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Practice Notes

Fiscal Implications of Court and Administrative Orders, Settlement Agreements, and Civil Consent Decrees

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Constitutionally, Congress possesses the power of the purse.[1] Congress provides budget authority to agencies to incur obligations and make expenditures through appropriations acts,[2] which the President signs into law.[3] These acts dictate the permissible purpose, period of availability, and amount of appropriations available to agencies to obligate and expend.[4] Although not directly involved in the appropriations process, the judiciary and various administrative bodies exercise authority that directly impacts purpose, time, and amount restrictions on appropriations. Further, various fiscal constraints limit the executive branch's ability to settle litigation before these same bodies. This article will review some of the fiscal implications of court and administrative orders as well as restrictions on entering into settlement agreements and consent decrees.

Time

As a general rule, a court order or administrative award serves as a new obligational event for the purpose of determining the fiscal year from which to pay the judgment or award.[5] The legal rationale for this rule is that "the court or administrative award 'creates a new right' in the successful claimant, giving rise to new Government liability."[6] Accordingly, an agency must use appropriations available for the fiscal year in which a claim becomes a legal liability, including when a settlement agreement establishes that liability.[7]

This rule applies when an agency must reimburse the Judgment Fund. Codified at 31 U.S.C. § 1304,[8] the Judgment Fund is a permanent, indefinite appropriation available to pay most monetary court judgments against the United States, including compromise settlements.[9] Agencies must reimburse the Judgment Fund for payments they make that are subject to the Contract Disputes Act (CDA)[10] and for discrimination-related payments in accordance with the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act).[11] The CDA requires the agency to reimburse the Fund "out of available funds or by obtaining additional appropriations for such purposes."[12] The timing of the judgment determines availability.[13] The No FEAR Act requires reimbursement "out of any appropriation, fund, or other account . . . available for operating expenses of the Federal agency to which the discriminatory conduct involved is attributable."[14] Based on the general rule, availability should be determined as of the time of judgment for No FEAR Act litigation.

Agencies must reimburse the Judgment Fund promptly, typically within forty-five days of receiving notice that the Judgment Fund has made a payment on the agency's behalf.[15] Alternatively, the agency may establish a reimbursement or payment plan with the Fiscal Service.[16] Even when an agency defers reimbursement to the Judgment Fund, the appropriate source of reimbursement continues to be funds available at the time of judgment rather than when the agency actually reimburses the Judgment Fund.[17]

In an unpublished 1987 memorandum opinion, the Government Accountability Office (GAO) determined that any agency enjoys discretion regarding when it reimburses the Judgment Fund.[18] Reasoning that Congress did not require an "agency to disrupt ongoing programs or activities in order to find the money," the GAO posited that an agency would not violate the CDA if it did not reimburse the fund in the same fiscal year in which the award was paid, or even if reimbursement were delayed into the subsequent fiscal year.[19] As part of its analysis, the GAO did not disturb its earlier holding in *Bureau of Land Management–Reimbursement of Contract Disputes Act Payments* "that CDA reimbursements are chargeable to appropriations current as of the date of award,"[20] merely noting that the holding did not preclude deferred reimbursement.[21]

Although court orders and most administrative awards serve as obligational events for determining the availability of funds, some administrative awards are chargeable to an earlier appropriation.[22] For example, the GAO has opined that administrative back pay awards and related interest "should be charged to, and paid from, the agency appropriation covering the fiscal year or years to which the award relates."[23] The GAO has determined that, as a general matter, administrative payment of claims for compensation and associated allowances are charged to the fiscal year in which the employee performed the work.[24]

A board of contract appeals decision serves as an obligational event, but a contracting officer's purely administrative resolution of a contract claim does not. Contracting officer resolutions of in-scope contracting disputes that are enforceable under the original contract are chargeable to the fiscal year in which the agency entered into the contract because the agency's liability arises when it enters into the contract.[25] The agency pays claims for out-of-scope modifications or work not involving an enforceable antecedent liability from funds available in the fiscal year in which the contracting officer grants relief.[26]

Purpose

Court orders may clarify the permissible purposes for which an agency may obligate funds, particularly when determining the appropriate source of funds to remedy violations of the law. *Bureau of Engraving and Printing (BEP)—Currency Reader Program* recounts how a Federal court determined that BEP, which designs and produces Federal Reserve notes, violated Section 504 of the Rehabilitation Act of 1973[27] "by failing to provide meaningful access to [U.S.] currency for blind and visually impaired persons."[28] The court ordered the Department of the Treasury to "take such steps as may be required to provide meaningful access to [U.S.] currency for blind and visually impaired persons."[29] Seeking to comply with the court's order, BEP requested an advance decision from the GAO as to whether BEP appropriations were available to give away currency readers to the blind and visually impaired.[30] The GAO posited that the distribution of the readers was "in furtherance of BEP's statutory mission *as clarified by the court.*"[31] Notwithstanding the "personal nature" of the readers, the GAO determined that they constituted a reasonable expense in support of BEP's now-clarified statutory mission.[32]

In addition, the GAO has indicated that the appropriation responsible for a violation of the law is an appropriate source of funding for subsequent remedial efforts. In *United States v. Garney White – Funding of Judgment*, the Farmers Home Association (FmHA) issued a rural housing loan to Mrs. and Mr. White to purchase a home under construction.[33] The house was defectively built, so the Whites refused to make payment, resulting in the United States purchasing the home at a foreclosure sale and seeking to evict the Whites.[34] Eventually, the court set aside the sale and ordered the FmHA to repair the house.[35] The GAO determined that the "funds appropriated to meet administrative expenses of the program may be used to comply with the court order because the necessity for expending these funds arose as a result of the Secretary's conduct of the rural home loan program."[36]

