carrier in emergency situations, and to reimburse certain costs of the substitute carrier. B-196132, Oct. 11, 1979.

What are perhaps the outer limits of the "authorized by law" exception are illustrated in B-159141, Aug. 18, 1967. The Federal Aviation Administration (FAA) had entered into long-term, incrementally funded contracts for the development of a civil supersonic aircraft (SST). To ensure compliance with the Antideficiency Act, the FAA each year budgeted for, and obligated, sufficient funds to cover potential termination liability. The appropriations committees became concerned that unnecessarily large amounts were being tied up this way, especially in light of the highly remote possibility that the SST contracts would be terminated. In considering the FAA's 1968 appropriation, the House Appropriations Committee reduced the FAA's request by the amount of the termination reserve, and in its report directed the FAA not to obligate for potential termination costs. The Comptroller General advised that if the Senate Appropriations Committee did the same thing—a specific reduction tied to the amount requested for the reserve, coupled with clear direction in the legislative history—then an overobligation resulting from a termination would be regarded as authorized by law and not in violation of the Antideficiency Act.

3. Voluntary Services Prohibition

a. Introduction

We previously discussed the Antideficiency Act prohibitions contained in section 1341 of title 31, United States Code. The next section of the Antideficiency Act is 31 U.S.C. § 1342:

> "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . ."

This provision first appeared, in almost identical form, in a deficiency appropriation act enacted in 1884.[90] Although the original prohibition read "hereafter, no department or officer of the United States shall accept . . .," it was included in an appropriation for the then Indian Office of the Interior Department, and the Court of Claims held that it was applicable only to the Indian Office. *Glavey v. United States*, 35 Ct. Cl. 242, 256 (1900), *rev'd on other grounds*, 182 U.S. 595 (1901). The Comptroller of the Treasury continued to apply it across the board. *See*, *e.g.*, 9 Comp. Dec. 181 (1902). In any event, the applicability of the 1884 statute soon became moot because Congress reenacted it as part of the Antideficiency Act in 1905[91] and again in 1906.[92]

Prior to the 1982 recodification of title 31, section 1342 was subsection (b) of the Antideficiency Act, while the basic prohibitions of section 1341, previously discussed, constituted subsection (a). The proximity of the two provisions in the United States Code reflects their relationship, as section 1342 supplements and is a logical extension of section 1341. If an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly "voluntary" services and then presenting Congress with the bill, in the hope that Congress will recognize a "moral obligation" to pay for the benefits conferred—another example of the so-called "coercive deficiency."[93] In this connection, the chairman of the House committee responsible for what became the 1906 reenactment of the voluntary services prohibition stated:

> "It is a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they can [not] make these deficiencies, and Congress can refuse to allow them; but

[90] Act of May 1, 1884, ch. 37, 23 Stat. 17.

[91] Pub. L. No. 217, ch. 1484, § 4, 33 Stat. 1214, 1257 (Mar. 3, 1905).

[92] Pub. L. No. 28, ch. 510, § 3, 34 Stat. 27, 48–49 (Feb. 27, 1906).

[93] See section C.1 of this chapter for a discussion of the coercive deficiency concept. *See also PCL Construction Services*, *Inc. v. United St*ates, 41 Fed. Cl. 242, 251–260 (1998) (incrementally funded contract did not raise coercive deficiency issues where contract clauses clearly provided that contractor assumed the sole risk of working at a rate that would exhaust funding.)

> after they are made it is very hard to refuse to allow them . . . ."[94]

In addition, as we have noted previously, the Antideficiency Act was intended to keep an agency's level of operations within the amounts Congress appropriates for that purpose. The unrestricted ability to use voluntary services would permit circumvention of that objective. Thus, without section 1342, section 1341 could not be fully effective. Note that 31 U.S.C. § 1342 contains two distinct although closely related prohibitions: It bans, first, the acceptance of any type of voluntary services for the United States, and second, the employment of personal services "exceeding that authorized by law."

b. Appointment without Compensation and Waiver of Salary

(1) The rules—general discussion

One of the evils that the "personal services" prohibition was designed to correct was a practice existing in 1884, whereby lower-grade government employees were being asked to "volunteer" their services for overtime periods in excess of the periods allowed by law. This enabled the agency to economize at the employees' expense but nevertheless generated claims by the employees.[95] Currently, 31 U.S.C. § 1342 serves a number of other purposes and is relevant in a number of contexts involving services by government employees or services which would otherwise have to be performed by government employees. For example, one court suggested that 31 U.S.C. § 1342 also is based in part on the principle that only public officials should be allowed to perform governmental functions. *See Suss v. American Society for the Prevention of Cruelty to Animals*, 823 F. Supp. 181, 189 (S.D.N.Y. 1993) ("The risks of abuse of power by private parties exercising functions involving [the] exercise of sovereign compulsion is one reason for the limitations imposed by federal law on the use of volunteers in implementing public sector programs."). However, as mentioned previously, the fundamental purposes embodied in section 1342 are to preserve the integrity of the appropriations process by avoiding "coercive deficiencies" and augmentations.

[94] 39 Cong. Rec. 3687 (1906), quoted in 30 Op. Att'y Gen. 51, 53–54 (1913).

[95] See 30 Op. Att'y Gen. 51, 54–55 (1913), discussing the legislative history of the 1884 prohibition.

