreported deferrals and also reviews special messages. GAO has statutory authority to sue an agency to make budget authority available for obligation when the ICA requires the agency to make the funds available.

Appropriation Riders

Beyond these generally applicable fiscal control statutes, Congress exerts control over federal funds through appropriations statutes themselves. When granting budget authority to a particular federal agency, Congress commonly imposes conditions on the availability of budget authority. Also called riders, the conditions function as "a limitation or requirement."[485] These conditions may appear in the text of the appropriation itself, in general provisions applicable to a particular title of an appropriations act, or in general provisions applicable to all titles of an appropriations act. Alternatively, conditions on the use of appropriated funds may also be enacted outside of the appropriations process in the provisions of any other law.[486]

At times, the terms of Congress's appropriation riders spur objections from the executive branch that Congress has exceeded its constitutional authority in passing the rider. The President may communicate such objections in many ways, from correspondence to Congress, to hearing testimony, to presidential signing statements.[487] The executive branch's objections are perhaps most comprehensively set forth in opinions issued by DOJ at the request of the President or other executive branch officials.[488] However communicated, the President may state that, based on such objections, the agency should construe the rider to avoid its allegedly unconstitutional features.[489]

The executive branch's analysis typically distinguishes between two types of funding decisions: (1) Congress's refusal to grant *any* budget authority to carry out a statutory function, and (2) Congress's decision to grant budget authority subject to an appropriations rider. Given

[485] *See* GAO GLOSSARY, *supra* note 19 (defining *appropriation rider* to include "a limitation or requirement in an appropriation act").

[486] *See supra* notes 270–272 & text.

[487] *E.g.*, 1 PUB. PAPERS OF PRESIDENT GEORGE W. BUSH 1153 (2006) (directing the Secretary of State to construe a statutory provision requiring consultation with congressional committees prior to exercising certain statutory authorities as "requir[ing] only notification").

[488] Federal law tasks the Attorney General with providing opinions on questions of law at the request of the President or the head of an executive branch agency or military department. *See* 28 U.S.C. §§ 511–13. While the Attorney General once personally rendered such opinions, the Attorney General has delegated this function to OLC. *See* 28 C.F.R. § 0.25(a).

[489] *See* Constitutionality of Statute Directing Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 643 (1982) ("Broadly worded statutes that could be interpreted in such a way as to create a conflict with the separation of powers have, in the past, been interpreted very narrowly so as not to impinge upon the constitutional prerogatives of the Executive Branch.").

Congress's appropriations power, the executive branch has "recognized that the Congress may grant or withhold appropriations as it chooses."[490] In such a case, the executive branch's only remedy would be a "political" appeal to the electorate to have the funding hold lifted,[491] but meanwhile the executive branch could not administer the defunded program.

The executive branch has historically viewed appropriations riders differently. Unlike with a complete denial of funding for statutory functions, Congress makes budget authority available, but under a rider that dictates how that budget authority may be obligated. The rider requires action, but only action of a certain type. In DOJ's view, the Constitution imposes limits on Congress's ability to dictate how the executive branch obligates budget authority.[492]

The executive branch has phrased its position in varying terms, but the common theme of these different phrasings is that Congress cannot use its appropriations power to frustrate the other branches' performance of their separate constitutional duties. Under one phrasing, Congress cannot indirectly accomplish through its appropriations power what it could not accomplish directly through its other legislative powers.[493] If the Constitution prevents Congress from passing a statute making congressional committees the final arbiters of tax refunds, then Congress cannot make the availability of budget authority for tax refunds turn on committee approval.[494] Under the other phrasing, Congress may not require the President to cede constitutionally vested discretion as a condition of receiving budget authority, and the President may not agree to give up constitutional authorities or duties in exchange for budget authority.[495]

While the executive branch generally recognizes Congress's power to withhold funds needed to implement legislation, the executive branch does not concede to Congress a similar power to withhold funds necessary for the President to carry out power or duties conferred by the Constitution. DOJ has opined that Congress could not "purport[] to deny" the President "the minimum obligational authority sufficient to carry" out a function "authorized by the Constitution."[496]

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[490] Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230, 233 (1955) ("It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted.").

