YEAR-IN-REVIEW

I. KEY CONCEPTS AND TERMINOLOGY

A. Obligations

- *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

  Indian tribes sued under the Indian Self-Determination and Education Assistance Act, seeking to recover full contract support costs incurred by tribes under self-determination health services contracts. The Government argued that its contracts with Indian tribes were not "ordinary procurement contracts," so it was not legally bound to pay certain contract costs. The Court held that the tribal contracts were binding in the same manner as ordinary contractual promises and that the federal government must fully fund contract support costs under Indian Self-Determination and Education Assistance Act contracts. The Court pointed out that Congress enacted a lump-sum appropriation available for this purposes, and said that the agency must fulfill its contractual obligations to the tribes, notwithstanding that the government may have planned to use those appropriations for other purposes.

B. Agency Discretion

- *Gonzales v. Oregon*, 546 U.S. __, 126 S. Ct. 904 (2006).

  State of Oregon brought action seeking declaratory and injunctive relief preventing federal enforcement of application of the U.S. Attorney General's interpretive rule that physicians who assist suicide of patients under the Oregon Death with Dignity Act would violate federal law pursuant to the Controlled Substance Act. Specifically, the interpretive rule determined that using controlled substances to assist suicide is not a legitimate medical practice, and, accordingly, prescribing such drugs would violate the Controlled Substance Act. The Court found that the rule was not entitled to the deference accorded in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), because Congress did not grant the Attorney General the authority to define legitimate medical practice. While it noted that the statutory phrase "legitimate medical purpose" was ambiguous, Congress must still delegate the authority to the Attorney General before his interpretive rule will be accorded deference. When an administrative rule is not within the scope of the agency's delegated authority, the rule is accorded deference only to the extent that it is persuasive pursuant to the deference standard announced in *Skidmore v. Swift & Co.*, 323 U.S. 131, 140 , 65 S. Ct. 161, 164 (1944). The Court ultimately did not find the Attorney General's rule, or powers exerted in creating this rule, to be persuasive. The Court held that the Controlled Substance Act did not authorize the Attorney General to

prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, as authorized by the Oregon Death with Dignity Act.

C. Powers under the Spending Clause

- *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, ___U.S. ___, 126 S. Ct. 1297 (2006).

  Forum for Academic and Institutional Rights, Inc., an association of law schools and law faculty, sought a preliminary injunction against enforcement of the Solomon Amendment—a federal statute denying federal funding to an institution of higher education that "has a policy or practice . . . that either prohibits, or in effect prevents" the military "from gaining access to campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access of campuses and to students that is provided to any other employer." 10 U.S.C. § 938(c)(2). The Court noted that, under the Spending Clause, "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obliged to accept." The Court reasoned that funding conditions such as the Solomon Amendment cannot violate the Spending Clause if Congress could constitutionally impose the same requirements through direct legislation. The Court proceeded to hold that Congress could enact legislation directly mandating the Solomon Amendment's requirements without violating the First Amendment.

D. Fiscal and Budget Terminology

- GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005).

  The fifth edition replaces the 1993 version and fulfills GAO's responsibility to publish standard terms, definitions and classifications for the government's fiscal, budget, and program information. It also identifies, as appropriate, the intersection of terminology in the federal budget process from three separate perspectives: (1) appropriations law/obligational accounting; (2) budget; and (3) financial accounting. For example, the term "liability" is defined differently for obligational (or budgetary) accounting than for proprietary (or financial) accounting. The Glossary contains relevant economics and performance budgeting terms, as well.

  The Glossary includes seven useful appendices. Appendix I provides a detailed overview of the development and execution of the federal budget, while Appendix II contains diagrams of the Federal Budget Formulation Process beginning with the President's development of budget and fiscal policy through the enactment of annual appropriation statutes. Appendix III describes the two different but overlapping methods used by the federal government for tracking funds—obligational accounting and proprietary

accounting. Other appendices describe the Budget Functional Classification system (IV), federal Budget Account Identification Codes (V), the Program and Financing Schedule (VI) and Object Classes (VII).

II. STATUTORY CONSTRUCTION

A. Avoidance of Constitutional Issues & Other Concepts

- *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

  In addition to the obligation issue discussed above, this case presented statutory construction issues. The Court reaffirmed the concept that where Congress merely appropriates lump-sum amounts, without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions. Comments in committee reports and other legislative history as to how funds should be spent also do not establish any legal requirements on the agency.