One of the earliest questions to arise under 31 U.S.C. § 1342—and an issue that has generated many cases—was whether a government officer or employee, or an individual about to be appointed to a government position, could voluntarily work for nothing or for a reduced salary. Initially, the Comptroller of the Treasury ducked the question on the grounds that it did not involve a payment from the Treasury, and suggested that the question was appropriate to take to the Attorney General. 19 Comp. Dec. 160, 163 (1912).

The very next year, the Attorney General tackled the question when asked whether a retired Army officer could be employed as superintendent of an Indian school without additional compensation. In what has become the leading case construing 31 U.S.C. § 1342, the Attorney General replied that the appointment would not violate the voluntary services prohibition. 30 Op. Att'y Gen. 51 (1913). In reaching this conclusion, the Attorney General drew a distinction that the Comptroller of the Treasury thereafter adopted, and that GAO and the Justice Department continue to follow to this day—the distinction between "voluntary services" and "gratuitous services." The key passages from the Attorney General's opinion are set forth below:

> "[I]t seems plain that the words 'voluntary service' were not intended to be synonymous with 'gratuitous service' and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation . . . . It would be stretching the language a good deal to extend it so far as to prohibit *official* services without compensation in those instances in which Congress has not required even a minimum salary for the office.
>
> "The context corroborates the view that the ordinary meaning of 'voluntary services' was intended. The very next words 'or employ personal service in excess of that authorized by law' deal with *contractual* services, thus making a balance between 'acceptance' of 'voluntary service' (*i.e.*, the cases where there is no prior contract) and 'employment' of 'personal service' (*i.e.*, the cases where there is such prior contract, though unauthorized by law).

* * * * *

> "Thus it is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. . . ."

Id. at 52–53, 55.

The Comptroller of the Treasury agreed with this interpretation:

> "[The statute] was intended to guard against claims for compensation. A service offered clearly and distinctly as gratuitous with a proper record made of that fact does not violate this statute against acceptance of voluntary service. An appointment to serve without compensation which is accepted and properly recorded is not a violation of [31 U.S.C. § 1342], and is valid if otherwise lawful."

27 Comp. Dec. 131, 132–33 (1920).

Two main rules emerge from 30 Op. Att'y Gen. 51 and its progeny. First, if compensation for a position is fixed by law, an appointee may not agree to serve without compensation or to waive that compensation in whole or in part. *Id.* at 56. This portion of the opinion did not break any new ground. The courts had already held, based on public policy, that compensation fixed by law could not be waived.[96] Second, and this is really just a corollary to the rule just stated, if the level of compensation is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial, is permissible. *Id.;* 27 Comp. Dec. at 133.

[96] *Glavey v. United States*, 182 U.S. 595 (1901); *Miller v. United States*, 103 F. 413 (C.C.S.D.N.Y. 1900). *See also* 9 Comp. Dec. 101 (1902). Later cases following *Glavey* are *MacMath v. United States*, 248 U.S. 151 (1918), and *United States v. Andrews*, 240 U.S. 90 (1916). The policy rationale is that to permit agencies to disregard compensation prescribed by statute could work to the disadvantage of those who cannot, or are not willing to, accept the position for less than the prescribed salary. *See Miller*, 103 F. at 415–16.

Both GAO and the Justice Department have had frequent occasion to address these issues, and there are numerous decisions illustrating and applying the rules.[97]

In a 1988 opinion, the Justice Department's Office of Legal Counsel considered whether the Iran-Contra Independent Counsel could appoint Professor Laurence Tribe as Special Counsel under an agreement to serve without compensation. Applying the rules set forth in 30 Op. Att'y Gen. 51, the Office of Legal Counsel concluded that the appointment would not contravene the Antideficiency Act since the statute governing the appointment set a maximum salary but no minimum. Memorandum Opinion for the Acting Associate Attorney General, *Independent Counsel's Authority to Accept Voluntary Services—Appointment of Laurence H. Tribe*, OLC Opinion, May 19, 1988.

Similarly, the Comptroller General held in 58 Comp. Gen. 383 (1979) that members of the United States Metric Board could waive their salaries since the relevant statute merely prescribed a maximum rate of pay. In addition, since the Board had statutory authority to accept gifts, a member who chose to do so could accept compensation and then return it to the Board as a gift. Both cases make the point that compensation is not "fixed by law" for purposes of the "no waiver" rule where the statute merely sets a maximum limit for the salary.

A good illustration of the kind of situation 31 U.S.C. § 1342 is designed to prevent is 54 Comp. Gen. 393 (1974). Members of the Commission on Marihuana and Drug Abuse had, apparently at the chairman's urging, agreed to waive their statutory entitlement to $100 per day while engaged in Commission business. The year after the Commission ceased to exist, one of the former members changed his mind and filed a claim for a portion of the compensation he would have received but for the waiver. Since the $100 per day had been a statutory entitlement, the purported waiver was invalid and the former commissioner was entitled to be paid. Similar claims by any or all of the other former members would also have to be allowed. If insufficient funds remained in the Commission's now-expired appropriation, a deficiency appropriation would be necessary.

[97] Some cases in addition to those cited in the text are 32 Comp. Gen. 236 (1952); 23 Comp. Gen. 109, 112 (1943); 14 Comp. Gen. 193 (1934); 34 Op. Att'y Gen. 490 (1925); 30 Op. Att'y Gen. 129 (1913); 13 Op. Off. Legal Counsel 113 (1989); 3 Op. Off. Legal Counsel 78 (1979).

