YEAR-IN-REVIEW

APPROPRIATIONS LAW FORUM 2008

I. THE POWER OF THE PURSE

Discretionary Nature of Lump Sum Appropriations

- *Hein v. Freedom From Religion Foundation, Inc.,* ___U.S.___, 127 S. Ct. 2553 (2007)

  This Supreme Court opinion looked at the nature of appropriations to determine whether, or the extent to which, they contained congressional directives to agencies.

  In this case, the Court applied a narrow exception to the general rule against federal taxpayer standing carved out by the Supreme Court's 1968 decision in *Flast v. Cohen,* 392 U.S. 83 (1968). The *Flast* case established the rule that taxpayers have standing to challenge governmental action as unconstitutional only where Congress directed or mandated the action pursuant to its tax and spending power under the constitution. Under this exception, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power. The plaintiffs here alleged that certain executive branch officials violated the Establishment Clause of the First Amendment by participating in meetings and conferences where religion and religious ideas were being discussed. However, the Court found that the plaintiff taxpayer did not have standing since Congress had not directed these activities in any statute. The activities of the executive officials being challenged were funded with general appropriations. The Court found that these appropriations did not provide direction to the executive officials and that their actions were discretionary. The Court noted that to the extent Congress expressed direction in committee reports, such statements do not have the force and effect of law and did not establish the necessary congressional nexus. The Court cited GAO precedent to support the proposition that committee report language is not binding.

Recess Appointment

- *B-309301, June 8, 2007: Recess Appointment of Sam Fox*

  This case explored the applicability of the voluntary services prohibition in the context of a recess appointment. Mr. Fox received an appointment to serve as ambassador to Belgium during a congressional recess. Mr. Fox was denied a salary, however, by the State Department under 5 U.S.C. § 5503, which prohibits payment for services—

> "to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate."

Mr. Fox offered his services without compensation. This raised the question of whether the State Department could accept the uncompensated services Mr. Fox was willing to provide.

GAO noted that the voluntary services prohibition was enacted to prevent coercive deficiencies and future equitable claims against the government. Since there was a statutory prohibition barring the ambassador from being paid, this was not a situation in which a coercive deficiency might occur. Mr. Fox accepted the position knowing that he would not receive compensation for his services. Likewise, he could not file a claim against the government for compensation because there is a statutory prohibition on his receipt of compensation. 5 U.S.C. § 5503. Therefore, the voluntary services prohibition did not apply in this situation and the Department of State could allow him to serve as ambassador to Belgium without compensation. In coming to this determination, GAO stated:

> "We are also led to this interpretation by the fact that serious constitutional issues would arise if section 5503, in conjunction with the voluntary services prohibition, were read to directly restrict the President from making a recess appointment. Like the courts, we will interpret a statute to avoid constitutional issues."

II. STATUTORY CONSTRUCTION

<u>Significance of Legislative History</u>

- *B-308603, June 18, 2007: Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriation Acts*

  GAO explored the use of signing statements by the President, in which he took exception to legislative provisions contained in bills he was signing.

  GAO was asked to examine the fiscal year 2006 appropriations acts and the President's accompanying signing statements to identify the provisions in the acts to which the President took exception and to determine how the

President executed those provisions. GAO also examined how the federal courts have treated signing statements in their published decisions.

GAO found that in 11 signing statements the President took exception to 160 specific provisions. GAO examined 19 of those provisions to determine whether the agencies responsible for their execution carried out the provisions as written. GAO found that 10 of the 19 provisions were executed as written, 6 provisions were not, and 3 provisions were not triggered so there was no agency action to examine.

With regard to the use of signing statements by the federal courts, a search of all federal case law since 1945 found fewer than 140 cases that cited presidential signing statements, most commonly to supplement legislative history such as committee reports. Also, courts have cited signing statements to establish the date of signing, to provide a short summary of the statute, to explain the purpose of the statute, or to describe the underlying policy behind the statute. GAO concluded that, overall, federal courts infrequently cite or refer to signing statements in their published opinions.

- *B-309928, Dec. 20, 2007: Presidential Signing Statements—Agency Implementation of Ten Provisions of Law*

  GAO examined how agencies executed ten provisions of law to which the President took exception in signing statements. Because one provision applied to two agencies, GAO examined agency action in eleven instances.

  GAO found that, in six of the eleven instances, the responsible agencies reported either that they had taken actions to implement the provisions as written or that they had experienced no interference in carrying out their responsibilities as required by law. In two instances, the provisions were not triggered. In the remaining three instances, GAO found that the Department of Energy and the Federal Emergency Management Agency had not yet implemented the provisions for which they were responsible, although in all three instances each agency indicated that it was planning to implement the provision.

