Legal Framework Governing Funding Lapses

Edward C. Liu, Legislative Attorney

May 21, 2019
 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

  • Elements of Availability:
    o Purpose
    o Time
    o Amount
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
CONTACT INFORMATION

Edward C. Liu
Legislative Attorney
eliu@crs.loc.gov
202-707-9166