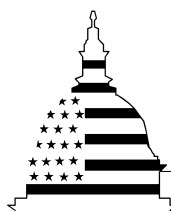


March 2007

PRINCIPLES OF
FEDERAL
APPROPRIATIONS
LAW

Annual Update of the
Third Edition



G A O

Accountability * Integrity * Reliability

Preface

We are pleased to present the annual update of the third edition of Volumes I and II of *Principles of Federal Appropriations Law*. Our objective in this publication is to present a cumulative supplement to the published third edition text that includes all relevant decisions from January 1 to December 31, 2006. After Volume III is published, the third edition of *Principles* will be complete and all three volumes will be updated annually.

The annual update is posted electronically on GAO's Web site (www.gao.gov) under "GAO Legal Products." These annual updates are not issued in hard copy and should be used as electronic supplements. Users should retain hard copies of the third edition volumes and refer to the cumulative updates for newer material. The page numbers identified in the annual update as containing new material are the page numbers in the hard copy of the third edition and the new, updated information appears as **bolded text**.

Volume 1

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Purpose

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Chapter 8 – Continuing Resolutions
(no updates this year)

Chapter 9 – Liability and Relief of Accountable
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Chapter 10 – Federal Assistance: Grants and
Cooperative Agreements

Chapter 11 – Federal Assistance: Guaranteed
and Insured Loans
(no updates this year)

Forward

Page i – Insert the following as footnote number 1 at the end of the first paragraph (after “GAO Legal Products.”):

¹ Section 8 of the GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811, 814 (July 7, 2004), 31 U.S.C. § 702 note, changed GAO’s name to the “Government Accountability Office.” This change was made to better reflect GAO’s current mission. See S. Rep. No. 108-216, at 8 (2003); H.R. Rep. No. 108-380, at 12 (2003). Therefore, any reference in this volume to the “General Accounting Office” should be read to mean “Government Accountability Office.” The acronym “GAO” as used in the text now refers to the Government Accountability Office.

Introduction

B. The Congressional “Power of the Purse”

Page 1-4 – *Replace footnote 6 with the following:*

⁶ Numerous similar statements exist. *See, e.g., Knote v. United States*, 95 U.S. 149, 154 (1877); ***Marathon Oil Co. v. United States*, 374 F.3d 1123, 1133–34 (Fed. Cir. 2004), cert. denied, 544 U.S. 1031 (2005); *Gowland v. Aetna*, 143 F.3d 951, 955 (5th Cir. 1998); *Hart’s Case*, 16 Ct. Cl. 459, 484 (1880), *aff’d*, *Hart v. United States*, 118 U.S. 62 (1886); *Jamal v. Travelers Lloyds of Texas Insurance Co.*, 131 F. Supp. 2d 910, 919 (S.D. Tex. 2001); *Doe v. Mathews*, 420 F. Supp. 865, 870–71 (D. N.J. 1976).**

Page 1-5 – *Insert the following after the second paragraph:*

For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. ___, 126 S. Ct. 1297 (2006), the Supreme Court reversed a lower court decision, 390 F.3d 219 (3rd Cir. 2004), and upheld the constitutionality of the so-called “Solomon Amendment.” Originally enacted as an appropriation rider and now codified as amended at 10 U.S.C. § 983, the Solomon Amendment generally prohibits the receipt of certain federal funds by institutions of higher education that deny military recruiters the same access they provide to other recruiters on their campuses. The Forum for Academic and Institutional Rights (FAIR), an association of law schools and faculty members, maintained that the Solomon Amendment attached an unconstitutional condition to their receipt of federal funds and, thus, exceeded congressional constitutional authority under the so-called “Spending Clause” in article I, section 8. Specifically, FAIR alleged that the statute violated their First Amendment rights to oppose federal policies regarding homosexuals in the military. In an 8–0 opinion by Chief Justice Roberts, the Supreme Court rejected these arguments. Quoting from *Grove City College v. Bell*, 465 U.S. 555, 575–76 (1984), the Court noted that under the Spending Clause, “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obliged to accept.” 126 S. Ct. at 1306. In essence, the Court reasoned that funding conditions such as the Solomon Amendment cannot violate the Spending Clause if Congress could constitutionally impose the same requirements through direct legislation. The Court went on to hold that Congress could enact legislation that directly mandated the Solomon Amendment’s requirements without running afoul of the First Amendment. *Id.* at 1307. The Court observed

that Congress could use its authority under article I, section 8, clauses 1 and 12–13 of the Constitution to provide for the common defense and to raise and support armies, *etc.*, as a basis for directly legislating the Solomon Amendment’s requirements for equal access by military recruiters so long as the legislation was otherwise constitutional. It then held that the Solomon Amendment’s requirements did not implicate First Amendment rights, dismissing each of FAIR’s arguments to the contrary. The opinion stated by way of summary:

“The Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or not *say*.”