- *Zuni Public School District No. 89 v. Department. of Education,* ___ U.S. ___, 127 S. Ct. 1534 (2007)

  In this case, the Supreme Court referred to a long-standing agency practice to help it resolve ambiguity in the language of a statute.

  The Court in this case was faced with interpreting statutory language setting out a formula to be used by the Department of Education in deciding how states may allocate federal funds to school districts. Under the statute, states are given greater allocation flexibility if the Secretary determines that the state has a program in place that equalizes state expenditures among its school districts. As part of the statutory formula for determining whether the state equalizes expenditures, the law instructs the Secretary to compare the school district with the greatest per-pupil expenditures to the school district with the smallest per-pupil expenditures, but to "disregard" school districts with per-pupil expenditures above the 95^{th} percentile and below the 5^{th} percentile of such expenditures. It was this "disregard" provision that was at issue.

Because the statute uses technical language ("percentile") and seeks a technical purpose (eliminating uncharacteristic or outlier districts), the Court found the statute to be sufficiently ambiguous to permit it to consider indications of congressional intent other than the language. In this regard, the Court took notice of a long-standing agency practice and referred to it in interpreting the disregard provision. The disregard provision had been enacted in 1994 at the request of the department to codify regulations that the department had promulgated 20 years earlier. These regulations set out a calculation method for determining whether a state equalizes expenditures and how districts with per-pupil expenditures above the 95^{th} percentile or below the 5^{th} percentile would be identified. Specifically, the regulations stated that the Secretary would rank all of the school districts on the basis of current expenditures per pupil and then identify those school districts that fall at the 95^{th} and 5^{th} percentiles of the total number of pupils in attendance at all the state's school districts taken together. The statute, when enacted, did not contain any reference to the total number of pupils in attendance as part of the calculation. The plaintiff argued that the plain language of the statute did not contemplate that this method be used, and that the 95^{th} and 5^{th} percentiles should be identified based solely on the ranking of school districts.

The Court concluded that the statute was intended to codify the 20 years of existing practice under the regulations, that Congress intended to leave the Secretary free to use the calculation method that had been in place before passage of the law, and that this method was a reasonable one. In his dissent, Justice Scalia criticized the court as elevating judge-supposed legislative intent over clear statutory text. Asserting that the plain language of the statute was clear on its face, he concluded that "[w]e must interpret the law as Congress has written it, not as we wish it would be."

Potentially Conflicting Statutes

- *National Association of Home Builders v. Defenders of Wildlife*, ___U.S. ___, 127 S. Ct. 2518 (2007)

  In this case, the court harmonized provisions of the Clean Water Act (CWA) and the Endangered Species Act (ESA) that appeared to be in conflict.

CWA contains a provision requiring the Environmental Protection Agency (EPA) to transfer to states certain powers to issue permits if the state meets nine specified criteria. ESA contains a provision requiring that every agency, including EPA, engage in consultations with certain designated agencies in order to ensure that any action it may take is not likely to jeopardize the continued existence of any endangered species. Because consultation was not one of the nine criteria set out in CWA, the question presented was whether EPA was required to engage in consultations as a condition of transferring to a state the authority to issue permits.

The Court viewed both statutes as mandatory commands: the CWA provision contained a mandatory and exclusive list of criteria that, if met, required approval of the transfer application; the language of the ESA is similarly imperative, the Court said, requiring consultation to insure that any action taken is not likely to jeopardize endangered species. The Court pointed out that if read literally, the later-enacted ESA provision would add an additional criterion to the list contained in the CWA, thus effectively repealing the CWA list of nine and replacing it with a new list of ten criteria. The Court relied on the canon of statutory construction that "repeals by implication are not favored" and will be not be presumed unless the intention of the legislature to repeal is clear and manifest. Reading the statutes in this way, however, did not resolve the fundamental ambiguity in the texts since an agency cannot simultaneously obey the differing mandates. To harmonize the two provisions, the Court adopted EPA's implementing regulation interpreting the ESA requirement. The Court read the regulation to require consultations only for actions in which there is discretionary federal involvement or control. This reading harmonizes the statutes by applying the consultation requirement to guide agencies' existing discretionary authority, but not overriding express statutory mandates such as the CWA transfer provision.

<u>Construing Identical Terms</u>

- *Environmental Defense v. Duke Energy Corp.,* ___U.S.___, 127 S. Ct. 143 (2007)

  This case stands for the proposition that we interpret words in a statute by reference to the context in which Congress used them. At issue here was the definition of the word "modification" as used in the Clean Air Act. Congress used the word in two places in the Act; the Environmental Protection Agency (EPA) regulations defined the word in two different ways, depending on the provision of the Act being applied. The Court upheld EPA's two different definitions.

