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SUMMARY

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Congress funds much of the federal government through a series of 12 regular, annual appropriations acts. A significant portion of that funding is for a single fiscal year, and most agencies thus rely on passage of new appropriations before the end of that fiscal year to have uninterrupted funding from one fiscal year to the next. If Congress does not pass the regular appropriations acts or a continuing resolution that generally continues funding at the prior year's level, an agency reliant on annual appropriations faces a funding lapse. This lapse in appropriations has significant consequences for governmental operations.

Commonly called a "government shutdown," the cessation of government functions and related furloughs of government employees that result from a lapse in appropriations are largely a function of a collection of statutes referred to as the Antideficiency Act. When the Act's first provisions were enacted in 1870, it was Congress's attempt to control government spending of appropriated funds to avoid the problem of *coercive deficiencies*—a situation where an agency obligates funds in excess of appropriated amounts or prematurely depletes an appropriation in a manner that pressures Congress to pass supplemental or "deficiency" appropriations. Over time, Congress has added to and amended the Antideficiency Act's various prohibitions and exceptions, creating what is a significant fiscal control law.

Today, a combination of the Antideficiency Act's core prohibitions and the related bar on voluntary services result in a suspension of many, but not all, government functions during a lapse in appropriations. During such a lapse, agencies apply the Act's prohibitions and its exceptions to determine what functions may continue and what functions must cease until further appropriations are provided. Understanding government conduct during a lapse in appropriations thus requires an understanding of the Antideficiency Act and related appropriations laws.

The Antideficiency Act generally precludes government employees or officers from creating legal obligations to pay government funds "before an appropriation is made." The Act further precludes individuals from volunteering their services to the government when the possibility of a future claim for payment exists. During a lapse in appropriations, these statutory prohibitions work in tandem to establish the general shutdown mandate, that is, the legal requirement to cease government functions and furlough employees. Some functions may be exempt from this general mandate and continue if other funds remain available despite the lapse in annual appropriations. Additional functions may be excepted from the mandate if authorized by law to continue in the absence of appropriations or if they satisfy the emergency exception to the Act. Various legislative proposals have been introduced in the 119th Congress that would address different facets of the Antideficiency Act and government shutdowns more broadly.

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On October 1, 2025, the federal government entered the longest full shutdown in U.S. history, eventually lasting 42 full days. By that date, Congress and the President had not enacted any of the 12 regular appropriations acts to fund the day-to-day operations of most agencies during Fiscal Year (FY) 2026. Congress and the President also had not enacted a continuing resolution to provide stopgap funding while deliberations continued on the FY2026 regular appropriations bills. As a result, many appropriations that Congress had provided to federal agencies in the Full-Year Continuing Appropriations and Extensions Act, 2025,[1] and prior appropriations acts lapsed, or expired.

With no new regular appropriations for FY2026 enacted to replace those that had lapsed, federal agencies across the federal government confronted an important legal duty, one flowing from a statute commonly referred to as the Antideficiency Act: federal agencies generally had to cease their operations and await new appropriations from Congress. The Antideficiency Act generally bars federal officers and employees from incurring obligations in advance of or in excess of available appropriations.[2] It also prohibits such officers and employees from accepting on behalf of the federal government services offered on a so-called "voluntary" basis.[3] These mutually reinforcing prohibitions mean that, when agency appropriations lapse, most agency operations must cease, so as to avoid incurring obligations that are unsupported by appropriations or accepting voluntary service from federal employees and others.

For much of the Antideficiency Act's existence, federal agencies did not appear to interpret the statute in this manner. Lapses in appropriations had consequences for federal agencies, but their effect was apparently of a more limited character. Prior to the Carter Administration, no federal agency had generally ceased its operations owing to a lapse in its funding.[4] In 1980, though, the Attorney General rendered the first legal opinion on the Antideficiency Act's consequences during a lapse in appropriations.[5] The analytical framework announced in that opinion, and mirrored to some extent in a contemporaneous opinion of the Comptroller General, continues to govern shutdown analyses today.[6]

Under a shutdown analysis, it is not the case that all of an agency's activities must cease upon a lapse in its appropriations. Certain activities, in Antideficiency Act parlance, are *exempt* from the statute's shutdown mandate because those activities continue to be funded with current appropriations. Other agency activities are *excepted* from the Act's shutdown mandate. Excepted activities may continue to occur because the Antideficiency Act does not bar obligations necessary to continue the functions, even though appropriations are not available for them.

Deciding which functions are exempt from the Antideficiency Act's shutdown mandate, which are excepted, and which are subject to the statute's bar on new obligations requires a case-by-case application of the statute. This report explains the shutdown analysis that would generally apply in such a case-by-case inquiry, illustrating this analysis with examples of agency decisions during the 2025 government shutdown, including some subject to dispute, to continue functions despite a lapse in appropriations.

[1] Pub. L. No. 119-4, 139 Stat. 9 (2025).

[2] 31 U.S.C. § 1341(a)(1)(B).

[3] *Id.* § 1342.

[4] *See* Merrill Brown, *FTC Temporarily Closed in Budget Dispute*, WASH. POST, May 1, 1980, at B1 ("The Federal Trade Commission temporarily shut down its operations today, apparently the first federal agency ever forced to close its doors in a budget dispute.").

[5] Applicability of Antideficiency Act upon a Lapse in Agency Appropriation, 43 Op. Att'y Gen. 224 (1980).

[6] *See infra* "Evolving Understandings of Lapses in Appropriations."

The report begins by introducing relevant terminology.[7] It then discusses the Antideficiency Act's prohibitions, focusing on the provisions that generally cause government shutdowns.[8] The report examines how interpretations of the Act have evolved over time.[9] It also discusses how an agency determines whether its activities are exempted or excepted from the Act's general shutdown mandate.[10] Finally, the report concludes by discussing several legislative proposals from the 119th Congress that, if enacted, would affect shutdown analysis.[11]

The Vocabulary of Government Shutdowns

A few key terms and concepts bear on the Antideficiency Act's application. As discussed in more detail below, the statute prohibits an officer or employee of the United States from authorizing an obligation or making an expenditure that exceeds the amount available in an appropriation or fund for that use.[12] An *obligation* is a "definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States."[13] An *expenditure* is an outlay of public funds from the U.S. Treasury.[14] Expenditures are the federal government's means of satisfying, or liquidating, its obligations.[15]

Agencies incur obligations through a wide range of activities. For example, when an agency awards a grant or cooperative agreement, it obligates the United States in an amount equal to what the award requires the federal government to pay to the recipient.[16] Similarly, an agency generally incurs an obligation for personal services rendered by agency employees as and when those services are rendered, typically on a pay-period basis.[17]

Congress authorizes agencies to incur such financial obligations by providing *budget authority*, a class of statutes that includes contract authority, borrowing authority, offsetting collections and receipts, and, most significantly, appropriations.[18] This last category of budget authority, appropriations, is legally unique. An appropriation is any law "that authorizes expenditures from a specified source of public money for designated purposes."[19] The Constitution's Appropriations

[7] *See infra* "The Vocabulary of Government Shutdowns."

[8] *See infra* "The Antideficiency Act: Operative Prohibitions."

[9] *See infra* "Evolving Understandings of Lapses in Appropriations."

[10] *See infra* "Authority to Continue Government Programs During Lapses in Appropriations."

[11] *See infra* "Relevant Legislation from the 119th Congress and Options for Legislators."

[12] 31 U.S.C. § 1341(a). The statute applies the same limitations to officers and employees of the District of Columbia. *See id.*

[13] Maine Cmty. Health Options v. United States, 590 U.S. 296, 307–08 (2020).

[14] GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, GAO-05-734SP, at 48 (2005) [hereinafter GAO GLOSSARY].

[15] *Id.*

[16] *See* 31 U.S.C. § 1501(a)(5); U.S. Dep't of Trans., Fed. Highway Admin.—Application of the Impoundment Control Act to Memo. Approval of State Elec. Vehicle Infra. Deployment Plans, B-337137, 2025 WL 1521234, at *5 (Comp. Gen. May 22, 2025).

[17] *See* B-287619, 2001 WL 761741, at *3 (Comp. Gen. July 5, 2001) ("Costs such as paying employees are obligations at the time the salaries are earned, that is, when the services are rendered, generally on a pay period basis."); B-197841, 1980 WL 17023, at *1 (Comp. Gen. Mar. 3, 1980) (explaining that "an employee who reports for work under the direction or with the consent of his or her supervisor is entitled to be paid for the time worked, and the United States is legally bound to pay the employee").

[18] 2 U.S.C. § 622(2)(A).

[19] Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 424 (2024).

Clause states that no "Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[20] Thus, while other forms of budget authority allow agencies to incur obligations, only appropriations allow agencies to also make expenditures to liquidate obligations.[21]

Congress permits obligations and expenditures by defining an appropriation's *availability*—that is, its lawful uses—along several dimensions. Congress defines availability by identifying the *purpose* of an appropriation, meaning the nature of the expenses that the appropriation is able to bear.[22] An agency may, for example, receive one appropriation for its research and development functions and another for its personnel costs.[23] Congress also controls availability by identifying the *amount* of the appropriation, either a definite amount (i.e., a stated dollar figure) or an indefinite amount (i.e., "such sums as may be necessary" for a program or function).[24] Finally, Congress stipulates an appropriation's *period of availability*, which is the time period for which the funding may be obligated.[25]

Appropriations can have a *definite*, or *fixed*, period of availability of one or more fiscal years.[26] Appropriations with a definite period of availability of more than one fiscal year are often referred to as *multi-year funds*.[27] Appropriations may, alternatively, have an *indefinite* period of availability; these appropriations are often referred to as *no-year funds*.[28] Multi-year and no-year funds remaining available for obligation beyond the first fiscal year they become available are sometimes referred to as *carryover authority*.[29] That is because the unobligated balance of such funds that remains at the end of one fiscal year—the portion of the appropriation that has not been used to incur obligations—continues to be available in (i.e., it "carries over" to) the next fiscal year.[30]

An appropriation's period of availability is particularly important in the context of a government shutdown because it is the *expiration*, or lapse, of appropriations that generally triggers the Antideficiency Act's shutdown mandate. When an appropriation is made and becomes first available, the appropriation is in its *current phase*.[31] In this phase, the agency may use the appropriation to incur new obligations.[32] For example, each pay period, it may record the cost of

[20] U.S. CONST. art. I, § 9, cl. 7.

[21] *See id.*

[22] *See* U.S. Dep't of Navy v. Fed. Lab. Rels. Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.).

