

## Keep Your Commanders off the Fiscal Naughty List— How to Spot and Prevent Common Antideficiency Act Violations

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*The wise man learns from someone else's mistakes, the smart man learns from his own, and the stupid one never learns.*<sup>1</sup>

### I. Introduction

On a crisp autumn morning in our nation's capital, the President of the United States was savoring his second cup of coffee as the Chief of Staff approached his desk in the Oval Office. It had been a long week for the President. Besides the usual awe-inspiring demands on the leader of the free world, he was also dealing with increasingly volatile situations in the Middle East, Eastern Europe, and Africa while watching his party's chances in the midterm elections plummet. Needless to say, his sleep had suffered over the last few nights. "Please tell me you have some good news in that folder," the President muttered. The Chief of Staff simply shook his head laterally while handing over the correspondence sent to 1600 Pennsylvania Avenue by the Office of the Undersecretary of Defense (Comptroller). "Dear Mr. President: This letter is to report a violation of the Antideficiency Act (ADA) by the Department of the Navy." The President's weary eyes scrolled down to focus on the paragraph fingering the culprit. "Colonel Troy H. Thatcher is responsible for the violation. He was orally admonished and required to receive additional training."

Aside from the ADA violation during his tenure as an O-6 installation commander, Colonel Thatcher was, in the parlance of Marine promotion board briefers, a "water walker"<sup>2</sup> who had excelled at every level of command and in various staff positions. The fiscal law foul, which was largely the result of poor staff work, was the sole blemish on his otherwise impeccable record. From leading Marines in the

first Gulf War as a platoon commander to shepherding a battalion through bitter fighting in Afghanistan, he had a bias for action which perfectly balanced mission accomplishment with troop welfare. Not surprisingly, this highly decorated Marine was selected for promotion to brigadier general on his very first look. However, a massive roadblock to his promotion was erected during the U.S. Senate's advice and consent portion of the promotion process. The senior senator from Idaho put a hold on the promotion due to Colonel Thatcher's aforementioned ADA violation. It was never lifted, and Colonel Thatcher retired as a colonel.

While the specifics of ADA violations may be a mystery to most, it is universally understood that ADA violations are to be avoided at all costs. While the preceding story was fictional, ADA violations receive high visibility. Letters are sent to the President throughout the year reporting ADA violations,<sup>3</sup> and ADA violators' hopes for career advancement can be dashed or delayed.<sup>4</sup>

Judge advocates can play a significant role in keeping commanders, and other potential responsible officials, off the ADA naughty list if they are able to properly identify potential ADA violations and prevent them before funds are obligated. Part II of this paper provides historical context for the ADA and identifies the actual law along with its applicability, effect, and penalties. Part III focuses on the prevention of ADA violations by examining recent Department of Defense (DoD) *in excess of* and *in advance of* violations. This part spotlights the frequent *in excess of* violations found in areas

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<sup>1</sup> Vitaliy Katsenelson, *Burj Khalifa: Wise Men Learn From Mistakes of Others*, FORBES (Jan. 11, 2011, 5:24 PM), <http://www.forbes.com/sites/greatspeculations/2011/01/11/burj-khalifa-wise-men-learn-from-mistakes-of-others/> (identifying the quote as a Russian expression).

<sup>2</sup> See John 6:16-24 (story of Jesus walking on water). See also ALAN AXELROD, WHISKY TANGO FOXTROT: THE REAL LANGUAGE OF THE MODERN AMERICAN MILITARY (2013) (A water walker is "any noncom or officer who receives the maximum rating on his or her efficiency report

from both the rater and the endorser. It is generally believed that only Jesus Christ could possibly achieve such miraculous ratings—but, then, he could also walk on water.").

<sup>3</sup> See 31 U.S.C. § 1517(b) (2013) (requiring the head of an executive agency to immediately report to the President and Congress "all relevant facts and a statement of actions taken" when Antideficiency Act (ADA) violations are confirmed).

<sup>4</sup> See 139 CONG. REC. S9230 (daily ed. Jul. 22, 1993) (statement of Sen. Leahy).

I would like to take a few moments this morning to discuss, once again, something I discussed a couple times earlier this year: The pending promotion of an Air Force Col Claude M. Bolton, Jr. It may sound insignificant to discuss this before the Senate, but this is an example of a person being recommended for promotion to brigadier general and the fact that this individual was involved in what I would consider a waste of taxpayers' money. . . . Colonel Bolton's promotion to brigadier general should not be approved, at least it should not be approved until we have all the facts bearing on his role in the Antideficiency Act violations and the reprocurement scheme while program manager.

*Id.*

where Congress has not appropriated any funds and military construction projects. By examining mistakes of the past, judge advocates will hopefully be in a better position to prevent future ADA violations in these common, yet preventable, areas.

## II. Background

### A. History of the ADA

The power of the purse is definitively granted to the legislative branch in Article I, Section 9, of the U.S. Constitution: “No money shall be drawn from the treasury, but in consequence of appropriations made by law . . . .”<sup>5</sup> The language is unmistakable; the constitutional framers did not desire the executive branch to make independent decisions regarding the expenditure of funds.<sup>6</sup> However, the amount of actual power exercised by Congress was severely lacking initially due to dubious fiscal practices by the executive branch.<sup>7</sup> There were two main tactics employed by agencies in the executive branch to undermine the power of the purse.<sup>8</sup> The first approach was for agencies to create obligations before, or of a sum greater than, their actual appropriations.<sup>9</sup> The legislative branch then felt morally compelled to cover the unauthorized promises made by executive agencies in order to uphold the government’s good name or to keep the country running and adequately protected.<sup>10</sup> The military appears to have been the worst offender in this area.<sup>11</sup> The second method was to spend all of the agency’s money during the first few months of the fiscal year and come back to Congress asking for more funds in order to continue operations.<sup>12</sup> This approach led Representative John Randolph of Virginia, in 1908, to quip, “Those who disburse the money are like a saucy boy who knows his grandfather will gratify him, and over-turns the sum allowed him at pleasure.”<sup>13</sup> The “saucy boy” in this quote was the executive branch, while Congress played the role of the benevolent

