

NLWJC- Kagan

Counsel - Box 007 - Folder 010

Shutdown II [3]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. complaint	Home Address. [partial] (5 pages)	n.d.	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8249

FOLDER TITLE:

Shutdown II [3]

2009-1006-F

vz94

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
80 F Street N.W.
Washington, D.C. 20001;

Michelle Borden

P6/(b)(6)

[001]

Joel T. Schatley
P.O. Box 661
Perryville, MD 21903

Ronal F. Waltz

P6/(b)(6)

[001]

Jennie Isaac

P6/(b)(6)

[001]

Walter Frank Sheffield

P6/(b)(6)

[001]

Timothy Ashton

P6/(b)(6)

[001]

David Skultety

P6/(b)(6)

[001]

Verett Kelley

P6/(b)(6)

[001]

Angela Green

P6/(b)(6)

[001]

Pamela Burke

P6/(b)(6)

[001]

Quentin P. Cheeks

P6/(b)(6)

[001]

Civil Action No. _____
Class Action

on behalf of themselves and
others similarly situated,

Plaintiffs,

v.

ALICE RIVLIN AS DIRECTOR OF
THE OFFICE OF MANAGEMENT AND
BUDGET, AND THE OFFICE OF
MANAGEMENT AND BUDGET
Executive Office
Of The President
17th St. and Pennsylvania
Avenue, N.W.
Old Executive Office Building
Washington, D.C. 20503

JAMES B. KING AS DIRECTOR OF
THE OFFICE OF PERSONNEL
MANAGEMENT, AND THE OFFICE OF
PERSONNEL MANAGEMENT
Theodore Roosevelt Federal
Building,
1900 E Street, N.W.,
Washington, D.C. 20415

RONALD H. BROWN AS SECRETARY
OF THE DEPARTMENT OF COMMERCE,
AND THE DEPARTMENT OF COMMERCE,
14th Street AND Constitution
Avenue, N.W.
Washington, DC 20230

HAZEL R. O'LEARY AS SECRETARY OF
ENERGY, AND THE DEPARTMENT OF
ENERGY, Forrestal Building
1000 Independence Avenue, S.W.
Washington, DC 20585

DONNA E. SHALALA AS SECRETARY OF
HEALTH AND HUMAN SERVICES, AND
THE DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
200 Independence Avenue, S.W.
Washington, D.C. 20201

HENRY G. CISNEROS AS SECRETARY OF
HOUSING AND URBAN DEVELOPMENT,
AND THE DEPARTMENT OF HOUSING

AND URBAN DEVELOPMENT,)
451 Seventh Street, S.W.)
Washington, D.C. 20410)

BRUCE BABBITT AS SECRETARY OF THE)
DEPARTMENT OF THE INTERIOR, AND)
THE DEPARTMENT OF THE INTERIOR)
1849 C Street, N.W.)
Washington, DC 20240)

JANET RENO AS UNITED STATES)
ATTORNEY GENERAL,)
AND THE DEPARTMENT OF JUSTICE,)
10th Street and)
Constitution Avenue, N.W.)
Washington, DC 20530)

ROBERT REICH AS SECRETARY OF)
LABOR, AND THE DEPARTMENT OF LABOR)
200 Constitution Avenue, N.W.)
Washington, D.C. 20210)

ROBERT E. RUBIN AS SECRETARY OF)
TREASURY, AND THE DEPARTMENT OF)
TREASURY,)
1500 Pennsylvania Avenue, N.W.)
Washington, D.C. 20220)

JOSEPH D. DUFFEY AS DIRECTOR,)
UNITED STATES INFORMATION)
AGENCY, AND UNITED STATES)
INFORMATION AGENCY,)
301 4th Street, S.W.)
Washington, D.C. 20547)

JESSE BROWN AS SECRETARY OF)
VETERANS AFFAIRS, AND THE)
DEPARTMENT OF VETERANS AFFAIRS,)
810 Vermont Avenue, N.W.)
Washington, DC 20420)