[491] Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller, 41 Op. Att'y Gen. 507, 526 (1960).

[492] *Id*. at 527 (opining that "the power to appropriate . . . cannot be exercised without regard to constitutional limitation" but rather must be exercised in a way that "is consistent with the letter and spirit of the constitution" (internal quotation marks omitted)).

[493] Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469 (1860) ("If Congress had really intended to make [a military officer] independent of [the president], that purpose could not be accomplished in this indirect manner any more than if it was attempted directly.").

[494] *See* Constitutionality of Proposed Legislation Affecting Tax Returns, 37 Op. Att'y Gen. 56, 58–62 (1933) (concluding committee approval rider attached to appropriation for the payment of tax refunds was unconstitutional because it either assigned executive functions to a congressional committee in violation of the separation of powers or permitted the Joint Committee on Taxation to exercise legislative power in violation of the Constitution's lawmaking provisions).

[495] The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the Nat'l Sec. Act, 10 Op. O.L.C. 159, 170 (1986) ("Just as an individual cannot be required to waive his constitutional rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his office as a condition of receiving the funds necessary to carry out the duties of his office.").

[496] Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1, 5–6 (1981) (emphasis added).

When DOJ identifies an unconstitutional condition attached to budget authority, it will advise agencies how to treat the rider. The executive branch may determine that the rider is invalid but not the appropriation to which the rider is attached. The executive branch usually will make this determination after engaging in a severability analysis.[497] A severability analysis examines whether the valid provisions of a partially invalid statute can stand without the invalid provisions, on the ground that Congress would "have preferred what is left of its statute to no statute at all."[498] If DOJ finds a rider severable, it might instruct the agency to obligate the appropriation without regard to the rider.[499] Along similar lines, the executive branch may adopt an interpretation of the rider that gives some effect to the rider but which does not require the agency to administer its programs in a manner that allegedly conflicts with the Constitution.[500] Such an interpretation may diverge from the rider's plain-text meaning,[501] but DOJ has stated that it will interpret an appropriations rider to avoid having to determine, under a different reading, that the rider is unconstitutional.[502]

The executive branch's objections tend to cluster in certain subject areas.[503] Objections are perhaps most likely when Congress imposes conditions affecting the President's foreign affairs powers.[504] For example, in 1990 DOJ stated that because the President's foreign affairs powers allowed the President to determine who would represent the United States in international negotiations, the President could disregard a proposed rider requiring him to include representatives of "an entity controlled by" Congress in a delegation to the Conference on Security and Cooperation in Europe.[505] In 1996, DOJ stated that it would be unconstitutional for Congress to condition the availability of appropriations on the United States opening an embassy in Jerusalem, reasoning that the condition would "severely impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations."[506] DOJ may

[497] *See, e.g.*, Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations, 20 Op. O.L.C. 232, 236–39 (1996) (performing severability analysis); Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 45–46 (1990) (same).

[498] Ayotte v. Planned Parenthood, 546 U.S. 320, 323 (2006).

[499] *See* Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469 (1860) ("Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop.").

[500] *See* Constitutionality of Statute Directing Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 643 (1982) (rider requiring the Federal Aviation Administration, an administration within the Department of Transportation, to submit "any" budget estimates or comments on legislation directly to Congress).

[501] *Id.* (interpreting rider as requiring submission to Congress of only "final" estimates and comments that had undergone "appropriate review" by "appropriate senior officials" within the executive branch).

[502] *See id*. at 642–43 ("Broadly worded statutes that could be interpreted in such a way as to create a conflict with the separation of powers have, in the past, been interpreted very narrowly so as not to impinge upon the constitutional prerogatives of the Executive Branch.").

[503] Of course, as administrations change, DOJ may object (or not object) to an appropriation rider in a manner that arguably diverges from a prior DOJ opinion objecting to a similar appropriation rider.

