

# Fiscal Law:

## Current Issues and Recurring Themes



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# Congressional Power of the Purse

“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .”

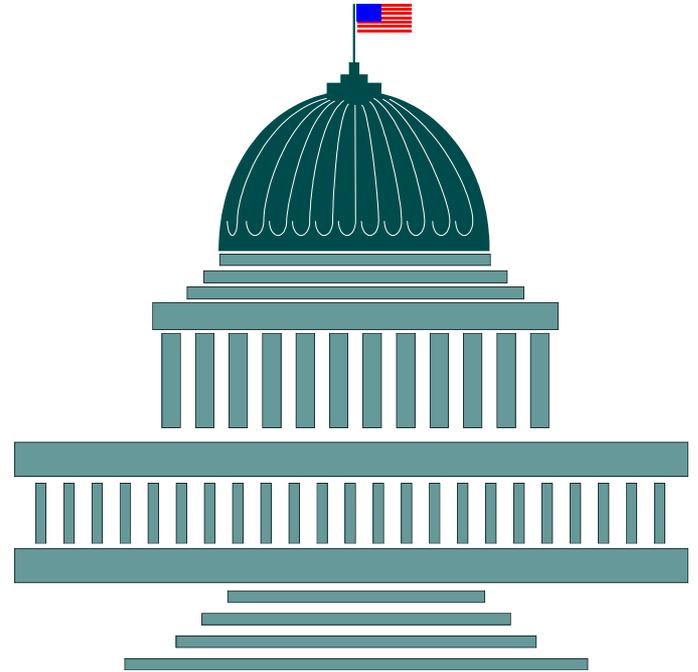
U.S. Constitution, Article I,  
section 9, clause 7



# What Does It Mean?

“The established rule is that the expenditure of public funds is proper only when established by Congress, not that public funds may be expended unless prohibited by Congress.”

United States v. MacCollom, 426 US  
317 (1976)



# THE BOX DOES NOT CHANGE!



## PURPOSE

- Funds may be obligated and expended only for specified purposes;

## TIME

- Funds are available for obligation only for specified time limits

## AMOUNT

- Agencies may not spend more than is appropriated

# PURPOSE



# Fulfilling Statutory Mission

The Bureau of Engraving and Printing may use appropriated funds to purchase and give currency readers to blind and visually impaired individuals as part of its compliance with a federal district court order to provide such individuals with meaningful access to US currency.

Bureau of Engraving and Printing – Currency Reader Program, B-324588, June 7, 2013

# Employee Parking Permits



- Agency may provide subsidized parking permits for employees if it determines it is necessary in order to avoid a significant impairment of the agency's operating efficiency

B-322337, August 3, 2012

# Gift Cards (again)

- CPSC's appropriations are not available to purchase and distribute gift cards as an incentive to join the Neighborhood Safety Network.
- Also cannot direct a contractor to undertake activities on behalf of an agency that the agency itself cannot undertake

B-323122, August 24, 2012

# Giveaway Items Held Proper

- Caps and other items distributed to local residents in furtherance of threatened eider conservation plan – US Fish and Wildlife Service, B-318386, 12 August 2009
- Gift cards for respondents to the Converter Box Coupon Program Survey - National Telecommunications and Information Administration, B-310981, 25 Jan 2008
- Lava rocks distributed by National Park Service at Capulin Mountain National Monument, B-193769, 24 Jan 1979