CAROL M. BROWNER AS ADMINISTRATOR)
OF THE ENVIRONMENTAL PROTECTION)
AGENCY, AND THE ENVIRONMENTAL)
PROTECTION AGENCY,)
401 M Street, S.W.)
Washington, D.C. 20460)

ROGER W. JOHNSON AS ADMINISTRATOR)
OF THE GENERAL SERVICES)
ADMINISTRATION,)
AND THE GENERAL SERVICES)

ADMINISTRATION,)
 18th and F Streets, N.W.)
 Washington, D.C. 20405)
)

TRUDY H. PETERSON AS ACTING)
 ARCHIVIST OF THE)
 UNITED STATES, AND THE NATIONAL)
 ARCHIVES AND RECORDS)
 ADMINISTRATION,)
 Seventh Street and Pennsylvania)
 Avenue, N.W.)
 Washington, D.C. 20408)
)

ARTHUR LEVITT, JR., AS CHAIRMAN OF)
 THE SECURITIES AND EXCHANGE)
 COMMISSION, AND THE SECURITIES AND)
 EXCHANGE COMMISSION,)
 450 Fifth Street, N.W.)
 Washington, D.C. 20549)
)

MICHAEL HEYMAN AS SECRETARY OF THE)
 SMITHSONIAN INSTITUTION, AND THE)
 SMITHSONIAN INSTITUTION,)
 1000 Jefferson Drive, S.W.)
 Washington, D.C. 20560)
)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This complaint is a class action on behalf of a large number of federal government employees. There are no duly enacted appropriations of money to operate the departments and agencies of the federal government at which the plaintiffs and the members of the plaintiff class are employed. By law, those departments and agencies cannot spend or obligate themselves to spend any monies for employees' salaries and benefits in the absence of such a lawful appropriation. Yet, defendants are requiring plaintiffs and members of the plaintiff class to work - or be subject to discipline by defendants -- without defendants having any lawful commitment to pay plaintiffs and the plaintiff

class members for that work. By so doing, defendants violate 5 U.S.C. § 5332, 5 U.S.C. § § 5341 et seq., 29 U.S.C. § 201, et seq., 31 U.S.C. § § 1341 and 1342, and 5 U.S.C. § § 702 and 706(2)(A). Plaintiffs seek declaratory and injunctive relief against these violations.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this case pursuant to 29 U.S.C. § 1331 and 5 U.S.C. § 702. The District of Columbia is a proper venue for this action because plaintiff American Federation of Government Employees ("AFGE") is headquartered here, because members of the plaintiff classes are employed here, and because the defendants' principal offices are located here.

PARTIES

3. Plaintiff AFGE is an international union that is affiliated with the American Federation of Labor and Congress of Industrial Organizations. AFGE represents approximately 700,000 federal government employees in 105 federal government departments and agencies. Its headquarters is located at 80 F Street N.W., Washington, D.C. 20001. AFGE brings this action in its capacity as representative of its members.

4. Plaintiff Michelle Borden is a federal government employee and is a member of AFGE; her address is [REDACTED] [001]

[REDACTED] She is employed by the Office of Personnel Management in the OPM Retirement Information Service in the position of computer programmer/analyst. Her pay level is set by the General Schedule, 5 U.S.C. § 5332, at GS-12, GS-334

series. Appropriations have lapsed for OEM. Ms. Borden has been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

5. Plaintiff Ronal Floyd Waltz is a federal government employee and is a member of AFGE; his address is [redacted] P6/(b)(6) [ovl]

[redacted] P6/(b)(6) He is employed by the United States Treasury in the United States Mint in the position of a laborers' leader. His pay level is set by 5 U.S.C. § 5341 et seq. Appropriations have lapsed for the United States Mint. Mr. Waltz has been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

6. Plaintiff Joel T. Schatley is a federal government employee and is a member of AFGE; his address is P.O. Box 661, Perryville, MD 21040. He is employed by the VA Medical Center in Perry Point, Maryland, in the position of psychiatric nursing assistant. His pay is set by the General Schedule at GS-5. Appropriations have lapsed for the VA Medical Center. Mr. Schatley has been required to work (or be subject to discipline) during the period of lapsed appropriations.

