



Furloughed Federal Employees*

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In these times of budget wars between the Congress and the White House, there is serious concern that federal employees will be furloughed, and important governmental services cut back or eliminated. What makes this situation worse is a little understood Nineteenth Century law that forbids people from volunteering to perform most Federal jobs. In fact, at one point the Attorney General of the United States threatened to bring criminal charges against anyone volunteering for government duty, or accepting volunteer labor for government work. As a result, in the event that employees are furloughed later this year, they will not be able to perform their jobs while they are in a non-paid furlough status, even if they are willing to put in a full day's work without compensation!

In order to understand why Congress would pass such a strange law, we must go back to the earliest days of the Republic, when the Congress and the President first began to battle over budgetary matters, battles that are continuing to this very day.

The Anti-Deficiency Act

Section 1342 of Title 31 of the United State Code provides in part that voluntary service may not be accepted *except* in cases of emergency involving public safety or the preservation of property, or unless otherwise be authorized by law:

An officer or employee of the United States 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"

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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.

This provision is one section of a more general law known as the “Anti-Deficiency Act,” that also includes prohibitions against authorizing expenditures exceeding the amount specified in appropriations measures or involving the government in contracts or obligations before an appropriation is made.¹ Violation of this section may be punished by a criminal fine of up to \$5,000, or by imprisonment for up to two years, or both.²

The Constitution provides that no money may be drawn from the Treasury unless appropriated by law passed by Congress.³ This clause has been interpreted as giving Congress the “power of the purse” to control the activities and spending of the Executive Branch.⁴ However, it did not take long for the President to seek ways to break free of Congressional spending constraints. As early as 1807, Congressman Randolph complained that Executive departments were making purchases on credit in excess of appropriated funds, with the understanding that Congress would have no choice but to fund these expenditures when the debts became due.⁵ Representative John C. Calhoun railed against the practice by the War Department of transferring funds from one appropriated project to another, thereby undermining Congressional intent to control the amount of funds to be spent on each project.⁶ Representative Calhoun called this practice a “sheer abuse of power.”⁷

¹31 U.S.C. §1341.

²31 U.S.C. §1350.

³Article I, Section 9, Clause 7.

⁴Stith, Kate, “Congress’ Power of the Purse” (1988). Yale Faculty Scholarship Series. Paper 1267 (hereinafter “Stith”).

⁵Remarks of Rep. J. Randolph, 17 Annals of Cong. 852 (1807). (“[W]here a head of department wants money, purchases may be made upon credit, with an understanding at the banks and with the purchaser that the notes are issued for the service of government. . . . Here, although the money has gone out of the bank, it is, in legal phrase still in the Treasury, until Congress meet and pass an appropriation law, when having been paid to take up the notes it marches again out in official costume and parade.”)

⁶L. Wilmerding, Jr., *The Spending Power, A History of Efforts of Congress to Control Expenditure* 78 (1943). Mr. Calhoun was particularly concerned with the War Department transferring funds from one purpose to another, which he considered to be a “great evil.” *Id.* at 78.

⁷*Id.* at 80.

Other tactics employed by the Executive Branch Departments to free themselves of spending limitations included contractually obligating the government for amounts in excess of appropriations,⁸ spending appropriated funds quickly and thereby threatening a government shut down if new funds were not appropriated,⁹ and by using unexpended funds in the following year for a purpose not previously appropriated.¹⁰ For example, in 1897, Congress was taken aback by a request by the Postmaster General for a deficiency appropriation equal to 34 percent of what had previously been requested and appropriated.¹¹ When Congress objected that the Post Office had previously been fully funded, the Postmaster replied that he would not break the law by spending money that had not been appropriated, and instead he would simply shut down the mail service.¹² Congress quickly appropriated the additional funds.

Early Congressional attempts to put an end to these practices were stymied by advent of the Civil War, when President Lincoln authorized the expenditure of two million dollars that had not been appropriated. Rather than chastise the President, Congress responded by ratifying his actions and, in addition, provided him with even more spending flexibility in order to support the needs of the war effort.¹³ Following the war, in 1868 and 1870, Congress reasserted its prerogatives, and attempted to control government spending by prohibiting the transfer of appropriated funds from one account to another, prohibiting the expenditure of funds in excess of the amount appropriated, and prohibiting contracts for future payments in excess of appropriations.¹⁴ These statutes became the basis for the “Anti-Deficiency Act” that was codified into law in 1905.

Prohibition on Voluntary Service

It was in this context that Congress added language to an 1884 appropriations bill that prohibited the government from accepting voluntary service, except for emergencies involving the safety of human life or the protection

⁸See, generally, L. Wilmerding, Jr., *The Spending Power, A History of Efforts of Congress to Control Expenditure*, Chapter V, “The Law and the Practice: 1820-1868 (1943).

⁹*Id.*

¹⁰*Id.*

¹¹Wilmerding at 137.

¹²*Id.* at 138.

¹³Stith at 1351, note 35.

