

To Buy or Not to Buy? So Many Questions: How Judge Advocates Can Find Purpose to Spend Appropriated Funds

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I. Introduction¹

You look down at your coffee and wonder if you have enough to get you through the next ninety minutes. You scan the quad chart you prepared in anticipation for the first command and staff meeting of the new year, questioning whether the rest of the staff needs to know any of the information or if you should just give a rhetorical “nothing for the group” when the garrison commander (GC) goes around the table. You identify a few topics to bring up—financial disclosure forms, the opening of the installation tax center—and then you settle into your seat and prepare to issue spot.

The GC enters and the meeting begins. The Directorate of Public Works (DPW) Director begins by briefing his quad chart, which oddly is broken up into fifteen parts. You notice in one of the sections that the labor union is requesting that DPW purchase cold weather gear for the employees plowing snow. The status reads “pending legal” despite this being the first time you have heard of the issue. You make a note in your little green book to follow up on it.

The newly hired Health Promotion Officer from the Community Health Promotion Council says she plans on buying 100 fitness trackers so that civilian employees can chart their fitness level while participating in an Army civilian fitness program. The GC responds “Ok. Get with the lawyer to make sure we’re good.” You look down the long conference table, give her a quick nod, and make another note.

The Garrison Chaplain begins his portion of the brief by offering a word of encouragement. He then mentions an

upcoming event he wants to host at the chapel that focuses on building strong families. He says, “Child care will be provided,” as he gives you a passing glance. You are not quite sure there is an issue, but his glance leaves you feeling a little uneasy. You make another note in your green book.

The Sexual Harassment/Assault Response and Prevention (SHARP) Program Manager wants to purchase some promotional items for the new SHARP Resource Center² on the installation, to include magnets, stress balls, and coffee mugs. You look down at your coffee mug and stare at the *Safety Starts Here*³ message on it — just a little something you picked up from the Fort Jackson Safety Office seven years ago. “How did they buy that?” you think to yourself. Your thought is interrupted by the GC’s voice, “No issues there, right? I mean it’s SHARP.”

The GC ends the meeting by discussing his desire to host a town hall type of event that highlights why we serve. The capstone of the event will be when he re-administers the oaths of enlistment and commissioned officers for all the Soldiers in attendance, concluding with a ceremonial cake cutting. The GC tasks the Garrison Headquarters and Headquarters Company (HHC) Commander with getting a cake. He then glances at you and asks, “Good to go?”

By the end of the meeting your coffee mug is empty and your little green book is full. You leave feeling inundated with fiscal law issues. Purchasing clothing, fitness trackers, magnets, stress balls, coffee mugs, child care, and ceremonial cakes with appropriated funds⁴ — these seem like relatively small and simple purchases in the grand scheme of the Department of Defense’s (DoD) annual budget.⁵ But you

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¹ The events laid out in the introduction and referenced throughout this article are based on the author’s actual experiences while serving as the Chief, Administrative and Civil Law, at Aberdeen Proving Ground, Maryland.

² In 2013, the Army opened its first Sexual Harassment/Assault Response and Prevention (SHARP) Program Resource Center at Joint Base Lewis-McChord, Washington. See Julie Smith, *New SHARP Facility Open at JBLM for Collaborative Effort*, JBLM NORTHWEST GUARDIAN (Nov. 7, 2013, 1:53 PM), http://www.nwguardian.com/2013/11/07/16763_new-

[sharp-facility-open-at-jblm.html](http://www.nwguardian.com/2013/11/07/16763_new-sharp-facility-open-at-jblm.html). In 2014, the Army launched a pilot program for eleven additional resource centers. See Libby Smith, *Installations to Open SHARP Resource Centers*, U.S. ARMY (July 2, 2014), <http://www.army.mil/article/129352/>.

³ This is a variation on the official motto of the U.S. Army Training Center and Fort Jackson, “Victory Starts Here.” THE INSTITUTE OF HERALDRY, <http://www.tioh.hqda.pentagon.mil/Catalog/Motto.aspx> (search for “Victory Starts Here” in the “Motto” query box).

⁴ E.g., *Appropriated Funds vs. Non-Appropriated Funds*, FEDERALPAY.ORG, <https://www.federalpay.org/article/>

fund-types (last visited Feb. 25, 2016) (“Appropriated Funds refer to moneys allocated by legislation passed by Congress and signed by the President . . . Non-Appropriated Funds refer to revenue earned by government departments, organizations or agencies by means other than taxation . . . There is more leeway regarding how Non-Appropriated funds can be used. For example, the Moral, Welfare and Recreation (MWR) within the Army is funded with Non-Appropriated Funds.”).

⁵ OFF. OF THE UNDER SEC. OF DEF. (COMPTROLLER) CHIEF FINANCIAL OFFICER, U.S. DEP’T OF DEFENSE (DoD) FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW at 1-1 (Feb. 2015), http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2016/FY2016_Budget_Request_Overview_Book.pdf (requesting funding totaling \$585.2 billion for the DoD for fiscal year 2016).

know that determining whether these purchases are authorized is seldom simple.

Judge advocates can confidently and accurately advise commanders on whether there is legal authority to spend appropriated funds for these items only after understanding some foundational principles of fiscal law and carefully examining relevant statutes, regulations, and opinions. First, when a commander inevitably asks “Why is this important?” a judge advocate must know and be able to articulate some foundational principles of fiscal law governing the expenditure of appropriated funds. Second, a judge advocate needs to identify what sources of authority are available that potentially address these expenditures, where to find them, and apply the various authorities to the proposed expenditures. Lastly, in the absence of specific sources of authority that address an expenditure, a judge advocate must be able to accurately apply the necessary expense test in order to advise his or her commander if an expenditure may be made with appropriated funds.

II. The Authority to Spend Appropriated Funds

A judge advocate must know and be able to articulate foundational principles of fiscal law governing the expenditure of appropriated funds when advising a commander. Inevitably a judge advocate will hear, “We have the funds. Why can’t we just buy it?” While just saying “no” may be an effective way to teach children how to respond to drugs,⁶ it is often insufficient legal advice. A judge advocate must be able to explain the rationale behind the rules on spending appropriated funds. And for that, judge advocates need to know their history.

