Research

The Antideficiency Act: A Primer

GORDON GRAY | AUGUST 3, 2016

Executive Summary[1]

- The Antideficiency Act (ADA) bars federal employees from spending or otherwise obligating funds to be spent in excess of amounts or for the purpose approved by Congress, accepting voluntary services, or spending or otherwise obligating funds in excess of agency spending plans.

- Unique to *all* budget laws includes potential criminal penalties, in addition to administrative sanctions, for violations. However, no one has ever been prosecuted under this statute. In the past ten years 8 federal employees have been suspended or removed from their positions for violations.

- Despite these possible penalties, violations continue to occur, with 197 violations reported covering more than $9.66 billion dollars – with a $1.6 billion expenditure being the largest instance.

- While seemingly related to budget minutiae, the ADA is remarkably broad in its influence on governance: it determines the mechanics of government shutdowns and has arisen in a diverse array of public policy areas from the Bergdahl prisoner exchange to ongoing litigation over the Affordable Care Act.

Introduction

Article I, section 9 of the Constitution states: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” It is from this clause that Congress derives its “power of the purse,” or its prerogative over the nation’s finances. It is Congress’s most jealously guarded authority and likely the strongest check against the power of the executive branch. But these 16 words are hardly definitive and leave room for

quite a bit of interpretation not often shared at both ends of Pennsylvania Avenue. Indeed, Congress's role of chief spender of taxpayer money has been, and continues to be encroached upon by the executive branch. As early as 1870, Congress has sought to clarify through statute its primacy in spending taxpayer dollars.[2] Current law, as set forth in the Antideficiency Act (ADA), holds federal employees personally responsible for spending money that Congress has not approved.[3] While Congress's role in the nation's fiscal policy is broadly determined by the Constitution, the ADA often proves more relevant in specific instances of disagreement between the branches on spending policy. Indeed, as prosaic as statutes relating to budget administration may appear, the ADA actually specifies the mechanics of government shutdowns, and arises in topics as varied as the exchange of five Taliban prisoners for U.S. Army Sergeant Bowe Bergdahl, as well as ongoing litigation between the House of Representatives and the executive branch over spending related to the Affordable Care Act. This primer provides background on the Antideficiency Act and its role in U.S. fiscal policy.

The Antideficiency Act

The Antideficiency Act prohibits federal employees from:

- making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

- involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).

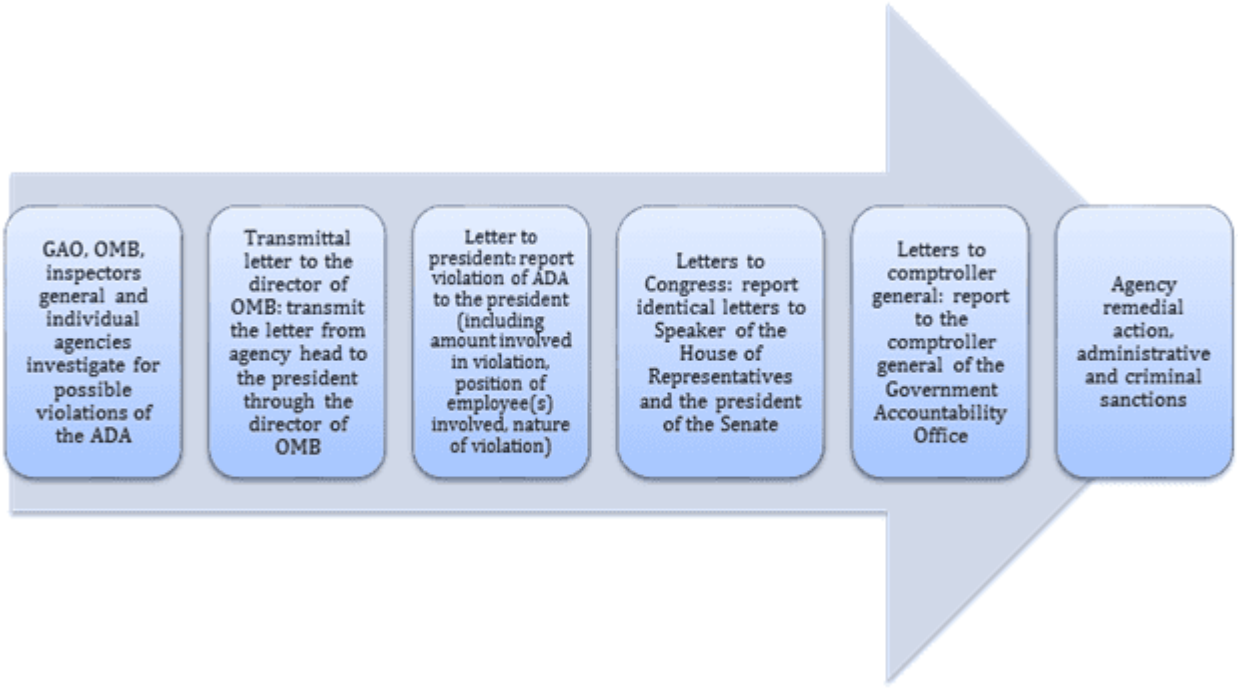
- accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.
- making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