7. Plaintiff Jennie Isaac is a federal government employee and a member of AFGE; her address is [redacted] P6/(b)(6) [ovl]

[redacted] P6/(b)(6) She is employed by the General Services Administration in the position of Quality Assurance. Her pay is set by the General Schedule at GS-09. Appropriations have lapsed for the GSA. Ms. Isaac has been required to work (or be subject to discipline) during the period of lapsed appropriations.

8. Plaintiff Walter Sheffield is a federal government employee and a member of AFGE. His address is [P6/(b)(6)] [001]
 [P6/(b)(6)] He is employed by the Environmental Protection Agency in the position of team leader, facilities operation branch. His pay is set by the General Schedule at GS-14. Appropriations have lapsed for the Environmental Protection Agency. Mr. Sheffield has been required to work (or be subject to discipline) during the period of lapsed appropriations.

9. Plaintiff Timothy G. Ashton is a federal government employee and a member of AFGE. His address is [P6/(b)(6)] [001]
 [P6/(b)(6)] He is employed by the General Services Administration in the position of criminal investigator. His pay is set by the General Schedule at GS-811-12. Mr. Ashton has been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

10. Plaintiff David Skultety is a federal government employee and a member of AFGE. His address is [P6/(b)(6)] [001]
 [P6/(b)(6)] He is employed by the General Services Administration in the position of criminal investigator. His pay is set by the General Schedule at GS-811-12. Mr. Skultety has been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

11. Plaintiffs Verett Kelley and Angela Green are federal government employees and members of AFGE. Their addresses are

[P6/(b)(6)] and [P6/(b)(6)] [001]
 [P6/(b)(6)] respectively. They are

employed by the Department of Labor to review and pay medical bills. Their pay is set by the General Schedule at GS-5. They have been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

12. Plaintiff Pamela Burke is a federal government employee and a member of AFGE. Her address is [REDACTED] [ov1]

[REDACTED] P6/(b)(6) She is employed by the Department of Labor Workers Compensation Program in the position of bill resolution clerk. Her pay is set by the General Schedule at GS-6. She has been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

13. Plaintiff Quentin Cheeks is a D.C. employee and a member of AFGE. His address is [REDACTED] [ov1] 20772. He is employed by the D.C. Department of Employment Services, D.C. Insurance Commission, in the position of Claims Examiner. His pay level is DS-11. She has been required to work without pay (or be subject to discipline) during the period of lapsed appropriations.

14. Defendant Office of Management and Budget ("OMB") is an agency of the Executive Office of the President of the United States. OMB's address is the Old Executive Office Building, Washington, D.C. 20503. OMB's statutory mission is set forth in 31 U.S.C. §§ 503, et seq. OMB is responsible for setting policies and issuing directives regarding federal expenditures. Defendant Alice Rivlin is the Director of the Office of Management and Budget.

15. Defendant Office of Personnel Management ("OPM") is an executive agency of the federal government. OPM's address is Theodore Roosevelt Federal Building, 1900 E Street, N.W., Washington, D.C. 20415. OPM's statutory mission is set forth in 5 U.S.C. § 1103(a)(7). OPM is responsible for setting policies and issuing directives governing personnel management by the federal government. Defendant James King is the Director of the OPM.

16. Defendant Department of Commerce is an executive department of the federal government. Its address is 14 Street and Constitution Avenue, N.W., Washington, DC 20230. The Department of Commerce submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Ronald H. Brown is the Secretary of the Department of Commerce.

17. Defendant Department of Energy is an executive department of the federal government. Its address is Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC 20585. The Department of Energy submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Hazel O'Leary is the Secretary of the Department of Energy.