Id. at 10 (emphasis in original).

Page 1-9 – *Replace the first paragraph with the following:*

In *Kansas v. United States*, 214 F.3d 1196, 1201–02, n.6 (10th Cir.), *cert. denied*, 531 U.S. 1035 (2000), the court noted that there were few decisions striking down federal statutory spending conditions.⁹ However, there are two recent interesting examples of situations in which courts invalidated a spending condition on First Amendment grounds. In *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), a conditional provision (contained in the annual appropriations for the Legal Service Corporation (LSC) since 1996) was struck down as inconsistent with the First Amendment. This provision prohibited LSC grantees from representing clients in efforts to amend or otherwise challenge existing welfare law. The Supreme Court found this provision interfered with the free speech rights of clients represented by LSC-funded attorneys.¹⁰ In *American Civil Liberties Union (ACLU) v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the court declared unconstitutional an appropriation provision forbidding the use of federal mass transit grant funds for any activity that promoted the legalization or medical use of marijuana, for example, posting an advertisement on a bus. Relying on *Legal Services Corp.*, the court held that the provision constituted “viewpoint discrimination” in violation of the First Amendment. *ACLU*, 319 F. Supp. 2d at 83–87.

Page 1-10 – *Insert the following after the first partial paragraph:*

There have been some recent court cases upholding congressional actions attaching conditions to the use of federal funds that require states to waive their sovereign immunity from lawsuits under the Eleventh Amendment. In these cases, courts found the condition a legitimate exercise of Congress’s spending power. For example, the court in *Barbour v. Washington Metropolitan Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 904 (2005), upheld a statutory provision known as the “Civil Rights Remedies Equalization Act,” 42 U.S.C. § 2000d-7, which clearly conditioned a state’s acceptance of federal funds on its waiver of its Eleventh Amendment immunity to suits under various federal antidiscrimination laws. Among other things, the court rejected an argument based on *Dole* that the condition was not sufficiently related to federal spending. The opinion observed that the Supreme Court has never overturned Spending Clause legislation on “relatedness grounds.” *Barbour*, 374 F.3d at 1168.

Similarly, two courts rejected challenges to section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1, which limits restrictions on the exercise of religion by persons institutionalized in a program or activity that receives federal financial assistance. *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003). In *Charles*, the court held that RLUIPA “falls squarely within Congress’ pursuit of the general welfare under its Spending Clause authority.” *Charles*, 348 F.3d at 607. The court also rejected the argument that the statute’s restrictions could not be related to a federal spending interest because the state corrections program at issue received less than 2 percent of its budget from federal funding: “Nothing within Spending Clause jurisprudence, or RLUIPA for that matter, suggests that States are bound by the conditional grant of federal money only if the State receives or derives a certain percentage . . . of its budget from federal funds.” *Id.* at 609.

Page 1-10 – *Replace the second paragraph with the following:*

For some additional recent cases upholding statutory funding conditions, see *Biodiversity Associates v. Cables*, 357 F.3d 1152 (10th Cir.), *cert. denied*, 543 U.S. 817 (2004) (upholding an appropriations

rider that explicitly superseded a settlement agreement the plaintiffs had reached with the Forest Service in environmental litigation); *Kansas v. United States*, 214 F.3d 1196 (10th Cir.), *cert. denied*, 531 U.S. 1035 (2000) (upholding the statutory requirement conditioning receipt of federal block grants used to provide cash assistance and other supportive services to low income families on a state’s participation in and compliance with a federal child support enforcement program); *Litman*, 186 F.3d 544 (state university’s receipt of federal funds was validly conditioned upon waiver of the state’s Eleventh Amendment immunity from federal antidiscrimination lawsuits); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (acknowledging that although it originally agreed to the condition for receipt of federal Medicaid funds on state provision of emergency medical services to illegal aliens, California now viewed that condition as coerced because substantial increases in illegal immigration left California with no choice but to remain in the program to prevent collapse of its medical system; the complaint was dismissed for failure to state a claim upon which relief could be granted); and *Armstrong v. Vance*, 328 F. Supp. 2d 50 (D.D.C. 2004) and *Whatley v. District of Columbia*, 328 F. Supp. 2d 15 (D.D.C. 2004), *aff’d*, 447 F.3d 814 (D.C. Cir. 2006) (two related decisions upholding appropriations provisions that imposed a cap on the District of Columbia’s payment of attorney fees awarded in litigation under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1490). See also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 Cornell L. Rev. 1 (Nov. 2003), an article that provides more background on this general subject.

