United States Government Accountability Office

Office of the General Counsel

PRINCIPLES OF FEDERAL APPROPRIATIONS LAW

Chapter 1 Introduction

Fourth Edition 2016 Revision

This document, in conjunction with GAO, *Principles of Federal Appropriations Law*, 4th ed., 2016 rev., ch. 2, GAO-16-464SP (Washington, D.C.: Mar. 2016), supersedes chapters 1, 2, and 3 of GAO, *Principles of Federal Appropriations Law*, 3rd ed., GAO-04-261SP (Washington, D.C.: Jan. 2004). Chapters 4 through 15 of the third edition of *Principles of Federal Appropriations Law,* in conjunction with GAO, *Principles of Federal Appropriations Law: Annual Update to the Third Edition*, GAO-15-303SP (Washington, D.C.: Mar. 2015), remain the most currently available material on the topics discussed therein. Both *Principles* and the *Annual Update to the Third Edition* are available at www.gao.gov/legal/redbook/redbook.html.

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Preface

We are pleased to present the first two chapters of the fourth edition of *Principles of Federal Appropriations Law*, commonly known as the "Red Book." Our objective in this publication is to present a basic reference work covering the legal issues that arise as the Comptroller General carries out his statutory duties to issue decisions and opinions concerning the use and obligation of appropriated funds.

Our approach in *Principles* is to lay a foundation with text discussion, using specific legal authorities to illustrate the principles discussed, their application, and exceptions. These authorities include GAO decisions and opinions, judicial decisions, statutory provisions, and other relevant sources. We encourage users to begin with Chapter 1, which provides a general framework and context for all that follows. Chapter 1 includes a section regarding citations to GAO case law and other relevant GAO material and an explanation of those other materials.

We have tried to be simultaneously basic and detailed—basic so that the publication will be useful as a "teaching manual" and guide for the novice or occasional user (lawyer and nonlawyer alike) and detailed so that it will assist those requiring a more in-depth understanding. The purpose of *Principles* is to describe existing authorities; it should not be regarded as an independent source of legal authority. The material in this publication is, of course, subject to changes in statute or federal and Comptroller General case law. Also, it is manifestly impossible to cover in this publication every aspect and nuance of federal appropriations law. We have not attempted to include all relevant decisions, and we admit (albeit grudgingly) that errors and omissions probably are inevitable. *Principles* should therefore be used as a general guide and starting point, not as a substitute for original legal research.

It is also important to emphasize that we have focused our attention on issues and principles of government-wide application. In various instances, agency-specific legislation may provide authority or restrictions somewhat different from the general rule. While we have noted many of these instances for purposes of illustration, a comprehensive cataloguing of such legislation is beyond the scope of this publication. Thus, failure to note agency-specific exceptions in a given context does not mean that they do not exist.

Unlike the previous three editions of *Principles*, we will publish each chapter of the fourth edition upon completion, but we will not assemble the chapters into volumes. In addition, we will revise fourth edition chapters annually to incorporate new Comptroller General case law as well as discussions of particularly prominent decisions from the courts. These changes will allow us to maintain the currency of the material in *Principles* without the publication of a separate annual update. New fourth edition chapters will supersede the corresponding chapters in the third edition. Third edition chapters that have not been superseded remain the most current work on their respective subjects, when used in conjunction with the 2015 annual update. We will no longer publish annual updates for any of the chapters of the third edition.

Chapters 1 and 2 of the fourth edition now include most of the material from chapter 3 of the third edition. Since chapter 3 of the third edition was consolidated into chapters 1 and 2 of the fourth edition, chapter 3 of the fourth edition, when issued, will be titled *Availability of Appropriations: Purpose* and will correspond to chapter 4 of the third edition. Occasionally, text in the fourth edition includes cross references to chapters that we have not yet updated for the fourth edition. For the time being, these cross references continue to refer to the third edition chapters and to the chapter numbers as they appeared in the third edition. As we update subsequent chapters for the fourth edition, we will also update corresponding cross references in earlier fourth edition chapters.

In a bow to the times and the electronic world, the fourth edition will be published exclusively in electronic form, but readers may easily print each chapter if desired. All new chapters of the *Principles*, along with additional information regarding changes in our publication process for the fourth edition are available on our website. Please visit www.gao.gov/legal/ for a link to our Red Book webpage.

The response to *Principles* has been both gratifying and encouraging since the first edition was published in 1982. We express our appreciation to the many persons in all branches of the federal government, as well as nonfederal readers, who have offered comments and suggestions. Our goal now, as it was in 1982, is to present a document that will serve as a helpful reference for a wide range of users.

To that end, we again invite comments and suggestions for improvement. We thank our readers for their support and hope that this publication continues to serve their needs.

Susan A. Poling
General Counsel

March 2016

Chapter 1: Introduction

A. Congress and the Constitutional Power of the Purse

> "Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions."

The Federalist No. 30 (Alexander Hamilton).

A necessary corollary of Hamilton's thesis is that the body that controls the government's money also wields great power to shape and control the government itself by determining, for example, the purpose for which government may use money or the amounts that are available for its endeavors.

Through the Constitution, the framers provided that the legislative branch—the Congress—has power to control the government's purse strings.[1] As James Madison explained, the framers vested Congress with the power of the purse for two primary reasons. *The Federalist No.* 58 (James Madison). First, this arrangement ensured that the government remained directly accountable to the will of the people: "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." *Id*. Second, Congress through its power of the purse holds a key check on the power of the other branches, allowing it to reduce "all the overgrown prerogatives of the other branches of government." *Id*. Indeed, a later

[1] Many articles describe and analyze substantive aspects of the congressional power of the purse. *See, e.g.,* Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 84–85 (2006); Sen. Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act,* 35 Harv. J. on Legis. 297 (1998); Col. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse,* 155 Mil. L. Rev. 1 (1998); 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 (1996); Kate Stith, *Congress' Power of the Purse,* 97 Yale L.J. 1343 (1988).

observer described the power of the purse as "the most important single curb in the Constitution on Presidential power."[2]

The framers vested Congress with the power of the purse by providing in the Constitution that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[3] U.S. Const., art. I, § 9, cl. 7. Time and again, the Supreme Court has reaffirmed that this clause means exactly what its straightforward language suggests: "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[4] *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). This principle, when stated differently, reveals a tenet that is of critical importance to every agency, every officer, every employee of the federal government:

> "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."

[2] Edward S. Corwin, *The Constitution and What It Means Today,* 134 (14th ed. 1978) ("[A] President cannot do very much without funds."). One case illustrates this principle well. Retired military personnel sued the government for breach of an implied-in-fact contract, claiming that recruiters had promised free lifetime medical care for them and their dependents in exchange for 20 years of service. *Schism v. United States,* 316 F.3d 1259, 1288 (Fed. Cir. 2002), *cert. denied,* 539 U.S. 910, 123 S. Ct. 2246 (2003). The court rejected those claims, observing:

"As Commander-in-Chief, the President does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding. Under Article I, § 8, only Congress has the power of the purse. To say that the Executive Branch could promise future funds for activities that Congress itself had not authorized . . . would allow the Executive Branch to commandeer the power of the Legislative Branch."

[3] Other provisions in the Constitution also reflect the framers' determination to vest Congress with the power of the purse: Congress may, for example, lay and collect taxes and pay debts (art. I, § 8, cl. 1); borrow money (art. I, § 8, cl. 2); and coin money and regulate its value (art. I, § 8, cl. 5).

[4] *See also Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not . . . previously sanctioned [by a congressional appropriation]."); *Office of Personnel Management v. Richmond*, 496 U.S. 414, 425 (1990) (any exercise of power by a government agency "is limited by a valid reservation of congressional control over funds in the Treasury"); B-300192, Nov. 13, 2002 ("[T]he Constitution grants to the Congress the power to appropriate the resources of the government.").

United States v. MacCollom, 426 U.S. 317, 321 (1976). This quintessential axiom animates the entire body of appropriations law. As James Madison and subsequent constitutional scholars have recognized, the congressional power of the purse is a key element of the constitutional framework of checks and balances. Accordingly, Congress's power of the purse does not manifest as a reservation of congressional authority to *dis*approve of federal expenditures. Rather, the Constitution vests in Congress the power and duty to affirmatively *authorize* all expenditures. Regardless of the nature of the payment—a salary, a payment promised under a contract, a payment ordered by a court—a federal agency may not make such a payment and, indeed, may not even incur a liability for such a payment, unless Congress has made funding authority available.[5] Indeed, a federal agency is a creature of law and can only carry out any of its functions to the extent authorized by law. *See, e.g.*, *Atlantic City Electric Co. v. Federal Energy Regulatory Commission*, 295 F.3d 1, 8 (D.C. Cir. 2002). *See also* B-323449, Aug. 14, 2012; B-288266, Jan. 27, 2003. Therefore, agencies must operate not only in accordance with the funding levels Congress has permitted, but also in accordance with their authorizing statutes.

The axiom that obligations and expenditures are permitted only in accordance with an appropriation made by law is not limited to funds drawn from the so-called "general fund" of the Treasury, which is where the government deposits the bulk of its tax receipts. Instead, any government obligation or expenditure whatsoever—whether it is derived from the general fund, from fees arising from the government's business-like activities, or from any other source—may be made only as authorized by an appropriation.[6] Some government activities are financed by permanent appropriations, and some of these derive their funds from fees rather than taxes. Congress need not appropriate funds for these activities on an annual basis to ensure their continued operation.

[5] Of course, Congress's power of the purse is not without limitation. Congress must stay within constitutional limits when determining the terms and conditions under which an appropriation may be used. For instance, the Supreme Court has overturned various funding conditions that violate the First Amendment. We discuss limitations on Congress's spending power in chapter 2.

[6] There are extraordinary exceptions to this rule, which generally are stated explicitly in law. For example, the Office of the Comptroller of the Currency imposes and collects particular fees from some financial institutions. By law these amounts are not considered appropriated funds. B-324857, Aug. 6, 2015. We discuss this issue further in the "What Constitutes an Appropriation" subsection in Chapter 2, *The Legal Framework*.

Nevertheless, such activities are financed using appropriated funds, and absent any statute stating otherwise, such activities are subject to the limitations imposed by law upon the use of all appropriated amounts.[7] Whenever "the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation." B-193573, Dec. 19, 1979.

The Constitution does not detail how Congress is to implement its constitutional power of the purse, but provides Congress with the power to enact statutes to protect and exercise this power. U.S. Const., art. I, § 9, cl. 7 (Congress may make all laws "necessary and proper" for carrying into effect Congress's legislative powers). Congress has done this through, among other ways, the annual budget and appropriations process and through a series of permanent statutes that establish controls on the use of appropriated funds. As one court has put it:

> "[The Appropriations Clause] is not self-defining and Congress has plenary power to give meaning to the provision. The Congressionally chosen method of implementing the requirements of Article I, section 9, clause 7 is to be found in various statutory provisions."

Harrington v. Bush, 553 F.2d 190, 194–95 (D.C. Cir. 1977) (footnote omitted). *E.g., Walker v. Department of Housing & Urban Development,* 912 F.2d 819, 829 (5th Cir. 1990). There were few statutory funding controls in the early years of the nation and abuses were commonplace. As early as 1809, one senator, citing a string of abuses, introduced a resolution to look into ways to prevent the improper expenditure of public funds.[8] In 1816 and 1817, John C. Calhoun lamented the "great evil" of diverting public funds to uses other than those for which they were appropriated.[9] Executive abuses continued into the post-Civil War years. "Funds were commingled. Obligations were made without appropriations. Unexpended balances from prior years were used to augment current appropriations."[10]

[7] We discuss this issue further in Chapter 2, *The Legal Framework*.

[8] 19 Annals of Cong. 347 (1809) (remarks of Senator Hillhouse).

[9] Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis,* 80 Mil. L. Rev. 51, 57 n.7 (1978).

[10] *Id.* at 57.

The permanent fiscal statutes, found mostly in title 31 of the United States Code, implement Congress's power of the purse and are designed to combat these and other abuses. These statutes form the legal framework for appropriations law. They did not spring up overnight, but have evolved over the span of more than two centuries. Nevertheless, when viewed as a whole, they form a logical framework that governs the collection and use of public money. We may regard them as pieces of a puzzle that fit together to form the larger picture of how Congress exercises its power of the purse. As Hamilton explained, nearly any action government takes requires money; therefore, the statutes governing the use of public money ultimately affect every government activity, whether monumental or minute. Some of the key statutes in this scheme, each of which is discussed elsewhere in this publication, are:

- A statute will not be construed as making an appropriation unless it expressly so states. 31 U.S.C. § 1301(d). We discuss this provision in Chapter 2, *The Legal Framework*.
- Appropriations may be used only for their intended purposes. 31 U.S.C. § 1301(a). This is known as the purpose statute and we discuss it in Chapter 4, *Availability of Appropriations: Purpose*.
- Appropriations made for a definite period of time may be used only for expenses properly incurred during that time. 31 U.S.C. § 1502(a). This is known as the *bona fide* needs statute and we discuss it in Chapter 5, *Availability of Appropriations: Time*.
- Time-limited appropriations that are unobligated at the end of their period of availability are said to "expire" and are no longer available for new obligations. 31 U.S.C. § 1552. This statute is known as the account closing law and it specifies the limited uses for which expired funds remain available. We discuss this in Chapter 5, *Availability of Appropriations: Time*.
- Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341. This is known as the Antideficiency Act and we discuss it in Chapter 6, *Availability of Appropriations: Amount*.
- Unless authorized by law, an agency may not keep money it receives from sources other than appropriations, but must deposit the money in the Treasury. 31 U.S.C. § 3302(b). This is known as the miscellaneous receipts statute and we discuss it in Chapter 6, *Availability of Appropriations: Amount.*
- All obligations that an agency incurs must be supported by documentary evidence and must be properly recorded. 31 U.S.C.

§ 1501. This is known as the recording statute and we discuss it in Chapter 7, *Obligation of Appropriations*.

This publication discusses the body of decisions and opinions, especially from the courts and GAO, that interpret and apply these statutes. Collectively, the clauses of the Constitution pertaining to Congress's power of the purse, the statutes protecting and exercising this power, and the decisions interpreting this power constitute the body of what is known as appropriations law. This body of law gives flesh and force to one of the key pillars of democracy that the framers incorporated in the Constitution. Appropriations law is not only about ensuring that federal agencies follow a set of rules that Congress has enacted. These laws also help ensure that government carries out the will of, and remains accountable to, the American people.[11]

B. The Role of GAO and its Predecessors

In furtherance of its constitutional responsibilities to control and oversee the use of public money, Congress has vested GAO with several statutory functions. Because some of these functions were carried out by other government officers before Congress created GAO in 1921, a brief discussion of these predecessors to GAO will help illuminate the contours of GAO's responsibilities.

1. Accounting Officers Prior to 1921

Since the early days of the republic, Congress, in exercising its oversight of the public purse, has utilized administrative officials for the settlement of public accounts and the review of federal expenditures.

[11] The second part of article I, section 9, clause 7 of the Constitution underscores accountability. It requires that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Implementation of this provision, as a logical corollary of the appropriation power, is also wholly within the congressional province. *Washington Post Co. v. United States Department of State*, 685 F.2d 698, 700 (D.C. Cir. 1982) ("the plenary authority of Congress in this area will be respected"), *vacated as moot*, 464 U.S. 979 (1983); *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) ("it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest"); *Harrington v. Bush*, 553 F.2d at 195; *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd*, *Hart v. United States*, 118 U.S. 62 (1886) ("[a]uditing and accounting are but parts of a scheme for payment"). *See also* B-300192, n.10, Nov. 13, 2002.

a. Prior to 1894

Throughout most of the nineteenth century, the accounting officers[12] consisted of a series of comptrollers and auditors. Starting in 1817 with two comptrollers and four auditors, the number increased until, for the second half of the century, there were three co-equal comptrollers (First Comptroller, Second Comptroller, Commissioner of Customs) and six auditors (First Auditor, Second Auditor, *etc.*), all officials of the Treasury Department. The jurisdiction of the comptrollers and auditors was divided generally along departmental lines, with the auditors examining accounts and submitting their settlements to the appropriate comptroller.

The practice of rendering written decisions goes back at least to 1817. However, very little of this material exists in published form. (Until sometime after the Civil War, the decisions were handwritten.)