18. Defendant Department of Health and Human Services ("HHS") is an executive department of the federal government. Its address is 200 Independence Avenue, S.W., Washington, D.C. 20201. HHS submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Donna E. Shalala is the Secretary of HHS.

19. Defendant Department of Housing and Urban Development ("HUD") is an executive department of the federal government. Its address is 451 Seventh Street, S.W., Washington, D.C. 20410. HUD submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Henry G. Cisneros is the Secretary of HUD.

20. Defendant Department of the Interior is an executive department of the federal government. Its address is 1849 C Street, N.W. Washington, DC 20240. The Department of the Interior submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Bruce Babbitt is Secretary of the Department of the Interior.

21. Defendant Department of Justice is an executive department of the federal government. Its address is 10th Street and Constitution Avenue, N.W., Washington, DC 20530. The Department of Justice submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Janet Reno is the Attorney General of the Department of Justice.

22. Defendant Department of Labor is an executive department of the federal government. Its address is 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Department of Labor submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Robert Reich is the Secretary of the Department of Labor.

23. Defendant Department of the Treasury is an executive department of the federal government. Its address is 1500

Pennsylvania Avenue, N.W., Washington, D.C. 20220. The Department of Treasury submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Robert E. Rubin is the Secretary of the Department of Treasury.

24. Defendant United States Information Agency is an executive agency of the federal government. Its address is 301 4th Street, N.W., Washington, D.C. 20547. The United States Information Agency submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Joseph P. Duffy is the Director of the United States Information Agency.

25. Defendant Department of Veterans Affairs is an executive department of the federal government. Its address is 810 Vermont Avenue, N.W., Washington, DC 20420. The Department of Veterans Affairs submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Jesse Brown is the Secretary of the Department of Veterans Affairs.

26. Defendant Environmental Protection Agency is an executive agency of the federal government. Its address is 401 M Street, S.W., Washington, D.C. 20460. The EPA submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Carol Browner is the Administrator of the EPA.

27. Defendant General Services Administration is an executive agency of the federal government. Its address is 18th and F Streets, N.W., Washington, D.C. 20450. The General Services Administration submitted a contingency plan to OMB for

agency operations during an appropriations lapse. Defendant Roger W. Johnson is the Administrator of the General Services Administration.

28. Defendant National Archives and Records Administration is an executive agency of the federal government. Its address is Seventh Street and Pennsylvania Avenue, N.W., Washington, D.C. The National Archives and Records Administration submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Trudy H. Peterson is the Acting Archivist of the National Archives and Records Administration.

29. Defendant Securities and Exchange Commission is an executive agency of the federal government. Its address is 450 Fifth Street, N.W., Washington, D.C. 20549. The Securities and Exchange Commission submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Arthur Levitt, Jr. is the Chairman of the Securities and Exchange Commission.

30. Defendant Smithsonian Institution is an executive agency of the federal government. Its address is 1000 Jefferson Drive, S.W., Washington, D.C. 20560. The Smithsonian Institution submitted a contingency plan to OMB for agency operations during an appropriations lapse. Defendant Michael Heyman is the Secretary of the Smithsonian Institution.

FACTS

31. Title 5 U.S.C. § 3101 states that "[e]ach Executive agency . . . may employ such number of employees of the various

classes recognized by chapter 51 of [title 5] as Congress may appropriate for from year to year." (Emphasis supplied).

32. In the absence of a lawful appropriation, defendants have no authority to pay or to obligate themselves to pay the salaries of plaintiffs and the plaintiff class. See U.S. Const. Art. I, § , cl. 7., 5 U.S.C. § 3101, and 31 U.S.C. § 1341.

33. On an annual basis, Congress enacts appropriations laws that authorize departments and agencies of the federal government to expend money in accordance with the terms set forth in the authorizing legislation. These laws fund operations of the federal government, including the pay of most federal government employees.