A. Constitutional Basis

It was the summer of 1787, and the largest city in the newly formed United States of America was hosting fifty-five

state delegates at a new constitutional convention.⁷ Among them were some of the nation’s foremost founding fathers — George Washington, Benjamin Franklin, and James Madison.⁸ These men sat inside the assembly room of the Pennsylvania State House (now known as Independence Hall) and began creating a new system of government in an effort to preserve the union of the newly liberated states.⁹

The need was apparent. The weak central government that existed under the Articles of Confederation had proved futile in addressing many issues, to include how to pay the debts from the recent revolution.¹⁰ In an attempt to resolve these issues, the various state delegates crafted the Constitution of the United States. This “supreme law of the land”¹¹ laid the foundation for a new model of government, one that divided the federal government’s authority between three separate branches: the legislative branch, the executive branch, and the judicial branch.¹²

Article I of the Constitution established the Congress, the legislative branch of the federal government.¹³ This bicameral legislative body, comprised of the Senate and House of Representatives, was given authority over numerous areas.¹⁴ One specific area of authority given to Congress was the power to authorize the expenditure of public funds.¹⁵ In particular, the delegates in Philadelphia wanted the House of Representatives to have this power.¹⁶ Massachusetts’ Delegate Elbridge Gerry stated that the House “was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings.”¹⁷

This constitutional grant of authority to Congress, known as *The Appropriations Clause*, is considered the cornerstone of Congress’s power of the purse.¹⁸ The Supreme Court of the United States reiterated this aspect of Congress’s authority over the purse in *United States v. MacCollum*, where Justice Rehnquist, writing for the court, stated, “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.”¹⁹ Therefore, just

⁶ See Proclamation No. 5653, 101 Stat. 2130 (May 12, 1987) (President Reagan proclaiming *Just Say No to Drugs Week* in May 1987 in an effort to realize “our dream of a drug-free generation of American youth”).

⁷ See *A More Perfect Union: The Creation of the U.S. Constitution*, THE U.S. NAT’L ARCHIVES & RECORDS ADMINISTRATION, <https://www.archives.gov/founding-docs/more-perfect-union> (last visited Jan. 21, 2017).

⁸ *Id.*

⁹ See *May 25, 1787: Constitutional Convention Begins*, HISTORY.COM, <http://www.history.com/this-day-in-history/constitutional-convention-begins> (last visited Jan. 21, 2017).

¹⁰ *A More Perfect Union*, *supra* note 9.

¹¹ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”).

¹² U.S. CONST. art. I, art. II, art. III.

¹³ U.S. CONST. art. I.

¹⁴ See, e.g., U.S. CONST. art. I § 8 (“To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads,” etc.).

¹⁵ U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

¹⁶ *Power of the Purse*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/> (last visited Jan. 29, 2017).

¹⁷ *Id.*

¹⁸ See *The Heritage Guide to The Constitution*, THE HERITAGE FOUNDATION, <http://www.heritage.org/constitution/> (last visited Jan. 28, 2017).

¹⁹ *U.S. v. MacCollum*, 426 U.S. 317, 321 (1976).

as the founding fathers intended, in order for the government to spend public funds Congress must authorize the expenditure.²⁰

This is more than just an interesting constitutional history lesson. It is imperative that a judge advocate understands and is able to articulate to a commander that there must be authority granted by Congress to spend funds.²¹ That rule does not originate with the legal advisor. It is laid out in the document all military personnel swear or affirm to support and defend—the Constitution of the United States.²²

B. The Funding Process

How does Congress grant authority to spend appropriated funds? Simply put, Congress provides the authority to expend funds in the laws it passes. Therefore, a judge advocate should understand how funds are requested from Congress and which laws address the expenditure of appropriated funds. This requires at least a basic understanding of the budget process.

Prior to receiving funding, the DoD—the largest of the executive agencies²³—goes through a laborious budget process that is years in the making. It involves each of the services working with the DoD and the White House Office of Management and Budget (OMB) to finalize their respective budgets through a process known as the Planning, Programming, Budget, and Execution (PPBE) cycle.²⁴ This multi-year process, introduced by Secretary of Defense Robert McNamara in 1961,²⁵ addresses the need for the DoD to plan and program to control change over several years.²⁶ It is designed to allow the DoD to prepare a budget for submission to Congress in addition to being the primary

means by which the DoD prepares its own internal, long-term financial plan.²⁷

While most judge advocates will not be involved in the budget process at the DoD level, a judge advocate may be involved at the local installation or unit level. This means that a judge advocate should be familiar with his or her service's budget regulations. For example, an Army judge advocate should familiarize themselves with the Army's counterpart to the DoD PPBE process detailed in Army Regulation (AR) 1-1, *Planning, Programming, Budgeting and Execution System*, in order to advise commanders and other staff sections on the budget process.²⁸ Furthermore, an Army judge advocate should work closely with his or her legal administrator in preparing the budget for their own office.²⁹ This provides the judge advocate an early opportunity to offer advice on the legality of proposed expenditures.

Once DoD has prepared its budget with the assistance of OMB, the budget is submitted through the White House to Congress.³⁰ Congress's timeline to act on the budget is laid out in The Congressional Budget Act of 1974.³¹ Generally, Congress authorizes the expenditure of public funds in a two-part process known as authorization and appropriation.³² This two-part process is not in the Constitution. It is the result of years of internal House and Senate rules regarding the budget process.³³ The resulting two sequential steps that are used today are: (1) enactment of an authorization measure that may create or continue an agency, program, or activity as well as authorize the subsequent enactment of appropriations; and (2) enactment of appropriations to provide funds for the authorized agency, program, or activity.³⁴

²⁰ *Id.*

²¹ *Id.*

²² 5 U.S.C. § 3331 (2012) ("An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States.'"); 10 U.S.C. § 502 (2012) ("Each person enlisting in an armed force shall take the following oath: 'I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States. . . .'").