[23] Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. A, tits. I & IV, 138 Stat. 460, 462–64, 478 (2024) (making appropriations for Department of Defense military personnel and research, development, test, and evaluation accounts).

[24] *See* GAO GLOSSARY, *supra* note 14, at 23 (defining "definite authority" and "indefinite authority").

[25] *See* 31 U.S.C. § 1502(a) ("The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title.").

[26] GAO GLOSSARY, *supra* note 14, at 22.

[27] *Id.*

[28] *Id.*

[29] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 120.2 (rev. Aug. 2025) ("*Carryover amounts* are unobligated balances that are available from the prior fiscal year(s) in multi-year and no-year accounts.").

[30] *Id.*

[31] GAO GLOSSARY, *supra* note 15, at 22.

[32] 31 U.S.C. § 1502(a).

employee salaries against a current appropriation that is available for payroll.[33] The agency may also use the current appropriation to make expenditures to liquidate such obligations.[34]

After the end of a fixed-period appropriation's period of availability, the appropriation enters its *expired phase*, which lasts for five fiscal years.[35] An agency may continue to use expired funds, albeit for more limited purposes than when the funds were current.[36] While an agency may use expired funds to record or adjust obligations incurred during the time that the appropriation was current or to make expenditures to liquidate such obligations, the agency may not use expired funds to incur new obligations.[37] For instance, if an agency made a contract when an appropriation was current but failed to record the liability it assumed in the contract against the relevant appropriation prior to the appropriation's expiration, the agency may nonetheless use the expired appropriation to record the obligation.[38] The agency may not, however, use expired funds for obligations that were first incurred after expiration.[39]

The Constitution requires that appropriations be "made by Law."[40] Thus, the procedural requirements that apply to statutes generally—bicameral passage and presentment of enrolled legislation to the President—applies to the making of appropriations.[41] The Constitution also stipulates that Congress may make a particular class of appropriations, funding to "raise and support Armies," for a term of not more than two years."[42] Otherwise, Congress has substantial flexibility in shaping appropriations. To make an appropriation, Congress must identify the purpose of the appropriation and the "source of public funds" that the appropriation draws on, but much else about modern federal funding decisions is a matter of legislative branch discretion.[43]

Congress has historically chosen to use this discretion by making many of its funding decisions in 12 regular appropriations bills, which are bills that "provide funding for the continued operation of federal departments, agencies, and various government activities" and typically are "considered by Congress annually."[44] Such funds are, with certain exceptions, designated as *discretionary appropriations*.[45] Congress makes many other spending decisions outside of the annual appropriations acts—decisions termed *mandatory appropriations*[46]—including by

[33] *See* Dep't of Health & Hum. Servs. Chief Actuary's Commc'ns with Cong., B-302911, 2004 WL 1977435, at *10 n.24 (Comp. Gen. Sept. 7, 2004) ("Federal salaries are obligated when earned and are earned on a biweekly pay period basis.").

[34] 31 U.S.C. § 1502(a).

[35] *Id.* §§ 1552–1553. No-year funds do not expire. *See* Commodity Futures Trading Comm'n—Recording of Obligations for Multiple-Year Leases, B-327242, 2016 WL 423697, at *6 n.9 (Comp. Gen. Feb. 4, 2016) (explaining that a "no-year appropriation is an appropriation that is available for an unlimited period of time").

[36] 31 U.S.C. § 1553(a).

[37] *See id.*

[38] Nat'l Lab. Rels. Bd.—Improper Obligation of Severable Servs. Cont., B-308026, 2006 WL 2673583, at *4 (Comp. Gen. Sept. 14, 2006).

[39] Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, 2001 WL 717355, at *4 (Comp. Gen. Apr. 25, 2001) (stating that once "the obligational period has expired, new obligations must be charged to current funds even if a continuing need arose during the prior period").

[40] U.S. CONST. art. I, § 9, cl. 7.

[41] *Id.* art. I, § 7, cl. 2.

[42] *Id.* art. I, § 8, cl. 12.

[43] *Cf.* Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 426, 437 (2024) (discussing the "significant variety" that existed in the "structure" of early Congresses' appropriations).

[44] GAO GLOSSARY, *supra* note 14, at 13.

[45] *Id.* at 46.

[46] *Id.* at 66.

enacting permanent appropriations that provide an agency with obligational authority that exists until the statute is modified or repealed.[47] Thus, some agencies depend solely on discretionary appropriations, other agencies depend entirely on mandatory appropriations, and still other agencies fund their programs using a combination of the two appropriation types. This variety in agency funding can, in turn, affect whether and how agency programs cease during a general lapse in appropriations.

The Antideficiency Act: Operative Prohibitions

What is known today as the Antideficiency Act is not a single act but a collection of related statutory provisions,[48] the earliest of which date to 1870.[49] Over time, Congress has added to and amended the Act's prohibitions and limitations as it has sought to address two interrelated concerns.

First, Congress confronted the longstanding executive practice of obligating appropriated funds in a manner that created "coercive deficiencies."[50] In essence, Congress would appropriate funds intended to last a full fiscal year, an agency would exhaust those funds partway through the year, and then the agency would seek a deficiency appropriation from Congress to enable continued agency operations for the rest of the fiscal year. This practice backed Congress into a corner, presenting a Hobson's choice of passing the deficiency appropriation or having government functions cease. Congress often chose the former option and passed additional appropriations.[51] Second, government agencies obligated appropriations without statutory authority for the expenditure. Even where these improper obligations did not themselves exceed the total available appropriation for an agency, they nonetheless contributed to deficiencies as spending funds on unauthorized functions contributed to premature depletion of appropriations for authorized purposes.[52]

[47] *See, e.g.*, 42 U.S.C. § 401(a) (permanently appropriating from the general fund of the Treasury certain tax collections for transfer to the Old Age and Survivors Disability Insurance Trust Fund). Such authority can include an agency's ability to impose fees or assessments on regulated parties and finance the agency's activities using such collections. *See* 12 U.S.C. § 16 (providing the Comptroller of the Currency certain fee authority).

[48] 31 U.S.C. §§ 1341, 1342, 1349–1351, and 1511–1519.

[49] Act of July 12, 1870, ch. 251, 16 Stat. 230, 251.

[50] Project Stormfury—Austl.—Indemnification for Damages, B-198206, 59 Comp. Gen. 369, 372 (Comp. Gen. Apr. 4, 1980) ("The Anti-deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations it was receiving in the 19th century and early 20th century, generated, it believed, by the lack of foresight and careful husbanding of funds by Executive branch agencies . . . . We term such commitments 'coercive deficiencies' because the Congress has little choice but to appropriate the necessary funds."); *see also* 39 CONG. REC. 3689 (daily ed. Feb. 28, 1905) (Rep. Hemenway) (noting that agencies spending into deficiency was "an abuse that has continued for many, many years"); CONG. GLOBE, 28th Cong., 1st Sess. 73 (1843) (Rep. C. Johnson) (complaining that Congress had "appropriated $1,000,000 for certain objects" but that the Secretary of the Navy "had gone on to employ hands enough to exhaust $2,000,000" to lay the groundwork for "additional expenditures to keep these men in employ, and threw the odium of refusing to continue them on Congress").

[51] *See, e.g.*, 39 CONG. REC. 3782 (daily ed. Mar. 1, 1905) (Rep. Underwood) (lamenting that, when presented with a request for a deficiency appropriation, "we must pay or stop the running of the government").

[52] *See id.* at 3781 (Rep. Underwood) (explaining that the Department of the Navy had exhausted its FY1905 appropriation in less than six months, requiring a deficiency appropriation, in part because, without authorization, the Navy had improperly spent $500,000 on ship gun sights using funds "ordinarily used for the maintenance and care of ships").

The Antideficiency Act addresses these concerns through its core limitations,[53] its limitation on voluntary services,[54] and its related enforcement provisions.[55] These provisions are discussed in turn, followed by an examination of how application of the Act has evolved over time, leading to the current practice of generally shutting down government functions during a lapse in appropriations.

The Act's Core Prohibitions (31 U.S.C. § 1341(a))

At a high level, the Act's core prohibitions prohibit an agency from incurring obligations without available appropriations to pay for those obligations. More specifically, the Act provides that

> an officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[56]

In the Department of Justice's (DOJ's) view, this core prohibition breaks down into two categories of potential violations. First, an agency would violate the Act by obligating or expending funds beyond *total* appropriations.[57] Second, the Act prohibits obligations or expenditures "exceeding an amount *available* in an appropriation or fund,"[58] which DOJ interprets as imparting a requirement of "legal permissibility."[59] Thus, an agency would violate the Act by obligating or expending funds for an impermissible purpose, and DOJ recognizes that Congress may constrain the scope of legally permissible spending not only by setting overall funding levels but also by including "caps" or "conditions" in an appropriations act.[60] A *cap* is a prohibition on obligating or expending funds "in excess of a designated amount for a particular purpose," and a *condition* is a prohibition on obligating or expending funds "for a particular purpose."[61] Thus, if an officer or employee obligates or expends funds in violation of a condition or cap contained in an appropriations law, DOJ recognizes that individual as violating the Act, even if the agency has not exceeded the total appropriation.[62] DOJ also recognizes that availability has a temporal element, and the final clause of the core prohibition disallows creating obligations "before an appropriation is made."[63] DOJ notes that this language "appears to presuppose that obligations are limited to the particular purposes Congress has authorized," and

[53] 31 U.S.C. § 1341.

[54] *Id.* § 1342.

[55] *Id.* §§ 1349–1351. The Act also addresses coercive deficiencies by instituting requirements for agencies to apportion (i.e., divide) a total appropriation over specific time periods to promote a steadier rate of spending and to avoid premature depletion of funds. *See id.* §§ 1511–1519. Because apportionment occurs *after* Congress makes an appropriation, those provisions are generally inapplicable to a lapse in appropriations and are thus beyond the scope of this report.

[56] 31 U.S.C. § 1341(a)(1)(A)–(B).

[57] Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 37 (2001).

[58] 31 U.S.C. § 1341(a) (emphasis added).

[59] 25 Op. O.L.C. at 38.

[60] *Id.* at 33–34.