Page 1-12 – Replace the second bullet in the first paragraph with the following:

- Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341 (Antideficiency Act). **GAO has said that because the Antideficiency Act is central to Congress’s core constitutional power of the purse, GAO will not interpret general language in another statute, such as the “notwithstanding any other provision of law” clause, to imply a waiver of the Act without some affirmative expression of congressional intent to give the agency the authority to obligate in advance or in excess of an appropriation. B-303961, Dec. 6, 2004.**

D. “Life Cycle” of an Appropriation

3. Budget Execution and Control

Page 1-34 – *Insert the following after the first partial paragraph:*

In 2006, GAO reported to Congress that in 13 instances executive agencies had impounded funds that the President had proposed for cancellation. [B-308011, Aug. 4, 2006](#); [B-307122.2, Mar. 2, 2006](#). When the President proposed cancellation of these funds, the Administration had not submitted reports of impoundments under the Impoundment Control Act because, officials explained, the Administration was not withholding funds from obligation. In all 13 instances, the agencies released impounded funds as a result of GAO’s inquiries. *Id.*

E. The Role of the Accounting Officers: Legal Decisions

2. Decisions of the Comptroller General

Page 1-42 – *Replace the third full paragraph with the following:*

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). Congress gave the director of OMB the authority to delegate this function to such agency or agencies as he deemed appropriate. *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).

Page 1-42 – Replace the fourth full paragraph with the following:

Other areas where the Comptroller General will decline to render decisions include questions concerning which 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 B-266193, Feb. 23, 1996; 56 Comp. Gen. 587, 591 (1977); B-226599.2, Nov. 3, 1988 (nondecision letter).**

the minimal costs entailed in complying with the access request and concluded that “there is no ‘irreconcilable conflict’ between prohibiting the use of federal funds to process the request and granting the City access to the databases.” *Id.* After the 2004 decision, the agency filed a request for rehearing. Before the rehearing, Congress passed the Consolidated Appropriations Act of 2005 specifying that no funds be used to provide the data sought by the City, and further provided that the data be “immune from judicial process.” Pub. L. No. 108-447, div. B, title I, 118 Stat. 2809, 2859 (Dec. 8, 2004). The court determined that this statutory language showed that Congress’s “obvious intention . . . was to cut off all access to the databases for any reason.” *City of Chicago v. Department of the Treasury*, 423 F.3d 777, 780 (7th Cir. 2005).

The second case, *City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51 (E.D. N.Y. 2004), concerned access to firearms information that was subject to the same appropriations language for fiscal year 2004 in Public Law 108-199. In this case, the demand for access took the form of subpoenas seeking discovery of the records in a tort suit by the City of New York and others against firearms manufacturers and distributors. The court in *City of New York* denied the agency’s motion to quash the subpoenas, which was based largely on the appropriations language. The court held that the appropriations language, which prohibited public disclosure, was inapplicable by its terms since discovery could be accomplished under a protective order that would keep the records confidential. *City of New York*, 222 F.R.D. at 56–65.

D. Statutory Interpretation: Determining Congressional Intent

1. The Goal of Statutory Construction

Page 2-74 – *Insert the following after the first full paragraph:*

Of course, there are those rare occasions when two statutory provisions are just irreconcilable. Even then there is a statutory construction principle called the “last-in-time” rule. For example, in [B-303268, Jan. 3, 2005](#), at issue was what Congress intended in enacting a “notwithstanding” clause in the State Department’s fiscal year 2004 appropriations. Congress had appropriated a lump sum of \$35 million to the Economic Support Fund for assistance to Lebanon, available “notwithstanding any other provision of law.” Pub. L. No. 108-7, div. E, title V, § 534(a), 117 Stat. 11, 193 (Feb. 20, 2003). Five months earlier, in the 2003 Foreign Relations Authorization Act, Congress had included a provision, “notwithstanding any other provision of law,” restricting from obligation \$10 million “made available in fiscal year 2003 or any subsequent fiscal year” to the Economic Support Fund for assistance to Lebanon until the President submitted certain findings to Congress. Pub. L. No. 107-228, § 1224, 116 Stat. 1350, 1432 (Sept. 30, 2002). The two “notwithstanding” clauses presented an irreconcilable conflict that GAO resolved by applying the “last-in-time” rule of construction—that is, we presume that the later-enacted statute represents Congress’s current expression of the law (*i.e.*, Congress’s “last word”). Consequently, the “notwithstanding” clause of the appropriation act superseded the authorization act’s “notwithstanding” clause. However, in this case the appropriation act’s “notwithstanding” clause had effect only for fiscal year 2004. The authorization act’s clause was permanent law. Thus the appropriation act’s clause superseded the authorization act’s clause *only* for fiscal year 2004, unless similar appropriation act provisions were enacted for subsequent fiscal years.