¹⁴See, G. Hopkins and R. Nutt, *The Anti-Deficiency Act and Funding Federal Contracts: An Analysis*, 80 *Military Law Review* 51, 58 (Spring 1978).

of property, or to the extent otherwise authorized by law.¹⁵ The provision was added to the appropriations measure as a result of Congressional ire over a practice that developed among Executive branch departments of asking clerks and other lower level employees to “volunteer” to perform overtime work, with the result that these “volunteers” later asked for payment for their services, thereby creating a deficiency that Congress was asked to fill.¹⁶

The law permits the use of volunteers when specifically authorized. Over the years, there have been a number of laws enacted that permit government agencies to use volunteers, for example, in connection with unpaid training opportunities to students in high school and college for periods of 3 to 4 months.¹⁷ Other specific authority includes the “volunteers in the parks” program authorizing the use of volunteers by the National Park Service,¹⁸ a 1972 law authorizing the use of volunteers by the U.S. Forest Service,¹⁹ and statutory authority for the Department of Labor’s wage and hour division to use voluntary services.²⁰

There have been several opinions by the Comptroller General and the Attorney General concluding that the Anti-Deficiency Act does not ban all voluntary services, but only voluntary activities that could lead to claims against the government.²¹ Where a volunteer cannot plausibly support a subsequent demand for compensation, for example, because the volunteer releases the government from any such obligation in writing, the prohibition on voluntary services may not apply.²² Other opinions have also exempted from the prohibition “gratuitous services” defined as services that were always intended to be non-salaried.²³

However, the general rule is that when Congress fails to enact appropriations, or appropriated funds are made unavailable through a sequester, government employees may not continue to work (except in cases of emergency) because it would be expected that Congress would eventually have

¹⁵ Act of May 1, 1884, 23 Stat. 15, 17 (1884).

¹⁶ GAO, *Principles of Appropriation Law* at 6-95 (3rd Ed. 2006).

¹⁷ <https://help.usajobs.gov/index.php/Volunteers>.

¹⁸ Public Law 91-377 (1970).

¹⁹ Public Law 92-300 (1972).

²⁰ 29 U.S.C. §204(b).

²¹ 5 Op. Off. Legal Counsel 1, 8 (1981); 4 Op. Off. Legal Counsel 16, 17 (1980).

²² Stith at 1373.

²³ 30 Op. Atty. Gen. 51 (1913).

to appropriate the funds to compensate the employees.²⁴ For example, in 1947, the Comptroller General ruled that an individual appointed to a position in the civil service to which a minimum salary is attached, cannot waive the salary associated with his official job and perform any part of his or her duties as a volunteer.²⁵ The Comptroller General held that the Anti-Deficiency Act would be violated even if a federal employee signed a written waiver and agreed not to press a claim against the government.

On the other hand, if a statute sets a maximum salary, but not a minimum for a particular position, the individual serving in that position may volunteer to provide services without compensation. This principle was articulated when Professor Lawrence Tribe was selected as the Special Counsel in connection with the Iran-Contra matter, and agreed to perform this service without compensation. When the appointment was challenged under the Anti-Deficiency Act, the Attorney General opined that this voluntary service was acceptable because only a maximum salary was specified for this position, and not a minimum.²⁶

With regard to lapses in government appropriations, that is when Congress failed to enact necessary appropriations at the beginning of the fiscal year, Attorney General Civiletti reaffirmed in 1980 that government employees could not continue to provide services without funding, again with the exception for services necessary to protect human safety or property, and to provide for the orderly closing of government offices.²⁷ The Attorney General stated that future violations of the Anti-Deficiency Act would be criminally prosecuted.²⁸ In 1995, Attorney General Reno concluded that “essential employees” could continue to perform services during a funding lapse, based on the statutory exception for protecting human life and property.²⁹ Attorney General Reno reiterated that government employees could not waive salary payments if there is a minimum salary established by statute.³⁰ She noted that if the compensation is not fixed by statute, that is, if it is fixed administratively or if the statute merely prescribes a maximum but no minimum,

²⁴Id. See also, GAO, *Principles of Appropriation Law* at Ch.6 (3rd Ed. 2006).

²⁵26 Comp. Gen. 956 (1947).

²⁶Memorandum Opinion for the Acting Associate Attorney General, *Independent Counsel's Authority to Accept Voluntary Services — Appointment of Laurence H. Tribe*, OLC Opinion, May 19, 1988.

²⁷43 Op. Att. Gen. 24 (1980).

²⁸Id.

²⁹P. Seam and B. Shron, *Government Shutdowns*, Harvard Law School, Federal Budget Policy Seminar, Briefing Paper No. 10 at 33 (May 4, 2005).

³⁰Id. at 34.

it may be waived. However, there should be an advance written agreement waiving all claims.³¹

Based on these principles, if there are furloughs of government employees resulting from the Congressional sequestration of previously appropriated funds, these employees would not be able to volunteer to provide services unless one of the exceptions to the Anti-Deficiency Act applies. In specific cases, where an agency can use volunteer services for certain functions, it may be possible for employees to volunteer to provide those functions, but again these employees would have to forgo any claim to future payment. This is an unlikely scenario since these volunteer programs are primarily designed for educational purposes, or to provide auxiliary services to the public, such as assisting as rangers in a national park.

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³¹GAO, *Principles of Appropriation Law* at 6-102 (3rd Ed. 2006).