There are no published decisions of the First Comptroller prior to the term of William Lawrence (1880–85). Lawrence published his decisions in a series of six annual volumes. After Lawrence's decisions, a gap of 9 years followed until First Comptroller Robert Bowler published a single unnumbered volume of his 1893–94 decisions.[13]

The decisions of the Second Comptroller and the Commissioner of Customs were never published. However, volumes of digests of decisions of the Second Comptroller were published starting in 1852. The first volume, unnumbered, saw three cumulative editions, the latest issued in 1869 and including digests for the period 1817–69. Three additional volumes (designated volumes 2, 3, and 4) were published in 1884, 1893, and 1899 (the latter being published several years after the

[12] Early decisions often referred to the "accounting officers of the government." While this phrase has fallen into disuse, its purpose was to distinguish those matters within the jurisdiction of the Comptroller General and his predecessors from those matters within the jurisdiction of the "law officers of the government"—the Attorney General and the Department of Justice.

[13] Citations to these are rarely encountered, and we have observed no consistent citation format, except that the First Comptroller's name is always included to prevent confusion with the later Comptroller of the Treasury series. Example: 5 Lawrence, First Comp. Dec. 408 (1884).

office had ceased to exist), covering respectively, the periods 1869–84, 1884–93, and 1893–94.[14]

Thus, material available in permanent form from this period consists of Lawrence's six volumes, Bowler's single volume, and four volumes of Second Comptroller digests.

b. 1894–1921: Comptroller of the Treasury

In 1894, Congress enacted the so-called Dockery Act, actually a part of the general appropriation act for 1895 (ch. 174, 28 Stat. 162, 205 (July 31, 1894)), which consolidated the functions of the First and Second Comptrollers and the Commissioner of Customs into the newly created Comptroller of the Treasury. (The title was a reversion to one that had been used before 1817.) The six auditors remained, with different titles, but their settlements no longer had to be automatically submitted to the Comptroller.

The Dockery Act included a provision requiring the Comptroller of the Treasury to render decisions upon the request of an agency head or a disbursing officer. (Certifying officers did not exist back then.) Although this was to a large extent a codification of existing practice, it gave increased significance to the availability of the decisions. Accordingly, the first Comptroller of the Treasury (Robert Bowler, who had been First Comptroller when the Dockery Act passed) initiated the practice of publishing an annual volume of decisions "of such general character as will furnish precedents for the settlements of future accounts." 1 Comp. Dec. iv (1896) (Preface).

The *Decisions of the Comptroller of the Treasury* series consists of 27 volumes covering the period 1894–1921.[15] Comptroller of the Treasury decisions not included in the annual volumes exist in bound "manuscript volumes," which are now in the custody of the National Archives, and are, thus, unavailable as a practical matter.

[14] Digests are numbered consecutively within each volume. Citations should specify the digest number rather than the page number since several digests appear on each page. Example: 4 Dig. Second Comp. Dec. ¶ 35 (1893). Without the text of the decisions themselves, the digests are primarily of historical interest.

[15] These are cited by volume and page number, respectively, and the year of the decision, using the abbreviation "Comp. Dec." Example: 19 Comp. Dec. 582 (1913). There is also a hefty (2,497 pages) volume, published in 1920, of digests of decisions appearing in volumes 1–26.

2. GAO's Authority to Settle Accounts and Issue Decisions

When the Budget and Accounting Act, 1921, created the General Accounting Office, the offices of the Comptroller of the Treasury and the six Auditors were abolished and their functions transferred to the Comptroller General. Among these functions was the issuance of legal decisions to agency officials concerning the availability and use of appropriated funds. Thus, the decisions GAO issues today reflect the continuing evolution of a body of administrative law on federal fiscal matters dating back to the Nation's infancy.

Under the Budget and Accounting Act, the Comptroller General "shall settle all accounts of the United States Government." 31 U.S.C. § 3526(a). Often the term "settle" means "compromise," particularly when used in a litigious context. Here, however, "settle" means an administrative determination of the state of the account and the final amount due. *Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219-221 (1916). Accountable officers bear personal pecuniary liability for the loss of funds in their accounts. For example, certifying officers bear personal liability for the amount of any illegal or improper payments resulting from their certifications. 31 U.S.C. § 3528(a)(3); B-301184, Jan. 15, 2004; B-307693, Apr. 12, 2007. Therefore, when the Comptroller General settles an account, he determines the amount due to the government for any funds that have been lost. The account balance the Comptroller General certifies is conclusive on the executive branch. 31 U.S.C. § 3526(d); *St. Louis, Brownsville & Mexico Railway Co. v. United States*, 268 U.S. 169 (1925); 54 Comp. Gen. 921 (1975); 33 Op. Atty. Gen. 268 (1922).

Integral to the Comptroller General's duty to settle the government's accounts is his authority to issue advance decisions to disbursing officers, certifying officers, and to heads of agencies and agency components. 31 U.S.C. § 3529. Such decisions may concern either a payment the head of the agency will make, or a voucher presented to a certifying official for certification. *Id*. Decisions of the Comptroller General under 31 U.S.C. § 3529 bind him when he settles an account containing the payment. 31 U.S.C. § 3526(b). Therefore, "the Comptroller General in an audit of agency obligations and expenditures may not legally object to particular financial transactions that he has already decided under section 3529 are in accordance with law." B-288266, Jan. 27, 2003. Thus, though the work of an accountable officer brings a formidable burden of personal pecuniary liability, advance decisions afford accountable officers a measure of protection and counsel.

A decision regarding an account of the government is binding on the executive branch. 31 U.S.C. § 3526(d); *see also United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 4 n.2 (1927); *St. Louis, Brownsville & Mexico Railway Co. v. United States*, 268 U.S. 169, 174 (1925); *United States v. Standard Oil Co. of California*, 545 F.2d 624, 637–38 (9th Cir. 1976). However, it is not binding on a private party who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had. The Comptroller General has no power to enforce decisions. Ultimately, agency officials who act contrary to Comptroller General decisions may have to respond to congressional appropriations and program oversight committees.

For many years the Comptroller General had authority to administratively and conclusively settle and adjust all claims against the United States. In 1995, Congress transferred a number of GAO's claims settlement duties to other agencies.[16] However, accounts settlement authority remains vested in the Comptroller General. Though the Comptroller General no longer issues decisions regarding claims settlement, he continues to perform his statutory duty to issue decisions regarding the legal availability of appropriations. B-327146, Aug. 6, 2015.

a. Procedures

There is no specific procedure for requesting a decision from the Comptroller General. A simple letter is usually sufficient. The request should, however, include all pertinent information or supporting material and should present any arguments the requestor wishes to have considered. GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006). GAO will also receive requests for decisions by email. To submit a request by email, refer to the "Appropriations Law Decisions" page of GAO's website at www.gao.gov/legal/appropriations-law-decisions/faqs.

A request for an advance decision submitted by a certifying officer will usually arise from "a voucher presented . . . for certification." 31 U.S.C. § 3529(a)(2). At one time, GAO insisted that the original voucher accompany the request and occasionally declined to render the decision

[16] Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (Nov. 19, 1995) and Pub. L. No. 104-316, 110 Stat. 3826 (Oct. 19, 1996), transferred the Comptroller General's authority over claims and related functions to the Director of the Office of Management and Budget, who in turn delegated specific functions to the Departments of Defense and Treasury, the General Services Administration, and the Office of Personnel Management. For additional details, see B-275605, Mar. 17, 1997.

if this was not done. *See, e.g.,* 21 Comp. Gen. 1128 (1942). The requirement was eliminated in B-223608, Dec. 19, 1988:

> "Consistent with our current practice, submission of the original voucher need not accompany the request for an advance decision. Accordingly, in the future, the original voucher should be retained in the appropriate finance office. A photocopy accompanying the request for decision will be sufficient. Language to the contrary in prior decisions may be disregarded."

Even if no voucher is submitted, GAO will most likely render the decision notwithstanding the absence of a voucher if the question is of general interest and appears likely to recur. *See, e.g.,* 55 Comp. Gen. 652 (1976); 53 Comp. Gen. 429 (1973); 53 Comp. Gen. 71 (1973); 52 Comp. Gen. 83 (1972).

Often, requests for decisions will require factual development, and GAO will contact the agency as necessary to establish and document relevant facts. It is the usual practice of GAO to obtain the legal positions and views of the agency or agencies involved in the request for a decision or opinion.

An involved party or agency may request reconsideration of a decision. The standard applied is whether the request demonstrates error of fact or law (*e.g.,* B-184062, July 6, 1976) or presents new information not considered in the earlier decision. *See* B-306666.2, Mar. 20, 2009; B-271838.2, May 23, 1997. While the Comptroller General gives precedential weight to prior decisions,[17] a decision may be modified or overruled by a subsequent decision. In overruling its decisions, GAO follows the approach summarized by the Comptroller of the Treasury in a 1902 decision:

> "I regret exceedingly the necessity of overruling decisions of this office heretofore made for the guidance of heads of departments and the protection of paying officers, and fully appreciate that certainty in decisions is greatly to be desired in order that uniformity of practice may obtain in the expenditure of the public money, but when a decision is made not only wrong in principle but harmful in its workings, my pride of decision is not so strong that when my attention is directed to such decision I will not promptly overrule it. It is a very easy thing to be

[17] It is a general principle of administrative law that an agency or administrative board rendering administrative decisions should follow its own decisions or give a reasoned explanation for departure. *See, e.g., Hinson v. National Transportation Safety Board,* 57 F.3d 1144 (D.C. Cir. 1995); *Doubleday Broadcasting Co. v. FCC,* 655 F.2d 417, 422–23 (D.C. Cir. 1981).

> consistent, that is, to insist that the horse is 16 feet high, but not so easy to get right and keep right."

8 Comp. Dec. 695, 697 (1902).

b. Matters Not Considered

There are a number of areas in which, as a matter of law or policy, the Comptroller General will generally decline to render a decision.

For example, as we discussed earlier in this chapter, effective June 30, 1996, Congress transferred claims settlement authority under 31 U.S.C. § 3302 to the Director of the Office of Management and Budget (OMB). The Director of OMB delegated claims settlement authority to the agency from whose activities the claim arose. *See, e.g.,* B-302996, May 21, 2004 (GAO no longer has authority to settle a claim for severance pay); B-278805, July 21, 1999 (the International Trade Commission was the appropriate agency to resolve the subject claims request).

Other areas where the Comptroller General will decline to render decisions include questions where the determination of another agency is by law "final and conclusive." Examples are determinations on the merits of a claim against another agency under the Federal Tort Claims Act (28 U.S.C. § 2672) or the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. § 3721). *See, e.g.,* B-300829, Apr. 4, 2004 (regarding the Military Personnel and Civilian Employees' Claims Act). Another example is a decision by the Secretary of Veterans Affairs on a claim for veterans' benefits (38 U.S.C. § 511). *See* 56 Comp. Gen. 587, 591 (1977); B-226599.2, Nov. 3, 1988 (nondecision letter).

In addition, GAO has traditionally declined to render decisions in a number of areas that are specifically within the jurisdiction of some other agency and concerning which GAO would not be in the position to make authoritative determinations, even though the other agency's determination is not statutorily "final and conclusive." Thus, GAO will not "decide" whether a given action violates a provision of the Criminal Code (title 18 of the United States Code) since this is within the jurisdiction of the Justice Department and the courts.[18] If the use of public funds is an element of the alleged violation, the extent of GAO's involvement will be to determine if appropriated funds were in fact used and to refer the

[18] 48 Comp. Gen. 24, 27 (1968); 37 Comp. Gen. 776 (1958); 20 Comp. Gen. 488 (1941); B-215651, Mar. 15, 1985.

matter to the Justice Department if deemed appropriate or if requested to do so.[19]

Other examples of areas where GAO has declined to render decisions are antitrust law,[20] political activities of federal employees under the Hatch Act,[21] and determinations as to what is or is not taxable under the Internal Revenue Code.[22]

GAO avoids opining on an issue that is the subject of current litigation, unless the court expresses an interest in receiving GAO's opinion.[23] GAO's policy with respect to issues that are the subject of agency administrative proceedings is generally similar to its litigation policy. *See* 69 Comp. Gen. 134 (1989) (declining to render an opinion on the propriety of an attorney's fee award being considered by the Equal Employment Opportunity Commission). *See also* B-259632, n.2, June 12, 1995.

Another long-standing GAO policy concerns the constitutionality of acts of Congress. As an agent of Congress, GAO recognizes that it is neither our role nor our province to opine on or adjudicate the constitutionality of duly enacted statutes. *See, e.g.*, B-326013, Aug. 21, 2014; B-323449, Aug. 14, 2012; B-321982, Oct. 11, 2011. Such laws come to GAO with a heavy presumption in favor of their constitutionality and, like the courts, GAO will construe statutes narrowly to avoid constitutional issues.[24]

[19] An example here is 18 U.S.C. § 1913, the anti-lobbying statute; *see* B-284226.2, Aug. 17, 2000.

[20] 59 Comp. Gen. 761 (1980); 21 Comp. Gen. 56, 57 (1941); B-284110, n. 8, Feb. 18, 2000; B-218279, B-218290, Mar. 13, 1985; B-190983, Dec. 21, 1979; B-194584, Aug. 9, 1979.

[21] B-165548, Jan. 3, 1969.

[22] B-147153, Nov. 21, 1961; B-173783.127, Feb. 7, 1975 (nondecision letter). *See also* 26 U.S.C. § 6406.

[23] 58 Comp. Gen. 282, 286 (1979); B-240908, Sept. 11, 1990; B-218900, July 9, 1986; B-217954, July 30, 1985; B-203737, July 14, 1981; B-179473, Mar. 7, 1974; A-36314, Apr. 29, 1931. For examples of cases where GAO's opinion was requested by a court, *see* 56 Comp. Gen. 768 (1977) and B-186494, July 22, 1976. Also, the United States Court of Federal Claims may issue a "call" upon GAO (or any other agency) for comments on a particular issue or for other information. 28 U.S.C. § 2507.

[24] B-215863, July 26, 1984; B-210922.1, June 27, 1983; B-114578, Nov. 9, 1973; B-157984, Nov. 26, 1965; B-124985, Aug. 17, 1955; A-23385, June 28, 1928. *See also Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952).

Immigration & Naturalization Service v. St. Cyr, 533 U.S. 289, 299, n.12 (2001); B-300192, Nov. 13, 2002 (regarding a provision in the fiscal year 2003 Continuing Resolution, Pub. L. No. 107-229, § 117, 116 Stat. 1465, 1468 (Sept. 30, 2002), prohibiting the use of appropriations to acquire private sector printing and specifically prohibiting the use of appropriations to pay for printing the President's Budget other than through the Government Printing Office: "Given our authority to settle and audit the accounts of the government . . ., we will apply laws as we find them absent a controlling opinion that such laws are unconstitutional."). GAO will, however, express its opinion, upon the request of a Member or committee of Congress, on the constitutionality of a bill prior to enactment. *E.g.,* B-360241, Mar. 18, 2003; B-228805, Sept. 28, 1987.

3. Program Evaluations and Financial Audits, Investigations, and Account Settlement

In addition to GAO's authority to settle the accounts of the United States and to issue decisions on matters involving the use of public money, Congress has also vested GAO with authority to investigate and evaluate agency activities and to audit financial transactions. GAO's audit and evaluation authority is rooted in many statutory provisions. One such provision is in the Budget and Accounting Act, 1921, and vested the Comptroller General with the authority to investigate the receipt, disbursement, and application of public funds, reporting the results to Congress;[25] and to make investigations and reports upon the request of either house of Congress or of any congressional committee with jurisdiction over revenue, appropriations, or expenditures.[26] He was also directed to supply such information to the President when requested by the President.[27] The mandates in the 1921 legislation, together with a subsequent directive in the Legislative Reorganization Act of 1946 to make expenditure analyses of executive branch agencies with reports to the cognizant congressional committees,[28] have played a large part in

[25] Pub. L. No. 67-13, §§ 312(a) and (c), *codified at* 31 U.S.C. §§ 712(1), 719(c).

[26] Budget and Accounting Act § 312(b), 31 U.S.C. §§ 712(4) and (5). At about this same time, both the House and the Senate consolidated jurisdiction over all appropriation bills in a single committee in each body.