A few earlier cases deal with fact situations similar to that considered in 30 Op. Att'y Gen. 51—the acceptance by someone already on the federal payroll of additional duties without additional compensation. In 23 Comp. Gen. 272 (1943), for example, GAO concluded that a retired Army officer could serve, without additional compensation, as a courier for the State Department. The voluntary services prohibition, said the decision, does not preclude "the assignment of persons holding office under the Government to the performance of additional duties or the duties of another position without additional compensation." *Id.* at 274. Another World War II era decision held that American Red Cross Volunteer Nurses' Aides who also happened to be full-time federal employees could perform volunteer nursing services at Veterans Administration hospitals. 23 Comp. Gen. 900 (1944).

One thing the various cases discussed above have in common is that they involve the appointment of an individual to an official government position, permanent or temporary. Services rendered prior to appointment are considered purely voluntary and, by virtue of 31 U.S.C. § 1342, cannot be compensated. *Lee v. United States*, 45 Ct. Cl. 57, 62 (1910); B-181934, Oct. 7, 1974.[98] It also follows that post-retirement services, apart from appointment as a reemployed annuitant, are not compensable. 65 Comp. Gen. 21 (1985). In that case, an alleged agreement to the contrary by the individual's supervisor was held unauthorized and therefore invalid.

It also has been held that experts and consultants employed under authority of 5 U.S.C. § 3109 (the basic governmentwide authority for procuring expert and consultant services) may serve without compensation without violating the Antideficiency Act as long as it is clearly understood and agreed that no compensation is expected. 27 Comp. Gen. 194 (1947); 6 Op. Off. Legal Counsel 160 (1982). *Cf.* B-185952, Aug. 18, 1976 (uncompensated participation in pre-bid conference, on-site inspection, and bid opening by contractor engineer who had prepared specifications regarded as "technical violation" of 31 U.S.C. § 1342).

[98] While the principle in B-181934 remains valid, the decision was overruled by 55 Comp. Gen. 109 (1975) on factual grounds. Additional information showed that the individual involved in that case was a "*de facto* employee" performing under color of appointment and with a claim of right to the position. A "voluntary" employee has no such "color of appointment" or indicia of lawful employment.

Several of the decisions note the requirement for a written record of the agreement to serve without compensation. Proper documentation is important for evidentiary purposes should a claim subsequently be attempted. *E.g.*, 27 Comp. Gen. at 195; 26 Comp. Gen. 956, 958 (1947); 27 Comp. Dec. 131, 132–33 (1920); 2 Op. Off. Legal Counsel 322, 323 (1977). Specifically, the decisions state that the individuals should acknowledge in writing and in advance that they will receive no compensation and that they should explicitly waive any and all claims against the government on account of their service.

The rule that compensation fixed by statute may not be waived does not apply if the waiver or appointment without compensation is itself authorized by statute. The Comptroller General stated the principle as follows in 27 Comp. Gen. at 195:

> "[E]ven where the compensation for a particular position is fixed by or pursuant to law, the occupant of the position may waive his ordinary right to the compensation fixed for the position and thereafter forever be estopped from claiming and receiving the salary previously waived, *if there be some applicable provision of law authorizing the acceptance of services without compensation*." (Emphasis in original.)

As noted above, the decision in 27 Comp. Gen. 194 cited as the provision authorizing the acceptance of services without compensation in that case what is now section 3109(b) of title 5, United States Code. Under section 3109(b), agencies may, when authorized by an appropriation or other act, procure the services of experts or consultants for up to 1 year without regard to other provisions of title 5 governing appointment and compensation. This authority is subject to a maximum rate of compensation in some cases, but there is no minimum rate.

In B-139261, June 26, 1959, GAO reiterated the above principle, and gave several additional examples of statutes sufficient for this purpose. The examples included the following statutory provisions that remain essentially the same in substance as they were in 1959:

- section 204(b) of title 29, United States Code, which authorizes the Administrator of the Labor Department's Wage and Hour Division to utilize voluntary and uncompensated services;

- section 401(7) of title 39, United States Code, which authorizes the Postal Service to accept gifts or donations of services or property; and

- section 210(b) of title 47, United States Code, which states that no provision of law shall be construed to prohibit common carriers from rendering free service to any agency of the government in connection with preparation for the national defense, subject to rules prescribed by the Federal Communications Commission.

At this point a 1978 case, 57 Comp. Gen. 423, should be noted. The decision held that a statute authorizing the Agency for International Development (AID) to accept gifts of "services of any kind" (22 U.S.C. § 2395(d)) did not permit waiver of salary by AID employees whose compensation was fixed by statute. Section 2395(d) is very similar to one of the examples given in B-139261, June 26, 1959, discussed above, of statutes that would authorize the acceptance of voluntary services. *See* 39 U.S.C. § 401(7). However, 57 Comp. Gen. 423 is distinguishable from B-139261, 27 Comp. Gen. 194, and the other voluntary services cases discussed previously. The question in 57 Comp. Gen. 423 was whether AID could invoke its gift-acceptance authority to justify paying regular federal employees less than the salaries prescribed by law. The decision held that it did not:

> "Section 2395(d) . . . authorizes the acceptance of gifts. Therefore, AID may accept services from private sources either gratuitously or at a fraction of their value. However, section 2395(d) does not authorize individuals to be appointed to regular positions having compensation rates fixed by or pursuant to statute at rates less than those specified. It, therefore, differs from the statute, which was the subject of 27 Comp. Gen. 194, *supra*, and accordingly is not a provision of law authorizing employees whose compensation is fixed by or pursuant to statute to waive any part of such compensation."