Unless otherwise authorized by statute, the general principle that the appropriation responsible for a violation of the law is an appropriate source of funding for any subsequent remedial effort may be limited to funding injunctive relief.[37] The GAO has repeatedly articulated a "long-standing rule" that, generally, "an agency's operating appropriations are not available to pay *judgments* unless provided by statute."[38]

Amount

Avoiding Antideficiency Act Violations

The Antideficiency Act (ADA) prohibits "an officer or employee of the [U.S.] Government" from making or authorizing an obligation exceeding, or in advance of, an appropriation "unless authorized by law."[39] However, the GAO has appeared to adopt a blanket rule that when exceeding

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an appropriation is the result of a judicial award, no ADA violation occurs.[40] Further, in *Bureau of Land Management—Reimbursement of Contract Disputes Act Payments*, the GAO extended this rule to a "quasi-judicial judgment or award," such as judgments issued by agency boards of contract appeals.[41] The rationale for this exception to the ADA is that the agency lacks options to avoid the over-obligations and the actions of a court are beyond the agency's control.[42]

A Lapse in Appropriations

In addition, court orders may provide an exception to ADA violations by unfunded agencies during a lapse in appropriations, such as when a court denies the Government's motion to stay and orders the case to continue. Generally, during a lapse, an agency may not incur obligations, including the salaries of its employees.[43] In the event of a lapse, the Department of Justice's (DOJ) contingency plan envisions that all civil litigation "will be curtailed or postponed to the extent that this can be done without compromising to a significant degree the safety of human life or the protection of property."[44] Attorneys at the DOJ are instructed to request that the courts postpone most active cases until the DOJ receives an appropriation.[45] However, "[i]f a court denies such a request and orders a case to continue, the Government will comply with the court's order, which would constitute express legal authorization for the activity to continue."[46]

It is unclear why the judiciary enjoys such unbridled authority to require the executive branch agencies to incur obligations during a lapse in appropriations in the absence of a clear and narrowly tailored exception to the ADA. If an agency lacks budget authority during a lapse, the ADA prohibits an agency from incurring obligations unless one of several narrow exceptions apply.[47] This obligational prohibition has constitutional implications.[48] Further, whenever an executive branch agency incurs civil-litigation-related obligations pursuant to a court order, such obligations become legal liabilities of the Government that "Congress must cover by enacting appropriations."[49]

At least one appellate judge has raised concerns about the courts' rationale for authorizing Government attorneys to continue to litigate civil cases during a lapse in appropriations.[50] In *Kornitzky Group v. Elwell,* the Federal Aviation Administration unsuccessfully moved to stay oral arguments because of a lapse in appropriations.[51] Denying the motion as being consistent with how the court handled motions to stay during similar lapses, a panel of the U.S. Court of Appeals for the District of Columbia Circuit reviewed the ADA's prohibition on voluntary services contained in 31 U.S.C. § 1342, the DOJ's lapse contingency plan, and then pointed to the DOJ's practice of acquiescing to the court during an earlier lapse.[52] Two concurring panel judges noted that "when [Federal] appropriations lapsed in 2013, resulting in a 'shutdown' from [1 to 17 October] 2013, the court received Government motions to stay oral argument in at least sixteen cases. Every one of these motions was denied; and every time, the Government then participated in oral argument."[53]

Grounding his opinion in the Appropriations Clause and § 1342 of the ADA, the dissenting judge questioned the court's rationale for denying the motion.[54] First, the dissent noted that the ADA "emergency" exception was inapplicable because oral argument in a case during a lapse in appropriations did not implicate an imminent threat to human life or property.[55] Judge Randolph noted further that the ADA's constitutionality was "beyond doubt," and the court, therefore, is not "free to disregard the restrictions of § 1342."[56] Denying the "authorized by law" exception that the majority applied in this case, the dissent opined that the court could not circumvent the ADA's statutory restrictions simply by authorizing Federal employees to appear in court, and it characterized the majority's use of such a rationale as "blatant bootstrapping."[57] The dissent reasoned that § 1342's "authorized by law" language does "not confer a license on the [judiciary]" but rather "requires legal authority for the obligation of public funds, either from appropriations or other relevant statutes, or—in the case of [executive] authority—from the Constitution itself."[58]

During past lapses, the DOJ's motions for stays in litigation have been met with uneven responses; some judges grant them, some do not.[59] Some courts analyze lapse-related motions to stay like routine motions,[60] while in others, there appears to be no uniform standard.[61]

Despite the lack of uniformity in how courts address agencies incurring obligations during a lapse in appropriations, Office of Legal Counsel (OLC) opinions provide reasoning that may serve as a standard for permissible court-authorized activity in civil cases during these lapses. Authored by Attorney General Benjamin R. Civiletti, *Authority for the Continuance of Government Functions*

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During a Temporary Lapse in Appropriations, serves as the cornerstone of executive branch lapse law.[62] This opinion reasoned that the "authorized by law" exception to the ADA included not only the use of multi- or no-year funding, statutes specifically permitting the obligation of funds in the absence of an appropriation, and obligations necessarily incident to the exercise of the President's constitutional authorities, but also activities that were "authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, an agency."[63] In August 1995, the OLC authored *Government Operations in The Event of a Lapse in Appropriations*,[64] which discussed various exceptions to the ADA's prohibition on incurring obligations during a lapse in appropriations. The discussion covered the necessarily implied exception to the ADA, noting that the act "contemplates that a limited number of [Government] functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well."[65]

In December 1995, the OLC issued *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations*.[66] Again citing its 1981 Civiletti opinion, the OLC posited that certain agency functions and activities could continue during a lapse "when authorization for their continuation was a valid inference from other funding decisions of the Congress," such as "functions that are 'authorized by necessary implication from the specific terms of duties that have been imposed on, or authorities that have been invested in' an agency."[67] These functions include "unfunded functions that enable other funded functions to be executed."[68]

The opinion continued to articulate what may be an appropriate standard for an unfunded agency's participation in civil court proceedings of a funded judiciary or in the administrative proceedings of a funded agency. The OLC stated:

> To the extent that any of the department's functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the department's functions and activities may continue.[69]

However, the same necessarily implied justification would not apply to orders issued by an unfunded judiciary or administrative entity.[70] In *Continuation of Federal Prisoner Detention Efforts During United States Marshals Service Appropriation Deficiency,* the U.S. Marshal Service (USMS) sought guidance on how it could continue to perform its mission in the event of a funding deficiency, that is, "after having expended all appropriated funds."[71] Cognizant of its "relevant" lapse appropriations opinions and the statutory mission of the USMS, which included a mandate "to obey, execute, and enforce all orders of the [U.S. district courts], the [U.S. courts of appeals], and the Court of International Trade," the OLC nevertheless opined that it was doubtful that the "authorized by law" exception

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to the ADA would permit the USMS to continue operating during a deficiency in appropriations.[72] The OLC opined that, "[i]n our view, the 'authorized by law' exception must refer to congressional, as opposed to judicial, authorization to expend funds. The [ADA] was intended to reaffirm *congressional* control of the purse."[73] In other words, the necessarily implied exception assumes that Congress intended that an unfunded agency be able to incur obligations critical to the continued functioning of a funded agency. If Congress has failed to fund both agencies, no such implication can be found.

When the judiciary itself was unfunded, the Administrative Office of the U.S. Courts (AOUSC) previously indicated that once its fee balances were depleted, the judiciary would comply with the ADA.[74] This would mean limiting itself to "essential work," including exercising its Article III constitutional powers; the scope of these powers extends to "activities to support the exercise of the courts' [Article III constitutional powers], specifically the resolution of cases and related services."[75] Each court possesses the discretion to determine which functions are essential.[76] In view of the ADA's prohibitions, AOUSC's 2013 guidance provided that "'essential work' in this context is interpreted very narrowly," and the only permissible judicial activities were the following:

1. activities necessary to support the exercise of Article III judicial power, i.e., the resolution of cases in which there is a constitutional or statutory grant of jurisdiction;
2. emergency activities necessary for the safety of human life and the protection of property; and
3. activities otherwise authorized by law, either expressly or by necessary implication."[77]

The guidance noted that with few exceptions, "no distinctions or priorities should be drawn between criminal and civil cases," but that judges should be "sympathetic" to executive branch requests for continuances.[78]

The GAO does not appear to have weighed in on whether the judiciary possesses the blanket authority to order agencies to incur obligations during a lapse, nor has it articulated a standard by which the judiciary may order unfunded agencies to do so. However, it has taken a narrow view of lapse-related exceptions to the ADA generally, and it has acknowledged, without endorsing, a singular application of the necessarily implied exception to the ADA.[79] In *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations,*[80] the GAO pointed out that the Civiletti opinion applied the "authorized by law" exception "to only one situation: the administration of Social Security payments."[81] The GAO accepted the attorney general's application of the exception, which "has become entrenched in practice for almost [forty] years," with congressional awareness, and it opined that "[t]o revisit that position now would be tumultuous."[82] However, the GAO has consistently declined to extend the Civiletti opinion's rationale to other factual situations and has elected not to follow the August 1995 OLC opinion that relies on it.[83]

Other Fiscal Limitations

The Appropriations Clause and Sovereign Immunity

A court's authority to order an agency to incur obligations and make expenditures is not without limitation, including the Appropriations Clause.[84] As the GAO has noted: "The Appropriations Clause of the [U.S.] Constitution . . . applies with equal force to payments directed by a court."[85] To illustrate, in *Source of Funds for Payment of Awards under 26 U.S.C. § 7430,* the GAO determined that neither the Judgment Fund nor IRS appropriations were available to satisfy litigation awards by the U.S. Tax Court because Congress had failed to appropriate any funds for that purpose.[86]

Additionally, the doctrine of sovereign immunity is rooted in the Appropriations Clause[87] and broadly "bars any action against the United States if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, of if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'"[88] The constraints of "sovereign immunity principles 'apply with equal force to agency adjudications'" and may be waived only by Congress.[89]

The doctrine of sovereign immunity applies to the orders of courts and administrative bodies.[90] To illustrate, in *Foreman v. Dep't of the Army*, the U.S. Court of Appeals for the Federal Circuit held that the doctrine of sovereign immunity precluded the Merit System Protection Board from awarding money damages against the Army for its alleged breach of a settlement agreement.[91] Similarly, in *Equal Employment Opportunity Commission Authority to Order a*

Federal Agency to Pay for Breach of a Settlement Agreement, the OLC posited that the doctrine of sovereign immunity precluded the Equal Employment Opportunity Commission from ordering an agency to pay a monetary award for breach of a settlement agreement governing its future conduct.[92]

Settlement Agreements and Civil Consent Decrees

The executive branch enjoys wide latitude when settling a case or administrative complaint, and the decision to compromise often reflects judgment calls concerning litigation risk and what is in the best interests of the United States or the agency.[93] Flowing from the statutory authority to supervise litigation, the attorney general's settlement authority is broad.[94] Although the attorney general's discretion is broader than the agencies that the DOJ represents in litigation, the terms of any DOJ settlement must be traceable "to a discernable source of statutory authority," which may include "the governing statutes of the agency involved in the litigation."[95] Generally, an agency may agree to terms that a court or administrative body could independently order the agency to comply with, absent the settlement agreement.[96] In addition, the Supreme Court has opined that a consent decree[97] may provide relief beyond that which a court could have awarded absent the agreement of the parties, so long as the resolved dispute falls within the court's subject matter jurisdiction, the agreement is within the scope of the complaint as evidenced by the pleadings, the agreement furthers the purposes of the underlying law, and the terms of the consent decree do not otherwise violate the law.[98]