grandfather.<sup>14</sup> Though it happened after the original ADA in 1870, a prime example of this strategy can be found in 1879 when the postmaster general requested a deficiency appropriation over a third of the amount originally requested and appropriated.<sup>15</sup> Congress denied the request and asserted that the post office had already been adequately funded.<sup>16</sup> The postmaster general’s countermove was to shut down the mail service for the remainder of the fiscal year; Congress promptly responded with additional funds.<sup>17</sup> Such questionable behavior could be seen from the Madison administration<sup>18</sup> up until the years immediately following the Civil War.<sup>19</sup>

In response to all of the fiscal mismanagement by the executive branch, Congress struck back by passing several pieces of legislation collectively known as the ADA.<sup>20</sup> Following the initial offering in 1870, the ADA was subsequently amended in 1905, 1906, 1951, 1956, and 1957.<sup>21</sup> The ADA has been described as “the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds set by appropriation acts and related statutes.”<sup>22</sup> The ADA finally provided “teeth” to the fiscal powers granted to the legislative branch in the form of potential adverse administrative actions and criminal penalties<sup>23</sup> along with mandatory reporting requirements to the President and Congress.<sup>24</sup>

### B. The Law, its Applicability, and its Effect

As previously stated, the ADA has evolved from the legislative branch’s first attempts to regain control over the country’s purse strings in 1870.<sup>25</sup> The ADA, as currently constituted, prohibits:

Making or authorizing an expenditure from, or creating or authorizing an obligation under, any

<sup>5</sup> U.S. CONST. art. I, § 9.

<sup>6</sup> Andrew Cohen, *The Odd Story of the Law that Dictates How Government Shutdowns Work*, THE ATLANTIC (Sep. 28, 2013, 8:00 AM), <http://theatlantic.com/politics/archive/2013/09/the-odd-story-of-the-law-that-dictates-how-government-shutdowns-work/280047/>.

<sup>7</sup> *Id.*

<sup>8</sup> WILLIAM G. ARNOLD, THE ANTIDEFICIENCY ACT ANSWER BOOK 5 (2009).

<sup>9</sup> *Id.*

<sup>10</sup> Cohen, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> ARNOLD, *supra* note 8, at 5.

<sup>13</sup> Cohen, *supra* note 6.

<sup>14</sup> *Id.*

<sup>15</sup> LUCIUS WILMERDING, JR., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 137–40 (1943).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Cohen, *supra* note 6.

<sup>19</sup> ARNOLD, *supra* note 8.

<sup>20</sup> *Id.*

<sup>21</sup> CONTRACT & FISCAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK, at 4-2 (2014) [hereinafter FISCAL LAW DESKBOOK].

<sup>22</sup> Major Gary L. Hopkins & Lieutenant Colonel Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3697) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 56 (1978).

<sup>23</sup> *Antideficiency Act Background*, U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/legal/lawresources/antideficiencybackground.html> (last visited Nov. 10, 2014) [hereinafter *ADA Background*].

<sup>24</sup> See 31 U.S.C. § 1517 (b) (2013).

<sup>25</sup> ARNOLD, *supra* note 8.

appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law. 31 U.S.C. § 1341(a)(1)(B).

Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).<sup>26</sup>

As for applicability, the plain language shows that federal employees are subject to the ADA.<sup>27</sup> However, the DoD, via the DoD Financial Management Regulation, narrows the scope of application to “commanding officers, budget officers, or fiscal officers . . . because of their overall responsibility or position.”<sup>28</sup> This places responsibility for ADA violations squarely in the purview of military commanders and not just financial managers.

The intent and effect of the ADA was summarized in a Comptroller General opinion published in 1962<sup>29</sup>:

These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the

matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.<sup>30</sup>

The U.S. Government Accountability Office (GAO)<sup>31</sup> proclaims that the preceding passage is the best possible summation of appropriations law in a single paragraph.<sup>32</sup> In short, the ADA delivered the de facto power of the purse back to the legislative branch by binding the executive branch to the specific appropriations provided each fiscal year.<sup>33</sup>

### C. Penalties

Sanctions for ADA violations can be both administrative or criminal in nature.<sup>34</sup> The ADA is unique among fiscal statutes in that it “prescribe[s] penalties of both types [administrative and penal], a fact which says something about congressional perception of the Act’s importance.”<sup>35</sup> Administrative discipline, according to the statute, includes suspension from duty without pay or removal from office.<sup>36</sup> A knowing and willful ADA violation carries the following penalties: fine of up to \$5,000, imprisonment for up to two years, or both.<sup>37</sup> To date, however, no ADA violators have faced criminal prosecution.<sup>38</sup>

### III. Preventing Common Violations

In practice, the ADA requires three levels of fiscal controls: appropriations, apportionment, and administrative subdivisions.<sup>39</sup> While it is important to understand all three, appropriations is, by far, the fiscal control that produces the most DoD ADA violations.<sup>40</sup> Beyond a basic understanding

<sup>26</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II, ch 6, pt. C, sec. 1, at 6-36 to 6-37 (3d ed. 2004 & Supp. 2013) [hereinafter GAO RED BOOK].

<sup>27</sup> ADA Background, *supra* note 23.