  In 1970, in amendments to the Clean Air Act, Congress enacted New Source Performance Standards (NSPS) requiring operators of stationary sources of air pollutants to use the best technology for limiting newly constructed sources and those undergoing "modification." The 1970 law defined "modification" to mean "any physical change in, or change in the method of operation of, a stationary source which increases the *amount* of any air pollutant. . . ." (Emphasis added). In 1975, EPA issued regulations implementing the provision by defining the term modification as any change to an existing facility that results in "an increase in the *emission rate* to the atmosphere of any [covered] pollutant." (Emphasis added).

In 1977, Congress amended the Clean Air Act by adding a Prevention of Significant Deterioration (PSD) scheme covering new and modified sources of pollution. Under the 1977 law, operators needed a PSD permit before "a major emitting facility" could be constructed or modified. The 1977 statute specifically defined "construction" as including the "modification," as defined in the 1970 statute, of any source or facility, and referred to the exact section of the definition of modification in the 1970 law. In 1980, EPA issued regulations defining the PSD provision. This definition, unlike its 1975 definition of the same term, however, focused on "net emissions," or overall annual emission, not on rate of emissions. Thus, the same statutory term and definition, appearing in two places in the Clean Air Act, as amended, and enacted 7 years apart, were defined differently by the EPA implementing regulations.

The Court of Appeals held that because Congress defined the term "modification" the same in both provisions, EPA was required to conform its PSD interpretation to its NSPS definition. The Court of Appeals saw an "effectively irrebuttable" presumption that the later-issued PSD regulations contain the same conditions for a "modification" as the earlier NSPS regulations. The Supreme Court disagreed. The Court said that although "we presume that the same term has the same meaning when it occurs here and there in a single statute, the Court of Appeals mischaracterized that presumption as 'effectively irrebuttable.'" The Court went on to say that the—

> "natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."

Or, as the Court succinctly stated, "context counts."

Words of Futurity

- *B-309704, Aug. 28, 2007: Bureau of Alcohol, Tobacco, Firearms, and Explosives—Words of Futurity in Fiscal Year 2006 Appropriations Act*

  GAO was asked whether a proviso appearing in the fiscal year 2006 Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Salaries and Expenses appropriation constitutes permanent legislation. The proviso prohibits ATF from using appropriated funds to disclose contents of the Firearms Trace System database except to certain parties. The proviso stated that "no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database" to anyone other than a law enforcement agency or a prosecutor in connection with a criminal investigation or prosecution. GAO pointed out that while provisions enacted in an appropriations act are generally presumed to be temporary in nature, Congress, of course, has the power to enact permanent legislation in an appropriations act. In ascertaining Congress's intent, the most important factor is the language itself, particularly the presence of "words of futurity." Here, because the phrase "this or any other act" was coupled with the phrase "with respect to any fiscal year," GAO concluded that Congress intended the proviso to be permanent law.

III. AVAILABILITY OF APPROPRIATIONS: PURPOSE

Personal *versus* Official Expenses

- *B-309604, Oct. 10, 2007: Customs and Border Protection—Availability of Appropriations for Credit Monitoring Services*

  This case arose in the aftermath of Hurricane Katrina and centered on whether an expenditure of appropriated funds provided a greater benefit to the government or to the individual.

  The Customs and Border Protection (CBP) asked whether its Salaries and Expenses appropriation was available to pay for credit monitoring services for its employees in the New Orleans area who, after Hurricane Katrina, were victims of identity theft. Neither government action nor inaction compromised the employees' identities, and there was no evidence that any government credit cards were compromised. Instead, it was employees' personal credit that had been compromised. In this case, the CBP employees individually, not the government, would be the primary beneficiaries of the proposed credit monitoring, which GAO considered part of the employees' overall management of their personal finances. Accordingly, GAO held that the appropriation was not available.

Purpose Violations and the Antideficiency Act

- *B-309715, Sept. 25, 2007: National Transportation Safety Board—Insurance for Employees Traveling on Official Business*

  This case, like the CBP decision, involved balancing a personal benefit to government employees with a benefit to the government itself. This case, also, is an example of when a purpose violation constitutes a violation of the Antideficiency Act.

  In this decision, the National Transportation Safety Board (NTSB) used its appropriated funds to purchase travel accident insurance for its employees on official travel. NTSB employees fly in official travel status on various types of commercial and government aircraft, both as ticketed and non-ticketed passengers, to accident sites around the world. NTSB employees were concerned that travel insurance incidental to the government travel card contract did not cover nonticketed travel, that there was no right of recovery for an accident involving a United States government aircraft, and that there was likely no way to recover from accidents involving foreign state aircraft. To allay these concerns, NTSB purchased an accidental death and dismemberment insurance policy for its employees who travel on official business.

