





















*Use of Appropriated Funds to Provide Light Refreshments  
to Non-Federal Participants at EPA Conferences*

Our *2001 ADA Opinion* did not address, among other things, “ceilings” (as noted above), the application of the ADA to amounts in a “fund,” or, most importantly for present purposes, “purpose restrictions . . . not found in appropriations acts.” *See id.* at 2 n.1. Nor, as this caveat indicated, does the general recognition that the term “available” in section 1341(a)(1)(A) incorporates a concept of “validity” and suggests “legal permissibility” resolve the scope of such a concept under the terms of the statute and thereby answer the question whether the ADA applies to a restriction not found in an appropriation.

The ADA prohibits “an expenditure or obligation exceeding an amount available *in an appropriation* . . . for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A) (emphasis added). Much as we thought in the *2001 ADA Opinion* that reading this statute *not* to include some legal permissibility standard would have left the phrase “for the expenditure or obligation” “somewhat superfluous,” here reading the statute to apply to the violation of a codified statute such as section 1345—not part of an appropriation making an amount available for expenditure or obligation—would leave the phrase “in an appropriation” without any clear purpose. Congress could have prohibited simply expenditures or obligations “exceeding an amount available for the expenditure or obligation,” which might, given our reading of “available” in our earlier opinion, have suggested a broad inquiry into all possible legal constraints on the “availab[ility]” of an amount for an expenditure or obligation. The inclusion of the phrase “in an appropriation” suggests a more restrictive intent, such that one should answer the question of “availab[ility]” by determining “availab[ility]” *within* the terms of a particular “appropriation.”

Moreover, and related, the concluding prepositional phrase “for the expenditure or obligation” in section 1341(a)(1)(A) is better read as modifying the noun “appropriation” (or “fund”) rather than, as our prior opinion asserted, the earlier adjective “available.” The full relevant portion of the ADA refers to “an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” Based on proximity, it is more credible to read the statute as referring to amounts “available” in an appropriation that is “for the expenditure or obligation” in question, rather than as essentially stating that the amount must be broadly “available for the expenditure or obligation” and also “in an appropriation.” The statutory history (discussed further below) also suggests this construction, as recognized in the *2001 ADA Opinion*. In finding support for our reading of “available” in the existence of the phrase “for the expenditure or obligation,” we acknowledged, based on the version of the Act in force from 1950 to 1982, that the entire phrase “an amount available in an appropriation or fund for the expenditure or obligation” could be interchangeable with “the amount available [ ]in” the “appropriation or fund” under which an expenditure or obligation was made. *See 2001 ADA Opinion* at 7; *see also id.* at 14-15.

Because in the earlier opinion we limited our consideration to “internal caps” and “conditions,” this interpretation of the textual structure gives us no reason to question our ultimate conclusion there, even though that opinion purported to rely on a different interpretation

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“inconsistent with the Antideficiency Act’s legislative history and evolution and with the rest of the (limited) caselaw.” *2001 ADA Opinion* at 18.

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of the structure: Once one identifies the “appropriation or fund for the expenditure or obligation” that is at issue, there is still the question of what amount is “available in” that appropriation, and our prior opinion determined that a limitation on spending that is “in an appropriation” is one whose violation also would violate the ADA. The assertion of how the phrase “for the expenditure or obligation” related to the rest of the provision was not necessary to reach that conclusion, given that the opinion provided additional bases for its reading of “available.” But the different understanding of the textual structure does make a difference here, because a proper reading reinforces that the ADA does not impose a roving requirement of “availability” under all possibly applicable law, but rather requires “availability” in the particular “appropriation . . . for the expenditure or obligation”—whether “availability” in the narrow sense of the existence of “unobligated” amounts “in” the appropriation or in the more extended sense of amounts not being subject to a restriction that is “in” the appropriation, such as the “internal cap” addressed in the *2001 ADA Opinion*. One can readily accept our prior reading of “available” as having, since that term was introduced into the ADA in 1950, “incorporated the concept of legal permissibility,” *see id.* at 7, and still conclude that the question of permissibility applies only “in an appropriation.”