²³ See *The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/executive-branch> (last visited Jan. 21, 2017) ("The Department of Defense is the largest government agency, with more than 1.3 million men and women on active duty, nearly 700,000 civilian personnel, and 1.1 million citizens who serve in the National Guard and Reserve forces.").

²⁴ See DoD, DIR. 7045.14, THE PLANNING, PROGRAMMING, BUDGETING, AND EXECUTION (PPBE) PROCESS (25 Jan. 2013); *Planning, Programming, Budgeting, and Execution (PPBE) Process*, DEF. ACQUISITION U., <https://dap.dau.mil/aphome/ppbe/Pages/Default.aspx> (last visited Jan. 21, 2017); See also MARY T. TYSKIEWICZ & STEPHEN DAGGETT, CONG. RESEARCH SERV., RL30002, A DEFENSE BUDGET PRIMER (1998) [hereinafter DEFENSE BUDGET PRIMER] (using the original term *Planning, Programming, and Budgeting System (PPBS)* which was later replaced in DoD Directive 7045.14 with the current term *PPBE*).

²⁵ DEFENSE BUDGET PRIMER, *supra* note 24, at CRS-26.

²⁶ *Id.* at CRS-27.

²⁷ *Id.*

²⁸ U.S. DEP'T OF ARMY, REG. 1-1, PLANNING, PROGRAMMING, BUDGETING, AND EXECUTION SYSTEM (30 Jan. 1994).

²⁹ U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT para. 38-4a(2)(c) (3 Dec. 2014) (stating that legal administrators are responsible for managing Staff Judge Advocate Office budgets).

³⁰ DEFENSE BUDGET PRIMER, *supra* note 24, at CRS-28.

³¹ Pub. L. No. 93-344, 88 Stat. 297 (1974).

³² Agencies and programs funded through discretionary spending (to include DoD) follow the authorization and appropriation process. However, funding for some agencies and programs is provided by the authorizing legislation without going through this two-step process (this is referred to as *direct or mandatory spending*). This spending makes up roughly 55% of all federal spending. See BILL HENIFF JR., CONG. RESEARCH SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS 1 (2012).

³³ *Budget Process: Evolution and Challenges: Hearing Before the H. Comm. on the Budget*, 104th Cong. (1996) (statement of Susan J. Irving, Associate Director, Budget Issues, Accounting and Information Management Division, Government Accountability Office).

³⁴ HENIFF, *supra* note 32, at 1.

1. Authorization Laws

Authorization laws can establish, continue, or modify an agency, program, or activity for a fixed or indefinite period of time.³⁵ They can also establish an agency's or programs' duties or functions, its structure, and responsibilities of officials.³⁶ An authorization does not create budget authority, but rather it is intended to provide guidance regarding the appropriate amount of funds to carry out the authorized activities of an agency.³⁷ Put another way, an authorization "does not give a government agency permission to cut a check or enter into a contract. Rather, its purpose is to set parameters for government agencies/programs."³⁸ While there is no general requirement, either constitutional or statutory, that an appropriation act be preceded by specific authorization, the majority of appropriations today are preceded by some form of authorization.³⁹ And even though an authorization is generally not required, there are a number of specific situations where it is required by statute⁴⁰ or under House and Senate rules.⁴¹ For budget guidance "for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes,"⁴² Congress passes the National Defense Authorization Act (NDAA).

2. Appropriation Laws

Appropriation laws are the "authority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes."⁴³ Stated another way, "appropriations legislation is what a department or agency needs before it can cut a check or sign a contract."⁴⁴ Discretionary agencies (to include the DoD) and programs are funded each year in appropriations legislation.⁴⁵

If judge advocates feel confused about Congress's federal budget two-part process, there is a good chance they

are not alone.⁴⁶ This is because authorizations and appropriations frequently do "not follow the course laid out in textbooks on legislative procedure."⁴⁷ At the very least a judge advocate should understand the distinction between the two. A judge advocate may hear a commander say something similar to, "Congress passed the NDAA. Now we can go forward with our purchases." As the commander's legal advisor, a judge advocate must be aware that this is not the case. You need authorization and appropriation before funds can be spent.⁴⁸

C. Limitations on the Authority to Spend Appropriated Funds

Once an agency receives its authorization and appropriation from Congress, can it spend those funds as it pleases? The answer is no. The authority of executive agencies to spend appropriated funds is limited. 31 U.S.C. § 1301(a) provides that, "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."⁴⁹ This rule is often characterized as whether or not the funds were *legally available* at the time of the expenditure.⁵⁰

Whether appropriated funds are legally available for expenditure depends on three things: the purpose of the obligation or expenditure must be authorized, the obligation must occur within the time limits applicable to the appropriation, and the obligation and expenditure must be within the amounts Congress has established.⁵¹ Therefore, there are three elements that must be observed for the

³⁵ See 1 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, pt. C, sec. 1, at 2-41 (3d ed. 2004) [hereinafter GAO Red Book I].

³⁶ *Id.*

³⁷ *Id.*

³⁸ George Krumbhaar, *Budget 101: Authorization vs Appropriations*, USBUDGET.COM OF GALLERYWATCH.COM, (on file with author).

³⁹ GAO Red Book I, *supra* note 35, at 2-41.

⁴⁰ See, e.g., 10 U.S.C. § 114(a) (stating that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law"); Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorization.").

⁴¹ See HOUSE RULES AND MANUAL, r. XXI, reprinted in H. R. DOC. NO. 110-162, at 836-91; STANDING RULES OF THE SENATE, r. XVI, reprinted in S. DOC. NO. 110-9, at 11-12.

⁴² See National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, 114th Cong. (2016).

⁴³ *Andrus v. Sierra Club*, 442 U.S. 347, 359 n.18 (1979) (citing COMP. GEN. OF THE U.S., TERMS USED IN THE BUDGETARY PROCESS 4 (1977)).

⁴⁴ Krumbhaar, *supra* note 38.

⁴⁵ See HENIFF, *supra* note 32, at 2.