However, there are several constitutional and statutory constraints on the executive branch's ability to settle a matter in litigation, including fiscal constraints. When agreeing to the terms of a settlement agreement or a consent decree, members of the executive branch may not disregard legal constraints on permissible relief.[99] Further, the executive branch may not agree to a legally infirm consent decree merely because the court acquiesces to the terms of the agreement. In this vein, the OLC has posited that neither the executive nor judicial branches may waive "without statutory authorization . . . the conditions upon which Congress consents to suits against the Government," including any applicable statute of limitations.[100] Further, DOJ and agency settlement agreements are subject to other fiscal constraints, such as the Purpose Statute, 31 U.S.C. § 1301(a).[101]

The GAO has issued opinions highlighting fiscal constraints on settlement agreements. For example, in *John W. Rensbarger*, the GAO determined that an agency Title VII-related settlement agreement, which included a provision for the nonreimbursable detail of a Government Printing Office employee to the Library of Congress, violated both the Purpose Statute and the ADA.[102] The GAO's analysis included a reminder that an agency may "only provide benefits in a settlement agreement which it otherwise has the authority to provide."[103]

Miscellaneous Receipts Statute and "Donations"

The Miscellaneous Receipts Statute (MRS)[104] provides that "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."[105] In *Commodity Futures Trading Commission – Donations under Settlement Agreements*, the GAO found the Commission's proposed policy permitting a charged party to donate funds directly to a nonvictim educational institution as part of a settlement agreement problematic.[106] Concerning the MRS, the GAO noted that the donation resulted from the commission's enforcement activities and was made in lieu of other sanctions or penalties, and the GAO admonished that the commission "may not circumvent the receipt of a penalty to accomplish a separate objective."[107]

Similarly, in *Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, the GAO evaluated a proposal to allow licensees who had violated Nuclear Regulatory Commission regulations to pay nonvictim universities or nonprofit institutions to engage in various nuclear-related safety research projects in lieu of a penalty, and it found that the proposal violated the MRS.[108] Subsequently, in *The Honorable John D. Dingell*, the GAO emphasized the importance of the MRS in the settlement context when it reiterated the following:

> [A]llowing alleged violators to make payments to an institution other than the [Federal Government] for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents 31 U.S.C. § 3302, which requires monies received for the Government by Government officers to be deposited into the Treasury.[109]

Accordingly, the GAO considers it an MRS violation when, in the settlement context, an agency, after assessing some form of fine or penalty, permits the violator to direct the payment to some third party other than the Government without statutory authority.[110]

The OLC has discussed the MRS in the settlement context as well. In *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, the OLC determined that a settlement permitting a company that had caused an oil spill to donate to a waterfowl preservation organization in lieu of paying a penalty would violate an earlier version of the MRS.[111] Rejecting the proposed settlement, the OLC noted, "[T]he fact that no cash actually touches the palm of a Federal official is irrelevant for purposes of § 484, if a Federal agency could have accepted possession and retains discretion to direct the use of the money."[112] "[M]oney available to the United States and directed to another is constructively 'received' for purposes of [the MRS]."[113] However, because the Commonwealth of Virginia—the co-plaintiff in the case—had an independent claim to damages, and because the United States had not incurred any expense or loss associated with the oil spill, the OLC had no objection to a settlement agreement in which Virginia was solely entitled to damages and could direct the donation to a waterfowl preservation organization.[114]

Subsequently, in *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Company Settlement Agreement,*[115] the OLC again acknowledged that the MRS constrains the terms of settlement agreements but determined that the Government could avoid "constructively" receiving money for MRS purposes if two criteria were met:

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> (1) the settlement be executed before an admission or finding of liability in favor of the United States; and (2) the United States not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.[116]

The OLC briefly addressed and distinguished earlier GAO opinions by pointing out that, in the instant case, the United States had the authority to mitigate civil penalties, and under these specific facts, the OLC did not believe the settlement violated the MRS.[117]

In 2016, Members of Congress concerned about the DOJ's settlement practices proposed legislation in the House and Senate entitled the "Stop Settlement Slush Funds Act of 2016."[118] Although not enacted, the legislation would have prohibited any officer or agent of the United States from entering into or enforcing a settlement agreement that required a donation to any person by any party to the agreement other than the United States.[119] An accompanying House report noted that the DOJ was responsible for third-party groups receiving approximately $880 million in the prior two years through the donation settlements, which was accomplished "entirely outside of the congressional appropriations and grant oversight process."[120] Regardless of the worthiness of the charitable institutions receiving donation settlements, once actual victims were compensated, the law requires that Congress—not the DOJ—determine how to use any other funds obtained from defendants.[121] In addition, the report accused the DOJ of using its broad settlement authority to circumvent the MRS.[122] Also, criticism of the DOJ's settlement practices appeared in the press.[123]

The following year, the attorney general issued a memorandum prohibiting the DOJ from continuing the practice of entering into settlement agreements that included, as a condition of settlement, payments to non-governmental, third-party organizations that were neither victims nor parties to the lawsuit.[124] The memorandum contained three exceptions to the prohibition: (1) victim restitution or payments directly remedying redressable harm, (2) "payments for legal or other professional

services rendered in connection with the case," and (3) payments otherwise expressly authorized by statute, "including restitution and forfeiture."[125]

However, in 2022, the attorney general rescinded the 2017 memorandum articulating the DOJ's present settlement position. In *Guidelines And Limitations for Settlement Agreements Involving Payments to Non-Government Third Parties*, the attorney general determined that the earlier memorandum was overly restrictive and noted that settlement agreements could be structured such that payments to non-governmental third parties would not violate the MRS.[126] In addition to the conditions articulated in the *Canadian Softwood Lumber Settlement Agreement* opinion, the following conditions apply: settlement agreements providing relief to nonparties must define with specificity defendant-funded projects that must also have a strong connection to the underlying law being enforced, the DOJ and client agencies may not recommend any particular third party to receive project-related payments, and the settlement agreement may not augment executive branch appropriations, meet a statutory obligation of those agencies, or be too general in application.[127]

Conclusion

The fiscal principles of time, purpose, and amount are all implicated by court and administrative orders and litigation settlements in those fora. Much of the law in this area is well-settled, but issues still linger and merit further discussion.