57 Comp. Gen. at 424–25.[99]

[99] Further support for the decision's conclusion that 22 U.S.C. § 2395(d) was addressed to services from private sources rather than federal employees can be found in the immediately preceding subsection, which states: "It is the sense of Congress that the President, in furthering the purposes of this [chapter], shall use to the maximum extent practicable the services and facilities of voluntary, nonprofit organizations registered with, and approved by, the Agency for International Development." 22 U.S.C. § 2395(c).

As noted earlier, 27 Comp. Gen. 194 concerned temporary experts or consultants. B-139261 concerned civilian volunteers who sought to provide services for an Air Force reserve center. Likewise, the other statutory examples cited in B-139261 clearly were aimed at individuals other than regular federal employees. Thus, 57 Comp. Gen. 423 appears to represent the sensible caveat that general statutory authorities to accept voluntary services or "gifts" of services do not supersede statutes providing for the compensation of federal employees and cannot be invoked to avoid the consequences of those statutes.

The rules for waiver of salary or appointment without compensation may be summarized as follows:

- If compensation is not fixed by statute, that is, if it is fixed administratively or if the statute merely prescribes a maximum but no minimum, it may be waived as long as the waiver qualifies as "gratuitous." There should be an advance written agreement waiving all claims.

- If compensation is fixed by statute, it may not be waived, the voluntary *versus* gratuitous distinction notwithstanding, without specific statutory authority. This authority generally may take the form of authority to accept donations of services or to employ persons without compensation.

- If the employing agency has statutory authority to accept gifts, the employee can accept the compensation and return it to the agency as a gift. Even if the agency has no such authority, the employee can still accept the compensation and donate it to the United States Treasury.

(2) Student interns

In 26 Comp. Gen. 956 (1947), the then Civil Service Commission asked whether an agency could accept the uncompensated services of college students as part of a college's internship program. The students "would be assigned to productive work, that is, to the regular work of the agency in a position which would ordinarily fall in the competitive civil service." The answer was no. Since the students would be used in positions the compensation for which was fixed by law, and since compensation fixed by law cannot be waived, the proposal would require legislative authority.

Thirty years later, the Justice Department's Office of Legal Counsel considered another internship program and provided similar advice. Without statutory authority, uncompensated student services that furthered the agency's mission, that is, "productive work," could not be accepted. 2 Op. Off. Legal Counsel 185 (1978).

In view of the long-standing rule, supported by decisions of the Supreme Court,[100] prohibiting the waiver of compensation for positions required by law to be salaried, GAO and Justice had little choice but to respond as they did. Clearly, however, this answer had its downside. It meant that uncompensated student interns could be used only for essentially "make-work" tasks, a benefit to neither the students nor the agencies.

The solution, apparent from both cases, was legislative authority, which Congress provided later in 1978 by the enactment of 5 U.S.C. § 3111. The statute authorizes agencies, subject to regulations of the Office of Personnel Management, to accept the uncompensated services of high school and college students, "[n]otwithstanding section 1342 of title 31," if the services are part of an agency program designed to provide educational experience for the student, if the student's educational institution gives permission, and if the services will not be used to displace any employee. 5 U.S.C. § 3111(b).

A paper entitled *A Part-Time Clerkship Program in Federal Courts for Law Students* by the Honorable Jack B. Weinstein and William B. Bonvillian, written in 1975 and printed at 68 F.R.D. 265, considered the use of law students as part-time law clerks, without pay, to mostly supplement the work of the regular law clerks in furtherance of the official duties of the courts. Based on the statute's legislative history and 30 Op. Att'y Gen. 51 (1913), previously discussed, Judge Weinstein concluded that the program did not violate the Antideficiency Act. Although this aspect of the issue is not explicitly discussed in the paper, it appears that the compensation of regular law clerks is fixed administratively. *See* 28 U.S.C. § 604(a)(5). In any event, the Administrative Office of the United States Courts was given authority in 1978 to "accept and utilize voluntary and incompensated (gratuitous) services." 28 U.S.C. § 604(a)(17).

[100] See footnote number 96, *supra*, and accompanying text.

(3) Program beneficiaries

Programs are enacted from time to time to provide job training assistance to various classes of individuals. The training is intended, among other things, to enable participants to enter the labor market at a higher level of skill. Questions have arisen under programs of this nature as to the authority of federal agencies to serve as employers.

A 1944 case, 24 Comp. Gen. 314, considered a vocational rehabilitation program for disabled war veterans. GAO concluded that 31 U.S.C. § 1342 did not preclude federal agencies from providing on-the-job training, without payment of salary, to program participants. The decision is further discussed in 26 Comp. Gen. 956, 959 (1947).

In 51 Comp. Gen. 152 (1971), GAO concluded that 31 U.S.C. § 1342 precluded federal agencies from accepting work by persons hired by local governments for public service employment under the Emergency Employment Act of 1971.[101] Four years later, GAO modified the 1971 decision, holding that a federal agency could provide work without payment of compensation to (*i.e.*, accept the free services of) trainees sponsored and paid by nonfederal organizations from federal grant funds under the Comprehensive Employment and Training Act of 1973.[102] 54 Comp. Gen. 560 (1975). The decision stated:

> "[C]onsidering that the services in question will arise out of a program initiated by the Federal Government, it would be anomalous to conclude that such services are proscribed as being voluntary within the meaning of 31 U.S.C. § [1342]. That is to say, it is our opinion that the utilization of enrollees or trainees by a Federal agency under the circumstances here involved need not be considered the acceptance of 'voluntary services' within the meaning of that phrase as used in 31 U.S.C. § [1342]."