2. The “Plain Meaning”
Rule

Page 2-74 – Replace the second full paragraph with the following:

By far the most important rule of statutory construction is this: You start with the language of the statute. Countless judicial decisions reiterate this rule. *E.g., 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); *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’n*, 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.”

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

Page 2-80 – Insert the following after the first paragraph:

The Supreme Court’s recent decision in *Lamie v. United States Trustee*, 540 U.S. 526 (2004), contained an interesting discussion of drafting errors and what to do about them. For reasons that are described at length in the opinion but need not be repeated here, the Court found an “apparent legislative drafting error” in a 1994 statute. *Lamie*, 540 U.S. at 530. Nevertheless, the Court held that the amended language must be applied according to its plain terms. While the Court in *Lamie* 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.

Page 2-82 – Insert the following after the third paragraph:

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 *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).

4. Statutory Aids to
Construction

Page 2-84 – Replace the first full paragraph with the following:

Occasionally, the courts use the Dictionary Act to **assist in resolving** questions of interpretation. *E.g.*, ***Gonzalez v. Secretary for the Department of Corrections*, 366 F.3d 1253, 1263–64 (11th Cir. 2004) (applying the Dictionary Act’s general rule that “words importing the singular include and apply to several persons, parties, or things,” 1 U.S.C. § 1); *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002) (an aircraft is not a “vehicle” for purposes of the USA PATRIOT Act); *United States v. Belgarde*, 148 F. Supp. 2d 1104 (D. Mont.), *aff’d*, 300 F.3d 1177 (9th Cir. 2002) (a government agency, which the defendant was charged with burglarizing, is not a “person” for purposes of the Major Crimes Act). Courts also hold on occasion that the Dictionary Act does not apply. See *Rowland v. California Men’s Colony*, 506 U.S. 194 (1993) (context refutes application of the title 1, United States Code, definition of “person”); ***United States v. Ekanem*, 383 F.3d 40 (2nd Cir. 2004) (“victim” as used in the Mandatory Victims Restitution Act (MVRA) is not limited by the default definition of “person” in the Dictionary Act since that definition does not apply where context of MVRA indicates otherwise).****

Page 2-84 – Replace the last paragraph with the following:

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

(codifying title 31 of the United States Code). **See also *Scheidler v. National Organization for Women*, ___ U.S. ___, 126 S. Ct. 1264 (2006); 69 Comp. Gen. 691 (1990).**⁷⁵

5. Canons of Statutory Construction

Page 2-86 - Replace the first full paragraph with the following:

Like all other courts, the Supreme Court follows this venerable canon. *E.g., United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) (“it is, of course, true that statutory construction ‘is a holistic endeavor’ and that the meaning of a provision is ‘clarified by the remainder of the statutory scheme’ ”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995) (“the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout”); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“[a]mbiguity is a creature not of definitional possibilities but of statutory context”). **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”).**

Page 2-87 - Add the following bullet to the first full paragraph and revise the second bullet as follows:

- **B-302335, Jan. 15, 2004:** When read as a whole, the Emergency Steel Loan Guarantee Act of 1999, 15 U.S.C. § 1841 note, clearly appropriated loan guarantee programs funds to the Loan Guarantee Board and not the Department of Commerce.
- **B-303961, Dec. 6, 2004:** 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. **See 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).

Page 2-88 - Add the following bullets to the first paragraph:

- ***Hibbs v. Winn*, 542 U.S. 88, 101 (2004): “The rule against superfluities complements the principle that courts are to interpret the words of a statute in context.”**
- ***Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004): A statute should be construed so that, “if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”**

Page 2-88 - Replace the last paragraph as follows:

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. *E.g., Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (emphasis in original): “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.’” **Citing *Chickasaw Nation*, the Court also recently 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).**

Page 2-89 - Replace the first and second paragraphs with the following:

When words used in a statute are not specifically defined, they are generally given their “plain” or ordinary meaning rather than some obscure usage. *E.g., 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); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994); *Mallard v. United States*, 490 U.S. 296, 301 (1989); B-261193, Aug. 25, 1995; 70 Comp. Gen. 705 (1991); 38 Comp. Gen. 812 (1959).

One commonsense way to determine the plain meaning of a word is to consult a dictionary. *E.g.*, *Mallard*, 490 U.S. at 301; *American Mining Congress v. EPA*, 824 F.2d 1177, 1183–84 & n. 7 (D.C. Cir. 1987). 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](#).

Page 2-90 - Replace the second full paragraph with the following:

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, 594–96 and fn. 8 (2004) (quoting the same law review passage, which it notes “has become a staple of our opinions”). 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”).

Page 2-93 - Replace the first full paragraph with the following:

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*, 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.”