⁴⁶ See DEFENSE BUDGET PRIMER, *supra* note 24 at CRS-1 ("Both the defense budget itself and the process of congressional review and approval are complex. Even observers who regularly track the defense budget may occasionally be baffled by defense budget terminology and procedures.").

⁴⁷ NESE F. DEBRUYNE, CONG. RESEARCH SERV., 98-756, DEFENSE AUTHORIZATION & APPROPRIATIONS BILLS: FY1970-FY2015 (2017).

⁴⁸ See generally HENIFF, *supra* note 32.

⁴⁹ 31 U.S.C. § 1301(a) (2012).

⁵⁰ See GAO Red Book I, *supra* note 35, at 4-6.

⁵¹ *Id.*

expenditure to be appropriately authorized: purpose, time,⁵² and amount.⁵³

As stated above, 31 U.S.C. § 1301(a), known as *The Purpose Statute*, requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.⁵⁴ When a statute clearly states what objects are appropriate for expenditure of government funds, answering the question of whether the purchase is authorized is relatively straightforward (i.e. Congress said so). However, when a statute does not clearly state what objects are appropriate for expenditure of government funds, a purchase can still be permissible if it is “necessary or proper or incident” to the proper execution of the general purpose of the appropriation.⁵⁵

How does a judge advocate determine if an expenditure is “necessary or proper or incident” to the proper execution of the general purpose of the appropriation? To answer that question, the Government Accountability Office (GAO)⁵⁶ applies a three-part necessary expense test. First, “[t]he expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.”⁵⁷ Second, “[t]he expenditure must not be prohibited by law.”⁵⁸ Third, “[t]he expenditure must not be otherwise provided for, that is, it must not be something that falls within the scope of some other appropriation or statutory funding scheme.”⁵⁹ Therefore, in order to determine whether a proper purpose exists to spend appropriated funds, a judge advocate must determine if there is statutory authority for the purchase or if the purchase qualifies as a necessary expense. If either exists,

the purchase can be made with appropriated funds; if neither exists, the purchase cannot be made with appropriated funds.

III. Finding Purpose

Determining an appropriation’s purpose either through finding and examining the statutory authority or applying the necessary expense test can be challenging. Thankfully there are a host of authorities that answer many of the questions that are posed to a judge advocate by either stating the purpose of an appropriation or applying the necessary expense test and determining a proper purpose exists for a purchase. Either way, a judge advocate must be aware of what authorities potentially address the proposed expenditure and where to find them.

A. Finding Purpose in a Statute⁶⁰

It seems like the most obvious place a judge advocate should begin his or her search for a proper purpose is in the statute. If there is a statute that authorizes the purchase, there is no need to conduct a necessary expense test. But what statutes should be examined? First, a judge advocate should review the legislation that created or continued the agency, program, or activity,⁶¹ to include any authorization act (e.g. the NDAA).⁶² In addition to the authorization act, a judge advocate should review the appropriations act, the second piece of legislation that is part of Congress’s spending process.⁶³ Both the authorization act and the appropriations

⁵² In addition to the rule that appropriated funds may only be used for a proper purpose, which is discussed in greater detail in this article, appropriated funds may only be used for limited periods of time. This means that an agency must incur a legal obligation to pay money within an appropriation’s period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations. *See id.* at ch. 5.

⁵³ In addition to the rule that appropriated funds may only be used for a proper purpose, the Antideficiency Act prohibits any government officer or employee from obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of funds, incurring an obligation in advance of an appropriation, unless authorized by law, and accepting voluntary services, unless otherwise authorized by law. *See* 31 U.S.C. §§ 1341–42, 1517(a); *see also* 2 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6 (3d ed. 2006) [hereinafter GAO Red Book II].

⁵⁴ 31 U.S.C. § 1301 (2012); *see also* GAO Redbook I, *supra* note 35, at ch. 4.

⁵⁵ To Maj. Gen. Anton Stephan, 6 Comp. Gen. 619, 621 (1927) (“It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the

Government creating the implication that such expenditures should not be incurred except by its express authority.”).

⁵⁶ The Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. It is headed by the Comptroller General of the United States. Part of the GAO’s mission is to “ensure the accountability of the federal government for the benefit of the American people.” U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Jan. 23, 2017). The GAO does this, in part, by “auditing agency operations to determine whether federal funds are being spent efficiently and effectively.”

⁵⁷ GAO Redbook I, *supra* note 35, at 4-21.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4-22.

⁶⁰ The U.S. Code can be searched at <http://uscode.house.gov/advancedSearch.xhtml>.

⁶¹ Legislation “that creates an agency, establishes a program, or prescribes a function” is referred to as *enabling* or *organic* legislation. Legislation “which authorizes the appropriation of funds to implement the organic legislation” is referred to as *appropriation authorization*, or simply *authorization* legislation. GAO Redbook I, *supra* note 35, at 2-40.

⁶² *See, e.g.,* Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014).

⁶³ GAO Redbook I, *supra* note 35, at 2-40.

act may contain statutory language detailing the purpose of the funds.⁶⁴

While looking to statutes may seem like an obvious starting point for finding a proper purpose, the reality is that most judge advocates will not be inundated with questions about spending appropriated funds to purchase something that has been specifically outlined in a statute. The far more common questions that a judge advocate will be asked are similar to the ones in the introduction; relatively small purchases that will often require looking beyond the statutes.

B. Finding Purpose in Agency Regulations⁶⁵

When a judge advocate is asked for an opinion regarding whether or not an expenditure of appropriated funds is authorized, the first place that judge advocate should look is the agency regulations. Agency regulations may state when the use of appropriated funds is authorized or may place restrictions on the use of appropriated funds.⁶⁶ The regulation may cite to a specific statute for authority, or the drafters may have applied the necessary expense test and determined that a purchase is authorized.⁶⁷ Either way, judge advocates must be aware of agency regulations authorizing or limiting anticipated expenditures.

