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March 23, 2009

The Honorable Daniel K. Inouye
Chairman
Committee on Appropriations
United States Senate

The Honorable Thad Cochran
Ranking Minority Member
Committee on Appropriations
United States Senate

Subject: *Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations*

In a letter dated October 30, 2008, the Committee requested our opinion regarding the applicability of the Antideficiency Act to statutory prohibitions on the use of appropriations. Letter from Robert C. Byrd, Chairman, and Thad Cochran, Ranking Member, U.S. Senate Committee on Appropriations, to Gene Dodaro, Acting Comptroller General, GAO, Oct. 30, 2008. Specifically, the Department of Justice's Office of Legal Counsel (OLC) has concluded that when an agency obligation or expenditure violates a statutory prohibition on the use of appropriated funds, the agency violates the Antideficiency Act only if the prohibition was enacted *in the appropriations act* from which the appropriations were obligated.¹ Under this interpretation, agencies would not be required to report violations of statutory prohibitions on the use of appropriations unless the prohibition is incorporated "in an appropriation." As we explain below, we disagree with OLC's narrow construction of the Act. In our opinion, neither the text of the statute nor the history and evolution of

¹ Memorandum for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007 (2007 OLC Opinion). OLC subsequently restated its position in a 2008 letter to the Federal Aviation Administration. Letter from Steven A. Engel, Deputy Assistant Attorney General, Office of Legal Counsel, to Kerry B. Long, Chief Counsel, Federal Aviation Administration, *Re: Whether the Federal Aviation Administration's Finalizing and Implementing of Slot Auction Regulations Would Violate the Anti-Deficiency Act*, Oct. 7, 2008 (2008 OLC Letter).

the Act over the last century support OLC's interpretation. Further, OLC's interpretation is not consistent with long-standing judicial and administrative understanding of the Act.²

BACKGROUND

The Constitution preserves for Congress the power of the federal purse. To protect Congress's power of the purse, the Constitution prohibits the drawing of money out of the Treasury except as appropriated by Congress: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. The Antideficiency Act has been described as the "statutory mechanism by which Congress guards its appropriations power," J. Gregory Sidak, *The President's Power of the Purse*, 1989 Duke L. J. 1162, 1234, and as "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds." Hopkins & Nutt, *The Anti-deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 56 (1978).

The Antideficiency Act provides, in relevant part:

"An officer or employee of the United States Government or of the District of Columbia government may not—

"(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation . . ."

31 U.S.C. § 1341(a)(1)(A).

The Antideficiency Act requires that agencies who violate the Act "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. §§ 1351, 1517(b). The Act requires agencies to transmit copies of reports to the Comptroller General. *Id.* Officers and employees who violate the Act are subject to administrative discipline, including suspension from duty without pay or removal from office, and, in some cases, a fine of not more than \$5,000, imprisonment of not more than 2 years, or both. *Id.* §§ 1349–1350, 1518–1519.

In coming to its interpretation of the Act, OLC focused on the phrase "in an appropriation" and concluded that the Antideficiency Act does not apply to statutory prohibitions on an agency's use of its appropriations if the prohibition was not enacted "in an appropriation." 2007 OLC Opinion at 8, 15. In OLC's view, the

² Because OLC's views were fully articulated in the 2007 OLC Opinion that it issued to the Environmental Protection Agency (EPA), we did not request further legal views from OLC in responding to your request. *See generally* GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html.

Antideficiency Act applies only if a prohibition on using an appropriation for a particular purpose was enacted as part of the appropriation used for the obligation or expenditure; that is, an obligation or expenditure violating that prohibition would constitute an Antideficiency Act violation as well.³ *Id.* at 9, 10, *citing* Memorandum Opinion for Assistant Attorney General for Administration, *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, OLC Opinion, Jan. 19, 2001 (2001 OLC Opinion).