[61] *Id.*

[62] *See id.*

[63] *Id.* at 47–48.

thus the Act's prohibitions apply even when appropriations are likely to follow and thus coercive deficiencies are unlikely.[64]

The Government Accountability Office (GAO) generally agrees with DOJ on the above interpretation,[65] but the two agencies diverge in their interpretations of how the Act applies to funding conditions or caps enacted outside of a specific appropriations act. As noted above, the Act's core prohibition on expenditures or obligations "exceeding an amount available in an appropriation or fund" requires an agency to determine what amount is in fact available for a given expense.[66] In DOJ's view, to give meaning to all parts of the phrase "available in an appropriation or fund," the agency "must look [only] to the applicable legislative act making the amounts in question available for obligation or expenditure" to identify a cap or condition that could trigger an Antideficiency Act violation.[67] GAO takes a broader view than DOJ: "If a statute, whether enacted in an appropriation *or other law*, prohibits an agency from using any of its appropriations for a particular purpose, the agency does not have an amount available in an appropriation for that purpose," and obligation of funds for such a purpose will violate the Antideficiency Act.[68]

This disagreement may seem academic; even under DOJ's more restrictive view, transgressing an outside funding condition would still violate the law, but not the Antideficiency Act specifically. This distinction may be significant, however, because whether an action violates the Antideficiency Act or simply another standalone statutory provision may determine whether there is an applicable enforcement mechanism.[69] The Antideficiency Act provides that an officer or employee who violates the Act's core prohibitions or voluntary services bar could be subject to adverse personnel actions, such as suspension or termination,[70] and, for willful violations, criminal penalties of fines and possible imprisonment for up to two years.[71] A violation of the Act also triggers a reporting requirement by the relevant agency to the President, Congress, and Comptroller General.[72]

Beyond enforcement, the number of caps or conditions found outside of appropriations acts may also be significant. Congress often enacts caps or conditions on the obligation or expenditure of appropriations in general legislation that Congress enacts separately from its appropriations acts.[73] Congress also routinely enacts caps and conditions in one appropriations act that apply

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[64] *Id.* at 48 (noting "particular congressional concern with the problem of overall deficiencies" but recognizing a broader purpose "to enforce Congress's control over the uses to which public funds are put.").

[65] *Id.* at 52 (noting that DOJ's view was "consistent with that of the Comptroller General").

[66] *See* 31 U.S.C. § 1341(a)(1)(A).

[67] Use of Appropriated Funds to Provide Light Refreshments at EPA Conferences, 31 Op. O.L.C. 54, 67 (2007); *see also id.* at 66 ("[A] proper reading [of the statute] reinforces that the [Antideficiency Act] does not impose a roving requirement of 'availability' under all possibly applicable law, but rather requires 'availability' in the particular appropriation for the expenditure or obligation."); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 145.2 (rev. Aug. 2025) (directing agencies to the 2007 OLC opinion for guidance on reporting Antideficiency Act violations based on funding restrictions found outside of appropriations acts).

[68] Antideficiency Act—Applicability of Statutory Prohibitions on the Use of Appropriations, B-317450, 2009 WL 754042 at *4 (Comp. Gen. Mar. 23, 2009) (internal quotation marks omitted) (emphasis added).

[69] *See* 31 U.S.C. §§ 1349–1351 (Antideficiency Act enforcement provisions).

[70] *Id.* § 1349(a).

[71] *Id.* § 1350.

[72] *Id.* § 1351.

[73] *See, e.g.*, 39 U.S.C. § 406(c)(2) ("No funds may be obligated or expended to establish, maintain or expand a post office established under subsection (a) for [certain defined purposes].").

"government-wide," including to agencies funded under separately enacted appropriations acts.[74] When it appropriates funds, Congress generally does not "incorporate . . . by reference" the caps or conditions in general law into each agency's appropriations.[75] Thus, when an agency obligates or expends funds in violation of a cap or condition not in the act providing the relevant appropriation, according to DOJ, the obligation or expenditure does not violate the Antideficiency Act. This distinction may also be particularly salient during a lapse in appropriations, when Congress has not passed regular appropriations acts, and thus many applicable limitations on agency obligations or expenditures will likely be found as general provisions elsewhere in law.

The Voluntary Services Bar (31 U.S.C. § 1342)

Congress recognized that agencies could pressure Congress into making deficiency appropriations not only by directly obligating or expending funds but also by accepting services from a person who would then expect payment for the services, even though the person may have had no legal right to payment.[76] In some instances, such "volunteers" were already government employees, whose employing agency coerced them into providing extra services "voluntarily" as a means to avoid appropriation limits.[77] In 1884, individuals who had been "temporarily employed . . . in the [Department of the Interior's] Indian Office," which lacked funds to pay them, presented a claim for payment to Congress; Congress passed a deficiency appropriation but generally prohibited agencies from accepting "voluntary services" "in excess of that authorized by law" in the future.[78]

Congress added this prohibition to the Antideficiency Act itself in 1905.[79] The Act now bars agencies from accepting "voluntary services" or employing "personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."[80] The Act further specifies that its emergency exception "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."[81]

Interpretations of the voluntary services bar have resulted in a distinction between *voluntary* services, which are prohibited, and *gratuitous* services, which are not. DOJ has opined that because the issue Congress was addressing was one of coercive deficiencies, the voluntary services bar should not be read to prohibit truly gratuitous service for which no future claim of

[74] For example, the annual Financial Services and General Government Appropriations Act typically contains a list of "general provisions" that apply "government-wide," including to agencies funded in other appropriations acts. *See, e.g.*, Consolidated Appropriations Act, 2026, Pub. L. No. 119-75, div. E, tit. VII, § 709 (prohibiting use of "funds made available pursuant to the provisions of this *or any other Act*" to implement a regulation that Congress has disapproved through a joint resolution (emphasis added)).

[75] Use of Appropriated Funds to Provide Light Refreshments at EPA Conferences, 31 Op. O.L.C. at 62 n.2 (suggesting Congress could respond to DOJ's reading of the Antideficiency Act as applying to only the "internal" caps and conditions of an appropriations act through such references to general law); *see also* Antideficiency Act—Applicability of Statutory Prohibitions, B-317450, 2009 WL 754042 at *6 (Comp. Gen. Mar. 23, 2009) ("[DOJ] suggests that Congress would have to specifically incorporate by reference every statutory provision of general applicability in order for the restriction to be 'in an appropriation.'").

[76] Recess Appointment of Sam Fox, B-309301, 2007 WL 1674285 at *3 (Comp. Gen. June 8, 2007).

[77] *Id.* (explaining that Congress felt a "moral obligation" to pay agency employees who an agency had "coerce[d]" to "volunteer" services to the agency).

[78] Act of May 1, 1884, ch. 37, 23 Stat. 15, 17.

[79] Act of Mar. 3, 1905, ch. 1484, 33 Stat. 1214, 1257–58.

[80] 31 U.S.C. § 1342.

[81] *Id.* This exception is discussed *infra* "The "Emergency Exception"

payment was likely to arise.[82] Two related principles flow from this reasoning. First, if compensation for a position is fixed by statute, an appointee may not agree to serve without pay, because that agreement would contradict the statutorily prescribed salary, be invalid, and potentially result in a claim for payment after the fact.[83] Second, and relatedly, if a position's salary is discretionary by law, or if statute establishes a maximum but not a minimum salary, then it is permissible for an individual to serve in that position without compensation provided it is clear that the service is truly gratuitous.[84]

Evolving Understandings of Lapses in Appropriations

Today, application of the above-discussed provisions of the Antideficiency Act to a lapse in appropriations results in what is commonly referred to as a government shutdown, that is, widespread furloughs of employees and cessation of non-exempt, non-excepted government functions. Interpreting the Act's core prohibitions and the voluntary services bar to require this result was a development that occurred in 1980 in a pair of legal opinions, one by the Comptroller General[85] and one by the Attorney General.[86]

Prior to 1980, lapses in appropriations had consequences, but government agencies did not view the Antideficiency Act as requiring furloughs and cessation of functions in the same manner as they do today. OMB had advised employees to "avoid hiring, grantmaking, nonemergency travel, and other nonessential obligations" but otherwise permitted employees to continue working, creating obligations to pay those employees even in the absence of appropriations.[87] For example, when Congress failed to pass annual appropriations or a continuing resolution for GAO before the start of FY1980, GAO stated that it did not "believe that it is the intent of Congress that GAO close down until an appropriation measure has been passed."[88] GAO instructed its staff that they should maintain only essential day-to-day operations, but it did not appear to direct an orderly shutdown in the contemporary sense.[89] This was in part because, when Congress eventually did pass an appropriation, it generally included language ratifying obligations incurred during the lapse.[90]

This practice changed in 1980 after the issuance of two legal opinions. In the first opinion, the Comptroller General reasoned that during a lapse in appropriations, the core prohibition of the

[82] Emp. of Retired Army Officer As Superintendent of Indian Sch., 30 Op. Att'y Gen. 51, 55 (1913) ("[I]t is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress . . . .").

[83] *See id.* at 56 (citing *Glavey v. United States*, 182 U.S. 595 (1901); *Miller v. United States*, 103 F. 413 (C.C.S.D.N.Y. 1900)).

[84] Auth. to Decline Comp. for Svc. on the Nat'l Council of the Arts, 13 Op. O.L.C. 113, 114 (1989) (opining that Professor Laurence Tribe could serve as Special Counsel to Independent Counsel Lawrence Walsh without compensation because the statute permitting Tribe's appointment "requires no minimum compensation but merely states a maximum compensation").

[85] B-197841, 1980 WL 17023 (Comp. Gen. Mar. 3, 1980).

[86] Applicability of Antideficiency Act upon a Lapse in Agency Appropriation, 43 Op. Att'y Gen. 224 (1980).

[87] *Id.* at 227.

[88] 125 CONG. REC. S13784 (daily ed., Oct. 1, 1979).

[89] *See id.*

[90] *See, e.g.*, Pub. L. No. 96-86, § 117, 93 Stat. 656, 662 (1979) (continuing resolution for FY 1980).

Antideficiency Act prohibited incurring obligations for the payment of employee salaries, and no other law authorized agencies to incur such obligations.[91] Additionally, although employees may wish to work during a lapse in anticipation that Congress would ratify obligations for their salaries after the fact, this would violate the voluntary services bar.[92] As a result, in the Comptroller General's view, "the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted."[93] In reaching this conclusion, the Comptroller General appeared to draw a distinction between what the statute required and what Congress then intended would happen to agency programs upon a lapse in appropriations. The Comptroller General did "not believe that the Congress intends that federal agencies be closed during periods of expired appropriations."[94] He wrote that "Congress expects that the various agencies of the government will continue to operate and incur obligations" during a lapse in appropriations. Despite this understanding of congressional intent, the Comptroller General decided that "such operations legally produce widespread violations of the Antideficiency Act."[95]

The Attorney General reached a similar conclusion in a second opinion issued less than two months later, though he took a more skeptical view of the notion that Congress intended for government functions to continue notwithstanding the Antideficiency Act's prohibitions.[96] Looking to the history of the Act, the Attorney General determined that the core prohibitions preclude agencies from obligating funds during a lapse in appropriations "except as necessary to bring about the orderly termination of an agency's functions" or as "otherwise authorized by law."[97] The Attorney General acknowledged that Congress had ratified past instances of agencies incurring obligations during a lapse in appropriation, but he reasoned that ratification would only be necessary if those obligations were not authorized in the first instance.[98] Additionally, in his view, implying an exception to the Act for employee salaries would run counter to the Act's purpose of protecting Congress's power to "determine for what purposes the Government's money is to be spent and how much for each purpose."[99]

Since these two opinions were issued in 1980, agencies have conducted shutdowns of functions during a lapse in appropriations. As lapses have occurred, questions have arisen as to what agency functions, if any, may continue during such lapses. To answer this question, agencies have analyzed various exemptions from and exceptions to the Antideficiency Act, which are discussed below.