Page 2-94 - Replace the first full paragraph with the following:

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, 242 (2004)** (“A statute’s caption . . . cannot undo or limit its text’s plain meaning”). ***See also Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 308–09 (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. ***See also McConnell v. Federal Election Commission*, 540 U.S. 93, 180 (2003)**.

Page 2-94 - Replace the second full paragraph with the following:

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:

“[T]he settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms. In case any doubt arises in the enacted part, the preamble may be resorted to to help discover the intention of the law maker.”

2A Sutherland, § 47:04 at 221–22.⁸⁰ **For a recent example in which the Court used statutory findings to inform its interpretation of congressional intent, see *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 589–91 (2004).**

6. Legislative History

Page 2-96 - Replace footnote number 81 with the following:

⁸¹ 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 concurring opinions 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.**

Page 2-97 - Replace the second full paragraph with the following:

The use becomes improper when the line is crossed from using legislative history to resolve things that are not clear in the statutory language to using it to rewrite the statute. *E.g.*, *Shannon v. United States*, 512 U.S. 573, 583 (1994) (declining to give effect to “a single passage of legislative history that is no way anchored in the text of the statute”); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (declining to “resort to legislative history to cloud a statutory text that is clear”); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (noting that “when the legislative history stands by itself, as a naked expression of ‘intent’ unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer”). The Comptroller General put it this way:

Page 2-99 - Replace the second full paragraph with the following:

However, material in committee reports, even a conference report, will ordinarily 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 is not entitled to any weight as legislative history if the statement in the report is unrelated to any language in the act itself. *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

An interesting example of the weight accorded report language which alters the plain meaning and effect of the statutory language is in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. ___, 126 S. Ct. 2455 (2006). In this case the issue was whether a provision of the Individuals with Disabilities Education Act (IDEA) authorizing the award of attorney fees and costs to parents who prevailed in lawsuits under the act extended to costs incurred for experts. The Court approached the issue by noting that the conditions Congress attaches to the receipt of federal funds by states are contractual in nature and must therefore be expressed “unambiguously” in order to give states adequate notice of what they are accepting. *Arlington Central*, 126 S. Ct. at 2459. It went on to hold that the IDEA statute did not clearly indicate that expert fees were covered by its fee-shifting provision. On the contrary, the Court concluded that the language

of the fee-shifting provision and other IDEA provisions strongly suggested that expert fees were not covered. The Court was influenced by the judicial rule that the term “costs” in fee-shifting provisions is a term of art that generally does not include expert fees. *Id.* The most striking aspect of the Court’s opinion was its rejection of legislative history from the conference report that explicitly stated the intent to include expert costs in IDEA’s fee-shifting provision. The conference report, quoted in the opinion at 126 S. Ct. 2463, could not have been clearer: “The conferees intend that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.” Nevertheless, the Court concluded:

“Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for respondents’ position. Under these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough.”

Id. Thus, the conference report statement could not make up for the absence of any statutory language making expert fees reimbursable. *Cf. 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).

Page 2-102 - Replace the first full paragraph with the following:

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). 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).

Page 2-105 - Replace footnote 85 with the following:

⁸⁵ 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. Background on the hearing, including witness statements, can be found at <http://judiciary.senate.gov/hearingcfm?id=1969> (last visited Feb. 1, 2007).**

Page 2-105 - *Add the following to the third full paragraph:*

- ***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.**

***See also F. Hoffman-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 423 (7th Cir. 1993); *Davis v. United States*, 46 Fed. Cl. 421 (2000).**

7. Presumptions and
“Clear Statement” Rules

Page 2-113 - *Replace the first full paragraph with the following:*

There is a strong presumption against waiver of the federal government’s immunity from suit. 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); ***Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004), cert. denied, 544 U.S. 1031 (2005); *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 51 Fed. Cl. 60 (2001), *aff’d*, 364 F.3d 1339 (Fed. Cir. 2004), cert. denied, 544 U.S. 973 (2005).** 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.

Agency Regulations and Administrative Discretion

A. Agency Regulations **Page 3-2 – Replace the second paragraph with the following:**

As a conceptual starting point, agency regulations fall into three broad categories. First, every agency head has the authority, largely inherent but also authorized generally by 5 U.S.C. § 301,¹ to issue regulations to govern the internal affairs of the agency. Regulations in this category may include such subjects as conflicts of interest, employee travel, and delegations to organizational components. This statute is nothing more than a grant of authority for what are called “housekeeping” regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979); *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998), *cert. denied*, 528 U.S. 826 (1999); *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). It confers “administrative power only.” *United States v. George*, 228 U.S. 14, 20 (1913); **B-302582, Sept. 30, 2004**; 54 Comp. Gen. 624, 626 (1975). Thus, the statute merely grants agencies authority to issue regulations that govern their own internal affairs; it does not authorize rulemaking that creates substantive legal rights. *Schism v. United States*, 316 F.3d 1259, 1278–84 (Fed. Cir. 2002), *cert. denied*, **539 U.S. 910 (2003)**.