[504] *See, e.g.*, Unconstitutional Restrictions on Activities of the Office of Sci. & Tech. Policy in Section 1340(a) of the Dep't of Def. & Full-Year Continuing Appropriations Act, 2011, 2011 WL 4503236, at *1 (O.L.C. Sept. 19, 2011) (rider preventing use of appropriations to "coordinate bilaterally in any way" with the People's Republic of China or its state-owned companies); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 2009 WL 2810454, at *9 (O.L.C. June 1, 2009) (rider preventing use of appropriations to pay the expenses of U.S. delegations to a United Nations entity presided over by a state found to "support[] international terrorism" (internal quotation marks omitted)).

[505] *See* Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 38 (1990).

[506] Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. O.L.C. 123, 125–26 (1995); *see also* Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 19, 27–29

also advise agencies to disregard conditions on appropriations that affect the President's constitutional power as commander-in-chief of the Armed Forces.[507] In fact, the executive branch first stated that it could disregard allegedly unconstitutional appropriation riders in 1860, when Congress appeared to legislate in the area of particular command relations.[508]

DOJ has also objected to riders that, if honored, would give Congress a role in executing a law that it has passed. Several times DOJ has advised agencies that they may disregard appropriation riders that purport to make budget authority available for obligation only if a congressional committee approves the proposed use.[509] DOJ has resisted riders that would give effect to one-house veto legislation by (for example) preventing the obligation of budget authority to implement rules that were the subject of a resolution of disapproval passed by one house of Congress.[510] Riders also at times require an agency provide certain information or documents to Congress.[511] The executive branch may view such requirements as intruding on executive privilege[512] or as interfering with the President's view of his authority to control communications between Congress and executive branch agencies.[513]

In stating these objections, the executive branch offers only an opinion on questions of law. If confronted with a case testing the validity of a rider to which the executive branch has objected, a federal court would generally give the executive branch's opinion "only as much weight as the

(1992) (concluding that Congress exceeded its authority when it made appropriations available only if the Department of State stopped issuing more than one diplomatic passport to U.S. government personnel to "to acquiesce in or comply with the policy" of a foreign government to deny entrance to individuals whose passports reflected "that the person has visited Israel").

[507] *See*, *e.g.*, Constitutional Issues Raised by Commerce, Justice, and State Appropriation Bill, 25 Op. O.L.C. 279, 282–83 (2001) (finding that a rider could not constitutionally prevent the President from obligating appropriations to support a United Nations peacekeeping mission in which U.S. Armed Forces were under the command or operational control of a foreign national).

[508] *See* Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468–69 (1860) (examining claim of a military officer that an appropriations rider specified that he would be in charge of a particular public works project); *see also* Price, *supra* note 10, at 373 & n.54 (noting that "presidents have claimed authority since at least 1860 to disregard some funding constraints on their executive authorities" and citing Captain Meigs' Memorial).

[509] *See* Authority of Congressional Committees to Disapprove of Action of Executive Branch, 41 Op. Att'y Gen. 230, 230, 233–34 (1955) (opining that a rider requiring appropriation committee approval before appropriated funds could be obligated for transfer of work performed "for a period of three years or more" by civilian DOD employees violated the separation of powers); Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations, 20 Op. O.L.C. 232, 232–33 (1995) (stating that rider purporting to make the validity of revised regulations dependent on committee approval of such regulations was unconstitutional).

[510] *See* Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731, 734 (1980) (authorizing agencies to "implement regulations that have purportedly been vetoed by congressional action that does not meet the Constitution's requisites for legislation").

[511] *See*, *e.g.*, Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, Div. B, § 112, 133 Stat. 2317, 2395–96 (2019) (requiring the Secretary of Commerce to publish in the Federal Register a report made by the Secretary to the President concerning the national security impacts of automobile imports and to provide to Congress any confidential portions of the report that are not published in the Federal Register).

[512] *See* Publ'n of a Report to the President on the Effect of Auto. & Auto.-Part Imports on the Nat'l Sec., 2020 WL 502937, at *5–8 (O.L.C. Jan. 17, 2020) (asserting that the FY2020 automobile-imports-report rider improperly applied to materials legally privileged from disclosure); Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller, 41 Op. Att'y Gen. 507, 525–26 (1960) (arguing that GAO's view that a rider cut off State Department funds if the agency did not provide Congress documents withheld from production under the president's assertion of executive privilege would render the rider unconstitutional).