Authority to Continue Government Programs During Lapses in Appropriations

Under the Antideficiency Act's general prohibitions, when an agency experiences a lapse in appropriations, its officers and employees generally may no longer involve the government in

[91] B-197841, 1980 WL 17023 at *1 (Comp. Gen. Mar. 3, 1980).

[92] *Id.*

[93] *Id.* at *2.

[94] *Id.*

[95] *Id.* at *3.

[96] Applicability of Antideficiency Act upon a Lapse in Agency Appropriation, 43 Op. Att'y Gen. 224, 225 (1980).

[97] *Id.* at 224.

[98] *Id.* at 228.

[99] *Id.* at 229.

obligations, as any such obligations would be incurred "before an appropriation is made" in violation of the Act.[100] Affected agency programs must thus cease, or shut down, because failing to do so would involve the government in obligations for expenses. For example, the agency must furlough employees whose duties relate to agency programs that are subject to a shutdown to ensure that those employees do not continue to render personal services and thus cause the United States to incur obligations without budget authority to do so.[101]

However, a lapse in appropriations does not necessarily cause *all* agency activities to cease. Some functions may continue because appropriations are still available for the specific functions in question, even though appropriations may have lapsed for other agency functions.[102] In Antideficiency Act parlance, such functions are *exempt* from the general shutdown mandate. Even activities that experience a lapse may continue to occur, and thus to incur obligations, when there exists express or implied authority to do so.[103] In Antideficiency Act terminology, these functions are *excepted* from the shutdown mandate. Deciding which functions are exempt from the Antideficiency Act's shutdown mandate, which are excepted, and which are subject to the statute's bar on new obligations requires a case-by-case application of the statute, using the analytical frameworks described below.

Identifying Exempt Functions

Congress has broad discretion in structuring agency appropriations, and this discretion yields variety in the type, number. and terms of appropriations that support a given agency's programs and activities. As noted above, some agencies receive only one appropriation through the annual appropriations process that is available for all of the expenses that the agency might lawfully incur under its authorizing statutes and which remains available for a single fiscal year.[104] Other agencies receive multiple appropriations with varying periods of availability.[105] Agencies might also receive mandatory funding that does not depend on annual funding cycles.[106]

However Congress chooses to structure funding, all agencies decide whether exempt functions exist by asking whether, despite a lapse in certain of their annual appropriations, some amount of funds remains available for a given function.[107] In other words, the agency considers whether an expense fits the purpose of an appropriation that remains current, an analysis that entails application of a statute commonly referred to as the Purpose Statute. Codified at 31 U.S.C.

[100] 31 U.S.C. § 1341(a)(2).

[101] B-197841, 1980 WL 17023, at *1 (Comp. Gen. Mar. 3, 1980) (explaining that "a supervisory officer or employee incurs an obligation on behalf of the government to pay the salaries" of employees who are permitted to "work during a period of expired appropriations" and thus the supervisor violates the Antideficiency Act because "there are no funds available at the time of the obligation was incurred").

[102] *See infra* "Identifying Exempt Functions."

[103] *See infra* "Identifying Excepted Functions."

[104] *See, e.g.*, Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, tit. V, 138 Stat. 460, 550 (2024) (appropriating $80.8 million in one-year funds for the Federal Election Commission).

[105] *See, e.g.*, *id.*, div. D, tit. III, 138 Stat. 681–86 (making multiple appropriations of varying durations for the Department of Education).

[106] *See supra* notes 46–47 and accompanying text.

[107] *See* U.S. Dep't of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, *4 (Comp. Gen. Oct. 22 2019) (explaining that "certain agencies and programs may continue to operate without implicating the Antideficiency Act if the agency or program has available budget authority," which may "derive from multiple year or no-year appropriation carryover balances, or otherwise available balances from other authorities, such as from fee income that Congress made available for obligation").

§ 1301(a), the statute states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[108]

Under the statute, "for appropriated funds to be legally available for an expenditure, the purpose of the obligation or expenditure must be authorized."[109] Deciding whether an appropriation is legally available for a particular obligation generally entails comparing the obligation with the text of the appropriation. Congress might expressly provide for the obligation in the appropriation, but such express authority is not required.[110] When Congress expressly appropriates for an object, the appropriation is also available for "any expenses that are reasonably necessary for the accomplishment of that purpose."[111] An appropriation thus provides both express and implied authority to incur obligations and make expenditures.[112] Agencies use a multi-factor test for deciding whether a particular expense comes within the express or implied authority of a given appropriation. Comptroller General decisions contain the most extensive discussion of the Purpose Statute and its application, setting forth a three-part test—the necessary expense rule—for marking the scope of an appropriation.[113] If during a lapse an obligation falls within the scope of a current appropriation under the test, then the agency may use the appropriation without implicating the Antideficiency Act's prohibitions.[114]

First, the agency may charge an expense to a given appropriation if there is a reasonable, logical relationship between the expense and appropriation's object.[115] The "starting point" for this analysis "is the text of the appropriation," which sets forth its object.[116] Oftentimes, an appropriation's object refers to another statute, which authorizes the agency's programs and functions. Congress might make an appropriation, for example, to carry out the agency's authorizing statute. Congress might alternatively make an appropriation for a generally worded object. In cases like these, the agency primarily looks to its authorizing statutes to understand the types of expenses for which the appropriation may be charged.[117] Second, in the case of an agency that receives more than one appropriation for its activities, the agency may charge an expense against an appropriation only if it is the one most specifically available for the

[108] 31 U.S.C. § 1301(a).

[109] U.S. Dep't of Navy v. Fed. Lab. Rels. Auth., 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.).

[110] *See* Nat'l Transp. Safety Bd.—Ins. for Emps. Traveling on Off. Bus., B-309715, 2007 WL 2792189, at *2 (Comp. Gen. Sept. 25, 2007) (stating that "each item of expenditure need not be specified in an appropriations act"); *see also* Dep't of Defense—Availability of Appropriations for Border Fence Construction, B-330862, 2019 WL 4200949, at *10 (Comp. Gen. Sept. 5, 2019) ("Given the size and breadth of the federal government, Congress may appropriate amounts for a broad purpose and not enumerate each permissible expenditure.").

[111] Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 WL 976607, at *2 (Comp. Gen. Apr. 22, 2005).

[112] *See* CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean Stiff, at 29 (2020).

[113] Although Comptroller General opinions are not binding on the executive branch, DOJ applies the Purpose Statute using a similarly phrased standard, which it has described as "mirror[ed]" by the Comptroller General's Purpose Statute decisions. *See* State & Loc. Deputation of Fed. L. Enf't Officers During Stafford Act Deployments, 2012 WL 1123840, at *8 (O.L.C. Mar. 5, 2012).

[114] Fed. Deposit Insur. Corp.—Operations of the Off. of Inspector Gen. during a Lapse in Appropriations, B-330693, 2019 WL 4942499, at *5 (Comp. Gen. Oct. 8, 2019) ("The [Antideficiency] Act is not implicated where an agency permissibly obligated available budget authority, even if other agencies or programs within an agency are concurrently experiencing a lapse in its appropriations.").

[115] U.S. Consumer Prod. Safety Comm'n—Use of Am. Rescue Plan Act Appropriation for Activities of the Inspector Gen., B-334321, 2023 WL 1816593, at *2 (Comp. Gen. Feb. 8, 2023).

[116] *Id.*

[117] Dep't of the Treasury Off. of Inspector Gen.—Availability of Appropriations for Pandemic Emergency Rental Assistance Program Oversight & Recoupment, B-336626, 2026 WL 114439, at *3 (Comp. Gen. Jan. 15, 2026).

expense.[118] The agency may record an expense only to the extent permitted by its most specific appropriation; it may not supplement the specific appropriation with more general appropriations.[119] Third, the agency may not use an appropriation to pay an expense when another law prohibits the payment.[120]

Exempt functions can be performed either within amounts of carryover authority originally appropriated to an account or using amounts that transfer to the account as carryover funds.[121] A *transfer* of funds entails the debiting of one appropriation to the credit of another.[122] "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."[123] Thus, to make a transfer, an agency needs *transfer authority*, that is, a statute that authorizes the transfer.[124]

A question under the Purpose Statute that arose during the 2025 government shutdown concerned the availability of certain Department of Defense (DOD) appropriations for the pay and allowances of certain military servicemembers. Congress typically makes appropriations to pay the active-duty and reserve components of the service branches under appropriations that carry the heading "military personnel."[125] Military-personnel appropriations are typically one-year funds.[126] Thus, the traditional source of funds for pay and allowances lapsed on October 1, 2025.[127] Due to the lapse, DOD initially placed affected military personnel in an excepted status,[128] apparently on the basis that title 37 of the *U.S. Code* entitles them to pay and other benefits, whether or not appropriations exist to incur such obligations.[129]

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[118] *Id.* at *4.

[119] *Id.* ("If the funds appropriated in the more specific appropriation become insufficient to cover the agency's needs, the agency is not then permitted to begin charging the general appropriation for that purpose unless Congress has specifically authorized it to do so.").

[120] 6 Comp. Gen. 619, 621 (Mar. 25, 1927).

[121] *See* Testimony Before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations, B-330720, 2019 WL 459186, at *3 (Comp. Gen. Feb. 6, 2019) (stating that "during a lapse in appropriations, agencies may potentially operate by exercising existing statutory authorities to transfer amounts between available appropriations or to reprogram amounts within the various purposes provided in an available appropriation").

[122] GAO GLOSSARY, *supra* note 14, at 95–96.

[123] 31 U.S.C. § 1532.

[124] GAO GLOSSARY, *supra* note 14, at 96.

[125] Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. A, tits. I & IV, 138 Stat. 460, 462–64 (2024) (making appropriations for Department of Defense (DOD) military personnel).