1. The Administrative Procedure Act

Page 3-6 – Replace the cite after the quoted language carried over from page 3-5 with the following paragraph:

Richard J. Pierce, Jr., *Administrative Law Treatise*, § 7.4 at 442 (4th ed. 2000) (citations omitted). **Two decisions make clear that the courts will insist upon at least some ascertainable and coherent rationale: *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (the court remanded a rule to the agency because it was “frankly, stunned to find” that the agency had provided “*not one word* in the proposed or final rule” (emphasis in original) to explain a key aspect of its rule), and *International Union, United Mine Workers of America v. Department of Labor*, 358 F.3d 40, 45 (D.C. Cir. 2004) (finding that the agency’s stated rationale to withdraw a proposed rule was disjointed and conclusory, the court returned the matter to the agency “so that it may either proceed with the . . . rulemaking or give a reasoned account of its decision not to do so”).**

Page 3-9 – Replace the second full paragraph with the following:

As a starting point, anything that falls within the definition of a “rule” in 5 U.S.C. § 551(4) and for which formal rulemaking is not required, is subject to the informal rulemaking procedures of 5 U.S.C. § 553 unless exempt. This statement is not as encompassing as it may seem, since section 553 itself provides several very significant exemptions. These exemptions, according to a line of decisions by the U.S. Court of Appeals for the District of Columbia Circuit, will be “narrowly construed and only reluctantly countenanced.” ***Jifry v. Federal Aviation Administration*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *Asiana Airlines v. Federal Aviation Administration*, 134 F.3d 393, 396–97 (D.C. Cir. 1998); *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 969 F.2d 1141, 1144 (D.C. Cir. 1992); *New Jersey Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).**⁸ Be that as it may, they appear in the statute and cannot be disregarded. For example, section 553 does not apply to matters “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. § 553(a)(2).

Page 3-9 – Replace footnote 8 with the following:

⁸ In *Utility Solid Waste Activities Group*, 236 F.3d at 754–55, the court held that the “good cause” exemption in section 553(b) does not allow an agency to forego notice and comment when correcting a technical error in a regulation. Likewise, the court held that agencies have no “inherent power” to correct such technical errors outside of the APA procedures. *Id.* at 752–54. **The decision in *Jifry* provides an example of a case upholding an agency’s use of the good cause exemption based on emergency conditions involving potential security threats. *Jifry*, 370 F.3d at 1179.**

4. Waiver of Regulations

Page 3-21 – Replace the first full paragraph with the following:

Sometimes legislative regulations or the statutes they implement do explicitly authorize “waivers” in certain circumstances. Here, of course, the waiver authority is an integral part of the underlying statutory or regulatory scheme. Accordingly, courts give effect to such waiver provisions and, indeed, they may even hold that an agency’s failure to consider or permit waiver is an abuse of discretion. However, the courts

usually accord considerable deference to agency decisions on whether or not to grant discretionary waivers. For illustrative cases, see ***BDPCS, Inc. v. FCC***, 351 F.3d 1177 (D.C. Cir. 2003); *People of the State of New York & Public Service Commission of the State of New York v. FCC*, 267 F.3d 91 (2nd Cir. 2001); *BellSouth Corporation v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999); *Rauenhorst v. United States Department of Transportation*, 95 F.3d 715 (8th Cir. 1996).

B. Agency Administrative Interpretations

1. Interpretation of Statutes

Page 3-29 – Replace the second full paragraph with the following:

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. **An example is *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), in which 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.**

Page 3-30 – Replace the second full paragraph with the following and insert new footnote number 30a as follows:

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.³⁰ The agency’s position is entitled to *Chevron* deference and should be upheld unless it is arbitrary or capricious. There should be no question of substitution of judgment.^{30a} If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it should stand, even though the reviewing body finds some other position preferable. *See, e.g., Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004); *Barnhart v. Thomas*, 540 U.S. 20 (2003); *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 20–21 (2000); *American Telephone & Telegraph Corp. v. Iowa Utility Board*, 525 U.S. 366 (1999). *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 Bureau of Indian Affairs statutory interpretation developed in case-by-case formal adjudication should be accorded *Chevron* deference). 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).

