

NLWJC- Kagan

Counsel - Box 007 - Folder 009

Shutdown II [2]

THE FEDERAL DIARY

Deadlines' Magic Uncertain

By Mike Causey
Washington Post Staff Writer

Because of the unprecedented nature of government's longest, still-in-progress shutdown, career officials and politicians very likely may decide to junk or ignore portions of Uncle Sam's furlough rule book this time around.

Under federal regulations, agencies are supposed to take certain actions if a furlough lasts for 22 working days or 30 consecutive days. The furlough officially started Dec. 16, so the clock is ticking.

Furlough-triggered actions— if done by the book—could include starting layoff (reduction in force) machinery in furloughed agencies and canceling sick or annual leave accumulated during any nonpay period of 80 hours or more. Because furloughed employees can't take leave, those with use-it-or-lose-it annual leave might forfeit excess amounts. The deadline for use-it-or-lose-it leave for most federal employees is this weekend.

But before calling Dr. Kevorkian for an appointment, bear in mind that those are regulations, not law. The regulations were not designed to cover a situation such as this one, in which the shutdown was triggered by a political cat fight between Congress and the White House. The furlough rules were designed to cover situations when there simply is no work for employees, or no money in the Treasury to pay them. That is an important, perhaps critical, difference.

Money to operate agencies and parts of agencies now on furlough is in the Treasury. And in many cases, it already has been approved by Congress but, as in the case of the military pay-raise legislation, has been vetoed by the president. Whichever side you blame in the shutdown—and there is enough blame to go around—money to run the operations isn't the main issue. The problem is major differences between the Republican Congress (mostly in the House) and the White House over when, and how, to achieve a balanced budget.

This is a no-fault furlough, as

far as government employees and most officials are concerned. That means the regulations are likely to be ignored or outflanked in this case.

For example, the White House and Republican congressional leaders have agreed that the nearly 300,000 furloughed federal workers will be paid. So will non-furloughed employees who continue to work as emergency personnel during the shutdown. But until the politicians decide when and how to pay employees, they cannot deal with issues such as use-it-or-lose-it leave. The leave year, when federal employees must take excess unused annual leave, ends Saturday for most workers.

According to "Your Furlough Guide," published by the Reston-based Federal Employees News Digest, workers who are unable to take scheduled use-it-or-lose-it leave because of a furlough may ask their agency to let them take the leave later because "of an 'exigency of the public business'—namely, the need to furlough employees because of lack of work or funds."

Federal personnel officials doubt that regulations requiring agencies to begin reduction-in-force actions will be applied. First, employees must be given 60-day notices. Second, furloughed employees would have to be called in to work in their agencies to begin issuing those notices.

Nobody knows how the furlough will play out and what rules, if any, will be ignored. But there is a very, very good chance that officials may give agencies the authority to issue new 30-day furlough notices—that is, to extend the furlough without triggering any new actions—once the magic 22- and 30-day deadlines have passed.

A decision, one way or the other, is expected shortly.

Thursday, Jan. 4, 1996

FOR MORE INFORMATION 
To post questions or comments to Mike Causey, see Digital Ink, The Post's on-line service. To learn about Digital Ink, call 202-334-4740.

AROUND THE WORLD

Greece's Ruling Party Moving to Replace Premier

ATHENS—Greece's ruling socialist party said Wednesday yesterday that it will begin preparations to replace Prime Minister Andreas Papandreou, who has been in critical condition at an Athens hospital since Nov. 20.

"The Central Committee meeting on Jan. 20 will find a final solution to the political problem caused by the prime minister's illness," Costas Skandalidis, the Panhellenic Socialist Movement's general secretary, told reporters.

The decision followed a marathon meeting of the executive bureau of Papandreou's party. It was the first clear move toward his replacement.

A hospital statement confirmed that Papandreou, 76, has suffered extensive kidney damage. Doctors have said it is unlikely that Papandreou, who has depended on life support machines for 45 days, will be able to resume his duties.

—Reuter

Costa Rican Kidnapping

■ SAN JOSE, Costa Rica—Costa Rican police and Nicaraguan troops searched the mountains along their common border for two kidnapped European women and their abductors.

It was Costa Rica's third kidnapping in three weeks. Two other women abducted in separate incidents were freed unharmed after their families paid ransom.

At least 10 masked kidnapers armed with AK-47 assault rifles took over a hotel Tuesday in the northern city of San Juan, police said. They stole a hotel vehicle and kidnapped Nicola Fleutchaus, 24, of Germany, and Regula Susana Sigfried, 50, a Swiss national who owns a travel agency in Costa Rica.

The hotel vehicle was found in Costa Rica along the San Juan River, which divides the two countries.

He said the kidnapers asked for ransom of more than \$1 million for the tourists Tuesday night and freedom for a group of Costa Ricans jailed in connection with the 1993 takeover of San Jose's Supreme Court building.

In Germany, Foreign Minister Klaus Kinkel asked the Costa Rican government to do everything possible to secure the hostages' safe release.

—Associated Press

Britain Expels Saudi Dissident

■ LONDON—Britain has ordered a leading Saudi Arabian dissident, Mohammed Masaari, to leave the country to accept a home on the Caribbean island state of Dominica, a Home Office spokesman said.

Masaari, head of the Committee for Defense of Legitimate Rights, which accuses the Saudi royal family of corruption, has been cited by Saudi Arabia as an impediment in its relations with Britain.

"He has been told . . . his request to stay here has been refused . . . on the grounds that there is a safe country to which he can be sent," the spokesman said.

A British newspaper reported last month that Saudi Arabia said it would enter no new contracts with British companies unless London curbed Masaari's activities.

Foreign Secretary Malcolm Rifkind said during a trip to Riyadh in November that Britain had "no time for those who are making mischief." He spoke after the Saudi foreign minister complained about Masaari.

—Reuter

Bomb Blast in New Delhi Bazaar

■ NEW DELHI, India—In the Indian capital's deadliest terrorist attack in two years, a bomb that may have been hidden in a motor scooter tore through a crowded New Delhi bazaar, killing at least six people and igniting a fire that gutted nearby shops.

A little-known Kashmiri separatist group, in a phone call to an Indian news agency, claimed it set off the bomb to protest "atrocities" by Indian security forces in the northern state of Jammu and Kashmir.

An eyewitness said he thought the explosives had been hidden in a parked scooter. The explosion engulfed the market area near New Delhi's main railroad station in smoke and set fire to a gas-lamp shop, where five gas cylinders quickly exploded and spread the flames to other stores.

—Los Angeles Times

DEFENSE AND DIPLOMACY

House Fails to Override Clinton Veto of Defense Bill

The Republican-controlled House failed yesterday to override President Clinton's veto of a \$265 billion defense bill that he said would undermine arms reduction treaties with Russia.

The House voted 240 to 156 to override Clinton's veto, 24 votes shy of the two-thirds requirement under the Constitution to override a presidential veto.

Clinton objected primarily to the bill's order that an anti-missile defense system be developed for construction by 2003 to protect the United States against limited missile attacks from rogue nations.

Clinton said the system would jeopardize Russian compliance with two strategic arms reduction (START) treaties. He said Russia might turn against those treaties in retaliation because the bill would probably require more than the one U.S. anti-missile site permitted under the 1972 U.S.-Soviet Anti-Ballistic Missile (ABM) treaty.

Republicans said they tried to work out a compromise with Clinton on the anti-missile system. They accused him of vetoing the bill because he wants neither the missile defense nor an adequate defense authorization bill.

Clinton already has signed into law a companion appropriations bill providing funding for most of the weapons the \$265 billion bill would authorize.

Clinton said he vetoed the bill for a long list of reasons, among them provisions that would have restricted the president's authority to commit U.S. troops to overseas peacekeeping operations.

— Reuter

U.S. Mulls Visa for Taiwan Official

■ The State Department is considering a request for a transit visa for Taiwan Vice President Li Yuan-zu—a decision that could affect U.S. relations with China.

Li has asked for a transit visa for a brief stop in the United States while he is en route to attend the inauguration of the new president of Guatemala, scheduled for Jan. 14, a State Department spokesman said.

U.S. relations with China were hit hard last May, when the U.S. granted a visa to Taiwan President Lee Teng-hui so he could attend a reunion at Cornell University, his alma mater.

The Chinese government in Beijing considers the island of Taiwan one of its provinces, and views its government as illegitimate.

The spokesman declined to say when the decision on the visa request is expected.

— Associated Press

Christopher to Join Mideast Talks

■ Secretary of State Warren Christopher will join Israeli-Syrian negotiations on Maryland's Eastern Shore today in an intensified effort to make progress toward peace ahead of another Middle East journey, U.S. officials said yesterday.

The officials said Christopher would attend the U.S.-mediated talks for a few hours so he can advise Israeli and Syrian leaders next week "on what we think should happen next, substantively and procedurally."

The talks, being held at the secluded Wye Plantation conference center an hour's drive from Washington, resumed yesterday under special U.S. Middle East envoy Dennis Ross and are scheduled to last three days.

Negotiators aimed to pick up where a first round ended Friday and set the stage for Christopher's 16th Middle East peace mission starting Jan. 10.

Last week's round was the first direct Israeli-Syrian negotiation in six months, and there have since been a number of positive comments from both sides adding to a sense of optimism. Officials, however, have played down prospects for a dramatic announcement Friday. One senior U.S. official, asked about the chance of an agreement in principle being reached then, replied: "I think that's too ambitious."

State Department spokesman Nicholas Burns told reporters that after flying to Paris Monday for a conference of donors to the new Palestinian Authority, Christopher would travel Wednesday to Jerusalem and then visit Damascus Thursday.

— Reuter

Sarah Menzano - HUD Telecom 1/4

investment vehicle - owned by fed EEs - don't get dividend.

GNMA - we've asked

FHA - mortgage

→ asked lenders to sign subordination app.