# Examples of Improper Giveaway Items

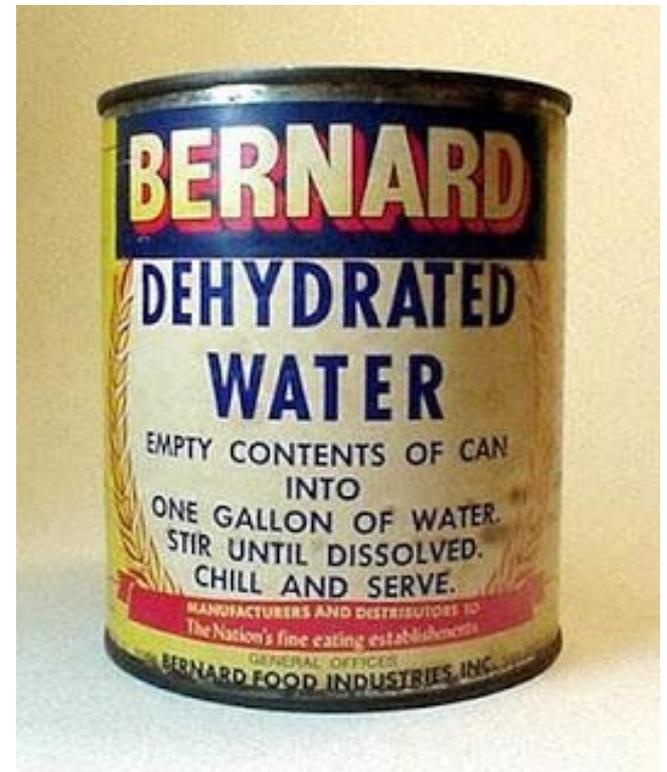
- **T-shirts with the CFC logo given to employees who contributed a certain amount**
- **Ice scrapers imprinted with the logo “Don’t Drink and Drive”**
- **Novelty plastic garbage cans containing candy in the shape of solid waste, given by EPA to attendees at an exposition**
- **Decorative ashtrays given to conference attendees**



# Bottled Water

## The Rule: personal expense!

- Appropriated funds may be used only upon a showing of necessity; i.e., there is no potable water available.
  - 2 Comp. Gen 776 (1923) *and many other cases!*
- Navy v. FLRA, No 10-1304 (D.C. Cir. Jan. 13, 2012)
  - Navy did not have a duty to bargain with unions before ceasing to provide bottled water to its employees.
- Agencies may use appropriated funds to purchase bottled water for use in response to legitimately anticipated dangers and exigencies. B-324781, December 17, 2013



# Proposed Purchase of Protective Hoods, B-301152, May 28, 2003

“ . . . so long as an agency determines that the threat of attack is legitimate, and that the protective hoods or other gear, equipment, or services sought is an appropriate, reasonable, and responsible response to such threat, an agencies’ operating appropriations are available for that purpose.”

# TIME



# Multiyear Contracting and the Bona Fide Needs Rule

- An agency may not obligate current funds for the bona fide needs of a future fiscal year without statutory authority
  - 41 USC 3903 authorizes agencies to use current year funds for both severable and nonseverable services for the bona fide needs of up to five years
  - The bona fide needs rule applies to cost reimbursement contracts just as it does to other contract types
- Department of Health and Human Services – Multiyear Contracting and the Bona Fide needs Rule, B-322455, August 16, 2013

# Funding of Severable Services Contracts

Severable Services Contracts, B-317636, April 21, 2009

- 10 USC 2410a authorizes agencies to enter into severable services contracts that begin in one fiscal year and end no more than 12 months later funded with the appropriation current at the time of contract award
  - a statutory exception to the *bona fide* needs rule
  - only applies to contracts funded with time limited appropriations
- An agency using a multiple year appropriation would not violate the *bona fide* needs rule if it enters into a severable services contract for more than one year so long as the period of performance does not exceed the period of availability of the appropriation
- Bona fide needs rule not an issue with no-year funds

# AMOUNT



# Continuing Resolutions

## Avoiding Government Shutdown

- Authority for agencies to continue operation where Congress and President have not completed regular appropriations by start of FY.
- Generally at current or lower rate of operations.
- Generally same terms and conditions (General Provisions) unless Congress provides otherwise.
- No New Starts.



# Rate For Operations

## (Typical Language)

- Sec. 101 - “...at a rate for operations as provided in the applicable Appropriations Acts for fiscal year ...for continuing projects or activities...that were conducted in [the preceding year] ...”
  - For FY 12: Established rate of operations at FY11 levels reduced by 1.503% to comply with limits set in Budget Control Act.
- Here, the term “projects or activities” refers to the total appropriation, not specific activities funded by such account.

# Apportionment

Automatic apportionments from OMB will be for either an amount prorated based upon the percentage of the year covered by the CR or the historical seasonal rate of obligations for the period of the year covered by the CR.