The prohibition at issue in the 2007 OLC Opinion was 31 U.S.C. § 1345.⁴ Section 1345 is a general, governmentwide prohibition on the use of appropriations for travel-related expenses for nonfederal personnel. OLC concluded that EPA's use of its appropriations to provide light refreshments to nonfederal participants at EPA conferences would violate section 1345.⁵ 2007 OLC Opinion at 1. However, because section 1345 is codified in title 31 of the United States Code and was not incorporated by reference into EPA's appropriations, OLC stated that EPA's violation of section 1345 does not constitute a violation of the Antideficiency Act. *Id.* at 8. OLC reasoned that because of the phrase "in an appropriation," the Antideficiency Act "does not reach beyond the 'appropriation' that makes 'an appropriation available . . . for [an] expenditure or obligation.'" *Id.* at 15.

While the distinction OLC makes between "in an appropriation" and not in an appropriation is critical to its conclusion, OLC does not define with specificity what it means for a restriction (or prohibition) to be "in an appropriation." For purposes of this opinion, we presume that the phrase "in an appropriation" would include restrictions found under the particular heading enacting an appropriation; restrictions in the agency-specific administrative provisions title of an appropriations act; and restrictions in the administrative provisions generally found in the last title of an appropriations act that apply to all funds appropriated in the act.

There are, of course, other restrictions that arguably would be "in an appropriation." For example, a restriction in an appropriations act intended to have future effect and

³ Although the 2007 OLC Opinion focuses on a purpose prohibition, OLC, in the opinion, also discussed what it called "internal caps" or amount limitations enacted in appropriations acts, and suggested that a violation of an amount limitation enacted in other laws would not constitute an Antideficiency Act violation. 2007 OLC Opinion at 9. Although our opinion focuses on purpose prohibitions, we would disagree, for the same reasons set out herein, with OLC's view of amount limitations.

⁴ It reads, as pertinent here, as follows: "[e]xcept as specifically provided for by law, *an appropriation* may not be used for travel, transportation, and subsistence expenses for a meeting." 31 U.S.C. § 1345 (emphasis added).

⁵ OLC's interpretation of section 1345 is more restrictive than our view of that section. *See* B-310023, Apr. 15, 2008; B-300826, Mar. 3, 2005; 72 Comp. Gen. 229 (1993), and cases cited therein.

permanence could be considered to be “in an appropriation” certainly for the year of enactment, if not in future years. A strong argument could be made that a restriction would be “in an appropriation” if the appropriations act incorporated the restriction by reference. OLC allows for this possibility, but is not definitive: “We do not have before us any particular appropriation (which might be said, depending on its text, to incorporate section 1345 . . .).” 2007 OLC Opinion at 8, n. 2. OLC suggests that Congress would have to specifically incorporate by reference every statutory provision of general applicability in order for the restriction to be “in an appropriation.”⁶ *Id.*

Not uncommonly, Congress will authorize or prohibit spending for a particular purpose in laws other than the agency’s appropriation. Section 1345 is an example of a prohibition that Congress enacted by separate statute to prohibit a particular use of appropriated funds. *See also, e.g.*, 5 U.S.C. § 5946 (prohibiting use of appropriated funds for employee membership fees in a society or association). An example of an authorization is 5 U.S.C. § 7905. Because agencies generally may not use their appropriations to reimburse federal employees for their costs of commuting to work, Congress, by separate statute, has authorized agencies to use appropriated funds to reimburse federal employees for certain commuting expenses under a transit benefit program. 5 U.S.C. § 7905. Having enacted such prohibitions or authorizations, Congress need not enact the same or similar language as part of each agency’s annual appropriation.

The interrelationship of appropriations acts and other legislation is central to understanding Congress’s constitutional power over federal spending. As one commentator has pointed out, while Congress authorizes federal spending primarily through appropriations acts, appropriations acts must be read in conjunction with other laws, such as legislation creating the particular agency or program, and must be read to give effect to statutes of general applicability. Kate Stith, *Congress’ Power of the Purse*, 97 Yale L. J. 1343, 1353 (1988). The Supreme Court recognized this dynamic when it observed that:

“[B]oth substantive enactments and appropriations measures are ‘Acts of Congress,’ but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden.”

Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978). *See also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (appropriations acts are to be read in conjunction with “restrictions in the operative statutes”). It is against this backdrop that we interpret

⁶ Alternatively, OLC suggests that Congress, in enacting section 1345, could have chosen to “either specifically or generally incorporate the penalties” of the Antideficiency Act. 2007 OLC Opinion at 8, n. 2.

the scope of the Antideficiency Act's coverage as it applies to statutory prohibitions on the use of appropriations enacted "outside" of appropriations acts.

