



Research

Government Shutdowns: What They Are and What They Are Not

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Major functions of the federal government are “funded” until October 1st, the beginning of the next fiscal year (FY 2014). If Congress and the Executive branch do not agree to new annual spending then some, but not all, of those functions will cease until new funding laws are enacted. This interruption is colloquially referred to as a government “shutdown.” In understanding what a shutdown is, it’s important to recognize that the shutdown itself is a symptom of an underlying issue: the absence of appropriations laws. Without current appropriations laws in place, federal agencies don’t have legal authority to spend money and federal employees are prohibited from working without pay. What results is an interruption in many federal operations, though not all. This primer examines how federal shutdowns arise and how they work – what stops and what does not.

KEY ELEMENTS OF A GOVERNMENT SHUTDOWN

- The Antideficiency Act governs the mechanics of a shutdown and requires that when the government fails to pass funding laws in a timely fashion, federal agencies are prohibited from expending funds and employees are prohibited from coming to work.
- Entirely insulated from a shutdown is the majority of federal spending: mandatory spending, including the major elements of the Affordable Care Act.
- Also spared from a federal shutdown are the activities and employees that are provided exceptions from the Antideficiency Act. These excepted employees include the armed forces, employees responsible for administering major entitlement programs (including the ACA), and federal prison guards.

APPROPRIATIONS ACTS

Most federal agencies, such as the Department of Defense, and their activities are funded through annual appropriations acts – annual laws passed by Congress to provide budget authority for federal agencies to carry out their missions.[1] It is critical to distinguish this funding stream from other major elements of the federal budget. Specifically, the agencies and activities comprise the discretionary share of federal expenditures, separate and distinct from the mandatory side of the federal government, which is largely composed of entitlement or benefit programs such as Medicare, Medicaid and Social Security. Mandatory spending comprised over 56 percent of federal spending in FY2012, whereas discretionary spending comprised over 36 percent. Interest was over 6 percent. Disagreement over appropriations levels therefore only effect 36 percent of the federal government. Put another way, the majority of federal spending continues in the event of a government shutdown.[2]

FUNDING GAPS AND THE ANTIDEFICIENCY ACT

If the Congress and the Executive branch fail to enact appropriations for federal agencies before the expiration

of existing funding laws, a funding gap occurs. This funding gap precipitates a government shutdown. However, the absence of specific funding legislation is not the specific mechanism for the shutdown, but rather the underlying cause.

The Antideficiency Act triggers the shutdown. Specifically, the Act prohibits federal employees from:

1. 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).
2. 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).
3. 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.
4. 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).[3]

It is this Act that gives “teeth” to the absence of appropriations legislation and forces the cessation of government activities and the furloughing of employees.

WHAT GETS SHUT-DOWN?

Broadly, any program that is funded by a lapsed appropriation would be subject to the provisions of the Antideficiency Act and would be ceased, and the associated federal employees furloughed, provided they do not fall under the exceptions allowed in the Act.

It is difficult to know *exactly* which current programs and employees would necessarily be ceased and furloughed on October 1st. In 2011, when another possible government shutdown was threatened, 119 agencies, offices, department and other government entities did provide updated contingency plans.[4] However, these plans did not necessarily provide exact numbers of furloughed employees or detailed program information. Additionally, sources of funding for programs change over time, as do programs in general. New programs come into existence, and others, though perhaps not as often, cease. That necessarily changes how a given program and associated employees might interact with a potential funding lapse. Moreover, it appears from recent potential shutdowns that agency planning is iterative and would rely on additional legal consultation.[5] Further, determinations about whether certain employees should be furloughed or not can change during a funding gap. For example, in 1995, the Social Security Administration furloughed 61,415 employees, only to recall 49,715 employees two days later.[6]

However, these unknowns do not preclude a broad understanding of what would be affected, in part because of experience, namely, the shutdowns from the mid-1990s.

Drawing from a range of sources including Congressional testimony from relevant agency personnel as well as contemporaneous news reports, the Congressional Research Service has compiled an excellent perspective on programs and employees that were previously affected by the mid-90’s shutdowns and is reproduced below:

- **Health.** New patients were not accepted into clinical research at the National Institutes of Health (NIH) clinical center; the Centers for Disease Control and Prevention ceased disease surveillance; and hotline

calls to NIH concerning diseases were not answered.