[126] *See id.*

[127] *See id.*

[128] *See* U.S. DEP'T OF DEF., CONTINGENCY PLAN GUIDANCE FOR CONTINUATION OF OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS 4 (Sept. 30, 2025) ("Military personnel on active duty, including reserve component personnel on Federal active duty, will continue to report for duty and carry out assigned duties.").

[129] *Cf.* U.S. DEP'T OF HOMELAND SEC., PROCEDURES RELATING TO A LAPSE IN APPROPRIATIONS 6 (Sept. 29, 2025) (stating that "active duty military members are excepted because their entitlement to pay is provided" under 37 U.S.C. § 204); TALKING POINTS ON THE USE OF RESEARCH, DEVELOPMENT, TEST AND EVALUATION FUNDS TO PAY MILITARY SALARIES DURING A LAPSE IN APPROPRIATIONS 1 (Oct. 17, 2025) [hereinafter RDT&E TALKING POINTS], https://www.politico.com/f/?id=00000199-f9bb-d346-aff9-fbbf1a8d0000 (noting that military servicemembers "continue to work" during a shutdown because obligations for their salaries "in advance of appropriations are 'authorized by law'" by virtue of their title 37 pay entitlement); *see also* Jennifer Scholtes & Meredith Lee Hill, *Lawmakers Bemoan Trump's Latest Power Grab: Troop Pay*, POLITICO (Oct. 20, 2025), https://www.politico.com/news/2025/10/20/troops-showdown-trump-funding-00614874 (stating that on October 17, 2025, "the White House sent lawmakers a five-page document," the talking points, "detailing its argument for why the president has the power to use funding for a different purpose than Congress mandated in law").

October 15, 2025, marked the first regularly scheduled pay date for affected servicemembers in FY2026.[130] Due to the lapsing of military personnel appropriations, however, payroll could not be met.[131] In President Trump's view, the prospect that military personnel serving in an active-duty status would go unpaid presented "a serious and unacceptable threat to military readiness and the ability of our Armed Forces to protect and defend our Nation."[132] Thus, on October 15, President Trump issued National Security Presidential Memorandum 8 (NSPM-8).[133]

In NSPM-8, President Trump invoked his role as Commander in Chief under Article II of the Constitution and directed the Secretary of Defense to "use for the purpose of pay and allowances any funds appropriated by the Congress that remain available for expenditure in Fiscal Year 2026 to accomplish the scheduled disbursement of military pay and allowances for active duty military personnel," as well as Reserve component personnel who had performed active service during the pay period.[134] The President instructed that funds used should be "provided for purposes that have a reasonable, logical relationship to the pay and allowances of military personnel, consistent with applicable law," including the Purpose Statute.[135] NSPM-8 did not identify the carryover balances DOD was to use to meet payroll.[136] According to what a news organization described as White House talking points,[137] DOD used carryover balances from its multi-year "Research, Development, Test, and Evaluation" (RDT&E) appropriations.[138]

The talking points cast the apparent use of RDT&E carryover balances in Purpose Statute terms while taking what appears to be a novel approach to Purpose Statute analysis.[139] The talking points recognize that annual appropriations "for active duty military pay are usually exclusively provided for by the Military Personnel accounts."[140] The talking points also note that when Congress decides to fund certain expenses in such a relatively specific manner, "other funds in a different account cannot be used for that same purpose."[141] The Attorney General has explained that this rule rests "on the theory that where Congress appropriates a specific sum for a specific object for the whole of a particular fiscal year, it is to be presumed that the sum so specified is all that Congress intends shall be used for that object for that fiscal year."[142] As Military Personnel appropriations lapsed,[143] the document asserts that those appropriations "no longer exist as a matter of law."[144] In the talking points view, other, more general funds, including RDT&E funds, thus "may instead be utilized to cover these authorized obligations."[145] This aspect of the talking

[130] National Security Presidential Memorandum 8, Use of Available Department of War Funds for Military Pay and Allowances During the Lapse in Annual Appropriations (Oct. 15, 2025).

[131] *See id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *See id.*

[137] *See supra* note 129.

[138] *See* RDT&E TALKING POINTS, *supra* note 129, at 1.

[139] *Id.* at 1 (quoting DOJ opinions applying Purpose Statute analyses).

[140] *Id.* at 2.

[141] *Id.*

[142] Pan. Canal Appropriations—Marine Barracks at Ancon., 26 U.S. Op. Atty. Gen. 81, 83 (1906).

[143] RDT&E TALKING POINTS, *supra* note 129, at 2.

[144] *Id.* As noted above, however, funds continue to exist after expiration, and the agency concerned has limited use of expired funds. *See* 31 U.S.C. § 1553(a).

[145] RDT&E TALKING POINTS, *supra* note 129, at 2.

points' reasoning appears novel. It is unclear whether the Attorney General or Comptroller General have ever previously endorsed the view that the lapse of a specific appropriation means that more general carryover authority becomes available, even though it would not be if the specific appropriation were still current.

The talking points also claim that a logical relationship exists between the expense of military payroll and RDT&E appropriations that are available for "expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment."[146] In particular, the talking points argue that a military force that cannot meet "basic household needs" cannot make effective use of such technology.[147] The Comptroller General has explained that determinations such as DOD's, which assert a relationship between a given expense and the object of an appropriation, are generally "a matter of agency discretion" but that it is possible for the relationship found to be "so attenuated" as to take it beyond the range of agency discretion.[148]

Identifying Excepted Functions

Part of an Antideficiency Act analysis in the event of a lapse in appropriations, as discussed above, entails identifying agency functions that are *exempt* from the Antideficiency Act's shutdown mandate because there are current appropriations to support them.[149] An equally important part of an agency's shutdown analysis is identifying functions that are *excepted* from the Act's general shutdown mandate. Excepted functions are those that may continue to be performed, despite a lapse in appropriations, either because the agency concerned is "authorized by law" to incur obligations in advance of appropriations or because the function meets an emergency "involving the safety of human life or the protection of property."[150] These exceptions are discussed below.

"Authorized by Law"

The Antideficiency Act's core prohibition bars public employees from "involving" the United States "in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*."[151] Thus, when "authorized by law," a public employee can take actions to incur an obligation, even though appropriations sufficient for its payment have not yet been made.[152] The Comptroller General and DOJ interpret the "authorized by law" exception as encompassing two general classes of obligations: those that a statute *expressly* allows an agency to incur in advance of appropriations and those that a statute *impliedly* allows an agency to incur.

[146] Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. A, tit IV, 138 Stat. 460, 478 (2024).

[147] RDT&E TALKING POINTS, *supra* note 129, at 2. The talking points also cite examples of "presidential spending actions to address emergencies." *See id.* at 3–5.

[148] Election Assistance Comm'n—Use of Grant Funds for Sec. Servs., B-333826, 2022 WL 1238356, at *2 (Comp. Gen. Apr. 27, 2022).

[149] *See* Smithsonian Inst.—Application of the Antideficiency Act to Emp. Travel During a Lapse in Appropriations, B-333281, 2021 WL 4860940, at *5 (Comp. Gen. Oct. 19, 2021) ("The Antideficiency Act does not categorize employees as 'excepted' or 'non-excepted,' and an employee's job description is generally insufficient to determine whether the emergency exception applies to a particular activity. Rather, we must analyze the *activity itself* to determine whether it may continue during a lapse in appropriation." (emphasis added)).

[150] 31 U.S.C. § 1342.

[151] *Id.* § 1341(a)(2).

[152] *See id.*

Express Authority

Express authority in law for a public employee to incur obligations despite a lapse in appropriations is "very rare."[153] The fact that an agency's authorizing statute might task an agency with a particular function is not sufficient authority to carry out that function during a lapse.[154] That is true even if the statute mandates that the agency perform the function.[155]

Rather, express statutory authority must specifically confer an agency with discretion to make obligations, whether or not sufficient appropriations exist for that obligation.[156] *Contract authority* is a type of budget authority that "permits an agency to incur obligations in advance of appropriations."[157] Thus, for example, DOD may contract "for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies," even if it lacks "an appropriation adequate to [the contract's] fulfillment," so long as the materials, facilities, and services acquired do not exceed "the necessities of the current year."[158] Statutes such as these expressly vest public employees with discretionary authority to incur obligations that the Antideficiency Act would otherwise bar.

Another class of statutes fit the "authorized by law" exception to the Antideficiency Act's prohibition against incurring obligations in advance of appropriations. As noted above, when Congress grants budget authority to an agency, it authorizes that agency to incur obligations and (in the case of appropriations) make expenditures to liquidate those obligations. However, Congress may itself create obligations.[159] It does so by enacting laws that, by their terms, commit

[153] *See* OFF. OF MGMT. & BUDGET, FREQUENTLY ASKED QUESTIONS DURING A LAPSE IN APPROPRIATIONS 1, (Oct. 3, 2025). A 1981 Attorney General opinion states that "legal authority to incur obligations in advance of appropriations" is "not uncommon in the Government." 43 U.S. Op. Atty. Gen. 293, 296 (1981). The 1981 opinion cites as examples of such authority "funds that are subject to multi-year or no-year appropriation." *Id.* Strictly speaking, carryover authority does not appear to fit the Antideficiency Act's reference to an authorization in law to incur an obligation "for the payment of money *before* an appropriation is made." 31 U.S.C. § 1341(a)(1)(B)c (emphasis added). Obligations incurred against carryover authority *use* existing appropriations; such obligations do not *anticipate* appropriations not yet made. Thus, this report refers to functions supported by carryover authority as exempt functions, rather than excepted functions, a phrasing consistent with contemporary agency practice. *See, e.g.*, DEP'T OF DEF., CONTINGENCY PLAN GUIDANCE FOR CONTINUATION OF OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS (2026) ("Activities funded with available appropriations (i.e., exempt activities) may continue, subject to prior apportionment and allotment of funds.").

[154] *See* 43 U.S. Op. Atty. Gen. at 297 (stating that "broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies" is not express authority to incur obligations in advance of appropriations).

[155] *See* St. Elizabeth's Hosp.—D.C. Payments, 61 Comp. Gen. 661, 663–64 (Sept. 30, 1982) (statutory duty of the Superintendent of St. Elizabeth's Hospital to admit a patient "believed to be suffering from a mental illness" did not authorize the Superintendent to incur obligations for such admissions in excess of available funds).

[156] *Cf.* Continuation of Fed. Prisoner Det. Efforts in the Face of a USMS Appropriation Deficiency, 24 U.S. Op. Off. Legal Counsel 47, 50 (2000) (stating that a claim to express authority must be "supported by something more than a finding that the functions for which the obligations are to be made can reasonably be said to fall within the agency's general responsibilities").