[27] 31 U.S.C. § 719(e).

[28] Pub. L. No. 79-601, § 206, 60 Stat. 812, 837 (Aug. 2, 1946), *codified at* 31 U.S.C. §§ 712(3), 719(e).

preparing Congress to consider the merits of the President's annual budget submission.

The Accounting and Auditing Act of 1950 authorized the Comptroller General to audit the financial transactions of most[29] executive, legislative, and judicial agencies; and to prescribe, in consultation with the President and the Secretary of the Treasury, accounting principles, standards, and requirements for the executive agencies suitable to their needs.[30] In addition, the Legislative Reorganization Act of 1970 expanded the focus of GAO's audit activities to include program evaluations as well as financial audits.[31]

In carrying out its various responsibilities to examine the financial, management, and program activities of federal agencies, and to evaluate the efficiency, effectiveness, and economy of agency operations, GAO reports to Congress both objective findings and recommendations for improvement. Recommendations are addressed to agency heads for action that the agency is authorized to take under existing law. Matters for consideration are addressed to Congress.

[29] With certain exceptions, GAO's audit authority and responsibility extends to all activities, financial transactions, and accounts of the federal government. Pub. L. No. 87-784, title I, pt. II, § 117(f), 64 Stat. 832 (Sept. 12, 1950). However, certain agencies and activities are not subject to audit by reason of specific statutory prohibitions and the type of funds involved. For example, prior to 1980, the Comptroller General did not have the authority to audit expenditures approved without vouchers. Enactment of Pub. L. No. 96-226, § 101, 94 Stat. 311 (Apr. 3, 1980) provided the authority to the Comptroller General to audit these unvouchered transactions; however, the Comptroller General may only release the results of the audit to the President or head of the agency, or, if there is an unresolved discrepancy, to the Senate Committee on Governmental Affairs, the House Committee on Government Reform, and the committees of Congress having legislative or appropriation oversight of the expenditure. This law, however, does not provide GAO with the authority to audit transactions of the Central Intelligence Agency or certain other financial transactions involving specified sensitive matters exempted by the President. 31 U.S.C. § 3524.

[30] Pub. L. No. 81-784, title I, pt. II, § 112(a), 64 Stat. 832, 837 (Sept. 12, 1950); 31 U.S.C. § 3511(a). Since 1991, GAO has implemented its responsibility to prescribe accounting principles and standards largely through the Federal Accounting Standards Advisory Board (FASAB), which is a federal advisory committee jointly created by the Comptroller General, the Secretary of the Treasury, and the Office of Management and Budget. For more information on FASAB, consult www.fasab.gov.

[31] Pub. L. No. 91-510, § 204, 84 Stat. 1140, 1168 (Oct. 26, 1970), *codified at* 31 U.S.C. § 717.

Under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720(b), whenever GAO issues a report that contains recommendations to the head of a federal agency, the agency must submit a written statement of the actions taken with respect to the recommendations to (1) the Senate Committee on Governmental Affairs and the House Committee on Government Reform, not later than 60 days after the date of the report and (2) the Senate and House Appropriations Committees in connection with the agency's first request for appropriations submitted more than 60 days after the date of the report. As GAO pointed out in a letter to a private inquirer (B-207783, Apr. 1, 1983, nondecision letter), the law does not require the agency to comply with the recommendation, merely to report on the "actions taken," which can range from full compliance to zero. The theory is that, if the agency disagrees with the GAO recommendation, Congress will have both positions so that it can then take whatever action it might deem appropriate.

The term "agency" for purposes of 31 U.S.C. § 720 is broadly defined to include any department, agency, or instrumentality of the U.S. government, including wholly owned but not mixed-ownership government corporations, or the District of Columbia government. 31 U.S.C. § 720(a). *See also* B-114831-O.M., July 28, 1975.

4. Publication of Decisions

Between July 1921 and September 1994, decisions that the General Counsel determined had wide applicability were published annually in hardbound volumes entitled *Decisions of the Comptroller General*. These decisions are cited by volume, page number on which the decision begins, and the year. For example: 31 Comp. Gen. 350 (1952). All other decisions were filed at GAO and available publicly upon request. There is no legal distinction between a decision published in *Decisions of the Comptroller General* and an unpublished decision. 28 Comp. Gen. 69, 71 (1948).

Many of GAO's decisions (published and unpublished) prior to 1994, and all decisions since 1994, are available on the GAO internet site, www.gao.gov. Unpublished decisions prior to 1994, and all subsequent decisions, are cited by file number and date. For example: B-193282, Dec. 21, 1978. The present file numbering system ("B-numbers") has been in use since January 1939. From 1924 through 1938, file numbers

had an "A" prefix.[32] Some of the computerized legal research systems (*e.g.,* Lexis, Westlaw) carry Comptroller General decisions. GAO's Office of General Counsel will assist researchers who have difficulty locating a copy of GAO decisions.

5. Other GAO Publications

GAO expresses its positions in many forms. Most of the GAO materials cited in this publication are decisions of the Comptroller General. While these constitute the most significant body of GAO positions on legal issues, the editors have also included, as appropriate, citations to the following items:

Legal opinions to Congress—GAO prepares legal opinions at the request of congressional committees or individual Members of Congress. Congressional opinions are prepared in letter rather than decision format, but have the same weight and effect as decision. The citation form is identical to that for decision. As a practical matter, except where specifically identified in the text, the reader will not be able to distinguish between a decision and a congressional opinion based on the form of the citation.

Office memoranda—Legal questions are frequently presented by other divisions or offices within GAO. The response is in the form of an internal memorandum, formerly signed by the Comptroller General, but now, for the most part, signed by the General Counsel or someone on the General Counsel's staff. The citation is the same as for a B-numbered decision, except that the suffix "O.M." (Office Memorandum) has traditionally been added. More recent material tends to omit the suffix, in which case our practice in this publication is to identify the citation as a memorandum to avoid confusion with decisions. Office memoranda are usually not cited in a decision. Technically, an office memorandum is *not* a decision of the Comptroller General as provided in 31 U.S.C. § 3529, does not have the same legal or precedential effect, and should never be cited as a decision. Instead, office memoranda represent the views of the General Counsel or members of the General Counsel's staff. Notwithstanding

[32] Cases prior to 1924 were classified according to type into one of four categories: advance decision (A.D. 1234), review decision (Review No. 2345), division memorandum (D.M.) 3456, or appeal (Appeal No. 4567). In addition, some of the earliest decisions have no file designation. These must be cited by reference to the "manuscript volume" in which the decision appears. (These volumes are maintained by GAO, containing the written products of the Office of General Counsel for a given month in chronological sequence.) Example: unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712.

these limitations, we have included selected citations to GAO office memoranda, particularly where they provide guidance in the absence of formal decisions on a given point, contain useful research or discussion, or have subsequently been followed in practice.

Audit reports—A GAO audit report is cited by its title, date of issuance, and a numerical designation. Up to the mid-1970s, the same file numbering system was used as in decisions ("B-numbers"). From the mid-1970s until October 2000, the designation for an audit report consisted of both a "B-number" and an identifier consisting of the initials of the issuing division, the fiscal year, and the report number. GAO no longer assigns a "B-number" to audit reports; now the designation includes only the fiscal year and the report number.

Several audit reports are cited throughout this publication either as authority for some legal proposition or to provide sources of additional information to supplement the discussion in the text. To prevent confusion stemming from different citation formats used over the years, our practice in this publication is to always identify an audit report as a "GAO report" in the text, in addition to the citation.

All new GAO reports are published on GAO's website at www.gao.gov.

In addition to the reports themselves, GAO publishes a number of pamphlets and other documents relating to its audit function. *See, e.g.,* GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: Sept. 2014) (known as the "Green Book"); GAO, *Government Auditing Standards,* GAO-12-331G (Washington, D.C.: Dec. 1, 2011) (known as the "Yellow Book"). References to any of these will be fully described in the text where they occur.

Nondecision letters—On occasion, GAO may issue letters, signed by some subordinate official on the General Counsel's staff, usually to an individual or organization who has requested information or who has requested a legal opinion, but is not entitled by law to a formal decision. Their purpose is basically to convey information rather than resolve a legal issue. Several of these are cited in this publication, either because they offer a particularly clear statement of some policy or position, or to supplement the material found in the decision. Each is identified parenthetically. The citation form is otherwise identical to an unpublished decision. As with the office memoranda, these are not decisions of the Comptroller General and do not have the same legal or precedential effect.

Circular letters—A circular letter is a letter addressed simply to the "Heads of Federal Departments and Agencies" or to "Federal Certifying and Disbursing Officers." Circular letters, although not common, are used for a variety of purposes and may emanate from a particular division within GAO or directly from the Comptroller General. Circular letters that announce significant changes in pertinent legal requirements or GAO audit policy or procedures are occasionally cited in this publication. They are identified as such and often, but not always, bear file designations similar to unpublished decision. *See* B-275605, May 17, 1997 (announcing changes resulting from the transfer of claims settlement and other related functions).

GAO's Policy and Procedures Manual for Guidance of Federal Agencies—Originally published in 1957 as a large loose-leaf volume, this was, for many years, the official medium through which the Comptroller General issued accounting principles and standards and related material for the development of accounting systems and internal auditing programs, uniform procedures, and regulations governing GAO's relationship with other federal agencies and private parties. The title of particular relevance for federal appropriations law is Title 7, "Fiscal Procedures." Researchers can access Title 7 on GAO's website, www.gao.gov/products/149099.

6. Standard Budgetary Terms

A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Washington, D.C.: Sept. 2005), contains standard definitions of fiscal and budgetary terms. As required by law, GAO publishes this guide in cooperation with the Secretary of the Treasury and the Directors of the Office of Management and Budget and the Congressional Budget Office. 31 U.S.C. § 1112(c). It is updated from time to time. Definitions used throughout *Principles of Federal Appropriations Law* are based on the *Glossary* unless otherwise noted.

7. Informal Technical Assistance

GAO also offers informal technical assistance regarding matters of appropriations law. Submit requests for assistance to redbook@gao.gov. Informal opinions expressed by GAO officers or employees may not represent the views of the Comptroller General or GAO and are in no way controlling on any subsequent formal or official determinations by the Comptroller General. 56 Comp. Gen. 768, 773–74 (1977); 31 Comp. Gen. 613 (1952); 29 Comp. Gen. 335 (1950); 12 Comp. Gen. 207 (1932); 4 Comp. Gen. 1024 (1925).

C. An Analytical Framework

> "I'm very glad," said Pooh happily, "that I thought of giving you a Useful Pot to put things in."
>
> A.A. Milne, *Winnie-The-Pooh*, chapter 6.

This publication contains an analytical framework that the reader can use to analyze most appropriations law problems. Questions in appropriations law are easier to resolve after one spots the key issues and classifies the problem into the appropriate aspect of an overarching framework.

Every appropriation contains limitations upon its availability; that is, federal agencies may spend appropriated amounts only in accordance with the conditions that Congress has placed upon the appropriation. These conditions may be classified in three ways: purpose, time, and amount. For an example, examine the following appropriation for the Marshals Service for fiscal year 2015:

> "For necessary expenses of the United States Marshals Service, $1,195,000,000, of which not to exceed $6,000 shall be available for official reception and representation expenses, and not to exceed $15,000,000 shall remain available until expended."[33]

This language specifies purpose limitations: about $1.2 billion is available for the "necessary expenses" of the Marshals Service, while no more than $6,000 of that amount is available "for official reception and representation expenses." This language places limits upon the permissible objects for which these funds may be used: the money is available only for the necessary expenses of the Marshals Service and not for, say, the Internal Revenue Service. We discuss this concept further in Chapter 4, *Availability of Appropriations: Purpose*.

The language explicitly provides that $15 million is "available until expended," which is a time limitation—or, in this case, the expression of an indefinite time limitation, as the $15 million is available for an unlimited period. As we will discuss in Chapter 5, *Availability of Appropriations: Time*, most appropriations, unlike the $15 million described here, are available only for limited periods of time. Indeed, though $15 million of

[33] Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, Pub. L. No. 113-235, div. B, 128 Stat. 2130, 2173, 2185 (Dec. 16, 2014).

this amount is available without time limitation, the balance of the $1.2 billion appropriation is available for only one fiscal year. In Chapter 5, we will also discuss various facets of a time analysis, such as the fancifully named, but conceptually simple, principle known as the *bona fide* needs rule.

The U.S. Marshals appropriation contains several limitations as to amount: for example, it appropriates a total of about $1.2 billion, but no more than $6,000 for the particular purpose of official reception and representation expenses. We discuss various twists and complications arising from amount in Chapter 6, *Availability of Appropriations: Amount*. Closely related to, but distinct from, an amount analysis is the analysis of the amount of an agency's obligation; we discuss this issue in Chapter 7, *Obligation of Appropriations*. Figuratively speaking, Chapter 6 primarily discusses how much money is available in the agency's checkbook, while Chapter 7 discusses the timing and amount of an agency's deductions from the checkbook upon incurring legal liabilities.

D. Statutory Interpretation: Determining Congressional Intent

> "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."

Greenwood v. United States, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

1. The Goal of Statutory Construction

As we have noted elsewhere, an appropriation can be made only by means of a statute. In addition to providing funds, the typical appropriation act includes a variety of general provisions. Anyone who works with appropriations matters will also have frequent need to consult authorizing and program legislation. It should thus be apparent that the interpretation of statutes is of critical importance to appropriations law.[34]

The objective of this section is to provide a brief overview, designed primarily for those who do not work extensively with legislative materials. The cases we cite are but a sampling, selected for illustrative purposes or for a particularly good judicial statement of a point. The literature in the area is voluminous, and readers who need more than we provide here

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

are encouraged to consult one of the established treatises such as *Sutherland Statutes and Statutory Construction* (hereafter "Sutherland").[35]

The goal of statutory construction is simply stated: to determine and give effect to the intent of the enacting legislature.[36] *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975); *United States v. American Trucking Ass'ns, Inc.,* 310 U.S. 534, 542 (1940); 55 Comp. Gen. 307, 317 (1975); 38 Comp. Gen. 229 (1958). While the goal may be simple, the means of achieving it are complex and often controversial. The primary vehicle for determining legislative intent is the language of the statute itself. There is an established body of principles, known as "canons" of construction, that are designed to aid in arriving at the best interpretation of statutory language. The statute's legislative history also is usually consulted to aid in the effort.

At this point, it is important to recognize that the concept of "legislative intent" is in many cases a fiction. Where not clear from the statutory language itself, it is often impossible to ascribe an intent to Congress as a whole.[37] As we will note later, a committee report represents the views of that committee. Statements by an individual legislator represent the views of that individual. Either may, but do not necessarily or inherently, reflect a broader congressional perception.

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

[35] We will refer to the 7th edition, by Norman J. Singer and J.D. Shambie Singer and published in 2010, as updated by the 2014 supplement.

[36] There is a technical distinction between "interpretation" (determining the meaning of words) and "construction" (application of words to facts). 2A Sutherland, *Statutes and Statutory Construction* § 45:4, at 26-27 (7th ed. 2014). The distinction, as Sutherland points out, has little practical value. We use the terms interchangeably, as does Sutherland.

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

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

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

This in turn is important for two reasons. First, everyone has surely heard the familiar statement that our government is a government of laws and not of men.[38] This means that you have a right to have your conduct governed and judged in accordance with identifiable principles and standards, not by the whim of the decision maker. The law should be reasonably predictable. A lawyer's advice that a proposed action is or is not permissible amounts to a reasoned and informed judgment as to what a court is likely to do if the action is challenged. While this can never be an absolute guarantee, it once again must be based on identifiable principles and standards. Conceding its weaknesses, the law of statutory construction represents an organized approach for doing this.

Second, predictability is important in the enactment of statutes as well. Congress legislates against the background of the rules and principles that make up the law of statutory construction, and it must be able to anticipate how the courts will apply them in interpreting the statutes it enacts.[39]

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

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

2. The "Plain Meaning" Rule

> "The Court's task is to construe not English but congressional English."