The reason that a judge advocate should start with the agency regulations is because when an agency is created or continued, rarely does the legislation lay out precise details about how the agency operates.⁶⁸ Congress allows the agency to implement regulations governing how the agency performs, especially when it comes to its day-to-day

functions.⁶⁹ The regulations promulgated by the agency often outline how appropriated funds may be spent; these determinations by the agency are given a great amount of deference by Congress unless they are plainly erroneous.⁷⁰ Therefore it is imperative that judge advocates are familiar with any agency regulation that may address the expenditure.

C. Finding Purpose in Other Areas

If judge advocates cannot find purpose in the clear language of a statute or agency regulation prior to applying the necessary expense test themselves, they should look for advice and guidance from three other sources: the Department of Justice (DoJ) Office of Legal Counsel (OLC), the DoD Office of General Counsel (OGC), and finally the GAO.⁷¹

1. The DoJ Office of Legal Counsel⁷²

It is aptly described as "the most important government office you've never heard of."⁷³ Despite the fact that some of the most prominent jurists in recent American history have served there,⁷⁴ most judge advocates are likely unfamiliar with the OLC. The OLC is headed by an assistant attorney general who is granted authority from the Attorney General of the United States to provide legal advice to both the President and all executive branch agencies.⁷⁵ The OLC's decisions interpreting statute are binding on the executive branch to include the DoD.⁷⁶ Simply put, the OLC has the "final say on what the president and all his agencies can and

⁶⁴ See generally Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 528 (2014) (stating that appropriated funds may not be used "to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed . . .").

⁶⁵ Judge advocates should search DoD and any service specific regulations for guidance on spending appropriated funds for a particular purchase. DoD regulations can be searched at <http://www.dtic.mil/whs/directives/>; Army regulations can be searched at <http://www.apd.army.mil/>; Air Force regulations can be searched at <http://www.e-publishing.af.mil/>; Navy regulations can be searched at <http://doni.daps.dla.mil/>; Marine Corps regulations can be searched at <http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx>; and Joint Publications can be searched at <http://www.dtic.mil/doctrine/>.

⁶⁶ See GAO Redbook I, *supra* note 35, at ch. 3.

⁶⁷ CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 2-71 (2014).

⁶⁸ See GAO Redbook I, *supra* note 35, at 3-3.

⁶⁹ *Id.*

⁷⁰ *Id.* at 3-38.

⁷¹ There are a host of secondary sources judge advocates can consider when determining whether an expenditure of appropriated funds is appropriate. For example, judge advocates will likely find additional guidance within their own services' Judge Advocate General's (JAG) Corps (e.g. Air Force JAG publications can be searched at <http://www.afjag.af.mil/library/publicationsarchive/index.asp>; Naval Justice

School publications can be searched at http://www.jag.navy.mil/njs_publications.htm, etc.).

⁷² The Office of Legal Counsel's (OLC) opinions can be searched by date and title or by volume at <http://www.justice.gov/olc/opinions-main>. While judge advocates should research OLC's opinions, they should be aware that not all of OLC's guidance will be published. See THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/olc/opinions-main> (last visited Jan. 27, 2017) ("This web site includes Office of Legal Counsel opinions that the Office has determined are appropriate for publication."); Memorandum from David J. Barron, Acting Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel, to Attorneys of the Office (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (hereinafter OLC Memo) ("[C]ounterbalancing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication.").

⁷³ Daniel Klaidman, *Palace Revolt*, NEWSWEEK, (Feb. 5, 2006, 7:00 PM), <http://www.newsweek.com/palace-revolt-113407>.

⁷⁴ The late Chief Justice William Rehnquist and the late Justice Antonin Scalia were among its leaders prior to serving on the Supreme Court. *Id.*

⁷⁵ THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/olc> (last visited Jan. 27, 2017).

⁷⁶ See OLC Memo, *supra* note 72 at 1 ("OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.").

cannot legally do.”⁷⁷ Therefore it is important for judge advocates to review OLC opinions that may address a proposed expenditure.

2. The DoD Office of General Counsel⁷⁸

In addition to OLC guidance, judge advocates must be aware of DoD specific legal guidance. The DoD’s OGC, headed by the General Counsel of the DoD (who is by law the chief legal officer within DoD⁷⁹), provides this guidance.⁸⁰ One of the responsibilities of the OGC is to “establish DoD policy on general legal issues, determine the DoD positions on specific legal problems, and resolve disagreements within the DoD on such matters.”⁸¹ In addition, the OGC’s Standards of Conduct Office (SOCO) “prepares policy guidance for Department-wide application.”⁸² Much of the OGC SOCO guidance addresses issues related to the appropriate expenditure of appropriated funds,⁸³ therefore it is essential for judge advocates to review this guidance.

3. The Government Accountability Office⁸⁴

In addition to the OLC and the OGC guidance, judge advocates must look to the GAO for guidance on appropriate expenditures. Often called the “congressional watchdog,”⁸⁵ the GAO is an independent, nonpartisan agency that works for Congress.⁸⁶ The GAO’s mission “is to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people.”⁸⁷ The GAO supports congressional oversight by “auditing agency operations to determine whether federal funds are being spent efficiently and effectively; investigating allegations of illegal and improper activities . . . and issuing legal decisions and opinions.”⁸⁸

The GAO’s opinions on authorized uses of appropriated funds provide great guidance for judge advocates researching these issues. Despite the non-binding nature of the GAO’s guidance for executive agencies,⁸⁹ a judge advocate is more likely to find an answer regarding a specific purchase in the GAO’s opinions than that provided by the OLC or the OGC. Therefore it is essential that judge advocates review the GAO’s opinions for fiscal law guidance on a proposed expenditure.

IV. Application of the Rules

After leaving the command and staff meeting you went back to your office and began researching the issues you wrote down in your green book. While walking through the garrison headquarters a few days later, you hear a voice calling out to you: “Judge, come in here for a minute.” You have researched the relevant statutes, regulations, and opinions. You enter the GC’s office prepared to advise him on the proposed expenditures.

A. Cold-Weather Gear

“So can we purchase cold-weather gear for the DPW employees plowing snow?” You know from your research the general rule is that buying clothing for individual employees generally does not materially contribute to an agency’s mission performance.⁹⁰ Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary.⁹¹ There are three recognized statutory exceptions under which clothing can be purchased.⁹² First, 10 U.S.C. § 1593 provides statutory authority to use appropriated funds to provide a uniform allowance for federal

⁷⁷ Klaidman, *supra* note 73.

⁷⁸ The Office of General Counsel (OGC) Standards of Conduct Office (SOCO) guidance can be searched at <https://search.usa.gov/search?affiliate=soco>.

⁷⁹ 10 U.S.C. § 140 (2012).

⁸⁰ U.S. DEP’T OF DEF. OFFICE OF THE GENERAL COUNSEL, <http://www.dod.mil/dodgc/about.html> (last visited Jan. 27, 2017).

⁸¹ *Id.*

⁸² U.S. DEP’T OF DEF. STANDARDS OF CONDUCT OFFICE, http://www.dod.mil/dodgc/defense_ethics/ (last visited Jan. 27, 2017) (stating that the SOCO is responsible for carrying out the DoD General Counsel’s Designated Agency Ethics Official (DAEO) responsibilities).

⁸³ See, e.g., Memorandum from DoD SOCO, OGC, to DoD Personnel 3 (2014), http://www.dod.mil/dodgc/defense_ethics/resource_library/dod_holiday_guidance.pdf (prohibiting the use of appropriated funds for office parties).

⁸⁴ GAO opinions can be searched by keyword or report number at <http://www.gao.gov/>.

⁸⁵ U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/about/index.html> (last visited Jan. 27, 2017).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Memorandum from Todd David Peterson, Deputy Assistant Attorney General to Lois J. Schiffer, Assistant Attorney General, Env’t & Nat. Res. Div. & John D. Leshy, Solicitor, Dep’t of the Interior 6 n.7 (July 28, 1998), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/04/22/1998-07-27-mineral-royalties-2.pdf> (“Although the opinions and legal interpretations of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies or officers of the executive branch.”).

⁹⁰ See IRS Purchase of T-Shirts, 70 Comp. Gen. 248, 248 (1991) (stating Combined Federal Campaign t-shirts for employees who donated five dollars or more per pay period not authorized).

⁹¹ *Id.*

⁹² 10 U.S.C. § 1593 (2012); 29 U.S.C. § 668 (2012); 5 U.S.C. § 7903 (2012).

civilian employees.⁹³ Second, 29 U.S.C. § 668 requires the head of each federal agency to establish and maintain an effective and comprehensive occupational safety and health program, which includes the provision of certain protective equipment and clothing pursuant to the Occupational Safety and Health Act (OSHA).⁹⁴ Lastly, 5 U.S.C. § 7903 authorizes using appropriated funds for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks.⁹⁵ In conjunction with this statutory authority, the Army provides regulatory guidance on what is considered personal protective equipment.⁹⁶ Additionally, GAO has offered its interpretation on purchasing cold-weather gear on multiple occasions.⁹⁷

Applying those three statutory exceptions along with the Army's regulatory guidance and GAO's opinions, you advise that appropriated funds may be used to purchase the cold-weather gear only if a determination is made that the cold-weather gear is required by OSHA⁹⁸ or that it is required special clothing for the protection of its personnel in the performance of their assigned tasks.⁹⁹ Without this determination, there is no authority to purchase the cold-weather gear for the DPW employees with appropriated funds. With this determination, the purchase of cold-weather gear is authorized.

B. Fitness Trackers

"What about the fitness trackers the Health Promotion Officer asked for?" Federal agencies are authorized under 5 U.S.C. § 7901 to establish physical fitness programs as a preventive health program.¹⁰⁰ In accordance with the statute, a health service program is limited to the treatment of on-the-job illness and dental conditions requiring emergency attention, preemployment and other examinations, referral of employees to private physicians and dentists, and preventive programs relating to health.¹⁰¹ The Army has created the Community Health Promotion Program¹⁰² through AR 600-63, which states "Garrison Commanders will establish and sustain programs and infrastructure that enable unit leader initiatives that promote physical fitness and resilience for individual Soldiers, units, and Family members."¹⁰³

There is no specific language in the statute or regulation that addresses purchasing this type of equipment. However, the authority in 5 U.S.C. § 7901 has been interpreted by GAO to extend to purchasing physical fitness equipment for employees in certain situations.¹⁰⁴ Since there is no specific statutory authority for this purchase, you must apply the necessary expense test to determine if the purchase is authorized.¹⁰⁵ Here, you advise that it is reasonable in this case to find that the purchase of fitness trackers for use by civilian employees engaged in an Army established health service program is necessary, proper or incident to the employees participating in that program. Put simply, without tracking the employee's fitness level it is impossible to gauge the effectiveness of the fitness program. The purchase bears a logical relationship to the appropriation sought to be charged, does not appear to be prohibited by law, and is not

⁹³ 10 U.S.C. § 1593 (2012).

⁹⁴ 29 U.S.C. § 668 (2012).

⁹⁵ 5 U.S.C. § 7903 (2012).

⁹⁶ See U.S. DEP'T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT para. 25-7 (12 Feb. 2008).

⁹⁷ See *Purchase of Insulated Coveralls*, Vicksburg, Mississippi, B-288828, 2002 WL 31242199 (Comp. Gen. Oct. 3, 2002) (discussing the rules for purchasing cold-weather clothing); see *Purchase of Cold Weather Clothing*, Rock Island District, U.S. Army Corps of Engineers, B-289683, (Comp. Gen. Oct. 7, 2002), <http://www.gao.gov/assets/370/366962.pdf> (stating that if a determination is made that it is necessary to provide protective clothing to satisfy Occupational Safety and Health Act (OSHA) standards then OSHA provides the necessary authority to make the purchase of cold weather gear); Cf. U.S. Dep't of the Air Force Whiteman Air Force Base, Mo. (Agency) and Am. Fed'n of Gov't Emp. Local 2361 (Union), 68 F.L.R.A. 969 (2015) (addressing the issue of purchasing of cold-weather gear using precedent of the Comptroller General).

⁹⁸ One may assume that this determination requires a high level of approval. However, the occupational safety and health standards found in 29 C.F.R. 1910.132(d)(1) (2011) only require that a determination be made by the employer ("The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall . . . select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment." (emphasis added)).

⁹⁹ U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM para. 25-7 (27 Nov. 2013) (lays out the Army's policy regarding OSHA, to include the provision of PPE, and states "all Army leaders at each echelon

will develop and implement functions and written procedures as part of the Army Safety Program and the Army Occupational Health Program to fulfill the following Army and OSHA requirements [regarding] PPE." Furthermore, para. 18-11c states that "PPE and training will be provided at no cost to the employee." In this case, it would be appropriate for the Director of DPW to make this determination in conjunction with the garrison command.

¹⁰⁰ 5 U.S.C. § 7901 (2012).

¹⁰¹ *Id.*

¹⁰² *Army Civilian Wellness Programs*, U.S. ARMY MEDICAL DEPARTMENT, ARMY PUBLIC HEALTH CENTER (PROVISIONAL), <http://phc.amedd.army.mil/topics/healthyliving/al/Pages/ArmyCivilianWellnessPrograms.aspx> (last visited Jan. 28, 2017) ("Community Health Promotion Councils (CHPC) will facilitate efforts for planning, implementing, and evaluating civilian fitness programs. The chair of the Physical Fitness Working Group of the CHPC is responsible for ensuring the status, results, and impacts of the CFP are reported at the quarterly briefings. The Health Promotion Representative will coordinate with the Physical Fitness Working Group to ensure execution in accordance with published standards; but is not a manager of any specific health promotion program.").

¹⁰³ U.S. DEP'T OF ARMY, REG. 600-63, ARMY HEALTH PROGRAM para. 5-2e (14 Apr. 2015).

¹⁰⁴ See Department of the Interior—Purchase of Physical Exercise Equipment, 63 Comp. Gen. 296, 296 (Apr. 17, 1984).

¹⁰⁵ See GAO Redbook I, *supra* note 35, at 4-21–4-22.

otherwise provided for.¹⁰⁶ Therefore, you advise that the expenditure of appropriated funds for the fitness trackers is authorized.

C. Chaplain's Program

"What about the Chaplain's upcoming strong families event? Can we pay for child care with appropriated funds?" Multiple provisions of the U.S. Code establish the position of chaplain in the Army and, together with regulations promulgated by the Secretary of the Army, prescribe the duties of that position.¹⁰⁷ These authorities require commanders to assist chaplains in the performance of their duties by furnishing them what is necessary.¹⁰⁸ Additionally, AR 165-1 authorizes the use of appropriated funds "for command-sponsored religious support activities, including, but not limited to, religious education, retreats, camps, conferences, meetings, workshops, and Family support programs."¹⁰⁹ Per the regulation, appropriated funds "should be used to . . . support chaplain-led programs to assist members of the Armed Forces and their immediate Family members in building and maintaining strong Family structures. This includes cost of transportation, food, lodging, supplies, fees, *childcare*, and training materials for members of the Armed Forces and their immediate Family members while participating in such programs."¹¹⁰ Therefore, based on the clear statutory and regulatory guidance, you advise the GC that the childcare for the chaplain's program can be paid for with appropriated funds.

D. Promotional Items

¹⁰⁶ *Id.*

¹⁰⁷ See 10 U.S.C. § 3073 (2012); 10 U.S.C. § 3547 (2012); 10 U.S.C. § 3581 (2012); U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAINS CORPS ACTIVITIES para. 1-7 (23 June 2015) [hereinafter AR 165-1].

¹⁰⁸ 10 U.S.C. § 3037; 10 U.S.C. § 3547, 10 U.S.C. § 3581; AR 165-1, *supra* note 112 at para. 1-7.

¹⁰⁹ AR 165-1, *supra* note 107 at para. 14-3.

¹¹⁰ *Id.*

¹¹¹ See NIH Policy on Promoting Efficient Spending: Use of Appropriated Funds for Conferences & Meeting Space, Food, Promotional Items, and Printing and Publications, Nat'l Inst. of Health 19 (June 15, 2015), <https://oamp.od.nih.gov/sites/default/files/contracttoolbox/nihespromnibusrwr20150529.pdf> ("NIH considers promotional items to be an extraneous expense. Therefore, [NIH institutes and centers] shall not use appropriated funds to purchase promotional items."); Memorandum from Christopher Douwes, U.S. Dep't of Transportation Fed. Highway Admin., to State Trail Administrators (Oct. 5, 2000) (updated Feb. 6, 2006) https://www.fhwa.dot.gov/environment/recreational_trails/guidance/financial_management/promoprohib.cfm (stating the general rule that the purchase of promotional items with federal funds is prohibited, to include purchase of pens, cups, shoelaces, key chains, baseball caps, paperweights, buttons, etc.).

¹¹² Compare Food & Drug Admin.—Use of Appropriations for "No Red Tape" Buttons and Mementoes, B-257488, 1995 WL 646489 (Comp. Gen. Nov. 6, 1995) (finding that using appropriated funds to purchase buttons with "no intrinsic value . . . and [] designed solely to assist in achieving

"Can we get the promotional items? After all, it's SHARP, my top priority." Multiple executive agencies take the approach that promotional items are extraneous expenses, and using appropriated funds to purchase them is prohibited.¹¹¹ However, in rare cases, an agency may purchase promotional items when it can demonstrate that the promotional items are necessary expenses that directly further its mission.¹¹²

In this case, part of the Army's mission "is to reduce with an aim toward eliminating sexual offenses within the Army through cultural change, prevention, intervention, investigation, accountability, advocacy/response, assessment, and training to sustain the All-Volunteer Force."¹¹³ One way the Army seeks to accomplish this is through establishing SHARP Resource Centers "to synchronize the advocacy services available to victims of sexual assault."¹¹⁴ As a newly created office on the installation, distributing a limited amount of appropriate promotional items can be reasonably necessary for the office to inform the installation population about the office, its services, and its location.¹¹⁵ You advise the GC that using appropriated funds for a reasonable amount of SHARP Resource Center promotional items is authorized.