34. The 1994 annual appropriations laws expired by their terms on October 1, 1995. At that time, Congress had not yet completed work on most of the 1995 appropriations bills on October 1, 1995. By that date, Congress did, however, enact a Continuing Resolution ("CR") to fund, albeit on a reduced basis, the operations of most departments and agencies of the federal government that are funded by annual appropriations bills. That CR was signed into law by the President. It expired by its terms at midnight on Monday, November 13, 1995. At that time, appropriations for the operations of most departments and agencies of the federal government -- including appropriations for the pay of most federal government employees -- lapsed.

35. OMB requires all federal departments and agencies to maintain contingency plans to deal with such an appropriations

lapse. Many federal government departments and agencies have submitted such contingency plans to OMB for review and approval. In these contingency plans, the departments and agencies are required to state, *inter alia*, which employees will be furloughed without pay and which employees will be required to work without pay.

36. All employees are entitled to be paid for the time they work. Chapter 53 of Title 5 of the U.S. Code sets forth the pay systems for the majority of federal employees. For example, the pay of most federal department and agency employees (other than senior executive service positions and presidential appointees) is set by The General Schedule. Such employees are "entitled to basic pay in accordance with the General Schedule," 5 U.S.C. § 5332(a)(1). And, under 5 U.S.C. §§ 5341 *et seq.*, prevailing rate federal employees are entitled to pay at the prevailing wage rate of their individual local wage areas.

37. Nonetheless, AFGE has been informed by an OPM representative that employees who are required to work (or be subject to discipline) during an appropriations lapse must work without pay unless and until Congress appropriates money to pay their wages and salaries.

38. Pursuant to direction provided by OMB, certain department and agency contingency plans state that employees that agencies designate as required to work must work or be subject to discipline. *See, e.g.,* Contingency Plan, Employment and Training Administration of the Department of Labor, (Sept. 6, 1995);

Contingency Plan, Financial Management Services of the Department of Treasury (Sept. 6, 1995). Pursuant to direction provided by OMB, certain contingency plans state what would in any event be true: that employees who are required to work during the appropriations lapse will not be paid during the appropriations lapse. See a.g., Contingency Plan, Pension and Benefit Administration of the Department of Labor (Sept. 6, 1995); Contingency Plan, Mine Health and Safety Administration of the Department of Labor (Sept. 12, 1995).

39. Title 31 U.S.C. § 1342 is the purported predicate for defendants' claimed right to order federal employees to work without pay. That provision authorizes federal departments and agencies to "employ" federal employees during a lapse in appropriations only in "emergencies involving the safety of human life or the protection of property." It further provides that the term "'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." (Emphasis supplied).

40. In determining which employees perform emergency-related services under 31 U.S.C. § 1342, OMB requires federal departments and agencies to follow rules set out by the Office of Legal Counsel of the Department of Justice. See Opinions of the Office of Legal Counsel of the Department of Justice, dated August 16, 1995 and January 16, 1981. According to the Office of

Legal Counsel, an employee performs emergency services if there is "some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property" and "some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question." August 16, 1995 Opinion at 6.

41. Based on the direction received from OMB, in preparing their contingency plans, the defendant federal departments and agencies designated thousands of employees as performing emergency related services despite the fact that the suspension of the employees' duties would not imminently threaten the safety of human life or the protection of property. In fact, defendant OMB has publically stated that approximately 1,000,000 federal employees, more than half of the federal civilian workforce, have been designated as performing emergency-related services and required to work without pay during the lapse in appropriations.

42. For example, the contingency plans submitted to OMB designate all of the following employees as "emergency" workers: coin production workers in the United States Mint; clerical support staff for privatization efforts at the Office of Personnel and Management; art movers and preservers in the National Gallery of Art; mail processing personnel at the Securities Exchange Commission; governmental relations and public affairs staff in the Department of Housing and Urban Development;

school maintenance workers at the Department of the Interior; civil litigation lawyers at the Department of Justice; statisticians in the Department of Labor; moonshine inspectors in the Bureau of Alcohol Tobacco and Firearms; IRS service center personnel; National Cemetery employees in the Department of Veterans Affairs; reference personnel at the National Archives; employees of the National Archives and Records Administration needed to publish a daily "emergency edition" of the Federal Register; employees in the Bureau of Educational and Cultural Affairs of the United States Information Agency who will continue to provide facilitative support for current grantees of the agency and for visitors; and employees in the Information Bureau of the United States Information Agency who will continue to provide facilities support for current speakers and basic support to overseas operations.