A proper understanding of the term “appropriation” as used in the ADA further supports this interpretation of section 1341. That term refers not to a particular pot of money—such that one might say availability is determined by all laws that apply to that pot—but rather to a particular *legislative authorization* of a federal agency to spend a particular amount of money for some purpose. An “appropriation” is a “legislative body’s act of setting aside a sum of money for a public purpose.” *Black’s Law Dictionary* 110 (8th ed. 2004). The congressional GAO (formerly known as the Government Accounting Office) has defined the word similarly to mean “[a]uthority given to federal agencies to incur obligations and to make payments from the Treasury for specified purposes.” *A Glossary of Terms Used in the Federal Budget Process*, GAO/AFMD-2.1.1 (1993). The GAO also has explained that “[a]ppropriations do not represent cash actually set aside in the Treasury. They represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations specified in the appropriation acts.” Government Accounting Office, Office of the General Counsel, 1 *Principles of Federal Appropriations Law* 2-5 (3d ed. 2004). The courts of appeals have adopted a similar definition. *See, e.g., United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 286 n.1 (4th Cir. 2002) (citing the GAO definition). And section 1341(b), although not defining “appropriation,” contemplates that purchases may be made using money from “an appropriation made to a regular contingent fund”—a legislative authorization of a particular amount for a fund.

Two sections of title 31 define the term “appropriations” similarly to the above authority. *See* 31 U.S.C. §§ 701 & 1511 (2000). Although both of these provisions define the term only for the chapter or subchapter in which they appear, of which section 1341 is not a part, it is nevertheless reasonable to turn to them for guidance regarding the same term used elsewhere in that title. Section 1511, which concerns apportioning an appropriation across the period of the appropriation and, as indicated above, is part of the ADA, *see generally 2001 ADA Opinion* at 4, defines “appropriations” to mean “appropriated amounts,” “funds,” and “authority to make obligations by contract before appropriations.” 31 U.S.C. § 1511; *see also id.* §§ 1512-1514

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(similar, part of the subchapter to which section 1511 applies). Section 701, which concerns the work of the GAO, defines “appropriations” as “appropriated amounts,” which includes, depending on the “appropriate context,” “funds,” “authority to make obligations by contract before appropriations,” and “other authority making amounts available for obligation or expenditure.” *Id.* § 701(1); *see also id.* § 1341(a)(1)(B) (providing that an employee may not involve the Government “in a contract or obligation for the payment of money before *an appropriation is made* unless authorized by law”) (emphasis added). Thus, it is an “appropriation” that makes an amount available; the appropriation is not the physical amount that is available. Amounts are appropriated by proper authority, and an appropriation is something that is made. *See, e.g., 2001 ADA Opinion* at 4 (referring to “appropriated funds”); *id.* at 5 (same); *id.* at 18 (referring to a use of funds that “the appropriation forbade”). Accordingly, to determine under the ADA the “amount available *in an appropriation* . . . for [an] expenditure or obligation,” we must look to the applicable legislative act making the amounts in question available for obligation or expenditure—that is, to the applicable appropriation.

A rule of construction that Congress has codified in title 31, and that applies to section 1341, reinforces this understanding of what an “appropriation” is, and thus where one looks to determine the amount available “in an appropriation.” Section 1301(d) provides that “[a] law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation *only if the law specifically states that an appropriation is made* or that such a contract may be made.” 31 U.S.C. § 1301(d) (2000) (emphasis added). Enabling legislation, for example, has typically been viewed as not an “appropriation.” *See, e.g., 1 Principles of Fed. Appropriations Law* at 2-40 (noting that “appropriation acts” “must be distinguished from” enabling or organic legislation, which typically “does not provide any money”). We do not see why the interpretive rule of section 1301(d) would not also apply to resolve any doubt about the scope of the ADA, such that a provision limiting the Government’s ability to perform certain functions, including limiting expenditures, is not “in an appropriation” for purposes of section 1341—and thus does not alter the “amount available in an appropriation” for a given expenditure or obligation—unless it is found in a “law specifically stat[ing] that an appropriation is made” for the object in question.

The statutory history of the ADA further supports our conclusion that a violation of a statutory restriction on spending does not violate that Act where the restriction is not “in an appropriation.” Throughout the four versions it has had in its long history, and even as Congress has broadened its scope somewhat, the ADA always has focused on expenditures in excess of sums in “appropriations” or “an appropriation,” and thus respected the distinction between appropriations and other legislation. The initial, 1870 version prohibited “any department of the government” from “expend[ing] in any one fiscal year any sum *in excess of appropriations made* by Congress for that fiscal year.” Act of July 12, 1870, ch. 251, 16 Stat. 230, 251 (emphasis added). The 1905 version similarly required that “[n]o Department of the Government shall expend, in any one fiscal year, any sum *in excess of appropriations made* by Congress for that fiscal year.” Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257-58 (emphases added). The 1950 revision stated: “No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under *any appropriation* or fund *in excess*