Fed EEs who may be public
leasing tenants

~~sect 8~~

home improvement loans
Title I

Alan Kleeke

PC - only law enf.

Prison guards - may walk out

AG working w/ def dept.

Govt to which mil. can be called on to do civ tasks.
- protecting fed prop / fed insts

Telecon w/ C. Schroeder 1/4

Can't figure out a way to make CG rez. ^{anything other than} a substantial time delay.

CG's actual practice - his office makes delerm - pay out of JF or some other fund (payment or Perm is appropriated)

?
std: ministerial? or execution of law?

if unconst + severable
then - must submit to Treasury

← This is unconst - Bowsher (if binding on exec branch)

→ so doesn't have to be complied w/?

} sever offensive clause? severability §. (?)
} or interpret CG's role as non-binding - really, severing

Prob: STAT not survive severing/

not permit interj to treat as non-binding

skill arg that Cong would have enacted this w/out CG clause.

Redbook - CG's law of appropriations

DOT sends docs to GAO.

CG then certifies - sends form to Treasury

Processing usually takes abt 30 days.

Then Treas - abt 7 days to write a check.

We could request expedition.

He's going to say: half a million claims will take a while

if ministerial, law not void.

But prob: time delay

then cert when to certify: seek an injunction?

AG: If this is going to take 45 days, then it's not so good, as orig. thought.

Telecon K. Wallman 1/4

Inventory of actions Pres can take to
mitigate effects

- employee
- beneficiaries.

2 lists -

walking into (explorative)
yes - he can do.

fed part - performance
or con

Pick 5 programs -

- how to deal w/
difficulties.

Boatman's Bank

Little Rock.



454-6635

Jim Fuller

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CHARLES A. SWEET

TELECOPY

TO:

Glenn Kagan

FIRM:

White House Counsel's office

TELECOPY NUMBER:

456-1647

FROM:

Jim Fuller

TELEPHONE:

434-5100 ; home: 202 965-1050

DATE:

1/8/95

CLIENT CHARGE:

NUMBER OF PAGES INCLUDING THIS PAGE

IF THERE ARE ANY PROBLEMS RECEIVING THIS TRANSMISSION, PLEASE
CALL (202) 434-5608 IMMEDIATELY. THANK YOU.

MESSAGE:

*Rough Draft of a typical escrow. Different
Danks tend to like different forms, so Worthen might
have changes/additions.*

J.F.

THIS FACSIMILE CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE ADDRESSEE(S) NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT OF THIS FACSIMILE, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR COPYING OF THIS FACSIMILE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL FACSIMILE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

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- (202) 434-5325 (202) 434-5326
- (202) 434-5327 (202) 434-5328
- (202) 434-5330

From December
in # 1

2

+++++
Speak to W. bank people.
+++++

Zorinda

ESCROW AGREEMENT

DRAFT

THIS ESCROW AGREEMENT, dated as of _____ by
WILLIAM JEFFERSON CLINTON of 1600 Pennsylvania Avenue,
Washington, D.C. ("Pledgor"), and WORTHEN BANK & TRUST COMPANY of
Little Rock, Arkansas 72203 ("Escrow Agent").

WITNESSETH:

WHEREAS, the Pledgor wishes to decline the benefit of his
usual compensation as President of the United States during such
time as Federal workers are ^{going un-compensated} {furloughed as a result of
disagreement over the Federal budget} and

WHEREAS, the Escrow Agent has agreed to hold the Pledgor's
compensation in escrow in accordance with the terms of this
Escrow Agreement;

NOW, THEREFORE, in consideration of the foregoing and the
mutual covenants herein set forth, the parties hereto agree as
follows:

1. Deposit of Compensation in Escrow. Pledgor authorizes
and directs that, effective upon execution hereof, all Federal
compensation payments to him that are currently directly
deposited into Pledgor's checking account with Escrow Agent shall
be segregated and held in a separate account by the Escrow Agent
in accordance with the terms hereunder.

2. Release of Funds in Escrow. The Escrow Agent shall
release the funds from escrow only as provided in this Paragraph
2, or as directed by a court of competent jurisdiction.

From
Dec

(a) The Escrow Agent shall [release and distribute the escrow funds to the Pledgor or to his checking account promptly upon receipt of notice [that the furlough of Federal workers has been terminated.] *Federal workers have resumed employment under normal salary*

(b) Upon release of all funds for the benefit of Pledgor in accordance with subparagraph (a), this Escrow Agreement shall nevertheless remain effective until Notice of Termination of this Escrow Agreement shall be delivered to the Escrow Agent by _____.

3. Resignation of Escrow Agent. The Escrow Agent may resign at any time by transferring the funds held in escrow to another agent who agrees in writing to accept and carry out the duties and obligations of this Escrow Agreement. The Escrow Agent's resignation shall take effect upon acceptance of the substitution by the Pledgor. The Pledgor shall be liable to pay the reasonable fees and expenses of the Escrow Agent and any substitute Escrow Agent.

4. Duties of Escrow Agent; Indemnification.

(a) The parties hereto agree that the sole duty and responsibility of the Escrow Agent, or any substitute Escrow Agent, shall be to hold the funds in escrow in accordance with the terms of this Escrow Agreement; and upon release of the funds and termination of this Agreement pursuant to Paragraph 2 herein, the Escrow Agent shall be released from any obligation under this Agreement.

(b) In the event of any dispute between the parties arising pursuant to this Agreement or as to the right of any of the parties in or to the funds, it is agreed that, notwithstanding anything to the contrary in this Escrow Agreement, the Escrow Agent shall have the right to hold and retain all or any part of the funds until such dispute is settled or finally determined by litigation, arbitration, or otherwise.

(c) The Escrow Agent shall be protected in relying upon the accuracy, acting in reliance upon the contents, and assuming the genuineness of any notice, demand, certificate, or other document which is given to the Escrow Agent pursuant to this Escrow Agreement, without the necessity of the Escrow Agent verifying the truth or accuracy of any such notice, demand, certificate, instrument, or other document.

(d) The Escrow Agent shall be indemnified by the Pledgor against any liabilities, damages, losses, costs, or expenses incurred by, or claims or charges made against, the Escrow Agent (including counsel fees and court costs) by reason of the Escrow Agent's acting or failing to act in connection with any of the matters contemplated by this Escrow Agreement or in carrying out the terms of this Escrow Agreement, except as a result of the Escrow Agent's negligence or willful misconduct.

5. Miscellaneous.

(a) All notices, certifications, and other documents shall be in writing and shall be deemed given when delivered, or mailed, postage prepaid, by certified or registered mail, return

receipt requested: to the Pledgor, c/o DAVID E. KENDALL, Williams & Connolly, 725 Twelfth Street, N.W., Washington, D.C. 20005-5901 and to the Escrow Agent, WORTHEN BANK & TRUST COMPANY,

_____, Little Rock, Arkansas 72203. Any party may change the address to which notice is to be delivered or mailed by notice of such change given to the other parties in the manner herein set forth.

(b) This Escrow Agreement may not be changed, terminated, or modified orally or in any manner other than by an instrument in writing signed by all the parties hereto.

(c) This Escrow Agreement shall be construed in accordance with the laws of the state of Arkansas.

(d) This Escrow Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective representatives, successors, and assigns.

(e) This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior negotiations.

IN WITNESS WHEREOF, the parties have caused this Escrow Agreement to be signed and ensealed as of the day and year first written above.

PLEDGOR

_____ (SEAL)

ESCROW AGENT

WORTHEN BANK & TRUST COMPANY

By: _____ (SEAL)

Title: _____

19:15

Anything else happened?
~~#~~ Truly inexhaustible?
What else remaining?

~~Call by affs~~

1/4/23 - VA, RW, CC re shutdown issues

To defeat/set aside ADA

Can we move it around - come up w/ other bill for
meals in VA

Declare national emergency?

what then can be do?

Inherent const power to ameliorate effects of PD

or benefits of gov services -

unemp

medicaid etc

4:15/ today mts.

January 2, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: SHUTDOWN ISSUES

This memorandum very briefly addresses three issues: (1) the status of the suit brought by NTEU against the government; (2) the constitutionality of the Dole proposal to bring back (but not pay) all federal employees; and (3) the possibility of paying non-furloughed employees in the absence of an appropriation.

1. This afternoon, Judge Sullivan heard NTEU's motion for a temporary restraining order, requiring the government to send home all employees who are not now being paid. NTEU argues that keeping such employees on the job is unconstitutional because the Appropriations Clause prevents Congress from incurring an obligation in advance of an appropriation. (DOJ concedes that the government is incurring an obligation to employees by accepting their services, but argues that this is perfectly constitutional.) Judge Sullivan will rule on the motion tomorrow at 10:00 a.m. He hinted at oral argument that he would find in favor of the government on the ground that public interest considerations render preliminary relief improper in this case, whatever NTEU's likelihood of ultimate success on the merits.

2. The arguments we have made in the NTEU litigation would make it difficult for us to argue that the Dole proposal (to bring back but not pay all federal employees) is unconstitutional. We have argued very broadly in that litigation that Congress may incur obligations in advance of an appropriation. Congress, we have said, has essentially unlimited authority to borrow; the Appropriations Clause restricts the ability of the government to make actual payments, but not the ability to incur obligations. I suppose we now could try to distinguish between different kinds of obligations -- specifically, between obligations to excepted employees (constitutional) and obligations to non-excepted employees (unconstitutional). But it's difficult to see how this argument would run. If Congress thinks that having all employees back on the job is in the public interest, then that should be enough to support incurring an obligation, at least under the reasoning we've used in the NTEU litigation.

3. It may be possible to use the Judgment Fund to pay non-furloughed employees in the absence of a congressional

appropriation. The Judgment Fund is a permanent, indefinite appropriation for purposes of paying judgments and settling claims against the US government. We could use this Fund to pay non-furloughed employees by "settling," for the precise amount of their salaries, the claims of such employees against the government.