  The Court rejected the Government's arguments that, through other statutory provisions, Congress imposed legally binding restrictions on funding for the contract support costs. In particular, it rejected the contention that a subsequent appropriation act capped such funding for the fiscal years at issue in this case by the following language:

  > "Notwithstanding any other provision of law . . . [the] amounts appropriated to or *earmarked in committee reports* for the . . . Indian Health Service . . . [for] payments to tribes . . . for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes."

  Leavitt, 543 U.S. at 633 (emphasis supplied). The Court conceded that the quoted language could be read as limiting prior year funding but rejected this interpretation since it would treat the language as retroactively repudiating contractual obligations, thereby raising constitutional concerns. Instead, the Court read the language as merely precluding the use of carryover funds from the prior year appropriations to pay for contract support costs.

B. Limitations on the use of no-year appropriations

- B-297398, Jan. 18, 2006—*Matter of: Crane & Company, Inc.*

  This bid protest decision raises an interesting issue of statutory interpretation and the use of no-year appropriations. In an effort to increase competition for the purchase of currency paper, the Bureau of Engraving and Printing issued a request for proposals (RFP) to furnish all facilities, labor, and materials to provide distinctive currency paper for the printing of currency. The RFP presented differing award scenarios that would result in either a 4- or 6-year

contract. The extended period was to allow firms a mobilization period and to provide firms not ready to begin production in the first two years of the contract to compete with other firms. Crane & Company, from whom the United States has purchased its currency paper for more than 125 years, filed the protest alleging that the RFP violated 31 U.S.C. § 5114(c). Section 5114(c) states that the Secretary of Treasury "may make a contract for a period of not more than 4 years to manufacture distinctive paper for United States currency and securities." GAO concluded that the unambiguous, plain language of section 5114(c) limited the Bureau's authority to enter into contracts not more than 4 years and sustained the protest.

The Bureau argued unsuccessfully that the 4-year limitation in section 5114(c) does not apply to its purchase of currency paper because the purchase was made with no year funds. The Bureau noted that, at the time that Congress enacted section 5114(c), the agency received annual appropriations that had limited the agency's ability to enter into multiyear contracts. The Bureau argued that the enactment of section 5114(c) had allowed the agency to pursue multiyear contracts without the regular time limitations of an annual appropriation. Subsequently, Congress enacted 31 U.S.C. § 5142, financing the Bureau's operations out of a revolving fund having no fiscal-year limitation, and according to the Bureau, relieving the Bureau of the restrictions of multiyear contracting that were tied to an annual appropriation. The Bureau contended that the authority in section 5114(c) would only apply to situations where the Bureau was using annual funds. GAO rejected this argument as inconsistent with the plain language of section 5114(c), which is not limited only to 1-year funds.

III. AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

A. Necessary Expense Rule—3-part test

- B-303170, Apr. 22, 2005—*Army—Availability of Army Procurement Appropriation for Logistical Support Contractors*

  This decision demonstrates the application of the 3-part test of the "necessary expense" rule to determine whether an appropriation is available to pay certain expenses. Using its "Other procurement, Army" appropriation, Army sought to pay for expenses related to operating and maintaining medical support equipment that the Army had acquired using that appropriation. GAO concluded that the appropriation was available for acquiring the equipment, but was not available for the operation and maintenance of that equipment. Applying the 3-part test of the necessary expense rule, GAO found that two prongs were not satisfied: (1) operation and maintenance expenses are not reasonably related to the acquisition or procurement of equipment and (2) another appropriation was legally available for the covering the expenses of operation and maintenance. Therefore, because the activities are not procurement activities, and consistent with its past practice and guidance, the

Army should charge its Operation and Maintenance appropriation for such services.

B. Governmentwide Prohibitions on the Use of Appropriations

1. *Restrictions on Lobbying*

- B-304715, Apr. 27, 2005—*Social Security Administration—Grassroots Lobbying Allegation.*

  GAO declined to take further action on requests for a legal decision regarding whether the Social Security Administration engaged in a grassroots lobbying effort on behalf of the President's Social Security initiative in violation of the prohibitions in 18 U.S.C. 1913 and section 503 of the Consolidated Appropriations Resolution, 2005, Pub. L. No.108-447, div. F, title V, 118 Stat. 2809, 3162 (Dec. 8, 2004). GAO has long required evidence of a clear appeal by the agency to the public to contact congressional members with regard to pending legislation before it would find that an agency violated these prohibitions. The materials submitted to GAO in this case did not evidence such an appeal. GAO declined to adopt a new, more relaxed standard in place of the established requirement.