<sup>28</sup> U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 05 (Apr. 2013).

<sup>29</sup> GAO RED BOOK, *supra* note 26, at 6-37.

<sup>30</sup> To The Sec’y of the Air Force, B-144641, 42 Comp. Gen. 272, 275 (1962).

<sup>31</sup> About GAO, U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/about/> (last visited Dec. 1, 2014) (“The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the ‘congressional watchdog,’ GAO investigates how the federal government spends taxpayer dollars.”).

<sup>32</sup> GAO RED BOOK, *supra* note 26, at 6-38.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6-143; see 31 U.S.C. §§ 1349(a), 1518 (2013) (providing adverse personnel actions for ADA violations); see also 31 U.S.C. § 1350 (2013) (providing criminal penalties for ADA violations).

<sup>35</sup> *Id.*

<sup>36</sup> 31 U.S.C. § 1349(a) (2013).

<sup>37</sup> 31 U.S.C. § 1350 (2013).

<sup>38</sup> GAO RED BOOK, *supra* note 26, at 6-144.

<sup>39</sup> FISCAL LAW DESKBOOK, *supra* note 21, at 4-3.

<sup>40</sup> See generally *View Antideficiency Act Reports*, U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/legal/>

of the reasons behind the ADA and the statutes themselves, judge advocates need to possess a solid working knowledge of appropriations in order to identify potential violations and stop them before funds are obligated. While there are possible remedial measures for potential ADA violations, the best outcome is to stop a potential ADA violation before it occurs. As such, it is wise to examine past violations, draw lessons, and avoid them.

#### A. Appropriations and Limitations

The most important provision of the ADA, according to the GAO, is 31 U.S.C. § 1341(a)(1)<sup>41</sup>:

An officer or employee of the United States Government . . . may not:

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

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.<sup>42</sup>

The statute above outlines two distinct prohibitions on expenditures: *in excess of* appropriations and *in advance of* appropriations.<sup>43</sup> Although this seems extremely simple (e.g., do not spend more money than you have and do not spend

money before you have it), numerous violations still occur in this area.<sup>44</sup>

#### 1. *In Excess Of*

There were quite a few *in excess of* ADA violations reported by the DoD in fiscal year (FY) 2005 through FY 2012.<sup>45</sup> Some *in excess of* DoD violations involve over-obligations of personnel funds.<sup>46</sup> This has been due to either mismanagement—as seen by the Air National Guard,<sup>47</sup> the Army,<sup>48</sup> and the Navy<sup>49</sup> respectively—or by overwhelming, unplanned events such as the increased personnel requirements in the aftermath of September 11, 2001.<sup>50</sup> Either way, these are cases which are probably outside a judge advocate’s sphere of influence.

However, *in excess of* violations also occur when funds are obligated for items in which Congress has not provided any appropriation.<sup>51</sup> The two areas<sup>52</sup> where DoD ADA *in excess of* violations are most likely to occur are obligating funds on unauthorized expenditures, also known as “no appropriation available” offenses, and using incorrect appropriations for military construction projects.<sup>53</sup> Judge advocates can oftentimes play a significant role in preventing these types of *in excess of* ADA violations by knowing the law and proactively preventing violations before they occur.

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lawresources/antideficiencyrpts.html (last visited Jan. 9, 2015) [hereinafter *GAO ADA Reports*].

<sup>41</sup> GAO RED BOOK, *supra* note 26, at 6-38 (“Not only is section 1341(a)(1) the key provision of the Act, it was originally the only provision, the others being added to ensure the enforcement of the basic prohibitions of section 1341.”).

<sup>42</sup> 31 U.S.C. § 1341(a)(1)(A)-(B) (2013).

<sup>43</sup> GAO RED BOOK, *supra* note 26, at 6-39.

<sup>44</sup> *Id.*

<sup>45</sup> *GAO ADA Reports*, *supra* note 40 (providing all reported ADA violations from fiscal year (FY) 2005 to the last full fiscal year of reports, which, as of this writing, is through FY 2013).

<sup>46</sup> *Id.*

<sup>47</sup> *Antideficiency Act Reports—Fiscal Year 2012*, U.S. GOV’T ACCOUNTABILITY OFF., 7, <http://www.gao.gov/assets/660/650531.pdf> (last visited Jan. 10, 2016) (GAO No. 12-07) [hereinafter *FY12 ADA Reports*] (“The Air National Guard (ANG) reported that it over-obligated its fiscal year 2009 Military Personnel (MILPERS) account when it failed to recalculate an applicable Man-Day Factor, a composite workday rate, to reflect changing information for ANG members . . .”).

<sup>48</sup> *FY12 ADA Reports*, *supra* note 47, at 15 (GAO No. 12-15) (“Army reported that a violation occurred when the Office of Deputy Chief of Staff, G-1, did not properly manage the fiscal year 2008 Military Personnel (MILPERS) account.”).

<sup>49</sup> *Antideficiency Act Reports—Fiscal Year 2011*, U.S. GOV’T ACCOUNTABILITY OFF., 10, <http://www.gao.gov/assets/600/590553.pdf>

(last visited Jan. 10, 2016) (GAO No. 11-11) (“The Bureau of Naval Personnel (BUPERS) overobligated the Navy’s 2008 Military Personnel (MP) account in violation of the Antideficiency Act. The BUPERS’s Comptroller Office was unable to properly exercise internal control and management oversight of the MP account . . .”).

<sup>50</sup> Letter from Tina W. Jonas, Comptroller, Dep’t of Def., to The President (Aug. 26, 2005), <http://www.gao.gov/ada/gao-ada-05-14.pdf> (providing an over-obligation of MILPERS funds by the Department of the Navy when the Marine Corps made over-disbursements of the Military Personnel, Marine Corps appropriation in the amount of \$21,800,000 in FY 2002 due to “the complexities associated with the increased workload of mobilizing thousands of reservists and no accurate process for tracking the costs.”).