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*of the amount available therein.*” Pub. L. No. 81-759, ch. XII, § 1211, 64 Stat. 595, 765 (1950) (emphases added). The current language of section 1341 was enacted as part of a general recodification of title 31 in 1982 and thus was not intended to work any substantive change, as we have recognized. *See, e.g., 2001 ADA Opinion* at 7. The preamble to the recodification stated that the bill’s purpose was “[t]o revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, ‘Money and Finance.’” Act of Sept. 13, 1982, 96 Stat. 877, 877; *see also Finley v. United States*, 490 U.S. 545, 554 (1989) (“Under established canons of statutory construction, ‘it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.’”); *see generally 2001 ADA Opinion* at 9-16 (canvassing the statutory and legislative histories of the Act in greater detail). Thus, the 1950 and current versions should be read in harmony, and the 1950 version, together with its predecessors, confirms the need to focus on what *an appropriation* from which an expenditure is to be made (or under which an obligation is to be incurred) does or does not make “available.”

The major substantive change during this history (apart from the addition of the word “fund” in 1950) was, as we explained in the *2001 ADA Opinion*, the shift in 1950, continued in the current version, from a focus on “overall spending” by a particular department for a fiscal year, under appropriations made for that department, to a focus on “spending out of particular appropriations” and on “expenditures in excess of any single appropriation or fund.” *Id.* at 14, 15. Congress thus did broaden the Act. But, as our earlier explanation indicates, the ADA continued to focus, indeed even more than before, on particular legislative authorizations of spending—on the “appropriation . . . for the expenditure or obligation.” Congress, in making the ADA’s requirements more stringent, did not silently add to the ADA a new sanction for all violations of statutory restrictions on spending, whether in an appropriation or ordinary legislation.<sup>4</sup>

Finally, to the extent that the above analysis leaves any ambiguity about whether violations of restrictions on spending not in the appropriation violate section 1341(a), our reading finds further support in the rule of lenity—the canon that if ambiguity remains in a criminal statute after textual, structural, historical, and precedential analyses have been exhausted, the narrower construction should prevail. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)

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<sup>4</sup> It is not clear how the term “fund” (added to the ADA in 1950) would be read in harmony with the term “appropriation.” and, thus, whether one could understand the phrase “amount available in a . . . fund for the expenditure or obligation” in precisely the same sense as the phrase “amount available in an appropriation . . . for the expenditure or obligation.” We are unaware of any judicial cases, opinions of this Office, or decisions of the Comptroller General interpreting section 1341(a)(1)(A) as applied to a “fund.” Although under normal rules of construction one presumptively should seek to read two seemingly parallel words in a statute, such as “appropriation” and “fund,” to have similar meanings, there may be reasons not to do so in section 1341. One can, as explained above, refer to an “appropriation made by Congress” and to “appropriated funds,” but it is not clear how one might use “fund” (or “funded”) in the same sense. Similarly, section 1341(b) refers to “an appropriation made to a regular contingent fund,” 31 U.S.C. § 1341(b) (emphasis added), and one would not ordinarily refer to “a fund made to a regular contingent fund” (or an appropriation made to an appropriation). Nor is it clear what it would mean to “authorize an obligation *under* . . . [a] fund.” We need not resolve such questions here, just as our *2001 ADA Opinion* did not resolve them, because the facts that you have provided do not suggest the involvement of any “fund” as a possible source of expenditures for light refreshments.

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(“Even if [the relevant statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner’s favor.”). As noted above, the ADA carries both administrative (section 1351) and criminal (section 1350) penalties for its violations. The Supreme Court in *Leocal* unanimously held that, where (as here) a statute has “both criminal and noncriminal applications,” the rule of lenity applies in all applications, to ensure a consistent interpretation. *Id.* Our *2001 ADA Opinion* did consider and reject the applicability of the rule of lenity to the distinct question whether to “equat[e] the terms ‘available’ and ‘unobligated,’” such that a cap or condition in an appropriation would not affect the “amount available in an appropriation” for a given “expenditure or obligation.” *2001 ADA Opinion* at 8. We did so because, although the language of the ADA “admits of some ambiguity,” we found no serious ambiguity or “complete equipoise” on this question. *Id.* at 9. But, as noted above, to conclude simply that “available” means more than “unobligated,” such that the ADA would apply to an internal cap or condition—“in an appropriation”—does not answer just how far beyond “obligated” that term reaches, and in particular the critical question whether it reaches beyond the “appropriation” that makes “an amount available . . . for [an] expenditure or obligation,” or not.<sup>5</sup>

For all of the above reasons, we conclude that the ADA does not reach beyond the “appropriation” that makes “an amount available . . . for [an] expenditure or obligation.” Because section 1345 of title 31 is not part of an appropriation, it does not determine the amount available in a particular appropriation for an expenditure or obligation; the ADA therefore does not apply by its own force to a violation of section 1345.