Commissioner of Internal Revenue v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

By far the most important rule of statutory construction is this: You start with the language of the statute. Countless Supreme Court decisions reiterate this rule. *E.g., Sebelius v. Cloer*, ___ U.S. ___, 133 S. Ct. 1886, 1893 (2013); *Carcieri v. Salazar,* 555 U.S. 379 (2009); *BedRoc Limited, LLC v. United States,* 541 U.S. 176 (2004); *Lamie v. United States Trustee,* 540 U.S. 526 (2004); *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.,* 530 U.S. 1 (2000); *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997); *Connecticut National Bank v. Germain,* 503 U.S. 249 (1992); and *Mallard v. United States District Court for the Southern District of Iowa,* 490 U.S. 296, 300 (1989). The primary vehicle for Congress to express its intent is the words it enacts into law. As stated in an early Supreme Court decision:

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

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

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

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

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

503 U.S. at 253–254 (citations and quotation marks omitted). *See also Hartford Underwriters Insurance Co.,* 530 U.S. 1; *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997); *Mallard,* 490 U.S. 296; *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989); *Tennessee Valley*

Authority v. Hill, 437 U.S. 153, 184 n.29 (1978); B-287158, Oct. 10, 2002; B-290021, July 15, 2002; B-288173, June 13, 2002; B-288658, Nov. 30, 2001; 56 Comp. Gen. 943 (1977).

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

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

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

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

An example of this is *Smith v. United States,* 508 U.S. 223 (1993), in which the Justices agreed that the case should be resolved on the basis of the statute's plain meaning, but reached sharply divergent conclusions as to what that plain meaning was. In *Smith,* the defendant had traded his gun for illegal drugs. He was convicted under a statute that provided enhanced penalties for the "use" of a firearm "during and in relation to . . . [a] drug trafficking crime." The majority affirmed his conviction, reasoning that exchanging a firearm for drugs constituted a "use" of the firearm within the plain meaning of the statute—that is, use in the sense of employ. Three Justices dissented, contending vehemently that the plain meaning of the statute covered only the use of a firearm for its intended purpose as a weapon.[40]

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

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

"There is no surer way to misread any document than to read it literally."

Guiseppi v. Walling, 144 F.2d 608, 624 (2nd Cir. 1944) (Learned Hand, J.) (concurring).

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

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

a. Errors in Statutes

(1) Drafting errors

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

In a number of other cases, courts have followed the same approach by correcting obvious printing or typographical errors. *See United States National Bank of Oregon v. Independent Insurance Agents of America,*

Inc., 508 U.S. 439 (1993); *Ronson Patents Corp. v. Sparklets Devices, Inc.,* 102 F. Supp. 123 (E.D. Mo. 1951).[41]

Comptroller General decisions have likewise repaired obvious drafting errors. In one situation, a supplemental appropriation act provided funds to pay certain claims and judgments as set forth in Senate Document 94-163. Examination of the documents made it clear that the reference should have been to Senate Document 94-164, as Senate Document 94-163 concerned a wholly unrelated subject. The manifest congressional intent was held controlling, and the appropriation was available to pay the items specified in Senate Document 94-164.[42] B-158642-O.M., June 8, 1976. The same principle had been applied in a very early decision in which an 1894 appropriation provided funds for certain payments in connection with an election held on "November fifth," 1890. The election had in fact been held on November 4. Recognizing the "evident intention of Congress," the decision held that the appropriation was available to make the specified payments. 1 Comp. Dec. 1 (1894). *See also* 11 Comp. Dec. 719 (1905); 8 Comp. Dec. 205 (1901); 1 Comp. Dec. 316 (1895).

The Justice Department's Office of Legal Counsel applied Comptroller General decisions in an opinion dated May 21, 1996, that addressed an obvious problem with the application of an appropriations act.[43] The act required the United States Information Agency to move an office to south Florida "not later than April 1, 1996," and made funds available for that purpose. However, the act was not signed into law until April 26, 1996. Recognizing that the act could not be implemented as written, the opinion

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

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

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

concluded that the funds remained available to finance the move after April 1.

One Supreme Court decision discussed drafting errors and what to do about them. *Lamie v. United States Trustee,* 540 U.S. 526 (2004). The Court found an "apparent legislative drafting error" in a 1994 statute. *Id*. at 530. Nevertheless, the Court held that the amended language must be applied according to its plain terms. While the Court acknowledged that the amended statute was awkward and ungrammatical, and that a literal reading rendered some words superfluous and could produce harsh results, none of these defects made the language ambiguous. *Id.* at 534–36. The Court determined that these flaws did not "lead to absurd results requiring us to treat the text as if it were ambiguous." *Id.* at 536. The Court also drew a distinction between construing a statute in a way that, in effect, added missing words as opposed to ignoring words that might have been included by mistake. *Id.* at 538.

(2) Error in amount appropriated

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

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

b. Avoiding "Absurd Consequences"

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

produce a result demonstrably inconsistent with clearly expressed congressional intent.

A case frequently cited for this proposition is *Church of the Holy Trinity v. United States,* 143 U.S. 457 (1892), which gives several interesting examples. In one of those examples, the Court held that a statute making it a criminal offense to knowingly and willfully obstruct or retard a driver or carrier of the mails did not apply to a sheriff arresting a mail carrier who had been indicted for murder. *United States v. Kirby,* 74 U.S. (7 Wall.) 482 (1868). Another is an old English ruling that a statute making it a felony to break out of jail did not apply to a prisoner who broke out because the jail was on fire. *Holy Trinity,* 143 U.S. at 460–61. An example from early administrative decisions is 24 Comp. Dec. 775 (1918), holding that an appropriation for "messenger boys" was available to hire "messenger girls."[44]

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

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

The case of *United States v. Singleton,* 144 F.3d 1343 (10th Cir. 1998), *vacated on reh'g en banc,* 165 F.3d 1297, *cert. denied,* 527 U.S. 1024

[44] At issue in 1918 was not equality of the sexes; the "boys" were all off fighting World War I.

(1999), provides another illustration of this point. Ms. Singleton was convicted of various crimes following testimony against her by a witness who had received a plea bargain in exchange for his testimony. She maintained that her conviction was tainted because the plea bargain constituted a violation of 18 U.S.C. § 201(c)(2), which provides in part:

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

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

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

Recent Supreme Court decisions likewise reinforce the need for caution when it comes to departing from statutory language on the basis of its apparent "absurd consequences." *See Baker Botts L.L.P. v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158, 2169 (2015) and *Lamie v. United States Trustee,* 540 U.S. 526, 537–38 (2004) ("harsh" consequences are not the equivalent of absurd consequences); *Barnhart v. Thomas,* 540 U.S. 20, 28–29 (2003) ("undesirable" consequences are not the equivalent of absurd consequences).

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

B-260759, May 2, 1995 (rejecting a literal reading of a statutory provision that would defeat its purpose and produce anomalous results).

4. Statutory Aids to Construction

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

a. Definitions, Effective Dates, and Severability Clauses

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

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

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

b. The Dictionary Act

Chapter 1 of title 1 of the United States Code, §§ 1–8, commonly known as the "Dictionary Act," provides certain rules of construction and

definitions that apply generally to federal statutes.[45] For example, section 1 provides in part:

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

Occasionally, the courts use the Dictionary Act to assist in resolving questions of interpretation. *E.g., Burwell v. Hobby Lobby,* ___ U.S. ___, 134 S. Ct. 2751, 2768 (2014) (absent a specific statutory provision to the contrary, the Dictionary Act definition of "persons" includes a corporation); *Carr v. United States,* 560 U.S. 438, 448 (2010) (Dictionary Act's provision that statutory "words used in the present tense include the future as well as the present," 1 U.S.C. § 1, interpreted to mean that the present tense generally does not include the past tense). Courts also hold on occasion that the Dictionary Act does not apply. *See Rowland v. California Men's Colony,* 506 U.S. 194 (1993) (context refutes application of the title 1, United States Code, definition of "person").

c. Effect of Codification

Positive law codification is the process of Congress enacting, one title at a time, a revision and restatement of the general laws of the United States.[46] 2 U.S.C. § 285b(1); B-324857, Aug. 6, 2015. Positive law codification is meant to "remove ambiguities, contradictions, and other imperfections both of substance and of form," while "conform[ing] to the understood policy, intent, and purpose of the Congress in the original enactments." 2 U.S.C. § 285(b)(1). Codification acts typically delete obsolete provisions and make other technical and clarifying changes to the statutes they codify. Codification acts usually include language stating that they should not be construed as making substantive changes in the laws they replace. *See, e.g.,* Pub. L. No. 97-258, § 4(a), 96 Stat.

[45] One provision defined the words "marriage" and "spouse". 1 U.S.C. § 7. The Supreme Court held that this provision is unconstitutional. *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013).

[46] The Office of the Law Revision Counsel in the House of Representatives prepares the text of these enactments. 2 U.S.C. § 285b(1). The Office gives background information about the nature and status of codification efforts at http://uscode.house.gov (last visited Feb. 2, 2016).

877, 1067 (1982) (codifying title 31 of the United States Code). *See also Scheidler v. National Organization for Women,* 547 U.S. 9 (2006); 69 Comp. Gen. 691 (1990).

A title of the United States Code that has been enacted into positive law is itself legal evidence of the law. 1 U.S.C. § 204(a). In contrast, language appearing in a non-positive law title in the United States Code is only prima facie evidence of the wording of the law, and may be rebutted by a showing that the text of the underlying provision differs. B-324857; B-323357, July 11, 2012.

5. Canons of Statutory Construction

As discussed previously, under the plain meaning rule—the overriding principle of statutory construction—the meaning of a statute must be anchored in its text. Over the years, courts have developed a host of conventions or guidelines for ascertaining the meaning of statutory text that are usually referred to as canons of construction. They range from broad principles that apply in virtually every case (such as the canon that statutes are construed as a whole) to narrow rules that apply in limited contexts.

Like all other aids to construing statutes, the canons represent rules of thumb that are often useful but do not lend themselves to mechanistic application or slavish adherence. As the Supreme Court observed:

> "[C]anons are not mandatory rules. They are guides that need not be conclusive. . . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force."

Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (citations and quotation marks omitted).

One problem with the canons is that they often appear to contradict each other. In a frequently cited law review article, Professor Karl Llewellyn

presented an analysis demonstrating that for many canons, there was an offsetting canon to the opposite effect.[47]

Recognizing their limitations, this section will briefly describe some of the more frequently invoked canons.

a. Construe the Statute as a Whole

We start with one canon that virtually always applies and is rarely if ever contradicted. As Sutherland puts it:

> "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole."

2A Sutherland, *Statutes and Statutory Construction* § 45:5 at 204 (7th ed. 2014).

Like all other courts, the Supreme Court follows this venerable canon. *E.g., King v. Burwell,* ___ U.S. ___, 135 S. Ct. 2480, 2493 (2015) (a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme") (internal quotation marks omitted). *See also Hibbs v. Winn,* 542 U.S. 88, 101 (2004) (courts should construe a statute so that "effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"); *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 598 (2004) (courts should not ignore "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it"); B-321685, Mar. 14, 2011, at 4 ("[t]he Supreme Court has indicated that the meaning of a statute is to be determined not just 'by reference to the language itself', but also by reference to 'the specific context in which that language is used and the broader context of the statute as a whole'").

The Court once elaborated on this canon, noting as well that the "holistic" approach may embrace more than a single statute:

[47] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed,* 3 Vand. L. Rev. 395 (1950). The Supreme Court has recognized the contradictory nature of canons. *E.g., Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."); *Landgraf v. USI Film Products,* 511 U.S. 244, 263 (1994) ("It is not uncommon to find 'apparent tension' between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites.").

> "[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. . . . A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, . . . and fit, if possible, all parts into an harmonious whole. . . . Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."

FDA v. Brown & Williamson Tobacco, 529 U.S. 120,132–133 (2000) (citations and quotation marks omitted).

Comptroller General decisions also follow this canon:

> "In interpreting provisions of a statute, we follow the settled rule of statutory construction that provisions with unambiguous language and specific directions may not be construed in any manner that will alter or extend their plain meaning. . . . However, if giving effect to the plain meaning of words in a statute leads to an absurd result which is clearly unintended and at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed. . . . Consequently, statutory phrases and individual words cannot be viewed in isolation."

B-287158, Oct. 10, 2002 (citations omitted). *See also* B-318897, Mar. 18, 2010.

The following decisions illustrate applications of the "whole statute" rule:

- Reading the context and purpose of the fiscal year 2013 continuing resolution as a whole, GAO determined that a provision in a fiscal year 2012 appropriation act that required the U.S. Postal Service to continue six-day delivery and rural delivery of mail carried forward into fiscal year 2013. Although the provision was an operational directive, GAO saw no language in the fiscal year 2013 continuing resolution to indicate that Congress did not expect the provision to continue to apply during the continuing resolution. B-324481, Mar. 21, 2013.
- Reading the Homeland Security Act as a whole, GAO construed particular reorganization and congressional notification provisions as a limitation on any general or inherent authority of the Secretary to reorganize the Department of Homeland Security that may otherwise be inferred from other sections of the Act. B-316533, July 31, 2008.
- Despite use of the phrase "notwithstanding any other provision of law" in a provision of an appropriation act, nothing in the statute read as a whole or its legislative history suggested an intended waiver of

the Antideficiency Act. B-303961, Dec. 6, 2004; s*ee also* B-290125.2, B-290125.3, Dec. 18, 2002 (redacted) (viewed in isolation, the phrase "notwithstanding any other provision of law" might be read as exempting a procurement from GAO's bid protest jurisdiction under the Competition in Contracting Act; however, when the statute is read as a whole, as it must be, it does not exempt the procurement from the Act).

- When read as a whole, the Emergency Steel Loan Guarantee Act of 1999 clearly appropriated loan guarantee programs funds to the Loan Guarantee Board and not the Department of Commerce. B-302335, Jan. 15, 2004.

b. Give Effect to All the Language: No "Surplusage"

Closely related to the "whole statute" canon is the canon that all words of a statute should be given effect, if possible. The theory is that all of the words have meaning since Congress does not include unnecessary language, or "surplusage."

The courts and the Comptroller General regularly invoke the "no surplusage" canon. Some examples follow:

- "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs v. Winn,* 542 U.S. 88, 101 (2004); *see also Corley v. United States*, 556 U.S. 303, 314 (2009).
- A statute should be construed so that, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Department of Environmental Conservation v. EPA,* 540 U.S. 461, 489 n.13 (2004).
- Words in a statute will not be treated as "utterly without effect" even if the consequence of giving them effect is to render the statute unconstitutional. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 216 (1995).
- The Social Security Act requires the Social Security Administration to calculate employee wage data "in accordance with such reports" of wages filed by employers with the Internal Revenue Service (IRS). The "such reports" language cannot be read as referring only to a particular report that the IRS no longer requires since this would render the language meaningless, contrary to established maxims of statutory construction. B-261522, Sept. 29, 1995.
- The no surplusage canon applies with even greater weight when the arguably surplus words are part of the elements of a crime. In this case, the Court declined to treat as surplusage the word "willfully" in a

statute that subjected to criminal penalties anyone willfully violating certain prohibitions. *Ratzlaf v. United States,* 510 U.S. 135, 140–141 (1994).

- Appropriation act language stating that none of the funds provided in this or any other act shall hereafter be used for certain purposes constitutes permanent legislation. The argument that the word hereafter should be construed only to mean that the provision took effect on the date of its enactment is unpersuasive. Since statutes generally take effect on their date of enactment, this construction would inappropriately render the word hereafter superfluous. 70 Comp. Gen. 351 (1991).

Although frequently invoked, the no surplusage canon is less absolute than the "whole statute" canon. One important caveat, previously discussed, is that words in a statute will be treated as surplus and disregarded if they were included in error: "The canon requiring a court to give effect to each word *'if possible'* is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute . . . .'" *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (emphasis in original). The Court also observed that the canon of avoiding surplusage will not be invoked to create ambiguity in a statute that has a plain meaning if the language in question is disregarded. *Lamie v. United States Trustee,* 540 U.S. 526, 536 (2004). The rule "applies only if verbosity and prolixity can be eliminated by giving the offending passage, or the remainder of the text, a competing interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

c. Apply the Common Meaning of Words

When words used in a statute are not specifically defined,[48] they are generally given their plain or ordinary meaning rather than some obscure usage. *E.g., Sebelius v. Cloer*, ___ U.S. ___, 133 S. Ct. 1886, 1893 (2013); *Carcieri v. Salazar,* 555 U.S. 379 (2009); *Engine Manufacturers Ass'n v. South Coast Air Quality Management District,* 541 U.S. 246 (2004); *BedRoc Limited, LLC v. United States,* 541 U.S. 176 (2004); 70 Comp. Gen. 705 (1991); B-261193, Aug. 25, 1995; 38 Comp. Gen. 812 (1959).