As discussed above, during a lapse in appropriations, the executive branch acquiesces to court orders to incur litigation-related obligations. However, the courts have neither articulated a uniform standard nor exhibited a common practice when deciding whether to grant or deny a lapse-related motion to stay civil litigation.[128] Under existing OLC opinions, an unfunded executive branch agency should be able to incur obligations in support of a funded judiciary under a necessarily implied-by-law rationale when the failure to do so would "prevent or significantly damage the execution of those funded functions."[129] When the judiciary is unfunded, the executive branch should be able to incur those obligations necessary to the courts' exercise of their core constitutional authority.[130] Given the obvious tension between incurring such obligations during a lapse in appropriations and Congress's constitutional power of the purse, any such exception to the prohibition on incurring an obligation during a lapse in appropriations should be exercised narrowly. **TAL**

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Notes

1. *See* U.S. Const. art. 1, § 9, cl. 7.

2. *See, e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459.

3. *See* U.S. Const. art. 1, § 7, cl. 2; Erica L. Green, *Biden Signs Stopgap Spending Bill, Averting Partial Shutdown*, N.Y. Times (Jan. 19, 2024), https://www.nytimes.com/2024/01/19/us/politics/biden-spending-bill.html.

4. *See, e.g.*, Consolidated Appropriations Act, 2023, div. C, 136 Stat. at 4566 (providing $49,628,305,000 for military personnel and Army expenses in fiscal year 2023).

5. *See* Bureau of Land Mgmt.–Reimbursement of Cont. Disputes Act Payments, 63 Comp. Gen. 308, 310 (1984) [hereinafter BLM].

6. *Id.*

7. *See* Nat'l Endowment of the Arts – Dep't of Just. – Appropriations Availability – Payment of Settlement, B-255772, 1995 WL 500331, at *1 (Comp. Gen. Aug. 22, 1995) (requiring the use of "appropriations current at the time of the settlement agreement"); Fiscal Year Chargeable for Compensatory Damages Under Section 102 of the C.R. Act, B-272984, 1996 WL 576967, at *1 (Comp. Gen. Sept. 26, 1996) (discussing a "compromise settlement of an employee discrimination claim").

8. 31 U.S.C. § 1304.

9. 31 C.F.R. § 256.1(a) (2024); U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 3, ch. 8, para. 4.1 [hereinafter DoD FMR] (explaining that "[t]he Judgment Fund is available for court judgments and Justice Department compromise settlements of actual or imminent litigation against the government").

10. 41 U.S.C. § 7108(c); 31 C.F.R. § 256.40 (2024); DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.2 (Reimbursement of Contract Dispute Act Judgments). Congress originally passed the law in 1978. *See* Contract Disputes Act of 1978, Pub. L. No. 95-563, 95 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–7109).

11. 5 U.S.C. § 2301 note; 31 C.F.R. § 256.40 (2023); DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.3 (Reimbursement of No FEAR Act Judgments). Congress, somewhat unusually, codified the whole of the No Fear Act of 2002 as a note to 5 U.S.C. § 2301. *See* Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566.

12. 41 U.S.C. § 7108(c).

13. "The Judgment Fund must be reimbursed with funds available for the same purpose that was current at the time of judgment provided by 41 U.S.C. § 7108." DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.2.2.; BLM, *supra* note 5, at 311 ("[R]eimbursements under [the CDA] should be treated as new obligations.").

14. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566, 568–69; *see also* DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.3.2 ("using the appropriation, fund, or other account available for operating expenses of the DoD Component to which the No Fear Act judgment or discriminatory matter stemmed").

15. 5 C.F.R. § 724.104(b) (2024); 31 C.F.R. § 256.41 (2024).

16. "If the agency is unable to timely reimburse Fiscal Service, the agency must contact Fiscal Service to establish a reimbursement plan." 31 C.F.R. § 256.41. *Cf.* DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.3.3 (noting that a DoD Component may "establish a payment plan with BFS").

17. *See* notes 19–22 *infra* and accompanying text.

18. Reimbursements to the Permanent Judgment Appropriation under Cont. Disp. Act, B-217990.25-O.M. (Comp. Gen. Oct. 30, 1987) [hereinafter Reimbursements], https://www.gao.gov/assets/b-217990.25-o.m.pdf.

19. *Id.* at 3–4.

20. *Id.* at 3 (citing BLM, *supra* note 5, at 312).

21. Reimbursements, *supra* note 18, at 3.

22. *See, e.g.*, Veterans Admin.—Appropriation Chargeable for Back Pay Claims, 69 Comp. Gen. 40 (1989) [hereinafter VA].

23. *Id.* at 41; *see also* Payment of Interest Under the Back Pay Act, B-242277, 1991 WL 211359, at *2 (Comp. Gen. Sept. 12, 1991).

24. VA, *supra* note 22, at 42; 3 U.S. Gov't Accountability off., GAO-08-978SP, Principles of Federal Appropriations Law ch. 14, sec. C(2)(c) (3d ed. 2008) [hereinafter GAO Red Book]. As of early 2024, the Government Accountability Office (GAO) is completing a major revision of its Red Book, whereby they publish completed chapters in the new fourth edition as they become available. *See The Red Book,* U.S. Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/red-book (last visited Mar. 19, 2024). This means that portions of the fourth and third editions are simultaneously the most recent edition of the Red Book, depending on the particular chapter. *See id.*

25. *See* BLM, *supra* note 5, at 311 ("[W]e do not disturb this concept as it relates to agency settlements at the contracting officer level. . . ."); Dep't of the Army, Fort Carson—Application of Bona Fide Needs Rule to Cont. Modification, B-332430, 2021 WL 4439454, at

*4 (Comp. Gen. Sept. 28, 2021) ("Because this liability arises under the original contract, it is also known as an 'antecedent liability.'") (citing Recording Obligations Under EPA Cost-Plus Fixed-Fee Cont., 59 Comp. Gen. 518, 522 (1980)).