In order to take this step, we of course first have to determine that non-furloughed employees currently have claims against the government for their salaries. The Justice Department already has taken the position that the government, in bringing employees to work during the shutdown, has incurred an obligation to them (in the amount of their salaries). The critical, as yet unanswered, question is when this obligation comes due. If the obligation comes due on the employees' normal payday, then the government already has breached its obligation and it can proceed to settle all employees' claims. If, however, the obligation has not yet come due (because, for example, the government has a "reasonable period of time" in which to make payment and that period has not yet expired), then the government has not yet breached and the employees have no claims to settle.

Assuming employees have current claims against the government, a couple of obstacles remain. First, we would have to make the case that paying employees their whole salaries is indeed a compromise settlement, in the sense that the government also gets something out of it. I think this should not be too difficult given that, by making the payment, the government avoids litigation costs and any possibility of prejudgment interest or liquidated damages. Second, we have to obtain the approval of the Comptroller General, which is the handmaiden of Congress, to use the Fund for this purpose. This approval probably will be forthcoming, given that a refusal by the Comptroller General will hand us a great political issue.

There is a meeting at DOJ tomorrow afternoon to discuss this issue -- particularly the question of when the government's obligations to nonfurloughed employees come due. My preliminary view is that we should take the position that they're due now, so that we can use the settlement mechanism to pay them. Let me know what you think before I head off to tomorrow's meeting.

January 3, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: SETTLEMENT OF EMPLOYEES' CLAIMS

I attended a meeting at DOJ this afternoon to discuss the Administration's response to claims brought by nonfurloughed employees for monetary compensation. These claims are likely to be brought any day. In Judge Sullivan's courtroom this morning, the attorneys for NTEU and AFGE said they would amend their complaints to add claims for pay. In addition, we can expect individual employees to bring such claims.

Attending the meeting were representatives from OLC, the SG's office, and the Federal Programs Branch and Appellate Staff of the Civil Division. OLC is leaning in favor of settling nonfurloughed employees' claims; the SG's office is leaning in the opposite direction. The idea of compromising the claims was broached with the AG this morning, and she seemed generally sympathetic.

The SG's office is taking the position that we have not yet breached our obligation to pay federal employees, because we have a "reasonable period" in which to make payment and that period has not yet expired. (The office, through Deputy SG Ed Needler, started the meeting by taking the position that there was no obligation to pay federal employees unless and until there was an appropriation; by the end of the meeting, however, this position had been pretty well discredited.) Needler argued that this "reasonable period" to make payment does not expire until there's basically no chance of an appropriation (e.g., negotiations break down and Congress adjourns). The head of the Federal Programs Branch suggested that the "reasonable period" be approximately one month, on the grounds that (1) some employers do pay their employees on a monthly basis and (2) the federal government sometimes takes three or four weeks to issue a new federal employee with her first paycheck.

Needler also suggested that compromising these claims might be improper because it was being done for political rather than legal reasons. Finally, Needler and the representative of the Appellate Staff of the Civil Division claimed that settling these claims would be an administrative nightmare, requiring separate paperwork for each federal employee and taking a minimum of several weeks to accomplish. I suspect, and Chris Schroeder (Deputy Assistant AG at OLC) agrees, that there was real exaggeration going on here, although the administrative

difficulties should not be dismissed.

I talked with Chris after the meeting about the importance of keeping our consideration of this matter confidential. I also talked with him about the necessity of informing our office of everything DOJ is doing that might relate to this issue. I do not think we should have any problems on these points, but you might want to emphasize them in your regular meeting with DOJ bigshots.

Memorandum

DRAFT



Subject Use of Judgment Fund to Avoid Missing Payday for Employees Performing Emergency Functions	Date December __, 1995
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To
Files

From
Paul P. Colborn
Special Counsel
Office of Legal Counsel

This memorandum summarizes my research concerning whether, during a lapse in appropriations, employees performing emergency functions excepted from the prohibitions of the Antideficiency Act, pursuant to 31 U.S.C. § 1342, may be paid out of the permanent appropriation established pursuant to 31 U.S.C. § 1304 (the "Judgment Fund") in order to avoid the consequences of missing their regular payday.

I have concluded that the Judgment Fund may be used so long as the payments would be for a bona fide compromise settlement of imminent litigation. Although the opposing argument might be viewed as having some merit, a good argument can be made that it would be a bona fide compromise settlement if the Government were to agree to pay the emergency workers their full salaries on their regular payday in order to avoid the potential interest liability, liquidated damages under the Fair Labor Standards Act ("FLSA"), other damages, and litigation costs that might arise as a consequence of missing the payday. Whether litigation is imminent will depend on the facts and circumstances of the particular lapse in appropriations. Finally, the logistical difficulties of obtaining the required Comptroller General approval in a timely fashion may make impractical the use of the Judgment Fund to pay emergency workers on their scheduled payday.

Background

The Judgment Fund is available to pay

final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when (1) payment is not otherwise provided for; (2) payment is certified by the Comptroller General; and (3) the judgment, award,

DRAFT

or settlement is payable under section 2414 . . .
of title 28"

31 U.S.C. § 1304(a).

David Cohen of the Civil Division¹ provided me with the following overview of the availability of the Judgment Fund:

An agency receives appropriations to pay employees, to pay rent, to pay for telephones, etc. Pursuant to the Anti-Deficiency Act, these appropriations can be used only for the purpose for which they were made. In 99.9% of the cases, Congress has not given the agency an appropriation to pay "judgments." Accordingly, when an agency is presented with a judgment, it has no appropriation to pay it. This is true even if the judgment arises out of the supply of telephone service to the agency and even though the agency has an appropriation to pay for telephone services. The appropriation is to pay for telephone services, not judgments. This is where the judgment fund comes in. The judgment fund is available to pay for judgments because agencies do not generally have appropriations for this purpose.

Electronic mail message from David Cohen to Paul Colborn (11/17/95, 11:10 a.m.).

28 U.S.C. § 2414 specifically addresses the use of the Judgment Fund for compromise settlements:

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by [her], shall be settled and paid in a manner similar to judgments in like causes, and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

¹ My research and analysis of this question was greatly assisted by my consultations with David Cohen, a Director of the Civil Division's Commercial Litigation Branch, who has considerable experience with respect to the Judgment Fund. My directory contains a series of electronic mail messages Cohen sent me on November 17, 1995.

DRAFT

The General Accounting Office ("GAO") has explained that

the rule [stated in 28 U.S.C. § 2414] is that a compromise settlement is payable from the same source that would apply to a judgment in the same suit. If a given action could result in a money judgment payable from the judgment appropriation, a compromise settlement of that action will be payable from the judgment appropriation. If the action would not result in a money judgment payable from the judgment appropriation -- either because a resulting judgment would be payable from agency funds or because it would not result in a money judgment at all, such as a suit for an injunction -- then the judgment appropriation will not be available for a compromise settlement.

United States General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, at 14-9 (1994) ("Principles of Federal Appropriations Law") (citations omitted) (citing 13 Op. O.L.C. 118 (1989) (preliminary print) as in accord).

Discussion

As discussed below, I have concluded that if all we had before us was the question of discharging the obligation to compensate the employees performing emergency functions, the government could not use the Judgment Fund because salaries are generally to be paid out of agency appropriations. On the other hand, we can make a good argument that if there is a bona fide imminent or actual litigation to be settled relating to missing a scheduled payday, then the Judgment Fund would be available. In another words, although the payment of salaries by agencies is "otherwise provided for" within the meaning of 31 U.S.C. § 1304, the payment of judgments and compromise settlement of litigation is not. Finally, I discuss certain practical difficulties that may make using the Judgment Fund in these circumstances impractical.

1. Salaries Generally Payable out of Agency Appropriations

Government agencies are authorized to "employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year." 5 U.S.C. § 3101 (emphasis added). Thus, an agency generally pays salaries out of agency appropriations. This general rule applies not only to salaries payable for work performed during fully-funded periods of government operations, but also to salaries for employees performing emergency functions during a lapse in

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appropriations.² In prior lapse situations, employees have been paid from agency appropriations once appropriations were restored. (The lapses have been brief enough that no payday has ever been missed.)

The foregoing general rule derives from the Antideficiency Act, which prohibits agencies from becoming "involve[d] . . . in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341. The Act contains its own "authorized by law" exception to this prohibition of entering into obligations in advance of appropriations: 31 U.S.C. § 1342 authorizes agencies to "accept voluntary services . . . or employ personal services exceeding that authorized by law" in order to meet "emergencies involving the safety of human life or the protection of property."

In the leading opinion on the emergency exception to the Antideficiency Act, Attorney General Civiletti explained that "Congress has contemplated expressly, in enacting [§ 1342], that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations" Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1, 11 (1981). By providing such authority "in advance of appropriations," Congress must be understood implicitly to have contemplated that employees performing emergency functions would be compensated out of agency appropriations when they become available. Attorney General Civiletti recognized this, stating that "under [this] emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money." Id. at 9 n.11. In other words, "the government's employment of personal services in an emergency in advance of appropriations" has the effect of "impos[ing] a necessity for further appropriations." Id.

The conclusion that salaries for employees performing emergency functions excepted from the Antideficiency Act prohibition are to be paid upon resumption of appropriations out of agency appropriations is supported by opinions of this Office and GAO concerning another exception to the Antideficiency Act, the Price-Anderson Act, 42 U.S.C. § 2210(h). These opinions have been summarized by GAO:

When Congress provides contract authority, it is normally assumed, at least where the governing

² The general rule also applies to back pay provided by an agency based on an agency administrative action; in contrast, if back pay is awarded pursuant to a court judgment or compromise settlement by the Attorney General, the Judgment Fund is the proper source of funds. See discussion infra, pages 8-9.