[157] GAO GLOSSARY, *supra* note 14, at 21–22.

[158] 41 U.S.C. § 67301(a)–(c). The Secretary of Homeland Security possesses the same authority with respect to the Coast Guard when it is not operating as a service in the Navy. *See id.* § 6301(b)(1)(B). Other statutes provide similar authority. *See* 25 U.S.C. § 99 (permitting the Commissioner of Indian Affairs to contract for "goods and supplies for the Indian Service required for the ensuing fiscal year, notwithstanding the fact that the appropriations for such fiscal year have not been made"); 41 U.S.C. § 6302 (authorizing the Secretary of the Army to contract for fuel "in sufficient quantities to meet the requirements for one year without regard to the current fiscal year" to be paid from funds appropriated for the current fiscal year or "which may be appropriated for the following fiscal year").

[159] *See* Me. Cmty. Health Options v. United States, 590 U.S. 296, 313 (2020) (explaining that "budget authority is not necessary for Congress itself to create an obligation by statute").

the federal government to make payments to a third party, without regard to whether appropriations are available to satisfy those obligations.[160] The mandatory nature of these obligations distinguishes them from "discretionary obligations entered into by administrative officers," and it is this latter category that the Antideficiency Act's general prohibitions govern.[161] For example, certain government officials enjoy a salary as an incident of the office they hold, whether or not the individual renders services in return for the salary.[162] This class of individuals generally includes those who are *not* covered by the Annual and Sick Leave Act and its provision of leave benefits.[163] For such individuals, the Antideficiency Act expressly authorizes obligations required to pay their salaries for the period of a lapse.[164]

Statutes are not, in the view of executive branch agencies, the sole basis for obligations that are "authorized by law" despite a lapse in appropriations; those agencies maintain that court orders may give rise to such obligations as well.[165] For example, when appropriations for DOJ lapse, continuing to participate in pending civil litigation would require DOJ to incur obligations for expenses such as the services rendered by its attorneys.[166] Thus, DOJ generally seeks stays of civil litigation upon a lapse in appropriation.[167] If a court denies such a stay, then DOJ recognizes the denial as, itself, authorization in law (i.e., a court order requiring continued participation in litigation) to incur obligations despite the lapse.[168] Similarly, in DOJ's view, a congressional

[160] U.S. Dep't of Agric.—Application of Recording Statute, Bona Fide Needs Statute & Antideficiency Act to Supplemental Nutrition Assistance Program Benefits, B-336036, 2025 WL 506899, at *9 n.36 (Comp. Gen. Feb. 15, 2025) ("To confer such authority, the statute must require the agency to incur the obligation regardless of the availability of sufficient appropriations.").

[161] U.S. Dep't of Educ.—Recording of Obligations Under the Guaranteed Student Loan Program, 65 Comp. Gen. 4, 9 (Comp. Gen. Oct. 2, 1985).

[162] United States v. Grant, 237 F.2d 511, 515 (7th Cir. 1956) (holding that, prior to enactment of the Annual and Sick Leave Act of 1953, the salary of a U.S. Marshal "belonged to him as an incident to his office and was in no way impaired by his alleged absence therefrom or neglect to perform his official duties").

[163] *See* Copyright Royalty Tribunal—Comm'rs' Pay During Funding Gap, B-208333, 1982 WL 27255, at *2 (Comp. Gen. Aug. 31, 1982) (quoting the Annual and Sick Leave Act's statement that officers who are covered by the statute "'are not entitled to the pay of the officers solely because of their status as officers'" as standing for the converse proposition that "officers who are not so covered *are* entitled to compensation solely because of their status as officers" (quoting 5 U.S.C. § 5508)).

[164] *See id.* (concluding that because Copyright Royalty Tribunal (CRT) commissioners were not subject to the Annual and Sick Leave Act, they enjoyed their salary as an incident of their offices, and thus CRT lawfully incurred commissioner salary obligations despite a lapse in appropriations). DOJ has similarly determined that the Antideficiency Act does not prohibit incurring obligations for the pay of certain White House personnel who are exempt from the Annual and Sick Leave Act, but it has categorized such exemptions as implicitly authorized by the Act. *See* Auth. to Employ White House Off. Pers. Exempt from the Ann. & Sick Leave Act Under 5 U.S.C. § 6301(2)(x) & (xi) During an Appropriations Lapse, 2011 WL 7485436, at *6 (O.L.C. Apr. 8, 2011).

[165] *See* Kornitzky Grp., LLC v. Elwell, 912 F.3d 637, 638 (D.C. Cir. 2019) (denying request to stay oral argument and noting the agreement of the parties "that conducting argument as scheduled is consistent with [31 U.S.C.] § 1342); *but see* People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 912 F.3d 641, 641–642 (D.C. Cir. 2019) (Katsas, J., concurring) (questioning whether the Antideficiency Act barred a court from ordering continued DOJ participation in a civil litigation that did not present an emergency involving the safety of human life or the protection of property) ("The counter-argument must be that activity not otherwise 'authorized by law' becomes so when this Court orders it. The position appears troubling, for a judicial decree resting on that premise—'*la loi, c'est nous*'—seems little better than an executive decree resting on '*l'état, c'est moi*.'").

[166] *See* B-197841, 1980 WL 17023, at *1 (Comp. Gen. Mar. 3, 1980).

[167] *See* U.S. DEP'T OF JUST., U.S. DEPARTMENT OF JUSTICE FY 2026 CONTINGENCY PLAN 3 (Sept. 29, 2025) ("Litigators will approach the courts and request that active cases, except for those in which a delay would compromise to a significant degree the safety of human life or the protection of property, be postponed until funding is available.").

[168] *See id.* (stating that a court denying a stay would "constitute express legal authorization for the activity to continue"). However, DOJ has also stated, to the contrary, that a court order might not count as express authority for (continued...)

subpoena directed to an executive branch officer or employee is "express authority" for the subpoenaed individual to incur the obligations necessary to comply with the subpoena.[169]

Finally, the Constitution itself might authorize an official to incur obligations in advance of appropriations. For example, the Constitution empowers the President to grant pardons,[170] recommend legislation to Congress,[171] and approve or disapprove legislation passed by that body.[172] When the President exercises these constitutional authorities, either personally or with the assistance of subordinates, obligations can be incurred. DOJ construes the Antideficiency Act to authorize the making of such commitments in advance of appropriations, reasoning that if the Act were interpreted to bar the President from incurring obligations necessary to carry out his constitutional functions during a lapse in appropriations, the Act would be unconstitutional.[173]

DOJ's general framework for identifying constitutionally authorized obligations borrows from Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which describes a three-part framework for assessing claims of presidential power.[174] Under this framework, the President's powers are at their height when acting "pursuant to an express or implied authorization of Congress," because such an exercise combines all of the President's own powers with all that Congress may confer upon him.[175] Absent such congressional authorization, the President must rely "upon his own independent powers," but there may also be a "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution" of authority "is uncertain."[176] Finally, when presidential actions conflict with statute, the president's powers are at their "lowest ebb."[177] Invoking this framework, DOJ's Antideficiency Act analysis considers whether, absent the Antideficiency Act's enactment, the Constitution would authorize the President to incur obligations to carry out his Article II responsibilities.[178] Such authority would be "further buttressed," in DOJ's view, if it is consistent with other statutes that are "more narrowly drawn" than the Antideficiency Act and "would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates."[179] DOJ also considers the extent of such obligations and their urgency.[180]

Congress similarly understands that the Constitution may authorize its members or staff to incur obligations in advance of appropriations to carry out their constitutional functions. For instance, the Committee on House Administration (CHA) maintains contingency plans to advise members on legislative operations during a lapse in appropriations.[181] CHA's contingency plans explain that

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Antideficiency Act purposes. *See* Continuation of Fed. Prisoner Det. Efforts in the Face of a USMS Appropriation Deficiency, 24 U.S. Op. Off. Legal Counsel 47, 50 (2000) ("In our view, the 'authorized by law' exception must refer to congressional, as opposed to judicial, authorization to expend funds.").

[169] Participation in Cong. Hearings During an Appropriations Lapse, 19 U.S. Op. Off. Legal Counsel 301, at *3 (1995).

[170] *See* U.S. CONST. art. I, § 7, cl. 2.

[171] *Id.* art. II, § 2, cl. 1.

[172] *Id.* art. II, § 3.

[173] 43 U.S. Op. Atty. Gen. 293, 299–300 (1981).

[174] 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[175] *Id.* at 635.

[176] *Id.* at 637.

[177] *Id.* at 637–38.

[178] 43 U.S. Op. Atty. Gen at 300.

[179] *Id.*

[180] *Id.*

[181] *See* COMM. ON HOUSE ADMIN., LEGISLATIVE OPERATIONS DURING A LAPSE IN APPROPRIATIONS: GUIDANCE ISSUED BY THE COMMITTEE ON HOUSE ADMINISTRATION (2025) [hereinafter HOUSE CONTINGENCY PLAN].

"activities that entail or directly support Members' performance of their constitutional responsibilities" are excepted functions under the Act.[182] These constitutional responsibilities include "all legislative activities," "broadly defined" as "activities that are an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed bills and resolutions" and other constitutional duties such as rulemaking for the House.[183] The contingency plans list tasks such as bill preparation and introduction, floor activities, committee hearings, and information gathering as all related to a member's performance of their constitutional functions.[184]

The federal courts have interpreted constitutional provisions to require the continued performance of judicial functions during a lapse in appropriations as well.[185] The Constitution guarantees criminal defendants a right to a jury trial that is conducted in a "speedy" manner.[186] The Seventh Amendment also grants certain civil litigants a jury trial right, though not one that is expressly to be held on a "speedy" basis.[187] In 1986, anticipating the possibility that relevant funds would be depleted before the end of the fiscal year, the Administrative Office of the U.S. Courts (AO) issued a directive to district courts that they should not empanel civil juries, and thus not hold civil jury trials, for a period of more than three months.[188] As DOJ explained in its representation of the AO, the directive rested on the view that the Antideficiency Act compelled suspending civil jury trials so that limited juror fee funds could be used to empanel petit juries in criminal cases.[189] The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that this directive violated the civil jury trial guarantee.[190] The court reasoned that the "right to a civil jury trial is violated when, because of such a suspension, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive."[191] The Ninth Circuit explained that it did not conclude that the Antideficiency Act required the AO's directive, but if the statute were read to compel suspension of civil jury trials for more than a minimal period of time, the Act would violate the Seventh Amendment.[192]

[182] *Id.* A permanent, indefinite appropriation funds Member pay, meaning that funding sufficient to pay Member salaries is always available. *See* 2 U.S.C. § 4502.

[183] HOUSE CONTINGENCY PLAN, *supra* note 181, at 1.

[184] *Id.*

[185] Federal justices and judges are entitled to their salary as an incident of the office they hold. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); 5 U.S.C. § 6301(2)(xiii) (excluding from the Annual and Sick Leave Act definition of "employee" "an officer in the legislative or judicial branch who is appointed by the President"); *see also supra* notes 162–164 and accompanying text.

[186] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[187] *Id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

[188] Armster v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 792 F.2d 1423, 1425–26 (9th Cir. 1986).

[189] *Id.* at 1426.

[190] *Id.* at 1430 (stating that the civil jury trial system "may not be suspended for lack of funds").

[191] *Id.*

[192] *Id.* at 1430 n.13.

Implied Authority

Since first formally examining the Antideficiency Act's effect on a lapse in appropriations,[193] DOJ has interpreted the Act as not necessarily requiring *express* authority to incur obligations in advance of appropriations.[194] Rather, DOJ has interpreted statutes to grant an agency *implied* authority to incur such obligations.[195] According to the Attorney General, an agency may incur such obligations when "authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency."[196]

DOJ and the Comptroller General have often disagreed over how far implied authority extends to authorize obligations during lapses in appropriations, but one commonly accepted category comprises obligations necessary for an orderly shutdown of nonexcepted functions.[197] Agency personnel must perform tasks after a lapse in appropriations so that nonexcepted agency functions cease in a responsible manner.[198] Performing these tasks would cause the agency to incur obligations in advance of appropriations, but the obligations are viewed as authorized by necessarily implication from the Antideficiency Act's shutdown mandate.

A more controversial category of implied authority involves *exempt* functions and certain related activities that an agency determines must be *excepted* so that its exempt functions may be carried out. In 1980, the Attorney General first approved an excepted designation grounded in this form of implied authority in the context of Social Security Act programs.[199]

Congress funds Social Security retirement benefits through a permanent appropriation of certain tax collections from the general fund of the Treasury, which are transferred to the Old Age and Survivors Disability Insurance (OASDI) Trust Fund to pay benefits to eligible beneficiaries.[200] Funding authority for benefit payments, in other words, does not lapse.[201] However, Congress determines funding for the administrative expenses necessary to process benefit payments in annual appropriations acts by imposing a limitation on obligations that can be charged to the OSADI Trust Fund for such administrative expenses.[202]

Then-Attorney General Benjamin Civiletti decided that, during a lapse that includes the limitation on administrative expenses, such administrative functions may be designated as excepted activities because the continued issuance of benefit checks depended on continued performance

[193] Applicability of Antideficiency Act upon a Lapse in Agency Appropriation, 43 U.S. Op. Atty. Gen. 224, 227 (1980) (stating that the President's request to the Attorney General for an opinion on the Antideficiency Act's operation during a lapse in appropriations "apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law").

[194] 43 U.S. Op. Atty. Gen. 298 (1981).

[195] *Id.*

[196] *Id.*

[197] *Compare id.* at 305 n.12, *with* Off. of Mgmt. & Budget Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriation, B-331132, 2019 WL 6909516, at *4 (Dec. 19, 2019).

[198] Applicability of Antideficiency Act upon a Lapse in Agency Appropriation, 43 U.S. Op. Atty. Gen. 224, 229 (1980) (stating that "it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations").

[199] *See* 43 U.S. Op. Atty. Gen. 293, 298 n.7 (1981).

[200] 42 U.S.C. § 401(a).

[201] *See id.* (appropriating certain tax collections for transfer to the OASDI funds "for the fiscal year ending June 30, 1941, and for each fiscal year thereafter").

[202] Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. D, tit. IV, 138 Stat. 460, 700 (2024).

of administrative tasks.[203] The Attorney General found it significant that there was no "contrary legislative history" suggesting that benefit payments ought to cease when funding for administrative functions lapse.[204]

GAO has not specifically objected to the designation of Social Security Act administrative functions as excepted activities, in part because that approach to lapses involving Social Security Act programs has "become entrenched in practice for almost 40 years."[205] However, GAO has objected to the executive branch's extension of similar reasoning to other statutory frameworks. In 2019, GAO examined the Internal Revenue Service's (IRS's) decision to process federal tax refunds during a lapse in its appropriations.[206] In GAO's view, there was "no clear congressional intent in the relevant statutes or the permanent, indefinite appropriation for tax refunds evidencing that IRS should continue to make tax refund payments when annual appropriations for the costs of issuing refunds are not available."[207]

GAO and DOJ thus appear to draw opposite conclusions from the absence of congressional intent on the question of whether, during a lapse in appropriations, permanently funded functions should continue if they depend on other functions whose funding lapses. For DOJ, the absence of relevant "legislative history" generally supports continued program operations.[208] For GAO, the absence of "clear congressional intent" generally weighs against a finding of implied authority.[209]

In these examples, executive branch agencies concluded that Congress's decision to grant an agency a permanent appropriation supported a necessary implication that the annually funded administrative functions of *that same agency* should continue to be performed during a lapse in appropriations. However, the executive branch's application of the necessary implication doctrine has not been confined to the disparately funded programs of a *single* agency. Instead, the executive branch has concluded that if one agency requires the services of a second agency to carry out the first agency's exempt functions, the second agency's services can be designated as excepted functions as well.[210]

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[203] 43 U.S. Op. Atty. Gen. 293, 298 n.7 (1981) ("The continuing appropriation of funds for the benefit payments themselves, however, substantially belies" the argument that a lapse in administrative expense funding should cause benefit payments to cease, "especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula."). Relying on Attorney General Civiletti's Social Security Act reasoning, DOJ has likewise concluded that there is implied authority for certain agency staff to be designated as excepted personnel so that they may support an agency official who is subpoenaed to testify at a congressional hearing. *See* Participation in Cong. Hearings During an Appropriations Lapse, 19 U.S. Op. Off. Legal Counsel 301, 303 (1995). On this view, Congress's decision to compel the agency official's testimony provides *express* authority for the official to appear and testify, and additionally grants *implied* authority for the official to be supported in hearing preparation by other agency staff. *See id*.

[204] 43 U.S. Op. Atty. Gen. at 298 n.7.

[205] *See* U.S. Dep't of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, *9 & n.10 (Comp. Gen. Oct. 22, 2019).

[206] *See id.* at *9 ("IRS asserts that the permanent and indefinite appropriation providing for tax refund payments supports a 'necessary implication' that Congress intended such payments to continue on a permanent basis notwithstanding a lapse in annual appropriations, and that IRS, therefore, may incur obligations to issue tax refunds.").

[207] *See id.* at *10; *see also* U.S. Dep't of Agric.—Operations of the Farm Serv. Agency During the Fiscal Year 2019 Lapse in Appropriations, B-331092, 2020 WL 3501349, at *11–12 (Comp. Gen. June 29, 2020) (concluding that the continued availability of Commodity Credit Corporation borrowing authority, used for certain Farm Service Agency (FSA) program payments, did not necessarily imply authority to incur obligations in advance of appropriations for the salaries and expenses of FSA employees who process such payments).

[208] 43 U.S. Op. Atty. Gen. at 298 n.7.

[209] 2019 WL 5390179, at *10.

[210] *See* Off. of Mgmt. & Budget—Regul. Rev. Activities During the Fiscal Year 2019 Lapse in Appropriation, B-331132, 2019 WL 6909516, at *6 (Comp. Gen. Dec. 19, 2019) (rejecting an OMB argument that its review of a (continued...)

For example, Congress funds the National Archives and Records Administration's (NARA's) costs of publishing the *Federal Register* in annual appropriations acts.[211] During the 2025 shutdown, these NARA appropriations lapsed. NARA continued to publish certain documents in the *Federal Register*, explaining in its contingency plan that, "[w]here another agency has authority to conduct activities during a lapse and those activities require the publication of documents in the *Federal Register*, NARA's authority to publish is necessarily implied by the authority of the originating (issuing) agency."[212]

NARA took a similar approach to *Federal Register* publications during the 2019-2020 partial government shutdown.[213] Examining NARA's publication of two agency documents for client agencies that did not experience funding lapses, GAO found no clear congressional intent that NARA functions should continue during a lapse based on the need of other agencies, themselves exempt from the shutdown, to have documents published in the *Federal Register*. [214]As a result, GAO concluded that NARA's activities violated the Antideficiency Act.[215]

GAO's examination of NARA publication practices during the 2019-2020 partial government shutdown involved yet another iteration of implied authority, as applied by the executive branch, which ties the *excepted* functions of one agency to the *excepted* functions of another agency.

During a lapse in its appropriations, the National Oceanic and Atmospheric Administration (NOAA) prepared temporary rules to limit catches of particular fish to protect fisheries and endangered species.[216] NOAA asserted that its activities fit the Antideficiency Act's emergency exception.[217] NARA, in turn, published the temporary rules in the *Federal Register*.[218] It contended that authority to do so was necessarily implied from NOAA's authority to carry out purportedly emergency functions.[219] In other words, one agency (i.e., NARA) asserted that it could designate activities as excepted based on the need for those activities to be performed to assist a second agency (i.e., NOAA) in carrying out the second agency's excepted activities.[220] GAO disagreed that NOAA's activities fit the emergency exception.[221] GAO also concluded that

Department of Labor (DOL) rule during a lapse in OMB appropriations was supported by implied authority based on the fact that DOL appropriations did not lapse and that delay in review of the proposed rule would have purportedly significantly harmed DOL programs).

[211] *See*, *e.g.*, Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, tit. V, 138 Stat. 460, 558 (2024).

[212] *See* NAT'L ARCHIVES & RECS. ADMIN., NARA 103, OPERATIONS IN THE ABSENCE OF APPROPRIATIONS, at 3 (Sept. 30, 2025).

[213] Nat'l Archives & Recs. Admin.—Publ'n of Fed. Reg. During the Fiscal Year 2019 Lapse in Appropriations, B-331091, 2020 WL 4013489, at *2 (Comp. Gen. July 16, 2020).

[214] *Id.* at *10.

[215] *Id.*

[216] *Id.* at *5.

[217] *Id.*

[218] *Id.* at *3.

[219] *Id.* at *8 ("NARA asserts that its authority to incur obligations to publish NOAA's temporary rules in the absence of an available appropriation was necessarily implied from NOAA's own authority to incur obligations to prepare and submit the rules.").