As noted by the Government Accountability Office (GAO), which investigates possible ADA violations, the basic premise of the ADA is straightforward: "Government officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the 'bank' to cover the cost in full. The 'bank,' of course, is the available appropriation."[4]

ADA Violations: Who Decides?

Federal expenditures and agencies are subject to ongoing oversight and audit from both within and without the executive branch. Agency financial officers, inspectors general, as well as the Office of Management and Budget (OMB) conduct ongoing assessment and examination of federal spending practices. The GAO, an agency of the legislative branch, performs audits and investigations into federal activity as part of its overall mission as well as in response to Congressional inquiries. Any one of these entities may discover a potential ADA violation. Both the law and OMB guidance provide clear guidance on reporting of possible violations.

Figure 1: ADA Reporting Flow Chart



If an agency suspects that it violated the ADA, the agency head is required to submit letters to the director of the OMB, the president, Congress, and the Comptroller General (head of the GAO) providing specific information on the violation including the amount federal funds in violation, the responsible federal employees and other related information.[5] These letters must also state whether the violation was suspected as having been executed "knowingly or willfully," which would require referral to the Department of Justice to investigate possible criminal conduct.

Outside of the executive branch, GAO may determine that an agency violated the ADA through its ongoing audits, Congressional inquiries, or other investigations. Even if the

agency does not agree with GAO's determination, the agency head is still required to report the potential ADA violation to the president, Congress, and the Comptroller general. Since 2005 there have been at least 4 separate instances where GAO determined that an agency violated the ADA, but the agency disagreed with finding while still complying with the reporting requirement.[6] In none of these instances were remedial actions taken. In a separate instance in 2014, an independent federal agency disagreed with its own IG's finding of an ADA, but nevertheless reported the potential violation and took some remedial actions.[7]

Penalties: Unique to Fiscal Laws

The ADA's prohibitions flow from the principle articulated in Article I reserving the power of the purse to Congress. However, the ADA also has accompanying administrative and criminal penalties for violations. Individual penalties are unique in budget law and give real "teeth" to the Antideficiency Act. Indeed, the ADA is the only one of the fiscal statues (Title 31) in U.S. law that have associated penalties. For example, the president routinely violates 31 U.S. Code § 1105, which requires the submission of a budget by the first Monday in February. However, that requirement has no associated penalties, and thus there is no real consequence to a violation.

A federal employee who violates the ADA: "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." A federal employee who "knowingly and willfully" violated the "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."[8]

