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Understanding the Legal Framework Governing a Shutdown

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The government funding deadline is fast approaching. With the Trump Administration's continued efforts to impound and rescind funding, complicating Congress's ability to reach an agreement on funding bills for the upcoming year, it is important to keep in mind the legal framework that governs a shutdown, and the limits a shutdown places on the executive branch.

This primer focuses on the activities that can (and cannot) legally continue during a shutdown; it does not address the impacts of a shutdown on government programs or the people who use them.

Critically, while the executive branch has some discretion as to what activities continue during a shutdown — and it is impossible to predict whether the Administration will take unlawful actions under the pretext of a shutdown¹ — a government shutdown does not provide the Administration *any additional legal authority* to fire federal employees, limit review of its actions by federal courts, or freeze funding once full-year appropriations are provided.

Activities That Can Continue During a Government Shutdown

Under the Antideficiency Act, agencies can neither spend, nor make commitments to spend, money *without appropriations from Congress*.²

Some activities continue during a shutdown because they are **separately or already funded**. For example, activities funded by multi-year or indefinite funding, such as disaster relief, continue, with payments made as normal. Likewise, if some appropriations bills have been enacted prior to a shutdown, activities funded by those enacted appropriations also continue (a scenario sometimes described as a “partial” government shutdown). The Administration has no legal authority to impound or freeze these funds.

¹ Sam Berger, “Trump is ignoring the law to keep the shutdown from causing him political pain,” The Washington Post, January 15, 2019, <https://www.washingtonpost.com/outlook/2019/01/15/trump-is-ignoring-law-keep-shutdown-causing-him-political-pain/>.

² Government Accountability Office, “Antideficiency Act,” <https://www.gao.gov/legal/appropriations-law/resources>.

Based on long-standing Department of Justice (DOJ) guidance, there are also a limited set of activities for which the federal government can make *commitments* to pay — though it still cannot make payments — during a shutdown³:

- **Activities expressly provided for in law to continue during a shutdown.** Some laws expressly provide that certain activities can continue in the absence of appropriations, such as the Department of Defense’s “feed and forage” authority allowing it to obtain certain types of necessary supplies for military personnel.
- **Activities to protect against imminent threats to life or property.** This includes activities related to law enforcement, national security, air traffic control, and federal prisons, among others.
- **Activities that are necessary to prevent significant damage to a funded program.** For example, activities necessary to ensure Social Security payments (which themselves are funded under law) are made in a timely way can continue during a shutdown even if those activities themselves do not have funding.
- **Activities necessary to discharge the President’s constitutional duties.** This includes, for example, the President’s Commander-in-Chief responsibilities.

Different administrations have interpreted these exceptions to apply more or less narrowly, meaning that the activities that continue during a shutdown have differed to some extent from administration to administration. The first Trump Administration took a more expansive view of the public services that should continue.⁴ However, to date, a core set of services — such as defense, law enforcement, transportation safety, Social Security, and Medicare — have continued during every shutdown.

Executive Branch Restrictions During a Government Shutdown

While the executive branch has some latitude in what activities it continues during a government shutdown, there are clear limits on its actions.

If an activity is not funded, no actual payments can be made during a shutdown.

Even for activities that continue during a shutdown because they are subject to one of the exceptions described above, funding to pay for them cannot be provided without appropriations. The federal personnel required to work — including law enforcement, prison guards, and the staff that process Social Security benefits — only receive IOUs that will be paid when appropriations are enacted. Federal contractors required to work or provide services also go unpaid during the shutdown.

³ Walter Dellinger, “Government Operations in the Event of a Lapse in Appropriations,” Justice Department Office of Legal Counsel, August 16, 1995, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1995-08-16-lapse-in-appropriations.htm>.

⁴ Juliet Linderman, “Selective shutdown? Trump tries to blunt impact, takes heat,” Associated Press, January 13, 2019, <https://apnews.com/article/66b50739f4b84063a2ff56dff3156712>.

Under current law, when the shutdown ends all federal employees receive backpay for the time the government was shut down regardless of whether they were working on an activity that could continue during a shutdown or were forced to stop work until the shutdown ended. However, federal contractors do not receive pay for this time period except for any work they were required to perform during it.

Each branch of government determines which of its activities can legally continue during a shutdown.

Congress and the judiciary make their own independent determinations about what activities continue during a lapse. The executive branch is not involved in those determinations.

In prior shutdowns, the judiciary has had sufficient funding in the absence of new appropriations to continue normal operations for the duration of the shutdown. Courts have said in previous shutdowns that in the event they ran out of funding during a shutdown, they would continue to hear cases and otherwise fulfill their constitutional responsibilities.⁵ Thus, litigants who are suing in federal court would be able to bring suits against the Administration during a shutdown.

When DOJ does not have funding during a shutdown, its lawyers may request extensions from courts for filing deadlines and other procedural steps. Individual courts have the discretion to determine whether to provide such extensions, and courts have both granted and denied such requests depending on the circumstances.

A shutdown would not provide the Administration with any additional legal authority to engage in widespread firing of federal employees.

A temporary lapse in funding does not provide grounds for an agency to fire employees. In addition, during a shutdown most agencies will not be able to legally conduct personnel actions unrelated to the shutdown itself because their HR departments will not be funded and these types of actions do not fall under any of the available exceptions.⁶

A shutdown would not impact the Administration's legal obligations to spend money once full-year appropriations are provided.

While many activities would cease during a shutdown because of a lack of funding, the shutdown would not provide the Administration with any authority to impound or freeze funds once appropriations are provided.

While this primer focuses on the legal framework that governs during a shutdown, the Administration has shown itself willing to take actions that are inconsistent with the law, which presents major challenges for the country at all times, not just during a shutdown.

⁵ United States Courts, "Judiciary Has Funds to Operate Through Jan. 31," January 22, 2019, <https://www.uscourts.gov/data-news/judiciary-news/2019/01/22/judiciary-has-funds-operate-through-jan-31>.

⁶ Office of Personnel Management, "Guidance for Shutdown Furloughs," January 2024, <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>.