<sup>51</sup> U.S. DEP’T OF DEF., DEF. CONTINGENCY CONTRACTING HANDBOOK, VERSION 4, at 47 (Oct. 2012), [http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/DCCHB\\_Oct\\_2012.pdf](http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/DCCHB_Oct_2012.pdf); *see also* United States v. MacCollum, 426 U.S. 317 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”).

<sup>52</sup> Though not nearly as common and therefore not covered in-depth in this paper, a third *in excess of* violation occurs when funds are expended when there are statutory prohibitions on funding. *See* Letter from Tina W. Jonas, Comptroller, Dep’t of Def., to The President (Aug. 21, 2005), <http://www.gao.gov/ada/gao-ada-06-23.pdf> (providing an example of a statutory prohibition on funding *in excess of* ADA violation). Specifically, during FY 2001, members of The U.S. Army Corps of Engineers “exceeded the cost limit and maximum space permitted for the renovation of General/Flag Officer’s Quarters at Fort Lee” as provided in 10 U.S.C. § 2825.”). *Id.*

<sup>53</sup> *See generally* GAO ADA Reports, *supra* note 40.

a. No Appropriation Available

GAO ADA reports of violations are littered with unauthorized DoD purchases that judge advocates may be able to identify and prevent before they happen.<sup>54</sup> In five separate fiscal years, light refreshments were purchased using operations and maintenance (O&M) funds by the Air Warfare College during regional studies events hosted at Maxwell Air Force Base by the Air University.<sup>55</sup> Naval Recruiting Command spent almost \$20,000 in O&M funds in FY 2006 to purchase food and mementos for employees at a banquet. Upon investigation, these purchases violated the bona-fide needs rule.<sup>56</sup> The Naval Hospital, Camp Pendleton, improperly used O&M funds to purchase food and gifts for participants at Breast Cancer Awareness conferences.<sup>57</sup> In FYs 1999 and 2000, the 204th Military Intelligence Battalion (an Army unit) “improperly used appropriated funds [\$11,173.90] to purchase wine glasses, pay personal entertainment-related expenses, purchase aviation patches, pay per diem and other costs for a non-official event, and purchase food and food-related items including food services at several non-official events and locations.”<sup>58</sup>

Additionally, the Army and the Navy both recorded ADA violations dealing with unauthorized purchases of bottled water.<sup>59</sup> In FYs 1996 through 2006, \$701,479.69 in Navy Working Capital funds were used to purchase bottled water at Naval Surface Warfare Center, Port Hueneme, California.<sup>60</sup> The Army violation occurred when the Defense Contract Management Agency used O&M funds to purchase bottled water in FYs 1997 through 2002.<sup>61</sup>

Like bottled water, coins are a typical questionable expense with tight regulations dictating the narrow instances when appropriated funds can be used for their purchase.<sup>62</sup> Moreover, coins have also caused the DoD to appear on the GAO ADA list more than once.<sup>63</sup> In FYs 2003 and 2004, the Public Affairs Officer, Chemical Material Agency, Aberdeen Proving Ground, Maryland, used \$13,420 in “Chemical

Agents Munitions Destruction, Army” funds to procure “metallic information products” (e.g., coins) to dispense as gifts at ceremonial events.<sup>64</sup> Though branding coins as “metallic information products” could be read as consciousness of guilt regarding a willful violation of the purpose statute, no criminal action was taken against the civilian employee.<sup>65</sup> However, the letter submitted to the President does a good job of capturing the essence of the ADA violation:

The procurement of the [] [“metallic information products”] was a violation of the Purpose Statue [sic], Title 31, United States Code, Section 1301(a). No other appropriation was found to be an appropriate source of funds for the procurement of these items under the circumstances. This situation resulted in a violation of Title 31, United States Code, Section 1341(a)(1)(A).<sup>66</sup>

The key to preventing improper expenditures on food, entertainment, bottled water, and coins is twofold. For starters, it is essential that judge advocates know fiscal law rules as they relate to these typical questionable expenses. Additionally, judge advocates must share this information with the key members of the command involved in the expenditures. However, absolute knowledge is useless if a judge advocate is unaware of the expenditure. Therefore, it is imperative that judge advocates be aware of the potential expenditures. This can be accomplished by working with the executive officer to ensure “legal” is included in any meeting, or on any routing sheet, dealing with these type of expenditures.

Some “no appropriations available” violations, however, are more difficult to proactively prevent. For example, the Department of the Air Force violated the ADA when personnel at Dover Air Force Base, Delaware, used government purchase cards for personal items.<sup>67</sup> “Such acquisitions were found to be personal items for which no

<sup>54</sup> *Id.*

<sup>55</sup> *Antideficiency Act Reports—Fiscal Year 2009*, U.S. GOV’T ACCOUNTABILITY OFF., 2, <http://www.gao.gov/assets/600/590637.pdf> (last visited Jan. 10, 2016) (GAO No. 09-03) [hereinafter *FY09 ADA Reports*].

<sup>56</sup> *Antideficiency Act Reports—Fiscal Year 2007*, U.S. GOV’T ACCOUNTABILITY OFF., 8, <http://www.gao.gov/assets/600/590635.pdf> (last visited Jan. 10, 2016) (GAO No. ADA-07-19) [hereinafter *FY07 ADA Reports*]; see also FISCAL LAW DESKBOOK, *supra* note 21, at 3-7 (providing “the bona fide needs rule is a timing rule that requires both the timing of the obligation and the bona fide need to be within the fund’s period of availability.”).