E. Ceremonial Cake

"Appreciate the advice. Last one — can we buy the cake for the ceremony?" The general rule is that food typically does not materially contribute to an agency's mission performance, and therefore is usually considered a personal expense.¹¹⁶ There are, however, statutory exceptions that

internal agency management objectives" was authorized), with Implementation of Army Safety Program, B-223608, 1988 WL 228374 (Comp. Gen. Dec. 19, 1988) (finding that the purchase of ice scrapers imprinted with a safety slogan to disseminate to employees was not authorized because the Army Corps of Engineers failed to show on the record that there was a connection between the promotional material imprinted on the ice scraper with the purposes of the OSHA.).

¹¹³ I. A.M. STRONG, U.S. ARMY SEXUAL HARASSMENT/ASSAULT RESPONSE & PREVENTION, http://www.sexualassault.army.mil/Template-IamStrong.cfm?page=iam_mission.cfm (last visited Jan. 28, 2017).

¹¹⁴ Sergeant William White, *Resource Center Synchronizes SHARP Efforts*, ARMY.MIL (Apr. 15, 2015), http://www.army.mil/article/146500/Resource_center_synchronizes_SHAR_P_efforts.

¹¹⁵ As a practice point, any promotional item should include contact information for the office, Sexual Assault Response Coordinator (SARC), or Unit Victim Advocate (UVA), in addition to promoting Army SHARP policy. The item should be of little or no intrinsic value, and should not be considered a gift. See Gen. Servs. Admin., Order OGC 5090.1A, *Purchase of Promotional or Memento Items* (Oct. 1, 2010), <https://www.gsa.gov/portal/directive/d0/content/521670> ("Personal items such as food, eating utensils, clothing, toys or sporting equipment normally should not be used as promotional items as they have been considered to be prohibited personal gifts in past decisions of the Comptroller General.").

¹¹⁶ See 31 U.S.C. § 1345 (2012) ("Except as provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting."); see In re: Corps of Engineers — Use of Appropriated Funds to Pay for Meals, B-249795 (May 12, 1993) ("Free

allow the purchase of food.¹¹⁷ Many of these exceptions either involve an employee's attendance at a training event¹¹⁸ or an award ceremony.¹¹⁹

However, in this case there is no statutory or regulatory authority, or OLC, OGC, or GAO guidance that would authorize the purchase of the cake with appropriated funds for this specific type of event.¹²⁰ The event does not appear to be training or an award ceremony, but is more celebratory in nature (similar to having cake at a military birthday celebration).¹²¹ Without finding specific guidance that authorizes the purchase, you advise against purchasing the cake with appropriated funds.

IV. Conclusion

Understanding some basics fiscal law principles, coupled with thorough research of relevant statutes, regulations, and other relevant guidance, enables a judge advocate to confidently and accurately address any expenditure of appropriated funds. Regardless of the type of expenditure, whether it is clothing, fitness trackers, magnets, stress balls, coffee mugs, childcare, or ceremonial cakes, a judge advocate will be ready to respond. Just make sure you have enough coffee to last the ninety minutes and plenty of room in your little green book.

food and refreshments normally cannot be justified as a 'necessary expense' under an appropriation since such expenses are considered personal expenses that government employees are expected to bear from their own salaries.'").

¹¹⁷ See 37 U.S.C. § 402 (2012) (providing statutory authority for DoD to pay service members a basic allowance for subsistence).

¹¹⁸ See 5 U.S.C. § 4110 (2012) (providing statutory authority for the government to pay for "expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."); 5 U.S.C. § 4109 (2012), 10 U.S.C. § 4301 (2012), 10 U.S.C. § 9301 (2012) (allowing the government to pay all or a part of the necessary expenses of the training); *compare* U.S. Army Garrison Ansbach—Use of Appropriated Funds to Purchase Food for Participants in Antiterrorism Exercises, B-317423, 2009 WL 754699 (Comp. Gen. Mar 9, 2009) (determining that appropriated funds may be used to purchase food for federal civilian employees and military members where the Ansbach commander determines the food is necessary for the attendees to obtain the full benefit of the antiterrorism training exercise) *with* Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 WL 174196 (Comp. Gen. Jan. 27, 2003) (determining that appropriated funds are not available to feed government employees while training at their duty station.).

¹¹⁹ See 5 U.S.C. § 4503 (2012); 5 U.S.C. § 4504 (2012); 5 U.S.C. § 4505 (2012).

¹²⁰ As with any question pertaining to the expenditure of appropriated funds, different or additional facts may change the opinion. A judge advocate would be wise to gather these facts. For example, knowing what else—if anything—will occur at the ceremony will be useful in determining whether the ceremony meets the definition of a training event or an awards ceremony. Knowing who will be in attendance at the ceremony in addition to military servicemembers will help determine whether there are other authorized means to pay for light refreshments such as, for example, official representation funds. See U.S. DEP'T OF ARMY, REG. 37-47, OFFICIAL REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY (18 Sept. 2012).

¹²¹ See generally U.S. MARINE CORPS, MARADMIN 541/10, APPROPRIATED FUNDS NOT AUTHORIZED FOR USMC BIRTHDAY CAKE (24 Sept. 2010) (indicating that appropriated funds could not be used to purchase a cake for the Marine Corps Birthday Ball, and the expenditure of appropriated funds could lead to a "violation of 31 U.S.C. 1301 (the Purpose Statute) and result in costly and time consuming Antideficiency Act (ADA) investigations"); U.S. Navy Office of the Judge Advocate General (OJAG), Code 13, *Military Balls*, ETHICS GRAM 15-01 (19 Aug. 2015), <https://www.history.navy.mil/content/dam/nhhc/browse-by-topic/commemorations/commemorations-toolkits/navy-birthday/Administration%20Direction%20and%20Planning/Ethics%20Gram%2015-01%20Military%20Balls.pdf> (indicating that appropriated funds should not be used to purchase cake for the official portion of a birthday ball).