Page 3-30 – Insert the following for new footnote number 30a:

^{30a} This is true even if the statute in question has been construed previously by a court, unless the court interpreted the statute according to “the unambiguous terms of the statute[, leaving] no room for agency discretion.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (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.*

Page 3-32 – Replace the third bulleted paragraph with the following:

- 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); *Helvering v. Winmill*, 305 U.S. 79, 82–83 (1938); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313–15 (1933); *Collins v. United States*, 946 F.2d 864 (Fed. Cir. 1991); *Davis v. Director, Office of Workers' Compensation Programs, Department of Labor*, 936 F.2d 1111, 1115–16 (10th Cir. 1991); 41 Op. Att'y Gen. 57 (1950); B-114829-O.M., July 17, 1974. Interestingly, in *Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118 (2nd Cir. 2004), the court acknowledged the potential relevance of congressional acquiescence to a 30-year-old regulation, noting that Congress had amended the applicable statute seven times over the life of the regulation without expressing any disapproval of it. However, the court ultimately rejected the congressional acquiescence argument—according to the court, “affectionately known as the ‘dog didn’t bark canon’”—and held the regulation invalid. *Id.* at 130 and n.5.

Page 3-33 – Replace the first full paragraph with the following:

More recent decisions further indicate that *Chevron* deference may extend beyond legislative rules and formal adjudications. Most notably, the Supreme Court observed in *dicta* in *Barnhart v. Walton*, 535 U.S. at 222, that *Mead Corp.* “denied [any] suggestion” in *Christensen* that *Chevron* deference was limited to interpretations adopted through formal rulemaking. 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 222.³³ 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 (agency advisory

opinion); *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (internal agency guidance memoranda).

Page 3-33 – Replace the third full paragraph with the following:

Circuit court decisions have added to the confusion. See *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2nd Cir. 2004) (the court found that a regulation was not entitled to *Chevron* deference, despite congressional acquiescence and even though the statute was ambiguous and the regulation was issued through notice and comment rulemaking, because evidence showed the agency intended the regulation to be only an “interpretive” as opposed to a “legislative” rule); *Doe v. United States*, 372 F.3d 1347, 1357–59 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 904 (2005) (court applied *Chevron* deference to an Office of Personnel Management regulation issued under general rulemaking authority); *James v. Von Zemenszky*, 301 F.3d 1364 (Fed. Cir. 2002) (ignoring *Barnhart* factors because the agency statutory interpretation contained in a directive and handbook “f[e]ll within the class of informal agency interpretations that do not ordinarily merit *Chevron* deference”); *Federal Election Commission v. National Rifle Ass’n*, 254 F.3d 173 (D.C. Cir. 2001) (holding that Federal Election Committee (FEC) advisory opinions are entitled to *Chevron* deference); *Matz v. Household International Tax Reduction Investment Plan*, 265 F.3d 572 (7th Cir. 2001) (holding that an Internal Revenue Service (IRS) statutory interpretation in an *amicus* brief, supported by an IRS Revenue Ruling and agency manual, was not entitled to *Chevron* deference); *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251 (11th Cir. 2001) (holding that a Department of Labor handbook was not due *Chevron* deference); *TeamBank v. McClure*, 279 F.3d 614 (8th Cir. 2002) (holding that Office of the Controller of the Currency informal adjudications are due *Chevron* deference); *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000) (holding that FEC’s probable cause determinations are entitled to *Chevron* deference). As Professor Pierce notes:

“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."³⁴

Page 3-35 – Replace the last paragraph with the following:

The deference principle does not apply to an agency's interpretation of a statute that is not part of its program or enabling legislation or is a statute of general applicability. *See Adams v. SEC*, 287 F.3d 183 (D.C. Cir. 2002); *Contractor's Sand & Gravel v. Federal Mine Safety & Health 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 "split-jurisdiction" situations, where multiple agencies share specific statutory responsibility, courts have determined that ***Chevron*** deference is due to the primary executive branch enforcer and the agency accountable for overall administration of the statutory scheme. *See Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991); *Collins v. National Transportation Safety Board*, 351 F.3d 1246 (D.C. Cir. 2003).

2. Interpretation of
Agency's Own
Regulations

Page 3-38 – Insert the following new paragraph after the quote at the top of the page:

Recent cases according ***Seminole Rock*** deference to agency interpretations of their regulations include: ***Entergy Services, Inc. v. Federal Energy Regulatory Commission***, 375 F.3d 1204, 1209 (D.C. Cir. 2004); ***Castlewood Products, L.L.C. v. Norton***, 365 F.3d 1076, 1079 (D.C. Cir. 2004); ***In re Sullivan***, 362 F.3d 1324, 1328 (Fed. Cir. 2004). In ***WHX Corp. v. SEC***, 362 F.3d 854, 860 (D.C. Cir. 2004), the court did not defer to an agency interpretation because the interpretation rested entirely on staff advice and there was no formal agency precedent or official interpretative guideline on point.