  GAO noted that generally accident insurance while in official travel status is a personal expense to be borne by the employee and, applying a necessary expense reasoning, held that that, here, accident insurance was not necessary for the successful execution of the object of NTSB's appropriation. GAO held further that, because NTSB had no appropriation for this purpose, the payments made by NTSB exceeded the amount available in an appropriation and constituted a violation of the Antideficiency Act.

- *B-308715, Apr. 20, 2007: Department of Energy—Title XVII Loan Guarantee Program*

  Title XVII of the Energy Policy Act of 2005 directed the Department of Energy (DOE) to make loan guarantees for projects that employ new or significantly improved technologies to address air pollution or anthropogenic emissions of greenhouse gases.

  However, another statutory provision prohibited the Department of Energy from using appropriated funds "to *implement or finance* authorized . . . loan guarantee programs unless provision is made for such programs in an appropriation Act." 42 U.S.C. § 7278 (emphasis added). GAO was asked whether DOE's preparatory activities to implement the title XVII program, such as issuing and publishing in the *Federal Register* program guidelines and a solicitation announcement, violated this prohibition. GAO found that

DOE's preparatory activities fell squarely within the common, ordinary definition of the word "implement." As a result, no DOE appropriations were legally available to fund these activities.

GAO stated that DOE's actions violated two fundamental fiscal laws: the purpose statute and the Antideficiency Act. Under the purpose statute, an agency may use appropriations only to achieve the object for which the appropriations were made; here, no funds were available for the purpose of implementing the loan program. Since there were no funds available for this purpose, the use of any appropriations violated the Antideficiency Act. When DOE failed to report the violation to Congress and the President in accordance with 31 U.S.C. §1351, GAO so advised Congress. DOE subsequently reported its violation. *See* B-308715, Nov. 13, 2007.

IV. AVAILABILITY OF APPROPRIATIONS: AMOUNT

Voluntary Services Prohibition

- *B-308968, Nov. 27, 2007: No-Cost Contracts for Event Planning Services*

At issue in this case was whether an agency may utilize a no-cost contract to obtain conference planning services without violating the voluntary services prohibition of the Antideficiency Act. GAO was asked to review a model contract for conference planning services that imposed no financial obligation on the government and that set out clearly that the contractor had no expectation of payment from the government; the contractor would recoup its costs and presumably earn a profit by charging exhibitors, sponsors, and attendees of the conference.

The purpose of the voluntary services prohibition is to preclude situations that might generate claims for compensation that might exceed an agency's available funds. GAO held that because an agency agreeing to the no-cost contract at issue would have no financial liability to the contractor, nor would the contractor have any expectation of payment from the government, an agency entering into such a contract would neither augment its appropriation nor run afoul of the voluntary services prohibition.

GAO advised that there are other considerations beyond compliance with fiscal laws that an agency should take into account before agreeing to a no-cost contract. For example, an agency should consider the ultimate cost to the government as a whole when most attendees are expected to be government employees. Agency officials also should consider possible conflicts of interest before signing a no-cost contract, keeping in mind that control of the agenda, selection of speakers, and other matters concerning content should serve the government's, not the contractor's, purpose. In addition, agencies should ensure an open, transparent selection process before entering into no-cost contracts. GAO said, "[u]ltimately, an agency must not lose sight of its objectives for a particular event and should ensure that in avoiding costs to the agency, it does not take actions that compromise the effectiveness of its conference, undermine the achievement of agency goals, or violate ethics rules."

<u>User Fees</u>

- *B-307319, Aug. 23, 2007: National Park Service—Special Park Use Fees*

While it is well established that the so-called user fee statute allows agencies to charge fees when it provides a service or thing of value, this decision stated that the fee, in certain circumstances, may be based on the market value, not merely the cost, of the item or service. For these purposes, GAO distinguished between an agency's regulatory functions and its commercial functions.

The Independent Offices Appropriations Act of 1952 (IOAA) (the user fee statute) authorizes heads of agencies to prescribe regulations establishing charges for a service or thing of value provided by an agency, and requires that fees be "fair" and based on four factors: "(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U.S.C. § 9701(b). GAO found that judicial interpretation to date had applied IOAA to the government's exercise of its regulatory functions, and in that context courts have narrowed the application of these factors so that fees charged under IOAA are "limited to the cost to the agency of a specific benefit rendered to a particular entity." *Florida Power & Light Co. v. United States,* 846 F.2d 765, 767 (D.C. Cir. 1988), *cert. denied,* 490 U.S. 1045 (1989).