<sup>57</sup> *Id.*

<sup>58</sup> *Antideficiency Act Reports—Fiscal Year 2005*, U.S. GOV’T ACCOUNTABILITY OFF., 2, <http://www.gao.gov/assets/600/590633.pdf> (last visited Jan. 10, 2016) (GAO No. ADA-05-06) [hereinafter *FY05 ADA Reports*].

<sup>59</sup> See generally *GAO ADA Reports*, *supra* note 40.

<sup>60</sup> *Antideficiency Act Reports—Fiscal Year 2008*, U.S. GOV’T ACCOUNTABILITY OFF., 2, <http://www.gao.gov/assets/600/590636.pdf> (last

visited Jan. 10, 2016) (GAO No. ADA-08-04) [hereinafter *FY08 ADA Reports*].

<sup>61</sup> *FY05 ADA Reports*, *supra* note 58, at 4 (GAO No. ADA-05-12).

<sup>62</sup> FISCAL LAW DESKBOOK, *supra* note 21, at 2-49, 2-50; see also Major Kathryn R. Sommercamp, *Commander’s Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997 (providing an in-depth paper on commander’s coins and their potential issues).

<sup>63</sup> See *Antideficiency Act Reports—Fiscal Year 2006*, U.S. GOV’T ACCOUNTABILITY OFF., 2, <http://www.gao.gov/assets/600/590634.pdf> (last visited Jan. 10, 2016) (GAO No. ADA-06-04); see also *FY07 ADA Reports*, *supra* note 56, at 6 (GAO No. ADA-07-15).

<sup>64</sup> Letter from Tina W. Jonas, Comptroller, Dep’t of Def., to The President (Apr. 23, 2007), <http://www.gao.gov/ada/gao-ada-07-15.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *FY05 ADA Reports*, *supra* note 58, at 2 (GAO No. ADA-05-06).

appropriated funds were available, as they were unnecessary to accomplish the military organization's mission."<sup>68</sup> While judge advocates may not be able to prevent such illicit activities, they can ensure this information gets properly channeled into the military justice system.

### *b. Military Construction Projects*

While "prohibited appropriations" and "no appropriations available" violations appear regularly in the ADA reports, improperly funded military construction projects are the main source of *in excess of* ADA violations committed by the DoD.<sup>69</sup> By statute, military construction includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements . . . ."<sup>70</sup> Judge advocates must work to have a thorough knowledge of military construction laws in order to prevent these types of ADA violations.<sup>71</sup> The key is involvement in the process. Judge advocates need to find a way to maintain situational awareness of all construction projects to ensure the projects are funded from the proper appropriation and not split or phased to stay beneath a threshold.<sup>72</sup>

The Joint Improvised Explosive Device Defeat Organization (JIEDDO), formally established by DoD Directive in 2006 to counter the growing improvised explosive device (IED) threats in Iraq and Afghanistan,<sup>73</sup> decided to establish an IED device sensor testing facility in FY 2006.<sup>74</sup> The concept, named Project Iraqi Village, was "to construct buildings that had the same characteristics as those constructed in Iraq to provide a real-world environment for testing and evaluating advanced sensor techniques."<sup>75</sup> While the project certainly seems to fall within the unit's mandate,

the following passage from the report of ADA violation to the President highlights the fiscal flaw:

The misunderstanding of what [Research Development Test and Evaluation-Army] and [Joint IED Defeat Funds] may be used for and the characterization of Project Iraqi Village as a testing facility were the root causes of the violation. A failure in correctly identifying the project as one involving construction that exceeded the unspecified minor construction threshold of \$750,000 precipitated the ADA violation. Project Iraqi Village should have been authorized by Congress . . . and funded with Military Construction Funds.<sup>76</sup>

The Joint Improvised Explosive Device Defeat Organization is certainly not alone in producing ADA violations of this ilk. The U.S. Army Corps of Engineers committed a comparable ADA violation in FY 2007 when \$8 million of O&M funds were used to construct a classified information facility on Fort Sam Houston, Texas.<sup>77</sup> Similarly, the Oklahoma City Air Logistics Center Product Support Directorate, Tinker Air Force Base, Oklahoma, used O&M funds and Other Procurement, Air Force funds to construct "a complete and usable real property facility in excess of \$2 million" during FYs 2003 through 2005.<sup>78</sup> "Since military construction funds were not appropriated nor approved for the project, the [ADA] violation is uncorrectable."<sup>79</sup>

In addition to identifying the relevant appropriation, judge advocates also need to be on the lookout for improper project splitting.<sup>80</sup> Perhaps the most infamous case in this area involves the rapid "construction" of the Army Materiel Command (AMC) Headquarters Building at Fort Belvoir, Virginia in the early 2000s.<sup>81</sup> Following the events of September 11, 2001, AMC wanted to relocate from their

<sup>68</sup> Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Dec. 20, 2010), <http://www.gao.gov/ada/GAO-ADA-11-05.pdf>.

<sup>69</sup> See generally *GAO ADA Reports*, *supra* note 40.

<sup>70</sup> 10 U.S.C. § 2801 (a) (2013).

<sup>71</sup> See *FISCAL LAW DESKBOOK*, *supra* note 21, ch.8 (providing a comprehensive overview of the laws associated with military construction funding).

<sup>72</sup> See *FISCAL LAW DESKBOOK*, *supra* note 21, at 8-6 (providing that "project splitting and/or incrementation is prohibited").

<sup>73</sup> *About JIEDDO*, JOINT IMPROVISED EXPLOSIVE DEVICE DEFEAT ORGANIZATION, <https://www.jieddo.mil/about.htm> (last visited Jan. 10, 2016).