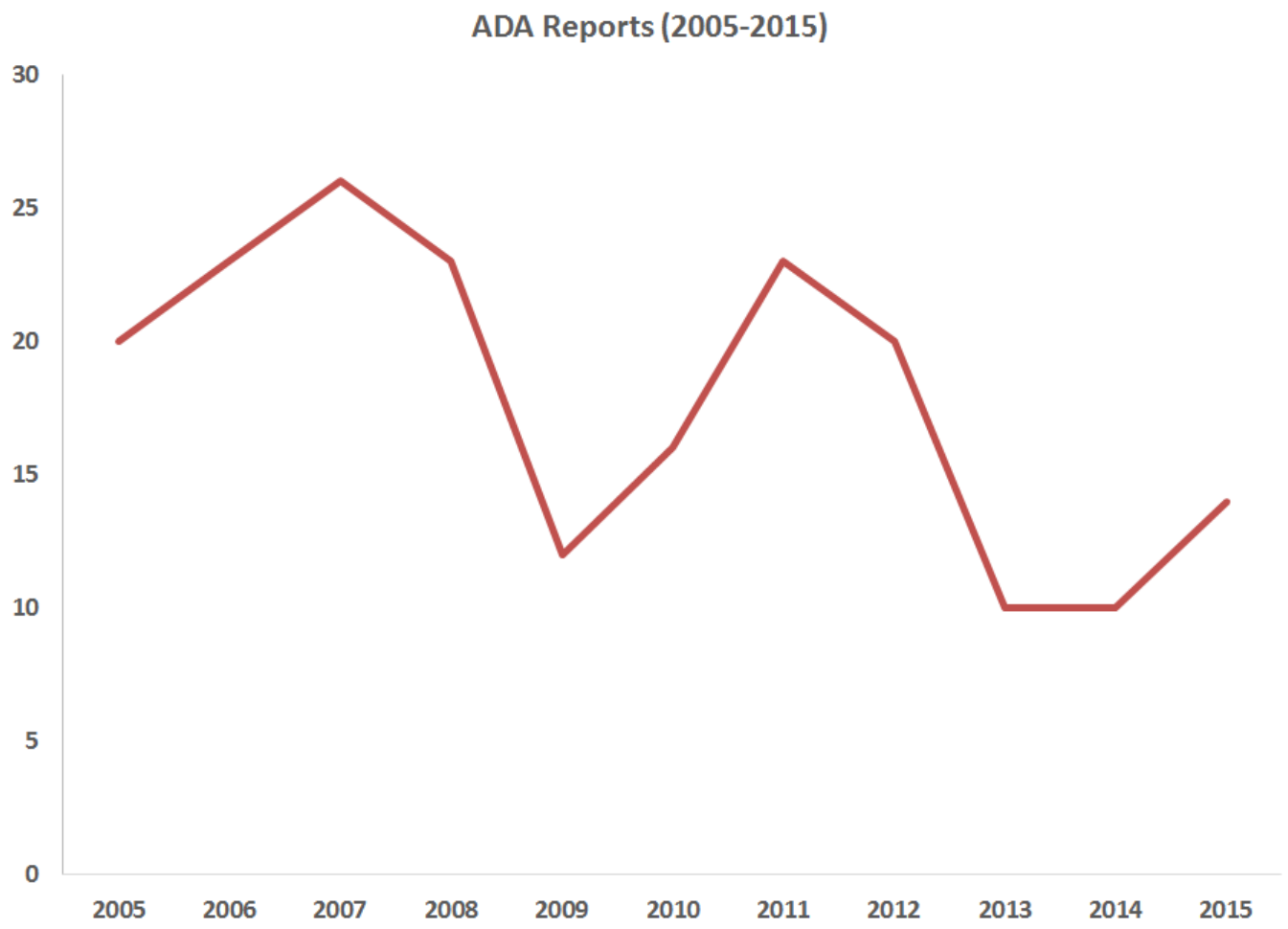
According to GAO, however, no federal employee ever appears to have been prosecuted or convicted under this statute.[9] Despite the lack of criminal prosecution, the mere potential for criminal, indeed felony, prosecution does appear to enhance compliance with the Act.[10] Indeed, mindfulness of the ADA figured prominently in a recent deposition by an IRS employee, who noted that: "when it comes to the Antideficiency Act, which has criminal penalties associated with it, we take it very seriously."[11]

A review of past ADA violations reports suggest that severe administrative penalties are rarely invoked. Since 2005, 8 federal employees – including 1 naval officer –were either suspended or removed from their positions.[12] At least one of these individuals was removed from federal service entirely, specifically an individual involved in the planning of a now controversial conference for General Services Administration (GSA) employees.[13] In several instances some employees involved in ADA violations retired before sanctions could be imposed.