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legislation does not provide otherwise, that liquidating appropriations will be obtained through the normal appropriations process. For example, GAO and the Department of Justice have both reviewed the nature of obligations and funding under the Price-Anderson Act, and both agree that an agency must first use current funds to the extent available. If the agency has no appropriated funds available for that purpose, or if funds available to the agency are not sufficient, the agency must then seek additional funding from Congress. Only if Congress fails or refuses to provide the necessary funds does the potential availability of [the Judgment Fund] come into play. B-197742, August 1, 1986; Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989.

Principles of Federal Appropriations Law, at 14-54.

I believe that obligating to pay emergency workers (pursuant to the Antideficiency Act emergency services exception) should be analyzed the same way as obligating to make indemnity payments (pursuant to the Antideficiency Act exception contained in the Price-Anderson Act). Accordingly, since during a lapse in appropriations there are no current funds to pay the emergency workers, under the rationale of the Price-Anderson opinions agencies should either await enactment of their regular appropriations bill or seek enactment of a special appropriations bill for the emergency workers -- unless, as is discussed next, litigation considerations justify departing from that general rule to make a compromise settlement.

³ I agree with David Cohen's assessment that the holdings of the Price-Anderson opinions concerning access to the Judgment Fund are inapplicable to the compromise settlement issue here, because the settlement authority in that situation had been vested in the Secretary of Energy (whose administrative settlement authority does not entail access to the Judgment Fund), while the settlement authority in the present situation is vested in the Attorney General (whose litigation settlement authority does entail such access):

Reading the OLC opinion as a whole in conjunction with the unpublished GAO opinion leads to the following conclusion. The OLC opinion determines that the litigation in that case and the settlement of that litigation did not involve the Attorney General. Given that determination, the question was whether the judgment fund could be used to pay the settlement. OLC and GAO concluded that given the lack of involvement of the Attorney General and the specific

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2. Payment of a Compromise Settlement

Notwithstanding my conclusion in the prior section that the salaries of the emergency workers should generally be paid out of agency appropriations, we can argue that a justification for using the Judgment Fund lies in the possibility of imminent litigation that might arise if it appears that an extended lapse in appropriations threatens to cause the government to miss a regularly-scheduled payday.

In contrast to the payment of regular agency operating expenses such as salaries, which are generally paid out of agency appropriations, judgments ordered by a court and compromise settlements entered into by the Attorney General are generally paid out of the Judgment Fund. See 31 U.S.C. § 1304(a).
A "compromise settlement"

is an agreement reached by the parties involving mutual concessions. 38 Op. Att'y Gen. 94, 95-96 (1933). The Attorney General, as the government's chief litigator, has broad authority to compromise cases referred to the Justice Department for prosecution or defense. (Citations omitted.) The power attaches "immediately upon the receipt of a case in the Department of Justice." 38 Op. Att'y Gen. at 102.

Principles of Federal Appropriations Law, at 14-8. It is important for present purposes to recognize that a "case" need not actually have been filed, so long as a claim has been referred to the Attorney General for which litigation is "imminent". See 28 U.S.C. § 2414 ("compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits"). ?

Whether the section 2414's threshold requirement that litigation be imminent would be satisfied will depend on the

statute, Congress intended the settlement to be paid from appropriated funds, not the judgment fund, even though what was at issue was a settlement of litigation. However, if the agency lacked appropriated funds to pay the settlement and Congress refused to appropriate additional funds, then suit could be brought on the settlement agreement. At that point, the Attorney General would become involved and the Attorney General could settle the litigation (or the imminent litigation) AND payment WOULD be made out of the judgment fund.

Electronic mail message from David Cohen to Paul Colborn (11/17/95, 11:35 a.m.).

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facts and circumstances attendant to the particular lapse in appropriations. Given the litigation brought by the union during the recent lapse in appropriations, however, it is reasonable to expect that this requirement can be satisfied.

I believe that we would have a good argument that the "compromise settlement" requirement would also be met. Missing a scheduled payday would raise potential liability or litigation risk for the United States beyond the mere obligation to pay employees for their services. It would appear that a colorable cause of action could be stated for pre-judgment interest (interest from the missed payday to the date of judgment),⁴ liquidated damages for violation of the Fair Labor Standards Act ("FLSA"),⁵ and conceivably some kind of consequential or other

⁴ One possible basis for liability for pre-judgment interest may be the Back Pay Act, 5 U.S.C. § 5596, which requires the award of such interest to employees who "have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay . . . of the employee . . ." 5 U.S.C. § 5596(b). The Back Pay Act regulations issued by the Office of Personnel Management define "personnel action" to "include personnel actions and pay actions (alone or in combination)." 5 C.F.R. § 550.803.

⁵ The Government would contest liability under the FLSA. Although it has been held that missing a payday violates the FLSA, see Biggs v. Wilson, 1 F.3d 1537 (9th Cir. 1993), a strong argument can be made that the Antideficiency Act overrides the FLSA in this circumstance; that is, the Act's express authorization to employ emergency workers during a lapse in appropriations should be interpreted to mean that Congress does not intend that missing the payday in those circumstances would violate the FLSA. Moreover, even if a court were to find a violation of the FLSA, there would be a strong basis for opposing the liquidated damages (double the back pay due) that are ordinarily awarded for FLSA violations. The FLSA

permits the [court] "in its sound discretion" to award a lesser amount of liquidated damages, or none at all, "if the employer shows to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." . . . If the employer fails to carry its burden of demonstrating good faith and reasonable grounds, the award of liquidated damages is mandatory.

Martin v. Selker Bros., Inc., 949 F.2d 1286, 1299 (3d Cir. 1991) (quoting 29 U.S.C. § 260). Liquidated damages were not imposed on the State of California when it was held in Biggs to have

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damages. A good argument can be made that this potential liability, along with the costs of litigation, would provide the basis for a bona fide compromise settlement. We could argue that a settlement wherein the Government committed to pay all the emergency workers on their scheduled payday and the potential plaintiffs agreed to forego the possibility of collecting interest, liquidated damages, or other damages would qualify as a compromise settlement.

The Comptroller General's opinions on the use of the Judgment Fund for back pay awards support the position that the Fund is the proper source of payment for a compromise settlement of imminent litigation. See generally, Principles of Federal Appropriation Law, at 14-53 through 14-54. "[A]dministrative back pay awards should be charged to, and paid from, the agency appropriation covering the fiscal year or years to which the award relates. Back pay claims awarded by the judgment of a court or settlement are payable from the judgment fund."

violated the FLSA by missing the payday of government employees during a lapse in appropriations. See Biggs, 1 F.3d at 1538. Finally, many of the employees the government will call upon to perform emergency functions are in job classifications that are exempt from the FLSA. However, despite the fact that the likelihood of FLSA liability is thus probably low, it should suffice for current purposes to state that claims could be asserted under the FLSA and that there is sufficient litigation risk to justify a compromise settlement.

⁶ It may be argued in response that such a settlement would not be a bona fide compromise. GAO has stressed that "an agency is not authorized to force a sham lawsuit to avoid its funding obligations." Principles of Federal Appropriations Law at 14-54. This Office has also said (in its Price-Anderson Act opinion) that "[t]he availability of the fund . . . assumes, of course, that there is a good faith dispute over the obligation of the United States to pay on the extant settlement obligation." Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, at 11 (Dec. 18, 1989). Although the argument that avoiding the potential additional liability and costs identified above would make this a bona fide settlement is a good one, I do not discount the opposing argument that paying the employees 100 cents on the dollar for their salaries suggests a "sham" settlement because the Government has never disputed that it is obligated to pay the salaries. In other words, it would be argued, the settlement would not involve "mutual concessions" that are real. See 38 Op. Att'y Gen. at 95-96.

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Matter of Veterans Administration -- Appropriation Chargeable for Back Pay Claims, 69 Comp. Gen. 40, 41 (1989) (emphasis added). More specifically:

Appropriations provided for regular governmental operations or activities, even though these operations or activities give rise to a cause of action, are not available to pay court judgments in the absence of specific authority. 40 Comp. Gen. 95, 97 (1960). In order to simplify the payment of such judgments, Congress enacted 31 U.S.C. 1304(a) However, [the Judgment Fund] does not encompass payment of administrative awards made either by the employing agency or an outside administrative entity.

Id. at 42. Since agency appropriations for salaries are not available to pay court judgments or compromise settlements for the payment of salaries, the Judgment Fund is available for such judgments and settlements.

3. Practical Difficulties with Using the Judgment Fund

There are practical difficulties with using the Judgment Fund in this circumstance, given the necessity of obtaining the Comptroller General's approval to use the Fund. GAO has described its process:

Disbursements from the judgment appropriation may be made only upon certification by the Comptroller General. (31 U.S.C. § 1304(a)(2)). The payment process is normally triggered by a written payment request from the Department of Justice, which transmits a copy of the judgment and advises that no further review will be sought. Upon determining that the judgment is properly payable from the judgment appropriation, GAO will calculate the amount of any interest which may be authorized by law, and will initiate action to offset any known indebtedness to the United States by the judgment creditor (31 U.S.C. § 3728). When these actions are completed, GAO issues a "Certificate of Settlement" to the Treasury Department, specifying the amount to be paid, the payee(s), and the appropriation account to be charged. The Treasury Department then issues the check(s) on the basis of the information contained in the GAO's certification.

Our role under 31 U.S.C. § 1304 is ministerial in the sense that we do not review the merits of the underlying judgment. Apart from determining the proper source of funds, calculating interest where appropriate, and offsetting known indebtedness,

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our function is to certify payment as provided in the judgment.

Comp. Gen. B-197742, 1986 WL 63966, *8-9 (C.G.) (emphasis added).

In the normal situation, the Department simply sends a copy of a judgment (or compromise settlement document) to GAO, which does a limited review and then sends the Treasury a "certificate of settlement" approving payment. Here, however, the submission to GAO would presumably be much more complicated because it would have to provide requisite factual information about the many employees to be paid and the many appropriation accounts that would be affected. The form of the submission would have to be worked out in advance with GAO. David Cohen informed me that GAO operates under a "first in, first out" system for reviewing Judgment Fund applications; the Department's submission normally would go to the back of the line, thus making approval before the looming payday questionable. Of course, it might be possible to negotiate with GAO a pass to the front of the line.