<sup>74</sup> Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Mar. 30, 2012), <http://www.gao.gov/assets/660/650541.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* But see Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §

2802 (2014) [hereinafter FY15 NDAA] (increasing the O&M ceiling to \$1 million and the general UMMC ceiling to \$3 million).

<sup>77</sup> Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Sep. 19, 2012), <http://www.gao.gov/assets/660/650551.pdf>.

<sup>78</sup> Letter from Robert F. Hale, Comptroller, Dep't of Def., to The President (Jul. 22, 2011), <http://www.gao.gov/ada/GAO-ADA-11-16.pdf> [hereinafter Hale Letter 11-16].

<sup>79</sup> See *FISCAL LAW DESKBOOK*, *supra* note 21, at 4-19 (providing that a potential purpose statute violation can be corrected, thus avoiding an ADA violation, if "proper funds (the proper appropriation, the proper year, the proper amount) were available at the time of the erroneous obligation" and "proper funds were available (the proper appropriation, the proper year, the proper amount) at the time of correction for the agency to correct the erroneous obligation"). However, in this case, since no military construction funds were ever available for this project, this obligation is not correctable under the GAO-sanctioned two-part test; Hale Letter 11-16, *supra* note 78.

<sup>80</sup> See *FISCAL LAW DESKBOOK*, *supra* note 21, at 8-6 (providing that "project splitting and/or incrementation is prohibited").

<sup>81</sup> *FY09 ADA Reports*, *supra* note 55, at 2 (GAO No. 09-12).

leased space in Arlington, Virginia to Fort Belvoir, Virginia, in order to be on a military installation and enjoy improved force protection.<sup>82</sup> In FYs 2002 through 2005, AMC sent \$44 million in O&M funds to the General Services Administration (GSA) for a services contract to relocate their headquarters building to Fort Belvoir.<sup>83</sup> On January 17, 2007, Mr. Thomas F. Gimble, then Acting DoD Inspector General, offered the following explanation to the Senate Armed Services Committee's Subcommittee on Readiness:

GSA used the funds to contract for the construction of two modular two-story office buildings totaling about 230,000 square feet at Fort Belvoir. The buildings serve as the headquarters of the Army Materiel Command and provide office space for about 1,400 civilian and military personnel. Although the Army contended that construction did not occur, no buildings existed at the site prior to the contract. Army officials stated that using operations and maintenance funds was correct because the contractor was providing a service: the use of the buildings. However, the procurement of these buildings was clearly a construction project. The Army should have used Army Military Construction funds, even though the approval of construction projects is a far lengthier process in DoD than in GSA.<sup>84</sup>

While finding creative solutions to problems is usually a desired trait for a judge advocate, military construction is an area where a novel approach (e.g., executing a multi-million dollar service contract for the use of a building on a military installation) can quickly lead to an ADA violation. Not surprisingly, the AMC Headquarters Building incident can be found in the GAO ADA Report for FY 2009.<sup>85</sup>

In another example of smaller pieces being used to construct large complexes in an attempt to skirt the rules, the

U.S. Army Intelligence Center (USAIC) and School used \$15,449,992.49 in O&M funds to “construct a multiple building training complex consisting of classrooms, interrogation booths, and latrine facilities.”<sup>86</sup> Understanding the O&M threshold,<sup>87</sup> USAIC scoped the project in increments in order to stay below threshold amounts.<sup>88</sup> That practice is not permitted.<sup>89</sup>

The command ordered 435 shelters that were manufactured to a pre-determined building design and constituted the components of the complex configuration. They were assembled and connected by construction tradesmen. Site preparation construction work conducted by U.S. Army Installation Management Command for the training complex project was mistakenly scoped as three projects, and each was funded . . . . The entire project, including the site preparation work, constituted a single specified military construction project, and should have been authorized in accordance with law and funded from Military Construction, Army appropriation.<sup>90</sup>

Third Army, U.S. Central Command and U.S. Army Garrison (USAG) Grafenwoehr proved, in separate ADA violations, that improperly using O&M funds for military construction projects is not just a stateside problem.<sup>91</sup> In FY 2004, Third Army used \$16,802,792 in O&M funds to construct a detention facility at Camp Bucca, Iraq.<sup>92</sup> For a military construction project of this size, even if carried out in a deployed environment, O&M funding is the wrong appropriation.<sup>93</sup> Though the price associated with the Camp Bucca violation (\$16,802,792) is certainly greater (just under \$3 million),<sup>94</sup> the ADA violation at USAG Grafenwoehr seems a bit more sinister. Specifically, the U.S. Army Installation Management Command “split construction costs into four military construction projects on a new building addition. The splitting of these construction costs allowed

<sup>82</sup> Memorandum from Deputy Assistant Sec’y of the Army (Financial Operations) to Deputy Chief Financial Officer, Office of the Under Sec’y of Defense (Comptroller), subject: Report on Antideficiency Act Violation No. 06-07, Enclosure 1, p. 3 (31 Jul 2008).

<sup>83</sup> *Services and Inter-Agency Contracting: Hearing Before the Subcomm. on Readiness S. Comm. on Armed Serv.*, 110th Cong. 9-10 (2007) (statement of Mr. Thomas F. Gimble, Acting Inspector General, Department of Defense), <http://www.dodig.mil/iginformation/archives/DoD%20OIG%20prepared%20Statement%2001-17-2007.pdf>.

<sup>84</sup> *Id.*

<sup>85</sup> *FY09 ADA Reports*, *supra* note 55, at 8 (GAO No. 09-12).