2. *Update on Information Dissemination Restrictions*

- B-304228, Sept. 30, 2005—*Department of Education —No Child Left Behind Act Video News Release and Media Analysis.*

  The Department of Education hired a contractor to develop a "long-range communications strategy" to communicate with the public regarding the No Child Left Behind Act and its programs. As part of this contract, the contractor produced video news releases (VNR) regarding tutoring services available under the Act and conducted a media analysis evaluating news stories to determine the effectiveness of the "messages" reaching the public. Consistent with prior case law, GAO concluded that the Department's use of appropriated funds to produce the VNR violated the publicity or propaganda prohibition. The VNR contained a prepackaged news story which failed to alert the viewing audience that the Department was the source of the news story. As no funds were available for the Department to produce and distribute materials in violation of the publicity or propaganda prohibition, the Department also violated the Antideficiency Act.

  The media analysis presented a troublesome issue. GAO did not object to the Department's use of appropriations for a media analysis, but did object to one of the measures used in the analysis. In one of the contractor's reports, the contractor evaluated how the media was reporting whether the "[t]he Bush Administration/GOP is committed to education," which is a purely political measure. While GAO cautioned the Department that appropriated funds are

not available to conduct a media analysis that gathers information regarding the public's perception of any political party, GAO concluded that the Department incurred little if any expense by including this purely political factor in an otherwise acceptable media analysis. Accordingly, GAO found that the media analysis did not violate the publicity or propaganda prohibition.

- B-305368, Sept. 30, 2005—*Department of Education—Contract to Obtain Services of Armstrong Williams*.

  In addition to the VNR and the media analysis mentioned above, the Department's contractor arranged for the Department to obtain commentary from Armstrong Williams regarding the No Child Left Behind Act and its programs. Because the Department took no steps to ensure that the Department's role in sponsoring the commentary was disclosed the target audiences, the commentary constituted covert propaganda in violation of publicity or propaganda prohibition.

- B-304716, Sept. 30, 2005—*Department of Health and Human Services—Contract with Maggie Gallagher*.

  Upon receiving numerous inquiries regarding media reports concerning a contract between the Department of Health and Human Services, Administration for Children and Families (ACF) and syndicated columnist Maggie Gallagher to promote President Bush's Healthy Marriage Initiative, GAO examined the contract pursuant to the Comptroller General's authority to investigate the use of public money, 31 U.S.C. § 712, and to settle the accounts of the government, 31 U.S.C. § 3526. The contract required Ms. Gallagher to draft several brochures, to prepare a presentation to ACF managers on the benefits of marriage, and to produce and disseminate newspaper articles signed by the Assistant Secretary. We concluded that these materials did not violate the publicity or propaganda prohibition because they were not covert, self-aggrandizing, or purely partisan.

- B-306349, Sept. 30, 2005—*Department of Education—No Child Left Behind Newspaper Article*.

  Articles written and distributed to newspapers and circulars by the Department's contractor that did not disclose to readers that the government was the source may have violated publicity or propaganda prohibition. An Inspector General report had reviewed similar articles and concluded that the practice did not violate the prohibition. The IG report, however, had been written without consideration of congressional action reminding executive agencies that the critical element in determining whether materials constituted covert propaganda is the disclosure of source to the intended audience. GAO recommended that the Department examine these articles to determine whether a violation had occurred.

In May 2005, Congress, concerned about executive disregard of the publicity or propaganda prohibition, required that any executive branch agency using appropriations "to produce a prepackaged news story intended for broadcast or distribution" must include "a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by the executive branch agency." Pub. L. No. 109-13, § 6076, 110 Stat. 231, 301 (May 11, 2005). The conference report stated that the section confirmed GAO's analysis that the key element in determining whether materials are covert propaganda is whether the target audience of the materials is aware that the government is the source of the materials. *See* H.R. Conf. Rep. No. 109-72, at 158–59 (2005).

Congress included identical language in fiscal year 2006 appropriations. Pub. L. No. 109-115, § 844, 119 Stat. 2396, 2507 (Nov. 30, 2005).

- B-305349, Dec. 20, 2005—*Social Security Administration—Use of the Gallup Organization to Poll the Public on Social Security.*

  The Social Security Administration's (SSA) use of appropriated funds to hire the Gallup Organization to survey the general public on its familiarity with the Social Security Program did not violate 5 U.S.C. § 3107, the prohibition on using appropriated funds to pay "publicity experts." SSA did not hire Gallup to "extol or advertise" SSA or individuals within SSA, and, thus, Gallup was not a "publicity expert" within the meaning of section 3107.