Another, more substantive complication about GAO approval would be that this use of the Judgment Fund might well be viewed as novel, and perhaps as an attempt to bypass Congress. GAO normally conducts a limited review of Judgment Fund applications, but as is indicated by the underlined statements in the above-quoted Comptroller General opinion, GAO does consider whether the Judgment Fund is a proper source of payment. Thus, GAO might well subject this application to substantive legal scrutiny -- which would entail a delay.

Given these practical and substantive difficulties in obtaining timely approval from the Comptroller General (who, after all, is an agent of Congress), it might be simpler and faster to get specific legislative authorization from Congress.

⁷ This Office has previously observed that "were the requirement of certification to be other than a ministerial function it would raise serious questions under the Supreme Court's holding in Bowsher v. Synar, 478 U.S. 714 (1986) (Congress cannot constitutionally assign to the Comptroller General, an arm of Congress, the duty of executing the laws)." Availability of Judgment Fund for Settlement of Cases or Payment of Judgments Not Involving a Money Judgment Claim, 13 Op. O.L.C. 118, 120 n.3 (1989) (preliminary print). Making a determination as to whether the Judgment Fund is legally available would appear to be a non-ministerial function.

FAX TO
KATHY
WALLMAN.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 95-2115
)	(EGS)
ALICE RIVLIN, as Director of the)	
OFFICE OF MANAGEMENT AND BUDGET)	
and OFFICE OF MANAGEMENT AND)	
BUDGET, <u>et al.</u> ,)	
)	
Defendants.)	

NATIONAL TREASURY EMPLOYEES)	
UNION, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 95-2153
)	(EGS)
UNITED STATES OF AMERICA,)	
<u>et al.</u> ,)	
)	
Defendants.)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO NTEU
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

The National Treasury Employees Union ("NTEU") asks this Court to issue a temporary restraining order which would prohibit the United States Government from requiring federal employees to report to work until such time as Congress enacts appropriations bills covering those employees' positions. As this Court previously recognized, the immediate effects of the extraordinary order that NTEU seeks would be the creation of "chaos" in the United States. Transcript of Court's Ruling (Nov. 17, 1995) (hereinafter "Tr.") at 9. Among the many profound and far-reaching effects of such an order, (a) most federal law enforcement activities, including criminal prosecutions, would cease, (b) guards at federal prison facilities would leave prisoners unattended, (c) the Marshals Service could no longer apprehend fugitives, maintain prisoners in custody, or provide protection for the Judiciary, (d) care of patients in governmental hospital facilities would cease, and (e) tens of millions of Americans would be deprived of benefit payments for the basic necessities of life, such as housing, food and medical care. For these reasons, it is beyond dispute that the order sought is manifestly contrary to the public interest and should, on that basis alone, be denied.

Putting aside the overriding public interest considerations in this case, plaintiffs have not, and cannot satisfy any of the other prerequisites for obtaining injunctive relief. First, NTEU has failed to demonstrate any likelihood of success on the

merits. The Anti-Deficiency Act is fully consistent with not only the language of the Appropriations Clause, but also its underlying purpose. Moreover, NTEU's contention that Congress cannot legislatively authorize a monetary obligation without placing a fixed dollar limit upon that obligation is simply erroneous as a matter of law.

Second, plaintiffs have failed to demonstrate any irreparable harm. Employees affected by the current budget impasse will undoubtedly suffer a temporary monetary injury as a result of delayed salary payments. However, as this Court previously recognized, Congress has always appropriated funds for payment of employee salaries after the resolution of each of the many past budgetary impasses, and there is no reason to believe that it will fail to do so in this instance. Moreover, even if Congress were to fail to enact appropriations sufficient to provide retroactive salary payments, employees have an adequate remedy at law to recover compensation for their services. Consequently, whatever monetary injury plaintiffs may endure can, in no sense, be considered irreparable.

Finally, the harm to both the public interest and to third parties resulting from the order sought here far outweighs whatever conceivable benefit NTEU hopes to secure from that order. The effects on members of the public of such an order would, in the words of this Court, "be devastating at least, and catastrophic at worst." Tr. at 10. In contrast, NTEU's proposed order would do nothing to restore salary payments to federal

employees nor would it redress any other financial dislocation or uncertainty resulting from the current budgetary impasse. To the contrary, the constitutional theories NTEU espouses, if adopted by this Court, would deprive federal employees of the right to be paid for services already provided to the Government.

In short, there is nothing equitable about NTEU's ill-considered request for a temporary restraining order from the standpoint of either the Government, its employees, or the public. Nor is there any merit to its constitutional theories. Accordingly, NTEU's motion for temporary restraining order must be denied.

ARGUMENT

In order to obtain injunctive relief, plaintiffs must "demonstrate four things: (1) that [they are] substantially likely to succeed on the merits of [their] suit, (2) that in the absence of an injunction, [they] would suffer irreparable harm for which there is no adequate legal remedy, (3) that the injunction would not substantially harm other parties, and (4) that the injunction would not significantly harm the public interest." Taylor v. Resolution Trust Corporation, 56 F.3d 1497, 1505-1506 (D.C. Cir. 1995); Virginia Petroleum Jobbers Ass'n v. FEC, 259 F.2d 921, 925 (D.C. Cir. 1958). As this Court found with respect to a similar request made by plaintiff AFGE just six weeks ago, NTEU has not and cannot satisfy any of these four factors.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A SUBSTANTIAL
LIKELIHOOD OF SUCCESS ON THE MERITS

As NTEU concedes, section 1342 of the Anti-Deficiency Act ("the Act"), 31 U.S.C. § 1342, authorizes the Executive Branch to incur monetary obligations to employees for certain limited purposes during a lapse in appropriations. See e.g., Complaint, ¶ 30; Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order ("NTEU's TRO Mem.") at 4. NTEU's central contention in this case is that section 1342 violates the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7. Id.

Initially, NTEU insisted that the Appropriations Clause prohibits Congress from authorizing any monetary obligation to be incurred by the Government unless and until Congress appropriates monies sufficient to satisfy that obligation. As defendants demonstrated in the memorandum filed in support of their motion to dismiss ("Def. Mem.") at 20-32, that contention is at war with the text of the Constitution, is in conflict with nearly two centuries of legislative practice, and is irreconcilable with numerous decisions of the Supreme Court.¹ In response, NTEU now

¹ As defendants previously explained, Congress' power to authorize monetary obligations to be incurred stems from section 8 of Article I which provides that "Congress shall have power" -- "[t]o borrow money on the credit of the United States" and "to pay the Debts . . . of the United States." Art. I, § 8, cl. 1-2. By virtue of these enumerated powers, Congress has broad constitutional authority to impose monetary obligations upon the United States for goods and services provided to the Government. Pope v. United States, 323 U.S. 1 (1944); see Glidden v. Zdanok, 370 U.S. 530, 566-567 (1962) ("[T]he Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted

(continued...)

concedes as much and openly acknowledges that "[i]t may be that Congress, in certain circumstances, can, consistent with the Constitution, obligate funds in advance of appropriations."

Plaintiffs' Supplemental Memorandum in Support of Motion for Temporary Restraining Order ("Pl. Supp. TRO Mem.") at 1 n.1.

Having abandoned their principal argument, NTEU nonetheless continues to assert that section 1342 of the Anti-Deficiency Act violates the Appropriations Clause. Although the precise bases for this contention are not readily apparent, NTEU apparently

¹(...continued)
constitutional court.").

The Appropriations Clause makes no reference to the scope of Congress' power to authorize monetary obligations to be incurred. Instead, it provides that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." Art. I, § 9, cl. 7 (emphasis supplied). Thus, the plain language of the Clause restricts not what monetary obligations Congress may authorize, but instead what payments or disbursements may be made from the Treasury. Office of Personnel Management v. Richmond, 496 U.S. 414, 424, 427 (1990); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850); Hart v. United States, 118 U.S. 62, 66-67 (1886); see New York Airways, Inc. v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966).

Moreover, Congress has never construed the Appropriations Clause as a limitation upon its own constitutional power to determine what monetary obligations may be incurred upon behalf of the United States. Indeed, federal statutes enacted by Congress have permitted certain limited obligations to be incurred in advance of appropriations for most of the nation's history. See generally Def. Mem. at 25-27. That long-standing practice "is entitled to great weight." Skinner v. Mid-America Pipeline, 490 U.S. 212, 221-222 (1989) quoting Field v. Clark, 143 U.S. 649, 683 (1892); see Harrington v. Bush, 553 F.2d 190, 195 (D.C. Cir. 1977) ("Congressional power is plenary with respect to the definition of the appropriations process"); McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 400 (1819) ("An exposition of the constitution deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.").

Seems broad enough
to cover Dole bill. What
would be the limitation?

1) rests its claim on several arguments. It contends that section 1342 of the Act is incompatible with the underlying purpose of the Appropriations Clause. Pl. TRO Mem. at 5-6. It also contends that, while Congress may enter into obligations in advance of appropriations, it may not authorize the Executive Branch to do so. Pl. Supp. TRO Mem. at 1-2. Finally, NTEU asserts that Congress may not authorize the Executive Branch to take any action, including employment of personal services, unless it imposes a fixed dollar limitation upon the amount that may be obligated to effectuate that action. Pl. Supp. TRO Mem. at 3-8. As explained below, these contentions, like NTEU's initial constitutional theory, are wholly without merit.