GAO noted that no court had directly addressed the question of whether an agency, when acting not in a regulatory context but in a commercial context, may set fees based on market value rather than recovery of agency costs. GAO concluded that nothing in IOAA prohibits an agency from setting a fee in a commercial or proprietary transaction that reflects market value. GAO stated that at least in a commercial transaction, an agency may fairly decide that it should set its fees by reference to prices that arise out of competition in open markets. Therefore, GAO concluded that with respect to commercial transactions, IOAA permits agencies to appropriately weigh the statutory factors and to set fees based on market price.

Under NPS guidance, however, NPS was charging a two-part fee (market price plus full cost). NPS guidance relied not just on IOAA but also on its own statutory fee-setting authority. Under 16 U.S.C. § 3a, NPS is authorized to recover, and credit to current appropriations, costs of providing necessary services associated with special use permits. GAO found that this was not a reasonable reading of the two statutes because it failed to read them harmoniously as part of an overall statutory scheme. This practice essentially double counted the costs to the government that may be recovered. GAO stated that the two laws could be harmonized by reading section 3a to modify the disposition (credit to the agency's appropriation) of certain fees recovered under IOAA (costs of providing necessary services). GAO concluded that NPS may charge a fee for special park uses based on market value when it is acting under business-type conditions, but it may not separately charge an additional fee for its costs. Rather, it may calculate actual costs to the government, deduct that amount from the fee collected, and credit that amount to the current NPS appropriation.

Indemnification Agreements

- *Rick's Mushroom Service, Inc. v. United States,* 76 Fed. Cl. 250 (2007)

  In this case, the Court of Federal Claims applied the prohibition against open-ended indemnity agreements. The case involved a mushroom grower seeking indemnification from the government for losses it had incurred as a result of operating a defective waste facility that had been designed by the Department of Agriculture's National Resource Conservation Service (NRCS). Pursuant to a cooperative agreement with NRCS, the facility had been constructed in accordance with detailed plans and specifications drafted by NRCS. The plaintiff argued that the cooperative agreement was a contract that created an implied warranty. The government replied that the Antideficiency Act precludes any employee of the NRCS from binding the government to "an open-ended indemnity contract in the absence of specific authorization for the undertaking." *Rick's Mushroom,* 76 Fed. Cl. at 260. The government asserted that "the contracting officer's presumed knowledge of [the Antideficiency Act's] prohibition, [is] strong evidence that the officer would not have provided, in fact, the contractual indemnification claimed," citing *Hercules Inc. v. United States,* 516 U.S. 417, 427–28 (1996). The Federal Claims Court agreed, noting that the Supreme Court in *Hercules* relied upon the fact that the Comptroller General has repeatedly ruled that government agencies may not enter into the type of open-ended indemnity for third-part liability that petitioner claims to have implicitly received. *Rick's Mushroom,* 76 Fed. Cl. at 260.

V. AVAILABILITY OF APPROPRIATIONS: TIME

The *Bona Fide* Needs Rule and Advance Payment Authority

- *B-309530, Sept. 17, 2007: National Labor Relations Board—Funding of Subscription Contracts*

  In this decision, GAO addressed the intersection of the *bona fide* needs rule and the advance payment statute. This case involved the purchase of Web site database subscriptions to be provided in a future year or years.

  In this case, the National Labor Relations Board (NLRB) obligated its fiscal year 2006 appropriation to pay for seven subscriptions, two of which were to begin in November 2006 (fiscal year 2007), and five which were to being on October 1, 2006 (the first day of fiscal year 2007). With regard to the two subscriptions beginning in November, GAO concluded that fiscal year 2007 funds should have been used because there was not a *bona fide* need for the subscriptions in 2006. NLRB had relied on a line of cases establishing the rule that the cost of a publication is to be charged to the appropriation current when the subscription was ordered, notwithstanding that deliveries may extend into a subsequent fiscal year or years. These cases interpreted the advance payment statute, which generally prohibits agencies from paying for goods before they have been received or for services before they have been rendered. 31 U.S.C. § 3324(a). An exception in the statute allows agencies to pay for publications, such as subscriptions to periodicals, before they are received. GAO cases have interpreted this exception as authorizing multiyear contracts for periodicals, pointing out that Congress intended for agencies to be able to take advantage of economies available to nonfederal subscribers (such as discounts for longer-term subscriptions). NLRB argued that since GAO has upheld the use of current year appropriations for future year subscription needs, fiscal year 2006 funds could be used for a fiscal year 2007 subscription need.

  GAO disagreed. GAO distinguished that line of cases from the facts present in the NLRB decision. In each of those cases, the subscription was clearly a *bona fide* need of the appropriation current at the time the order was placed, and delivery began in that same year. GAO stated that these decisions should not be understood to suggest that the advance payment authority negates application of the *bona fide* needs rule. In other words, in order for an agency to properly charge the current year appropriation for a subscription, there must be a demonstrated need in that current year, regardless of whether the subscription may continue into future years.

