

31 United States Code: A History of Bad Behavior by Executive Branch Agencies

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The United States Constitution

All Bills for raising Revenue shall originate in the House of Representatives – Art. 1, Sec. 7, Cl. 1

The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; – Art. 1, Sec. 8, Cl. 12

To provide and maintain a Navy – Art. 1, Sec. 8, Cl. 13

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. – Art. 1, Sec. 9, Cl. 7

What does it mean?

It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.

Cincinnati Soap Co. v. United States, 301 US 321 (1937) (citation omitted)

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)

How is it done?

- The Constitution does not provide instructions on how Congress should implement its appropriations power.
- Congress does this in two ways:
 - Through annual appropriations
 - Through permanent legislative restrictions



In the Beginning . . .

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, *viz.* A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids.

Purpose

- The first few years appropriations were in lump sum amounts.
- 1792 – Congress began making specific appropriations
- Complaining about “lack of flexibility,” the executive branch simply lumped the funds together.

Congressional Response

. . . and the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other

- Chap. 28 sec. 1, 2 Stat. 535 (March 3, 1809)

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

- 31 USC 1301(a)

Time

- The first appropriation was enacted “for the service of the present year,” establishing the concept of an annual appropriation.
 - This now is reflected in 31 USC 1301(c), as well as in a recurring GP (sec. 8003) in the DoD appropriations act



The Surplus Fund

- 1795 – Creation of the Surplus Fund, into which unexpended funds were to be transferred two years after expiration
 - Act of March 3, 1795 Chap. 45, sec. 16
- 1820 – Departments of War and Navy directed to send unexpended funds to the Surplus Fund
 - Act of May 1, 1820, Chap. 52, sec. 1-3

Act of May 1, 1820, Chap. 52, sec. 6

And be it further enacted, That no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment; and excepting also, contracts for the subsistence and clothing of the army or navy, and contracts by the quartermaster's department, which may be made by the Secretaries of those departments.

This statute, known as the “Adequacy of Appropriations” or “Feed and Forage” Act, today is codified at 41 USC 6301

Augmentation

Leading up to 1849,
Executive branch agencies
sometimes collected money
that was owed to the United
States and used it for
operating expenses.



Congressional Response

. . . the gross amount of all duties received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States, shall be paid by the officer or agent receiving the same into the treasury of the United States as early a day as practical, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever

- Chap. 110 sec. 1, 9 Stat. 398, March 3, 1849

The Miscellaneous Receipts Act

(b) Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

...

(d) An official or agent not complying with subsection (b) of this section may be removed from office. The official or agent may be required to forfeit to the Government any part of the money held by the official or agent and to which the official or agent may be entitled.

Surplus Fund

- In 1854 the Attorney General suggested that appropriations could be used in the order in which they were appropriated, thus circumventing the Surplus Fund
- The result was an accumulation of large unobligated balances



Congressional Response

61 Stat. 251 (July 12, 1870)

SEC. 5. *And be it further enacted*, That all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfilment of contracts properly made within that year; and such balances not needed for the said purposes shall be carried to the surplus fund: *Provided*, That this section shall not apply to appropriations known as permanent or indefinite appropriations.

This statute, known as the Bona Fide Needs Statute, today is codified at 31 USC 1502(a)

Amount

- Leading up to 1870 agencies sometimes obligated funds far in excess of the amount of available resources



Congressional Response

. . . it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.

-- 16 Stat. 251 (1870), now codified at 31 USC 1341 (the Antideficiency Act)

Some Agencies Didn't Listen

- In 1879 the Postal Service exhausted its appropriation, then came back asking for a deficiency appropriation equal to 34 percent of what it previously had been given.
 - Threatened to stop mail delivery
- Congress responded by amending the Antideficiency Act in 1905 and 1906 to require the apportionment of appropriations to prevent the need for deficiency appropriations; further amended in 1950
 - Now codified at 31 USC 1511-1519

Voluntary Services

- In the 1880s, executive branch agencies asked lower-grade government employees to “volunteer” to work extra hours in excess of that allowed by law
- Not surprisingly, this generated claims for pay for overtime work



Congressional Response

31 USC 1342

- Originally enacted in 1884, included in an appropriation for the then Indian Office of the Interior Department
 - Court of Claims held it applicable only to the Indian Office
 - Comptroller of the Treasury applied it across the entire government
- Congress reenacted it as part of the Antideficiency Act in 1905 and again in 1906

Voluntary Services vs Gratuitous Services

- An agency may not accept voluntary services except in emergencies involving human life and property. 31 USC 1342
- The dangers sought to be avoided are coercive deficiencies and augmentations
- 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