<sup>86</sup> Letter from Robert F. Hale, Comptroller, Dep’t of Def., to The President (Jun. 28, 2010), <http://www.gao.gov/ada/gao-ada-10-10.pdf>.

<sup>87</sup> See *FISCAL LAW DESKBOOK*, *supra* note 21, ch.8, at 45-46 (providing at the time of the ADA violation, the following statutory thresholds for military construction projects: for projects \$750,000 or less, use Operations & Maintenance (O&M) funds; for projects between \$750,000 and \$2 million, use Unspecified Minor Military Construction (UMMC) funds (some exceptions apply); and if greater than \$2 million, use specified Military Construction funds). *But see* FY15 NDAA, *supra* note 76

(increasing the O&M ceiling to \$1 million and the general UMMC ceiling to \$3 million).

<sup>88</sup> *Antideficiency Act Reports—Fiscal Year 2010*, U.S. GOV’T ACCOUNTABILITY OFF., 9, <http://www.gao.gov/assets/600/590638.pdf> (last visited Jan. 10, 2016) (GAO No. 10-10).

<sup>89</sup> *FISCAL LAW DESKBOOK*, *supra* note 21, ch. 8, at 5-6.

<sup>90</sup> Letter from Robert F. Hale, Comptroller, Dep’t of Def., to The President (Jun. 28, 2010), <http://www.gao.gov/ada/gao-ada-10-10.pdf>.

<sup>91</sup> *FY09 ADA Reports*, *supra* note 55, at 1 (GAO No. 09-01); *FY12 ADA Reports*, *supra* note 47, at 19 (GAO No. 12-19).

<sup>92</sup> Letter from Douglas A. Brook, Comptroller (Acting), Dep’t of Def., to The President (Nov. 3, 2008), <http://www.gao.gov/ada/gao-ada-09-01.pdf>.

<sup>93</sup> *Id.* (“The Army should have funded the project with Military Construction, Army funds or sought Contingency Construction Authority under Section 2808 of the National Defense Authorization Act for FY 2004.”).

<sup>94</sup> Letter from Robert F. Hale, Comptroller, Dep’t of Def., to The President (Sep. 14, 2012), <http://www.gao.gov/assets/660/650550.pdf>.

each project to remain below the \$750,000 OMA [O&M, Army] minor construction ceiling.”<sup>95</sup> The total cost of the military construction project was \$2,957,489.00,<sup>96</sup> so the proper pot of money clearly should have been Military Construction funds.<sup>97</sup>

The examples above are just a sampling of the numerous DoD ADA violations involving military construction.<sup>98</sup> However, this is certainly an area where judge advocates can proactively prevent attempts to circumvent thresholds before they become ADA violations. The key to success is participation in the process. Attend meetings that discuss construction projects. Ensure “legal” is on the routing sheet for construction matters. Find a way to educate the staff on common construction funding failures, either through structured training or hip-pocket classes when a potential issue arises.

## 2. *In Advance Of*

In order for an appropriation to be available, there are three separate required events: (1) Congress must pass the appropriation act, (2) the President must sign the appropriation act, and (3) the date must be at least 1 October in the FY for which the appropriation becomes available.<sup>99</sup> The *in advance of* prohibition from 31 U.S.C. §1341(A)(1)(b) seems, on its face, as simple as the 31 U.S.C. §1341(A)(1)(a) *in excess of* prohibition (e.g., do not spend money before it is appropriated).<sup>100</sup> However, a surprising number of ADA violations by the DoD can be found in this area.<sup>101</sup> In fact, a half-dozen DoD *in advance of* ADA violations are contained in the GAO’s FY 2008 report, split equally between the Army and the Navy.<sup>102</sup>

In FY 2003, responsible officials from the U.S. Army Corps of Engineers used FY 2003 O&M funds for services from the General Services Administration which extended into FY 2004.<sup>103</sup> “Because the orders were placed before the enactment of the FY 2004 appropriations act and did not include a clause providing that the obligation was contingent upon enactment of appropriation, the obligations in FY 2003

for FY 2004 services violated the ADA.”<sup>104</sup> The other two Army ADA violations recorded in 2008 deal with the improper obligation of one-year funds for multi-year leases.<sup>105</sup> In this first one, responsible officials from U.S. Army Pacific Command obligated \$16,329,687.68 of FY 2001 O&M funds (which have a one-year period of availability)<sup>106</sup> for two-and four-year severable leases for equipment.<sup>107</sup> As for the latter, the Information Technology Business Center, Fort Sam Houston, Texas, “entered into two multiyear leases for storage area network software and improperly obligated FYs 2003 through 2007 [O&M, Army] funds in advance of appropriations without legal authority in violation of 31 U.S.C. § 1341(a)(1)(B).”<sup>108</sup>

Not to be outdone by their sister department, the Navy’s three *in advance of* violations were equally avoidable with proper oversight and a basic understanding of fiscal law. Responsible officials at Naval Base Ventura County, Point Mugu, California, using O&M, entered into a fourteen-month severable services contract running from September 30, 2004 through November 30, 2005. Since severable services contracts are limited, by statute, to one year,<sup>109</sup> “the amounts obligated beyond the 12-month period constitute obligations in advance of an appropriation, a violation of the ADA.”<sup>110</sup> Moreover, the Fleet Numerical Meteorology and Oceanography Center “obligated FY 2004 O&M funds for services that were needed and provided in FY 2005 and FY 2006.”<sup>111</sup> Finally, the Joint Intelligence Operations Center obligated FY 2005 funds to purchase furniture which was to be delivered in future fiscal years.<sup>112</sup>

## IV. Conclusion

The U.S. fiscal landscape has come a long way from the days when the Postmaster General had the audacity to spend all appropriated funds and hold mail delivery hostage until Congress supplied more funds.<sup>113</sup> The consequences for

<sup>95</sup> *Id.* But see FY15 NDAA, *supra* note 76 (which changed the basic O&M threshold to \$1 million).