Id. at 561.

[101] Pub. L. No. 92-54, 85 Stat. 146 (July 12, 1971).

[102] Pub. L. No. 93-203, 87 Stat. 839 (Dec. 28, 1973).

In B-211079.2, Jan. 2, 1987, the relevant program legislation expressly authorized program participants to perform work for federal agencies "notwithstanding section 1342 of title 31." The decision suggests that the statutory authority was necessary not because of the Antideficiency Act but to avoid an impermissible augmentation of appropriations. It is in any event consistent in result with 24 Comp. Gen. 314 and 54 Comp. Gen. 560. The relationship between voluntary service and the augmentation concept is explored later in this chapter in our discussion of augmentation of appropriations.

(4) Applicability to legislative and judicial branches

The applicability of 31 U.S.C. § 1342 to the legislative and judicial branches of the federal government does not appear to have been seriously questioned.

The salary of a Member of Congress is fixed by statute and therefore cannot be waived without specific statutory authority. B-159835, Apr. 22, 1975; B-123424, Mar. 7, 1975; B-123424, Apr. 15, 1955; A-8427, Mar. 19, 1925; B-206396.2, Nov. 15, 1988 (nondecision letter). However, as each of these cases points out, nothing prevents a Senator or Representative from accepting the salary and then, as several have done, donate part or all of it back to the United States Treasury.

In 1977, GAO was asked by a congressional committee chairman whether section 1342 applies to Members of Congress who use volunteers to perform official office functions. GAO responded, first, that section 1342 seems clearly to apply to the legislative branch. GAO then summarized the rules for appointment without compensation and advised that, to the extent that a particular employee's salary could be fixed administratively by the Member in any amount he or she chooses to set, that employee's salary could be fixed at zero. This once again was essentially an application of the rules set down decades earlier in 30 Op. Att'y Gen. 51 (1913) and 27 Comp. Dec. 131 (1920). *See also* B-69907, Feb. 11, 1977.

The salary of a federal judge is also "fixed by law"—even more so because of the constitutional prohibition against diminishing the compensation of a federal judge while in office. U.S. Const. art III, § 1. A case applying the standard "no waiver" rules to a federal judge is B-157469, July 24, 1974.

c. Other Voluntary Services

Before entering the mainstream of the modern case law, two very early decisions should be noted. In 12 Comp. Dec. 244 (1905), the Comptroller of

the Treasury held that an offer by a meat-packing firm to pay the salaries of Department of Agriculture employees to conduct a pre-export pork inspection could not be accepted because of the voluntary services prohibition.[103] Similar cases have since come up, but they have been decided under the augmentation theory without reference to 31 U.S.C. § 1342. See 59 Comp. Gen. 294 (1980) and 2 Comp. Gen. 775 (1923), discussed later in section E of this chapter.

To restate, apart from the 1905 decision, which has not been followed since, the voluntary services prohibition has not been applied to donations of money. In another 1905 decision, a vendor asked permission to install an appliance on Navy property for trial purposes at no expense to the government. Presumably, if the Navy liked the appliance, it would then buy it. The Comptroller of the Treasury pointed out an easily overlooked phrase in the voluntary service prohibition—the services that are prohibited are voluntary services "for the United States." Here, temporary installation by the vendor for trial purposes amounted to service for his own benefit and on his own behalf, "as an incident to or necessary concomitant of a proper exhibition of his appliance for sale." Therefore, the Navy could grant permission without violating the Antideficiency Act as long as the vendor agreed to remove the appliance at his own expense if the Navy chose not to buy it. 11 Comp. Dec. 622 (1905). This case has not been cited since.

For the most part, the subsequent cases have been resolved by applying the "voluntary *versus* gratuitous" distinction first enunciated by the Attorney General in 1913 in 30 Op. Att'y Gen. 51, discussed above. The underlying philosophy is perhaps best conveyed in the following statement by the Justice Department's Office of Legal Counsel:

> "Although the interpretation of § [1342] has not been entirely consistent over the years, the weight of authority does support the view that the section was intended to eliminate subsequent claims against the United States for compensation of the 'volunteer,' rather than to deprive the government of the benefit of truly gratuitous services."

[103] It would now also contravene 18 U.S.C. § 209, which prohibits payment of salaries of government employees from nongovernmental sources. This statute did not exist at the time of the 1905 decision.

6 Op. Off. Legal Counsel 160, 162 (1982).

In an early formulation that has often been quoted since, the Comptroller General noted that:

> "The voluntary service referred to in [31 U.S.C. § 1342] is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section."

7 Comp. Gen. 810, 811 (1928).

In 7 Comp. Gen. 810, a contractor had agreed to prepare stenographic transcripts of Federal Trade Commission public proceedings and to furnish copies to the Commission without cost, in exchange for the exclusive right to report the proceedings and to sell transcripts to the public. The decision noted that consideration under a contract does not have to be monetary consideration, and held that the contract in question was supported by sufficient legal consideration. While the case is thus arguably not a true "voluntary services" case, it has often been cited since, not so much for the actual holding but for the above-quoted statement of the rule.

For example, in B-13378, Nov. 20, 1940, the Comptroller General held that the Secretary of Commerce could accept gratuitous services from a private agency, created by various social science associations, which had offered to assist in the preparation of official monographs analyzing census data. The services were to be rendered under a cooperative agreement which specified that they would be free of cost to the government. The Commerce Department agreed to furnish space and equipment, but the monographs would not otherwise have been prepared.