DISCUSSION

OLC and GAO agree that the Antideficiency Act encompasses purpose prohibitions, not just amount.⁷ See 2007 OLC Opinion at 10, 12. Where we disagree is on the reach of the Act. The literal language of the Antideficiency Act prohibits agencies from expending or obligating amounts "exceeding an *amount available in an appropriation or fund* for the expenditure or obligation . . ." 31 U.S.C. § 1341(a)(1)(A) (emphasis added). OLC, focusing narrowly on the phrase "in an appropriation," argues that the Act applies only to purpose prohibitions enacted in the appropriation that the agency used for the improper purpose. By detaching the phrase from the context of the entire subsection, OLC gives it a disproportionate, if not a controlling, effect. When the phrase is read in the context of the entire provision, however, its meaning is apparent: "an amount available in an appropriation" refers to an amount that Congress has provided to an agency for some legally permissible purpose.

In our opinion, the reach of the Antideficiency Act extends to all provisions of law that implicate the use of agency appropriations. If a statute, whether enacted in an appropriation or other law, prohibits an agency from using any of its appropriations for a particular purpose, the agency does not have "an amount available in an appropriation" for that purpose. If the agency nevertheless incurs an obligation for that purpose, it has incurred an obligation "exceeding an amount available in an appropriation" in violation of section 1341(a)(1)(A). Determining what amount, if any, is available for a particular obligation or expenditure, begins with examining the language in the agency's appropriations act, but it does not end there: agencies must consider the effect of all laws that address the availability of appropriations for that expenditure. See *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1084 (Fed. Cir. 2003) ("If there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit.").

Our reading of the Act is consistent with its century-old history and evolution as set out by OLC in its 2001 Opinion. In that opinion, OLC, drawing on the history of the Act, concluded, and we agree, that the Act was intended to cover not only deficiencies caused by executive spending in excess of appropriated funds, but also to enforce Congress's "appropriations power by exercising control over the *purposes* for which agencies may use their appropriated funds." 2001 OLC Opinion at 5 (emphasis in original). See also *id.* at 15 ("we believe . . . the Act's proponents sought

⁷ The Antideficiency Act recognizes time limitations as well. Section 1341(a)(1)(B) specifically prohibits agencies from obligating funds "*before an appropriation is made. . .*" *Id.* (emphasis added). Time limitations on appropriated funds affect their availability for obligation, and obligations in advance of appropriations have been found to violate the Antideficiency Act. See *Leiter v. United States*, 271 U.S. 204 (1925).

not only to prohibit government agencies from spending funds in excess of their total appropriations (*i.e.*, creating a deficiency), *but also to enforce Congress's control over the uses to which public funds are put*" (emphasis added)).

The Antideficiency Act "arose during the nineteenth century from Congress's increasing frustration with the failure of executive branch agencies to stay within the budgets allocated to them." *Id.* at 9. The original version, enacted in 1870, made it unlawful "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. . . ." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251.

Congress's concern was not limited to agency overobligations and overexpenditures for authorized purposes; Congress's concern extended to agencies' use of appropriated funds for unauthorized purposes. In response to continuing overobligations and overexpenditures of their appropriations, Congress amended the law in 1905, adding criminal penalties for violating the Act. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257. Congress again amended the Act in 1906, tightening controls on apportionments. Act of Feb. 27, 1906, ch. 510, 34 Stat. 27, 49. "Although much of the legislative debate focused on the problem of overall deficiencies, several Committee members and other representatives emphasized the need to prevent executive branch departments from taking funds authorized for one purpose and using them for another, noting that such abuses were a significant cause of deficiencies." 2001 OLC Opinion at 11.

A review of the legislative history discloses a number of examples of recognizing that the Act would extend to the use of appropriations for unauthorized purposes. One example raised by a member of the appropriations committee was a State Department official's "misapplication" of funds to print a book that Congress had not authorized. 39 Cong. Rec. 3781 (1905) (statement of Mr. Underwood). Another example was the Attorney General's use of a miscellaneous expenditures appropriation to commission a portrait. 40 Cong. Rec. 1274–75 (1906) (statement of Mr. Littauer). Summarizing the legislative history, OLC stated that "a number of members of Congress asserted (without opposition) that the 1905 and 1906 amendments would also enforce Congress's constitutional authority to control the objects on which funds were to be spent." 2001 OLC Opinion at 13.