/s/

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<sup>5</sup> As in our *2001 ADA Opinion*, we need not here resolve the applicability of the ADA to restrictions other than internal caps and conditions that may appear in an appropriations act. The *2001 ADA Opinion* mentioned “ceilings” as an example. It is enough that section 1345 plainly is not “an appropriation” under any possible scope of that term. The Comptroller General has stated that an appropriation may be “exhausted” for purposes of section 1341(a) upon (1) the “[d]epletion of [an] appropriation account”; (2) the “depletion of a maximum amount specifically earmarked in a lump-sum appropriation”; or (3) the “[d]epletion of an amount subject to a monetary ceiling imposed by some other statute (usually, but not always, the relevant program legislation).” *2 Principles of Fed. Appropriations Law* at 6-41. The first category is, as we have explained, the paradigmatic violation of the ADA. The second is similar to the scenario addressed in our *2001 ADA Opinion*, although we expressly did not reach specific earmarks. *See 2001 ADA Opinion* at 2. The third, although not directly on point for section 1345, is arguably in tension with our conclusion. We have considered the Comptroller’s limited precedent and brief reasoning in support of this third category and do not find them persuasive regarding whether the ADA applies to section 1345. *See, e.g., Monetary Ceilings on Minor Military Construction (10 U.S.C. § 2805)*, 63 Comp. Gen. 422, 424 (1984) (stating, without further explanation, that the monetary limit in section 2805(c) limited the “amount available in an appropriation” under the ADA); *Matter of Reconsideration of B-214172*, 64 Comp. Gen. 282, 289 (1985) (without citing *Monetary Ceilings*, extending earlier precedents that “involved limitations that were contained in an appropriation act” to apply “to a limitation contained in authorizing legislation”).

**APPENDIX**

- The Clean Air Act, section 103, 42 U.S.C. § 7403: The EPA has authority to “establish a national research and development program for the prevention and control of air pollution,” and, among other things, may “promote the coordination” of research with private organizations, and may “provide financial assistance to,” “make grants to,” or “contract with” appropriate public or private agencies. EPA also may “provide training for, and make training grants to,” appropriate public or private organizations or individuals. *Id.* § 7403(a)-(b).
- The Clean Water Act, section 104, 33 U.S.C. § 1254: The EPA has authority to “establish national programs for the prevention, reduction, and elimination of pollution” and, among other things, may “promote the coordination” of relevant activities with appropriate public and private organizations, may “render technical services” to appropriate organizations, and may “cooperate with,” “make grants to,” or “contract with” those organizations. *Id.* § 1254(a)-(b). EPA also may “finance pilot programs,” in cooperation with appropriate public and private parties, of “manpower development and training and retraining.” *Id.* § 1254(g).
- The Solid Waste Disposal Act, section 8001, 42 U.S.C. § 6981: EPA may “encourage, cooperate with, and render financial and other assistance to appropriate” public or private organizations and individuals. *Id.* § 6981(a).
- The National Environmental Policy Act, section 102(2)(G), 42 U.S.C. § 4332(2)(G): Federal agencies shall “make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.”
- The Comprehensive Environmental Response, Compensation, and Liability Act, section 104(k)(6), 42 U.S.C. § 9604(k)(6): The EPA may “provide, or fund eligible entities or nonprofit organizations to provide training, research, and technical assistance to individuals and organizations, as appropriate.” In addition, under section 311, the EPA may “enter into contracts and cooperative agreements with, and make grants to, persons, public entities, and nonprofit private entities,” *id.* § 9660(b)(3), and conduct “a program of training,” *id.* § 9660(b)(9).
- The Intergovernmental Cooperation Act, 42 U.S.C. § 4742: A federal agency “may admit State and local government employees and officials to agency training programs established for Federal professional, administrative, or technical personnel.” *Id.* § 4742(a).
- The Government Employees Training Act, 5 U.S.C. § 4110: A federal agency may expend travel expenses “for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or

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which will contribute to improved conduct, supervision, or management of the functions or activities.”