[513] Constitutionality of Statute Directing Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 639 (1982) (asserting that FAA submission of information directly to Congress could be read to "interfere greatly with the President's right to supervise the [FAA's] action").

force of [its] reasoning will support."[514] Courts are free to reject the executive branch's reasoning.[515] But executive branch objections can have significant practical effect. DOJ describes its legal opinions as containing "authoritative interpretations of law for the Executive Branch."[516] Agencies tasked with obligating the relevant appropriation will likely follow DOJ's opinions,[517] though on occasion agencies have followed appropriation riders "as written" even after the President objected to those provisions.[518] It may also be difficult to find a plaintiff with standing and incentive to sue to challenge the agency's disregard of the rider. In the event that the executive branch directs agencies to either disregard, or narrow the scope of, an appropriation rider, Congress may respond through legislation and oversight, to name a few available tools.[519]

Key Takeaways: Appropriation Riders

- The executive branch scrutinizes appropriation riders to identify constitutional concerns and may instruct agencies to either ignore or narrowly construe riders that the executive branch finds are constitutionally invalid.
- The executive branch contends that Congress may not use a rider to interfere with another branch's exercise of its separate constitutional authorities or require a coequal branch to limit use of their constitutionally vested powers in exchange for budget authority.
- Common areas of executive branch objection include riders involving foreign affairs, use of the Armed Forces, requirements to obtain committee approval for particular obligations or other agency action, and disclosure of information to Congress.

Considerations for Congress

The fiscal control statutes described above erect background legal rules governing the handling, obligation, or expenditure of public funds. Each of these background rules reflects a particular policy determination made by Congress. The MRA prohibits agencies from retaining public money the agencies receive, which ensures that agencies depend on appropriated sources of funding. The Purpose Statute allows an appropriation to be obligated only for those objects expressly or impliedly covered by the appropriation, limiting use of the appropriation to the reason Congress provided the funds. Transfer and reprogramming provisions limit an agency's ability to shift funds between accounts or among certain subdivisions within an account, preserving Congress's determinations or expectations regarding the amount of activity that an

[514] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 104 (D.D.C. 2008).

[515] *See* Lewis Pub. Co. v. Morgan, 229 U.S. 288, 311 (1913) (adopting a narrower construction of a statute than the Attorney General).

[516] Whether Appropriations May Be Used for Informational Videos News Releases, 29 Op. O.L.C. 74, 74 (2005).

[517] *See, e.g.*, *The May 31, 2014 Transfer of Five Senior Taliban Detainees: Hearing Before the H. Comm. on Armed Services*, 113 Cong. 27 (2014) (testimony of Chuck Hagel, Sec'y of Defense) (confirming that the President directed DOD to transfer detainees held at Naval Station Guantanamo Bay without notice to Congress, even though an appropriation rider required 30 days' notice of such transfer, because OLC advised the President that he had constitutional authority to effect the transfer without notice).

[518] *See, e.g.*, Presidential Signing Statements Accompanying Fiscal Year 2006 Appropriations Acts, B–308603, 2007 WL 1746393, at *5 (Comp. Gen. June 18, 2007) (noting that, after reviewing how agencies executed, if at all, 19 provisions in an appropriations act as to which the President "raised some concern or objection," agencies executed 10 provisions "as written").

[519] For a discussion of the tools available to Congress, see CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

agency may or would undertake in a given area. The Antideficiency Act prevents obligations beyond available appropriations. The ICA limits the executive branch's ability to withhold budget authority from obligation or expenditure, so that the President cannot frustrate Congress's purpose in providing that budget authority. Congress has also established means for enforcing these legal rules. Federal officers and employees face discipline or penalties for violating the MRA or the Antideficiency Act. Reprogramming provisions ensure congressional awareness of new allocations of agency funds. And the ICA provides a role for Congress and its agent, GAO, to monitor agency impoundment of funds.