C. Grant Agreements.

- B-303927, June 7, 2005—*Department of Labor—Grants to New York Workers' Compensation Board.*

  After September 11, 2001, Congress appropriated funds to the Department of Labor (DOL) for payment to the New York State Workers' Compensation Board for "processing of claims" related to the terrorist attacks. DOL awarded a grant to the Workers' Compensation Board for this purpose. From the amount granted, the Board transferred $44 million to anther state entity to reimburse it for claims paid to victims of the terrorist attack. GAO held that the appropriation, which was available for the Compensation Board's costs of processing claims, was not available to make payments to other New York State entities for claims payments. GAO advised the Department to seek recovery of the $44 million unless Congress ratifies the grant expenditure. GAO also held that the Department's grant to the Workers' Compensation Board imposed a responsibility on the Department to ensure performance of the grant.

D. Availability for Personal Expenses

1. *Refreshments*

- B-304718, Nov. 9, 2005—*Veterans Benefits Administration—Refreshments for Focus Groups*.

  Veterans Benefits Administration (VBA) can use appropriations to pay for refreshments and light meals as an incentive to attract participants for focus groups used to evaluate VBA programs. GAO will not object to providing such incentive where the agency can show that providing the incentive will generate information permitting the agency to comply with a statutory requirement to evaluate the delivery of benefits. Refreshments should be provided pursuant to an enforceable policy to ensure that such refreshments are provided only when an incentive such as refreshments is necessary, and not for internal employee meetings or focus groups.

2. *Commuting Expenses*

- B-305864, Jan. 5, 2006—*U.S. Capitol Police—Employee Shuttle*

  U.S. Capitol Police asked whether it may use appropriated funds for a shuttle bus to transport employees from the Capitol Police provided parking lot to a new work facility that was not within easy walking distance to the parking lot. To the extent that the Capitol Police sought only to provide a shuttle as a means of easing employees' commutes, appropriations are not available to pay this type of personal expense. However, the Capitol Police can provide a shuttle if there are legitimate operational needs to shuttle employees among the Capitol Police offices in different buildings. In that case, there is no objection to incidental use of the shuttle by employees during their commutes so long as such use does not result in additional expense to the Capitol Police.

III. AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. Augmentation

1. *Collection of Conference Attendance Fees*

- B-306663, Jan. 4, 2006—*Contractors Collecting Fees at Agency-Hosted Conferences*.

  In reconsidering one aspect of B-300826, Mar. 3, 2005, GAO reaffirmed its conclusion that a government agency may not allow its contractor to charge and retain a fee that the agency itself legally could not charge and retain. GAO noted that Congress, on occasion, has permitted agencies to collect and retain fees and advised that, if Congress desired, it could authorize agencies to retain

such fees. Otherwise, the miscellaneous receipts statute requires that agencies deposit amounts collected in the Treasury as miscellaneous receipts. Congress could achieve legislative change in a number of ways, including amending the Government Employees Training Act, 5 U.S.C. §§ 4101–4118, or amending an agency's authorizing statute.

2. *Settlement Agreements*

- B-306860, Feb. 28, 2006—*Office of Federal Housing Enterprise Oversight—Settlement Agreement with Freddie Mac.*

  The terms of a settlement agreement between the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Home Loan Mortgage Corporation (Freddie Mac) in which Freddie Mac agreed to pay a vendor to electronically format certain documents it was producing for OFHEO was not an improper augmentation of OFHEO's appropriation. Under its regulatory oversight authority, OFHEO brought an administrative proceeding against Freddie Mac and its former executive officers. OFHEO agreed to drop administrative proceedings against Freddie Mac pursuant to a settlement agreement in which Freddie Mac agreed to pay a vendor to format electronically certain documents for OFHEO that would assist OFHEO in continuing proceedings against the former executive officers. Even though the formatting would benefit OFHEO, no augmentation of OFHEO's appropriation will occur because: (1) the settlement agreement satisfies a prosecutorial objective; and (2) the vendor payments that Freddie Mac is required to make are not legal obligations of OFHEO.

B. Timing of Deposits/Refunds under the Miscellaneous Receipts Statute

- B-305402, Jan. 3, 2006—*National Aeronautics and Space Administration—Retention of Demutualization Compensation.*

  The National Aeronautics and Space Administration (NASA) may not retain amounts of demutualization compensation that it received from its contractor, California Institute of Technology (Caltech). Caltech operates a NASA laboratory. Prudential Life Insurance Company paid Caltech demutualization compensation on policies that Caltech had held for the benefit of Caltech employees who worked at the NASA laboratory. Caltech, in turn, paid the amounts to NASA. Because these amounts do not qualify as a repayment to NASA, NASA has no authority to retain and credit the amounts to its appropriation. Accordingly, NASA must deposit them into the Treasury as miscellaneous receipts under 31 U.S.C. § 3302(b).