26. Proper Fiscal Year Appropriation to Charge for Cont. and Cont. Increase, 65 Comp. Gen. 741, 744 (1986).

27. 29 U.S.C. § 794(a).

28. Bureau of Engraving and Printing (BEP)—Currency Reader Program, B-324588, 2013 WL 2468740, at *1 (Comp. Gen. June 7, 2013).

29. *Id.* (quoting Am. Council of the Blind v. Paulson, 581 F. Supp. 2d 1 (D.D.C. 2008)).

30. *Bureau of Engraving and Printing*, 2013 WL 2468740 at *3–4 (discussing whether transferring currency readers to the blind and visually impaired would violate the necessary expense rule). Currency readers "are portable electronic devices capable of speaking the denomination of a bill out loud." *Id.* at *2.

31. *Id.* at *3 (emphasis added).

32. *Id.* at *4.

33. United States v. Garney White—Funding of Judgment, B-193323, 1980 WL 17186, at *1 (Comp. Gen. Jan. 31, 1980).

34. *Id.*

35. *Id.* at *2.

36. *Id.* at *4.

37. *See* Source of Funds for Payment of Awards under 26 U.S.C. 7430, 63 Comp. Gen. 470, 472 (1984).

38. *Id.* (emphasis added); *see also* VA, *supra* note 22, at 42 ("Appropriations provided for regular governmental operations or activities, even though these operations or activities give rise to a cause of action, are not available to pay court judgments in the absence of specific authority.").

39. Antideficiency Act, 31 U.S.C. § 1341(a)(1) (enumerating the exceptions to the Antideficiency Act (ADA)).

40. Availability of Funds for Payment of Intervenor Att'y Fees—Nuclear Regul. Comm'n, 62 Comp. Gen. 692, 700 (1983). ("A judicial award would not be viewed as violating . . . the [ADA]."); Major Paul D. Hancq, *Violations of the Antideficiency Act: Is The Army Too Quick to Find Them?*, Army Law., July 1995, at 30, 37 ("Judicial awards, even if they exceed available appropriations, do not violate the [ADA].") (citing 62 Comp. Gen. at 700).

41. BLM, *supra* note 5, at 312.

42. GAO Red Book, *supra* note 24, ch. 6, sec. C(2)(f).

43. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att'y Gen. 293, 301 (1981) [hereinafter Continuance].

44. U.S. Dep't of Just., FY 2024 Contingency Plan 3 (2023), https://www.justice.gov/jmd/page/file/1015676/download.

45. *Id.*

46. *Id.* During a lapse in appropriations, many courts grant motions to stay in civil litigation. *See* Ida Brudrick et al., Cong. Rsch. Serv., RL34680, Shutdown of the Federal Government: Causes, Processes, and Effects 32 (2018) ("Some civil cases were postponed, in part due to continuance requests from the Department of Justice."). *See, e.g.*, Lee v. United States, 361 F. Supp. 3d 1306, 1308 n.1 (S.D. Ga. 2019) ("[T]he Court entered an [o]rder staying the case due to the lapse in appropriations for the [DOJ].").

47. Testimony Before the Subcomm. on Interior, Env't, and Related Agencies, Comm. on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations, B-330720, 2019 WL 459186, at *3–4 (Comp. Gen. Feb. 6, 2019) (including "emergencies involving the safety of human life or the protection of property," performing "core constitutional powers," and conducting "an orderly shutdown of agency activity," among others).

48. U.S. Dep't of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, at *7 (Comp. Gen. Oct. 22, 2019), ("Because the [ADA] is central to Congress' constitutional power of the purse, we interpret exceptions narrowly and in the manner to protect congressional prerogative."); *see also* Continuation of Fed. Prisoner Det. Efforts During U.S. Marshals Serv. Appropriation Deficiency, 24 Op. O.L.C. 47, 48 (2000) [hereinafter Marshals] ("[T]he [ADA] reinforces the prohibition in Article 1, Section 9 of the Constitution . . . .").

49. *U.S. Dep't of the Treasury*, 2019 WL 5390179, at *7 (referring to agencies that incur obligations by validly asserting an ADA exception).

50. Kornitzky Grp. v. Elwell, 912 F.3d 637, 639–41 (D.C. Cir. 2019) (Randolph, J., dissenting).

51. *Id.* at 638.

52. *Id.* at 638–39.

53. *Id.* The dissent criticized the court's opinion as lacking legal analysis and relying on other orders denying motions to stay that also lacked any legal analysis. *Id.* at 640–41.

54. *Id.* at 640.

55. *Id.*

56. *Id.* at 639–40.

57. *Id.* at 640.

58. *Id.* (citing Continuance, *supra* note 43, at 295–301).

59. *See, e.g.*, *Judiciary to Continue Funded Operations Until January 25*, U.S. Courts (Jan. 16, 2019), https://www.uscourts.gov/news/2019/01/16/judiciary-continue-funded-operations-until-jan-25 ("[S]ome Federal courts have issued orders suspending or postponing civil cases in which the Government is a party, and others have declined to do so.").

60. *See, e.g.*, Klamath-Siskiyou Wildlands Ctr. v. Grantham, No. 2:18-cv-02785-TLN-DMC, 2019 WL 7374626, at *1 (E.D. Cal. Jan. 4, 2019) (denying a motion for a stay without engaging in analysis related to a lapse in appropriations).

61. *See* Airplane Transp. Assoc. of America v. FAA, 912 F.3d 642, 643 (D.C. Cir. 2019) (Randolph, J., dissenting) ("It is obvious that our circuit has not settled upon any principled way of deciding these stay motions.").

62. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1 (1981) [hereinafter 1981 Opinion].

63. *Id.* at 5.

64. Government Operations in The Event of a Lapse in Appropriations, 1995 OLC LEXIS 57 (Aug. 16, 1995), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1995-08-16-lapse-in-appropriations.htm.

65. *Id.* at *8–9 (citing 1981 Opinion, *supra* note 62). Examples included disbursing social security benefits and "contracting for the materials essential to the performance of the emergency services," and shutdown activities. *Id.*

66. Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations, 19 Op. O.L.C. 337 (1995).

67. *Id.* at 337 (quoting 1981 Opinion, *supra* note 62, at 5).

68. *Id.*

69. *Id.* at 338.

70. In the event the judiciary were unfunded, the courts could continue to operate for a limited time by relying on fees and no-year appropriations. Brudrick et al., *supra* note 46, at 20 (explaining that the judiciary could continue to operate approximately ten business days to three weeks).

71. Marshals, *supra* note 48, at 47.

72. *Id.* at 49.

73. *Id.* at 50.

74. *Judiciary Operating on Limited Funds During Shutdown*, U.S. Courts (Jan. 7, 2019) [hereinafter U.S. Courts], https://www.uscourts.gov/news/2019/01/07/judiciary-operating-limited-funds-during-shutdown.

75. *Id.*; *see also* Memorandum from Judge John D. Bates, Admin. Off. of U.S. Courts, to All United States Judges et al., subject: Status of Judiciary Funding and Guidance for Judiciary Operations During a Lapse in Appropriations (IMPORTANT INFORMATION) 3 (Sept. 24, 2013) [hereinafter 2013 Bates Memo]; Brudirck et al., *supra* note 46, at 20.

76. U.S. Courts, *supra* note 74; 2013 Bates Memo, *supra* note 75, at 3.

77. 2013 Bates Memo, *supra* note 75, attach. 1, at 1–2.

78. *Id.* attach. 1, at 3.

79. *See infra* note 80 and accompanying text.

80. B-331093, 2019 WL 5390179, at *9 (Comp. Gen. Oct. 22, 2019).

81. *Id.* at *10. The Civiletti opinion determined "that Social Security payments could continue even though the appropriation for salaries of those who made the payments had lapsed." *Id.*

82. *Id.*

83. *See, e.g.*, U.S. Dep't of Agriculture–Operations of the Farm Serv. Agency During the Fiscal Year 2019 Lapse in Appropriations, B-331092, 2020 WL3501349, at *11–13 (Comp. Gen. June 29, 2020) (noting that the GAO had declined to extend the logic of the 1981 Civiletti opinion to cases of other agencies involved in 2019 appropriations lapse and declining to do so in the case of the Farm Services Agency).

84. *See supra* notes 1–3 and accompanying text.

85. GAO Red Book, *supra* note 24, ch. 14, sec. C(2)(b); *see also* Gov't Emp. Ret. Sys. of the Virgin Islands v. Gov't of the Virgin Islands, 995 F.3d 66, 119 (3d Cir.

2021) (Matey, J., concurring in part and dissenting in part).

86. Source of Funds for Payment of Awards Under 26 U.S.C. § 7430, 63 Comp. Gen. 470, 473 (1984) ("An appropriation of funds from the Treasury cannot be inferred. It must be explicitly stated."). The GAO recommended that the IRS seek a specific appropriation to pay all prior litigation awards. *Id.* at 474.

87. Waiver of Statute of Limitations in Connection with Claims Against the Dep't of Agric., 22 Op. O.L.C. 127, 129 (1998).

88. Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program, 32 Op. O.L.C. 47, 48 (2008) (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).

89. 32 Op. O.L.C. at 49 (quoting Auth. of the Equal Emp. Opportunity Comm'n (EEOC) to Impose Monetary Sanctions Against Fed. Agencies for Failure to Comply with Orders Issued by EEOC Admin. Judges, 27 Op. O.L.C. 24, 27 (2003)).

90. *See* Statute of Limitations and Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Dep't of Agric., 22 Op. O.L.C. 11, 16 (1998) ("A court can award damages against the United States only where there has been a waiver of sovereign immunity.").

91. Foreman v. Dep't of the Army, 241 F.3d 1349, 1352 (Fed. Cir. 2001).

92. Equal Employment Opportunity Commission Authority to Order a Federal Agency to Pay for Breach of Settlement Agreement, 38 Op. O.L.C. 22, 38 (2014).

93. *See* 22 Op. O.L.C. at 140; *see also* Authority of the United States to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 138 (1999) ("[C]onsiderations, such as litigation risk, are inherent in a settlement power itself . . . .").

94. 23 Op. O.L.C. at 135.

95. *Id.* at 137–38.

96. *See* 38 Op. O.L.C. at 34 ("As long as the intended relief does not exceed the scope of remedies available in court, the Government's consent to be sued for violations of Title VII ordinarily permits voluntary settlement of a complaint alleging such violations."); Proposed Settlement of Diamond v. Dep't of Health & Hum. Servs., 22 Op. O.L.C. 257, 261 (1998) ("[A]n agency settlement may include any relief that a court could award . . . .").

97. The principal distinction between consent decrees and settlement agreements is that consent decrees are agreements that are entered as court orders enforceable through contempt, whereas settlement agreements are contracts between the parties that are judicially enforceable if breached. 23 Op. O.L.C. at 133. *Cf.* United States v. Bd. of Cnty. Comm'rs, 937 F.3d 679, 688 (6th Cir. 2019) ("[A] consent decree is a settlement agreement subject to continual judicial policing.") (quoting Vanguards of Cleveland v. City of Cleveland, 23 F. 3d 1013, 1017 (6th Cir. 1994)); Fed. Trade Comm'n v. Enforma Nat. Prods., 362 F.3d 1204, 1218 9th Cir. 2004) ("A consent decree is 'no more than a settlement that contains an injunction.'") (quoting *In re* Masters Mates & Pilots Pension Plan, 957 F. 2d 1020, 1025 (9th Cir. 1992)).