One commonsense way to determine the plain meaning of a word is to consult a dictionary. *E.g., Arizona State Legislature v. Arizona*

[48] As discussed earlier in this section, such definitions may appear within the statute itself or within another enactment.

Independent Redistricting Commission, ___ U.S. ___, 135 S. Ct. 2652, 2671 (2015); *Carcieri,* 555 U.S. at 387–88; *Mallard v. United States,* 490 U.S. 296, 301 (1989); *Arizona v. Inter Tribal Council of Arizona, Inc.,* ___ U.S. ___, 133 S. Ct. 2247, 2254 (2013). Thus, the Comptroller General relied on the dictionary in B-251189, Apr. 8, 1993, to hold that business suits did not constitute "uniforms," which would have permitted the use of appropriated funds for their purchase. *See also* B-302973, Oct. 6, 2004; B-261522, Sept. 29, 1995.

Also, if a word has a specific legal meaning, courts tend to apply that meaning when interpreting a statute. *United States v. Nason,* 269 F.3d 10, 16 (1st Cir. 2001) (stating that "we presume, absent evidence to the contrary, that Congress knew and adopted the widely accepted legal definition of meanings associated with the specific words enshrined in the statute," and referring to *Black's Law Dictionary* for the "most widely accepted legal meaning" of a term). GAO used this rule of statutory construction to construe a prohibition in a fiscal year 2010 appropriations act, which prohibited the distribution of federal funds to "affiliates," "subsidiaries," and "allied organizations" of the Association of Community Organizations for Reform Now. NeighborWorks, a federally chartered entity, asked if one of its grantees, Affordable Housing Centers of America, fell within the scope of this provision. As the First Circuit Court of Appeals did when interpreting federal statutes, GAO used *Black's Law Dictionary,* federal statutes, and federal regulations to find the plain legal meaning of these terms. B-320329, Sept. 29, 2010.

As a perusal of any dictionary will show, words often have more than one meaning.[49] The plain meaning will be the ordinary, everyday meaning. *E.g., Mallard,* 490 U.S. at 301; 38 Comp. Gen. 812 (1959). If a word has more than one ordinary meaning and the context of the statute does not make it clear which is being used, there may well be no plain meaning for purposes of that statute. *See Smith v. United States,* 508 U.S. 223 (1993), discussed previously.

d. Give a Common Construction to the Same or Similar Words

When Congress uses the same term in more than one place in the same statute, it is presumed that Congress intends for the same meaning to apply absent evidence to the contrary. *E.g., United States v. Cleveland Indians Baseball Club,* 532 U.S. 200, 213 (2001); *Ratzlaf v. United*

[49] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425 (1918) (Holmes, J.).

States, 510 U.S. 135 (1994). The Comptroller General stated the principle as follows in 29 Comp. Gen. 143, 145 (1949), a case involving the term "pay and allowances":

> "[I]t is a settled rule of statutory construction that it is reasonable to assume that words used in one place in a legislative enactment have the same meaning in every other place in the statute and that consequently other sections in which the same phrase is used may be resorted to as an aid in determining the meaning thereof; and, if the meaning of the phrase is clear in one part of the statute and in others doubtful or obscure, it is in the latter case given the same construction as in the former."

Conversely, when Congress uses a different term, it intends a different meaning. *E.g.,* 56 Comp. Gen. 655, 658 (1977) (term "taking line" presumed to have different meaning than "taking area," which had been used in several other sections in the same statute).

Several different canons of construction revolve around these seemingly straightforward notions. Before discussing some of them, it is important to note once more that these canons, like most others, may or may not make sense to apply in particular settings. Indeed, the basic canon that the same words have the same meaning in a statute is itself subject to exceptions. In *Cleveland Indians Baseball Club,* the Court cautioned: "Although we generally presume that identical words used in different parts of the same act are intended to have the same meaning, . . . the presumption is not rigid, and the meaning [of the same words] well may vary with the purposes of the law." *Cleveland Indians Baseball Club*, 532 U.S. at 213 (citations and quotation marks omitted). To drive the point home, the Court quoted the following admonition from a law review article:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against."

Id. See also General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, fn. 8 (2004) (quoting the same law review passage, which it notes "has become a staple of our opinions"). In 2007, the Court applied the exception described in the *Cleveland Indians Baseball Club* case in *Environmental Defense v. Duke Energy Corp.,* 549 U.S. 561 (2007) (upholding differing regulatory definitions of the same statutory term contained in two sections of the Clean Air Act). Rejecting the lower court's holding that there is an "effectively irrebuttable" presumption that the same defined term in different provisions of the same statute must be

"interpreted identically," the Court pointed out simply that "[c]ontext counts." *Environmental Defense,* 549 U.S. at 575–76.

Of course, all bets are off if the statute clearly uses the same word differently in different places. *See Robinson v. Shell Oil Co.,* 519 U.S. 337, 343 (1997) ("[o]nce it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous…").

Two canons are frequently applied to the use of similar—but not identical—words in a statute when they are part of the same phrase. These canons are known as *ejusdem generis* or "of the same kind," and *noscitur a sociis*, loosely meaning that words are known by the company they keep. *See, e.g.,* B-320329, Sept. 29, 2010 (applying the principle of *ejusdem generis* to construe the term "allied organization" to be in the same class as "affiliates" and "subsidiaries" in an appropriations act provision).

One case concerned whether a state's retention of Social Security Act benefits to cover some of its costs for providing foster care violated a provision of the Act that shielded benefits from "execution, levy, attachment, garnishment, or other legal process." *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler,* 537 U.S. 371 (2003). The Court noted that, under the two canons—

> "'[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"

537 U.S. at 379, quoting *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 114–115 (2001). Applying the canons, the Court held that the state's receipt of the Social Security benefits as a "representative payee" did not constitute "other legal process" within the Act's meaning. It reasoned that, based on the accompanying terms, "other legal process" required at a minimum the use of some judicial or quasi-judicial process. *See* 537 U.S. at 385-86; s*ee also Gustafson v. Alloyd Co.,* 513 U.S. 561, 573–74 (1995) (concerning the scope of statute that defined the term "prospectus"); *Gutierrez v. Ada,* 528 U.S. 250, 254–255 (2000) (construing the term "any election" within the statute).

The Court has cautioned, however, that a canon of construction like *noscitur a sociis* cannot modify the meaning of a term that is specifically defined in a statute. *See Schwab v. Reilly,* 506 U.S. 770 (2010) ("Although we may look to dictionaries and the Bankruptcy Rules to

determine the meaning of words the [United States] Code does not define, . . . the Code's definition of the 'property claimed as exempt' in this case is clear.").

Another familiar canon dealing with word patterns in statutes is *expressio unius est exclusio alterius,* meaning that the expression of one thing is the exclusion of another. Sutherland describes this canon as simply embodying the commonsense notion that when people say one thing, they generally do not mean something else. 2A Sutherland, § 45:14, at 139-141 (7th ed. 2014). As usual, care must be used in applying this canon. *See POM Wonderful LLC v. Coca-Cola Co.*, ___ U.S. ___, 134 S. Ct. 2228, 2238 (2014); *United States v. Vonn,* 535 U.S. 55 (2002). The Court observed in *Vonn*:

> "At best, as we have said before, the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives."

537 U.S. at 65 (citations omitted).

e. Punctuation, Grammar, Titles, and Preambles Are Relevant but Not Controlling

Punctuation, grammar, titles, and preambles are part of the statutory text. As such, they are fair game for consideration in construing statutes. However, as discussed below, they carry less weight than the substantive terms of the statute. The common principle that applies to these sources is that they can be consulted to help resolve ambiguities in the substantive text, but they cannot be used to introduce ambiguity that does not otherwise exist.

Punctuation and Grammar. Punctuation may be taken into consideration when no better evidence exists. For example, whether an "except" clause is or is not set off by a comma may help determine whether the exception applies to the entire provision or just to the portion immediately preceding the "except" clause. *E.g.,* B-218812, Jan. 23, 1987. Punctuation was a relevant factor in the majority opinion in *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241–42 (1989).[50]

On the other hand, punctuation or the lack of it should never be the controlling factor. As the Supreme Court stated in *United States National*

[50] A number of additional cases, which we do not repeat here, are cited in Justice O'Connor's dissenting opinion, 489 U.S. at 249.

Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 454 (1993), "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." In that case, the Court disregarded an interpretation based on the placement of quotation marks in a statute, finding that all other evidence in the statute pointed to a different interpretation.

Likewise, a statute's grammatical structure is useful but not conclusive. *Lamie v. United States Trustee,* 540 U.S. 526, 534–35 (2004) (the mere fact that a statute is awkwardly worded or even ungrammatical does not make it ambiguous). Nevertheless, the Court sometimes gives significant weight to the grammatical structure of a statute. For example, in *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003), the Court rejected the lower court's construction of a statute in part because it violated the grammatical "rule of the last antecedent." Also, in *Arcadia, Ohio v. Ohio Power Co.,* 498 U.S. 73 (1991), the Court devoted considerable attention to the placement of the word "or" in a series of clauses. It questioned the interpretation proffered by one of the parties that would have given the language an awkward effect, noting: "In casual conversation, perhaps, such absentminded duplication and omission are possible, but Congress is not presumed to draft its laws that way." *Arcadia, Ohio,* 498 U.S. at 79. By contrast, in *Nobelman v. American Savings Bank,* 508 U.S. 324, 330 (1993), the Court rejected an interpretation, noting: "We acknowledge that this reading of the clause is quite sensible as a matter of grammar. But it is not compelled."

Titles and Headings. The title of a statute is relevant in determining its scope and purpose. By "title" in this context we mean the line on the slip law immediately following the words "An Act," as distinguished from the statute's "popular name," if any. For example, Public Law 97-177, 96 Stat. 85 (May 21, 1982), is "An Act [t]o require the Federal Government to pay interest on overdue payments, and for other purposes" (title); section 1 says that the act may be cited as the "Prompt Payment Act" (popular name). A public law may or may not have a popular name; it always has a title. The heading of a particular section of a statute may also be relevant. *See*, *e.g.*, B-321823, Dec. 6, 2011, at 4 (the heading of a particular statutory provision among the factors considered in construing that provision).

The title of an act may not be used to change the plain meaning of the enacting clauses. It is evidence of the act's scope and purpose, however, and may legitimately be taken into consideration to resolve ambiguities. *E.g., Lapina v. Williams,* 232 U.S. 78, 92 (1914); *White v. United States,*

191 U.S. 545, 550 (1903); *Church of the Holy Trinity v. United States,* 143 U.S. 457, 462–63 (1892); *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386 (1805); 36 Comp. Gen. 389 (1956); 19 Comp. Gen. 739, 742 (1940). To illustrate, in *Church of the Holy Trinity,* the Court used the title of the statute in question, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," as support for its conclusion that the statute was not intended to apply to professional persons, specifically in that case, ministers and pastors.[51]

The same considerations apply to a statute's popular name and to the headings, or titles, of particular sections of the statute. *See Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 256 (2004). *See also Immigration & Naturalization Service v. St. Cyr,* 533 U.S. 289, 308–309 (2001); *Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206, 212 (1998). In *St. Cyr,* the Supreme Court concluded that a section entitled "Elimination of Custody Review by *Habeas Corpus*" did not, in fact, eliminate *habeas corpus* jurisdiction. It found that the substantive terms of the section were less definitive than the title.

Preambles. Federal statutes often include an introductory "preamble" or "purpose" section before the substantive provisions in which Congress sets forth findings, purposes, or policies that prompted it to adopt the legislation. Such preambles have no legally binding effect. However, they may provide indications of congressional intent underlying the law. Sutherland states with respect to preambles:

> "Courts have long settled the principle that 'The preamble cannot control the enacting part of the statute, in cases where the enacting part is expressed in clear, unambiguous terms; but in case any doubt arises on the enacting part, the preamble may be resorted to to explain it, and show the intention of the law maker.'"

2A Sutherland, *Statutes and Statutory Construction,* § 47:4 at 299-300 (7th ed. 2014).[52] For an example in which the Court used statutory

[51] The utility of this principle will, of course, depend on the degree of specificity in the title. Its value has been considerably diminished by the practice, found in many recent statutes such as the Prompt Payment Act noted above, of adding on the words "and for other purposes."

[52] In one case a court recognized that the preamble lacked operative effect, but the court nonetheless held that it was arbitrary and capricious for the agency to construe the statute without at least considering the policy set out in its preamble. *Association of American Railroads v. Surface Transportation Board,* 237 F.3d 676 (D.C. Cir. 2001).

findings to inform its interpretation of congressional intent, *see General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 589–91 (2004). *See also* B-285066, May 19, 2000.

f. Avoid Constructions that Pose Constitutional Problems

It is well settled that courts will attempt to avoid a construction of a statute that would render the statute unconstitutional. For example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575 (1988), the Court, while citing numerous precedents, observed:

> "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . This cardinal principle . . . has for so long been applied by this Court that it is beyond debate. . . . [T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." (Citations and quotation marks omitted.)

As the Court put it in *Immigration & Naturalization Service v. St. Cyr,* 533 U.S. 289, 300 (2001), where an alternative to a constitutionally problematic interpretation "is fairly possible, . . . we are obligated to construe the statute to avoid such problems." (Citations and quotation marks omitted.)

Two cases arising under the Federal Advisory Committee Act (known as "FACA"), 5 U.S.C. App. §§ 1 *et seq.,* illustrate the lengths to which courts will go to avoid constitutional problems. In one case, the Court held that the Justice Department did not "utilize" within the meaning of FACA an American Bar Association committee that reported to the Department on federal judicial nominees and rated their qualifications. *Public Citizen v. United States Department of Justice,* 491 U.S. 440 (1989). A later ruling from an appellate court held that the First Lady was a full-time officer or employee of the federal government within the meaning of the Act. *Association of American Physicians & Surgeons, Inc. v. Clinton,* 997 F.2d 898 (D.C. Cir. 1993). Therefore, a task force she chaired was exempt from FACA under a provision of the Act that excluded "any committee which is composed wholly of full-time officers or employees of the Federal Government." The constitutional issue in both cases was whether application of FACA to the advisory committees involved in those cases would violate separation of powers by infringing upon the President's

ability to obtain advice in the performance of his constitutional responsibilities.[53]

However, there are outer limits to interpretations designed to avoid constitutional problems. *See Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206, 212 (1998) ("[t]hat doctrine [of constitutional avoidance] enters in only 'where a statute is susceptible of two constructions'") (citations omitted); *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 216 (1995) ("[t]o avoid a constitutional question by holding that Congress enacted, and the President approved, a blank sheet of paper would indeed constitute 'disingenuous evasion'") (citations omitted).

6. Legislative History

> "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."

United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

a. Uses and Limitations

The term "legislative history" refers to the body of congressionally generated written documents relating to a bill from the time of introduction to the time of enactment. As we will discuss, there are at least two basic ways to use legislative history. One is to examine the documents that make up the legislative history in order to determine what they say about the meaning and intent of the legislation, and the other is to examine the evolution of the bill's language through the legislative process. Changes made to a bill during its consideration are often instructive in determining its final meaning.

[53] The majority opinion in *Association of American Physicians & Surgeons* placed heavy reliance on *Public Citizen,* noting that "[t]he Court adopted, we think it is fair to say, an extremely strained construction of the word 'utilized' in order to avoid the constitutional question." *Association of American Physicians & Surgeons*, 997 F.2d at 906. Both *Public Citizen* and *Association of American Physicians & Surgeons* drew strongly worded concurring opinions along the same lines. The concurrences maintained that FACA clearly applied by its plain terms to the respective groups, but that its application was unconstitutional as so applied. The District of Columbia Circuit Court of Appeals clarified its holding in *American Physicians & Surgeons* in 2005. *In re Cheney,* 406 F.3d 723 (D.C. Cir. 2005). There, in order to avoid "severe separation-of-powers problems" in applying FACA on the basis that private parties were involved with a committee in the Executive Office of the President, the court held that for purposes of FACA "a committee is composed wholly of federal officials if the President has given no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee's decisions." *Id.* at 728.

