

# The Odd Story of the Law That Dictates How Government Shutdowns Work

A shutdown would end up costing more because of the price of restarting the government -- and other strange facts about the late-1800s Antideficiency Act.

ANDREW COHEN | SEP 28, 2013 | POLITICS

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A sign in the window of an information booth at the Lincoln Memorial in Washington announces the site's temporary closure during the 1995 government shutdown. (Mark Wilson/Associated Press)

If rogue Republicans do not relent over the budget impasse by October 1, whatever pandemonium happens next will largely be governed by a federal statute you likely have never heard of: [the Antideficiency Act](#). You can call it the "anti-deadbeat" law -- a collection of statutory and administrative provisions, really -- that forbid federal officials from entering into financial obligations for which they do not have funding, like paying the salaries of their employees or buying the things they need to run the government. It's also the law that wisely permits certain "essential" government functions -- like the military and the courts, for example -- to keep operating even in the

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affected by the shutdown, it's future work, too; and 2) shutting down the federal government is terribly wasteful and expensive because of the re-start costs involved.

That's the point made by the acclaimed dean of Antideficiency Act scholars, University of Baltimore Law Professor [Charles Tiefer](#) ("For obscure details," he told me, "you've come to the right guy."). It's not just that many federal operations will shut down next week, Tiefer said, it's that "all kinds of planning and preparation for federal activity in the months and weeks to come" will become "increasingly neglected and disjointed if the showdown lasts more than a couple of days." Here's a [key passage from the statute](#):

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property ...

As used in this section, the term "emergencies involving the safety of human life or the protection of property" 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.

## **Preparing for the Shutdown**

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[Here is an example of what is happening right now within federal agencies and bureaus.](#) Earlier this week, U.S.

for what will (and will not) happen in our nation's courts if as expected the money runs out next week. Bates wrote (emphasis in original):

If Congress fails to enact a CR by October 1, 2013, most federal entities will have to implement shut-down plans effective immediately. The Judiciary, however, will not shut down immediately. We will continue operations utilizing fees and no-year appropriations for an estimated 10 business days (through approximately October 15, 2013).

During these first 10 business days of a lapse in appropriations, the Judiciary will use available fee and no-year balances to pay judges, court employees and FDO employees, and to maintain court and federal defender operations. Courts and FDOs will continue to operate, but funding should be conserved as much as possible by delaying or deferring expenses not critical to the performance of your Constitutional responsibilities.

**All Judiciary and FDO employees should continue reporting to work and they will be in full-pay status during this period.** After the 10-day period, if there is still no appropriation, the Judiciary will operate under terms of the Anti-Deficiency Act, which allows "essential work" to continue during a lapse in appropriations. Among the definitions of "essential work" are powers exercised under the Constitution, which include activities to support the exercise of Article III judicial powers, specifically the resolution of cases.

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**Staff who are furloughed cannot work voluntarily or be required to work. Staff performing essential functions and working in a non-pay status should expect to be paid once appropriations are enacted; Congress will have to take affirmative action to authorize pay for staff who are furloughed.**

The details will be different in each instance, but you can be sure that all over the federal government this week these sorts of letters were being written and sent in preparation for the showdown. Here is the [current OMB memo](#) that outlines protocols. [Here](#) is a April 2011 White House memo that also adds context. Some workers will simply be sent home. Others will have to work with only the promise of pay. And Congress will have the obligation, moral if not political, to clean up whatever mess it and the White House create in the next few days and weeks.

### **The History of the Act**

"Those who disburse the money are like a saucy boy who knows his grandfather will gratify him, and over-turns the sum allowed him at pleasure," Rep. John Randolph of Virginia said in 1806. The "saucy boy" here was the executive branch, the grandfather Congress. Georgetown University Law Professor [Timothy Westmoreland](#), who has a background in congressional politics, wrote via email:

All civics students learn that the Congress has "the power of the purse." The Constitution gives the Congress the decision about whether to spend money or not. This shows up in Article I of the

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That seems fairly straightforward, but almost from the beginning of the Nation, the Executive Branch tried different ways to dodge that fundamental restriction. I've seen references to congressional complaints about this all the way back to John Calhoun in 1816 and Henry Clay in 1819.