1) First, there is no inconsistency between the Anti-Deficiency Act and the underlying purpose of the Appropriations Clause. As plaintiffs point out (Pl. TRO Mem. at 6), a "fundamental and comprehensive purpose" of the Clause is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." OPM v. Richmond, 496 U.S. at 427-428. In section 1342 of the Act, Congress made its judgment as to what monetary obligations should be incurred to advance the "common good." Specifically, Congress determined that, notwithstanding a lapse in appropriations, the Government should employ personal services for "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In

essence, Congress concluded that the safety of human life and the protection of property should not be sacrificed merely because necessary funds were not immediately available. While NTEU apparently has an entirely different set of priorities, this Court should adhere to the judgments made by Congress concerning the public good rather than overturning Congress' judgment in favor of the "individual pleas of litigants" such as NTEU.

Can it
conclude
something
similar are
in a time of
emergency?
(DrU)

(2) Second, plaintiffs' contention that Congress must enter into obligations directly rather than authorizing the Executive Branch to do so is completely baseless. As the Supreme Court explained in Yakus v. United States, 321 U.S. 414 (1944), "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function." Id. at 425, quoting Currin v. Wallace, 306 U.S. 1, 15 (1939). "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Mistretta v. United States, 488 U.S. 361, 372 (1989). Congress could hardly be expected to convene upon each emergency and legislatively authorize an obligation to be incurred. Moreover, such a cumbersome procedure would undermine the very purpose of the exception in section 1342, which was to enable agency heads to proceed swiftly in an

The bill - less of a
delegation - so this
argument entirely
disappears.

emergency without the need to seek a specific authorization and/or appropriation.

Finally, plaintiffs' contention that Congress may not constitutionally authorize any action unless it specifies a fixed dollar limitation upon any resulting obligations is simply erroneous. The Supreme Court has repeatedly reached precisely the opposite conclusion. E.g., Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923) ("It is not necessary that the exact amount required shall be appropriated or that legislation shall indicate no limit upon the expenditure for property to be taken."); Blanchette v. Connecticut General Insurance Corps., 419 U.S. 102, 127-128 (1974) (upholding constitutionality of Regional Rail Reorganization Act notwithstanding the fact that the Government's potential liability for the taking of the plaintiffs' property might exceed funds appropriated for that purpose); Preseault v. Interstate Commerce Commission, 494 U.S. 1, 12-14 (1990) (upholding statutorily authorized taking of reversionary interest in railroad right-of-way notwithstanding potential liability in excess of appropriation). Most recently, in Republic National Bank of Miami v. United States, 506 U.S. 80, _____, 113 S.Ct. 554, 562-563 (1992), the Supreme Court held that payments from the Judgment Fund, 31 U.S.C. § 1304, which itself contains no dollar limitation on the amount of funds that may be paid out, do not violate the Appropriations Clause.

Even if some limitation on the amount of obligations that may be incurred were required, Congress would be free to choose the type of limitation to be imposed. Under the Necessary and Proper Clause, Art. I, § 8, cl. 18, Congress is granted the "choice of means" by which it will exercise its power "to pay the debts of the United States." Legal Tender Cases, 110 U.S. 421, 440-441 (1884); McCulloch, 17 U.S. (4 Wheat) at 409-420. Moreover, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." Yakus v. United States, 321 U.S. 414, 425-426 (1944). Thus, Congress is free to choose to limit governmental obligations by restricting the purposes for which those obligations may be incurred rather than by imposing an arbitrary and inflexible dollar limitation.

Such a flexible limitation is particularly appropriate here given the fact that the exception in section 1342 is concerned with "emergencies involving the safety of human life or the protection of property." 42 U.S.C. § 1342. Congress could not possibly anticipate in advance how frequently such emergencies would arise, how severe any given emergency would be, or how many personnel would be required to prevent an imminent loss of human life or property. Consequently, as the legislative history of the Act reflects, Congress chose to leave to the head of each agency "some latitude" to deal with "extraordinary cases . . . involving saving of life or of the property of Government, where it is necessary to create a deficiency" 39 Cong. Rec.

3687, 3781-3782 (March 1, 1905). The decision to afford flexibility to agency heads to deal with potentially life-threatening situations was both prudent and well within Congress' authority. See Skinner v. Mid-America Pipeline Company, 490 U.S. 212, 222 (1989), quoting Bob Jones University v. United States, 461 U.S. 574, 596-597 (1983) ("Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will.").

can't make
this arg
w/ w/ +
Dole. Make
a difference!

Nor is there any basis for plaintiffs' contention that section 1342 of the Anti-Deficiency Act is somehow unique in that it does not specify a specific dollar cap on obligations that may be incurred. This same approach has been applied by Congress in a variety of other contexts. For example, Congress has enacted permanent, indefinite appropriations for interest on the public debt and for certain payments for public and assisted housing programs. 31 U.S.C. § 1305(2), (7), (9) and (10). Similarly, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680, imposes liability upon the Government for certain torts without any fixed dollar limitation.² The retirement systems for federal employees are also financed, in

² Judgments under the FTCA are paid from the Judgment Fund which, as stated above, contains no specific dollar limit on the amount appropriated. 31 U.S.C. § 1304. Rather than imposing an aggregate dollar limitation on the Government's liability, Congress instead chose to limit the Government's liability through restrictions on awards of prejudgment interest and punitive damages, 28 U.S.C. § 2674, and by excluding certain classes of activities from the FTCA's coverage entirely. Id. at § 2680.

part, by indefinite appropriations necessary to cover the unfunded liability of the Government for retirement benefits. 5 U.S.C. § 8348(a) and (g). Once again, the statute imposes no fixed aggregate dollar limitation upon the amounts appropriated.³ Finally, the Tucker Act, 28 U.S.C. § 1346(a)(2) and 1491, authorizes claims founded upon the Constitution, a federal statute or an express or implied contract. It too contains no aggregate fixed dollar limitation on the Government's liability.

In sum, NTEU's contentions in this case find no support in the text of the Constitution, conflict with the long-standing legislative practices of the Congress, and fly in the face of the interpretation consistently accorded to the Appropriations Clause by the courts. For all of these reasons, plaintiffs have failed to demonstrate a substantial likelihood of success on the merits of their claims.⁴

³ Instead, the statute limits the Government's liability by fixing the amount of benefits to be paid to each eligible employee.

⁴ NTEU also suggests that section 1342 of the Anti-Deficiency Act represents an improper and overly broad delegation under the standards set out in Mistretta v. United States, 488 U.S. 361, 372, 379 (1989). See Pl. Supp. TRO Mem. at 5-6. Section 1342 strictly limits the purposes for which personal services may be employed under that section to "emergencies involving the safety of human life or protection of property." 31 U.S.C. § 1342. This provision clearly provides an "intelligible principle" or standard to guide the actions of the Executive Branch. Nothing more is required to sustain the validity of the delegation of authority contained in the Act. Skinner v. Mid-America Pipeline Company, 490 U.S. 212, 218-223 (1989); Mistretta, 488 U.S. at 372; see generally Def. Mem. at 32-36.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY IRREPARABLE HARM

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Sampson v. Murray, 415 U.S. 461 (1974). Plaintiffs here have failed to establish either one.

As plaintiffs' declarations reflect, their injuries stem entirely from the expected delay in the receipt of their salary and varying degrees of associated economic losses. However, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added). As the D.C. Circuit explained:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Id. quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d at 925 (emphasis in original). An "insufficiency of savings or difficulties in immediately obtaining other employment -- external factors common to most discharged employees and not attributable to any unusual factors relating to the discharge itself-- will not support a finding of irreparable injury, however severely they may affect a particular individual." Sampson, 415 U.S. at 92 n. 68.

It cannot be doubted that federal employees affected by the current budgetary impasse have, or imminently will, suffer an

economic loss as a consequence of the delay in their salary payments. It is equally clear, however, that those federal employees who have worked will be compensated at a later date; therefore, in no sense, can the loss of salary be considered irreparable harm.

Upon the conclusion of each of the many appropriations lapses that have occurred in the past 15 years, Congress has always appropriated funds for the retroactive payment of salaries of federal employees. There is every reason to believe that it will do the same on this occasion and, in that event, any lost salary payments will be fully restored without the need for any further actions by plaintiffs.

However, regardless of what additional funds may be appropriated by Congress, plaintiffs have an adequate remedy at law which, unlike the remedy they seek here, will fully compensate them for any lost salary payments. Among the remedies available to plaintiffs is a proceeding under the Tucker Act, 28 U.S.C. §§ 1346(a) and 1491, to recover any payments to which they may be entitled under the Constitution or any federal statute.

See United States v. Wickersham, 201 U.S. 390 (1906) (employee is "entitled to the privileges and emoluments of his position until he was legally disqualified by his own action or that of some duly authorized public authority"); United States v. Langston, 118 U.S. 389, 394 (1886) ("[A] statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent

enactments which merely appropriated a less amount"); see United States v. Testan, 424 U.S. 392, 402 (1976) ("[A]t least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he is legally disqualified.").

Nor is there any merit to plaintiffs' contention that the remedy available under the Tucker Act is inadequate because no appropriated monies would be available to pay a judgment. Pl. TRO Mem. at 7-8. First, even if that were true (which it is not), the Supreme Court has specifically considered and rejected the argument "that the Tucker Act remedy is inadequate since Congress may not appropriate the money awarded by the Court of Claims." Blanchette, 419 U.S. at 148 n.35.