Applying the same approach, GAO found no violation of 31 U.S.C. § 1342 for the Commerce Department to accept services by the Business Advisory Council, which were agreed in advance to be gratuitous. B-125406, Nov. 4, 1955. Likewise, the Commission on Federal Paperwork could accept free services from the private sector as long as they were agreed in advance to be gratuitous. B-182087-O.M., Nov. 26, 1975.

In a 1982 decision, the American Association of Retired Persons wanted to volunteer services to assist in crime prevention activities (distribute literature, give lectures, *etc.*) on Army installations. GAO found no Antideficiency Act problem as long as the services were agreed in advance, and so documented, as gratuitous. B-204326, July 26, 1982.

In B-177836, Apr. 24, 1973, the Army had entered into a contract with a landowner under which it acquired the right to remove trees and other shrubs from portions of the landowner's property incident to an easement. A subsequent purchaser of the property complained that some tree stumps had not been removed, and the Army proceeded to contract to have the work done. The landowner then submitted a claim for certain costs he had incurred incident to some preliminary work he had done prior to the Army's contract. Since the landowner's actions had been purely voluntary and had been taken without the knowledge or consent of the government, 31 U.S.C. § 1342 prohibited payment.

In 7 Comp. Gen. 167 (1927), a customs official had stored, in his own private boathouse, a boat which had been seized for smuggling whiskey. The customs official later filed a claim for storage charges. Noting that "the United States did not expressly or impliedly request the use of the premises and therefore did not by implication promise to pay therefor," GAO concluded that the storage had been purely a voluntary service, payment for which would violate 31 U.S.C. § 1342.

As if to prove the adage that there is nothing new under the sun, GAO considered another storage case over 50 years later, B-194294, July 12, 1979. There, an Agriculture Department employee had an accident while driving a government-owned vehicle assigned to him for his work. A Department official ordered the damaged vehicle towed to the employee's driveway, to be held there until it could be sold. Since the government did have a role in the employee's assumption of responsibility for the wreck, GAO found no violation of 31 U.S.C. § 1342 and allowed the employee's claim for reasonable storage charges on a *quantum meruit* basis.[104]

Section 1342 covers any type of service which has the effect of creating a legal or moral obligation to pay the person rendering the service. Naturally, this includes government contractors. *See PCL Construction Services*,

[104] See generally Chapter 12, section C.2.b in volume III of the second edition of *Principles of Federal Appropriations Law.*

Inc. v. United States, 41 Fed. Cl. 242, 257–260 (1998), quoting with approval from the second edition of *Principles of Federal Appropriations Law* on this point. The prohibition includes arrangements in which government contracting officers solicit or permit—tacitly or otherwise—a contractor to continue performance on a "temporarily unfunded" basis while the agency, which has exhausted its appropriations and cannot pay the contractor immediately, seeks additional appropriations. This was one of the options considered in 55 Comp. Gen. 768 (1976), discussed previously in connection with 31 U.S.C. § 1341(a). The Army proposed a contract modification which would explicitly recognize the government's obligation to pay for any work performed under the contract, possibly including reasonable interest, subject to subsequent availability of funds. The government would use its best efforts to obtain a deficiency appropriation. Certificates to this effect would be issued to the contractor, including a statement that any additional work performed would be done at the contractor's own risk. In return, the contractor would be asked to defer any action for breach of contract.

GAO found this proposal "of dubious validity at best." Although the certificate given to the contractor would say that continued performance was at the contractor's own risk, it was clear that both parties expected the contract to continue. The government expected to accept the benefits of the contractor's performance and the contractor expected to be paid—eventually—for it. This is certainly not an example of a clear written understanding that work for the government is to be performed gratuitously. Also, the proposal to pay interest was improper as it would compound the Antideficiency Act violation. Although 55 Comp. Gen. 768 does not specifically discuss 31 U.S.C. § 1342, the relationship should be apparent.

GAO's opinion in B-302811, July 12, 2004, provides a recent example of an appropriate "gratuitous services" type contract that did not run afoul of the 31 U.S.C. § 1342 prohibition against voluntary services. This decision concerned the General Services Administration's (GSA) proposed National Brokers Contract, under which GSA would award four real estate brokers exclusive rights to represent the United States with respect to all GSA real property leases. The brokers would be required to provide a range of services commonly offered in commercial leasing transactions such as assisting federal agencies in developing their space requirements, surveying the rental market, and negotiating and preparing leases. The proposal took the form of a "no-cost" contract in which GSA would make no payments to the brokers for their services. Rather, the brokers would

collect commissions from the landlords who leased property to the federal agencies. In approving the legality of this proposed arrangement, the decision observed:

> "Because the contract was constructed as a no cost contract, GSA will have no financial liability to brokers, and brokers will have no expectation of a payment from GSA. The acceptance of services without payment pursuant to a valid, binding no-cost contract does not augment an agency's appropriation nor does it violate the voluntary services prohibition. Although the brokers contract clearly expects that brokers will be remunerated by commissions from landlords, as is a common practice in the real estate industry, GSA does not require landlords to pay commissions. If a landlord were to fail to pay a broker, the broker would have no claim against GSA."

Id. at 7.[105]

d. Exceptions

Two kinds of exceptions to 31 U.S.C. § 1342 have already been discussed—where acceptance of services without compensation is specifically authorized by law, and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

There is a third exception, written into the statute itself: "emergencies involving the safety of human life or the protection of property." The cases dealing with this statutory exception have arisen in a variety of contexts and are discussed below, along with recent developments.