  Applying this principle, GAO upheld the use of fiscal year 2006 funds for renewal of five subscriptions NLRB had ordered in fiscal year 2006 that were to begin on October 1, 2006, the first day of fiscal year 2007, even though these subscriptions would be provided entirely in fiscal year 2007. The record showed that in order to ensure continued delivery of the subscriptions, NLRB needed to place the order before the expiration of the subscriptions. GAO concluded that NLRB had a *bona fide* need for them in 2006.

VI. ACCOUNTABLE OFFICER RELIEF

Role of Certifying Officers in Credit Card Transactions

- *B-307693, Apr. 12, 2007: Mr. Jeffrey Elmore—Request for Relief of Financial Liability*

  This decision addressed the role of certifying officers in credit card transactions and clarified GAO's jurisdiction with respect to the relief of Department of Defense (DOD) certifying officers.

  In this decision, GAO addressed for the first time the role of a certifying officer in a credit card transaction. Here, a certifying officer of the Defense Logistics Agency (DLA), an agency of DOD, requested that we relieve him of liability for four improper government purchase card payments. An internal DLA audit had found the certifying officer liable for improper payments when the certifying officer certified payment to the credit card bank for improper uses of the credit card itemized on the bank's billing statements. Based on the DLA audit, GAO concluded that had the certifying officer examined the billing statements, he should have been aware that they included payment for improper items, and that he failed to exercise good faith. GAO denied relief.

  GAO pointed out that under 31 U.S.C. § 3528, a certifying officer is responsible for the existence and correctness of the facts in the payment voucher he signs and any accompanying documents. GAO stated that a critical tool that certifying officers have to carry out this responsibility is the power to question, and refuse certification of, payments that may be improper. GAO noted that DLA regulations and the General Services Administration's (GSA) Master Contract for purchase cards, if read literally, would suggest that the certifying officer should question only fraudulent uses of the card. DLA, having found the certifying officer liable, obviously interpreted its regulations and the GSA Master Contract to preserve the certifying officer's duty to scrutinize and question apparently improper purposes appearing on billing statements. GAO agreed with DLA's interpretation and said that that to interpret these provisions otherwise would be contrary to the statutory responsibilities imposed on certifying officers: "We are unwilling to read DLA regulations or the GSA Master Contract as overriding this statutory responsibility."

In this decision, GAO clarified its jurisdiction to relieve DOD certifying officers. GAO is authorized by statute to relieve certifying officers of pecuniary liability resulting from improper payments in certain instances. 31 U.S.C. § 3528(b)(1)(A). The law limits GAO's authority with respect to DOD certifying officers, stating that GAO "shall relieve" a certifying officer of the "armed forces" if DOD determines that relief is warranted under the statutory criteria. 31 U.S.C. § 3527(b)(2). The limitation does not apply to DOD components other than the armed forces. GAO, referring to the legislative history and how the statute evolved, concluded that "armed forces" means "Army, Navy, Air Force or Marine Corps."

VII. INTERAGENCY TRANSACTIONS

Agency Authority

- *B-309181, Aug. 17, 2007: Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activity, Department of Defense, and GovWorks to Obtain Office Space*

  This decision looked at whether either GovWorks, a Department of the Interior franchise fund, or the Counterintelligence Field Activity (CIFA), a Department of Defense (DOD) field activity, had authority to enter into a lease for office space. GAO concluded that the lease was unauthorized and that the government was not bound by the lease.

  GovWorks, now called Acquisition Services Directorate, operates out of a franchise fund established to provide "common administrative support services" to federal agencies. CIFA is a field activity and combat support agency established to develop and manage DOD counterintelligence programs. To consolidate CIFA operations, DOD entered into an agreement with GovWorks directing GovWorks to enter into a contract for facility acquisition. CIFA then executed a Military Interdepartmental Purchase Request (MIPR) transferring funds from the Operations and Maintenance, Defense-wide appropriation to GovWorks for this purpose. GovWorks subsequently entered into a contract with a third party on behalf of CIFA for the lease of office space and facilities management services. The lease was for a term of 10 years and 7 months with varying annual rents exceeding $6 million.

  While the parties described the contract as a service contract and not a lease, GAO concluded that the contract was clearly an attempt to obligate the government to a long-term lease agreement for office space. However, neither CIFA nor GovWorks had leasing authority, only the General Services Administration (GSA) does. GAO concluded, therefore, that the government was not bound by the contract and that the lease transaction was void *ab initio* and unenforceable. GAO noted that while GSA has authority to ratify the lease, it refused to do so. All lease payments made, therefore, were improper. GAO advised that GovWorks and CIFA take appropriate action to resolve the matter, and that all payments for rent due under the contract must cease to prevent future improper payments of government funds.