Second, even if no further funds were appropriated, Congress has already appropriated whatever monies might be needed to satisfy any judgment plaintiffs might recover in an action under the Tucker Act. As the Supreme Court's decision in Republic National Bank of Miami makes clear, the Judgment Fund, 31 U.S.C. § 1304, contains monies appropriated by Congress, and payments made from the Judgment Fund raise no issue under the Appropriations Clause. 113 S.Ct. at 562-563. Moreover, contrary to plaintiffs' contention (Pl. TRO Mem. at 7-8), it is irrelevant whether the Government contests the entry of a judgment under the Tucker Act. "Consent judgments . . . are nonetheless judicial judgments." Glidden Co. v. Zdanok, 370 U.S. at 527; Pope v. United States, 323 U.S. at 12 ("It is a judicial function and an

exercise of the judicial power to render judgment on consent."). There is no reason to believe that the term "judgments," as used in 31 U.S.C. § 1304, has anything other than its common and ordinary meaning. As Glidden and Pope make clear, a monetary judgment rendered by consent has the same validity and binding effect as any other judgment in a court of competent jurisdiction.⁵

⁵ Plaintiffs' reliance upon the Comptroller General's opinion in Matter of Civil Penalties Imposed Upon federal Agencies, 58 Comp. Gen. 667 (1979) for a contrary proposition is misplaced. That opinion focused on the phrase "compromise settlement" in 28 U.S.C. § 2414, and concluded that a civil administrative penalty imposed by a local air pollution authority (as opposed to a judgment by a court of competent jurisdiction) should be paid from agency funds. In contrast, as Glidden and Pope demonstrate, where no other appropriation is available, a judgment rendered by a court of law, whether by consent or otherwise, is plainly a "final judgment" within the meaning of 31 U.S.C. § 1304.

The Comptroller General's opinions in Matter of Strom Thurmond, 66 Comp. Gen. 158 (1986) and Matter of Monies for Land Condemnation, 54 Comp. Gen. 799 (1975), upon which plaintiffs rely (Pl. TRO Mem. at 8), are also inapposite. Both address the statutory language "not otherwise provided for" in 31 U.S.C. § 1304(a)(1). They stand for the proposition that agencies cannot supplement their budget for land acquisition by exercising their powers of eminent domain, and paying any resulting judgment from the Judgment Fund. The opinions have no application in circumstances, such as those that exist here, where Congress intended to authorize obligations to be incurred notwithstanding the lack of available appropriations. Preseault v. Interstate Commerce Commission, 494 U.S. 1, 14 (1990) (taking of reversionary interest was authorized by Congress notwithstanding lack of appropriation for that purpose and payments for any resulting judgment "would be made 'under' the Tucker Act, not the Trails Act, and would be drawn from the Judgment Fund, which is a separate appropriated account . . .").

III. THE ORDER SOUGHT WOULD RESULT IN INCALCULABLE HARM TO THIRD PARTIES AND IS MANIFESTLY CONTRARY TO THE PUBLIC INTEREST

As this Court observed in its ruling of November 17, 1995 on the motion for temporary restraining order filed by the American Federation of Government Employees (AFGE) in this consolidated action:

Although undoubtedly the public has an interest in having the budget impasse resolved and indeed has an interest in the outcome of this judicial proceeding, one could easily imagine the chaos that would be attendant to a complete governmental shutdown. It is inconceivable, by any stretch of the imagination, that the best interests of the public at large would somehow be served by the creation of that chaos.

Tr. at 9. These observations are every bit as true today as they were six weeks ago.

NTEU's suggestion that the order they seek "would not result in a massive disruption of public services" (Pl. TRO Mem. at 9) is quite plainly absurd. A few examples suffice to demonstrate the point. Among the unfunded agencies NTEU would have the Court shut down is most, if not all, of the Department of Justice. The effect of such an order would, of course, not be limited to bringing the criminal justice system to a grinding halt. For plaintiffs would also have the Court shut down entirely all sub-cabinet agencies within the Department of Justice, including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Bureau of Prisons, and the United States Marshals Service.

Thus, under plaintiffs' proposed order, the federal government would simply cease apprehending criminals, regardless

of what crimes they may have committed or plan to commit. In addition, plaintiffs would apparently have this Court, through the device of a temporary restraining order, either cause the release of those federal prisoners previously apprehended or, alternatively, leave them in their cells without any food, water, medical care or supervision. Similarly, the federal courts would either have to shut down entirely or provide for their own protection. The magnitude of the threat that such an order would pose to human life and property is difficult to even comprehend.⁶

NTEU gives entirely new meaning to the axiom "Justice is blind" when it suggests that this Court "is not responsible . . . for the consequences" of such an order. Pl. TRO Mem. at 9. NTEU has requested an equitable remedy from a court of equity. Consequently, the Court cannot shield its eyes from the chaos and destruction that would be wrought if NTEU's request were granted. "Relief saving one claimant from irreparable injury at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents."

⁶ The discussion in the text relates solely to the Department of Justice which is just one of the many agencies which would be affected by the order NTEU seeks. The actual disruption in governmental services would be far more massive than that described above. Other federal agencies that would be affected by the order sought include the Department of State, the United States Information Agency, the Department of Health and Human Services, the Veterans Administration, the Department of Housing and Urban Development, the Departments of Labor, Interior, and Education, the Securities and Exchange Commission, the Environmental Protection Agency, and, of course, the Judiciary.

Virginia Petroleum Jobbers, 259 F.2d at 925. Here, the harm that would be inflicted on innocent third parties is not even remotely classified as "similar" to the brief economic loss of one's salary. Instead, as this Court correctly concluded, it would be "devastating, at least, and catastrophic at worst." Tr. at 10.

It is no answer that this Court can rely upon the political branches to come to the rescue and undo the havoc that would be wrought upon the public. Pl. TRO Mem. at 9. It is not properly the role of this Court to create a crisis in the hopes that the Congress and the President will act to undo whatever damage is created.

In contrast to the extraordinary harm that NTEU's order would inflict upon the public at large, the order would do nothing to redress the injury that federal employees have suffered or will suffer by virtue of the delay in their salary payments. The sole effect of the order would be to put those federal employees now working out of their jobs and onto furlough status. It would not restore salary payments to any plaintiff.

If anything, the economic losses federal employees are now suffering would be exacerbated by the relief NTEU seeks. If NTEU prevails on its claim that the Government lacks the authority to enter into obligations for payment of salary, the commitments that have already been made to employees would be unconstitutional, and therefore invalid and unenforceable. Therefore, the relief NTEU seeks, under its own constitutional theory, would deprive federal employees of their right to be paid for services

already provided to the Government over the past several weeks--
an obligation which the Government, unlike the NTEU, recognizes.

Under these circumstances, there can be no question that the balance of harms weighs heavily against a temporary restraining order, such as that sought here. The relief which NTEU seeks would not only pose grave dangers to the public and to third parties not before the Court, but also could adversely affect those that NTEU purports to represent, i.e., federal employees now performing excepted services.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for temporary restraining order should be denied.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER
United States Attorney

DENNIS G. LINDER
Director, Federal Programs Branch

SUSAN K. RUDY
JOSEPH W. LOBUE
LOIS B. OSLER
U.S. Department of Justice
Civil Division
901 E Street, N.W., Room 1060
Washington, D.C. 20530

Telephone: (202) 514-4640
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 1996, I caused a copy of the foregoing Defendants' Memorandum in Opposition to NTEU Plaintiffs' Motion for Temporary Restraining Order to be served at addresses listed below by hand-delivery on counsel for NTEU:

Gregory O'Duden
Barbara A. Atkin
Elaine Kaplan
National Treasury Employees Union
901 E Street, N.W., Suite 600
Washington, DC 20004

and by telefax on counsel for plaintiffs AFGE:

Virginia A. Seitz
John M. West
Bredhoff & Kaiser
1000 Connecticut Avenue
Washington, D.C. 20036

JOSEPH W. LOBUE

MESSAGE CONFIRMATION

JAN-02-96 15:42

FAX NUMBER :

NAME :

FAX NUMBER : 66279

PAGE : 27

ELAPSED TIME : 10'00"

MODE : G3 STD

RESULTS : O.K

1/3/95

Sullivan - ruling

Harm of TRO to public interest

Declined to say much abt merits

Intending to amend comp. - wanted to know if part would concede jud.
said premature ^{2 monetary}

Briefing sched expedited

Argument on 16th - on everything

If amended to add backpay court - when will it decide?
Hard to say. ^{2 Can expect very shortly.}

Chris Pivader -

lets talk abt part's oblig to pay.

always acknowledged as binding oblig - to be satisfied from TF
finestred when obligator is ~~is~~ breached.

AG use compromise claims auth? Auth to comp claims even if
we thought we might prevail on claim - (e.g. as to when breach
occurred)

CS - That's my reading of her authority.

100% on dollar

Needles -

Not a compromise if ^{a way to} just accomplished payment.

giving up interest? litig. costs?

purpose - need to consider merits,

likelihood of success.

that's part of what "compromise" means.

way to continue paychecks
["mood print"]

Teresa

defenses - a) not yet ripe

b) more approp. fund.

Don't really go to 2 of whether there should
be payment.

Chris -

K theory - to employ pers. services

FLSA theory

Even under ADA, oblig
arises from
Appointment to position -
not a K -
stat. oblig - from pay statute
Remedy - Tucker Act

Needler - not working under gen'l schedule

Roth - not suddenly punched into indep Kours -
continue to have same vts/obligs

Preston - what happens if found to be a sham?
(GATO has once before declined on ground that
it wasn't a compromise)

We have said they must appropriate \$s for three ee's.
This is not an oblig conditional on availability of funds.
It is an oblig notwithstanding such availability/
appropriation.

Mechanics - several vts.
In some cases, other funds may be available?

Need notice + opt out procedures.

But only if this is settlement of the class action.

~~But~~ We can do if this is settlement of indiv claims.

How often entering into such compromises? every pay period?

Therius - against:

- 1) It's an oblig to pay when funds become available (Needler)
- 2) Fees period of time - Needler says no such here because negots are continuing - may be solved at any minute!

Teresa - in normal course, who makes decision
re continuing emp etc.

Needler - any exhaustion req? NO.

What is a "was period"?

- normal paydays

- custom/practice in country at the time (no later than 1900)

- how long a country should have to respond once made aware of outstanding obligation (time it would take)

- (Needles theory) - as long as there's a chance

if country wanted to

Pres - make specific comment to country? -

oblig to pay is vice

you have oblig to respond.