[105] The July 12, 2004, opinion clarified an earlier opinion on the subject of the National Brokers Contract, B-291947, Aug. 15, 2003. Also, it distinguished another opinion, B-300248, Jan. 15, 2004, which held that the Small Business Administration improperly augmented its appropriations by requiring certain lenders to pay fees to an agency contractor. See section E.2.a of this chapter for a detailed discussion of the Small Business Administration opinion and how it compares with the GSA opinion.

(1) Safety of human life

In order to invoke this exception, the services provided to protect human life must have been rendered in a true emergency situation. What constitutes an emergency was discussed in several early decisions.

In 12 Comp. Dec. 155 (1905), a municipal health officer disinfected several government buildings to prevent the further spread of diphtheria. Several cases of diphtheria had already occurred at the government compound, including four that resulted in deaths. The Comptroller of the Treasury found that the services had been rendered in an emergency involving the loss of human life, and held accordingly that the doctor could be reimbursed for the cost of materials used and the fair value of his services.

In another case, the S.S. Rexmore, a British vessel, deviated from its course to London to answer a call for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General allowed a claim for the vessel's actual operating costs plus lost profits attributable to the services performed. The Rexmore had rendered a tangible service to save the lives of the people aboard the Army transport, as well as the transport vessel itself. 2 Comp. Gen. 799 (1923).

On the other hand, GAO denied payment to a man who was boating in the Florida Keys and saw a Navy seaplane make a forced landing. He offered to tow the aircraft over two miles to the nearest island, and did so. His claim for expenses was denied. The aircraft had landed intact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even to avoid a potential future emergency is not enough to overcome the statutory prohibition. 10 Comp. Gen. 248 (1930).

(2) Protection of property

The main thing to remember here is that the property must be either government-owned property or property for which the government has some responsibility. The standard was established by the Comptroller of the Treasury in 9 Comp. Dec. 182, 185 (1902) as follows:

> "I think it is clear that the statute does not contemplate property in which the Government has no immediate interest or concern; but I do not think it was intended to apply exclusively to property owned by the Government.

> The term 'property' is used in the statute without any qualifying words, but it is used in connection with the rendition of services for the Government. The implication is, therefore, clear that the property in contemplation is property in which the Government has an immediate interest or in connection with which it has some duty to perform."

In the cited decision, an individual had gathered up mail scattered in a train wreck and delivered it to a nearby town. The government did not "own" the mail but had a responsibility to deliver it. Therefore, the services came within the statutory exception and the individual could be paid for the value of his services.

Applying the approach of 9 Comp. Dec. 182, the Comptroller General held in B-152554, Feb. 24, 1975, that section 1342 did not permit the Agency for International Development to make expenditures in excess of available funds for disaster relief in foreign countries. A case clearly within the exception is 3 Comp. Gen. 979 (1924), allowing reimbursement to a municipality which had rendered firefighting assistance to prevent the destruction of federal property where the federal property was not within the territory for which the municipal fire department was responsible.

An exception was also recognized in 53 Comp. Gen. 71 (1973), where a government employee brought in food for other government employees in circumstances which would justify a determination that the expenditure was incidental to the protection of government property in an extreme emergency. In this case, the General Services Administration had to assemble and maintain for 5 days a cadre of approximately 175 special police in connection with the unauthorized occupation of a Bureau of Indian Affairs building. The police officers were required to perform tours of duty that sometimes extended to 24 hours. They were kept at the ready to reoccupy the building and they were not permitted to leave the marshalling area because of the imminence of court orders and administrative directives.

(3) Recent developments

During the past two decades, cases addressing the "emergencies involving the safety of human life or the protection of property" exception to 31 U.S.C. § 1342 have arisen primarily in the context of "funding gaps" where an agency is faced with an appropriations lapse (or potential lapse)

usually at the outset of a fiscal year. These cases are discussed in detail in section C.6 of this chapter. However, several points from that discussion are also relevant here. Most notably, in 1990, Congress amended 31 U.S.C. § 1342 by adding the following language:

> "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[106]

Two recent GAO decisions have considered the emergency exception to 31 U.S.C. § 1342 (including its 1990 amendment) in a context other than a funding gap. The question in B-262069, Aug. 1, 1995, was whether the District of Columbia could exceed its appropriation for certain programs, including Aid to Families with Dependent Children and Medicaid, without violating the Antideficiency Act. The main issue in that decision was whether the "unless authorized by law exception" to the Antideficiency Act in 31 U.S.C. § 1341(a)(1)(A) applied. GAO held that it did not. The decision also noted the existence of the emergencies exception to 31 U.S.C. § 1342, but held that it was likewise inapplicable:

> "An 'emergency' under section 1342 'does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.' We are not presently aware of any facts or circumstances that would make this limited exception available to the District. See, 5 Op. O.L.C. 1, 7–11 (1981)."

B-262069 at 3, fn. 1.

The decision in B-262069 addressed a hypothetical situation; the District had not actually exceeded its appropriation there. Unfortunately, a subsequent opinion, B-285725, Sept. 29, 2000, involved the real thing. In that case, the District of Columbia Health and Hospitals Public Benefit Corporation (PBC) had incurred obligations and made payments in excess

[106] As explained in section C.6, this amendment was intended to guard against what might have been viewed as an overly broad application of one of the Attorney General's funding gap opinions.

of its appropriations. The PBC maintained that the emergency exception to 31 U.S.C. § 1342 as construed by the Attorney General applied; thus, there was no violation. GAO disagreed:

> "The funding gap situations discussed by the Attorney General arise typically at the beginning of a fiscal year because of the absence or expiration of budget authority under circumstances that are beyond an agency's control. In the present situation, the exhaustion of appropriations occurred during the fiscal year because of a rate of operations and obligations in excess of available resources. Viewed in this light, PBC's failure to regulate its activities and spending so as to operate within its available budget resources is not the type of 'emergency' covered either by the Attorney General's earlier opinions or 31 U.S.C. § 1342."