In 1950, Congress amended the law again and introduced the term "available," explicitly recognizing that the Act encompasses purpose.⁸ Pub. L. No. 81-759, ch. 896, § 1211, 64 Stat. 595, 765 (Sept. 6, 1950). As amended, the Act then stated:

⁸ In 1982, Congress codified the 1950 provision as section 1341(a) of title 31, United States Code. As codified, the Act reads as it does today, "exceeding an amount available in an appropriation." While the wording is slightly different ("any appropriation" becomes "an appropriation," and "under an appropriation" becomes "in an appropriation"), the codification was not intended to make any substantive changes in the law. *See* Pub. L. No. 97-258, § 4(a), 96 Stat. 877, 1067 (Sept. 13, 1982).

“No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein.”

Id. Nothing in the statutory history or evolution of the Act suggests that legislated expressions of purpose availability are less deserving for purposes of the Antideficiency Act if they are enacted in an authorizing statute or other law rather than in an appropriations act.

The 2007 OLC Opinion’s cramped interpretation of the Antideficiency Act is inconsistent as well with Supreme Court and other judicial and Comptroller General understanding and application of the Act. In fact, in contrast to OLC’s 2007 Opinion, the Supreme Court has expressed the view that violating a statutory restriction enacted in other law (*i.e.*, not enacted as part of an agency’s appropriation) would trigger the Antideficiency Act. *See OPM v. Richmond*, 496 U.S. 414 (1990). In *Richmond*, the Court, explaining that money could not be paid out of the Treasury unless authorized by statute, held that a disability retirement payment sought by the petitioner would be in direct contravention of the governing statute. The Court emphasized its point by referring to the Appropriations Clause of the Constitution, U.S. Const., art. I, § 9, cl. 7, and the Antideficiency Act, and stated, “If an executive officer on his own initiative had decided that, in fairness, respondent should receive benefits despite the statutory bar, the official would risk prosecution” under the Antideficiency Act. *Id.* at 430. Clearly, the Court read the disability retirement statute as a restriction on the use of an appropriation that implicates the Antideficiency Act, even though the restriction was enacted in other law. *See also Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995) (Impact Aid Act requirements relevant in determining the “availability” of the agency’s appropriations and application of the Antideficiency Act).

GAO and, prior to GAO’s establishment, the Comptroller of the Treasury, have concluded that when some or all of an agency’s appropriation is not available for a certain purpose, even when that restriction or prohibition is not enacted as part of an appropriations act, any obligation or expenditure in violation of the restriction or prohibition would result in a violation of the Antideficiency Act. For example, opinions and decisions have concluded that:

- Use of an appropriation to make a contract payment in excess of statutory limitation would violate the Antideficiency Act. 13 Comp. Dec. 478 (1907).
- Use of appropriations for the construction of a monument, prohibited by separate statute, would violate the Antideficiency Act. 10 Comp. Gen. 395 (1931).
- Use of appropriations for improvements to a state road, prohibited by separate statute, would violate the Antideficiency Act. 39 Comp. Gen. 388 (1959).

- Obligation of appropriations in excess of a limitation in an authorizing statute violates the Antideficiency Act. 54 Comp. Gen. 799 (1975).
- Obligation of appropriations in excess of a limitation on the availability of the agency's operations and maintenance appropriation for construction projects would violate the Antideficiency Act if the agency were unable to adjust its accounts to charge the projects to its military construction appropriation. 63 Comp. Gen. 422 (1984).
- Use of appropriations to fund an international trade program violates the Antideficiency Act when the agency has no appropriation available for that purpose. B-229732, Dec. 22, 1988.
- Use of a specific agency appropriation, prohibited by separate statute for funding cost comparison studies, violates the Antideficiency Act unless the agency could adjust its accounts to charge the costs to another appropriation legally available for that purpose. B-302973, Oct. 6, 2004.
- Use of appropriations to purchase accident insurance for employees on official travel violates the Antideficiency Act when the agency has no appropriation available for that purpose. B-307815, Sept. 25, 2007.⁹

OLC's narrow interpretation of the Antideficiency Act essentially elevates form over substance. Under OLC's logic, reporting a violation of a restriction on the availability of an appropriation would be a function of the form of enactment of the restriction, not the substance of the violation.

