

# ISSUE BRIEF

No. 4049 | SEPTEMBER 18, 2013

## What Happens During a Government “Shutdown”?

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If President Barack Obama “shuts down” the government by vetoing a continuing resolution (CR) that funds all government operations with the exception of Obamacare, or the Senate fails to pass such a CR, *crucial services will continue without interruption*. That includes all services essential for national security and public safety—such as the military and law enforcement—as well as mandatory government payments such as Social Security and veterans’ benefits.

The key fact, as the U.S. Department of Justice (DOJ) itself has said, is that when there is a short-term lapse in appropriations, “the federal Government will not be truly ‘shut down’...because Congress has itself provided that some activities of Government should continue.” In fact, any claims that not passing a CR will result in a “shutting down” of the government “is an entirely inaccurate description” according to the DOJ.<sup>1</sup>

Such a lapse in funding would be neither catastrophic nor unprecedented, but it would pare down government services to those most essential for “the safety of human life or the protection of property.” That would not include the hundreds of billions of dollars in the federal budget that are constantly

squandered and wasted on frivolous, unnecessary, and unneeded programs.

**What the Law Says.** The effect of a veto of appropriated funding by the White House or the failure of the Senate to pass a CR is governed by the Constitution, federal law, DOJ legal opinions, and planning memoranda issued by the White House Office of Management and Budget (OMB).

Under Article I of the Constitution, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This constitutional limitation is implemented by the federal Antideficiency Act (ADA), which makes it illegal for federal officials to spend money in excess of appropriations or to obligate the government to enter into contracts before an appropriation has been passed to pay for such a commitment.

The ADA also prohibits the federal government from accepting voluntary services, which is why federal employees (except those deemed “essential”) have to be furloughed—they cannot volunteer their services during a shutdown even if they want to.<sup>2</sup> The ADA contains a very expansive exception, however, “for emergencies involving the safety of human life or the protection of property.”

Although that exception has been broadly interpreted by the OMB and the DOJ<sup>3</sup> to give executive agencies wide discretion over how to spend their remaining funds, the statute was amended by Congress in 1990 in response to a 1981 opinion issued by Attorney General Benjamin R. Civiletti to make it clear that the term *emergencies* does “not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.”

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This paper, in its entirety, can be found at  
<http://report.heritage.org/ib4049>

Produced by the Edwin Meese III Center for Legal and Judicial Studies

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A 1995 opinion by the DOJ's Office of Legal Counsel over that amendment confirmed the earlier DOJ opinions, although it slightly narrowed the interpretation of "the safety of human life or the protection of property" to mean that they must be "compromised in some significant degree" by the lack of funding.<sup>4</sup>

A 2011 OMB memorandum also confirmed that the executive branch still views those DOJ opinions as establishing the guidelines for the continued operation of the government during a lapse in funding.<sup>5</sup>

The OMB refers to those government functions that can continue to operate because they meet the emergency definition as "excepted" functions. Federal employees who "are needed for the performance of those 'excepted' functions" can continue to be employed even in the absence of a CR or an appropriations bill.<sup>6</sup> In fact, the OMB says that federal employees can continue to work who are necessary not just to protect life and property but to perform activities "expressly authorized by law" or "necessarily implied by law," an extremely broad standard.<sup>7</sup>

**Many "Essential" Functions.** As a recent report by the Congressional Research Service<sup>8</sup> points out, an OMB memorandum from 1981 lays out examples of the many government functions of federal agencies that may continue during a funding lapse:

- National security, including the conduct of foreign relations essential to the national security or the safety of life and property;
- Benefit payments and the performance of contact obligations under no-year or multi-year

appropriations or other funds remaining available for those purposes;

- Medical care of inpatients and emergency outpatient care and activities essential for the safe use of food, drugs, and hazardous materials;
- Air traffic control and other transportation safety functions;
- Border and coastal protection and surveillance;
- Protection of federal lands, buildings, waterways, and other property of the U.S.;
- Care of prisoners and others in federal custody;
- Law enforcement and criminal investigations;
- Emergency and disaster assistance;
- Activities essential to the preservation of the money and banking system of the U.S., including borrowing and tax collection;
- Production of power and maintenance of the power distribution system; and
- Protection of research property.

In its 2011 memorandum, the OMB also provided other instances of "excepted" situations where federal agencies would continue to function. For example, operations where a "statute or other legal requirement expressly authorizes an agency to

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1. Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, "Memorandum Opinion for the Director of the Office of Management and Budget," August 16, 1995, <http://www.justice.gov/olc/appropriations2.htm> (accessed September 18, 2013).

2. 31 U.S. Code § 1342.

3. See opinions of U.S. Attorney General Benjamin R. Civiletti, 43 Op. Att'y Gen. 224 (April 25, 1980) and 43 Op. Att'y Gen. 293 (January 16, 1981).

4. Dellinger, "Memorandum Opinion."

5. Jacob J. Lew, director, Office of Management and Budget, "Planning for Agency Operations During a Lapse in Government Funding," December 15, 2011, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-03.pdf> (accessed September 18, 2013).