Obligations

- Prior to 1954 federal agencies did not use the same definition of the term “obligation;” Congress could not determine agencies needs
- Supplemental Appropriations Act of 1955, Public Law 663, Chap. 935, sec. 1311, established rules for proper recording
 - Now codified at 31 USC 1108 and 1501



Account Closing Laws

- Prior to 1949 – unexpended balances of annual appropriations retained their FY identity for two years following expiration, after which they went to the surplus fund of the Treasury
- Required another appropriation by Congress to get it back out, even for simple, undisputed claims
- As early as 1853 Treasury interpreted “unexpended” as “unobligated” to avoid the problem of requiring contracts to be fully paid within two years

Attempted Solutions

- 1945 – Congress provided “such sums” for the Comptroller General to pay certified claims under \$500 from the Surplus Fund
- 1949 – Surplus Funds-Certified Claims Act, Ch. 299, 63 Stat. 407 (July 6, 1949)
 - Expired funds transferred to a “Payment of Certified Claims” account from which the Comptroller General paid certified claims
- 1956 – Surplus Funds-Certified Claims Act repealed; responsibility for paying claims passed to the agencies, Public Law 84-798, 70 Stat. 647 (July 25, 1956)

The M Account

- Established “M” accounts for the deposit of obligated but unpaid balances two years after expiration
- After two years, any remaining unexpended balances were transferred to a consolidated “Merged surplus authority” and lost all fiscal year identity for expenditure purposes
- Could be used by agencies indefinitely to liquidate obligations properly incurred against any of the appropriations from which the account was derived



In 1989, the Air Force used \$1B from the M Account to fund B-1B contract modifications

Congressional Response

- National Defense Authorization Act for FY 1990 and 1991, P.L. 101-189 (November 19, 1989)
 - Approval requirements, codified at 31 USC 1553(c)
- National Defense Authorization Act for FY 1990 and 1991. P.L. 101-510, 104 Stat. 145, 1675 (November 5, 1990)
 - Account closing laws, 31 USC 1551-1558

A Specific Prohibition

The Statute:

Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences.

- 31 USC 1348 (a)(1)

The Rule:

The language of the section quoted is plain and comprehensive and has been uniformly construed in a long line of decisions to prohibit the furnishing at public expense of personal telephone service to a Government officer or employee in a private residence or quarters.

- 11 Comp. Gen. 87, 88 (1912)

Statutory Exceptions to the Rule

- Residences owned or leased by the United States in foreign countries for the use of the Foreign Service. 31 USC 1348(a)(2)
- Telephones required for official business in constructing and operating locks and dams for navigation, flood control, and related water uses, under regulations by the Secretary of the Army. 31 USC 1348(b)
- Funds appropriated to the Department of Defense are available to install, repair, and maintain telephone wiring in residences owned or leased by the United States Government and, if necessary for national defense purposes, in other private residences. 31 USC 1348(c)
- The Secretary concerned may install telephone lines and any necessary telecommunication equipment in the private residences of persons who provide certain voluntary services under 10 USC 1588(f)(1)
- Telephones necessary for the protection of national forests. 16 USC 580f
- Authorized telework. Public Law 104-52 sec. 620, Nov. 19, 1995

Other Exceptions

- Government owned quarters which is both the official duty station and private residence
 - E.g., isolated lighthouse keeper (4 Comp. Gen. 891 (1925)); lock tender (19 Comp. Dec. 350 (1912))
- Other situations where there is adequate justification of necessity for a telephone in a private residence and there are adequate safeguards to prevent abuse
 - First developed in the context of military necessity and national security justifications
 - Has expanded to other contexts such as need for secure communications or immediate availability in case of a nuclear accident

Act of July 16, 1914, Chap. 14, sec. 5, 38 Stat 508

No appropriation made in this or any other Act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefore . . . and in the estimates for the fiscal year nineteen hundred and sixteen and subsequent fiscal years there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase, maintenance, repair, or operation of all motor-propelled or horse-drawn passenger-carrying vehicles, specifying the sums required, the public purposes for which said vehicles are intended, and the officials or employees by whom the same are to be used.

Now . . .

- 31 USC 1344
- 31 USC 1349 – penalty for violating 1344 is a suspension of at least one month



Painting of Portraits

None of the funds made available in this or any other Act may be used to pay for the painting of a portrait of an officer or employee of the Federal government, including the President, the Vice President, a member of Congress (including a Delegate or a Resident Commissioner to Congress), the head of an executive branch agency (as defined in section 133 of title 41, United States Code), or the head of an office of the legislative branch.