98. 23 Op. O.L.C. at 149 (citing Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525–26 (1986)).

99. *See* Waiver of Statutes of Limitations in Connection with Claims Against the Dep't of Agric., 22 Op. O.L.C. 127, 140 (1998) (The Attorney General's "settlement authority does not allow her to discard a statutory requirement and determine that, on the basis of her own view of the equities, a claim should be paid, notwithstanding its legal invalidity"); *see also* 23 Op. O.L.C. at 135 ("[T]he Attorney General must still exercise her discretion in conformity with her obligation to enforce the Acts of Congress") (internal quotations omitted).

100. 22 Op. O.L.C. at 129 (citing Finn v. United States, 123 U.S. 227, 229 (1887)).

101. Auth. of U.S. Dep't of Agric. to Award Monetary Relief for Discrimination, 18 Op. O.L.C. 52, 53 & n.4 (1994) (noting that the comptroller general had applied the principle in a number of opinions). *Cf.* U.S. Dep't of Just., Justice Manual § 3-8.130 ("[E]nsure that the terms of the consent decree DO NOT obligate the Government to expend funds beyond the purpose, time, or amount of the office's available resources.").

102. John W. Rensbarger, B-247348, 1992 W.L. 152986, at *1 (Comp. Gen. June 22, 1992). The detail also violated 44 U.S.C. § 316, which provided that Government Printing Office "employees may not be detailed to duties not pertaining to the work of public printing and binding." *Id.* at *2.

103. *Id.* at *5. In addition, the OLC has recognized the ADA as a limitation on settlement authority. *See* 23 Op. O.L.C. at 156 ("[T]he express terms of the [ADA] . . . mean[] that there must be an identifiable source of statutory authority to incur an obligation in advance of an appropriation before a settlement may be entered that would incur one.").

104. While the session law establishing this provision does not refer to it as the "Miscellaneous Receipts Statute," that is how practitioners commonly refer to it. *See* Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, Fiscal Law Deskbook para. X(a)(2)(c) (2023).

105. 31 U.S.C. § 3302(b).

106. Commodity Futures Trading Commission – Donations Under Settlement Agreements, B-210210, 1983 WL 197623, at *2–3 (Comp. Gen. Sept. 14, 1983).

107. *Id.* at *2.

108. Nuclear Regul. Comm'n's Auth. to Mitigate Civ. Penalties, 70 Comp. Gen. 17, 19 (1990).

109. The Honorable John D. Dingell, B-247155.2, 1993 WL 798227, at *2 (Comp. Gen. Mar. 1, 1993). The opinion addressed the Environmental Protection Agency's authority to allow violators to settle cases by funding public awareness projects in lieu of paying administrative penalties. *Id.* at *1.

110. Whether the Fed. Commc'n Comm'n's Ord. on Improving Pub. Safety Commc'ns in the 800 MHz Band Violates the Antideficiency Act or the Miscellaneous Receipts Statute, B-303413, 2004 WL 2515818, at *10 (Comp. Gen. Nov 8, 2004), at 14 (citing the GAO's earlier Nuclear Regulatory Commission and Commodity Futures Trading Commission opinions approvingly).

111. Effect of 31 U.S.C. § 484 on the Settlement Auth. of the Att'y Gen., 4B Op. O.L.C. 684, 687–88 (1980).

112. *Id.* at 688.

113. *Id.*

114. *Id.* at 688–89.

115. Application of the Gov't Corp. Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Co. Settlement Agreement, 30 Op. O.L.C. 111 (2006). This case involved a proposed settlement that would authorize the United States to distribute duties in its possession to a private foundation, which would then fund various "meritorious initiatives." *Id.* at 113.

116. Under circumstances where a settlement satisfies the two conditions above, "the governmental control over settlement funds is so attenuated that the Government cannot be said to be receiving money for the Government." *Id.* at 119.

117. *Id.* at 121.

118. S. 3050, 114th Cong. (2016); H.R. 5063, 114th Cong. (2016). The legislation passed the House. *H.R.5063—Stop Settlement Slush Fund Act of 2016,* Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/5063/actions (last visited Mar. 22, 2024).

119. S. 3050, 114th Cong. § 2(a) (2016); H.R. 5063, 114th Cong. § 2(a) (2016); *see also* H.R. Rep. No. 114-694, at 2 (2016) ("[The Act] prohibits terms in Department of Justice (DOJ) settlements that direct or provide payments to non-victim third-parties.").

120. H.R. Rep. No. 114-694, at 2. The report noted that in some cases, the donations restored funding previously cut by Congress. *Id.* at 2, 8–9.

121. *Id.* at 9.

122. *Id.* at 4; *see also id.* at 5 (criticizing the OLC's opinion in Application of the Gov't Corp. Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111 (2006)).

123. *See, e.g.*, George F. Will, *'Slush Fund' by Any Other Name,* Wash. Post, Sept. 1, 2016, at A15.

124. Memorandum from the Att'y Gen., to All Component Heads and U.S. Att'ys, subject: Prohibition on Settlement Payments to Third Parties (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download.

125. *Id.* at 1.

126. Memorandum from the Att'y Gen. to All Component Heads and U.S. Att'ys, subject: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties 1–2 (May 5, 2022), http://www.justice.gov/ag/page/file/1499241/download.

127. *Id.* at 3.

128. *See supra* section titled "A Lapse in Appropriations."

129. Effect of Appropriations for Other Agencies and Branches on the Auth. to Continue Dep't of Just. Functions During the Lapse in the Dep't's Appropriations, 19 Op. O.L.C. 337, 338 (1995).

130. *See supra* notes 74–78 and accompanying text.