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Legal Framework Governing Funding Lapses

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Appropriations Clause

- U.S. Const. Art. I, § 9, cl. 7.
 - “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”
- *Reeside v. Walker*, 11 How. 272, 291 (1851)
 - “However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.”



Antideficiency Act

- 31 U.S.C. § 1341(a)(1)(A): No expenditures or obligations in excess of available appropriations.
 - Elements of Availability:
 - Purpose
 - Time
 - Amount
- 31 U.S.C. § 1341(a)(1)(B): No obligations in advance of appropriations.



Voluntary Services Prohibition

- 31 U.S.C. § 1342: Prohibits acceptance of voluntary services or employment of personal services exceeding that authorized by law except for:
 - Emergencies involving the safety of human life, or
 - Protection of property



Attorney General Opinions

- 1981 Opinion (Civiletti) identified five categories of agency functions that could continue during funding lapse
 - Other available funds
 - Expressly permitting obligations in advance of appropriations
 - Necessarily implied from duties and authorities of agency
 - Necessarily incident to constitutional powers
 - Emergencies involving the safety of human life or the protection of property
- 1995 Opinion (Dellinger) narrowed “emergency” exception



Other Available Funds

- Notwithstanding lapse of regular appropriations, an agency may continue to have funds available to it that are subject to multi-year or no-year appropriations
 - Social Security Benefits
 - Old Post Office Tower
 - Court Fees
- Availability still limited by purpose, time, amount



Obligations Authorized by Law

- Express Authorizations
 - 25 U.S.C. § 99: Authorizing Commissioner of Indian Affairs to enter contracts for goods and services “notwithstanding the fact that the appropriations for such fiscal year have not been made”
- Implicit Authorizations
 - Based on “specific terms” of duties and authorities placed on agency
 - E.g.: Social Security benefits *administration*



Constitutional Functions

- Based on constitutional avoidance doctrine
- Examples:
 - Pardon power
 - Conduct of foreign relations
 - National security activities
 - Congressional operations related to legislation and oversight



Emergency Exception

- Scope is based on text of 31 U.S.C. § 1342
- Allows performance of functions by agency employees during lapse in response to “emergencies involving the safety of human life or the protection of property”
- Limited to those situations in which life or personal property would be “significantly” compromised by delay
 - Does not encompass de minimus threats
 - E.g., routine vehicle maintenance



OMB Guidance

- Plans required under OMB Circular A-11, § 124 “Agency Operations in the Absence of Appropriations”
 - Excludes denials of funding
 - Plan should identify numbers of employees by exception category, and legal basis for exception
 - Possible changes to plan in the event of extended lapse



Antideficiency Act Enforcement

- 31 U.S.C. § 1349:
 - Adverse personnel actions including, where appropriate, suspension without pay or removal from office
- 31 U.S.C. § 1350:
 - Imprisonment up to 2 years for willful violations
 - Example: Consumer Products Safety Commission employee referred to DOJ by IG for working during furlough status. DOJ declined to prosecute.
- 31 U.S.C. § 1351:
 - Report on violations



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