In the second part of the decision, GAO examined whether the actions of either entity violated the Antideficiency Act, 31 U.S.C. § 1341(a), which prohibits a government official or employee from making an expenditure or an obligation that exceeds or is in advance of available appropriations. In this case, CIFA had used the Operation and Maintenance, Defense-wide appropriation to make the lease payments. Although the lease was unenforceable for lack of authority, that appropriation is available for lease payments and there was no evidence CIFA had made payments in excess or advance of the appropriation. GAO, therefore, found no violation of the Act.

Interdepartmental Waiver Rule

- *B-308822, May 2, 2007: National Archives and Records Administration—Damage to Revolving Fund Records Caused by Building Failure*

This case applied the interdepartmental waiver rule governing claims of one federal agency against another and its exception with regard to revolving funds. At issue in this case was whether the General Services Administration (GSA) should bear the cost of repairing damage to National Archives and Records Administration (NARA) records caused by water damage in a GSA building.

Generally, under the interdepartmental waiver rule, when one federal agency damages property of another federal agency, funds available to the former may not be used to pay claims for damages to the latter. The rule is based on the concept that property of the various agencies is not the property of separate entities but rather of the government as a single entity, and there can be no reimbursement by the government for damages to or loss of its own property. There is a major exception to the rule, however, for revolving funds. The exception is applicable to agencies operating out of a revolving fund because Congress intends that the revolving fund activity operate like a self-sufficient business, charging rates to recover its costs of operations.

Because both GSA's management of federal buildings and NARA record centers operate out of revolving funds, the exception to the interdepartmental waiver rule would seem to apply, that is, the agencies should operate as self-sufficient businesses and the agency suffering the damage should not be required to pay for repairs related to damages for which it was not responsible. However, GAO concluded that the basis for the exception did not apply here because GSA's program was not sufficiently similar to a business entity. Although GSA's charges are to approximate commercial charges, GAO noted that neither those charges nor GSA's responsibilities are identical to those of a commercial landlord. GAO pointed to costs that ordinarily are covered by commercial rental charges, including depreciation, interest on long-term debt, and liability insurance, that GSA does not recover. GAO stated that the interdepartmental waive rule, not its exception, applied here, and that GSA was not required to reimburse NARA for recovery of the damaged records.

Bona Fide Needs Rule

- *B-308944, July 17, 2007: Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*

  This decision reaffirmed the application of the *bona fide* needs rule to interagency transactions and also addressed the issue of "parking" funds.

  In this case, the Department of Defense (DOD), using Military Interdepartmental Purchase Requests (MIPRs), transferred funds to a Department of the Interior franchise fund, GovWorks, to support the award of four contracts. GovWorks, now called Acquisition Services Directorate, is a revolving fund designed to provide common administrative services to Interior and other agencies by procuring goods and services from vendors on behalf of the federal agencies on a competitive basis. GAO found that DOD and GovWorks improperly used expired DOD appropriations to finance four contracts.

  For three of the contracts, the MIPRs used to finance the contracts did not identify the specific items or services that DOD wanted GovWorks to acquire on its behalf and thus did not properly obligate DOD's appropriation. The transferred funds expired before DOD identified items or services with enough specificity that GovWorks could execute contracts on DOD's behalf. The fact that GovWorks did not use the funds until after the funds had expired led GAO to conclude that the contracts did not fulfill a *bona fide* need arising during the funds' period of availability.

  One MIPR described the goods DOD sought with enough specificity to create a valid interagency agreement and properly obligate DOD's appropriation. Although the item to be purchased was a readily available commercial item, GovWorks did not use the funds to execute a contract on DOD's behalf until 17 months after the date of the MIPR, and 11 months after the funds expired. GAO found that because GovWorks did not use the funds within a reasonable time of their receipt, the contract did not fill a *bona fide* need arising during the funds' period of availability.

GAO pointed out the impropriety of DOD "parking" funds from one fiscal year with GovWorks for use after the period of availability for those funds has expired:

> "Clearly, DOD parked funds at GovWorks. . . . DOD transferred funds to GovWorks using indefinite, nonspecific MIPRs, and GovWorks held these funds, in some cases for as long as 50 months. DOD improperly directed GovWorks to use expired DOD funds for these contracts. . . . In this case, officials of both agencies acted in disregard of the recording statute and the *bona fide* needs rule, parking DOD funds at GovWorks and possibly violating the Antideficiency Act."

- *B-308969, May 31, 2007: Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract*

  This decision focused on the need to properly identify the obligational event and legal liability of an interagency agreement.