- **Law Enforcement and Public Safety.** Delays occurred in the processing of alcohol, tobacco, firearms, and explosives applications by the Bureau of Alcohol, Tobacco, and Firearms; work on more than 3,500 bankruptcy cases reportedly was suspended; cancellation of the recruitment and testing of federal law enforcement officials reportedly occurred, including the hiring of 400 border patrol agents; and delinquent child-support cases were delayed.
- **Parks, Museums, and Monuments.** Closure of 368 National Park Service sites (loss of 7 million visitors) reportedly occurred, with loss of tourism revenues to local communities; and closure of national museums and monuments (reportedly with an estimated loss of 2 million visitors) occurred.
- **Visas and Passports.** Approximately 20,000-30,000 applications by foreigners for visas reportedly went unprocessed each day; 200,000 U.S. applications for passports reportedly went unprocessed; and U.S. tourist industries and airlines reportedly sustained millions of dollars in losses.
- **American Veterans.** Multiple services were curtailed, ranging from health and welfare to finance and travel.
- **Federal Contractors.** Of \$18 billion in Washington, DC, area contracts, \$3.7 billion (over 20%) reportedly were affected adversely by the funding lapse; the National Institute of Standards and Technology (NIST) was unable to issue a new standard for lights and lamps that was scheduled to be effective January 1, 1996, possibly resulting in delayed product delivery and lost sales; and employees of federal contractors reportedly were furloughed without pay. [7]

WHAT DOESN'T STOP IN THE EVENT OF A SHUT DOWN?

There are two key criteria for determining what is not included in the shutdown. First, any program or activity that is funded through multi-year appropriations or appropriations with no time limit associated with them (unless the underlying multi-year or open-ended appropriation itself also lapses) can't be shut down. Mandatory spending is also spared, which includes Medicare, Medicaid and Social Security.

Therefore, these following examples would still continue in the event of a shut down:

Programs, Implementation, and Employees of the Affordable Care Act. The principle spending programs in the ACA would *not* be ceased in the event of a government shutdown and are not subject to appropriation. Virtually all of the spending associated with the ACA is mandatory. Moreover, much of the funding for *implementation* is also mandatory and was provided directly in the ACA itself.[8] **Further, for federal employees working on implementation of the ACA, exception from furlough may be “necessarily implied”** by the existence of implementation language in existing law. In short, the Affordable Care Act is well insulated from annual appropriations and the implications from an appropriations lapse.

Costs to the Federal Government. According to a 1996 letter from OMB, the two federal shutdowns ended up *costing* the federal government \$1.4 billion.[9] Current guidance from OMB on shut-down procedures underscores how the disruption of a government shutdown can lead to adverse fiscal policy. In 2012, OMB provided several planning memoranda for agencies that included guidance as well as frequently asked questions. One question relating to IT services in the event of a shutdown is particularly illuminating:

“Question: What if the cost of shutting down a website exceeds the cost of maintaining services?”

Answer: The determination of which services continue during an appropriations lapse is not affected by whether the costs of shutdown exceed the costs of maintaining services.”[10]

WHO WORKS BUT ISN'T PAID?

The second key determination for whether a program is spared from a shutdown relate to the exceptions provided for in the Antideficiency Act and subsequent legal interpretations made by the executive branch as well as through Congressional action.[11] There are two broad principles that animate these exceptions.[12] First, are exceptions provided for in the Antideficiency Act itself. Among the most critical exemptions relates to cases of “emergency involving the safety of human life or the protection of property.” It is this clause that ensures the continuation of a number federal activities, particularly those related to national security. Second are exceptions for government activity that “‘necessarily implied’ from the authorized continuation of other activities, like SSA employers.[13]

It is important to distinguish that these are exemptions from the strictures of the Antideficiency Act, and are not a presumption of funding. This is a subtle but important distinction. For example, on October 1st, if new funding laws are not enacted, the Department of Defense would be largely (again except where funding is otherwise in place) unfunded. However, owing to exceptions provided for in the Antideficiency Act, all members of the military would remain in their current duty status. However, they would do so without pay until new appropriations are enacted. [14] While any “excepted” employee would ultimately be entitled to compensation once appropriations are passed, during a shutdown, they would risk missing paychecks.

Therefore, these are examples of employees who will continue to work, but without pay:

Armed Forces. Due to the exemption for cases of “emergency involving the safety of human life or the protection of property,” the armed forces would remain on duty during a shutdown without pay.

Other Employees Essential to Activities that Protect Life and Property. These include air-traffic controllers, employees responsible for the care of prisoners and other persons in the custody of the United States, doctors and other medical professionals responsible for inpatient and emergency care, and border patrol agents.

Employees Responsible for Administration of Entitlement Programs. Due to the exception for “government implied” activity, groups like SSA employers are deemed essential to payment and processing of certain benefits otherwise provided for in law. The existence of those benefit program necessarily implies administration of those benefits and the incurring of obligations to perform that obligation.

CONCLUSION

The beginning of the new fiscal year and the expiration of current funding laws will occur on October 1st, and with each passing day, the possibility of a government shutdown increases. As has been demonstrated in past experience as well as through existing laws and policies, a government shutdown is disruptive. Many public services are interrupted. These disruptions can also come with costs. However, while visible and disorderly, much of the federal government, including the largest spending programs remain in place and untouched, now including the Affordable Care Act, during a shutdown. A shutdown therefore is public disruption, and not a restraint on federal spending.

[1] Budget Authority is defined as: “Authority provided by federal law to enter into financial obligations that will result in immediate or future outlays involving federal government funds.” GAO, “A Glossary of Terms Used in the Federal Budget Process,” GAO-05-734SP, Sep 1, 2005