-- Public Law 115-31, Division E, Title VII, Sec. 736

Eliminating Government-funded Oil-painting Act (EGO Act)

- (a) No funds appropriated or otherwise made available to the Federal Government may be used to pay for the painting of a portrait of an officer or employee of the Federal Government, including the President, the Vice President, a Member of Congress, the head of an executive agency, or the head of an office of the legislative branch.

- (b) In this section—
 - (1) the term ‘executive agency’ has the meaning given the term in section 133 of title 41; and
 - (2) the term ‘Member of Congress’ includes a Delegate or Resident Commissioner to Congress

B-327671, February 19, 2016

- The prohibition is on the painting of a portrait
- Prohibition does not prevent an agency from incurring costs associated with accepting donated portraits



The Impoundment Control Act of 1974

2 USC 681-688

- An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority.
- The Impoundment Control Act provides authority for agencies to “impound” or withhold the obligation of funds in certain circumstances.



Two Types of Impoundment

- Deferral
 - Temporarily postpone obligation of funds
 - Permissible only to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law, but not for policy reasons
 - Deferred amounts must be obligated before end of period of availability
- Rescission
 - President wants to permanently cancel the availability of budget authority
 - May be proposed for any reason, including policy reasons
 - Requires a rescission bill from Congress

Violations of the ICA

- Agency withholds funds for an authorized reason but fails to send a special message to Congress
- Agency refuses to obligate funds for policy reasons
- Agency sets aside funds or intentionally slows down spending in anticipation of proposed cancellations or rescissions of previously appropriated funds
- Timing of a proposed deferral is such that funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence

Not Violations of the ICA

- Agency delays obligating funds for programmatic reasons
- Agency chooses to reprogram funds under a lump-sum appropriation
- Agency delays obligating funds or budget authority expires because of ineffective or unwise program administration

Role of GAO

- Reviews special messages to Congress; ensures that the impoundment is not misclassified
- Reports to Congress any impoundment the President fails to report
- If an agency does not release budget authority for obligation, the Comptroller General may bring a civil action in the US District Court for the District of Columbia to require such action
- GAO monitors the status of affected funds and is available to prepare statistical summaries and analyses for Congress

It's not always about us . . .

Whereas numerous applications are being received from various organizations requesting lodging, food, and transportation for the purpose of holding conventions or meetings at Washington and elsewhere; and

Whereas the expenditure of Government funds for such purposes is against the policy of Congress: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, unless specifically provided by law, no moneys from funds appropriated for any purpose shall be used for the purpose of lodging, feeding, conveying, or furnishing transportation to, any conventions or other form of assemblage or gathering to be held in the District of Columbia or elsewhere.

This section shall not be construed to prohibit the payment of expenses of any officer or employee of the Government in the discharge of his official duties.

-- Public Resolution No. 2, 74th Congress, ch. 4, 49 Stat. 19 (Feb 2, 1935), now codified at 31 USC 1345

. . . and it's not always codified

During the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office, no funds may be obligated or expended in excess of \$5,000 to furnish or redecorate the office of such department head, agency head, officer, or employee, or to purchase furniture or make improvements for any such office, unless advance notice of such furnishing or redecoration is transmitted to the Committees on Appropriations of the House of Representatives and the Senate. . . .

Public Law 115-31, Division E, Title VII, Sec. 710

Office Furnishing or Redecorating Expenses



- HUD – Compliance with Statutory Notification Requirement and the Antideficiency Act, B-329955, May 16, 2019
- EPA – Installation of Soundproof Booth, B-329603, April 16, 2018
- Federal Maritime Administration, B-327432, June 30, 2016

A Provision for Mathematically Challenged Appropriators

That hereafter the total amount appropriated in the various paragraphs of an appropriation act shall be determined by the correct footing up of the specific sums or rates appropriated in each paragraph contained therein unless otherwise expressly provided.

- 29 Stat. 148 (May 28, 1896)

Translation:

Except as specifically provided by law, the total amount appropriated in an appropriation law is determined by adding up the specific amounts or rates appropriated in each paragraph of the law.

- 31 USC 1302



Grand Canyon National Park

42 Stat. 1213 (1923)

- Administration, protection and maintenance
\$60,000
- Construction of physical improvements \$65,400
- “in all, \$126,000”

How much is appropriated?



A correct footing up of the specific sums appropriated produces a total of \$125,400 and that is the amount appropriated, regardless of the “in all, \$126,000,” which, under the terms of the provision cited must be ignored.

- 2 Comp. Gen. 592 (1923)

See also 5 Comp. Dec. 18