Antideficiency Violations Over Time

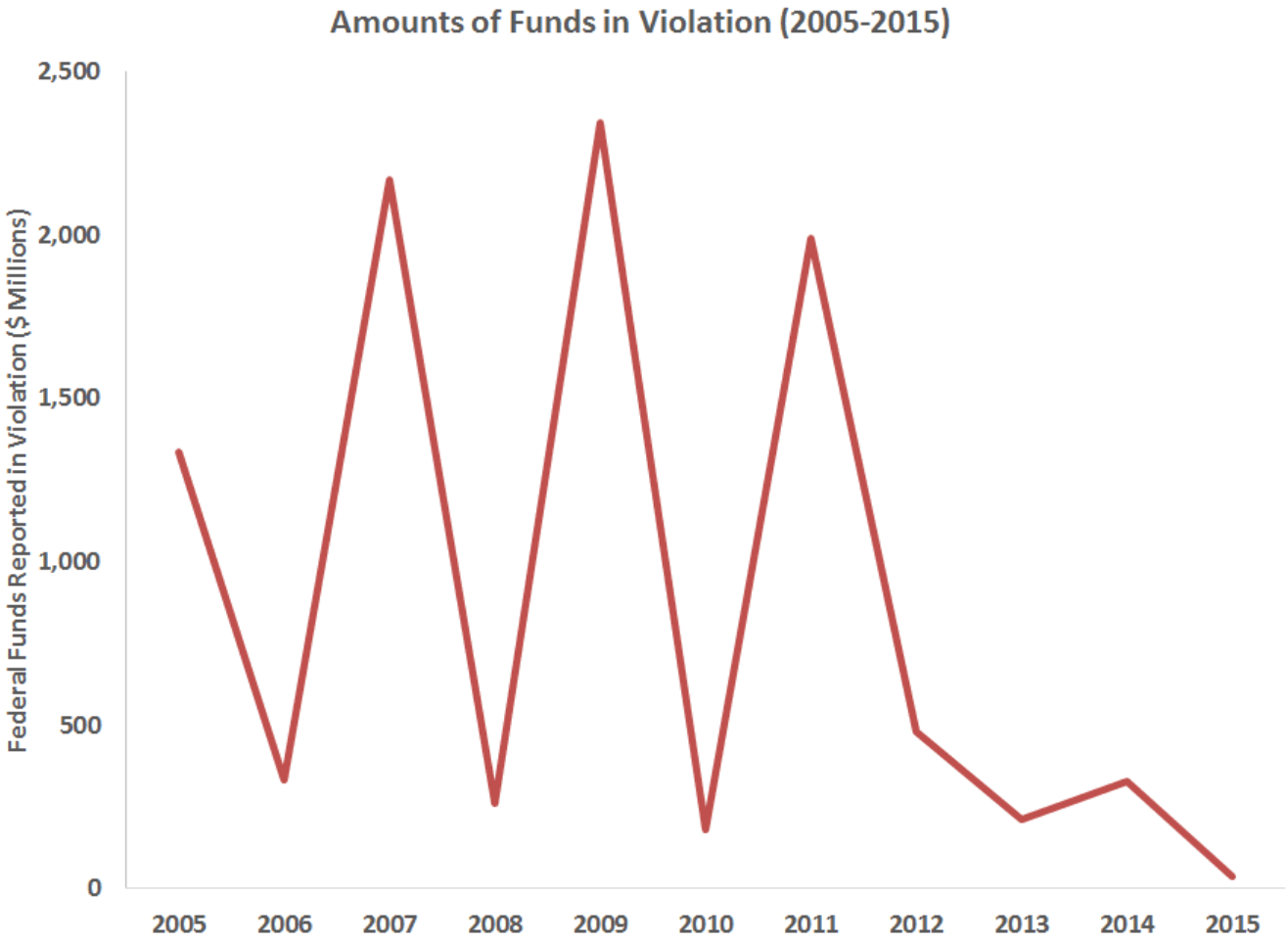
While ADA violations routinely occur, they generally appear to be reported in a transparent fashion. Indeed, knowingly failing to record an ADA violation is a felony.[14] Since 2005, there have been 197 ADA violation reports.

Figure 2: ADA Violation Reports



Over the same period, over $9.66 billion in federal funds were spent or obligated in violation of the ADA.[15] Note that a single report may include multiple violations of the ADA statute. Moreover, some of the funds reported in violation may be recorded in more than one report over more than one year.[16]

Figure 3: Amount of Federal Funds in Violation



Since 2005, there have been four separate violations relating to funds in excess of $1 billion. The single largest violation in dollar terms relates to over $1.6 billion in NASA funds that were spent before it was apportioned by OMB – a violation of 31 U.S.C. § 1517(a). OMB is responsible for apportioning appropriated funds for agencies, essentially providing a spending plan over a specified period of time for a given amount of funding. In this instance, NASA spent $1.6 billion in unspent funds before it had received its spending plan from OMB – a violation of 1517(a), the 4th prong of the ADA. One employee received a letter of counseling, the only reported administrative sanction associated with this violation.[17]

While a seemingly benign or purely bureaucratic matter, precluding agencies from spending federal funds before appropriations are apportioned ensures that agencies comport with the intent of the appropriation. These spending plans preclude agencies from spending the entirety of their appropriations in the first few months of a year, while continuing to incur obligations thereafter, forcing Congress to appropriate additional funds. These "coercive deficiencies" are an example of the type of practice from the post-Civil War era that gave rise to the ADA in the first place.[18]

The Antideficiency Act in Practice

While most reports of Antideficiency Act violations relate to the minutiae of budget execution, the ADA does arise in a diverse array of public policy areas, and at times in dramatic fashion. Perhaps the most conspicuous examples of the ADA in practice relates to government shutdowns that arise from a gap in federal appropriations.[19] When Congress and the executive fail to pass timely appropriations acts, a gap in federal funding occurs. Without appropriations in place, the ADA precludes government agencies from spending money or incurring obligations. Since federal employees are entitled to compensation for work, allowing employees to work during a funding gap would incur obligations for which there is no appropriations in place – employees are thus furloughed. The ADA further precludes the federal government from accepting volunteer service except in the protection of safety and property. It from this exception that certain federal employees continue to work – technically on a voluntary basis – during a government shutdown. Known as "excepted employees" for being excepted from the prohibitions of the ADA (they have been referred to as "essential" in the past), these employees include soldiers, doctors and air-traffic controllers.