<sup>96</sup> *Id.*

<sup>97</sup> See FISCAL LAW DESKBOOK, *supra* note 21, at 8-25 (“Congress typically specifically authorizes only those military projects expected to exceed \$2 million.”). But see FY15 NDAA, *supra* note 76 (changing the basic UMMC threshold to \$3 million.) Therefore, an identical project, if scoped post-FY15 NDAA, could potentially be funded with UMMC funds or specifically authorized military construction funds.

<sup>98</sup> See generally GAO ADA Reports, *supra* note 40.

<sup>99</sup> FISCAL LAW DESKBOOK, *supra* note 21, at 4-9.

<sup>100</sup> 31 U.S.C. § 1341(A)(1) (2013).

<sup>101</sup> See generally GAO ADA Reports, *supra* note 40.

<sup>102</sup> FY08 ADA Reports, *supra* note 60, at 1 (GAO No. 08-02).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 8 (GAO No. ADA-08-13); *id.* at 16 (ADA-08-16).

<sup>106</sup> FISCAL LAW DESKBOOK, *supra* note 21, at 3-3.

<sup>107</sup> FY08 ADA Reports, *supra* note 60, at 8 (GAO No. 08-13).

<sup>108</sup> *Id.*

<sup>109</sup> See 10 U.S.C. § 2410(a) (2013).

<sup>110</sup> FY08 ADA Reports, *supra* note 60, at 5 (GAO No. 08-08).

<sup>111</sup> *Id.* at 5 (GAO No. ADA-08-09).

<sup>112</sup> *Id.* at 6 (GAO No. ADA-08-10).

<sup>113</sup> WILMERDING, *supra* note 15.

ADA violations are real.<sup>114</sup> The potential administrative and criminal sanctions for ADA violations present a strong deterrent to potential fiscal troublemakers.<sup>115</sup> Leaders generally do not want the President of the United States, the President of the Senate, and the Speaker of the House of Representatives receiving a letter identifying them as the officials responsible for an ADA violations.<sup>116</sup> While there have been no criminal prosecutions under the ADA,<sup>117</sup> there have been plenty of adverse consequences.<sup>118</sup> Ultimately, the series of statutes that make up the ADA have been effective.<sup>119</sup> The ADA is the stick that caused the power of the purse to shift back into the firm control of the legislative branch.<sup>120</sup>

As such, ADA violations, mainly due to their administrative consequences and the overall sign of incompetence attributed to violators, are to be avoided at all costs. Judge advocates can play a pivotal role in preventing ADA violations before they occur. This requires a proactive approach of becoming thoroughly familiar with the fiscal issues in the command and understanding key fiscal law concepts. While some ADA violations are simply outside the judge advocate's sphere of influence, there are some areas where violations are frequent and preventable.<sup>121</sup>

The violations covered in this paper likely could have been turned into good, non-ADA violating obligations with effective legal oversight. Focused, well-written legal reviews can quash the use of O&M funds for common questionable expenses such as unauthorized gifts, entertainment, food, bottled water, and "metallic information products."<sup>122</sup> Attentive judge advocates can ensure military construction projects are properly scoped and funded via the correct appropriation before ground is broken.<sup>123</sup> Finally, the *in advance of* violations can also be prevented by a judge advocate plugged into the situation with a solid grasp on requirements as they relate to time.<sup>124</sup> If only Colonel Troy A. Thatcher, USMC (Ret.) had a knowledgeable and proactive judge advocate to intervene—and ultimately help

prevent—his ADA violation, he probably would have become the Commandant of the Marine Corps.

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<sup>114</sup> GAO RED BOOK, *supra* note 26, at 6-143; see 31 U.S.C. §§ 1349(a), 1518 (2013) (providing adverse personnel actions for ADA violations); see also 31 U.S.C. § 1350 (2013) (providing criminal penalties for ADA violations).

<sup>115</sup> *Id.*; see 31 U.S.C. §§ 1349(a), 1518 (2013) (providing adverse personnel actions for ADA violations); see also 31 U.S.C. § 1350 (2013) (providing criminal penalties for ADA violations).

<sup>116</sup> See 31 U.S.C. § 1517 (b) (2013) (requiring the head of an executive agency to immediately report to the President and Congress "all relevant facts and a statement of actions taken" when ADA violations are confirmed).

<sup>117</sup> GAO RED BOOK, *supra* note 26, at 6-144.

<sup>118</sup> See generally GAO ADA Reports, *supra* note 40 (providing numerous examples of the consequences to officials found responsible for ADA violations). The consequences include removal from duty, pay grade demotion, suspension without pay, letters of reprimand, letters of caution, verbal admonishments, oral reprimands, downgraded awards. *Id.*

<sup>119</sup> Cohen, *supra* note 6.

<sup>120</sup> ARNOLD, *supra* note 8, at 5.

<sup>121</sup> See GAO ADA Reports, *supra* note 40.

<sup>122</sup> See FISCAL LAW DESKBOOK, *supra* note 21, ch. 3, at 33-52 (providing analysis on typical questionable expenses to include clothing, food, bottled water, entertainment, and coins).

<sup>123</sup> See Major Brian A. Hughes, *Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand*, ARMY LAW., Aug. 2005, at 1 (providing an overview of common military construction funding issues, specifically as they relate to using O&M funds in lieu of appropriate funds).

<sup>124</sup> See FISCAL LAW DESKBOOK, *supra* note 21, ch. 3 (providing a chapter devoted to "Availability of Appropriations as to Time").