Consider, for example, how Congress has legislated to limit the Department of Defense's (DOD) use of its appropriation for publicity or propaganda purposes. In October 2008, in the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Congress enacted a permanent prohibition on DOD's use of appropriations for publicity or propaganda purposes. Pub. L. No. 110-417, § 1056(a), 122 Stat. 4356, 4610–11 (Oct. 14, 2008), *reprinted at* 10 U.S.C. § 2241 note. Previously, Congress had enacted a virtually identical prohibition each year in DOD's annual appropriations acts. *See, e.g.*, Pub. L. No. 110-116, § 8001, 121 Stat. 1295, 1313 (Nov. 13, 2007). If DOD, in the future, were to violate the permanent prohibition, OLC's interpretation of the Antideficiency Act would lead to the absurd result of permitting DOD to forego

⁹ *See also* B-308715, Nov. 13, 2007 (use of appropriations for activities needed to implement or finance a loan guarantee program, prohibited by separate statute, violates the Antideficiency Act); 64 Comp. Gen. 282 (1985) (expenditures that exceed statutory ceilings in the agency's authorizing legislation would violate the Antideficiency Act; such expenditures would exceed "available" appropriations as that term is used in the Antideficiency Act).

reporting the violation to Congress.¹⁰ In the past, the department would have had to report a violation—raising the question, why should congressional enactment of a permanent prohibition have less effect than a temporary prohibition enacted in an appropriations act?

In the so-called Anti-Lobbying Act, 18 U.S.C. § 1913, Congress imposed a governmentwide prohibition on the use of any appropriation for the purpose of encouraging the public to lobby a Member of Congress on behalf of the agency's interest in any bill, measure, or legislation before Congress (also known as grassroots lobbying). As a result of OLC's interpretation of the Antideficiency Act, an agency violating the Anti-Lobbying Act would not have to report to Congress the fact that public money was used to lobby a Member or Members of Congress unless a similar provision was carried in the agency's appropriation act, an untenable result in our opinion.

From Congress's perspective, the Antideficiency Act's reporting requirement serves its responsibilities to monitor and oversee federal spending to ensure accountability in government. OLC's interpretation of the Antideficiency Act promotes opacity in government at the expense of transparency and, by so doing, diminishes the ability of Congress to exercise its constitutional power to oversee the use of public money.¹¹ Under the interpretation in OLC's 2007 Opinion, the Antideficiency Act would be inapplicable to countless statutory prohibitions and restrictions, and agencies would be permitted to withhold from Congress disclosure of violations of those prohibitions.

CONCLUSION

Agencies must consider the effect of statutory prohibitions, conditions, and limitations in determining whether an appropriation is available for purposes of the Antideficiency Act. If there are no funds available in an appropriation because of a statutory prohibition or restriction—whether enacted as part of the appropriations act or in other law—any obligation or expenditure would be in excess of the amount available for the obligation or expenditure as provided for in the Antideficiency Act. This reading of the Act is consistent with the legislative purposes of the Antideficiency Act as well as prior federal court and GAO opinions and decisions.

We find no principled reason for following the OLC views expressed in the 2007 OLC Opinion and restated in the 2008 OLC Letter. If an agency violates any of the numerous prohibitions or restrictions on its use of the public's money enacted in

¹⁰ Many other annual appropriations acts enact restrictions on using funds for publicity or propaganda purposes. *See, e.g.*, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004).

¹¹ Similarly, the Antideficiency Act reporting requirement aids the President in the discharge of his duty to "take care that the laws be faithfully executed . . ." U.S. Const., art. II, § 3.

statutes other than appropriations acts, the agency will have violated the Antideficiency Act. GAO expects agencies to report violations consistent with this opinion and will track agencies' Antideficiency Act reports accordingly. *See* GAO Circular Letter to Heads of Departments, Agencies and Others Concerned, *Transmission of Antideficiency Act Reports to the Comptroller General of the United States*, B-304335, Mar. 8, 2005.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel