

---

---

## Article

# The Interagency Marketplace

Jason Marisam<sup>†</sup>

### INTRODUCTION

Federal agencies routinely contract with each other to exchange money, regulatory power, and governmental services.<sup>1</sup> Collectively, these interagency exchanges create a vast public institution that I call the interagency marketplace. The interagency marketplace is governed by a set of constitutional and statutory rules that, despite their everyday significance to agencies and substantial impact on the administrative structure, have been largely overlooked by public law scholars. In this Article, I offer a comprehensive descriptive and normative account of the legal rules governing the interagency marketplace.

This Article is part of a burgeoning field of scholarship on law and interagency coordination.<sup>2</sup> The literature here has so far focused on how various legal institutions improve inter-

---

<sup>†</sup> Visiting Assistant Professor, Hamline University School of Law; Post-Graduate Research Fellow, Harvard Law School. J.D., Harvard Law School. I would like to thank Daryl Levinson, Matthew Stephenson, Jody Freeman, Adrian Vermeule, and David Barron for helpful comments and advice. Copyright © 2012 by Jason Marisam.

1. See *infra* Part II.

2. See generally, e.g., J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005) (arguing that Congress should encourage interagency lobbying as a means of improving agency outcomes); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005) (describing a “modular” approach to agency regulation, as opposed to more traditional approaches); Freeman & Rossi, *supra* note 1 (manuscript at 1) (analyzing the methods by which agencies can more efficiently coordinate efforts over shared regulatory spaces); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (making the case that courts should not undermine jurisdictional regimes that feature overlapping authority between multiple political institutions); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011) (exploring the causes, implications, and solutions to duplicative delegations to administrative agencies).

agency coordination largely by ensuring that one agency takes into account the actions or interests of other agencies regulating in the same area.<sup>3</sup> This Article fills a gap in this literature by looking at how the vast, yet unexplored, interagency marketplace can be used to improve decision making, by allowing agencies to better take advantage of each other's regulatory expertise and experience.

Like all marketplaces, the interagency marketplace is designed to facilitate exchanges among parties.<sup>4</sup> But the rules governing the interagency marketplace are not and should not be the same as the rules governing private marketplaces. Unlike in private marketplaces, the central actors in the interagency marketplace are public officials who run executive agencies.<sup>5</sup> Thus, the rules for the interagency marketplace must not only aim to improve efficiency but also to promote government accountability and preserve the balance of powers among the branches of government.

The Constitution provides two simple default rules for the interagency marketplace that apply in the absence of statutory authority to the contrary: (1) after Congress delegates authority to an agency, that agency cannot redelegate the authority to a different agency;<sup>6</sup> and (2) after Congress appropriates money to an agency, that agency cannot transfer the funds to a different agency.<sup>7</sup> These two constitutional rules quashed most activities in the interagency marketplace until 1932, when Congress passed the Economy Act.<sup>8</sup>

The Economy Act provides the most comprehensive statutory framework governing the interagency marketplace.<sup>9</sup> Congress passed the Act to invigorate the interagency marketplace and generate governmental efficiencies,<sup>10</sup> which the Act does in two ways. First, by allowing agencies to obtain services from each other in exchange for money, the Act lets agencies tap into

---

3. See, e.g., Freeman & Rossi, *supra* note 1 (manuscript at 1–3).

4. See *infra* Part II.

5. See *infra* Part II.

6. This power is derived from the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18.

7. See *id.* § 9 (stating that Congress, and Congress alone, may appropriate funds from the Treasury).

8. 31 U.S.C. § 1535 (2006).

9. See U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF GEN. COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-22 to -76 (3d. ed. 2004) [hereinafter REDBOOK].

10. See *id.* at 12-22 to -26.

each other's expertise and infrastructure without having to waste money building up their own duplicative expertise and infrastructure.<sup>11</sup> Second, the Act allows agencies to save money by hiring other, more efficient agencies to perform tasks for them.<sup>12</sup>

Today, Economy Act agreements—that is, interagency agreements made under the authority of the Economy Act—are a routine part of agencies' operations.<sup>13</sup> Agencies often use the Act to hire other agencies to administer their programs, analyze data, perform studies, oversee regulated entities, train personnel, and so on.<sup>14</sup>

However, the Economy Act by no means creates a free market for interagency services. The Act and its jurisprudence lay out a comprehensive set of procedures and rules that constrain exchanges in the interagency marketplace. Most importantly, the Act severely restricts the conditions under which an agency can transfer power to another agency. An agency can only redelegate tasks if: (1) the agency "retains responsibility" over the tasks; (2) the tasks are not part of the agency's primary administrative functions; and (3) the tasks do not involve significant decision-making authority, such as the authority to issue binding rules and regulations.<sup>15</sup> The Economy Act also limits interagency fund transfers—most critically by barring agencies from realizing profits from the interagency services they provide.<sup>16</sup> Under the Act, an agency can only recoup the actual costs of its services.<sup>17</sup> It cannot receive any money in excess of that amount.<sup>18</sup>

Among other claims, I argue that these Economy Act restrictions on interagency re delegation and agency profits should be relaxed. In particular, I propose amending the Economy Act to authorize an agency to re delegate a reasonable amount of its authority to a qualified agency. Expanding re delegation powers in this way would allow agencies to fix in-

---

11. *See id.*

12. *See id.*

13. *See, e.g.,* Letter from Katherine V. Schinasi, Managing Dir., U.S. Gov't Accountability Office, to Joshua B. Bolton, Dir., Office of Mgmt. & Budget (Sept. 27, 2005), available at <http://www.gao.gov/new.items/d05960r.pdf> (noting a marked increase in interagency transactions).

14. *See* REDBOOK, *supra* note 9, at 12-54 to -68.

15. *See infra* Part I.

16. *See* REDBOOK, *supra* note 9, at 12-38.

17. 31 U.S.C. § 1535(b) (2006).

18. *Id.*

---

---

efficient jurisdictional arrangements by reassigning authority to the agency best-positioned to regulate. To check the potential abuse of these expanded powers, I would boost the procedural constraints that currently apply to Economy Act agreements. In particular, I would amend the Economy Act to subject all redelegation proposals to notice-and-comment procedures and grant standing rights that would allow aggrieved parties to challenge redelegations in court. Moreover, to protect the balance of powers among the branches of government, I would bar the redelegation of authority from independent agencies to cabinet departments or other dependent agencies that are less insulated from presidential influence.

I also propose amending the Economy Act to authorize profits for agencies providing services in the interagency marketplace. There is no principled reason why an agency providing services under an interagency agreement should be prohibited from realizing some share of the efficiency gains generated by the agreement. Allowing profits would create a financial incentive for budget-minded agency officials to provide services for other agencies—a good outcome if one assumes that agencies are typically hired by other agencies because of their superior expertise and capabilities. I also propose several other amendments to the Economy Act that would remove restrictions on interagency fund transfers.

At first glance, proposals to grant agencies greater redelegation powers and profit-earning capabilities may appear radical. In our constitutional system, two of the most important legislative checks on executive power are Congress's ability to set agencies' powers and to set agencies' budgets.<sup>19</sup> By allowing agencies to broaden their powers through redelegation and augment their budgets by profiting from interagency services, my proposals seem to circumvent these fundamental constitutional checks.

However, when viewed in light of the historical practices in the interagency marketplace, my proposals appear less like radical departures and more like sensible updates to a body of law that has fallen behind the times. In our modern regulatory environment, where the most pressing problems span multiple

---

19. *Cf.* THE FEDERALIST NO. 58, at 298 (James Madison) (Ian Shapiro ed., 2009) (“[The] power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . .”).

agencies' expertise and jurisdictions,<sup>20</sup> the law should do more to facilitate interagency agreements that let agencies collaborate and cooperate. Moreover, today's political realities make it an ideal time to revamp the Economy Act as I suggest. The Economy Act was created in the midst of the Great Depression to generate governmental efficiencies.<sup>21</sup> Congress and the White House are more serious about wringing greater efficiencies out of agencies today than in any time since the Great Depression.<sup>22</sup> They are looking to save money in nearly all areas of agency spending.<sup>23</sup> They should look to the interagency marketplace. Governmental efficiencies can be gained by broadening agencies' redelegation powers and allowing agencies to profit from the services they provide in the interagency marketplace. And these efficiencies can be gained without sacrificing accountability or unduly altering the balance of powers among the branches of government. In short, the rules governing the interagency marketplace are ripe for efficiency-improving amendments.

This Article proceeds as follows. Part I describes the constitutional default rules for the interagency marketplace. Part II describes the history of the Economy Act and the legal structure that it provides for the interagency marketplace. Part III proposes several amendments to the Economy Act. The final Part concludes.

## I. THE CONSTITUTIONAL RULES FOR THE INTERAGENCY MARKETPLACE

The Constitution provides two default rules that control the interagency marketplace in the absence of statutory language to the contrary: agencies cannot redelegate their authority or transfer their funds to each other.<sup>24</sup> Case law has tended to adopt interpretive presumptions against reading ambiguous

---

20. See Marisam, *supra* note 2, at 182–83.

21. See REDBOOK, *supra* note 9, at 12-22 to -26.

22. Cf. IAN MILLHISER, CTR. FOR AM. PROGRESS, IMPROVING GOVERNMENT EFFICIENCY: FEDERAL CONTRACTING REFORM AND OTHER OPERATIONAL CHANGES COULD SAVE HUNDREDS OF BILLIONS OF DOLLARS 1–2 (2010), available at [http://www.americanprogress.org/issues/2010/03/pdf/improving\\_efficiency.pdf](http://www.americanprogress.org/issues/2010/03/pdf/improving_efficiency.pdf) (discussing the billions of dollars saved through efficiencies gained through recent contracting and procurement reform).

23. See, e.g., Huma Khan, *As Budget Debates Begin, Republicans Put NPR, PBS on Chopping Block*, ABC NEWS (Feb. 15, 2011), <http://abcnews.go.com/Politics/budget-debates-begin-republicans-put-npr-pbs-chopping/story?id=12915626>.

24. See *supra* notes 6–7.

statutes as authorizing interagency redelegation and interagency fund transfers.<sup>25</sup> As a result, absent clear and precise statutory language to overcome the constitutional default rules against interagency redelegations and fund transfers, these actions are prohibited.<sup>26</sup>

#### A. THE CONSTITUTIONAL DEFAULT RULE PROHIBITING THE INTERAGENCY REDELEGATION OF AUTHORITY

Our Constitution vests in Congress the ability to create and empower administrative agencies.<sup>27</sup> And when, from the slew of available agencies, Congress decides to delegate power to a particular agency, that agency cannot turn around and transfer that power to a different agency unless Congress authorizes it to do so.<sup>28</sup> I call this constitutional default rule prohibiting interagency redelegation the anti-redelegation doctrine.

The anti-redelegation doctrine is related to two better-known doctrines: the far more famous nondelegation doctrine<sup>29</sup> and the somewhat more famous subdelegation doctrine.<sup>30</sup> Understanding these two other doctrines will help illuminate the content of the anti-redelegation doctrine.

---

25. See, e.g., *United States v. Tower & Sons*, 14 Ct. Cust. 421, 426 (Ct. Cust. App. 1927) (When Congress delegates power to an agency, “for [the agency] in turn to redelegate the same is a failure to comply with the mandate of the legislature.”).

26. *Id.*

27. Again, this power is derived from the Necessary and Proper Clause. See U.S. CONST. art. I, § 8, cl. 18; see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1183 (1992) (explaining the relationship between the Necessary and Proper Clause and the delegation of legislative authority to administrative agencies).

28. *Tower & Sons*, 14 Ct. Cust. at 426.

29. For analysis of the nondelegation doctrine, see generally Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87 (2010); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

30. For analysis of the subdelegation doctrine, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175–77 (2004). See generally David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (expanding on the theory of subdelegation); Nathan D. Grundstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144 (1944) (evaluating the subdelegation doctrine).

All three doctrines are based on the same maxim: *delegata potestas non potest delegari*, or a delegated authority cannot be delegated again.<sup>31</sup> Under the maxim, a principal can delegate authority to an agent, but the agent cannot delegate the same authority to anyone else unless authorized by the principal to do so.<sup>32</sup>

In the case of the nondelegation doctrine, the people of the United States are the principal, and Congress is the agent.<sup>33</sup> Through the Constitution, the people have delegated all legislative authority to Congress,<sup>34</sup> and Congress cannot delegate that legislative authority to any other entity, such as an executive agency.<sup>35</sup> The people could authorize Congress to delegate its legislative authority, but that would require amending the language in the Constitution, which expressly places all legislative authority in Congress.<sup>36</sup>

In the case of the subdelegation doctrine,<sup>37</sup> Congress is the principal and a federal agency is the agent.<sup>38</sup> After Congress delegates authority to that agency or its officials, that authority cannot then be subdelegated to a subagency within the agency or to lower-level officials within the same agency, unless authorized by Congress.<sup>39</sup> The question of whether Congress has authorized subdelegation is a matter of statutory interpretation.<sup>40</sup> Most statutes are silent on the matter of subdelegation.<sup>41</sup>

---

31. See Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 173–76, 190–96 (1928).

32. See *id.*

33. See U.S. CONST. art. I, § 1.

34. *Id.*

35. See *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“[W]e long have insisted that ‘the integrity and maintenance of the system of government ordained in the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.” (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892))).

36. U.S. CONST. art I, § 1.

37. For analysis of the doctrine, see David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Nathan D. Grundstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144 (1944); and Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175–77 (2004).

38. See, e.g., *United States v. Mango*, 199 F.3d 85, 89–91 (2d Cir. 1999).

39. *Id.*

40. See *id.*

41. See, e.g., *National Park Service Organic Act*, 16 U.S.C. § 1, subch. 1 (2006) (indicating authority for administering the act but silent on matters of

The question then becomes whether this silence should be presumed to express congressional approval or disapproval of subdelegation.<sup>42</sup> Courts have generally adopted an interpretive presumption in favor of subdelegation to a subordinate agency.<sup>43</sup> There are a few cases that have struck down intra-agency subdelegations even when there was no express evidence of contrary congressional intent.<sup>44</sup> But by and large, since the early half of the twentieth century, courts have tended to interpret congressional silence in favor of intra-agency subdelegation.<sup>45</sup> Thus, for example, the Department of Health and Human Services is presumptively allowed to subdelegate its authority under the Food, Drug, and Cosmetic Act to the Food and Drug Administration, a sub-agency housed within the Department, because the authorizing statute is silent on the issue of subdelegation.<sup>46</sup>

In the case of the anti-redelegation doctrine, Congress is again the principal, and the agent is a federal agency. After Congress delegates authority to an agency or its officials, that authority cannot then be redelegated to another agency or another agency's officials, unless authorized by Congress.<sup>47</sup> The question of whether Congress has authorized redelegation is again a matter of statutory interpretation.<sup>48</sup> And again, most

---

delegation outside of law enforcement); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–87 (2006) (enumerating the agencies responsible for administering the act but completely silent on the issue of delegation).

42. U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004).

43. *See id.*

44. *See, e.g.,* Halverson v. Slater, 129 F.3d 180, 183–89 (D.C. Cir. 1997) (invalidating subdelegation from the Department of Transportation to its sub-agency the Saint Lawrence Seaway Development Corporation).

45. *See, e.g.,* United States v. Giordano, 416 U.S. 505, 512–14 (1974) (ruling against intra-agency delegation in the case at hand but noting that, in general, it is an “unexceptional” argument to say that “vesting a duty in the Attorney General” does not “preclude delegation to other officers in the Department of Justice”); Flemming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121–22 (1947); United States v. Mango, 199 F.3d 85, 90–91 (2d Cir. 1999).

46. Several sections of the Food, Drug, and Cosmetics Act do forbid delegation. For example, 21 U.S.C. § 350d(b)(7) (2006) prohibits the Secretary of the Department of Health and Human Services from delegating to anyone other than the Commissioner the authority to suspend registration of food facilities that violate safety provisions of the Act. The absence of such provisions in *other* areas of the Act implies that delegation to subagencies like the Food and Drug Administration is permissible. *See generally* 21 U.S.C. §§ 301–99 (2006) (lacking any such delegation prohibitions).

47. *See U.S. Telecom Ass'n*, 359 F.3d at 565.

48. *See Halverson*, 129 F.3d at 183–89.

statutes are silent on the matter.<sup>49</sup> While courts have generally adopted a presumption that interprets statutory silences in favor of subdelegation, the few cases on point have adopted the opposite presumption for redelegation.<sup>50</sup> That is, courts have read statutory silences as an indication of congressional disapproval of interagency redelegation.<sup>51</sup> Thus, for example, the Department of Health and Human Services is presumptively barred from redelegating its authority under the Food, Drug, and Cosmetic Act to the Department of Agriculture's Food Safety and Inspection Service because the authorizing statute is silent on the issue of interagency redelegation.<sup>52</sup>

A series of cases from within the D.C. Circuit offers the finest elaboration of the interpretive distinction between intra-agency subdelegation and interagency redelegation. The court's jurisprudence makes two important analytical moves. First, it clearly distinguishes between intra-agency subdelegation and redelegation:

When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. But the cases recognize an important distinction between subdelegation to a subordinate and [re]delegation to an outside party. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering [re]delegations to outside parties.<sup>53</sup>

The second important move in this line of cases is to treat redelegation to other agencies in the same manner as redelegation to outside parties—thus placing interagency redelegation in the category of delegations that are presumptively unauthorized.<sup>54</sup> More precisely, for the purposes of doctrine and interpretive

---

49. A smattering of statutes authorize interagency redelegation in specific circumstances. *See infra* notes 322–23.

50. *See, e.g.*, *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783–84 (D.C. Cir. 1998).

51. *See, e.g., id.*; *United States v. Pan-Am. Petroleum Co.*, 6 F.2d 43, 87–88 (S.D. Cal. 1925), *aff'd in part and rev'd in part*, 9 F.2d 761 (9th Cir. 1926), *aff'd*, 273 U.S. 456 (1927); *cf. ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 515–17 (1988) (ruling that a history of cooperation between two agencies is not worthy of deference when the statutory grant of authorization clearly delegates a duty to only one agency).

52. *See generally* §§ 301–99 (failing to address delegation to the Department of Agriculture under broader circumstances).

53. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (emphasis omitted) (citations omitted).

54. *See id.* at 565–68; *Shook*, 132 F.3d at 783–84; *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 19–21 (D.D.C. 1999).

presumptions, the cases do not distinguish among three different types of redelegation: (1) redelegation from one agency to another agency at the same level of government in our federal system;<sup>55</sup> (2) redelegation from a federal agency to a state agency;<sup>56</sup> and (3) redelegation from an agency to a private entity.<sup>57</sup> The courts applied the presumption against redelegation equally to all three types of redelegation.<sup>58</sup>

The lumping together of these different types of redelegation is seen most directly in the case of *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority*.<sup>59</sup> The case involved the transfer of authority between the D.C. Control Board and the Board of Trustees.<sup>60</sup> These two local Washington agencies operate under the control of Congress, which has plenary authority over D.C., and had established the Control Board to oversee D.C. agencies' administrative practices.<sup>61</sup> However, the Control Board redelegated some of its oversight duties—in particular those concerning oversight of the D.C. education system—to the Board of Trustees.<sup>62</sup> The relevant congressional statutes were silent on the Control Board's authority to redelegate its broad oversight duties to another agency.<sup>63</sup> The D.C. Circuit interpreted this silence as prohibiting the redelegation, stating that “[a]lthough the Control Board may have its own delegation powers that could be used to *subdelegate* to one of its own members or staff . . . we still do not think that the Control Board can *redelegate* its [statutory] power to an outside body.”<sup>64</sup> The court further noted that the Circuit has: “often . . . upheld an agency head's ability to delegate duties to subordinate officers, but [that] these cases do not involve delegations of agency authority to outside parties.”<sup>65</sup>

Tellingly, the court referred to the Board of Trustees as an

---

55. For example, redelegation from one federal cabinet department to another. See *Shook*, 132 F.3d at 783–84.

56. See *U.S. Telecom Ass'n*, 359 F.3d at 565–68.

57. See *Stanton*, 54 F. Supp. 2d at 19–21.

58. See *U.S. Telecom Ass'n*, 359 F.3d at 565–68; *Shook*, 132 F.3d at 783–84; *Stanton*, 54 F. Supp. 2d at 19–21.

59. 132 F.3d 775.

60. *Id.* at 775–76.

61. See *id.* at 776–78.

62. *Id.*

63. See *id.*

64. *Id.* at 783–84 (emphasis in original) (footnote omitted).

65. *Id.* at 784 n.6.

“outside body” and an “outside part[y].”<sup>66</sup> It did not matter to the court that this outside body was an agency at the same level of government as the Control Board.<sup>67</sup> The court applied the same interpretive presumption that the D.C. Circuit and the District Court for D.C. would later apply to redelegation from a federal agency to private actors<sup>68</sup> and redelegation from a federal agency to a state agency.<sup>69</sup> In all these cases, redelegation was presumptively unauthorized.

The Supreme Court’s clearest articulation of the anti-redelegation doctrine came in *ETSI Pipeline Project v. Missouri*.<sup>70</sup> In that case, Congress had delegated oversight of a Missouri River reservoir to the Department of the Army.<sup>71</sup> The governing statute was silent on the issue of interagency redelegation.<sup>72</sup> Nevertheless, the Army Department and the Department of the Interior (Interior) entered into an agreement that appeared to redelegate authority from the Army to Interior.<sup>73</sup> The agreement authorized the Secretary of the Interior, “as agent for the Secretary of the Army, [to] contract for the marketing of water for industrial uses” from the reservoir.<sup>74</sup> Interior later entered into such a contract, and the contract’s validity was challenged in court.<sup>75</sup> The Supreme Court held that Interior did not have independent authority to enter into the contract and that the Army could not redelegate its contracting authority to Interior, because “the Executive Branch is not permitted to administer the [delegating statute] in a manner that is inconsistent with the administrative structure that Congress enacted into law.”<sup>76</sup> The Supreme Court’s statement presumes that Congress’s silence on interagency redelegation meant that Congress did not want to allow the agencies to alter the administrative structure through redelegation. As a result,

---

66. *Id.*

67. *See id.*

68. *See Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 19–21 (D.D.C. 1999).

69. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004) (“There is no such presumption [of validity] covering subdelegations to outside parties . . . . The fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis.”).

70. 484 U.S. 495 (1988).

71. *Id.* at 505.

72. *Id.* at 506.

73. *Id.* at 516.

74. *Id.*

75. *Id.*

76. *Id.* at 517.

without express authorization from Congress, the Army could not redelegate its contracting authority to Interior.<sup>77</sup>

The presumption against interagency re delegation applies even when the President approves of or directs the re delegation.<sup>78</sup> If Congress delegates authority directly to the President, then the President has the power to subdelegate that authority to an agency of his choosing.<sup>79</sup> But when Congress names a specific agency to act and does not otherwise authorize re delegation, then the President has no power to authorize an interagency re delegation.<sup>80</sup> For example, in a 1921 executive order, President Harding transferred from the Navy Department to Interior the authority to develop naval petroleum reserves.<sup>81</sup> However, the executive order was held unconstitutional because the President cannot “transfer from one member of his Cabinet to another member of his Cabinet powers and duties that had been conferred by the Congress on a specified Cabinet officer . . . .”<sup>82</sup>

In short, courts have generally adopted a presumption in favor of intra-agency subdelegation.<sup>83</sup> Thus, in the absence of clear congressional language to the contrary, high-level agency officials can usually subdelegate authority to lower level officials or subagencies within the agency.<sup>84</sup> However, courts have adopted the opposite presumption for re delegation to outside parties, including re delegation to other agencies at the same level of government.<sup>85</sup> Thus, in the absence of clear congressional language, interagency re delegation is presumptively barred.<sup>86</sup>

---

77. *Id.*

78. *See, e.g.,* United States v. Pan-Am. Petroleum Co., 6 F.2d 43, 87 (S.D. Cal. 1925).

79. Presidential subdelegation powers were originally established by constitutional common law. *See* Wolsey v. Chapman, 101 U.S. 755, 769 (1879); United States v. Eliason, 41 U.S. (16 Pet.) 291, 301–02 (1842); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839). Congress later codified these powers in the Presidential Subdelegation Act of 1950, 3 U.S.C. §§ 301–03 (2006); *see also* Marisam, *supra* note 2, at 231–36 (analyzing the benefits and costs in according the President such an authority).

80. *See* 3 U.S.C. §§ 301–03.

81. *Pan-Am. Petroleum Co.*, 6 F.2d at 50.

82. *Id.* at 87.

83. *See* Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 783–84 (D.C. Cir. 1998).

84. *Id.*

85. *See, e.g.,* ETSI Pipeline Project v. Hodel, 484 U.S. 495, 517 (1988).

86. *See id.*

B. THE CONSTITUTIONAL DEFAULT RULE PROHIBITING  
INTERAGENCY FUND TRANSFERS

The Appropriations Clause of the Constitution provides that: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>87</sup> The clause is considered one of the most important constitutional checks on executive power.<sup>88</sup> It prevents the President and executive agencies from using money in any way that is not specifically authorized by Congress.<sup>89</sup> Applied to the interagency marketplace, this constitutional rule has one simple but powerful effect: “[a]gencies are prohibited from transferring funds [among themselves] absent statutory authority.”<sup>90</sup>

Whether Congress has authorized an agency to transfer funds to another agency is a matter of statutory interpretation.<sup>91</sup> The interpretations here are usually not handed down by federal courts, but by the Comptroller General, whom Congress has placed in charge of interpreting and applying appropriations law.<sup>92</sup> The Comptroller General has taken a narrow view

---

87. U.S. CONST. art. I, § 9, cl. 7.

88. *OPM v. Richmond*, 496 U.S. 414, 427 (1990) (“The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation . . . .” (quoting 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858))).

89. *See id.* at 428.

90. Denali Comm’n, B-319189, 2010 WL 4631284 (Comp. Gen. Nov. 12, 2010); *see also* 17 Comp. Gen. 174 (1910) (requiring explicit statutory authority for transferring funds in such a manner); Air Force Office of Scientific Research, B-301561, 2004 WL 1853465 (Comp. Gen. June 14, 2004) (“Unless otherwise authorized by law, transfers of funds between federal agencies and instrumentalities are prohibited by law.”). This constitutional rule has also been codified in 31 U.S.C. § 1532 (2006) (“An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.”).

91. *See* Edward R. Murray, Note, *Beyond Bowsher: The Comptroller General’s Account Settlement Authority and Separation of Powers*, 68 GEO. WASH. L. REV. 161, 162 (1999) (describing the Comptroller General’s authority to interpret “what types of government expenses are allowable”).

92. *See* 31 U.S.C. §§ 712(1), 717, 719(c), 3511, 3526(a) (charging the Comptroller General with several duties, including investigating all matters related to the use of public funds, evaluating federal programs, reporting to Congress on audits and illegal uses of public money, prescribing the accounting standards for each executive agency head, and settling the accounts of the government). It is an open question whether these opinions are binding on the executive, as the Comptroller General asserts, or merely advisory. *Compare* Murray, *supra* note 91, at 165 (deciding “[t]hese authorities are most likely unconstitutional in light of [*Bowsher v. Synar*, 478 U.S. 714 (1986)]”), *with* REDBOOK, *supra* note 9, at 1-27 (“A decision regarding an account of the gov-

in determining whether Congress has authorized interagency fund transfers. For the most part, it requires one of several statutory phrases to overcome the constitutional presumption against interagency transfers. These phrases include language stating that an agency can transfer funds to another agency,<sup>93</sup> reimburse another agency,<sup>94</sup> or contract with another agency.<sup>95</sup> Without these specific phrases or similar ones, the Comptroller General is unlikely to find that Congress has authorized interagency fund transfers.<sup>96</sup> For example, in one case involving an agreement between the Environmental Protection Agency (EPA) and the Department of the Interior, the Comptroller General disallowed a transfer that the agencies said advanced the general “purposes” of the EPA’s authorizing statutes but was not specifically authorized in the statutes.<sup>97</sup>

Although a fairly straightforward doctrine, the rule against interagency transfers can have harsh results. In one case, the Bureau of Standards (Bureau), a subagency of the Department of Commerce, had discovered a chemical that could act as an air purifier—a finding of particular interest to the Department of the Navy because of the chemical’s potential benefits for air in submarines.<sup>98</sup> The Navy did not have adequate science labs of its own to study the chemical, and so the Navy wanted to fund further research by the Bureau.<sup>99</sup> At the time, the Navy had statutory authority to transfer funds to buy military equipment from other military agencies.<sup>100</sup> But, the Comptroller General held that this statutory authority did not cover scientific research.<sup>101</sup> Thus, the Navy could not pay the Bureau to research how the chemical could aid in submarine air purification. Because the Bureau did not have adequate funds of its own to perform the kind of research the Navy wanted, the research could not be performed.<sup>102</sup> The constitutional rule against interagency transfers effectively stifled valuable scien-

---

ernment is binding on the executive branch . . .”).

93. Library of Cong., B-302760, 2004 WL 1146276.

94. Dep’t of Hous. & Urban Dev., B-167790, 1977 WL 12105.

95. Dep’t of Energy, B-193005, 1978 WL 11174.

96. *See, e.g.*, Dep’t of the Interior, Office of Water Research & Tech., B-197344, 1980 WL 16095 (Comp. Gen. Aug. 21, 1980).

97. *Id.*

98. 7 Comp. Gen. 524, 524–25 (1928).

99. *Id.* at 525.

100. *Id.*

101. *Id.* at 526.

102. *Id.* at 525.

tific research and development. Overall, without clear and express statutory language, the Constitution establishes that agencies cannot redelegate authority or transfer funds to each other, and the Comptroller General has been unyielding in upholding this principle.<sup>103</sup>

## II. THE ECONOMY ACT OF 1932

The only comprehensive statute regulating the interagency marketplace is the Economy Act of 1932.<sup>104</sup> Other statutes permit specific agencies to obtain specific services from other agencies,<sup>105</sup> but the Economy Act is the only statute that covers all government agencies—whether cabinet departments, independent agencies, or temporary government commissions and councils—and all types of government services.<sup>106</sup> Indeed, Economy Act agreements have been used for a wide array of services, such as providing personnel details, data analyses, inspections or oversight of regulated entities, scientific research and development, staff training, government procurements, real property leases, personal property maintenance work, and more.<sup>107</sup> In this Article, I adopt the language of the Redbook<sup>108</sup> and refer to the agency that transfers the money as the ordering agency and the agency that receives the money and provides the services as the performing agency.<sup>109</sup>

Congress passed the Economy Act during the Great Depression to improve governmental efficiencies.<sup>110</sup> The Act allows an agency to save money by hiring another agency to provide a service more efficiently than it can.<sup>111</sup> Moreover, by allowing agencies to provide services for each other, it prevents agencies from wasting resources by building up expertise and infrastructure that duplicate other agencies' existing expertise and infrastructure.

---

103. See, e.g., Denali Comm'n, B-319189, 2010 WL 4631284 (Comp. Gen. Nov. 12, 2010).

104. See 31 U.S.C. § 1535 (2006).

105. See, e.g., 42 U.S.C. § 4101(a) (2006) (authorizing the Department of Housing and Urban Development to reimburse federal agencies such as the Army Corps of Engineers for flood management services).

106. See REDBOOK, *supra* note 9, at 12-31 to -33.

107. See *id.* at 12-54 to -68.

108. *Id.* at 12-22 to -76.

109. See, e.g., *id.* at 12-31.

110. See *id.* at 12-22.

111. See 31 U.S.C. § 1535(a) (2006) (stating that interagency agreements for goods or services are permissible in certain circumstances).

However, the Economy Act does not free agencies to enter into any transaction they like.<sup>112</sup> The Act places significant restrictions on the interagency marketplace.<sup>113</sup> Most importantly, the Act does not expressly authorize interagency redelegations and thus does not on its face overcome the constitutional default rule against redelegation.<sup>114</sup> Nevertheless, the Comptroller General has allowed some redelegation, so long as the ordering agency retains control over the redelegated tasks and the tasks do not involve significant decision-making authority or an agency's primary administrative functions.<sup>115</sup>

As for interagency fund transfers, the Act expressly authorizes them and thus overcomes the constitutional default rule against them.<sup>116</sup> However, the Act places several restrictions on how and how much money can be transferred.<sup>117</sup> Most importantly, it prevents performing agencies from profiting by charging ordering agencies more than the actual cost of their services.<sup>118</sup>

Despite the Economy Act's substantive restrictions on interagency agreements, the Act places few procedural restrictions on agencies.<sup>119</sup> The Comptroller General reviews only a fraction of all Economy Act agreements.<sup>120</sup> Moreover, Economy Act agreements are not subject to the fundamental administrative procedures established under the Administrative Procedure Act.<sup>121</sup> With such spotty oversight of Economy Act agreements, it is difficult to ensure that agencies actually comply with the substantive rules established under the Act.

---

112. *Id.*

113. *Id.*

114. *Id.* § 1535 (failing to mention interagency redelegations as facets of allowable interagency agreements).

115. *See infra* Part II.B.

116. *See infra* Part II.B.

117. *See infra* Part II.C.

118. REDBOOK, *supra* note 9, at 12-36 to -37 (citing 31 U.S.C. § 1536(b) as demonstrative of "the Economy Act's approach of structuring the transaction so that the performing agency neither profits nor is penalized").

119. *See* John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 349-52 (1970) (identifying review by the Comptroller General as the primary tool for gauging acceptability of transactions).

120. *See Interdepartmental Work: on H.R. 10199 Before the Comm. on Expenditures in the Exec. Dep'ts*, 71st Cong. 3, 32 (1930) [hereinafter *Hearings*] (discussing a conscious effort to review a limited number of agreements in the interest of efficiency and timeliness).

121. *See* 5 U.S.C. §§ 551-59, 701-06 (2006).

This Part proceeds as follows. In Section A, I examine the history behind the Economy Act. I draw attention to the history because the trends that pushed Congress to enact the Economy Act are present again today and could spur Congress to revisit and improve the law. In Sections B and C, I discuss the Act's legal rules and constraints for the interagency redelegation of authority and interagency transfer of funds. In Section D, I consider the procedural constraints on Economy Act agreements.

#### A. THE HISTORY OF THE ECONOMY ACT

In the early twentieth century, the interagency marketplace was barren.<sup>122</sup> There were very few statutes that authorized agencies to pay other agencies for their services, and those statutes that did exist were quite limited in scope and application.<sup>123</sup> For example, the Navy was often given authority in the annual appropriations bill to buy military equipment from other branches of the military.<sup>124</sup> But broad authorizations for interagency exchanges were nonexistent.<sup>125</sup> On top of these legal constraints, there was a bureaucratic norm against interagency exchanges.<sup>126</sup> Public officials at the time were uncomfortable with government contracting, and agencies operated in relative independence from one another.<sup>127</sup>

Two trends helped break down the legal and bureaucratic barriers to a robust interagency marketplace. First, the complexity of government multiplied exponentially in the late nineteenth and early twentieth centuries.<sup>128</sup> The industrial revolution, westward expansion, the growth of interstate commerce, and a surge in energy demands generated new and complex regulatory problems.<sup>129</sup> A slew of agencies were created to tackle these problems—agencies such as the Department of Commerce and Labor,<sup>130</sup> the Interstate Commerce Commission,<sup>131</sup>

---

122. See REDBOOK, *supra* note 9, at 12-22; see also A. H. Erck, *Standardization of Purchase Procedure for the Federal Government*, 137 ANNALS AM. ACAD. POL. & SOC. SCI. 199, 199 (1928) (noting that until the 1920s the “various departments operated practically independently of each other”).

123. See, e.g., Act of May 21, 1926, ch. 355, 44 Stat. 591, 605 (1935).

124. *Id.*

125. See Erck, *supra* note 122.

126. *Id.*

127. See REDBOOK, *supra* note 9, at 12-23 (“[T]here was discomfort with the concept of the government contracting with itself.”).

128. See *infra* notes 130-40.

129. See *infra* notes 130-40.

130. See HELEN BOWERS, FROM LIGHTHOUSES TO LASERBEAMS: A HISTORY

the Federal Trade Commission,<sup>132</sup> the Food and Drug Administration,<sup>133</sup> the U.S. Geological Survey,<sup>134</sup> the Bureau of Reclamation,<sup>135</sup> and the Bureau of Mines.<sup>136</sup> With more agencies addressing increasingly complex and overlapping regulatory problems, it became increasingly beneficial for agencies to interact and rely on each other. Hiring other agencies to perform tasks was one way that an agency could tap into other agencies' experience and expertise handling complex regulatory problems.<sup>137</sup>

Second, in the early twentieth century, federal spending exploded and the federal debt ballooned.<sup>138</sup> In 1917, the debt was under \$6 billion.<sup>139</sup> Fifteen years later, when the Economy Act was passed, the debt was over \$19 billion.<sup>140</sup> The massive deficit spending put enormous pressure on political actors to make government more efficient.<sup>141</sup> Removing some of the bar-

---

OF THE U.S. DEPARTMENT OF COMMERCE 1913–1988, at 6–7 (1988) (describing how “the enormous growth of business, industry, commerce and banking between 1850 and 1900” and “the nation’s rapid change from an agrarian society to an industrial one” helped inspire the department’s creation).

131. See Rene Sacasas, *The Filed Tariff Doctrine: Casualty or Survivor of Deregulation?*, 29 DUQ. L. REV. 1, 8–10 (1990) (detailing how Congress created the Interstate Commerce Commission after years of complaints regarding the indiscretions of the railroad industry).

132. See John B. Daish, *The Federal Trade Commission*, 24 YALE L.J. 43, 43–44 (1914).

133. See *Centennial of FDA*, U.S. Food & Drug Admin., Dep’t of Health & Human Servs., <http://www.fda.gov/AboutFDA/WhatWeDo/History/CentennialofFDA/default.htm> (last visited Dec. 6, 2011) (calling the creation of the FDA “a hallmark of the Progressive Era” that spurred “widespread consumer protection in the U.S.”).

134. See Act of Mar. 3, 1879, ch. 182, § 1, 20 Stat. 394 (1962) (codified as amended at 43 U.S.C. § 31(a) (2006)) (creating the Geological Survey and tasking its director with “the classification of the public lands and examination of the Geological Structure, mineral resources, and products of the national domain”).

135. See *History of Interior*, DEP’T OF THE INTERIOR, <http://www.doi.gov/whoweare/history.cfm> (last visited Dec. 6, 2011) (noting the Bureau of Reclamation was “established to construct dams and aqueducts in the west”).

136. See *id.* (citing mine safety and minerals technology as the impetus for the Bureau’s creation).

137. See REDBOOK, *supra* note 9, at 12–31.

138. See *Historical Debt Outstanding—Annual 1900–1950*, DEP’T OF THE TREASURY, [http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt\\_histo3.htm](http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo3.htm) (last visited Dec. 6, 2011) (outlining historical trends in federal debt).

139. *Id.*

140. *Id.*

141. See REDBOOK, *supra* note 9, at 12–22 (suggesting that government acceptance of interagency agreements stemmed, at least in part, from adverse economic conditions).

riers to interagency exchanges was one way that Congress could help improve governmental efficiencies.<sup>142</sup>

In 1920, Congress passed a short provision allowing agencies to provide goods or perform services for other agencies.<sup>143</sup> However, the law ended up doing little to invigorate the interagency marketplace, partly because of narrow statutory interpretations.<sup>144</sup> The Comptroller General held that the 1920 law only authorized the “performance of specific pieces of work such as ordinarily would be for accomplishing by means of a contract with a commercial contractor.”<sup>145</sup> Thus, the kinds of tasks performed under the law were generally limited to the purchasing or loaning of goods and the commission of studies.

The law’s own restrictive language was also a problem. The law did not authorize full reimbursement of agencies’ costs, but instead limited reimbursement to costs from “direct expenditure” only.<sup>146</sup> In practice, this rule meant that one agency could pay another agency for the paper it used to prepare a study, but it could not pay for the salaries of that agency’s employees to cover the time spent preparing the study.<sup>147</sup> Similarly, an agency could not seek reimbursement for loaning out its equipment or facilities to another agency.<sup>148</sup> The loaning agency had to absorb all the costs of wear and tear and overhead itself.<sup>149</sup>

In general, under the 1920 law, an agency could not recoup the full costs of providing services for other agencies.<sup>150</sup> Thus, exchanges in the interagency marketplace depended on the willingness of one agency to tap into its own coffers in order to

---

142. *Id.*

143. That whenever any Government bureau or department procures, by purchase or manufacture, stores or materials of any kind, or performs any service for another bureau or department, the funds of the bureau or department for which the stores or materials are to be procured or the service performed may be placed subject to the requisitions of the bureau or department making the procurement or performing the service for direct expenditure . . .”).

144. *See, e.g.*, 5 Comp. Gen. 757, 758 (1926).

145. *Id.*

146. § 7, 41 Stat. at 613.

147. *See* REDBOOK, *supra* note 9, at 12–22 n.11; *see also* Sec’y of War, A-33694, 1930 WL 1184 (Comp. Gen. Nov. 1, 1930) (requiring appropriation funds to be applied only to the direct object that was approved); Sec’y of the Interior, A-27111, 1929 WL 1264 (Comp. Gen. May 11, 1929) (disallowing payment for depreciation on “passenger-carrying vehicles used in . . . cooperative work”).

148. Sec’y of War, A-33694, 1930 WL 1184.

149. *See id.*

150. *See* § 7, 41 Stat. at 607.

do a favor for another agency.<sup>151</sup>

Within a decade of the 1920 law's enactment, the Great Depression was in full swing.<sup>152</sup> The pressure on lawmakers to find greater governmental efficiencies ramped up.<sup>153</sup> In this environment, Congress decided to revisit the 1920 law. The result was the Economy Act of 1932, which gave broader authority for interagency exchanges and for the first time allowed agencies to be fully reimbursed for their interagency services.<sup>154</sup>

In its committee report, the House Committee on the Expenditures in the Executive Department emphasized the efficiency gains that would come from passing a law designed to encourage more interagency transactions:

[V]ery substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this bill will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities on [their] own.<sup>155</sup>

The idea here is twofold. First, allowing agencies access to the personnel and property of other agencies can save money by avoiding the unnecessary duplication of expertise and infrastructure in different agencies. Second, allowing an ordering agency to hire a performing agency can save money if the performing agency can do the job more efficiently than the ordering agency could.

In the end, the emphasis on economics was effective, and the Act passed as part of a package of measures designed to reduce government spending.<sup>156</sup> The Comptroller General was put in charge of giving agencies and legislators advice about the legality of interagency transactions under the law.<sup>157</sup>

---

151. *See id.*

152. *See, e.g., The Great Depression*, AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/general-article/dustbowl-great-depression/> (last visited Dec. 6, 2011).

153. *See id.*

154. *See* 31 U.S.C. § 1535 (2006).

155. Wash. Nat'l Airport, B-136318, 1978 WL 13460 (Comp. Gen. Aug. 14, 1978) (quoting H.R. REP. NO. 71-2201, at 2-3 (1931)).

156. *See* REDBOOK, *supra* note 9, at 12-22.

157. This authority was implicit in the Office's general authority to oversee appropriations law. *See* 31 U.S.C. §§ 712(1), 719(c), 3526(a).

B. THE ECONOMY ACT AND THE INTERAGENCY REDELEGATION OF AUTHORITY

Interagency redelegation is not mentioned in the Economy Act.<sup>158</sup> The Comptroller General initially interpreted this silence to mean that the Act did not provide the statutory authority needed to overcome the constitutional default rule against interagency redelegation.<sup>159</sup> However, over time the Comptroller General, while still claiming to adhere to the interpretation that the Economy Act does not authorize interagency redelegations, has issued opinions approving of Economy Act agreements that redelegate authority from one agency to another.<sup>160</sup> These redelegations survive Comptroller General review largely because the Comptroller General has adopted a legal test that permits apparent redelegations so long as the ordering agency retains “ultimate responsibility” for the redelegated tasks.<sup>161</sup> But despite this porous legal test, the Comptroller General has not opened the door for any and all redelegations.<sup>162</sup> The Comptroller General continues to prohibit the redelegation of an agency’s primary administrative functions and the redelegation of significant decision-making authority, such as the authority to draft binding rules or to levy fines on regulated entities.<sup>163</sup> In general, the more significant and central to an agency’s core mission, the less likely that regulatory powers can be redelegated under the Economy Act.

In legislative hearings on the Economy Act, one legislator is quoted stating that it is “impossible under this bill . . . for one department to delegate its functions to another.”<sup>164</sup> Comptroller General interpretations of the Economy Act have long claimed to accord with this statement.<sup>165</sup> Early interpretations held that an Economy Act agreement “does not vest in the service-

---

158. *See id.* § 1535 (omitting any reference to such redelegation).

159. 18 Comp. Gen. 262, 266 (1938).

160. *See, e.g.*, Dir., AMFD, B-200309, 1981 WL 24197 (Comp. Gen. Apr. 3, 1981).

161. *Id.*

162. *See, e.g.*, B-120281 (Comp. Gen. Nov. 25, 1958), available at <http://redbook.gao.gov/fl0027891.php> (providing an example of how the Comptroller General specifies particularized circumstances in which redelegation is authorized).

163. *See, e.g.*, B-163758, 1971 WL 7556 (Comp. Gen. May 6, 1971) (specifying that, “authority is granted to the head of a department, agency, or other establishment to redelegate to such official or officials as he may designate within his organization,” not to another organization).

164. *Hearings, supra* note 120, at 6.

165. *See, e.g.*, 18 Comp. Gen. 262, 266 (1938).

rendering agency any authority which it does not have independently.<sup>166</sup> Thus, in principle, a performing agency can only perform a task if it is authorized by Congress to perform that task on its own—an ordering agency cannot authorize a performing agency to do a job that the performing agency cannot otherwise do itself.

The rationale behind this reading of the Economy Act is rooted in constitutional norms. As the Comptroller General explained:

The [constitutional] theory . . . is that there is inherent in a grant of authority to a department or agency to perform a certain function, and to expend public funds in connection therewith, a responsibility which, having been reposed specifically in such department or agency by the Congress, may not be transferred except by specific action of the Congress.<sup>167</sup>

In practice, many—if not most—Economy Act agreements abide by this prohibition on interagency redelegation. For example, agencies routinely loan or lease property to each other, property that each agency is at least impliedly authorized to use to do its job.<sup>168</sup> Similarly, agencies have routinely followed the longstanding practice of procuring office supplies such as computers for each other, supplies that each agency is clearly allowed to use to administer its duties.<sup>169</sup> Moreover, agencies routinely compile or analyze data for each other, services that are generally permissible under agencies' broad powers to collect and analyze information.<sup>170</sup>

However, some Economy Act agreements are not in line with a strict application of the prohibition on interagency redelegation of authority. These agreements have survived Comptroller General review because of the porous legal test that the Comptroller General uses to determine whether there has been an impermissible redelegation.<sup>171</sup> The test, first laid out in a 1944 case, permits the apparent redelegation of authority to perform tasks so long as the ordering agency retains ultimate responsibility or control over the tasks.<sup>172</sup>

---

166. *Id.*

167. REDBOOK, *supra* note 9, at 12-71 (quoting B-45488 (Comp. Gen. Nov. 11, 1944)).

168. Civil Aeronautics Bd., 24 Comp. Gen. 184 (1944).

169. Sec'y of State, A-48145, 1933 WL 782 (Comp. Gen. Apr. 18, 1933).

170. Sec'y of Commerce, 14 Comp. Gen. 923 (1935).

171. *See* B-45488 (Comp. Gen. Nov. 11, 1944) (on file with Government Accountability Office).

172. REDBOOK, *supra* note 9, at 12-71 to -72; *see* B-45488 (Comp. Gen. Nov. 11, 1944) (on file with Government Accountability Office).

Under this test, the Comptroller General has routinely upheld the redelegation of authority to perform relatively minor administrative functions, such as the disbursing of funds.<sup>173</sup> For example, the Comptroller General upheld an Economy Act agreement through which the Civil Service Commission allowed the Department of the Army to access and disburse money from a disability fund.<sup>174</sup> It is difficult to argue that there was not some redelegation of authority under this arrangement. Congress placed the Commission in control of the funds, and the Commission in turn authorized the Army to access the funds.<sup>175</sup> Congress never authorized the Army to access the funds.<sup>176</sup> The Army's sole authority to do so came from the Commission.<sup>177</sup> Nevertheless, the Comptroller General held that this arrangement was permissible because the Commission planned to audit the Army's decision, and thus "responsibility for the performance of the function generally would remain" with the Commission.<sup>178</sup>

In another case involving the redelegation of authority to disburse funds, Congress had statutorily transferred the authority to run certain overseas schools from the Department of Defense to the Department of Education.<sup>179</sup> Despite the transfer of authority, the two agencies wanted to enter into an Economy Act agreement that would authorize the Department of Defense to continue to provide financial services for the schools, such as disbursing payments to the schools' employees and certifying vouchers for payments.<sup>180</sup> In effect, the Department of Education wanted to redelegate back to the Department of Defense some of the authority that Congress had just transferred from Defense to Education.<sup>181</sup> Despite the apparent interagency redelegation, the Comptroller General approved the agreement so long as Education "retain[ed] responsibility for the administrative function" by auditing and accounting for Defense's use

---

173. See Job Corps Ctr. Receipts, 65 Comp. Gen. 666 (1986); Dir., AFMD, Comp. Gen. B-200309, 1981 WL 24197 (Comp. Gen. Apr. 3, 1981); Comp. Gen. B-45488 (Comp. Gen. Nov. 11, 1944) (on file with Government Accountability Office); see also REDBOOK, *supra* note 9, at 12-71 to -72.

174. See REDBOOK, *supra* note 9, at 12-71 to -72.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Dir., AFMD, B-200309, 1981 WL 24197 (Comp. Gen. Apr. 3, 1981).

180. *Id.*

181. *Id.*

of the funds.<sup>182</sup>

While the Comptroller General's holdings allow for some limited redelegation of agency authority, they do not afford agencies complete freedom to redelegate as they see fit. The case law has only allowed de facto redelegation of mundane administrative functions, such as the disbursing of funds when the ordering agency retained ultimate responsibility. The Comptroller General has never upheld Economy Act agreements that involve the redelegation of more potent powers, such as the authority to publish binding rules or punish regulated entities with fines.

Indeed, the Comptroller General has made clear that agreements redelegating an agency's primary administrative functions or redelegating significant decision-making authority are impermissible, regardless whether the ordering agency retains ultimate responsibility.<sup>183</sup> For example, the Comptroller General held that the Public Health Service cannot redelegate its authority to provide health care to merchant seamen because such services are a primary function of the agency and the Economy Act "certainly was not intended to be a basis for transferring a primary administrative function from an agent in which it is vested by Congress."<sup>184</sup> Similarly, the Comptroller General has stated that an agency can redelegate the authority to collect debts owed to a government agency, but an agency cannot redelegate the more significant authority for "the taking of final compromise or termination action" against debtors.<sup>185</sup>

In sum, the Economy Act does not expressly authorize interagency redelegations and thus appears not to override the constitutional default rule against redelegation.<sup>186</sup> However, the Comptroller General permits some redelegation to go forward de facto, so long as the ordering agency retains responsibility for the redelegated tasks and the tasks do not involve significant decision-making authority or an agency's primary administrative functions.<sup>187</sup>

---

182. *Id.*

183. *See, e.g.*, Chairman Edward A. Garmatz, H. Comm. on Merch. Marine & Fisheries, B-156510 (Comp. Gen. Feb. 23, 1971), available at <http://redbook.gao.gov/2/f10006984.php>.

184. *Id.*

185. REDBOOK, *supra* note 9, at 12-71.

186. *See id.*

187. B-163758, 1971 WL 7556 (Comp. Gen. May 6, 1971).

### C. THE ECONOMY ACT AND INTERAGENCY FUND TRANSFERS

The Economy Act states that agencies may transfer funds in exchange for services,<sup>188</sup> and thus provides the express statutory authority needed to overcome the constitutional default rule against fund transfers. However, the Act does not authorize a system of free exchanges within the interagency marketplace.<sup>189</sup> To prevent agencies from using fund transfers to circumvent congressional controls on agencies' budgets and spending powers, the Act places significant constraints on how and how much funds can be transferred among agencies.<sup>190</sup> In this Section, I discuss the three most important Economy Act restrictions on interagency fund transfers—what I will refer to as the actual cost rule, the deobligation rule, and the lower-cost rule.

#### 1. The Actual Cost Rule

The Economy Act requires that an ordering agency reimburse a performing agency for the full or "actual cost" of its services.<sup>191</sup> The ordering agency cannot pay the performing agency anything more or anything less than the actual cost of the services provided.<sup>192</sup> The rule has two key effects: the performing agency cannot profit from services provided under the Economy Act, and the performing agency cannot receive nonmonetary consideration in lieu of some or all of the agency's actual costs.<sup>193</sup>

The actual cost rule was apparently designed, in part, to reverse the line of cases under the 1920 law that barred reimbursement for salaries, overhead, and wear and tear. By mandating that ordering agencies reimburse performing agencies for the full costs of their services,<sup>194</sup> the actual cost rule ensures that performing agencies do not need to dip into their own coffers to provide services for other agencies, as they had to do prior to the Economy Act. Thus, the rule lifted a significant financial disincentive to offering services in the interagency marketplace.

The actual cost rule is also supposed to preserve Congress's

---

188. 31 U.S.C. § 1535(a) (2006).

189. *See id.* § 1535.

190. *See id.*

191. *Id.* § 1535(b).

192. *Id.*

193. *See id.*

194. *Id.*

ability to control the size of agencies' budgets. Congress's power to control agency spending is one of the most important checks that the legislature has on the Executive.<sup>195</sup> Congress sets agencies' budgets each year.<sup>196</sup> If agencies need extra money for a program, they must submit a supplementary budget request to Congress.<sup>197</sup> Thus, because agencies are completely reliant on Congress for their funds, Congress can ensure that agencies' spending priorities do not diverge too much from congressional priorities.<sup>198</sup> Moreover, Congress can use its budgetary powers to discipline agency behavior—rewarding agencies that generally behave in line with congressional expectations by appropriating them more money or punishing poorly behaved agencies by slashing their funding.<sup>199</sup>

The actual cost rule prevents agencies from using the interagency marketplace in ways that weaken this congressional check on executive agency behavior. Because of the actual cost rule, a performing agency cannot charge more for its services than its actual costs—that is, it cannot profit from its services.<sup>200</sup> This ban on profits prevents performing agencies from using Economy Act agreements to augment their budgets beyond the limits intended by Congress. At the same time, the rule is supposed to ensure that ordering agencies cannot augment their budgets by receiving free or discounted services from performing agencies. The receipt of free or discounted services could let an ordering agency redistribute the money it otherwise would have to spend on those services to a different set of services, thus in effect augmenting the funds available for those other services.

From an accounting perspective, the actual cost rule is loosely enforced. The Economy Act does not define “actual cost,” so the precise contours have been outlined piecemeal by the Comptroller General. Under the case law, an agency performing services for an ordering agency must be reimbursed for the

---

195. THE FEDERALIST, *supra* note 19, at 298.

196. See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 31 U.S.C.) (codifying Congress's budget authority and the requirement that, each year, Congress develops a “budget resolution” in order to set agencies' budgets).

197. See, e.g., Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 178 (2009).

198. *Id.*

199. See Marisam, *supra* note 2.

200. 31 U.S.C. § 1535(b) (2006).

salary of the employees engaged in the work,<sup>201</sup> the costs of materials or equipment used,<sup>202</sup> transportation costs,<sup>203</sup> and overhead such as costs from administrative supervision and rent for office space.<sup>204</sup> However, the Economy Act does not require a precise accounting of the actual costs. It is enough that the agencies agree on a reimbursement that is based on a “bona fide attempt to determine the actual cost and, in fact, reasonably approximates the actual cost.”<sup>205</sup> The reason for such a flexible accounting requirement is that the Act is meant to foster interagency coordination and cooperation, not interagency bickering over bills.<sup>206</sup>

Despite the relatively lax accounting standard, the actual cost rule is quite restrictive in other ways. Most importantly, there are no exceptions to the prohibition on profits.<sup>207</sup> In one case, the Water Resources Council hired the Bureau of Land Management to conduct a water resources study on its behalf.<sup>208</sup> The Council advanced the Bureau several hundred thousand dollars for its services.<sup>209</sup> However, the Bureau only had to use about half of the advanced sum for the study.<sup>210</sup> The Bureau asked the Comptroller General for advice on whether by law the Bureau could use the remaining money for similar water-related studies.<sup>211</sup> The answer was no.<sup>212</sup> The Comptroller General held that the Bureau had to return the unused portion of the advanced funds because “any retention of amounts in excess of actual costs for the study called for in the [interagency agreement] would result in an improper augmentation of [the Bureau’s] appropriations.”<sup>213</sup>

---

201. See, e.g., *Architect of the Capitol*, A-45460, 1932 WL 1021 (Comp. Gen. Nov. 11, 1932).

202. See, e.g., B-149858, 1978 WL 13315 (Comp. Gen. Oct. 12, 1978).

203. See, e.g., *Cent. Intelligence Agency*, B-250377, 1993 WL 35613 (Comp. Gen. Jan. 28, 1993).

204. See, e.g., *Sec’y of Agric.*, 22 Comp. Gen. 74 (1942).

205. *Int’l Cooperation Admin.*, B-133913, 1958 WL 2065 (Comp. Gen. Jan. 21, 1958).

206. See REDBOOK, *supra* note 9, at 12-41.

207. See 31 U.S.C. § 1535(b) (2006) (requiring exact payments on the basis of “the actual cost of goods or services provided”).

208. *Bureau of Land Mgmt.*, 72 Comp. Gen. 120, 120 (1993).

209. *Id.* at 121.

210. *Id.* at 122.

211. *Id.* at 121.

212. See *id.* at 120-21 (denying the Bureau’s request to use excess funding for subsequent related studies).

213. *Id.* at 122.

One effect of this holding was that the Bureau realized none of the efficiency gains from the interagency agreement.<sup>214</sup> Presumably, the Bureau performed the study for less money than the Council could have, thus saving the Council money. But the Council could not share these savings with the Bureau because, under the Economy Act, the Council could not pay the Bureau anything more than the Bureau's actual costs.<sup>215</sup> In the end, only the Council could enjoy the savings generated by the Economy Act agreement.<sup>216</sup> The same effect arises whenever a performing agency performs a task for less money than it would have cost the ordering agency to do the job. That is, by barring profits for the performing agency, the actual cost rule ensures that only the ordering agency—and not the performing agency—enjoys savings and efficiency gains from Economy Act agreements.<sup>217</sup>

Aside from barring profits for performing agencies, the actual cost rule has another significant effect: it prevents the ordering agency from providing the performing agency with non-monetary consideration in lieu of some or all of the actual costs of the services.<sup>218</sup>

The common law of contracts requires that parties to a contract offer some form of bargained-for consideration.<sup>219</sup> But money does not have to be involved in the transaction.<sup>220</sup> According to the Restatement (Second) of Contracts, consideration can be a “promise,” “an act other than a promise,” “a forbearance,” or “the creation, modification, or destruction of a legal relation.”<sup>221</sup>

Such a permissive view of consideration does not apply to ordering agencies under the Economy Act.<sup>222</sup> The actual cost

---

214. *See id.* (holding that the Bureau could not use the money it saved for other projects).

215. *See* 31 U.S.C. § 1535(b) (2006) (providing no exceptions to the stated requirement that payments be made on the basis of “the actual cost of goods or services provided”).

216. *See* Bureau of Land Mgmt., 72 Comp. Gen. 120 (1993).

217. For a discussion of the implications of this perverse effect of the actual cost rule, see *infra* Part III.B.

218. *See* 31 U.S.C. § 1535(b) (emphasizing that payment shall be made by “check”).

219. RESTATEMENT (SECOND) OF CONTRACTS: REQUIREMENT OF EXCHANGE; TYPES OF EXCHANGE § 71 (2002).

220. *Id.*

221. *Id.*

222. 31 U.S.C. § 1535(b) (requiring prompt payment by check on the “written request of the agency . . . filling the order”).

rule requires that the ordering agency pay the performing agency money.<sup>223</sup> The ordering agency cannot offer a different form of consideration in lieu of some or all of the cash needed for full reimbursement of the performing agency's costs.<sup>224</sup> For example, the ordering agency cannot offer as consideration a promise to forbear from performing a task that interferes with the performing agency's operations. Instead, it must offer money.<sup>225</sup> No other form of consideration will suffice if the money does not cover the performing agency's actual costs.<sup>226</sup>

This restriction on nonmonetary consideration can affect interagency negotiations on services provided in the interagency marketplace. For example, in one case, the Air Force was negotiating with the State Department over how to split the costs of the agencies' activities during missions overseas.<sup>227</sup> As part of the negotiations, the Air Force asked the Comptroller General whether it could write off some of the debt owed to it by the State Department for airlift services received under Economy Act agreements.<sup>228</sup> The Comptroller General said that the Air Force could not.<sup>229</sup> The Air Force had to bill the State Department for the airlifts because "an agency may not forego collection of all required costs in a reimbursable transaction" under the Economy Act.<sup>230</sup>

The introduction of the actual cost rule significantly relaxed prior legal constraints on exchanges in the interagency marketplace by allowing performing agencies to recoup their full costs. But the rule constrains fund transfers in the interagency marketplace in two ways: (1) it prevents performing agencies from reaping profits for their services;<sup>231</sup> and (2) it prevents performing agencies from receiving nonmonetary consideration in lieu of some or all of the actual costs of the services provided.<sup>232</sup>

---

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.*

227. Dep't of the Air Force, B-214972, 1985 WL 286656 (Comp. Gen. Apr. 26, 1985).

228. *Id.*

229. *Id.*

230. *Id.*

231. *See* 31 U.S.C. § 1535(b) (capping the compensation value at the actual cost of providing the goods or services, thus failing to leave room for compensation beyond such a value).

232. Bureau of Land Mgmt., 72 Comp. Gen. 120 (1993) (emphasizing the

## 2. The Deobligation Rule

The deobligation rule involves a bit of esoteric, but impactful, appropriations law. The rule mandates that, upon entering into an Economy Act agreement, an ordering agency must “obligate” funds to pay the performing agency.<sup>233</sup> However, if the funds expire before the performing agency fulfills its duties under the agreement, the ordering agency must “deobligate” the funds and reimburse the agency using newly obligated and unexpired funds.<sup>234</sup> While seemingly innocuous, the rule has effectively stripped ordering agencies of significant amounts of money.

The purpose of the deobligation rule is to protect Congress’s ability to control agency behavior by limiting the amount of money available to agencies.<sup>235</sup> When Congress appropriates funds to agencies, the funds have a limited shelf life, after which time they expire.<sup>236</sup> The typical appropriation lasts for a single fiscal year and expires with the passing of that year.<sup>237</sup> Thus, if agencies do not use all of the money appropriated for a fiscal year, they must return that money to the U.S. Treasury at the end of the fiscal year. Congress enacted the deobligation rule to prevent agencies from extending the life of their appropriations beyond the set time limits.<sup>238</sup> Without the deobligation requirement, it could be possible for an agency with money left over at the end of a fiscal year to obligate those funds for services to be provided by another agency a year or two later—in effect circumventing congressional spending limits by allowing funds to retain purchasing power long after

---

requisite monetary compensation).

233. 31 U.S.C. § 1535(d) (“An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit.”).

234. *Id.* (“The amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation . . .”).

235. *See, e.g.*, 2 U.S.C. § 621(a) (2006) (declaring that “it is essential . . . to assure congressional control over the budgetary process”).

236. *See* 31 U.S.C. § 1502(a) (explaining that appropriated funds are available only for expenses incurred during the “period of availability” established for the funds).

237. For a discussion of Congress’s annual “appropriations process” and its “striking regularities,” see Lance T. LeLoup & William B. Moreland, *Agency Strategies and Executive Review: The Hidden Politics of Budgeting*, 38 PUB. ADMIN. REV. 232 (1978).

238. *See* Sec’y of Agric., 31 Comp. Gen. 83, 85 (1951) (noting that the availability of an ordering agency’s funds is restricted to the period provided by the appropriating act).

Congress intended the funds to dry up. If agencies could extend their purchasing power in this way, it could make it harder for Congress to keep track of and limit agency spending for a given year—thereby weakening a crucial legislative check on executive powers.

While the deobligation rule helps preserve congressional dominance over agency spending, the rule also has significant costs. The rule can cause funds to effectively disappear from ordering agencies' budgets. To illustrate how agencies lose funds because of the deobligation requirement, consider a fact pattern that has arisen in at least a couple of Comptroller General opinions.<sup>239</sup> Agency A hires Agency B to perform a study. Agency A obligates funds to pay for the study from the current fiscal year, FY1. However, Agency B does not perform and complete the study until the next fiscal year, FY2. Agency A has to reimburse Agency B for the study from FY2 funds. The FY1 funds cannot be used because those funds have expired and cannot by law be carried over to the next fiscal year. Those FY1 funds generally cannot be used for any other purpose either, because they have expired and are permanently lost to the agency.

Agencies can try to avoid this loss of funds through scrupulous accounting, but this is not always such an easy task. Even in a specific case in which the ordering agency asked the performing agency to submit “monthly progress reports and statements of costs incurred,” the agency still failed to precisely obligate and deobligate funds over the course of a multi-year Economy Act agreement.<sup>240</sup> The ordering agency lost funds as a result.<sup>241</sup>

In short, the deobligation rule is an arcane but significant source of fiscal pain for ordering agencies.

### 3. The Lower-Cost Rule

Under the Economy Act, an agency is not free to contract with whomever it pleases.<sup>242</sup> Before hiring an agency in the interagency marketplace, an ordering agency must show that it

---

239. See, e.g., Chairman, Comm. on Educ. and Labor, B-223833, 1987 WL 103317 (Comp. Gen. Nov. 5, 1987); Sec'y of the Army, B-134099, 1957 WL 1624 (Comp. Gen. Dec. 13, 1957).

240. Bureau of Alcohol, Tobacco, and Firearm, 58 Comp. Gen. 471, 473 (1979).

241. *Id.* at 475.

242. See 31 U.S.C. § 1535(a)(4) (2006).

cannot receive the same services “as conveniently or cheaply” from a commercial enterprise.<sup>243</sup> That is, the performing agency must be able to provide the services at a lower cost than a private firm could.<sup>244</sup>

The lower-cost rule came about because, when Congress debated the Economy Act, some legislators worried that agencies would begin to rely on interagency services too much and take away public contracts from private firms.<sup>245</sup> One legislator, for example, was specifically concerned that the Army Corps of Engineers would use the Act to hire the Navy Department for maintenance work instead of hiring businesses in his home district.<sup>246</sup>

The lower-cost rule does not create an even playing field between public agencies and private contractors, though. Rather, it is biased in favor of private contractors. If an agency cannot determine that the cost of dealing with another agency is cheaper than the cost of dealing with a private contractor, then the agency cannot enter into the Economy Act transaction.<sup>247</sup> For example, in one case, the Federal Bureau of Prisons hired the Department of Veteran Affairs to provide drug testing services.<sup>248</sup> A private company filed an action in federal court to enjoin the agreement, alleging that “the Bureau had improperly determined that [Veteran Affairs] could provide the services more conveniently or cheaply than a commercial enterprise.”<sup>249</sup> The Bureau ultimately agreed to scrap the interagency agreement and seek bids from private firms.<sup>250</sup>

The lower-cost rule does not apply to every Economy Act transaction, though.<sup>251</sup> It only applies to services that are “lawfully procurable” from private contractors and not to the per-

---

243. *Id.*

244. *Id.*

245. *E.g.*, *Hearings*, *supra* note 120, at 9.

246. *Id.*

247. *See, e.g.*, *Seattle Laundry & Dry Cleaning Inst.*, 37 Comp. Gen. 16, 18 (1957) (explaining that if work can be as conveniently or cheaply performed by private agencies as government agencies, then such contracts must be open to competitive bids from private agencies).

248. *Accu-Lab Med. Testing*, B-270259, 1996 WL 72343 (Comp. Gen. Feb. 20, 1996).

249. *Id.*

250. *See id.* (agreeing with the protesting agency that “there are numerous capable small businesses which can offer the solicited drug testing services at fair market prices”).

251. *Sec’y of the Interior*, 19 Comp. Gen. 941, 943 (1940).

formance of “regular governmental functions.”<sup>252</sup> But contractors can legally provide an array of services, and if a private contractor can provide a service as cheaply as a public agency can, the lower-cost rule dictates that the job go to the private contractor.<sup>253</sup>

#### D. PROCEDURAL CHECKS ON ECONOMY ACT AGREEMENTS

In the previous two Sections, I discussed the Economy Act’s substantive rules governing the interagency marketplace. In this Section, I discuss the legal procedures through which those rules are enforced. I show that procedural shortcomings give ample room for agencies to enter into agreements that may violate substantive Economy Act rules.

Review by the Comptroller General is the most important procedural tool for supervising agreements under the Economy Act.<sup>254</sup> During the drafting of the Economy Act, legislators considered mandating that the Comptroller General screen all proposed Economy Act agreements before they took effect.<sup>255</sup> This idea was rejected primarily because it would significantly delay the services provided under the interagency agreements.<sup>256</sup> Instead, the Comptroller General was charged with reviewing only a portion of agreements made under the Economy Act.<sup>257</sup> In practice, the Comptroller General typically issues opinions before agencies finalize Economy Act agreements only when the agencies themselves request an advisory opinion.<sup>258</sup> The Comptroller General typically reviews interagency agreements only after Congress requests a review.<sup>259</sup> But if neither the agencies themselves nor Congress requests a Comptroller General opinion, then Economy Act agreements are likely to go without scrutiny.

---

252. *Id.*

253. *See* 31 U.S.C. § 1535(a)(4) (2006).

254. *See* John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 350 (1970) (arguing that “Comptroller General decisions are the primary source of guidance on permissible uses of appropriated funds and are considered by many to be the final word on the propriety of questionable payments”).

255. *See Hearings*, *supra* note 120, at 32.

256. *See id.* at 32.

257. *See* 31 U.S.C. § 3529.

258. *See id.* (permitting agencies to request decisions from the Comptroller General regarding particular classes of questions).

259. *Id.* § 712 (authorizing the Comptroller General to investigate the use of public appropriations upon the request of Congress).

Comptroller General review is also available at the request of outside parties.<sup>260</sup> However, this review process is designed to allow private contractors to protest the results of public bids for government contracts.<sup>261</sup> It is not set up to foster review of interagency redelegation or even interagency contracts for the procurement of goods when no public bids were sought, which is almost always the case for Economy Act agreements.

Outside of this spotty Comptroller General review, there are few, if any, procedural checks on agency agreements under the Economy Act. Most importantly, Economy Act agreements are not subject to the procedures established in the Administrative Procedure Act (APA).<sup>262</sup>

The APA provides the most comprehensive procedural rules governing agency behavior.<sup>263</sup> For example, it requires that agencies publish all of their “substantive rules” and “statements of general policy” in the Federal Register, an official daily government publication.<sup>264</sup> For proposed rulemakings, the APA goes further. Section 553 of the APA establishes procedures known as notice-and-comment rulemaking that require agencies to publish proposed rulemakings in the Federal Register, solicit public comments for their proposals, and consider these comments before promulgating a final rule.<sup>265</sup> These notice-and-comment procedures are designed to ensure that agencies’ decisions are transparent and responsive to a diversity of interests.<sup>266</sup> The accountability gains from these notice-and-comment procedures are so great that Cass Sunstein has called Section 553 of the APA arguably “the greatest invention of

---

260. *See id.* §§ 3551–56 (describing the process by which “interested parties” may protest procurement actions and obtain Comptroller General review).

261. *See id.* § 3551(1)(E) (permitting parties to protest the “[c]onversion of a function that is being performed by Federal employees to private sector performance,” but not providing for protests of interagency redelegation).

262. *See* 5 U.S.C. § 551(1) (2006) (defining “agency” for purposes of the APA).

263. *See id.* §§ 551–59 (outlining extensive mechanisms for regulating the actions of administrative agencies).

264. *Id.* § 552(a)(1)(D).

265. *Id.* § 553.

266. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 211 (2006) (noting that along with transparency and responsiveness, notice-and-comment rulemaking also ensures reason-giving). *But see* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61–62 (1985) (describing recent doctrinal innovations in administrative law that have transformed notice-and-comment rulemaking).

modern government.”<sup>267</sup>

However, agreements under the Economy Act are not covered by these most fundamental of administrative procedures.<sup>268</sup> Economy Act agreements do not meet the definition of agency policies and actions that are subject to APA provisions.<sup>269</sup> No other statutes require agencies to publicize their Economy Act agreements.<sup>270</sup> Thus, Economy Act agreements generally remain out of public sight and entirely free from notice-and-comment procedures.

Along with Section 553 of the APA, judicial review has been hailed as one of the greatest procedural checks on agency behavior.<sup>271</sup> It is a bedrock principle of administrative law and our separation-of-powers system that important decisions by executive agencies can be subject to review by an independent federal judiciary.<sup>272</sup> However, judicial review of Economy Act agreements is highly unlikely.

Under justiciability doctrine and Section 702 of the APA,<sup>273</sup> private parties have standing to challenge an agency action in federal court if they can show either: (1) that the agency’s authorizing statute expressly states that a party adversely affected or aggrieved by an action taken under the statute has standing;<sup>274</sup> or (2) that the party has suffered an injury arguably

---

267. Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, N.Y. TIMES MAG., May 13, 2010, at 38, 42.

268. For an argument that the APA imposes too little control on agency action to the detriment of the administrative process, see Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 98 (2003).

269. See 5 U.S.C. § 551(1) (defining “agency” for purposes of the APA); see also § 551(13) (defining “agency action”).

270. But see KATE M. MANUEL & BRIAN T. YEH, CONG. RESEARCH SERV., R 40814, INTERAGENCY CONTRACTING: AN OVERVIEW OF FEDERAL PROCUREMENT AND APPROPRIATIONS LAW (2010) (noting that because of “widely reported incidents of mismanagement” of interagency contracts, Congress has recently enacted new statutes addressing such contacts).

271. See, e.g., Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 537 (1989) (arguing that judicial review prevents arbitrariness, avoids undesirable regulation, and brings about important regulatory controls).

272. See *id.* at 522 (suggesting that “judicial review of administrative action is necessary . . . to ensure that regulatory agencies comply with congressional commands”).

273. 5 U.S.C. § 702.

274. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940).

within the “zone of interests” that the authorizing statute was designed to protect.<sup>275</sup>

The Economy Act does not expressly state that an aggrieved party has standing to challenge Economy Act agreements,<sup>276</sup> and there is no indication that Congress designed the statute to protect any private zone of interests. Thus, the Economy Act appears to fail both tests for creating judicially cognizable rights in private parties. As a result, it is unlikely that a court will allow a party to challenge the validity of an Economy Act agreement, though the issue has not been directly addressed by federal courts.<sup>277</sup>

Overall, Economy Act agreements are sometimes subject to Comptroller General review, never subject to the APA, and unlikely to be subject to judicial review. Agencies may be able to exploit these procedural shortcomings to enter into Economy Act agreements that violate substantive Economy Act law. Indeed, in at least one instance in 2010, agencies entered into an Economy Act agreement that re delegated far more significant decision-making authority than the Comptroller General had previously allowed under its case law.<sup>278</sup> The agreement involves the 2010 health care reform statute, officially known as the Patient Protection and Affordable Care Act.<sup>279</sup> The Act puts

---

275. See *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156–57 (1970) (holding that the APA serves a broadly remedial purpose and that there is “no presumption against judicial review in favor of administrative absolutism”).

276. See 31 U.S.C. § 1535 (2006) (authorizing heads of agencies to place orders within their agencies or other agencies, but not mentioning whether agency heads may challenge agreements made pursuant to the Act).

277. In *FDIC v. Hurwitz*, bank managers filed a claim against the FDIC seeking damages for the agency’s violation of the Economy Act. 384 F. Supp. 2d 1039, 1039–40 (S.D. Tex. 2005). The FDIC responded that, “[n]othing in [the Economy Act] indicates that Congress intended to allow any private party unhappy with a discretionary action by an agency to sue for damages on the ground that the agency expended funds in violation of appropriations and [the bank managers] cite no case authority permitting such actions.” FDIC’s Motion to Dismiss Counterclaim and Memorandum in Support at 26, *Hurwitz*, 384 F. Supp. 2d 1039 (No. 95-3956), 2003 WL 25753868. In response, the managers dropped their Economy Act-based claim and the court never had to decide whether the FDIC was correct that there is no cause of action for violations of the Economy Act. Response to FDIC’s Motion to Dismiss Counterclaim at 2, *Hurwitz*, 384 F. Supp. 2d 1039.

278. See Privacy Act of 1974: New System of Records, 75 Fed. Reg. 179, 56,601 (Sept. 16, 2010) (describing an arrangement in which one agency delegated authority for reviewing insurance coverage claims to another agency).

279. Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of the Internal Revenue Code and 21, 25, 29, 42 U.S.C.).

the Department of Health and Human Services (HHS) in charge of regulating the external appeals process for insurance coverage determinations by private insurers.<sup>280</sup> The Office of Personnel Management (OPM) has long run a similar appeals process for federal employees.<sup>281</sup> To take advantage of OPM's expertise here, HHS re delegated to OPM the "authority to administer the program, using an arrangement under the Economy Act."<sup>282</sup> Under the agreement, OPM is to "[t]rack and report to HHS on the administration of the program"<sup>283</sup>—a provision presumably added to the interagency agreement to help satisfy the Comptroller General's requirement that an ordering agency retain responsibility for the contracted task.

Despite this provision, the agreement appears to violate Economy Act law by re delegating significant decision-making authority. The agreement re delegates the authority to administer regulations that involve important binding decisions, such as whether health insurers' denials of coverage determinations are valid or whether the insurers must pay the patients' health costs, to OPM.<sup>284</sup> The Comptroller General has never allowed the re delegation of such significant decision-making authority before.<sup>285</sup> However, unless the agreement is brought to the attention of the Comptroller General by Congress or the agencies themselves, it will likely go forward.<sup>286</sup>

Because Economy Act agreements are generally not made public, it is difficult to know how many of these agreements may violate Economy Act law. But because of the spotty review procedures under the Economy Act, it is predictable that this HHS-OPM Economy Act agreement is not the only example of agencies pushing the bounds of the legal restrictions on activities in the interagency marketplace in order to achieve efficiencies.

---

280. See 42 U.S.C. § 300gg-19(c) (2006) (delegating external review process authority to the secretary).

281. See Notice: Privacy Act of 1974: New System of Records, 75 Fed. Reg. 56,001, 56,001 (Sept. 16, 2010) (referencing the Federal Employees Health Benefits Program appeal process).

282. *Id.*

283. *Id.* at 56,602.

284. See *id.* (discussing the purpose for the system).

285. See *supra* Part II.B.

286. See *supra* notes 111–14 and accompanying text.

### III. AMENDING THE ECONOMY ACT OF 1932

In Part I, I described the constitutional default rules restricting the interagency marketplace. In Part II, I described the extent to which the Economy Act relaxes these restrictions. In this Part, I argue for amendments to the Economy Act that would further relax these restrictions. Most controversially, I propose amending the Economy Act to allow agencies to redelegate a reasonable amount of authority to other qualified agencies. To prevent the abuse of these new powers, I would subject all proposed redelegations to notice-and-comment procedures and I would grant standing rights to parties aggrieved by redelegations. As for interagency fund transfers, I propose amending the Act so that: (1) performing agencies can profit from the services they provide under the Economy Act; (2) performing agencies can accept nonmonetary forms of consideration in lieu of full reimbursement of their actual costs; and (3) the deobligation and lower-cost rules are replaced or eliminated.

#### A. AMENDING THE ECONOMY ACT TO ALLOW MORE INTERAGENCY REDELEGATION

Current Economy Act case law allows some redelegation, but only for tasks that involve little discretionary decision-making.<sup>287</sup> Loosening this restriction on redelegation would allow agencies to fix a greater share of inefficient jurisdictional arrangements by redelegating authority to the agency best positioned to regulate.<sup>288</sup> However, broader redelegation powers would also pose concerns that executive agencies could somehow abuse their new powers.<sup>289</sup> In this Section, I propose amendments to the Economy Act that would balance efficiency, accountability, and separation of powers concerns by: (1) permitting the redelegation of a reasonable amount of authority to a qualified agency; (2) subjecting all proposed redelegations to notice-and-comment procedures; (3) granting aggrieved parties standing rights in court; and (4) barring the redelegation of authority from independent agencies to non-independent agencies. I first discuss how interagency redelegation can improve governmental efficiencies. I then discuss why broader redelegation powers would raise accountability and separation of powers concerns. I then lay out my proposal for broader

---

287. See *supra* Part II.B.

288. See *infra* Part III.A.1.

289. See *infra* Part III.A.2.

redelegation powers and greater checks on those powers.

### 1. The Likely Efficiency Gains from Broadening Redelegation Powers

Effective regulation requires expertise, experience, and resources. Sometimes, the agency charged with a regulatory task is the wrong agency to regulate because it does not have the best mix of these qualities. It is inefficient when the wrong agency has authority to perform a task because that agency has to waste resources building up the expertise and decision-making infrastructure that another agency already possesses. Or, if the agency fails to build up its expertise and infrastructure, the agency risks making poor policy decisions. Agencies are the institutional actors most likely to know when the wrong agency has authority because they are the most familiar with the regulatory problems and with how their capacities to address those problems compare with other agencies' capacities.<sup>290</sup> If this agency knowledge were complemented with broader redelegation powers, agencies could fix many inefficient jurisdictional arrangements by redelegating authority to the agency best positioned to regulate.

When Congress grants regulatory authority to the wrong agency, it is primarily because of three shortcomings in the legislative drafting process—all of which agencies could correct for through interagency redelegation.

First, the wrong agency—that is, the agency without the best mix of expertise, experience, and resources—may have authority because Congress has delegated in broad, ambiguous terms.<sup>291</sup> Congress often must delegate in broad terms to ensure that agencies have the legal flexibility they need to regulate effectively.<sup>292</sup> Nevertheless, such broad delegations often lead to the wrong agency having authority to perform a task. Implicit in broad delegations is the power to perform a bundle of tasks related to a statutory purpose. In our regulatory system, where agencies' jurisdictions and expertise routinely overlap,<sup>293</sup> it is

---

290. See Marisam, *supra* note 2, at 210–14 (indicating that agencies themselves take limited action to avoid duplication between agency programs).

291. See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006).

292. See Marisam, *supra* note 2, at 191.

293. See generally Marisam, *supra* note 2 (discussing the duplicative delegations incorporated into the United States' regulatory system).

inevitable that some of the tasks in a bundle will touch on the expertise of agencies different from the one Congress has named in the statute. In some instances, different agencies may have such an expertise advantage over the agency named in the statute that it would be better if these different agencies performed the tasks instead.

With broader redelegation powers, agencies could divvy up these bundles of tasks in ways that would bring about more efficient jurisdictional arrangements. For example, Congress has mandated that the Department of Veterans Affairs give preferential treatment to small, veteran-owned businesses when awarding government contracts.<sup>294</sup> Implicit in this mandate is the authority to determine whether a particular business meets the statutory definition of “small.” The Small Business Administration (SBA) has far more experience making these sorts of status determinations than Veterans Affairs does. Indeed, the SBA already has a decision-making process set up to determine whether a business is “small” for the purposes of receiving government money.<sup>295</sup> If Veterans Affairs could redelegate to the SBA its authority to determine whether a particular business is “small,” then the decision-making authority would rest with the more expert decision maker.

Second, the wrong agency may have authority because regulatory conditions have changed in ways that were unforeseeable to the enacting Congress.<sup>296</sup> When legislators draft statutes, they cannot predict how regulatory environments will change.<sup>297</sup> Some of these unforeseeable changes will inevitably affect which agency is best suited to perform a task.

Again, with broader redelegation powers, agencies could correct for these unforeseeable regulatory changes by transferring authority to the agency best positioned to regulate. For example, Congress long ago delegated to the Department of Agri-

---

294. 38 U.S.C. §§ 8127–28 (2006).

295. See *Determining Business Size*, SMALL BUS. ADMIN., <http://www.sba.gov/content/determining-business-size> (last visited Dec. 6, 2011) (outlining the process to determine business size and stating that “all federal agencies must use SBA size standards for contracts identified as small business”).

296. See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 397–98 (2003); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2089–90 (1990); Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword, System Effects and the Constitution*, 123 HARV. L. REV. 4, 19 (2009).

297. See Marisam, *supra* note 2, at 193.

culture authority to regulate plant pests.<sup>298</sup> At the time, genetically modified plants did not exist. Today, however, genetically modified plants make up a substantial percentage of agriculture. These genetically modified plants pose potentially significant environmental risks that were unforeseeable to the enacting Congress because the plants did not exist then.<sup>299</sup> It would be efficient if Agriculture could redelegate some of its authority to regulate plants to an agency with more environmental expertise, such as the EPA.<sup>300</sup> Agriculture could retain the authority relevant to its farming expertise, but redelegate the tasks more relevant to environmental protection—in this way crafting a more efficient jurisdictional arrangement.

Finally, the wrong agency may have authority simply because legislators made a mistake. Legislators draft statutes under time pressure and without perfect information.<sup>301</sup> Under these conditions, mistakes are inevitable. Congress will invariably delegate some task to the wrong agency.

Again, broader redelegation powers would let agencies fix these congressional errors. For example, the Patient Protection and Affordable Care Act of 2010 is an incredibly comprehensive 2400 page statute that Congress drafted in a matter of weeks. It contains hundreds of mandates for agencies.<sup>302</sup> Inevitably, some of those mandates are addressed to the wrong agency, errors that agencies could fix through redelegation. Indeed, the example I discussed earlier, in which HHS redelegated to OPM

---

298. See Federal Plant Pest Act of 1957, 7 U.S.C. §§ 150aa–jj (1958), *repealed by* Pub. L. No. 106-224, tit. IV, § 438(a)(2), 114 Stat. 454 (2000). The Department's plant protection powers are now codified in the Plant Protection Act, 7 U.S.C. §§ 7701–86 (2006).

299. See, e.g., Zachary R. F. Schreiner, Comment, *Frankenfuel: Genetically Modified Corn, Ethanol, and Crop Diversity*, 30 ENERGY L.J. 169, 173 (2009).

300. The EPA has authority to regulate genetically modified plants only if they are designed to resist pests. See 7 U.S.C. § 136. Plants modified for other purposes, such as to improve yield or boost nutrient levels, are outside the EPA's jurisdiction, despite any environmental risks. See Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167, 2221–30 (2004).

301. See Marisam, *supra* note 2, at 191; Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 885 (2007); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 71 (1994); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 134 (2005).

302. Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of the I.R.C. and 21, 25, 29, 42 U.S.C.).

the authority to establish external review processes for health insurers, may be an instance of agencies trying to correct for imperfect delegations in the Act. OPM has far more experience than HHS regulating such health insurance coverage determinations.<sup>303</sup> Thus, it made sense for HHS to redelegate its authority to the more expert OPM.

This example of redelegation between HHS and OPM suggests that agencies may already be reshaping inefficient jurisdictional arrangements through redelegation. However, because of the current legal restrictions on interagency redelegation, it is unlikely that agencies are engaging in an optimal amount of redelegation. Some agencies may hesitate to redelegate significant decision-making authority because of the risk of being overturned by the Comptroller General.<sup>304</sup> Other agencies may avoid redelegating authority because they place a value on abiding by public laws that govern agency behavior, regardless of the risk of being caught. Similarly, some agencies may avoid redelegation because the codified rules against redelegation have cemented an agency norm against redelegation.<sup>305</sup> Ultimately, without a broadening of redelegation powers, agencies are unlikely to engage in an optimal amount of redelegation.

In general, there are many reasons why the wrong agency may have authority to perform a task. Broader redelegation powers would permit agencies to rectify many of these inefficient jurisdictional arrangements. In some instances, agencies may already have pushed beyond the limits that the Comptroller General has placed on redelegation powers. But it would be better if agencies did not have to risk violating substantive public law in order to fix inefficient jurisdictional arrangements.

## 2. The Potential Abuse of Broader Redelegation Powers

Broader redelegation powers would improve governmental efficiencies, but they would also lead to greater concerns about agencies' abuse of those redelegation powers. As discussed below, agencies with broad redelegation powers could make

---

303. See Notice: Privacy Act of 1974: New System of Records, 75 Fed. Reg. 56,601, 56,601 (Sept. 16, 2010).

304. See *supra* Part II.B (discussing situations in which the Comptroller General prohibits or limits interagency redelegation).

305. See generally Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL. STUD. 765 (1998) (generalizing that respect for symbols of government creates social norms to which actors conform).

redelegation decisions that are arbitrary or overly political and that diverge too much from congressional preferences. The current procedural checks on Economy Act agreements are insufficient to guard against these potential misuses of redelegation powers.

Broad redelegation powers would enable an agency to transfer authority to any number of different agencies. It matters which agency is selected to receive a redelegation of regulatory power because different agencies will regulate the same problem differently. Different agencies are responsive to different interest groups and have different internal decision-making processes. For example, the EPA is often assumed to be more responsive to environmental interests when compared to industry-specific agencies such as the Nuclear Regulatory Commission, which are often assumed to be more responsive to the interests of the industries that they regulate. As a result, these different agencies would take different policy approaches to the same regulatory problem.

Ideally, agencies would redelegate authority to the most expert agency. But they could also redelegate authority to an agency for wholly arbitrary or overly political reasons. For example, the president could influence agencies to redelegate authority to another agency because that agency is more responsive to interests friendly to the president. Imagine a president with close ties to oil companies pressuring the EPA to redelegate the authority to set air pollution standards for offshore oil projects to the Department of the Interior, a department with a history of lax enforcement of oil companies.<sup>306</sup> Such a redelegation would be undesirable because it would benefit one particular interest group at the expense of the public good.<sup>307</sup>

From a separation-of-powers perspective, the risk of untoward presidential influence in redelegation decisions would be greatest during times of divided government, when different political parties control the White House and Congress. Imagine a Democratic Congress delegating a task to the Department of Labor only to have a Republican President influence Labor to

---

306. See, e.g., Eric Lipton & John M. Broder, *Regulators' Warnings Weren't Acted On*, N.Y. TIMES, May 8, 2010, at A12.

307. However, under a strong unitary theory of the executive, such redelegations may actually be considered efficient if they allow the president to more easily ensure the regulatory outcomes that he desires. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1995) (arguing that the President should be "able in theory to direct all matters that involve policy discretion").

redelegate that task to the Department of Commerce because Commerce is friendlier to the business interests that donated money to the President. Unless Congress could muster a veto-proof majority, the President would have effectively thwarted an important agency design decision—a decision that, under our constitutional system, should rest primarily with the legislature and not the executive. Such a redelegation would be troubling because of its blatant disregard for congressional preferences about which agency should perform a task.

A redelegation could also raise separation of powers problems if it involved a transfer of authority from an independent agency to a dependent agency. Congress places authority with independent agencies because their policy decisions are supposed to be relatively insulated from presidential influence.<sup>308</sup> If an independent agency redelegated its decision-making authority to a dependent agency with closer ties to the President, then Congress's desire to insulate that decision-making function from presidential control would be thwarted.

Even without presidential involvement, broader redelegation powers could raise problems of democratic legitimacy. Legislators are elected officials who are supposed to be responsive to majority preferences, and our constitutional separation of powers system places with these legislators the primary responsibility for determining agencies' jurisdictional powers. Democratic legitimacy could suffer if unelected agency officials were to alter jurisdictional arrangements through redelegations in ways that departed significantly from the wishes of their principals in Congress, principals who are elected and generally more accountable to the public.

In short, without sufficient procedural checks, agencies could end up redelegating authority for a number of bad reasons. The APA and judicial review procedures are designed to prevent agencies from generally making decisions that are arbitrary, overly political, or depart too significantly from congressional preferences. But Economy Act agreements are not subject to the APA and generally not subject to judicial review. Without these crucial checks, granting agencies broad

---

308. *But see* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 588–91 (arguing that though “independent agencies are often free, at least in a formal sense, of other relationships with the White House that characterize the executive-branch agencies,” the executive branch still influences the actions of independent agencies in ways that are “less direct and generally more subtle”).

---

---

redelegation powers would lead to substantial risks that the executive branch could get away with arbitrary or excessively political redelegations and redelegations that thwart congressional desires.

### 3. Amending the Economy Act to Broaden Redelegation Powers and Check the Potential Abuse of Redelegation Powers

To improve governmental efficiency, I suggest amending the Economy Act to permit the redelegation of a reasonable amount of authority to a qualified agency. To check the potential abuse of these broader redelegation powers, I suggest amending the Economy Act to state that all proposed redelegations under the Act must go through notice-and-comment procedures and that all parties aggrieved by a redelegation have standing to challenge the redelegation in court. To protect congressional interests and preserve the balance of powers among the branches, I propose barring the redelegation of authority from independent to dependent agencies. These amendments would give agencies far freer rein to redelegate authority and thereby fix inefficient jurisdictional arrangements and save money. At the same time, they would subject redelegation proposals to robust procedural checks and constraints that currently do not apply to Economy Act agreements.

#### *a. Allowing Redelegation of a Reasonable Amount of Authority to a Qualified Agency*

Allowing redelegation—but only a reasonable amount and to a qualified agency—would improve efficiencies without unduly altering the balance of powers among the branches of government. My intent in proposing the reasonableness standard is to bar agencies from redelegating their entire duties under comprehensive regulatory schemes that Congress put them in charge of administering. Our constitutional separation-of-powers system gives Congress primary power to determine agencies' powers.<sup>309</sup> And major questions such as which agency should administer a comprehensive regulatory scheme should continue to fall to Congress.

However, the reasonableness standard should generally allow an agency to redelegate some subset of its authority to a qualified agency—that is, an agency with the expertise, experi-

---

309. *See id.*

ence, and resources to handle the task. The balance of powers among the branches is not so threatened when executive agencies use their superior knowledge about regulatory conditions to tweak jurisdictional arrangements in this way.

Comprehensive authorizing statutes are often replete with inefficiencies that could be fixed through reasonable relocations that tweak the jurisdictional bounds among agencies. For example, the Clean Water Act grants the EPA broad authority to regulate emissions into waterways.<sup>310</sup> Implicit in this broad delegation is the authority to regulate an array of pollutants that are expelled into waterways.<sup>311</sup> It should be unreasonable for the EPA to redelegate its entire broad standard-setting and permitting authority under the Clean Water Act to another agency, no matter the agency's qualifications. But it could be reasonable for the EPA to redelegate the far more limited authority to set standards for ships' ballast water discharges to the Coast Guard, an agency that not only has experience with marine habitat protection but also has far more expertise than the EPA when it comes to the anatomy of ships.<sup>312</sup>

Initially, my proposal to expand agencies' redelegation powers may seem radical. We are taught that a prime congressional check on executive power is the legislative ability to limit an agency's powers. By allowing an agency to expand its powers through interagency redelegation, my proposal may seem to subvert this fundamental check.

However, when viewed in light of the history of the Economy Act, my proposal should be seen not as a radical departure from the law but rather as a sensible update that adapts the law to our modern regulatory environment while still keeping with the law's historical purpose. Indeed, the same trends that led to the passage of the Economy Act in 1932 are present again today. Just as it was wise then to respond to these trends by expanding the scope of interagency fund transfers, it is wise today to respond to these trends by expanding the scope of interagency redelegations.

Recall that, in the early twentieth century, the interagency marketplace was almost nonexistent.<sup>313</sup> Only a smattering of statutes enabled a few specific agencies to receive a limited

---

310. See 33 U.S.C. § 1342 (2006).

311. *Id.* § 1342(a).

312. See, e.g., 16 U.S.C. §§ 4701–51 (2006) (delegating to the Coast Guard the authority to regulate invasive species in the Great Lakes).

313. See *supra* Part II.A.

number of services in exchange for an interagency transfer of funds.<sup>314</sup> Two trends pushed Congress to enact legislation that encouraged far more interagency transactions: (1) the emergence of newly complex regulatory problems that meant it was increasingly important for agencies to tap into each other's experience and expertise; and (2) the enormous pressure on Congress to find new governmental efficiencies during the Great Depression.<sup>315</sup> Lifting some of the restrictions on the interagency marketplace made it easier for agencies to rely on each other's expertise and for agencies to save money by hiring more efficient agencies to perform tasks for them.

Similarly, today, only a smattering of agency-specific statutes enables some agencies to redelegate limited authority to other agencies.<sup>316</sup> Two trends compel a general expansion of re delegation authority in the interagency marketplace far beyond this smattering. First, the complexity of the most pressing regulatory problems is far greater than it was just a few decades ago. These complex regulatory problems implicate multiple agencies' expertise. For example, complex climate change issues are of deep concern to the EPA and the Departments of Energy, Transportation, and Agriculture.<sup>317</sup> Moreover, complex financial instruments and transactions are tracked and regulated by several key agencies—the Federal Reserve Board, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and several offices in the Department of the Treasury.<sup>318</sup> Adequately addressing these sorts of complex regulatory problems requires making the most of every agency's expertise and experience. Broader interagency re delegation powers could help agencies craft jurisdictional arrangements that do just that.

The second trend pushing for an expansion of interagency

---

314. See *supra* Part II.A.

315. See *supra* Part II.A.

316. See *supra* notes 156–157.

317. Exemplifying this, an official from each of the listed organizations sits on the Climate Change Science Program Interagency Committee. See *Climate Change Science Program Interagency Committee: Officials of the Climate Change Science Program and Subcommittee on Global Change Research*, U.S. CLIMATE CHANGE SCI. PROGRAM, <http://www.climatechange.gov/about/officials.htm> (last visited Dec. 6, 2011).

318. See generally John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447 (1995) (analyzing the competition between agencies regulating financial markets and the arguments for both competition and consolidation).

redelegation is the immense pressure on Congress to find governmental savings.<sup>319</sup> While Congress often purports to be interested in keeping down wasteful spending, today there is more pressure on Congress to save money than in any other time since the Great Depression, when the Economy Act was passed.<sup>320</sup> Given this pressure, Congress is looking to cut spending in most areas of the government.<sup>321</sup> The interagency marketplace is one area that is ripe for new efficiencies. Amending the Economy Act to allow for broader redelegation powers would save money by freeing agencies to shift tasks to agencies that can perform those tasks at lower costs.

Aside from having a historical parallel in the creation of the Economy Act, my proposal also has statutory parallels. I crafted the proposal by looking to the handful of existing statutes that already authorize interagency redelegation. The proposed language limiting redelegations to a reasonable amount of authority has precedent in a statute that authorizes the Department of Housing and Urban Development to redelegate to the Department of Agriculture “a reasonable portion of the total authority to contract to make assistance payments” to lower-income home owners.<sup>322</sup> Moreover, the proposed language limiting redelegations to only qualified agencies has precedent in several statutes that allow redelegation only to agencies with clearly relevant expertise. For example, one statute permits the Secretary of Labor to redelegate the authority to investigate certain banking functions “to the appropriate federal banking agency.”<sup>323</sup> In short, my proposal for broadening redelegation powers hews closely to established statutory language.

Overall, my proposed amendment to allow agencies to redelegate a reasonable amount of their authority to other qualified agencies would improve governmental efficiencies, and it would do so by building on the history of the Economy Act and the language of other statutes that currently govern the interagency marketplace.

---

319. *See supra* Part II.A.