Page 3-39 – Insert the following after the last full paragraph:

Recently the Court held that an agency's interpretation of its own regulation is entitled to ***Auer*** deference only when the regulation interpreted is itself a product of the agency's expertise and authority in a given area. In ***Gonzales v. Oregon***, 546 U.S. ___, 126 S. Ct. 904 (2006), the Court examined an interpretive rule issued by the Attorney General, which stated 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). *Id.* at 913. The Attorney General argued that the rule was entitled to *Auer* deference because it interpreted the term “legitimate medical purpose” as that term was used in a 1971 regulation issued by the Attorney General under the CSA.

However, the Court found *Auer* deference unwarranted, because rather than reflecting the Attorney General’s deliberation and imprimatur, the 1971 regulation merely mimicked the language of the CSA. The Court stated:

“In *Auer*, the underlying regulations gave specificity to a statutory scheme . . . and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the [statutory scheme]. Here, on the other hand, the underlying regulation does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near-equivalence of the statute and regulation belies the Government’s argument for *Auer* deference.”

Gonzales, 126 S. Ct. at 915.

In contrast to some of the more muddled deference cases discussed previously, *Gonzales* draws a bright line when it comes to an agency’s interpretation of its own regulation. “An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.” *Id.* at 916.

C. Administrative Discretion

1. Introduction

Page 3-41 – Replace the first full paragraph with the following:

Under the Administrative Procedure Act (APA), action that is “committed to agency discretion by law” is not subject to judicial review. 5 U.S.C. § 701(a)(2). As the Supreme Court has pointed out, this is a “very narrow exception” applicable in “rare instances” where, quoting from the APA’s legislative history, “statutes are drawn in such broad terms that in a given case there is no law to apply.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). As noted, the “no law to apply” exception is uncommon, and most exercises of discretion will be found reviewable at least to some extent.³⁷ *See Raymond Proffitt Foundation v. Corps of Engineers*, 343 F.3d 199, 207 (3rd Cir. 2003); *Drake v. Federal Aviation Administration*, 291 F.3d 59 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *City of Los Angeles v. Department of Commerce*, 307 F.3d 859 (9th Cir. 2002); *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991).

Page 3-41 – Replace footnote number 37 with the following:

³⁷ However, agency inaction in declining to initiate enforcement or other regulatory action is subject to “a presumption of unreviewability,” although that presumption is rebuttable. *Heckler v. Chaney*, 470 U.S. 821 (1985). Another obvious exception is if a statute explicitly precludes judicial review. *See Jordan Hospital, Inc. v. Shalala*, 276 F.3d 72 (1st Cir.), *cert. denied*, 537 U.S. 812 (2002); *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002) (construction of World War II memorial); *Ismailov v. Reno*, 263 F.3d 851 (8th Cir. 2001) (refusal to extend deadline for asylum application). ***See also Ohio Public Interest Research Group, Inc. v. Whitman*, 386 F.3d 792 (6th Cir. 2004); *Godwin v. Secretary of Housing and Urban Development*, 356 F.3d 310 (D.C. Cir. 2004).**

Page 3-42 – *Insert the following new paragraphs after the last bulleted paragraph:*

Even where the APA does not flatly preclude judicial review, the courts will entertain a lawsuit under the Act only if it involves an “agency action” that is subject to redress under the Act. In ***Norton v. Southern Utah Wilderness Alliance***, 542 U.S. 55 (2004), the Court rejected a suit under the APA to compel the Interior Department to regulate the use of off-road vehicles on certain federal wilderness lands. The Court concluded that there was no legal mandate requiring the agency to take such action. The Court described the jurisdictional parameters of the APA as follows:

“The APA authorizes suit by ‘[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’ 5 U.S.C. § 702. Where no other statute provides a private right of action, the ‘agency action’ complained of must be ‘*final* agency action.’ § 704 (emphasis added). ‘Agency action’ is defined in § 551(13) to include ‘the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*’ (Emphasis added.) The APA provides relief for a failure to act in § 706(1): ‘The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.’

“Sections 702, 704, and 706(1) all insist upon an ‘agency action,’ either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1)).”

Norton, 542 U.S. at 61–62. Thus, the Court held that in order to be viable, an APA claim seeking to compel an agency to act must point to “a *discrete* agency action that it is *required to take.*” *Id.* at 64 (emphasis in original). This standard precludes “broad programmatic attack[s].” *Id.* The Court added:

“The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to

protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”

Id.

2. Discretion Is Not Unlimited

Page 3-43 – Replace the second full paragraph with the following:

Discretion must be exercised before the obligation is incurred. Approval after the fact is merely a condoning of what has already been done and does not constitute the exercise of discretion. 22 Comp. Gen. 1083 (1943); 14 Comp. Gen. 698 (1935); A-57964, Jan. 30, 1935. (This point should not be confused with an agency’s occasional ability to ratify an otherwise unauthorized act. ***See, e.g., B-306353, Oct. 26, 2005.***)