The converse of the plain meaning rule is that it is legitimate and proper to resort to legislative history when the meaning of the statutory language is not plain on its face. *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386 (1805); *see also United States v. Donruss Co.,* 393 U.S. 297, 302-03 (1969); *Caminetti v. United States,* 242 U.S. 470, 490 (1917) (legislative history "may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation"). A classic example of the use of legislative history to resolve statutory ambiguity involved a statute using the words "science" or "scientific." Either term, without more, does not inform whether the statute applies to the social sciences as well as the physical sciences. *E.g., American Kennel Club, Inc. v. Hoey,* 148 F.2d 920, 921 (2nd Cir. 1945); B-181142, Aug. 5, 1974 (GAO recommended that the term "science and technology" in a bill be defined to avoid this ambiguity).

Although one may use legislative history to resolve ambiguities that are not clear in the statutory language, one should not use legislative history to rewrite the statute.[54] For instance, an appropriations provision barred the Air Force from using funds to lease certain aircraft "under any contract entered into under any procurement procedures other than pursuant to" the Competition in Contracting Act. In a floor statement on the bill, the provision's sponsor said that the language would require "full and open competition" for the aircraft and preclude a "sole source" award. However, CICA clearly does not require full and open competition or prohibit sole-source awards. Therefore, the Comptroller General upheld the Air Force's award of a sole-source contract. B-291805, Mar. 26, 2003. As the Comptroller General stated in an earlier case:

> "[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there."

[54] *See also Arlington Central School District v. Murphy*, 548 U.S. 291 (2006) (plaintiffs could not recover fees paid for expert witnesses, despite statement in the legislative history suggesting otherwise, as "everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered"); *Shannon v. United States*, 512 U.S. 573, 583 (1994) (declining to give effect to "a single passage of legislative history that is in no way anchored in the text of the statute"); *Ratzlaf v. United States*, 510 U.S. 135, 147–148 (1994) (declining to "resort to legislative history to cloud a statutory text that is clear"); B-307767, Nov. 13, 2006 (floor statement is not entitled to weight as legislative history when the statute is clear on its face since the statement provides an individual member's views and does not necessarily represent the meaning and purpose of the lawmaking body collectively).

55 Comp. Gen. 307, 325 (1975).

In many instances courts will consult legislative history even if a statute's meaning appears clear on its face. As the Supreme Court once stated:

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

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940). In one case, the Court found the relevant statute to be "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). Nevertheless, the Court examined the legislative history in detail to confirm that its literal reading of the statute was not absurd, illogical, or contrary to congressional intent.

b. Components and Their Relative Weight

In discussing legislative history, we will first consider use of the explanatory documents that go into it. These documents fall generally into three categories: committee reports, floor debates, and hearings. For probative purposes, they bear an established relationship to one another. Let us emphasize before proceeding, however, that listing items of legislative history in an "order of persuasiveness" is merely a guideline. The evidentiary value of any piece of legislative history depends on its relationship to other available legislative history and, most importantly, to the language of the statute.

(1) Committee reports

Committee reports are reports generated by the legislative committees during an investigation or during consideration of a bill. One such report is the joint explanatory statement, which is often called the statement of managers. This document describes the elements of the conference committee's agreement, as they relate to the House and Senate positions on the bill. *See* House Rule XXII, cl. 7(e); Senate Rule XXVIII, para. 6; B-142011, Apr. 30, 1971. A joint explanatory statement can be a particularly useful legislative history document because it describes the final bill text to which both chambers ultimately agreed. While joint explanatory statements have some value in determining congressional

intent, they do not have "the force of law." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237 (D.C. Cir. 2003).[55]

Next in the sequence of precedence are the reports of the legislative committees that considered the bill and then reported the bill out to their respective houses. The Supreme Court has been willing to refer to committee reports when appropriate. *E.g., Dart Cherokee Basin Operating Co. v. Owens*, ___ U.S. ___, 135 S. Ct. 547 (2014); *Demore v. Hyung Joon Kim,* 538 U.S. 510, 517–20 (2003); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 543–544 (2001); *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474 (1921); *United States v. St. Paul, Minneapolis & Manitoba Railway Co.,* 247 U.S. 310, 318 (1918); *Lapina v. Williams,* 232 U.S. 78, 90 (1914).

However, material in committee reports or a joint explanatory statement will not be used to controvert clear statutory language. *Squillacote,* 739 F.2d at 1218; *Hart v. United States,* 585 F.2d 1025 (Ct. Cl. 1978); B-278121, Nov. 7, 1997; B-33911, B-62187, July 15, 1948. Also, such material will not be used to add requirements that Congress did not include in the statute itself. For example, where Congress appropriates lump sum amounts without statutorily restricting the use of those funds, "a clear inference arises that it does not intend to impose legally binding restrictions, and 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. 55 Comp. Gen 307, 319 (1975); *see also Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 608 n.7 (2007); *Lincoln v. Vigil,* 508 U.S. 182, 192 (1993). Also, such material is not entitled to any weight as legislative history if the statement in the report is different from or unrelated to any language in the act itself. *Abrego Abrego v. Dow Chemical Co.,* 443 F.3d 676, 692 (9th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446 (7th Cir. 2005); B-320091, July 23, 2010, at n.4.

The following excerpt from a colloquy between Senators Armstrong and Dole demonstrates why committee reports must be used with caution:

[55] The conference committee also produces what is known as a "conference report," which contains the final text of the legislation as agreed by the conferees. It is the joint explanatory statement, not the conference report, that contains the descriptive, non-legally-binding statements that may be useful in a legislative history analysis. Stated differently, the conference report, despite its name, is more akin to the text of a bill and is not similar to a committee report produced by a committee of either chamber. *See Roeder*, 333 F.3d at 236.

> "Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?
>
> "Mr. DOLE. No.
>
> "Mr. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface . . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.
>
> . . . .
>
> "I only wish the record to reflect that this is not statutory language. It is not before us. If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.
>
> ". . . [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute."[56]

Notwithstanding the imperfections of the system, in those cases where there is a need to resort to legislative history, committee reports remain generally recognized as the best source. In this regard, Sutherland observes:

> "During the Twentieth Century, courts increasingly have turned to reports of standing committees for aid in interpretation. This movement has coincided with an improvement in the preparation of reports by standing committees and their counsel."

2A Sutherland, § 48:6, at 590 (7th ed. 2014).

(2) Floor debates

Proceeding downward in the order of precedence, after committee reports come floor debates. Statements made in the course of floor debates have traditionally been regarded as suspect, in that they are only "expressive of the views and motives of individual members." *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474 (1921). In addition:

[56] 128 Cong. Rec. 16918–19 (1982).

> "[I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other... "

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897). Some older cases, such as *Trans-Missouri Freight,* indicate that floor debates should never be taken into consideration. Under the more modern view, however, they may be considered in appropriate circumstances, with the real question being the weight the debates should receive in various circumstances.

Floor debates are less authoritative than committee reports. *Garcia v. United States,* 469 U.S. 70, 76 (1984); *Zuber v. Allen,* 396 U.S. 168, 186 (1969); *United States v. O'Brien,* 391 U.S. 367, 385 (1968); *United States v. United Automobile Workers,* 352 U.S. 567, 585 (1957). It follows that they will not be regarded if they conflict with explicit statements in more authoritative portions of legislative history, such as committee reports. *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 125 (1942); B-114829, June 27, 1975. Conversely, they will carry more weight if they are mutually reenforcing. *National Data Corp. & Subsidiaries v. United States,* 50 Fed. Cl. 24, 32, n.14 (2001), *aff'd,* 291 F.3d 1381 (Fed. Cir.), *cert. denied,* 537 U.S. 1045 (2002).

Debates will carry considerably more weight when they are the only available legislative history as, for example, in the case of a post-report floor amendment. *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,* 472 U.S. 159, 169–70 (1985); *Preterm, Inc. v. Dukakis,* 591 F.2d 121, 128 (1st Cir.), *cert. denied,* 441 U.S. 952 (1979). Indeed, the *Preterm* court suggested that "heated and lengthy debates" in which "the views expressed were those of a wide spectrum" of Members might be more valuable in discerning congressional intent than committee reports, "which represent merely the views of [the committee's] members and may never have come to the attention of Congress as a whole." *Preterm,* 591 F.2d at 133.

The weight to be given statements made in floor debates varies with the identity of the speaker. Thus, statements by legislators in charge of a bill, such as the pertinent committee chairperson, have been regarded as "in the nature of a supplementary report" and receive somewhat more weight. *United States v. St. Paul, Minneapolis & Manitoba Railway Co.,* 247 U.S. 310, 318 (1918). *See also McCaughn v. Hershey Chocolate Co.,* 283 U.S. 488, 493–94 (1931) (statements by Members "who were not in charge of the bill" were "without weight"); *Duplex v. Deering,* 254 U.S. at 474–75; *NLRB v. Thompson Products, Inc.,* 141 F.2d 794,

798 (9th Cir. 1944). The Supreme Court's statement in *St. Paul Railway Co.* gave rise to the practice of "making" legislative history by preparing questions and answers in advance, to be presented on the floor and answered by the Member in charge of the bill.[57]

Statements by the sponsor of a bill are also entitled to somewhat more weight. *E.g., Schwegmann Brothers v. Calvert Distillers Corp.,* 341 U.S. 384, 394–95 (1951); *Ex Parte Kawato,* 317 U.S. 69, 77 (1942); *Bedroc Limited v. United States,* 50 F. Supp.2d 1001, 1006 (D. Nev. 1999), *aff'd,* 314 F.3d 1080 (9th Cir. 2002). However, they are not controlling. *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 597–99 (2004); *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979).

Statements by the opponents of a bill expressing their "fears and doubts" generally receive little, if any, weight. *Shell Oil Co. v. Iowa Department of Revenue,* 488 U.S. 19, 29 (1988); *Schwegmann,* 341 U.S. at 394. However, even the statements of opponents may be "relevant and useful," although not authoritative, in certain circumstances, such as where the supporters of a bill make no response to opponents' criticisms. *Arizona v. California,* 373 U.S. 546, 583 n.85 (1963); *Parlane Sportswear Co. v. Weinberger,* 513 F.2d 835, 837 (1st Cir. 1975); *Bentley v. Arlee Home Fashions, Inc.,* 861 F. Supp. 65, 67 (E.D. Ark. 1994).

Where Senate and House floor debates suggest conflicting interpretations and there is no more authoritative source of legislative history available, it is legitimate to give weight to such factors as which house originated the provision in question and which house has the more detailed and "clear cut" history. *Steiner v. Mitchell,* 350 U.S. 247, 254 (1956); 49 Comp. Gen. 411 (1970).

(3) Hearings

Hearings are the least persuasive form of legislative history. They reflect only the personal opinion and motives of the witness. It is more often than not impossible to attribute these opinions and motives to anyone in Congress, let alone Congress as a whole, unless more authoritative forms of legislative history expressly adopt them. As one court has stated, an isolated excerpt from the statement of a witness at hearings "is not entitled to consideration in determining legislative intent." *Pacific*

[57] The origin and use of this device were explained in a floor statement by former Senator Morse on March 26, 1964. *See* 110 Cong. Rec. 6423 (1964).

Insurance Co. v. United States, 188 F.2d 571, 572 (9th Cir. 1951). "It would indeed be absurd," said another court, "to suppose that the testimony of a witness by itself could be used to interpret an act of Congress." *SEC v. Collier,* 76 F.2d 939, 941 (2nd Cir. 1935).

There is one significant exception. Testimony by the government agency that recommended the bill or amendment in question, and which often helped draft it, is entitled to special weight. *Shapiro v. United States,* 335 U.S. 1, 12 n.13 (1948); *SEC v. Collier,* 76 F.2d at 941.

Also, testimony at hearings can be more valuable as legislative history if it can be demonstrated that the language of a bill was revised in direct response to that testimony. Relevant factors include the presence or absence of statements in more authoritative history linking the change to the testimony, the proximity in time of the change to the testimony, and the precise language of the change as compared to what was offered in the testimony. *See Premachandra v. Mitts,* 753 F.2d 635, 640–41 (8th Cir. 1985). *See also Allen v. State Board of Elections,* 393 U.S. 544, 566–68 (1969); *SEC v. Collier,* 76 F.2d at 940, 941.

c. Post-enactment Statements

Observers of the often difficult task of discerning congressional intent occasionally ask, "Is there an easier way to do this? Can I just call the sponsor or the committee and ask what they had in mind?" The answer is that post-enactment statements have virtually no weight in determining prior congressional intent. The objective of statutory construction is to ascertain a collective intent, not an individual's intent or, worse yet, an individual's characterization of the collective intent. It is impossible to demonstrate that the substance of a *post hoc* statement reflects the intent of the pre-enactment Congress, unless it can be corroborated by pre-enactment statements, in which event it would be unnecessary. Or, as the Court has said:

> "Since such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct post-enactment polls of the original legislators."

Pittston Coal Group v. Sebben, 488 U.S. 105, 118–19 (1988). *See also Bruesewitz v. Wyeth LLC,* 562 U.S. 223 (2011) (asserting that post-enactment legislative history is not a legitimate tool of statutory interpretation); *Gustafson v. Alloyd Co.,* 513 U.S. 561, 580 (1995) ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."); 2A Sutherland, § 48:4, at 573-579 (7th ed. 2014) (to be considered legislative history, material should be generally available to legislators and relied on by them in passing the bill).

In expressing their unwillingness to consider post-enactment statements, courts have not viewed the identity of the speaker (sponsor, committee, committee chairman, etc.) or the form of the statement (report, floor statement, letter, affidavit, etc.) to be relevant. There are numerous cases in which the courts, and particularly the Supreme Court, have expressed the unwillingness to give weight to post-enactment statements. *See, e.g., Bread Political Action Committee v. Federal Election Commission,* 455 U.S. 577, 582 n.3 (1982); *Quern v. Mandley,* 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974); *United States v. Southwestern Cable Co.,* 392 U.S. 157, 170 (1968); *Haynes v. United States,* 390 U.S. 85, 87 n.4 (1968). *See also General Instrument Corp. v. FCC,* 213 F.3d 724, 733 (D.C. Cir. 2000) (referring to post-enactment statements as "legislative future" rather than legislative history); *Cavallo v. Utica-Watertown Health Insurance Co.,* 3 F. Supp. 2d 223, 230 (N.D. N.Y. 1998).

Courts have not found expressions of intent concerning previously enacted legislation that are made in committee reports, or floor statements during the consideration of subsequent legislation, to be relevant either. *E.g., O'Gilvie v. United States,* 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute"); *Huffman v. Office of Personnel Management,* 263 F.3d 1341, 1354 (Fed. Cir. 2001) (post-enactment statements made in the legislative history of the 1994 amendments have no bearing in determining the legislative intent of the drafters of the 1978 and 1989 legislation).

GAO follows the principle that post-enactment statements shed no useful light on legislative intent. *E.g.,* 72 Comp. Gen. 317 (1993); 54 Comp. Gen. 819, 822 (1975). One type of post-enactment statement is a presidential "signing statement", which usually takes the form of a presidential statement or press release issued in connection with the President's signing of a bill. The Office of Legal Counsel has virtually conceded that presidential signing statements fall within the realm of post-enactment statements that carry no weight as legislative history. *See* 17 Op. Off. Legal Counsel 131 (1993).[58] In 2007, GAO examined

[58] While this opinion stopped short of attempting "finally to decide" the matter, it presented several powerful arguments against the validity of signing statements as legislative history but no arguments in favor of their use for this purpose. On June 27, 2006, the Senate Judiciary Committee held a hearing on the subject of presidential signing statements. 152 Cong. Rec. 12,697 (June 27, 2006). *See also* 31 Op. Off. Legal Counsel 23 (2007).

how the federal courts have treated signing statements in their published decisions. A search of all federal case law since 1945 found fewer than 140 cases that cited presidential signing statements. In most instances the signing statements were used to supplement legislative history such as committee reports. Courts also have cited signing statements to establish the date of signing, provide a short summary of the statute, explain the purpose of the statute, or describe the underlying policy behind the statute. GAO concluded that, overall, federal courts infrequently cite or refer to signing statements in their published opinions. When cited or referred to, these signing statements appear to have little impact on judicial decision-making. B-308603, June 18, 2007, Enclosure IV, at 37. *See also* B-309928, Dec. 20, 2007, and GAO, *Presidential Signing Statements: Agency Implementation of Selected Provisions of Law*, GAO-08-553T (Washington, D.C.: Mar. 2008) for additional discussion on signing statements.