Sometimes, though, Congress may decide that these background legal rules strike the wrong balance. Congress may see value in insulating an agency, in whole or in part, from the annual appropriation process.[520] Or Congress may wish to grant the President, OMB, or agencies greater flexibility to respond to changing circumstances by obligating appropriations for broader purposes. Congress may even decide that there is value in having agencies tasked with implementing a program decide whether, for policy reasons, budget authority should be withheld from obligation. If Congress reaches any of these judgments, though, Congress must ensure that its intent translates into law by crafting legislation that provides any needed exceptions from the background legal rules created by the fiscal control statutes.

[520] For example, to varying degrees statute insulates certain financial regulatory agencies from the periodic reauthorization and annual appropriations. *See* CRS Report R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues*, by Henry B. Hogue, Marc Labonte, and Baird Webel, at 3 & 27 tbl. 5 (discussing the concepts of accountability and independence in the context of independent agencies and identifying the funding characteristics of financial regulatory agencies).

Appendix. Glossary

Apportionment	The process of distributing an appropriation available for a definite period to particular time periods or functions. Appropriations provided for an indefinite period and authority to incur obligations by contract in advance of appropriations are apportioned to achieve their most effective and economical use.
Appropriation	Authority provided by statute for an agency to obligate and expend money from the Treasury for a specified purpose.
Appropriation Rider	As used in this report, a limitation or requirement in an annual, supplemental, or continuing appropriations act.
Authorization	Authority provided by statute for an agency to perform functions, administer programs, or receive appropriation. An authorizing statute might provide budget authority, such as by establishing an entitlement or providing borrowing authority.
Budget Authority	Authority provided by statute to enter into financial obligations on behalf of the United States that will result in the immediate or future outlays of federal funds.
Deferral	The act of withholding or delaying the obligation or expenditure of budget authority (through creation of reserves or otherwise) or any other action or inaction that effectively precludes the obligation of budget authority.
Expenditure	The act of spending money, including to pay an obligation.
General Provision	The numbered provisions of an appropriations act that, among other things, may set the conditions under which budget authority may be obligated or expended.
Impoundment	Action or inaction by an officer or employee of the federal government that precludes the obligation or expenditure of budget authority.
Impoundment Resolution	Under the ICA, a nonbinding resolution passed by only one chamber of Congress disapproving of a deferral.
Obligation	A definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability based only on the actions of a third party.
Pocket Rescission	The act of proposing a rescission of budget authority under the ICA at a time when the resulting 45-legislative-day hold period would last for the remainder of the budget authority's period of availability. GAO contends that the ICA prohibits pocket rescissions, while the executive branch argues the ICA does not.
Program, Project, or Activity	An element within a budget account. For annually appropriated accounts, these elements may be identified in Appropriations Committee reports and budget justifications. For permanent appropriations, OMB identifies these elements in certain schedules included in the President's budget submission. These elements are intended to provide more detail concerning the operations funded by a given account.
Programmatic Delay	Delay in making budget authority available for obligation that results from an agency taking steps necessary to implement a program. Programmatic delay need not be reported under the ICA.

Report-and-Approve Provision	Provision in an appropriations act that requires an agency to report a proposed use of budget authority to some component of Congress, typically specified committees, and then receive approval for the use from that component before budget authority is available for obligation or expenditure. Provisions of this type are of questionable constitutional validity, given Supreme Court decisions specifying the steps that, under the Constitution, Congress must take to engage in "legislative" action.
Report-and-Wait Provisions	Provision in an appropriations act that requires an agency to report a proposed use of budget authority to some component of Congress, typically specified committees, and then wait a stated time period after submitting notice before obligating or expending budget authority.
Reprogramming	Shifting funds within an appropriation account to obligate funds in a manner different than that contemplated at the time of the appropriation's enactment.
Rescission Proposal	A proposal, pursuant to the ICA, that Congress cancel budget authority previously provided. May also refer to cancelled budget authority.
Rescission Bill	A bill eligible for expedited consideration under the ICA that when enacted into law cancels budget authority previously provided.
Reserve	Withholding appropriations from apportionment to effect savings, provide for contingencies, or as specifically provided by law.
Special Message	Message submitted to Congress by the President under the ICA, proposing a rescission or a deferral.
Transfer	The act of shifting funds between appropriation accounts.
Transfer Authority	Authority provided by statute to debit one appropriation account to the credit of another.

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