320. *Cf.* H.R. REP. NO. 72-1126, at 1 (“[W]e are now confronted with industrial stagnation, unemployment, a period of low commodity prices, and swindling, if not disappearing, national income.”).

321. *See* Jennifer Steinhauer, *House Members Offer Hundreds of Budget-Cutting Amendments*, N.Y. TIMES: THE CAUCUS (Feb. 15, 2011, 5:35 PM), <http://thecaucus.blogs.nytimes.com/2011/02/15/house-members-offer-hundreds-of-budget-cutting-amendments>.

322. 12 U.S.C. § 1715z(k) (2006).

323. 29 U.S.C. § 1134(c) (2006).

*b. Subjecting Agencies' Redelelegation Decisions to Notice-and-Comment Procedures and Judicial Review*

The new powers that I propose should not go unchecked. To guard against the risk that agencies will abuse their redelegation powers, I propose amending the Economy Act so that all agreements involving redelegations are subjected to notice-and-comment procedures. I would also amend the Act to grant standing rights to parties aggrieved by redelegations made under the Act.

Subjecting proposed redelegations of authority under Economy Act agreements to notice-and-comment procedures would bring transparency to what are now generally opaque Economy Act instruments. By forcing agencies to publish and consider comments on proposed redelegations, regulated entities and public interest groups would be able to monitor agencies and push back on undesirable redelegations.<sup>324</sup> For example, regulated entities accustomed to dealing with a particular agency could submit comments pushing the agency to reconsider redelegating authority to a new agency that has little experience dealing with the industry, and public interest groups could submit comments pushing the agency to reconsider redelegations that appear biased in favor of private industries.

Judicial review procedures would also serve as a crucial check on redelegation powers. Under my amendment, a new provision in the Act would grant standing to parties "adversely affected or aggrieved" by redelegations. Congress often uses this language when it wants to confer standing rights on private parties.<sup>325</sup> Courts have construed this phrase to give standing to regulated entities challenging agency actions affecting them,<sup>326</sup> and to interest groups whose members are or would be injured by agency actions.<sup>327</sup>

For interagency redelegations, regulated entities could challenge an agency's proposal to redelegate the authority to enact policies covering those entities. For example, if the EPA

---

324. Cf. Marisam, *supra* note 2, at 200–01 (stating that current notice-and-comment requirements for administrative rules allow "regulated entities and other interests" to point out duplicative delegations and comment on additional burdens that will be imposed on them).

325. See, e.g., 47 U.S.C. § 402(b)(6) (2006).

326. See, e.g., *Ass'n of Data Processing Orgs. v. Camp*, 397 U.S. 150, 153–54, 157 (1970).

327. See, e.g., *Nat'l Coal. to Ban Handguns v. Bureau of Alcohol, Tobacco & Firearms*, 715 F.2d 632, 633–34 (D.C. Cir. 1983).

were to redelegate to Interior the authority to regulate air emissions from oil projects, then oil companies could challenge the redelegation in court. Some public interest groups could also have standing to challenge the redelegation of authority if their members were somehow harmed by the redelegation. For example, if the EPA redelegated the authority to set air emissions standards for oil projects to Interior, and Interior then loosened the EPA's existing standards, a coalition of residents harmed by the increase in pollution from the looser standards could challenge the underlying interagency redelegation.<sup>328</sup>

Once parties established they had standing, judicial review of an Economy Act redelegation would be determined based on the same APA standard that applies to all agency actions: whether an agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>329</sup> Under this standard, courts evaluate the agency's explanation and evidence for its decision. The reviewing court takes a "searching and careful" review into "whether [the agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>330</sup>

For redelegation actions to survive judicial review, an agency would have to demonstrate that it had taken a "hard look" at the reasonableness of the amount of authority redelegated and the qualifications of the agency that received the redelegated authority.<sup>331</sup> Unreasonable redelegations of the sort that I discussed in the prior subsection should have trouble surviving judicial review under this standard.

Overtly political redelegations would also have trouble surviving judicial review. Courts have proved willing to strike down agency decisions that are excessively influenced by politics. The leading case in this regard is *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Insurance Co.*,<sup>332</sup> in which the Supreme Court invalidated the Department of Transporta-

---

328. *Cf. Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118–19 (9th Cir. 2005) (illustrating a somewhat analogous situation, in which the EPA disagreed with an environmental assessment and permit issuance by the Army Corps of Engineers (Corps), and a group of negatively affected citizens sued top-ranking Corps officials).

329. 5 U.S.C. § 706(2)(A) (2006).

330. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

331. See Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Review*, 58 ADMIN. L. REV. 753, 757–61 (2006).

332. 463 U.S. 29 (1983).

tion's repeal of the passive restraint rule for seat belts, presumably because the repeal was improperly swayed by a new presidential administration.<sup>333</sup> Applied to redelegation cases, this sort of decision would safeguard against the risk that presidents would influence which agency performed a task not for efficiency reasons but for political reasons. For example, judicial review could prevent a president from pressuring an agency to redelegate authority to a different agency that is more responsive to interest groups with close ties to the president.

Along with the judiciary, the legislature would exert substantial influence over redelegation decisions too. Congress depends on interest groups to alert it when agencies make bad decisions.<sup>334</sup> With the APA's notice-and-comment procedures in effect, interest groups would be aware of proposed redelegations and could alert Congress to any undesirable redelegations. Congress could then pressure agency officials in public hearings or behind closed doors to reverse redelegations.<sup>335</sup> More definitively, Congress could amend an agency's authorizing statute to strip the agency of the power to redelegate particular functions.<sup>336</sup> Indeed, the mere threat of eviscerating an agency's redelegation powers would stop a reasonable agency from redelegating authority in a way that Congress did not want.<sup>337</sup>

Most of the time, though, Congress would not need to act to ensure that agencies' redelegations aligned with congressional preferences because Economy Act negotiations over redelegations would:

all take place in the shadow of congressional oversight. Agency officials would know that if powerful legislators disagreed with the agencies' decisions—and cared enough about the jurisdictional arrangement for the regulatory problem at hand—the legislators would reverse the bureaucrats. Thus, executive agencies would likely consider congressional preferences when entering into redelegation agreements in the first place.<sup>338</sup>

Ultimately, the procedural checks that I propose would

---

333. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54, 88.

334. David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227, 228 (1995).

335. See Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121–22 (2006).

336. *Id.* at 134.

337. *Id.* at 68.

338. Marisam, *supra* note 2, at 239–40.

help screen out improper redelegations, but they would also undeniably lead to regulatory delay. A long line of literature has examined how procedural constraints on agency decision-making can slow down the regulatory process.<sup>339</sup> By proposing that agency redelegations go through notice-and-comment rulemaking and face potential court challenges, I would create layers of bureaucracy that would delay agencies' attempts to redelegate authority, even if those redelegations were desirable.

However, the tradeoff between accountability and regulatory delay is necessary here. With broader powers comes a greater risk of abuse of those powers, and thus a greater need to check those powers. Regulatory delay is a fair price to pay to ensure there is no abuse of redelegation powers.

Moreover, the concern about regulatory delay is mitigated somewhat by the fact that I would not subject to additional procedures run of the mill Economy Act agreements that do not involve redelegations. Because these agreements do not involve the alteration of agencies' jurisdictional boundaries, they do not raise the same concerns. For example, an agency's decision to redelegate regulatory powers to another agency may violate congressional wishes about which agency should regulate, but there is no such concern when an ordering agency hires a performing agency to complete a task that the performing agency already has the authority to perform on its own. Also, I would exempt interagency personnel details from the additional procedures. These agreements, which agencies have been entering into without much ado for well over a century, would continue to operate under the relatively light existing procedures.

In short, if agencies are granted the broader redelegation powers that I propose, then it is important to check these powers with notice-and-comment and judicial review procedures.

*c. Limiting Redelegation from Independent Agencies to Non-Independent Agencies*

To protect legislative interests, I would bar the redelegation of authority from independent agencies to dependent agencies. Currently, the Economy Act does not distinguish

---

339. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rule-making Process*, 41 DUKE L.J. 1385, 1387 (1992); see also Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 70 (2000) (noting that comment responses "required considerable agency staff time, slowed the pace of rulemaking, and produced unnecessary conflict").

between the different types of agencies operating in the inter-agency marketplace. Cabinet departments run by officials who serve at the pleasure of the President are treated the same as independent agencies run by officials that the president can only remove for cause. There is nothing stopping an independent agency from hiring a cabinet department to perform a task for it. An agreement between an independent agency and a cabinet department is not problematic if the tasks at hand are rote or mundane. But from a separation of powers perspective, it may be problematic if an independent agency redelegates significant decision-making authority to a cabinet department. Congress purposefully places authority in independent agencies to keep power away from presidential influence.<sup>340</sup> Sending power from an independent agency to a cabinet department with close ties to the President would undermine that congressional intent. Thus, to preserve Congress's power to insulate decision-making from the President, the Economy Act should bar the redelegation of authority from independent agencies to cabinet departments or other dependent agencies.

The same separation-of-powers problem is not present for agreements that run the other way, though. If a cabinet department chooses to relinquish authority to an independent agency, Congress's interests are not at risk in the same way. Congress on occasion may be displeased with these sorts of redelegations if it had chosen to place the authority within a cabinet department because it wanted to subject that authority to greater political influences. But overall, because Congress generally has more influence over independent agencies than it does over cabinet departments,<sup>341</sup> Congress will be less concerned with redelegations from cabinet departments to independent agencies. Thus, such redelegations should be allowed.

Redelegation from one independent agency to another independent agency presents a trickier problem, though. Independent agencies are quite diverse in structure and the degree to which they are insulated from presidential influence.<sup>342</sup> Thus,

---

340. See generally Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 *CARDOZO L. REV.* 273 (1993) (proving an "alternative paradigm" of analyzing agency power); Paul R. Verkuil, *The Purpose and Limits of Independent Agencies*, 1988 *DUKE L.J.* 257 (analyzing why independent agencies are better suited to run government programs assuming their structure is analyzed from a functional standpoint).

341. James C. Miller III, *A Reflection on the Independence of Independent Agencies*, 1988 *DUKE L.J.* 297, 298-99.

342. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The*

it is difficult to generalize about whether independent agency to independent agency redelegations threatens congressional interests. Perhaps the best rule here would presumptively allow such transfers, but to count on courts to look more closely at any redelegations that involve independent agencies.

Overall, interagency redelegation, when exercised with the proper constraints, can improve governmental efficiency without unduly harming accountability and the balance of powers among the branches of government. I propose balancing efficiency, accountability, and separation of powers concerns by amending the Economy Act to: (1) permit the redelegation of a reasonable amount of authority to a qualified agency; (2) subject all proposed redelegations to notice-and-comment procedures; (3) grant aggrieved parties standing rights in court; and (4) bar the redelegation of authority from independent agencies to dependent agencies.

#### B. AMENDING THE RULES FOR INTERAGENCY FUND TRANSFERS

In the previous Section, I discussed several rules in the Economy Act that constrain interagency fund transfers. In this Section, I argue for amending the Economy Act to relax each of these constraints. Most importantly, I propose eliminating the actual cost rule so that performing agencies can profit from the services they provide under Economy Act agreements and accept nonmonetary consideration in lieu of full reimbursement of their actual costs. I also propose replacing the deobligation requirement with looser contractual specificity and timing requirements, and altering the lower-cost rule to give agencies discretion to choose between an agency or a private contractor when the cost of hiring either one is equal.

##### 1. Eliminating the Actual Cost Rule to Allow Profits for Performing Agencies

The Economy Act's actual cost rule prevents performing agencies from billing ordering agencies for more than the actual cost of their services.<sup>343</sup> While the prospect of public agencies reaping profits by offering services in the interagency marketplace may seem distasteful, the prohibition on profits should be discarded because it is unsound in theory and costly in practice.

---

*Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1113 (2000) (noting agencies are free "of the political will exemplified by the executive branch").

343. See *supra* Part II.C.1.

The actual cost rule is supposed to prevent agencies from augmenting their appropriations beyond the amount set by Congress.<sup>344</sup> Congress's power to control agency spending is one of the most important legislative checks on the executive branch.<sup>345</sup> Allowing agencies to augment their budgets through Economy Act agreements weakens Congress's ability to control agencies by tracking and limiting how much money agencies have available to spend.<sup>346</sup>

However, the problem with the actual cost rule is that it does not actually prevent agencies from augmenting their budgets through Economy Act agreements. The rule does prevent performing agencies from augmenting their budgets by profiting from their interagency services. However, the rule not only permits ordering agencies to augment their budgets beyond the amount appropriated by Congress, it actually forces them to do so.

Basic economic principles show how the actual cost rule leads to this perverse result. Under economic theory, trade between two parties generates efficiency gains that the parties must decide how to divvy up between themselves.<sup>347</sup> Economy Act agreements are similar in principle. Efficiency gains are generated when an ordering agency hires a performing agency to perform a task for less money than it would cost the ordering agency to do the job itself.<sup>348</sup> However, unlike private trading partners, the public agencies have no freedom to decide how to divvy up the efficiency gains. By prohibiting the performing agency from accepting any amount of money in excess of its actual costs, the actual cost rule forces all gains to go to the ordering agency.

To illustrate how the actual cost rule in effect shifts all efficiency gains to the ordering agency, imagine the following hypothetical.<sup>349</sup> It would cost the EPA \$500 to oversee the cleanup of a hazardous waste site. However, the Department of the Interior can do the job for only \$400. The EPA hires Interior to

---

344. *See supra* Part II.C.1.

345. *See supra* Part II.C.1.

346. *See supra* Part II.C.1.

347. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *MACROECONOMICS* 390–93 (16th ed. 1998).

348. *See supra* Part II.C.1.

349. This hypothetical is not far-fetched. The EPA from time to time hires Interior to oversee the cleanup of hazardous waste sites. *See generally* *United States v. Chromalloy Am. Corp.*, 158 F.3d 345 (5th Cir. 1998) (outlining such a situation).

perform the oversight duties under an Economy Act agreement. This agreement generates a net gain of \$100—the difference between how much it would cost the EPA to perform the oversight task and how much it actually cost Interior. How do the agencies divvy up this \$100 gain? They don't. The actual cost rule prevents them from doing so. Because Interior cannot charge anything more than the \$400 it spent performing the task, the EPA receives the full benefit. That is, the EPA gets to keep the \$100 it saves from not having to perform the task itself. It does not need to negotiate with Interior about how to divide up those savings, like private parties involved in a transaction would. As a result, the EPA's budget is in effect augmented by \$100, even though Congress did not directly give this money to the EPA. This illustrates that the actual cost rule does not meet its goal of preventing agencies from augmenting their budgets beyond the amount appropriated by Congress.

One response to my point here is that, while an ordering agency may save money by hiring a more efficient agency to do work for it, these savings are not the equivalent of a budgetary augmentation because no new money is actually delivered to the ordering agency. That is, budgetary augmentation can only occur when an agency receives money, not when it saves money by receiving services.

The problem with this response is that the distinction between receiving money and saving money by receiving services has no practical effect. Whether an agency saves money by hiring a more efficient agency in the interagency marketplace or whether an agency earns the money in the interagency marketplace, the effect on the agency's budget is the same: the agency has extra money to spend on something else.

The definitive treatise on appropriations law agrees that there is no practical distinction between budgetary augmentation from receiving money and budgetary augmentation from saving money by receiving services.<sup>350</sup> The treatise explains: "Certainly, if I wash your car without charge or if I give you money to have it washed, the result is the same—the car gets washed and your own money is free to be used for something else."<sup>351</sup>

Even Economy Act jurisprudence claims to adhere to the principle that there is no distinction between money received

---

350. See REDBOOK, *supra* note 9, at 6-165.

351. *Id.*

directly and money saved. Economy Act case law has established that an ordering agency improperly augments its budget when it pays the performing agency less than its full costs.<sup>352</sup> Underpayments are said to augment the ordering agency's budget by "free[ing] its funds for other work."<sup>353</sup> This freeing of funds occurs because the ordering agency has saved money by receiving services it did not pay for.<sup>354</sup> Thus, in principle, the Economy Act case law claims to recognize that an agency can augment its budget by receiving services without receiving money directly.

The problem with this case law is that it operates under the fallacy that, if ordering agencies pay performing agencies' full costs, ordering agencies have not freed their funds for other work. But this reasoning is wrong if we reasonably assume that ordering agencies generally hire performing agencies for tasks that the performing agencies can complete more efficiently than the ordering agencies can. If an ordering agency pays a performing agency its full costs, then the ordering agency saves money because it avoids having to use additional resources to do the job itself. An ordering agency can save some more money by paying the performing agency less than its full costs. But either way, the ordering agency saves money. The difference is only in degree not kind.