As with all other principles relating to statutory interpretation, the rule against consideration of post-enactment statements is not absolute. Even post-enactment material may be taken into consideration, despite its very limited value, when there is absolutely nothing else. *See* B-169491, June 16, 1980.

d. Development of the Statutory Language

As previously noted, examination of legislative history includes not only what the drafters of a bill said about it, but also what they did to it as the bill progressed through the enactment process. Changes made to a bill may provide insight into what the final language means. For example, the deletion from the final version of language that was in the original bill may suggest an intent to reject what was covered by that language. *See generally* 2A Sutherland, § 48:4, at 573-579 (7th ed. 2014). The same is true of language offered in an amendment that was defeated. *Id.,* § 48:8, at 634-635.

The courts consider the evolution of legislative language in different contexts. See, for example:

- *Doe v. Chao,* 540 U.S. 614, 621–23 (2004): Congress deleted from the bill language that would have provided for the type of damage award sought by the petitioner.
- *Chickasaw Nation v. United States,* 534 U.S. 84, 91 (2001): The original Senate bill applied both to taxation and to reporting and withholding. The final version applied only to reporting and withholding, thereby suggesting that a cross-reference to another law dealing with taxation was left in by error.

- *Landgraf v. USI Film Products,* 511 U.S. 244, 255–256 (1994): The President vetoed a 1990 version of a civil rights bill in part because he objected to the bill's broad retroactivity provisions. This indicates that the absence of comparable retroactivity provisions in the version of the bill enacted in 1991 was not an oversight, but rather part of a political compromise.

See also *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 423 (7th Cir. 1993); *Davis v. United States*, 46 Fed. Cl. 421 (2000).

As always, care must be exercised when interpreting language changes in a bill, particularly when the accompanying documents do not discuss them. Unless the legislative history explains the reason for the omission or deletion or the reason is clear from the context, drawing conclusions is inherently speculative. Perhaps Congress did not want that particular provision; perhaps Congress felt it was already covered in the same or other legislation. Absent an explanation, the effect of such an omission or deletion is inconclusive. *See Fox v. Standard Oil Co.,* 294 U.S. 87, 96 (1935); *Southern Packaging & Storage Co. v. United States,* 588 F. Supp. 532, 549 (D.S.C. 1984); 63 Comp. Gen. 498, 501–02 (1984); 63 Comp. Gen. 470, 472 (1984).

7. Presumptions and "Clear Statement" Rules

In a perhaps growing number of specific areas, courts apply extra scrutiny in construing statutes that they regard as departing from traditional norms of legislation. In these areas, the courts require a greater than usual showing that Congress did, in fact, mean to depart from the norm. Typically, the courts will raise the bar by imposing a "presumption" that must be overcome in order to establish that Congress intended the departure. Alternatively but to the same effect, courts sometimes require a "clear statement" by Congress that it intended the departure.

Such presumptions and clear statement rules have been described as "substantive canons" as opposed to "linguistic canons" since, rather than aiding in the interpretation of statutory language *per se,* they are designed to protect "substantive values drawn from the common law, federal statutes, or the United States Constitution."[59] A few examples are given below.

[59] William N. Eskridge, Jr., and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking,* 45 Vand. L. Rev. 593 (1992).

a. Presumption in Favor of Judicial Review

There is a "strong presumption" in favor of judicial review of administrative actions. *E.g., Demore v. Hyung Joon Kim,* 538 U.S. 510 (2003); *Immigration & Naturalization Service v. St. Cyr,* 533 U.S. 289 (2001); *McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479 (1991); *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667 (1986). In *Bowen,* the Court stated the presumption as follows:

> "We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning, 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'"

476 U.S. at 670, quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967).

The Court in *Bowen* went on to note that the presumption of reviewability can be rebutted:

> "Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action. The presumption of judicial review is, after all, a presumption, and like all presumptions used in interpreting statutes, may be overcome by, *inter alia,* specific language or specific legislative history that is a reliable indicator of congressional intent or a specific congressional intent to preclude judicial review that is fairly discernable in the detail of the legislative scheme."

Id. at 672–73 (quotation marks omitted).

Later decisions indicate that a particularly strong showing is required to establish a congressional intent to preclude judicial review of constitutional claims through *habeas corpus* petitions. *See Demore*, 538 U.S. 510; *St. Cyr,* 533 U.S. 289. Thus, the Court observed in *St. Cyr,* 533 U.S. at 299:

> "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect repeal."

Finally, it is important to note one area in which the usual presumption in favor of judicial review becomes a presumption *against* judicial review: exercises of discretion by the President. In *Franklin v. Massachusetts,* 505 U.S. 788 (1992), the Supreme Court held that the President is not an "agency" for purposes of the Administrative Procedure Act (APA); therefore, presidential actions are not subject to judicial review under the APA. The Court recognized that the general definition of "agency" in the APA (5 U.S.C. § 551(1)) covered "each authority of the Government of

the United States" and that the President was not explicitly excluded from this definition. However, the Court held:

> "Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. *We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.*"

505 U.S. at 800–801 (emphasis supplied).

Several subsequent cases have followed and extended *Franklin*. *See Dalton v. Specter,* 511 U.S. 462 (1994); *Tulare County v. Bush,* 185 F. Supp.2d 18 (D.D.C. 2001), *aff'd,* 306 F.3d 1138 (D.C. Cir. 2002), *reh'g en banc denied,* 317 F.3d 227 (D.C. Cir.), *cert. denied,* 540 U.S. 813 (2003).[60]

b. Presumption against Retroactivity

As noted previously, statutes and amendments to statutes generally are construed to apply prospectively only (that is, from their date of enactment or other effective date if one is specified). However, while Congress generally has the power to enact retroactive statutes,[61] the Supreme Court has held:

> "Retroactivity is not favored in the law. Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result."

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

The Court reaffirmed the presumption against retroactivity of statutes in several recent decisions. *E.g., AT&T Corp. v. Hulteen,* 556 U.S. 701 (2009); *Immigration & Naturalization Service v. St. Cyr,* 533 U.S. 289 (2001); *Martin v. Hadix,* 527 U.S. 343 (1999); *Lindh v. Murphy,* 521 U.S. 320 (1997); *Landgraf v. USI Film Products,* 511 U.S. 244 (1994). In

[60] This requirement of an "express statement" by Congress to subject the President to provisions of the APA does not, however, extend to judicial review of the *constitutionality* of presidential actions. *Dalton,* 511 U.S. at 469, 473–474; *Franklin,* 505 U.S. at 801.

[61] One exception is the Constitution's prohibition against "*ex post facto*" laws (U.S. Const. art. I, § 9, cl. 3), which precludes penal statutes from operating retroactively. Another exception, based on separation of powers considerations, prevents Congress from enacting laws that have the effect of requiring federal courts to reopen final judgments. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995).

Landgraf, the Court elaborated on the policies supporting the presumption against retroactivity:

> "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate."

Landgraf, 511 U.S. at 272–73.

In *Landgraf*, the Court also resolved the "apparent tension" between the presumption against retroactivity in its *Bowen* line of decisions and another decision, *Bradley v. Richmond School Board,* 416 U.S. 696 (1974).[62] *Bradley* held that when a law changes subsequent to the judgment of a lower court, an appellate court must apply the new law, that is, the law in effect when it renders its decision, unless applying the new law would produce "manifest injustice" or there is statutory direction or legislative history to the contrary. The Court affirmed that the presumption embraces statutes that have "genuinely" retroactive effect, by which it meant statutes that apply new standards "affecting substantive rights, liabilities, or duties" to conduct that occurred prior to their enactment.[63] *Landgraf,* 511 U.S. at 277–78.

By way of summary, the Court in *Landgraf* set forth the following test for determining whether the presumption against retroactivity applies:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to

[62] Previously, the Court had acknowledged but left unresolved the "apparent tension" between *Bradley* and *Bowen*. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 837 (1990).

[63] Specifically, the Court held that a provision of the Civil Rights Act of 1991 that created a new cause of action for certain civil rights violations could not be added to a lawsuit pending at the time the 1991 Act was signed into law since the conduct involved in that lawsuit occurred before the 1991 Act was enacted. On the other hand, "procedural" changes, such as provisions for jury trials in certain civil rights actions, ordinarily could apply to lawsuits pending at the time of enactment. (In this case, however, the provision for jury trial would not apply since it was limited to the newly created cause of action.)

> resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."

Id. at 280.

The Comptroller General also applies the traditional rule that statutes are not construed to apply retroactively unless a retroactive construction is required by their express language or by necessary implication or unless it is demonstrated that this is what Congress clearly intended. *See*, *e.g.*, 64 Comp. Gen. 493 (1985).

This rule was recently applied to a statute that authorized the United States Court of Appeals for Veterans Claims to reimburse its employees for a portion of their professional liability insurance payments. Since nothing in the statute or its legislative history indicated that the statute was to have retroactive effect, the Comptroller General held that the statute did not authorize reimbursement for insurance payments made prior to December 27, 2001. B-300866, May 30, 2003.

Another line of cases has dealt with a different aspect of retroactivity. GAO is reluctant to construe a statute to retroactively abolish or diminish rights that had accrued before its enactment unless this was clearly the legislative intent. For example, the Tax Reduction Act of 1975 authorized $50 "special payments" to certain taxpayers. Legislation in 1977 abolished the special payments as of its date of enactment. GAO concluded that payments could be made where payment vouchers were validly issued before the cutoff date but lost in the mail. B-190751, Apr. 11, 1978. Similarly, payments could be made to eligible claimants whose claims had been erroneously denied before the cutoff but were later found valid. B-190751, Sept. 26, 1980.

c. Federalism Presumptions

Under the Constitution's Supremacy Clause (U.S. Const. art. VI, cl. 2), Congress, when acting within the scope of its own assigned constitutional authority, can preempt state and local laws. As the Court noted in *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 604 (1991), "[t]he ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent." Specifically, Congress may preempt either by an explicit statutory provision or by establishing a federal statutory scheme that is so pervasive as to leave no

room for supplementation by the states. In either event, however, the Court stated:

> "When considering pre-emption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Mortier, 501 U.S. at 605, quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

The Court continues to apply the "clear and manifest purpose" test to preemption cases. *See City of Columbus v. Ours Garage and Wrecker Service, Inc.,* 536 U.S. 424 (2002). In *Ours Garage,* the Court construed a statute that included an explicit preemption provision; the issue concerned its scope. Acknowledging that the language could be read to preempt safety regulation by local governments, the Court refused to find preemption:

> "[R]eading [the statute's] set of exceptions in combination, and with a view to the basic tenets of our federal system pivotal in *Mortier*, we conclude that the statute does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'"

Ours Garage, 536 U.S. at 434.

There also is a presumption against construing federal statutes to abrogate the immunity from suit that states enjoy under the Eleventh Amendment to the United States Constitution. Congress must make its intent to abrogate such immunity "unmistakably clear in the language of the statute." *See Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 726 (2003); *Hoffman v. Connecticut Department of Income Maintenance,* 492 U.S. 96, 101 (1989) and cases cited. The necessary unmistakable intent to preempt was supplied by the express language of the statute in *Hibbs*, but such intent was found lacking in *Hoffman*.

d. Presumption against Waiver of Sovereign Immunity

There is a strong presumption against waiver of the federal government's immunity from suit. GAO and the courts have repeatedly held that waivers of sovereign immunity must be "unequivocally expressed." *E.g., United States v. Nordic Village, Inc.,* 503 U.S. 30 (1992); B-320998, May 4, 2011. Legislative history does not help for this purpose. The relevant statutory language in *Nordic Village* was ambiguous and could have been read, evidently with the support of the legislative history, to impose monetary liability on the United States. The Court rejected such a reading, applying instead the same approach as described above in its federalism jurisprudence:

> "[L]egislative history has no bearing on the ambiguity point. As in the Eleventh Amendment context, see *Hoffman, supra,* . . . the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."

Nordic Village, 503 U.S. at 37.

8. Resolving Conflicts Between Statutes

Though legislatures enact statutes one at a time, each enactment occurs within a wider context of laws. Often, this wider context of enactments significantly impacts the interpretation of a single statute. To give a simple example, suppose a town council enacts a statute providing that all dogs in the downtown park must be leashed. If this statute were the only one the council enacted on this subject, interpreting it will, in many circumstances, be simple. However, suppose the town council has also enacted a different statute, which provides that all poodles in the town are permitted to roam free. Though each of these two statutes standing alone is simple enough, interpreting and applying them together can be tricky if, for example, one confronts a poodle in the downtown park. Fortunately, there is a set of principles guiding the interpretation of statutes in such situations.

a. Harmonize different statutes

First, we assume that the legislature intended to enact a consistent body of law, and so we try to harmonize conflicting statutes to give full force to each of them. We do not presume that the legislature intended that a later statute repeal an existing one unless there is clear intent to do so. Another way to express this principle is that repeals by implication are disfavored. For example, Congress in 1934 enacted a statute according an employment preference for qualified Indians in the Bureau of Indian Affairs. *Morton v. Mancari*, 417 U.S. 535, 537 (1974). In 1972, Congress enacted another statute proscribing discrimination in most federal employment on the basis of race. *Id*. at 540. The appellate court held that the 1972 law implicitly repealed the 1934 law and, therefore, that the Bureau of Indian Affairs was barred from granting an employment preference to Indians. The Supreme Court reversed the lower court, holding that the 1934 law remained in full force. The Court noted that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id*. at 550. The Court stated that the 1934 and 1972 statutes "can readily co-exist" and that multiple factors indicated that Congress had no intention to repeal the 1934 statute when it acted in 1972. Id. at 551. *See also Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009).

b. More specific enactments control over more general enactments

If harmonizing different statutes and giving full force to all of them solves the issue at hand, the analysis ends there. Only when harmonization does not resolve an issue do we turn to the second principle, which is that more specific enactments control over more general ones. This is true whether the more specific provision is enacted before or after the more general one. For example, Congress enacted a statute providing that national banks could be sued only in the district in which they were established. *Radzanower v. Touche Ross & Co*., 426 U.S. 148, 150 (1976). Several years later, a different enactment provided that a plaintiff seeking redress under the Securities Exchange Act of 1934 could file suit in any district in which the defendant transacts business. *Id*. In this case a plaintiff asserted that his suit against a national bank for alleged securities violations could proceed in any district in which the bank transacted business. *Id*. The Supreme Court disagreed, concluding that the provision pertaining specifically to national banks was more specific and, therefore, that a suit alleging that a national bank violated the Securities Exchange Act could be brought only in the district in which the bank was established. *Id*. at 158. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id*. at 153 (internal quotation marks omitted). *See also Traynor v. Turnage*, 485 U.S. 535, 548 (1988).

c. Enactments later in time supersede earlier ones

If two statutes may not be harmonized and one statute is not more specific than another, there is a final principle to which we may turn, which is that a later enactment supersedes an earlier one. This is often called the "last-in-time" rule. Recall the first principle from this section, which is that we must harmonize different statutes if we can and that repeals by implication are disfavored. If we conclude that a later enactment supersedes an earlier one, then we have, in effect, concluded that the later statute implicitly repealed the earlier one. Because repeals by implication are heavily disfavored, we turn to this principle only when two statutes cannot be reconciled in any reasonable manner, and then only to the extent of the conflict. For example, a statute provided that students who lived outside of the District of Columbia could, under certain circumstances, be "taught free of charge" in District schools. *Eisenberg v. Corning*, 179 F.2d 275, 276 (1949). A later enactment provided that no appropriations "shall be used for the free instruction of pupils who dwell outside the District of Columbia." Id. The later statute made no mention of the earlier one, so there was no explicit repeal of the earlier law. However, the court held that the statutes conflicted, with "the earlier

permitting and the later prohibiting," and therefore that the later statute superseded the earlier one.[64] *Id*. at 277.