  After NASA determined that the Government, not Caltech, was entitled to these amounts, NASA should have ensured that they were deposited in the United States Treasury the day following receipt. Directing Caltech officials to

deposit amounts in an interest-bearing money market account violated 31 U.S.C. § 3302(c)(1) and Treasury Regulation, 31 C.F.R. § 206.5(a)(1).

C. Impoundment

- B-307122, Mar. 2, 2006—*Impoundments Resulting from the President's Proposed Rescissions of October 28, 2005.*

  On October 28, 2005, the President transmitted to Congress a proposal to rescind $2.3 billion of available funding to offset the cost of Hurricane Katrina relief. The proposal called for "cancellations" from 53 different federal programs. Under the Impoundment Control Act, whenever the President proposes budget authority for rescission, he must transmit a special message to Congress meeting certain requirements. Once the message is received, agencies may withhold from obligation budget authority proposed for rescission for up to 45 legislative days.

  OMB informed GAO that the President's October 28 announcement was not a formal proposal for rescission of budget authority under the Impoundment Control Act. OMB stated that affected agencies were specifically instructed not to withhold budget authority in anticipation of an impending rescission. Because GAO is responsible, under the Impoundment Control Act, for monitoring impoundments of budget authority, GAO contacted each agency affected by the President's proposal to determine whether they were withholding budget authority. GAO identified 12 instances in which agencies withheld a total of over $470 million in budget authority from obligation. In 11 of the 12 instances of improper withholding, the agencies indicated that they were withholding funds in expectation of a rescission. Because the October 28 proposal was not a special message, the agencies in withholding budget authority impounded these funds in violation of the Impoundment Control Act.

IV. AVAILABILITY OF APPROPRATIONS AS TO TIME

A. Contract ratifications

- B-306353, Oct. 26, 2005—*Architect of the Capitol—Contract Ratification.*

  An employee of the Architect of the Capitol (AOC) directed an AOC contractor to undertake work on three separate occasions. The employee was not authorized to issue directives to AOC's contractors. The contractor believed that the employee was authorized and began work. Upon learning of the unauthorized directives, AOC immediately suspended the work of the contractor. Subsequently, the AOC Director of Procurement determined that the work indeed was necessary to meet construction project goals and executed a contract modification, ratifying the employee's earlier directives. This decision represents an example of a ratification of an unauthorized directive to begin work and application of the seven requirements under the

Federal Acquisition Regulations for ratification of improper directives. Because of the proper ratification, appropriations were available to pay all the costs incurred.

B. Grant extensions

- B-303845, Jan. 3, 2006—*Department of Education—Grant Extensions.*

A GAO audit of the Department of Education's management of grant programs revealed that, despite apparent statutory and regulatory limitations on grants to Historically Black Colleges and Universities (HBCU) and Historically Black Graduate Institutions (HBGI), the Department had extended grants beyond the limitation period of 5 years. In some cases, the Department had made 4-year "extensions" to the original 5-year grants awarded to those institutions. GAO concluded that extension of a 5-year grant made to an HBGI was improper given the plain language of the authorizing statute, 20 U.S.C. § 1063b(b), which limited the grants to HBGIs to a period not to exceed 5 years. Accordingly, any extension of the grants beyond the 5-year period was improper. GAO also concluded that extensions of 5-year grants made to HBCUs amounted to an improper waiver of regulations limiting duration of HBCU grant periods to 5 years. 34 C.F.R. § 608.11. Adherence to the existing framework for grantmaking, as laid out in the statute and implementing regulation, provides structure and consistency, which in turn promotes the goals of proper administration and accounting, as well as fairness to all grant applicants.

To the extent that the Department determines that additional assistance is warranted, the Department could award a new grant to that institution. A new grant would constitute a new obligation of the Department that would be chargeable to appropriations current at the time the Department awards the new grant. The Department will also need to recover from grantees any amounts from terminated grants that the grantees had not obligated as of the end of the 5-year grant period.

C. Advance Payments

- B-306975, Feb. 27, 2006—*National Archives and Records Administration Records Center Revolving Fund—Advance Payments.*

  The National Archives and Records Administration requested a decision on whether its customer agencies' appropriations are available to pay, in advance monthly charges for storage services for temporary and pre-archival records. NARA proposed to base advance charges on monthly projections and then to adjust agencies' bills the following month to reflect the actual amount of services provided. We had no objection to this billing method but cautioned that NARA may not credit excess amounts from September billing cycles on to October's bill. These funds would not be available for obligation in the next fiscal year commencing on October 1. Likewise, a customer agency who owes

more than the amount advanced in September must cover the underpayment from the previous fiscal year's funds.