To illustrate this point, return to the example in which it would cost the EPA \$500 to oversee cleanup of a hazardous chemical site but the EPA saves money by hiring Interior officials. It costs Interior officials \$400 to do the job. If the EPA pays the officials the full cost of \$400, then the EPA saves \$100. If the EPA underpays Interior officials, giving them only \$300, then it saves \$200. Under current law, the EPA violates the Economy Act and is said to improperly augment its budget if it gives Interior officials only \$300 but not if it gives them \$400. But what is the difference? Sure, there is a difference in degree—\$200 in savings compared to \$100 in savings. But in both cases, the EPA saves money and thus frees up funds for other work. If freeing up funds for other work without congressional authorization is the standard by which one measures improper budgetary augmentation—as the Economy Act jurisprudence claims that it is—then in both cases, the EPA has improperly augmented its budget.

---

352. *See id.* at 12-38 (citation omitted).

353. 57 Comp. Gen. 674, 681 n.1 (1978).

354. *Id.*

There is only one foolproof way to ensure that neither the performing agency nor the ordering agency frees up funds under Economy Act agreements, if that is what Congress really wants: mandate that ordering agencies restore to the United States Treasury any savings that they generate through Economy Act agreements. If the EPA were to save \$100 by hiring Interior officials to oversee cleanup of a site, then it would have to deposit \$100 in the Treasury, thus forgoing any share of the gains generated by the interagency agreement.

The problem with this approach is that it would undermine the very purpose of the Economy Act. By stripping ordering agencies of the ability to realize any share of the efficiency gains generated by Economy Act agreements, these agencies would have no financial incentive to seek out such agreements in the first place. Agencies would surely hesitate to jump through all the administrative and accounting hoops set up by the Economy Act only to have all of the efficiency gains from the transaction snatched away. The net result would be fewer Economy Act agreements and thus fewer net efficiency gains from such agreements. Thus, if Congress truly wants to prevent agencies from augmenting their budgets under Economy Act agreements, then it would have to draft an amendment to the Economy Act that would devastate the very interagency practices that the statute was enacted to promote in the first place.

Ultimately, a commitment to a robust market for interagency services requires allowing some budgetary augmentation. Once this is understood, the question becomes whether there is any reason to maintain the current rule that allows agencies to augment their budgets by saving money after they obtain services from a more efficient agency but not by receiving profits after they provide services for other agencies. As I just discussed, there is no principled reason to distinguish between receiving money and receiving services in this way. The damage to congressional control of an agency's budget is the same in both cases because in both cases the agency frees up funds to spend elsewhere. In short, the Economy Act's ban on profits in the interagency marketplace is theoretically unsound.

The ban is also practically unsound. Because the actual cost rule prevents agencies from boosting their budgets by providing interagency services, budget-minded agency officials have no financial motivation to take the time to negotiate and finalize interagency agreements for their services. They may have other motivations to enter into these agreements—for ex-

ample, they may care about overall government efficiency or they may want to build and maintain cooperative relationships with other government agencies.<sup>355</sup> But without the potential to earn profits, a key financial motivation for agencies to offer interagency services is missing.

Abandoning the Economy Act's ban on profits would, for the first time, create financial incentives for performing agencies to offer their services under the Economy Act. These monetary incentives should entice more performing agencies to enter into and possibly seek out Economy Act agreements—a good outcome if one assumes that performing agencies are usually hired because they are more efficient than ordering agencies. Of course, with potential profits on the table, ordering agencies and performing agencies would have to negotiate the performing agency's price instead of having that price set by the actual cost rule. But as sophisticated, repeat players in the interagency marketplace, there is no reason to think that agencies would have difficulty settling on reasonably efficient ways to divide the gains generated by Economy Act agreements.

In the end, the current ban on profits in the interagency marketplace is theoretically unsound. The Economy Act should be amended to allow performing agencies to realize some share of the efficiency gains generated under Economy Act agreements.

## 2. Eliminating the Actual Cost Rule to Permit Nonmonetary Consideration

Aside from barring profits, the actual cost rule also prevents ordering agencies from offering nonmonetary consideration in lieu of some or all of the performing agencies' actual costs.<sup>356</sup> I suggest eliminating this restriction on nonmonetary consideration. Removing this restriction could generate an increase in efficient Economy Act agreements.

Agencies are not purely or even primarily motivated by larger budgets.<sup>357</sup> Agencies have many desires that have little

---

355. See Marisam, *supra* note 2, at 211.

356. See *supra* Part II.B.1.

357. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–33 (2005); see also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 382–84 (2000) (attempting to analyze the motives of bureaucrats if allowed total control of their own budgets).

or nothing to do with money.<sup>358</sup> Because of these nonmonetary motivations, agencies may be willing to perform tasks for nonmonetary consideration. For example, a performing agency may want to perform tasks in exchange for a promise that the ordering agency refrain from activities that interfere or conflict with the performing agency's regulatory functions.<sup>359</sup> Or a performing agency may want to perform tasks in exchange for a promise that the ordering agency will consult with the performing agency before making decisions relevant to the task at hand.

By prohibiting these sorts of arrangements, the actual cost rule effectively scuttles what could be efficient interagency agreements. Indeed, eliminating the restriction on nonmonetary consideration could lead to more Economy Act agreements that benefit both agencies and the public. To illustrate, imagine a scenario in which the Mine Safety and Health Administration (MSHA) is preparing to issue rules for miners' exposure to asbestos.<sup>360</sup> The EPA, knowing MSHA lacks its expertise studying and regulating chemicals like asbestos, offers to help study the problem of miners' exposure to asbestos. However, MSHA is not prepared to pay for the EPA's services. Instead, the agencies agree that the EPA will perform the study and MSHA will promise to use the study to draft regulations that are coordinated with the EPA's general regulations on asbestos emissions under the Clean Air Act.<sup>361</sup> Ultimately, the EPA benefits from MSHA's interagency coordination efforts, MSHA benefits from the EPA's expertise, and the public benefits from smarter and better coordinated regulations. More benefits could also accrue later if the agreement improved cooperation among the agencies down the road.

Abandoning the restriction on nonmonetary consideration would prove particularly beneficial if agencies were granted the broader redelegation powers that I argued for earlier. If the restrictions on redelegation and nonmonetary consideration were relaxed, it would further free agencies to enter into agreements that do not involve the exchange of money but are nevertheless efficient. Imagine a hypothetical agreement involving the Fed-

---

358. See Marisam, *supra* note 2, at 211.

359. Agencies often care about protecting their turf from interagency interference. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 179–95 (1989).

360. MSHA has this authority under the Mine Safety and Health Act. 30 U.S.C. §§ 801–965 (2006).

361. See 42 U.S.C. §§ 7401–7671 (2006).

eral Energy Regulatory Commission (FERC) and the Department of the Interior. FERC has the authority to regulate and license hydropower projects in federal oceans.<sup>362</sup> The Department of the Interior has the authority to lease federal ocean space for hydropower projects.<sup>363</sup> The two agencies enter into an Economy Act agreement under which Interior redelegates its hydropower leasing authority to FERC. Interior benefits by having FERC perform the leasing function. FERC benefits because, by coupling the leasing function with its licensing function, FERC can avoid the bureaucratic hassle that comes from having to coordinate its process for approving hydropower projects with Interior's approval process. Agencies should be allowed to enter into these sorts of arrangements in which each agency benefits but no money is exchanged.

Ultimately, performing agencies will sometimes be perfectly happy to receive as consideration something other than money. The Economy Act should be amended to let performing agencies accept some nonmonetary benefits instead of full reimbursement of their costs.

Agencies could make troubling promises under these sorts of arrangements, though. The primary risk here is that an ordering agency, instead of promising to pay the performing agency money, could promise to act in legally objectionable ways. For example, an ordering agency's promise not to interfere with a performing agency's operations could run afoul of the law if it meant that the ordering agency avoided taking regulatory actions that it was statutorily required to take. However, the benefits from allowing nonmonetary consideration should outweigh this risk, particularly given that courts can weed out some of the problematic nonmonetary promises under existing APA provisions that allow for judicial review of agency inaction.<sup>364</sup>

Ultimately, when my proposal to eliminate the restriction on nonmonetary consideration is combined with the proposal to eliminate the actual cost rule's ban on profits, there is nothing

---

362. 16 U.S.C. § 817 (2006) (granting the Commission the power to review construction proposals over streams).

363. See 43 U.S.C. §§ 1331–56 (2006).

364. See 5 U.S.C. § 706(1) (2006) (giving courts permission to “compel agency action unlawfully withheld or unreasonably delayed”); see also Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62 (2008) (showing “no fundamental difference between judicial review of agency inaction or action under the APA”).

left of the actual cost rule. My proposals would let performing agencies receive both more and less than their actual costs. Taken together, my proposals would eliminate the actual cost rule entirely.

### 3. The Deobligation Rule

The deobligation rule requires agencies to pay performing agencies with funds available for the fiscal year in which the services were provided.<sup>365</sup> As a result, ordering agencies sometimes lose the ability to spend funds that they had obligated to pay performing agencies because those funds expired when the performing agency's actions unexpectedly stretched into a new fiscal year. The purpose of the deobligation rule is to prevent agencies from extending the life of their appropriations beyond the time limit set by Congress. The deobligation rule ensures that agencies cannot subvert congressional control of agency spending by using funds to purchase services after the funds have expired. But there are better ways to protect congressional control of agency spending without deterring efficient agency exchanges. I advocate replacing the deobligation requirement with a two-part test that screens interagency agreements for contractual specificity and requires performing agencies to fulfill their duties within a reasonable amount of time.

The deobligation rule is not necessary to prevent agencies from extending the life of their funds. Other statutes that enable agencies to transfer funds are exempt from the deobligation requirement.<sup>366</sup> These statutes are far less comprehensive than the Economy Act. They generally authorize only one specific agency to receive a limited set of services from other agencies. Nevertheless, agencies tend to prefer to use these non-Economy Act statutes whenever they can for the plain reason that transactions under these statutes are not subject to the deobligation requirement. Indeed, agencies routinely ask for opinions from the Comptroller General on whether interagency services can be provided under non-Economy Act statutes instead of the Economy Act so as to avoid the deobligation requirement.<sup>367</sup>

---

365. See *supra* Part II.C.2.

366. See, e.g., 10 U.S.C. § 2687 (2006) (authorizing the Secretary of Defense to reimburse other federal agencies for assistance in closing military bases); 42 U.S.C. § 301 (authorizing the Secretary of Health and Human Services to contract with other agencies for medical research).

367. See, e.g., Dep't of Hous. & Urban Dev., B-167790, 1977 WL 12105 (Comp. Gen. Sept. 22, 1977); Admin. Office of the U.S. Courts, 55 Comp. Gen. 1497 (1976).

Without the deobligation requirement, how do these non-Economy Act statutes stop agencies from abusing their spending powers by extending the life of their appropriations? They do so in two ways. First, the Comptroller General requires that the interagency agreements are “sufficiently specific and devinitive [sic] to show the purposes and scope of the contract finally to be executed.”<sup>368</sup> Second, the Comptroller General does not allow performing agencies to deliver services at any future time. They have only a “reasonable period of time.”<sup>369</sup> For example, in one case, the Chemical Safety and Hazard Investigation Board had hired the General Services Administration to provide the Board’s officials with identification cards.<sup>370</sup> However, the Comptroller General invalidated the contract because it “does not specify a period of performance for the agreement or for the services and does not specify the price for products and services to be provided under the agreement.”<sup>371</sup>

Taken together, the specificity and time requirements prevent agencies from improperly extending the life of their appropriations without the harsh consequences of the deobligation rule. By requiring sufficient specificity of the services requested, an agency cannot obligate funds for some vague anticipated need. It must be able to state precisely what it requires at the time it enters into the contract. Even if an agency can anticipate its future needs with specificity, the performing agency only has a “reasonable time” to fulfill its side of the bargain. The net effect is that an agency cannot avoid congressional time limits on spending merely by setting aside funds for future use.

At the same time, the rules give agencies some wiggle room to enter into interagency contracts without fear of losing their funds the minute a fiscal year expires. Imagine a scenario in which it is twenty days before the end the fiscal year. An ordering agency has a need for a specific service. It hires a performing agency to provide that service and obligates funds to pay the performing agency. It turns out that it takes the performing agency thirty days to provide the service, meaning that the per-

---

368. Adm’r Veterans Admin., B-127518 (Comp. Gen. May 10, 1956), *available at* <http://redbook.gao.gov/7/f10033226.php>.

369. Dep’t of Def., B-308944, 2007 WL 2120292, (Comp. Gen. July 17, 2007).

370. Gen. Serv. Admin., B-318425, 2009 WL 5184705 (Comp. Gen. Dec. 8, 2009).

371. *Id.*

forming agency's duties under the interagency agreement were fulfilled ten days into a new fiscal year. Under the deobligation rule, the ordering agency would lose access to the obligated funds because those funds would have expired with the passing of the fiscal year. The agency would have to pay the performing agency using funds available for the new fiscal year. By contrast, under the specificity and time requirements that I propose, the ordering agency could still pay using the originally obligated funds because the ordering agency had a specific need at the time the interagency agreement was made and the performing agency provided that need within a month, which is surely a reasonable amount of time to provide almost any interagency service.

Ultimately, Congress should amend the Economy Act to replace the deobligation rule with the specificity and time requirements that I propose. These requirements can protect congressional control of agency spending while still allowing agencies some leeway when it comes to obligating funds for interagency services.

#### 4. Amending the Lower-cost rule

The lower-cost rule prevents agencies from obtaining services in the interagency marketplace when a private firm can do the job at the same or lower cost.<sup>372</sup> I argue that the lower-cost rule is needlessly biased in favor of private contractors, and it should be replaced by a rule that gives the ordering agency discretion to choose between another agency or a private contractor when both can provide the needed service at the same cost.

The lower-cost rule properly bars an ordering agency from using another agency when a private contractor would be cheaper. After all, the Economy Act is supposed to save the government money, not cost it more. But if the work estimates from the agency and private contractor are the same, why force the agency to pick the private party? The agency may prefer to pick another agency for many perfectly justifiable reasons. For example, the agency may have a good working relationship and a history of valuable cooperation with the other agency. Or the agency may have recently received high quality services from the other agency in the past.

Ordering agencies should have discretion to make contrac-

---

372. See *supra* Part II.C.3.

tual decisions based on these sound factors, so long as the private contractor and public agency can do the job for the same costs.

Amending the lower-cost rule need not be a high priority, though. In practice, the rule probably does very little to bias orders in favor of private contractors because ordering agencies have leeway to find ways to hire another agency instead of a private contractor if they so choose. Ordering agencies must make the lower cost determination on their own.<sup>373</sup> They do not need to request bids from private contractors and other agencies and then compare the bids.<sup>374</sup> If an ordering agency's internal "determination and findings" estimate that another agency could do the job more cheaply than a private contractor or that the private contractor cannot provide exactly what the agency needs, the ordering agency can then hire the agency instead of the contractor.<sup>375</sup>

If the ordering agency wants to contract with another agency instead of a private contractor, it is not too difficult to make that happen. Nevertheless, if Congress decides to amend the Economy Act generally, it would be easy for it to also fix the lower-cost rule by allowing agencies discretion to choose other agencies when the cost of doing so would be no different than the cost of hiring a private firm.

### CONCLUSION

During the Great Depression, Congress and the White House sought ways to make government more efficient.<sup>376</sup> As part of this effort, Congress passed the Economy Act of 1932 to invigorate the interagency marketplace and improve governmental efficiencies.<sup>377</sup> Congress and the White House are more serious about improving governmental efficiencies today than at any other time since then.<sup>378</sup> They are looking to save money in nearly all areas of agency spending.<sup>379</sup> Once again, Congress and the White House should look to improve the efficiency of

---

373. Seattle Laundry & Dry Cleaning Inst., 37 Comp. Gen. 16 (1957).

374. *Id.*

375. *See supra* Part II.C.3.

376. *See supra* Part II.

377. *See supra* Part II.

378. H.R. REP. NO. 72-1126, at 1 ("[W]e are now confronted with industrial stagnation, unemployment, a period of low commodity prices, and swindling, if not disappearing, national income.")

379. *Id.*

the interagency marketplace. Some of the rules governing the interagency marketplace are misguided or outdated. In particular, I propose broadening interagency redelegation powers to better enable agencies to fix inefficient jurisdictional arrangements by transferring authority to the agency best positioned to regulate. So long as adequate procedural checks and safeguards are built into the interagency marketplace, broader redelegation powers can improve efficiencies without unduly harming public accountability or the balance of powers among the branches. I also propose lifting the ban on profits from services provided in the interagency marketplace. Efficiency gains are often generated when agencies hire other, more expert agencies to provide services for them. There is no principled reason why the agencies providing the services should not be able to recover some share of the governmental savings generated by these interagency agreements. Indeed, lifting the ban on profits would provide a financial incentive for more agencies to enter into efficiency-enhancing interagency transactions.