[220] *See id.*

[221] *See id.* at *7 (concluding that while "NOAA's management and conservation responsibilities with respect to both fish and endangered species are certainly significant," those resources were could not be designated as "property" for purposes of the Antideficiency Act's emergency exception).

authority to continue functions during a lapse in appropriations could not be implied from another agency's excepted activities.[222]

The "Emergency Exception"

As noted above, Congress paired the Antideficiency Act's prohibition against accepting voluntary services or employing personal services "exceeding that authorized by law" with an exception. The voluntary services bar does not apply "for emergencies involving the safety of human life or the protection of property."[223] In 1990, Congress amended the statute to specify that this emergency exception "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."[224] While the emergency exception appears in the Antideficiency Act's voluntary services section (31 U.S.C. § 1342), and not in the Act's core prohibition (31 U.S.C. § 1341(a)), the executive branch interprets the Act's core prohibition to likewise except other obligations (i.e., obligations other than personal services) that are necessary "to enable the employees" performing emergency functions "to meet the emergency successfully."[225] The exception refers to emergencies involving, among other things, "the protection of property."[226] The Comptroller General has construed "property" to include only that property that is "government-owned" or "property for which the government has a responsibility."[227]

DOJ applies a two-part test to identify activities that fit the emergency exception. First, the agency's performance of the activity must have a "reasonable and articulable connection" to the safety of human life or the protection of property.[228] Second, delay in performing the activity must pose a threat to life or property that is sufficiently imminent.[229] That is, "[t]here must be some reasonable likelihood that the safety of human life or the protection of property would be compromised," "in some significant degree," "by delay in the performance of the function in question."[230] Thus, DOJ has concluded that most activities related to the pretrial detention of federal inmates fit the emergency exception. [231] In its view, suspending such activities "would require the release of dangerous prisoners, or would preclude the provision of essential prisoner

[222] *Id.* at *8 ("Given that, in each circumstance, NARA incurred obligations to provide legal notice to affected persons based on the emergency rationale asserted by NOAA, [NARA's] publication would, in relying upon the same rationale, also invoke the emergency exception, rather than the necessary implication justification NARA asserts as its authority.").

[223] 31 U.S.C. § 1342.

[224] Omnibus Budget Reconciliation Act of 1990 Pub. L. No. 101-508, § 13213(b), 104 Stat. 1388, 1388–621 (1990).

[225] 43 U.S. Op. Atty. Gen. 293, 306 (1981) ("Congress, for example, having allowed the Government to hire firefighters" to meet emergencies "must surely have intended that water and firetrucks would be available to them.").

[226] 31 U.S.C. § 1342.

[227] U.S. Dep't of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, at *5 (Comp. Gen. Oct. 22, 2019) (examining activities to process federal tax remittances); *see also* Smithsonian Inst.—Application of the Antideficiency Act to Emp. Travel During a Lapse in Appropriations, B-333281 (Oct. 19, 2021) (concluding National Zoo animal collections are "property" within the meaning of the Act); U.S. Dep't of Agric.—Operations of the Farm Serv. Agency During the Fiscal Year 2019 Lapse in Appropriations, B-331092, 2020 WL 3501349, at *4, 8 (Comp. Gen. June 29, 2020) (reaching the same conclusion with respect to FSA security interests in FSA loan collateral and in cotton pledged as collateral for FSA loans).

[228] Gov't Operations in the Event of a Lapse in Appropriations, 1995 WL 17216091, at *6 (O.L.C. Aug. 16, 1995).

[229] *Id.*

[230] *Id.*; *see also* Continuation of Fed. Prisoner Det. Efforts in the Face of a USMS Appropriation Deficiency, 24 U.S. Op. Off. Legal Counsel 47, 54 (2000) (explaining that the second part of DOJ's analysis reinforces "what is implicit in the concept of an emergency," which is "that there must exist an imminent threat or set of circumstances requiring an immediate response or action").

[231] 24 U.S. Op. Off. Legal Counsel at 55.

care or supervision."[232] Actions to fight a fire threatening federal property fit the exception given the imminent threat posed to such property by an uncontrolled fire.[233] Similarly, an agency may take actions that are necessary to preserve the United States' security interests in property that is pledged as collateral for a federal law, such as monitoring its mail for receipt of notices connected to bankruptcy proceedings that involve the pledged collateral.[234]

During the 2025 government shutdown, annual appropriations for IRS lapsed. Despite the lapse, IRS continued to accept and process tax remittances.[235] Tax remittances are the payments made to IRS by individuals, other than withholdings, in satisfaction of their tax liabilities.[236] According to IRS, the "agency's longstanding position is that processing these remittances is necessary to secure and protect them against imminent loss."[237] IRS designated tax remittance processing activities as excepted activities even though, in 2021, GAO had concluded that the same IRS designation, made during the 2019-2020 partial government shutdown, violated the Antideficiency Act.[238] In GAO's view, the emergency exception would have allowed IRS to incur obligations necessary to ensure the "physical security of tax returns that contained remittances."[239] However, GAO concluded that IRS had not demonstrated that the further step of processing remittances was necessary for their safeguarding.[240]

Relevant Legislation from the 119th Congress and Options for Legislators

As explained above, government shutdowns are legally a product of applying the Antideficiency Act and its exceptions to a lapse in appropriations. As a result, Congress has the authority to change the consequences of a lapse by repealing, strengthening, or otherwise altering the Act's existing prohibitions and exceptions or by providing agencies express authority to enter into certain obligations during a lapse in appropriations. Proposals to address shutdowns have been of perennial interest to Congress as lapses have occurred over the years.[241] This section briefly highlights several proposals from the 119th Congress.

One such proposal—the Prevent Government Shutdowns Act—seeks to broadly end government shutdowns by enacting a permanent appropriation akin to a continuing resolution that would be

[232] *Id.*

[233] *See* Volunteer Servs. in Emergencies, 3 Comp. Gen. 979, 980–81 (June 20, 1924) (allowing a claim for compensation submitted to the United States by a municipal fire department whose fire truck suffered damage in the course of rendering firefighting assistance to Department of Interior property).

[234] U.S. Dep't of Agric.—Operations of the Farm Serv. Agency During the Fiscal Year 2019 Lapse in Appropriations, B-331092, 2020 WL 3501349, at *5 (Comp. Gen. June 29, 2020) ("Where a bankruptcy notice or third party action notice requires FSA to take time sensitive action in order to protect the government's security interests, then the Antideficiency Act's exception for emergencies to protect property allows obligations for this activity during a lapse in appropriations.").

[235] INTERNAL REV. SERV., FISCAL YEAR 2026 LAPSED APPROPRIATIONS CONTINGENCY PLAN 10 (2025) [hereinafter IRS CONTINGENCY PLAN].

[236] U.S. Dep't of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, *3 (Comp. Gen. Oct. 22, 2019).

[237] IRS CONTINGENCY PLAN at 10.

[238] *See* 2019 WL 5390179 at *8.

[239] *Id.* at *7.

[240] *Id.*

[241] *See, e.g.*, Federal Pay Continuity Act, H.R. 5995, 96th Cong. (1979).

available to an agency if there were a lapse in appropriations for that agency.[242] Specifically, if a lapse in appropriations occurs, the Prevent Government Shutdowns Act would appropriate "such sums as may be necessary, at the rate for operations as provided in the preceding applicable appropriation Acts, under the authorities and conditions provided in such Acts, for continuing programs, projects, or activities."[243] That appropriation would be available for a two-week period, which would automatically extend for successive two-week periods if no appropriations legislation is enacted.[244] The bill also proposes limiting congressional travel during a shutdown and making changes to congressional procedure to limit the consideration of matters unrelated to funding the government during a lapse.[245]

A variety of bills seek to address the issue of federal employee pay during a shutdown. The Shutdown Fairness Act[246] would enact a permanent appropriation that would be available to an agency to pay employees' and contractors' "standard employee compensation" during a lapse in regular appropriations.[247] A similar but competing proposal, the True Shutdown Fairness Act,[248] would enact a comparable permanent appropriation to pay employees' and contractors' salaries, but it would also permit adjusting existing contracts to pay contractors furloughed under prior shutdowns[249] and limit the use of reductions-in-force during a future lapse in appropriations.[250]

Other proposals deal with the issue of Members' pay during a shutdown. Congressional salaries are funded through a permanent, indefinite appropriation, so in general there is an appropriation available to pay for Members' salaries even when annual appropriations for the legislative branch lapse.[251] Moreover, because the amount of compensation for Senators and Representatives is fixed according to statute,[252] pay may not be waived without violating the Antideficiency Act's voluntary services bar.[253] As a result, Members of Congress continue to be paid even when annual appropriations otherwise lapse and a government shutdown occurs. Some Members have criticized this outcome and proposed legislative changes that would withhold salaries of Senators and Representatives during a shutdown. The Withhold Member Pay During Shutdowns Act would reduce Members' salaries by eliminating pay for each day a lapse in appropriations affected one or more federal agencies.[254] A Senate resolution proposes temporarily withholding

[242] Prevent Government Shutdowns Act, H.R. 5870, 119th Cong. (2025).

[243] *Id.* § 2.

[244] *Id.*

[245] *Id.* § 3.

[246] H.R. 7137, 119th Cong. (2026); S. 3168, 119th Cong. (2025).

[247] *See* H.R. 7137 § 2(b).

[248] H.R. 7322, 119th Cong. (2026); S. 3165, 119th Cong. (2025).

[249] H.R. 7322 § 2(c).

[250] *Id.* § 3.

[251] *See* 2 U.S.C. § 4502.

[252] *See id.* § 4501.

[253] *See supra* note 83 and accompanying text; *see also* B-206396, 1988 WL 228230, at *1 (Comp. Gen. Nov. 15, 1988) (listing decisions that have reached the same result regarding waiver of Member pay).

[254] Withhold Member Pay During Shutdowns Act, H.R. 5891, 119th Cong. § 2 (2025); S. 3057, 119th Cong. § 2 (2025). The Act would not eliminate Members' pay but instead place it in escrow for release at the end of Congress for any shutdown occurring after enactment but before the November 2026 general election, out of consideration of the 27th Amendment. H.R. 5891 § 2(c); *see* U.S. CONST. AMEND. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

Senators' paychecks during a shutdown and releasing withheld funds after enactment of appropriations.[255]

In addition to the above proposals, Congress could, if it wished, enact legislation that would amend the Antideficiency Act's prohibitions and exceptions to change the effects of a lapse in appropriations, for example by authorizing specific agencies to enter into certain obligations in advance of appropriations. Finally, Congress may not wish to make any legislative changes to current law and instead may view interpretation and application of the Antideficiency Act and related appropriations laws as reflecting the proper level of congressional control over the Treasury.

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[255] S. Res. 526, 119th Cong. (2025).