? who make claims
must ~~make~~ ^{waive} all others.

Have to certify claim by claim?

What appropriation can you do the claims?

What sort of process can we set up to do paperwork?

Can make a lot of it up, probably.

What to do if CA won't certify?

At opinion emp - in excess of const auth?

Find out liability - will Treas have to borrow \$?

Jim Fuller

Get a statement

→ | conditions under which
escrow will terminate.



pay to David K
434-5029

Fuller suggests

Escrow acct will remain open until such time as
directed by X.

Then a separate provision
when / under what circumstances # will be placed in this
acct.

THE WHITE HOUSE

WASHINGTON

January 2, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: ESCROW ACCOUNT

The President gets a paycheck once a month at the end of each month. This paycheck is deposited directly into an account at the Worthen National Bank in Little Rock. The President's December paycheck already has been deposited.

We (or the President's personal lawyers) could ask Worthen to set up an escrow account. Worthen then could transfer the appropriate funds into that account. The escrow document would state what monies are to be placed in the escrow account and when that account is to be dissolved.

The best approach is immediately to transfer into the escrow account the portion of the President's December paycheck representing his salary from the commencement of the current shutdown. An alternative is to begin escrowing money only upon receipt of the President's next paycheck (at the end of January). But this alternative approach would send scary signals about the probable length of the shutdown; it also might be mocked as meaningless.

The escrow account could be entirely dissolved when federal employees begin to receive their salaries. Under a stricter approach, no new monies would be deposited in the escrow account once employees begin to receive their salaries, but the monies already in the escrow account would remain there until federal employees received backpay from the government.

Telecon - Nelson Cunningham

Bank - set up special acct.

Pres or designee be escrow agent
give it a name.

Direct that P's salary go into acct.

Will check -

where it goes now
who handles

etc.

P's salary - once a mo at end of ~~the~~ each mo

Dec already paid

Wentworth National Bank
Little Rock.

who's bank officer?

Bank should set
up escrow -
bank's lawyers
sit up e. doc -
which P could
then sign.

P

change direct deposit?

or just - give bank instructic -
transfer 2 who salary from
Dec into escrow acct.

Shuding instructic - transfer
all funds into this acct.

Don't monkey w/ direct deposit.
Instead just have the bank transfer.

talk to
Fuller
434-5100

Memo to Jack

add each
day?

could wait until next
paycheck
btr - gesture - more meaningful,
less wearily.
2 who's

Telecon w/ K. Wallman 1/2/75

G. Sullivan —

Deeming all essential
promise to pay.

wrong / incorrect to make p. wh w/n't long paid
NTEU - (Sullivan) - seeking restraining order.

[Timeline

↓

more protracted now

What has got done?
what are we doing today? ||

can we say - can't do?
do we have leverage to make
this sort of argument?

strength of argument?
et going to do anything?

[DRAFT LETTER. BOLD BRACKETED MATERIAL IS OPTIONAL]

Dear Senator Dole and Speaker Gingrich:

I am writing to inform you of an urgent situation affecting federal workers and the federal government that requires the immediate attention of the Congress.

Since December 15, 1995, over 500,000 federal employees have been working without receiving the pay to which they are lawfully entitled. These employees have been instructed to work pursuant to the terms of the Antideficiency Act, 31 U.S.C. §§ 1341, 1342, which authorizes federal agencies to employ the services of workers who are performing emergency functions as defined by that Act, or if their functions come within other legal authorities recognized under that Act. While the federal government thus has the legal authority to employ these employees, since December 15, 1995, there have been neither normally appropriated funds nor a continuing resolution actually to pay their salaries. As a consequence, they have recently received a partially empty pay envelope, and the next envelope they receive will be completely empty unless prompt action is taken..

Empty pay envelopes are working substantial hardships on all workers affected by the current appropriations hiatus, and that hardship constitutes reason enough for the Congress to make available appropriations to pay all federal workers, as you have in fact pledged to do. What is more, with respect to the employees who have been working without pay, pending and imminent litigation makes prompt action by the Congress a true necessity.

The United States has already been sued in the United States district court for the District of Columbia challenging the legality of the executive branch's action in employing federal workers under the current circumstances. In that litigation, government lawyers have asserted as part of the government's defense that the United States has incurred a binding obligation to pay salaries for those employees who have in fact been working during the appropriations hiatus. This has been the consistent legal position of the United States since at least 1981.

During prior lapses in appropriations, employees have never missed a normal paycheck, as the impasse has always been resolved within a reasonable time. As a result, the United States has never faced potential liability for the failure to perform its obligation to compensate employees. Now, however, a normal pay check has been missed, and I am informed that law suits seeking the employee compensation that the United States is obligated to pay are imminent. These suits may allege entitlements to a variety of damages in addition to pay that is owed, including interest and perhaps exemplary damages.

I have been advised that the United States has no legal defenses to being required to honor our obligations for back pay within a reasonable time. The Office of Management and Budget under President Reagan issued the first advice that the United States would not contest employees' claims for pay in this situation, and this pledge has been repeated a number of times since. It is imperative that we honor this obligation so as to avoid litigation costs and the risk of further damage awards against the United States. In order to enable the obligations to be honored, Congress must enact an appropriation that will permit agencies to pay employees the compensation that is owed. **[In light of Congress's stated position that all employees will be compensated at their established pay**

schedules, I would also urge that this appropriation be made applicable to all employees, whether they have worked during this period or not.]

Should Congress fail to act in a prompt fashion, I will then have a responsibility to minimize unnecessary liability being imposed upon the federal fisc. **[Accordingly, I would have to exercise the full measure of my authority to settle claims for back pay as expeditiously as possible.] or [When the United States is required to respond to litigation seeking back pay, the United States will reaffirm its stated position that it will not contest judgment. Once judgment is obtained against the United States, I will exercise my legal authority to acknowledge additional back pay claims that may be brought by employees who have worked during the appropriations hiatus and to institute procedures to settle those claims as expeditiously as possible in order to minimize the liability of the United States.]** Such claims would be payable from the judgment fund, 31 U.S.C. § 1304, which is the only source of appropriations currently available for these purposes.

Responding to claims for back pay in this way would itself be a time consuming, labor intensive and entirely wasteful procedure, although I would consult with the Comptroller General and the Secretary of the Treasury to establish as efficient and speedy a claims procedure as possible. Much more preferable, however, would be Congress's prompt consideration and passage of an appropriations measure sufficient for the United States to honor its commitments to federal employees through the established payroll procedures.

Sincerely yours,

Janet Reno
Attorney General

Telecon - Chris Shrader. 1/2/95

919-613-7096
~~919~~
1-800-980-8154

ES: Denied - prior motion
said may renew if circumstances have changed
(conal reference)
(didn't have them in mind)

Our defense - union's claims are unripe, speculative -
because no one has been denied check.
That has changed.

IT's claim -
approps clause -
can't incur obligations
in advance of approps

us -

That's wrong.
we can do above.
under the approp. cl -
we can authorize
incurrence of obligations
& cong has authorized
we are obligated to pay.

↓
where how? thru K?
someplace else? ↓

used their
personal
services.

When is this oblig. breached? →
One plausible time - when
miss a paycheck.

Judgment Fund -
such compen. Penn Teacher Act?

perhaps no time specifying
when our performance
is due?
SG - exec br. has year period
of time in which to seek
approps.

Failing this - oblig. would be
liquidated from JF thru
a lawsuit brought apt US.
a: when have access to JF? Lots of ramifications

10:00 am tomorrow -
mtg - civil app / SG /
OLC
disag re rt way to analyze
occ conf w -
S231

Read our reply brief to their motion for ST -

- position we've taken in post
- a) stat author'd to incur oblijs
- b) those are binding oblijs.

goes no further.

Draft memo from Paul Colburn when JF becomes available to negotiate an obligation.

Motion for TRO brought on NTEU(?) filed on Friday

status conf at 11:00 today

Paul Colburn will attend.

Sullivan may get into merits at status conf.

Civil - under J Popovici

we have filed papers 9:00am - Susan Ruty // Tom Peoples

Our argument - probably - same as before (not get into issues we were talking about above)

wait until mty.

Expectation - haven't done anything that goes beyond what we've done before.

NTEU mty same arguments - can't incur oblijs in adv of approp under Const. also can't do h.c. There is no statute

If EEs ult. have valid claim agt JF - any that litig brought for this reason - AG could compromise it by settling for amt of salary owed.

HOOPS

- a) meaning of word "compromise"
 broad enough to pay 100% of claim
- b) stat mech of getting check cut -
 requires cert from Com. Gen'l - of
 legality of tx.

↓
 handmaiden of Congress
 (probably occurs under Bush)

JF-perm, indef approp
 such funds as shall be necessary.
 indefinitely large.
 as long as no other approp available.

Open 2's

①. Must to incur obligs to all ex's (not only emergency ex's) in advance of approps?

* 2. when do any such ~~ex's~~ obligs come due?

so long as authorized by law? (which this would be) was some point. is authorization itself enough?

Ask CHRIS - Any way to say the bill ~~is~~ enough?

Neil Kinkopf

1/2/95

Judge will rule tomorrow at 10:00

Strong expectation - deny TRO request

Made clear from bench - public int harm -
so extreme that he won't do at a TRO stage.

Didn't want to get to likelihood of success ~~unusual~~ to
argument. ~~oblique~~

Filed during 1st shutdown
bet/during 1st lapse

2 cases - AFGE/NTEU -
statutory case:

we've interpret'ed emergency
exceptive too broadly
(prob think that's the
only exception)

2nd arg - violate FLSA,
by acting
under the ADA.

(even if so - just get FLSA
remedy)

→ court claim
only ADA is
unusual.

but court doesn't have
auth. to obligate
in advance of apprais.
anyway

AFGE filed TRO - denied the 1st time.

(continuing vest. didn't render moot)

NTEU motion filed Friday this TRO motion