Not incidentally, who were these congressional titans complaining about? Presidents James Madison and James Monroe. Westmoreland continues:

The most obvious tactic was for Executive Branch officials to make contracts without already having the money from the Congress. If that happened, the Congress was backed into a corner: a commitment by the U.S. had already been made by the Executive, so the Congress felt it had to make the funds available because of some sense of a moral or good-faith obligation. This was called creating a "coercive deficiency." In the early days, most of this appears to have been done by the military, but that may not be surprising since so much of the early Federal spending was for the military.

To take back its control of the spending power, the Congress passed laws just after the Civil War that made such actions illegal. The main one is the Antideficiency Act, which prohibits Executive Branch officials from obligating or spending money before it is given to them by the Congress. It also prohibits these officials from taking money given to them for one purpose and using it for another. There are civil and criminal penalties for violating the law, as well as extensive auditing and reporting requirements.

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A version of this 19th Century statute is still the law. Agencies themselves, Inspectors General, and the Government Accountability Office (GAO) all look into potential violations, and they are found every year. Some of them are simple errors. Some are disputes over bookkeeping rules or over interpreting legislation. Some are relatively small. Others are in the hundreds of millions. In Fiscal 2012, GAO reported 20 violations -- ranging from a \$50,000 violation in the National Guard to an \$800 million one by the SEC. Civil servants can be disciplined or fired for violating the law. They can be criminally prosecuted for a willful violation, although I don't think anyone has ever been convicted.

The Act becomes especially significant when the Congress fails to provide appropriations. At that point, government employees are legally prohibited from spending money, because they haven't been given any money to spend. So an agency head cannot authorize a government employee to come to work; that would be incurring a government obligation without having an appropriation. The law also prohibits accepting voluntary services for the government, so the agency head can't even allow people to volunteer to do their jobs.

### **Who Does the Act Affect?**

The act "definitely applies to government employees and officials of the core executive and independent agencies," Harvard Law Professor [Howell E. Jackson](#), a budget and regulatory expert, told me. This means the vast majority of federal workers will be told to go home next week in the absence of a budget deal. Those who get to stay will come from two groups -- one in which federal workers have been explicitly exempted and one in which

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Perhaps the most interesting example of a "specific exemption," Jackson says, is the [Food and Forage Act of 1861](#) - near the start of the Civil War. As the title suggests, that law permitted soldiers to graze their horses and take whatever other necessities were required to live on horseback. It's a law that was invoked in a decidedly non-horsey sense during the Vietnam War, again during Operation Desert Shield in Iraq in 1990, and, for a brief time, immediately following the terror attacks of September 11, 2001.

"Federal employees can accept volunteers or go beyond their funding in cases of emergency involving the safety of human life or the protection of property," Westmoreland says. So federal firefighters and law enforcement officials clearly are exempt, Tiefer adds, as are judges presiding over criminal (but not necessarily civil) cases. Moreover, it's the OMB, with help from the Justice Department, that makes the call on who is essential and who is not, and each federal department, as we see above in the judicial example, has formulated its shutdown protocols.

Westmoreland writes:

There has been a lot of legal interpretation (including during the Reagan and Clinton Administrations) of what this means. Overall, it has been interpreted narrowly but not rigidly. But the threat to life or property has to be "imminent." Air-traffic controllers and meat inspectors can generally keep working. People writing checks or doing maintenance generally cannot.

Worried about that federal payment that may be coming to you? You may be right to be concerned. Most payments will come, but others won't. As Jackson notes, new Social Security or Medicare checks or applications may not be

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There is also another group of activities that are not really an exception to the Act because they actually meet the terms of the Act: programs that already have received an appropriation from the Congress. Most government activities are funded by the Congress for just one year at a time. But some -- like Social Security -- have permanent funding in their statutes. Others may have multi-year funding that will not expire on September 30. Those programs won't shut down, although some of the staff who make the programs work more easily or more efficiently might have to stay home because their salaries are part of the annual spending bill.

So, barring a degree of political bipartisanship that seems increasingly unlikely, a dusty law designed in the 1880s to stop excessive federal spending will be employed next week to guide the government in a dispute over, well, excessive federal spending.

"The irony is that it always costs money to restart them and they typically get their back pay for the days they don't work, the government employees, and they have to catch up on the work that's not done while they are on these involuntary furloughs," Jackson said. "So it's a very expensive way to play politics over the fiscal crisis."

#### ABOUT THE AUTHOR

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