6. Jacob J. Lew, director, Office of Management and Budget, "Planning for Agency Operations During a Lapse in Government Funding," April 7, 2011, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-13.pdf> (accessed September 18, 2013).

7. Office of Management and Budget, Circular A-11, Section 124, [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc) (accessed September 18, 2013).

8. Clinton T. Brass, "Shutdown of the Federal Government: Causes, Processes, and Effects," Congressional Research Service *Report for Congress*, August 6, 2013, <http://www.fas.org/sgp/crs/misc/RL34680.pdf> (accessed September 18, 2013).

obligate funds in advance of appropriations” such as a Civil War–era law that “provides authority to the Defense Department to contract for necessary clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies” or another federal law authorizing the Bureau of Indian Affairs to continue to contract for goods and supplies.<sup>9</sup>

The DOJ’s 1995 opinion again confirmed that essential government benefit payments continue because they operate “under indefinite appropriations provisions that do not require passage of annual appropriations legislation.” It pointed out that “Social Security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the Treasury, because there is no lapse in the relevant appropriation.”

And all government employees necessary to continue to make those benefit payments will continue to be employed to do so even though their salaries would normally be paid through the CR because they are “necessary to disburse the Social Security benefits that operate under indefinite appropriations.” This same rule would obviously apply to other such government benefits such as Medicare and for military veterans, as well as “the performance of emergency services that continue under that separate exception.”<sup>10</sup>

The 2011 OMB memorandum confirmed that there would be no cessation in any government functions necessary for President Obama to carry out his “constitutional duties and powers (e.g., Commander-in-Chief or conducting foreign relations).” So, for example, the President would be able to continue his very extensive (and very expensive) foreign travels in the interests of “conducting foreign relations,” even if he decides to cause a lapse in government funding with a veto of a CR.

Regarding the President’s duty as commander in chief, the Department of Defense has issued guidance outlining that “the legal authority for critical military operations to continue” is clear. Among the units and activities exempt from a funding lapse are “forward based combat, combat support and combat service support units.”<sup>11</sup> So “operations such as those in Iraq and Afghanistan would continue, units preparing for deployment would carry on their training and other deployment preparations, and activities needed to support operations and training would continue.” There would also be no suspension or furlough of “units identified for deployment in plans for major regional contingencies” as well as “units assigned to carry out strategic nuclear operations.”<sup>12</sup>

**Recent History.** There have been 17 funding gaps since 1977 ranging in duration from one to 21 days.<sup>13</sup> In November 1995, when President Bill Clinton vetoed a CR and there was a funding gap for five days, only about 800,000 out of a total of 4.475 million federal employees were furloughed.

Only about 280,000 federal employees were furloughed during the December 1995 to January 1996 funding gap.<sup>14</sup> During this time, the Social Security Administration initially retained about 5,000 employees and then called back an additional 50,000 employees within three days to continue paying benefits and processing new claims, *keeping over 80 percent of the total employees of the agency employed despite the lack of a CR.*<sup>15</sup>

**Not Much Shut Down.** Based on past experience, one may safely conclude that a very large number of federal employees would continue to provide services during any government “shut down,” and essential services necessary to safeguard the country will continue, as will the crucial benefit payments on which many Americans depend.

9. Lew, April 7, 2011 (citing 41 U.S. Code §§ 6301–6302 and 25 U.S. Code § 99).

10. Dellinger, “Memorandum Opinion.”

11. Stephen Daggett, “Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations,” Congressional Research Service *Report for Congress* (April 1, 2011), pp. 17–18, <http://www.fas.org/sgp/crs/natsec/R41745.pdf> (accessed September 18, 2013).

12. *Ibid.*

13. Jessica Tollestrup, “Federal Funding Gaps: A Brief Overview,” Congressional Research Service *Report for Congress* (January 19, 2012), pp. 2–3, <http://www.fas.org/sgp/crs/misc/RS20348.pdf> (accessed September 18, 2013).

14. *Ibid.*, pp. 3–4. Total federal employees for 1995 can be found at <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/> (accessed September 18, 2013). All of these furloughed employees received their salaries retroactively.

15. Brass, “Shutdown of the Federal Government,” p. 16.

But this would still *not* allow the full, continued implementation of Obamacare. As outlined in a prior Heritage *Issue Brief*, “[E]ven if a government shutdown occurs without a defunding bill, while the Administration may have some funding available from other sources to continue to implement parts of Obamacare that fall within exceptions to the ADA, it would not be able to legally implement *all* of the many different parts of the law, and it is doubtful it

would have the funds to implement all of the law.”<sup>16</sup> There are many parts of the law that could not be deemed “emergencies” even under the broad reading given that term by the executive branch. And the more parts of the law that are stopped, the better off the American people will be.

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16. See Hans A. von Spakovsky, “Conservatives and the Fight to Defund Obamacare,” Heritage Foundation *Issue Brief* No. 4010, August 8, 2013, <http://www.heritage.org/research/reports/2013/08/conservatives-and-the-fight-to-defund-obamacare>.