B-285725, Enclosure at 9.

The opinion acknowledged that PBC's ongoing functions of operating a hospital and clinics involved the provision of services essential to the protection of human life. However, the opinion observed that PBC, like many federal agencies engaged in protecting human life and safety, requested and received appropriations to cover these functions. It added:

> "Once the Congress enacts appropriation[s], it is incumbent on the PBC (and similarly situated federal agencies) to manage its resources to stay within the authorized level. Nothing in the District's Submission demonstrates that the PBC's exhaustion of appropriations prior to the end of the fiscal year was caused by some unanticipated event or events (*e.g.*, mass injuries resulting from hurricane, flood or other natural disasters) requiring PBC to provide services for the protection of life beyond the level it should have reasonably been expected to anticipate when it prepared its budget."

Id. By way of summary, the opinion observed:

> "While the failure of Congress to enact appropriations at the beginning of the fiscal year may qualify as an emergency event for purposes of section 1342, it would be a novel

> proposition, one that we are unwilling to endorse, to conclude that an agency's failure to manage and live within the resources provided for an activity involved in protecting human life permits it to incur obligations in excess of amounts provided. Nothing that we have been provided warrants the conclusion that the overobligations resulted from an unanticipated emergency rather than from the PBC's failure to manage and live within its budgetary resources during the fiscal year."[107]

B-285725 at 3.

In essence, B-285725 held that the emergencies exception to 31 U.S.C. § 1342 does not apply where an agency exceeds its appropriations—at least absent events beyond the agency's control that the agency (and presumably the Congress) could not have foreseen in determining the agency's funding levels.

In two opinions to the United States Marshals Service (USMS) in 1999 and 2000, the Office of Legal Counsel addressed a potential exhaustion of USMS appropriations, which never materialized: Memorandum Opinion for the General Counsel, United States Marshals Service, *USMS Obligation To Take Steps To Avoid Anticipated Appropriations Deficiency*, OLC Opinion, May 11, 1999, and Memorandum Opinion for the General Counsel, United States Marshals Service, *Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriations Deficiency*, OLC Opinion, Apr. 5, 2000. The opinions dealt with a potential exhaustion of appropriations for USMS prisoner-detention functions, but did not describe the circumstances giving rise to the potential exhaustion. While these opinions recognized the "affirmative obligation" on the part of agencies to manage available appropriations in order to avoid deficiencies, they did not address the important distinction between an exhaustion of appropriations (or funding gap) resulting from unforeseen circumstances and an exhaustion of appropriations resulting from the agency's failure to manage its operations within the limits of enacted appropriations. We would disagree with the Office of Legal Counsel opinions to the extent they could be read to suggest that regardless of the reasons for the exhaustion of

[107] Finally, the opinion noted that, even if the exception to section 1342 applied, it would not sanction the agency's actual disbursement of funds in excess of its appropriations. Thus, the agency violated the Antideficiency Act in any event.

appropriations, whenever an agency like USMS, whose statutory mission involves the protection of life and property, runs out of money, it has open-ended authority to continue to incur obligations under the Antideficiency Act's emergencies exception.[108] This is exactly the "coercive deficiency" that the Congress legislated against in enacting the Antideficiency Act.[109] *See* B-285725, Sept. 29, 2000. The Antideficiency Act was intended to keep agency operations at a level within the amounts that Congress appropriates for that purpose. If an agency concludes that it needs more funds than Congress has appropriated for a fiscal year, the agency should ask Congress to enact a supplemental appropriation; it should not continue operations without regard to the Antideficiency Act.

e. Voluntary Creditors

A related line of decisions are the so-called "voluntary creditor" cases. A voluntary creditor is an individual, government or private, who pays what he or she perceives to be a government obligation from personal funds. The rule is that the voluntary creditor cannot be reimbursed, although there are significant exceptions. For the most part, the decisions have not related the voluntary creditor prohibition to the Antideficiency Act, with the exception of one very early case (17 Comp. Dec. 353 (1910)) and two more recent ones (53 Comp. Gen. 71 (1973) and 42 Comp. Gen. 149 (1962)). The voluntary creditor cases are discussed in detail in Chapter 12, section C.4.c in volume III of the second edition of *Principles of Federal Appropriations Law*, dealing with claims against the United States.

4. Apportionment of Appropriations

Because of the apportionment and related provisions of the Antideficiency Act, 31 U.S.C. §§ 1511–1519, an agency generally does not have the full amount of its appropriations available to it at the beginning of the fiscal year. Apportionment is an administrative process by which, as its name suggests, appropriated funds are distributed to agencies in portions over the period of their availability. The Office of Management and Budget (OMB) apportions funds for executive branch agencies. 31 U.S.C. § 1513(b); Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note. Appropriations for legislative branch agencies, the judicial branch,

[108] The opinions did acknowledge, of course, that USMS could not actually spend funds if its appropriations were exhausted. They also noted that a determination whether particular obligations would satisfy the emergencies exception could not be made in the abstract and would require case-by-case evaluation.

[109] See section C.2.b of this chapter for a discussion of the "coercive deficiency" concept.