  In fiscal year 2003, the Department of the Interior on behalf of the Department of Defense (DOD), entered into an indefinite delivery, indefinite quantity contract with Northrop Grumman Mission Systems to support DOD's Personnel Security Research Center. The contract provided a minimum purchase guarantee of $1 million. Because the government had a fixed liability for this minimum amount, GAO stated that DOD had incurred an obligation of $1 million. DOD, however, obligated only $175,000 of fiscal year 2003 funds for the contract at time of award. DOD did not record obligations for the remainder of the $1 million liability until fiscal year 2004 as it placed task orders for additional services, and it improperly used fiscal year 2004 funds to cover its fiscal year 2003 liability. Although GAO was not asked if DOD had violated the *bona fide* needs rule, the facts in this case suggest that DOD did not have a *bona fide* need in fiscal year 2003 for $1 million of services.

"Pooling" Appropriations

- *B-308762, Sept. 17, 2007: Department of Homeland Security's Use of Shared Services within the Preparedness Directorate*

  In this decision, GAO considered the concept of pooling of appropriations and various authorities for the use of such arrangements.

  GAO reviewed the Department of Homeland Security's use of shared services within the Preparedness Directorate and its compliance with appropriations law and the proper use of the Economy Act. The directorate was financed by eight separate appropriations, and it had developed a complex system of pooling its appropriations to fund shared services. Pooled funds were used to fund contracts and interagency agreements for services that were common across the directorate. GAO found that this sharing of funds across appropriation accounts, in effect, constitutes a transfer between appropriations. GAO pointed out that, unless authorized by law, transfers of funds between agency appropriation accounts are prohibited by law.

GAO discussed transfer authorities potentially available, including the Economy Act. GAO noted that while the Act commonly provides authority for an agency to place an order with another agency for goods or services that the other agency can provide more conveniently than by the ordering agency, the Act also applies to transfers between appropriations within an agency. However, the Preparedness Directorate did not actually enter into Economy Act agreements; instead it stated that it used "*de facto* Economy Act agreements" or Economy Act principles as authority to carry out the shared services transactions. GAO rejected this argument based on the lack of documentary evidence of a binding agreement necessary to record an obligation under the recording statute. In addition, the Economy Act itself requires the head of the ordering agency or unit to make a best interest determination.

GAO found, however, that the Preparedness Directorate did have authority pursuant to 31 U.S.C. § 1534, the account adjustment statute, to obligate the contracts and interagency agreements for the shared services directly against one appropriation and adjust the accounts of the benefiting appropriations before the end of the fiscal year based on the benefiting appropriations' use of the services. The directorate, however, did not provide us with documentation showing that it either obligated shared services assessments against or adjusted the accounts of all the directorate appropriations that received benefits. GAO recommended that the directorate adjust the appropriations to correct these errors. GAO stated further that if any of the appropriations that funded the directorate do not have available unobligated balances to cover the adjustments, the directorate should report an Antideficiency Act violation.

- *B-308150, Mar. 9, 2007: United States Central Command—Cairo Housing*

GAO was asked whether the Office of Military Cooperation (OMC), Cairo, may use its appropriation to fund leases for residences occupied by personnel of other agencies at the U.S. Embassy in Cairo, Egypt, as part of a housing pool. GAO held that OMC could use its appropriated funds for this purpose because these payments represented the costs attributable to OMC's use of housing in the pool.

OMC is a Department of Defense Security Assistance Organization located at the United States Embassy in Cairo. Under a pooling arrangement with the State Department and other agencies, OMC agreed to pay for its share of the housing costs in the housing pool, and that its costs would be proportional to its personnel's use of pooled housing. Under the agreement, however, there were some circumstances requiring OMC to use its appropriated funds to lease residences occupied by another agency's personnel. While GAO recognized that OMC does not receive an appropriation to fund the housing of other agencies' personnel, its appropriation is available for expenses necessary and incident to the object of its appropriation.

GAO had previously approved a similar reimbursement arrangement involving a housing pool at an embassy. 50 Comp. Gen. 403 (1980). GAO stated that when all the agencies at an embassy decide to pool housing for the convenience of the group, each agency may properly pay for its share of the housing costs, regardless of whether its personnel actually reside in the housing units it funds. Unlike the arrangement in that case, where each agency used its appropriation to house personnel of other agencies, OMC is the only agency at the Cairo embassy using its appropriation to house another agency's personnel. Nevertheless, GAO found that the same principle applies to OMC's arrangement. GAO held that the fact that OMC is making lease payments for property occupied by personnel of another agency is not problematic, so long as the payment is based on the cost attributable to OMC's use of housing in the pool.