# No New Starts

## (Typical Language)

SEC. 102.(a) No appropriations or funds...shall be used for... (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during [the preceding fiscal year].

SEC. 104. No appropriation or funds made available or authority granted...shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during [the preceding fiscal year].

FMR (DoD 7000.14-R) Vol 3, *Chapter 6*

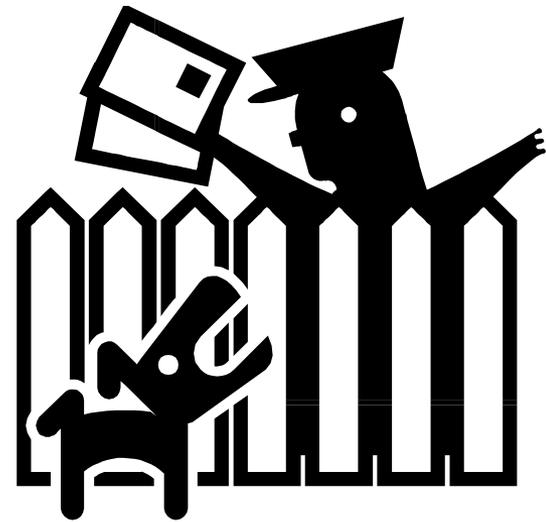
# Rate of Production

(Typical Language)

SEC. 102.(a) No appropriations or funds made available or authority granted...for the Department of Defense shall be used for (1) the new production of items not funded for production in [the preceding fiscal year] or prior years; (2) the increase in production rates above those sustained with [the preceding year's] funds...

# Delivering the Mail

Absent specific legislative language, a continuing resolution maintains the status quo regarding government funding and operation. Thus, the USPS could not discontinue six day mail delivery under a CR.



B-324481, March 21, 2013.

# CR Considerations

- Must stay within CR budget authority and apportionment
  - Can you obligate total amount for all contracts?
  - May have to cut back or delay some contract awards
  - May have to cut back or delay some operations
- Anticipate CRs in setting up contracts
- Assess quantity of items that may be purchased under CR

# Funding Gaps

- Occurs when budget authority expires and there are no appropriations or continuing resolutions.
- No incurring obligations in advance of appropriations.
  - Agencies to cease normal operations – DOJ opinions permit restricted government operations.
    - Activities otherwise authorized by law and funded with no year/multiyear appropriations;
    - Activities authorized through extraordinary contract authority;
    - Activities that protect life and property
    - Certain phase down activities other than normal operations.
  - DOD provides specific guidance on types of activities that may continue.

# Recording of Obligations and the Antideficiency Act

- Absent statutory authority to do otherwise, amount recorded under a multiyear lease is the full lease amount (10 USC 1501(a)(1))
- SEC's failure to record the full amount of its lease liability is a violation of the ADA
  - Securities and Exchange Commission – Recording of Obligations for Multiple-Year Contract, B-322160, Oct 3, 2011



# Online Terms of Service Agreements Containing Open-Ended Indemnification Clauses, OLC Opinion dated March 27, 2012

- A person with authority to contract on behalf of the government violates the ADA by entering into an unrestricted open-ended indemnification agreement.
- A person who lacks authority to contract on behalf of the government does not violate the ADA by consenting to such an agreement, because no binding obligation on the government was incurred.

# Voluntary Services

- An agency may not accept voluntary services except in emergencies involving human life and property. 31 USC 1342
- An agency may accept unpaid services if a person executes an advance written agreement (1) stating that the services are offered without expectation of payment, and (2) expressly waives any future claims against the government. B-324214, January 27, 2014
- The Denali Commission may not accept waivers of compensation from nonfederal commissioners because the rate of compensation is fixed by statute. B-322832, March 30, 2012

# Office of Science and Technology Policy – Bilateral Activities with China, B-321982, October 11, 2011

- P.L. 112-10 (April 15, 2011) prohibited OSTP from using appropriated funds to engage in bilateral meetings with the government of the People's Republic of China.
- OSTP had two meetings in violation of the provision.
- D'oh!
- OSTP: Provision is unconstitutional.
- GAO: No court has so held. Because OSTP was prohibited from using its funds for these purpose, OSTP incurred obligations in excess of an available appropriation.