E. Agency Administrative Interpretations

> "I was gratified to be able to answer promptly, and I did. I said I didn't know."
>
> Mark Twain, *Life on the Mississippi.*

This section discusses issues that arise concerning agency interpretations of statutes and of their own regulations. This area of law has produced an enormous volume of court decisions and legal scholarship: one of the foundational cases in this area, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), has been cited over 14,000 times in other court decisions. Clearly, a thorough treatment of this subject would overwhelm our tome on appropriations law. Here we offer only a fleeting introduction to this rich and always evolving area of law. For further information we encourage the reader to consult one of the many excellent treatises that discuss both the foundations of and the most recent developments in administrative law. *See, e.g*., Kristin E. Hickman and Richard J. Pierce, Jr., *Administrative Law Treatise* (5th ed., last updated October 2015).

1. Interpretation of Statutes

When Congress vests an agency with responsibility to administer a particular statute, the agency's interpretation of that statute, by regulation or otherwise, is entitled to considerable weight. This principle is really a matter of common sense. An agency that works with a program from day to day develops an expertise that should not be lightly disregarded. Even when dealing with a new law, Congress does not entrust administration to a particular agency without reason, and this decision merits respect.

In the often-cited case of *Udall v. Tallman,* 380 U.S. 1, 16 (1965), the Supreme Court stated the principle this way:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

[64] Additional cases applying the last-in-time rule include B-303268, Jan. 3, 2005, and B-316510, July 15, 2008.

In what is now recognized as one of the key cases in determining how much "deference" is due an agency interpretation, *Chevron, Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), the Court formulated its approach to deference in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, the agency must of course comply with clear congressional intent, and regulations to the contrary will be invalidated. Thus, before you ever get to questions of deference, it must first be determined that the regulation is not contrary to the statute, a question of delegated authority rather than deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. For example, the Court declined to give *Chevron* deference, or any lesser degree of deference, to an agency interpretation that it found to be "clearly wrong" as a matter of statutory construction, since the agency interpretation was contrary to the act's text, structure, purpose, history, and relationship to other federal statutes. *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 600 (2004).

Once you cross this threshold, that is, once you determine that "the statute is silent or ambiguous with respect to the specific issue," the question becomes "whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843. The Court in *Chevron* went on to say:

> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Id. at 843–44 (footnotes omitted).

Reiterating the traditional deference concept, the Court then said that the proper standard of review is not whether the agency's construction is "inappropriate," but merely whether it is "a reasonable one." *Id.* at 844-45.

When the agency's interpretation is in the form of a regulation with the force and effect of law, the deference, as we have seen, is at its highest. The agency's position is entitled to *Chevron* deference and must be upheld unless it is arbitrary or capricious. *See also Michigan v. EPA*,

___ U.S. ___,135 S.Ct. 2699, 2707 (2015) ("[e]ven under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation") (internal citations and quotations omitted). There should be no question of substitution of judgment.[65] If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it must stand, even if the reviewing body finds some other position preferable. *See, e.g., Household Credit Services, Inc. v. Pfennig,* 541 U.S. 232 (2004). *But see King v. Burwell*, ___ U.S. ___, 135 S.Ct. 2480, 2488-89 (2015) (noting that there may be reason to hesitate in "extraordinary cases" before concluding that Congress intended an implicit delegation from Congress to the agency to fill in the statutory gaps; declining to defer to agency interpretation under *Chevron* because the question presented was "of deep economic and political significance that is central to this statutory scheme" and because it was unlikely that Congress would have delegated the decision at issue to the agency, "which has no expertise in crafting health insurance policy of this sort") (internal citations and quotations omitted). *Chevron* deference is also given to authoritative agency positions in formal adjudication. *See Immigration & Naturalization Service v. Aguirre-Aguirre,* 526 U.S. 415 (1999) (holding that a Board of Immigration Appeals statutory interpretation developed in case-by-case formal adjudication should be accorded *Chevron* deference). *But see Mellouli v. Lynch*, ___ U.S. ___, 135 S. Ct. 1980, 1989 (2015) (declining to give deference to interpretation devised by Board of Immigration Appeals "[b]ecause it makes scant sense"). For an extensive list of Supreme Court cases giving *Chevron* deference to agency statutory interpretations found in rulemaking or formal adjudication, see *United States v. Mead Corp.,* 533 U.S. 218, 231 at n.12 (2001).

When the agency's interpretation anything short of a regulation with the force and effect of law or formal adjudication, such as an interpretive regulation, manual, or handbook, the standard of review has traditionally been somewhat lessened. In the past, deference in this context has not been a fixed concept, but has been variable, depending on the interplay

[65] This is true even if the statute in question has been construed previously by a court, unless "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 982 (2005). This result stems from the policy underlying *Chevron* deference, that is, the presumption that Congress, when it leaves ambiguity in a statute, means for the agency to resolve the ambiguity, exercising whatever degree of discretion the ambiguity allows. "[I]t is for agencies, not courts, to fill statutory gaps." *Id.*

of several factors.[66] The Supreme Court explained the approach as follows in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944):

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority [*i.e.,* the statements in question were not regulations with the force and effect of law], do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

See also Young v. UPS, ___ U.S. ___, 135 S.Ct. 1338, 1352 (2015) (declining to defer to agency interpretation that conflicted with its prior litigation positions and was issued in guidance document after Supreme Court had granted *certiorari*). Courts have found that the degree of weight to be given an agency administrative interpretation varies with several factors:

- The nature and degree of expertise possessed by the agency. *Barnhart v. Walton,* 535 U.S. 212, 222, 225 (2002).
- The duration and consistency of the interpretation. *Good Samaritan Hospital v. Shalala,* 508 U.S. 402, 417 (1993).
- The soundness and thoroughness of reasoning underlying the position. *Skidmore,* 323 U.S. at 140; *Arriaga v. Florida Pacific Farms, L.L.C.,* 305 F.3d 1228, 1239 (11th Cir. 2002);
- Evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position. *United States v. American Trucking Ass'n,* 310 U.S. 534, 549–50 (1940).

"[I]ncreasingly muddled" Supreme Court decisions on the scope of *Chevron* have left unclear the amount of deference due less formal

[66] The basic premise that an agency interpretation is entitled to some largely undefined degree of deference had consistently been espoused by the Supreme Court for well over a century and a half. *See, e.g., Chrysler Corp. v. Brown,* 441 U.S. 281, 315 (1979); *Batterton v. Francis,* 432 U.S. 416, 424–25 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 141 (1976) (referring to the quoted passage from *Skidmore, infra text,* as the "most comprehensive statement of the role of interpretative rulings"); *United States v. Philbrick,* 120 U.S. 52, 59 (1887); *Hahn v. United States,* 107 U.S. 402, 406 (1882); *United States v. Pugh,* 99 U.S. 265, 269 (1878); *United States v. Moore,* 95 U.S. 760, 763 (1877); *Edwards' Lessee v. Darby,* 25 U.S. (12 Wheat.) 206, 210 (1827).

pronouncements like interpretive rules and informal adjudications.[67] In 2000, the Supreme Court appeared to resolve the issue of how much deference was due these less formal pronouncements. The Court held that interpretations that "lack the force of law" (such as those in "policy statements, agency manuals, and enforcement guidelines") are only entitled to respect under *Skidmore* to the extent that those interpretations have the "power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 586-87 (2000). However, the Supreme Court later clarified this position in *Mead Corp.,* 533 U.S. 218, holding that *Chevron* deference may extend to statutory interpretations beyond those contained in legislative rules and adjudications where there is "some other indication of a comparable congressional intent" to give such interpretations the force of law.

More recent decisions further indicate that *Chevron* deference may extend beyond legislative rules and formal adjudications. Most notably, the Court observed in *dicta* in *Barnhart v. Walton,* 535 U.S. at 221-22 that *Mead Corp*. "denied [any] suggestion" in *Christensen* that *Chevron* deference was limited to interpretations adopted through formal rulemaking. Rather, the Court noted that while *Mead Corp.* indicated that "whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue," the presence or absence of notice-and-comment rulemaking was not dispositive. The *Barnhart* opinion went on to say that:

> "In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."

Id. at 222. *See also General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581 (2004); *Edelman v. Lynchburg College,* 535 U.S. 106, 114 (2002). Two additional decisions are instructive in terms of the limits of *Chevron*. In both cases the Court found that the issuances containing agency statutory interpretations were entitled to some weight, but not *Chevron* deference. *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,* 541 U.S. 1 (2004) (agency advisory opinion); *Alaska Department*

[67] Kristin E. Hickman and Richard J. Pierce, Jr., *Administrative Law Treatise,* § 3.5 (5th ed., last updated October 2015).

of Environmental Conservation v. EPA, 540 U.S. 461 (2004) (internal agency guidance memoranda). As two legal scholars note:

> "After *Mead*, it is possible to know only that legislative rules and formal adjudications are always entitled to *Chevron* deference, while less formal pronouncements like interpretative rules and informal adjudications may or may not be entitled to *Chevron* deference. The deference due a less formal pronouncement seems to depend on the results of judicial application of an apparently open-ended list of factors that arguably qualify as 'other indication[s] of a comparable congressional intent' to give a particular type of agency pronouncement the force of law."

Hickman and Pierce, *Administrative Law Treatise*, at § 3.5.

For illustrations of how GAO has applied the deference principle in decisions, see:

- 69 Comp. Gen. 274 (1990) (denying an offeror's protest, as the Defense Personnel Support Center's long-standing interpretation of a statutory provision pertaining to Department of Defense food procurements is entitled to deference).
- B-286800, Feb. 21, 2001 (denying an offeror's protest, as the Department of Defense's interpretation of its own regulation was entitled to great weight).

The deference principle does not apply to an agency's interpretation of a statute that is not part of its program or enabling legislation, where the statute is of general applicability, or when an agency resolves a conflict between its statute and another statute. *See Adams v. SEC,* 287 F.3d 183 (D.C. Cir. 2002); *Contractor's Sand & Gravel, Inc. v. Federal Mine Safety & Health Review Commission,* 199 F.3d 1335 (D.C. Cir. 2000); *Association of Civilian Technicians v. Federal Labor Relations Authority,* 200 F.3d 590 (9th Cir. 2000). In at least one "split-jurisdiction" situation, where multiple agencies shared specific statutory responsibility, the Supreme Court held that *Chevron* deference is due to the primary executive branch enforcer and the agency accountable for overall administration of the statutory scheme. *Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144 (1991). However, the Court was careful to limit its holding to that particular case and stated that "we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure." *Id*. at 158. *See also Collins v. National Transportation Safety Board,* 351 F.3d 1246 (D.C. Cir. 2003) (extending the holding in *Martin*).

As noted above, a regulation with the force and effect of law merits *Chevron* deference. In this connection, it is necessary to elaborate somewhat on one of the tests in *Chrysler Corp. v. Brown,* 441 U.S. 281 (1979)—that the regulation be issued pursuant to a statutory grant of 'legislative' (*i.e.,* rulemaking) authority. Congress may, of course, specifically authorize an agency to promulgate a rule on a specific subject; this constitutes a statutory grant of legislative authority. *See Chrysler*, 441 U.S. at 302-03 (explicit delegation to SEC under 15 U.S.C. § 78n to issue proxy rules). However, the statutory grant of legislative authority need not be so specific. The Court stated that "what is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Chrysler,* 441 U.S. at 308. For example, the Secretary of the Treasury has general authority to "prescribe all needful rules and regulations" to administer the Internal Revenue Code. 26 U.S.C. § 7805. The Court has given *Chevron* deference to IRS regulations issued through notice and comment rulemaking under the general authority of section 7805. *Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue,* 523 U.S. 382 (1998).

We began this chapter by noting the increasing role of agency regulations in the overall scheme of federal law. We conclude this discussion with the observation that this enhanced role makes continued litigation on the issues we have outlined inevitable. The proliferation and complexity of case law perhaps lends credence to Professor Davis's mild cynicism:

> "Unquestionably one of the most important factors in each decision on what weight to give an interpretative rule is the degree of judicial agreement or disagreement with the rule."

2 Administrative Law Treatise § 7:13 (2d ed. 1979).

2. Interpretation of Agency's Own Regulations

The principle of giving considerable deference to the administering agency's interpretation of a statute applies at least with equal force to an agency's interpretation of its own regulations. The Supreme Court has stated that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

Perhaps the strongest statement is found in a 1945 Supreme Court decision, *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413–14 (1945):

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[68]

The Court reaffirmed this principle in *Auer v. Robbins*, 519 U.S. 452 (1997). *See also* 72 Comp. Gen. 241 (1993); 57 Comp. Gen. 347 (1978); 56 Comp. Gen. 160 (1976); B-279250 (May 26, 1998). Although *Auer* calls for deference to an agency's interpretation of its own ambiguous regulation, this general rule does not apply in all cases. For example, deference may be unwarranted where an agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question, such as when it conflicts with a prior interpretation or appears to be nothing more than a "convenient litigating position" or *post hoc* rationalization advanced by an agency seeking to defend past action against attack. *Christopher v. SmithKline Beecham Corp*, ___ U.S. ___, 132 S. Ct. 2156, 2166-67 (2012). Furthermore, "[e]ven in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says" and "[m]orever, *Auer* deference is not an inexorable command in all cases". *Perez v. Mortgage Bankers Association*, ___ U.S. ___, 135 S. Ct. 1199, 1208 n.4 (2015).

A good illustration of how all of this can work is found in B-222666, Jan. 11, 1988. The Defense Security Assistance Agency (DSAA) was responsible for issuing instructions and procedures for Foreign Military Sales (FMS) transactions.[69] These appear in the Security Assistance Management Manual. A disagreement arose between DSAA and an Army operating command as to whether certain "reports of discrepancy," representing charges for nonreceipt by customers, should be charged to

[68] While this determines the controlling interpretation, the propriety of that interpretation does not automatically follow. *Seminole Rock,* 325 U.S. at 414. *See also*, *Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 780 (10th Cir. 1998) ("*Seminole Rock* review only establishes that an agency's administrative action is a permissible construction of its own regulatory authority; it does not establish that the regulation, as interpreted, is statutorily authorized").

[69] DSAA has since been renamed and is now the Defense Security Cooperation Agency. National Archives and Records Administration, Office of the Federal Register, *United States Government Manual 2012* (Washington, D.C.: July 1, 2012), at 552.

the FMS trust fund (which would effectively pass the losses on to all FMS customers) or to Army appropriated funds. DSAA took the latter position. GAO reviewed the regulation in question, and found it far from clear on this point. The decision noted that "both of the conflicting interpretations in this case appear to have merit, and both derive support from portions of the regulation." However, while the regulation may have been complex, the solution to the problem was fairly simple. DSAA wrote the regulation and GAO, citing the standard from the *Bowles* case, could not conclude that DSAA's position was plainly erroneous or inconsistent with the regulation. Therefore, DSAA's interpretation must prevail.

Just as with the interpretation of statutes, inconsistency in the application of a regulation will significantly diminish the deference courts are likely to give the agency's position. *E.g., Western States Petroleum Ass'n v. EPA,* 87 F.3d 280 (9th Cir. 1996); *Murphy v. United States,* 22 Cl. Ct. 147, 154 (1990). In addition, the text of a regulation must fairly support the agency's interpretation. *See Christensen v. Harris County,* 529 U.S. 576, 588 (2000). No *Seminole Rock-Auer* deference is warranted if the plain and unambiguous language of the regulation is at odds with the agency's interpretation. *Id*. In such a case, the agency's "interpretation" really amounts to a *de facto* amendment of the regulation.

An agency's interpretation of its own regulation is entitled to deference only when the regulation interpreted is itself a product of the agency's expertise and authority in a given area. For example, the Attorney General issued an interpretive rule stating that assisting suicide was not a "legitimate medical purpose" for which doctors could prescribe drugs, and doctors doing so would violate the Controlled Substance Act (CSA). *Gonzales v. Oregon,* 546 U.S. 243 (2006). The Court concluded that the interpretive rule was not a product of the Attorney General's experience or expertise. To the contrary, the rule did "little more than restate the terms of the statute itself." *Id*. at 257. Accordingly, the rule merited no judicial deference.