The ADA also arises in areas that would not seem immediately obvious, as was the case with the recovery of Sergeant Bowe Bergdahl. Bergdahl was held as a prisoner by elements aligned with the Taliban for five years, and was released when the U.S. transferred five individuals previously held in Guantanamo Bay to the nation of Qatar. In response to a Congressional inquiry, GAO would later find that this exchange violated the ADA.[20]

Congress passed and the president signed into law the National Defense Authorization Act (NDAA)for Fiscal Year 2014, which authorized transfer or release of individuals from Guantanamo Bay provided that the Secretary of Defense notify certain Congressional Committees no than 30 days prior to the release or transfer. The FY2014 DoD appropriations act stipulated that none of the funds provided by the Act could be used to transfer or release prisoners except in accordance with the provisions specified in the NDAA – including 30 days' advance congressional notification. In the case of the Bergdahl exchange, no advance notice was given, rather the committee was notified by phone on the day of the transfer and in writing two days later. Thus, insofar as the exchange was not performed in accordance with the NDAA, no appropriation was available to fund it. Thus, DoD's obligation of the $988,400 to conduct the Bergdahl exchange constituted an ADA violation, according to an opinion issued by GAO at the request of Congress.

A final example of a *potential* ADA violation relates to payments from the Treasury Department to health insurers as part of the Affordable Care Act. The payments reimburse health insurers for reducing deductibles and other out-of-pocket costs for low income

individuals purchasing health insurance plans. The Congressional Budget Office estimates that the Treasury will issue $7 billion in these cost-sharing subsidies in 2016, and a total $130 billion in payments over the next ten years.[21] A federal judge recently ruled that the ACA did not provide an appropriation for these payments.[22] The judge did not rule on the whether the government violated the ADA, but rather whether the payments ran afoul of Article 1, section 9. The judge's opinion has been stayed pending appeal, but if sustained, it would likely precipitate a finding of an ADA violation by GAO as well. However, it is unlikely that this finding would result in any sanctions of government employees. As noted above, in past instances where agencies did not agree with GAO's finding, the agencies took no remedial action.

Conclusion

The Antideficiency Act is a unique feature of U.S. governance. While it is frequently invoked in the particulars of budget execution and interagency accounting, it reflects a powerful concept enshrined in the Constitution – the separation of powers. Arising across highly varied areas of public policy, the Antideficiency Act acts as a check on the executive branch in the stewardship of the taxpayer dollars, and serves to buttress the legislative branch's exercise of the power of the purse.

[1] Excellent research assistance provided by Stephanie Renaut

[2] http://legisworks.org/sal/16/stats/STATUTE-16-Pg230b.pdf

[3] 31 U.S.C. § 1341(a)(1)(A).

[4] http://www.gao.gov/assets/210/202819.pdf

[5] https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s145.pdf

[6] See ADA report for 2005, 2006, 2008, and 2012

[7] http://www.gao.gov/assets/680/673842.PDF

[8] 31 U.S.C. § 1349 and 31 U.S.C. § 1350

[9] http://www.gao.gov/assets/210/202819.pdf

[10] Stith, Kate, "Congress' Power of the Purse" (1988). *Faculty Scholarship Series.* Paper 1267.
http://digitalcommons.law.yale.edu/fss_papers/1267

[11]

https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/HWM132060%5b1%5d.pdf

[12] See ADA report for 2007, 2009, 2011, 2013, and 2014

[13] http://www.gao.gov/assets/670/661913.PDF

[14] http://www.gao.gov/products/147333

[15] http://www.gao.gov/legal/anti-deficiency-act/about

[16] See for example, $301,152,402.00 that was obligated for missile guidance systems in excess of available appropriations in 2001 that was reflected in reports for 2005 and 2006.

[17] http://www.gao.gov/ada/gao-ada-07-01.pdf

[18] http://www.gao.gov/assets/210/202819.pdf

[19] See https://www.americanactionforum.org/research/government-shutdowns-what-they-are-and-what-they-are-not/

[20] http://www.gao.gov/assets/670/665390.pdf

[21] https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51385-HealthInsuranceBaseline.pdf

[22] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1967-73