43. Federal employees who are unlawfully required to work without pay during an appropriations lapse (or be subject to discipline) will suffer irreparable harm. These individuals cannot receive monetary relief from a court in the form of compensation for their services both (i) because a court cannot order Congress to appropriate money and pay employees for work performed during a period of lapsed appropriations, and (ii) because it was unlawful for defendants to order the employees to work.

CLASS ACTION ALLEGATIONS

44. AFGE and the named plaintiffs sue on behalf of the following class of employees: Federal government employees who are required to work without pay during a period of lapsed appropriations (or be subject to discipline).

45. The class is composed of hundreds of thousands of individuals. This class is so numerous that joinder of all members is impracticable.

46. The questions of law and fact at issue in this case that are common to all members of the class are set forth in this Complaint.

47. The representative parties will fairly and adequately protect the interests of the class. AFGE is a union representative of federal government employees, and the individual plaintiffs have claims that are typical of the claims of the class they represent and have the same interest as similarly situated federal employees in enforcing those claims. Plaintiffs have retained qualified and competent counsel to represent them.

48. Defendants have acted on grounds generally applicable to the class making declaratory and injunctive relief with respect to the class appropriate.

49. This class is appropriate for certification under Fed. R. Civ. P. 23(b)(2).

COUNT I

50. Plaintiffs incorporate by reference paragraphs 1-49 of the complaint.

51. Title 5 U.S.C. § 5332 provides that certain plaintiffs and members of the plaintiff class are "entitled to basic pay in accordance with the General Schedule." Title 5 U.S.C. § § 5341 et seq. provides that plaintiffs and members of the plaintiff class who are prevailing wage rate employees are entitled to pay at the scheduled prevailing wage rate in the individual's local wage area. See 5 U.S.C. § 5343(f).

52. By requiring plaintiffs and members of the plaintiff class to work without pay during a period of lapsed appropriations (or be subject to discipline), defendants are violating 5 U.S.C. § 5332 and § § 5341 et seq.

COUNT II

53. Plaintiffs incorporate by reference paragraphs 1-52 of the complaint.

54. Title 29 U.S.C. § 206(a), the Fair Labor Standards Act, requires defendants to pay plaintiffs and members of the plaintiff class at least the minimum wage specified in that Act. The Fair Labor Standards Act also requires defendants to pay employees the wages owed on their regular pay days.

55. By requiring plaintiffs and members of the plaintiff class to work without pay during a period of lapsed appropriations (or be subject to discipline), defendants are violating the Fair Labor Standards Act.

COUNT III

56. Plaintiffs incorporate by reference paragraphs 1-55 of the complaint.

57. Because defendants' requirement that plaintiffs and members of the plaintiff class work without pay during a period of lapsed appropriations (or be subject to discipline) violates 5 U.S.C. § 5332 and 29 U.S.C. § 206(a), that requirement constitutes unlawful agency action; and, because there is no lawful basis for that action, the requirement is arbitrary and capricious. As such defendants' requirement violates § § 702 and 706 of the Administrative Procedure Act.

COUNT IV

58. Plaintiffs incorporate by reference paragraphs 1-57 of the complaint.

59. Title 31 U.S.C. § 1342 states as follows:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

60. OMB's directions to the defendant federal departments and agencies provide, and have been implemented by the defendant departments and agencies to provide, that numerous employees may be designated as performing emergency related services despite the fact that the suspension of such employees' services would

not imminently threaten the safety of human life or the protection of property.

61. OMB's directions exceed the statutory authority set forth in 31 U.S.C. § 1342 and thus violate 31 U.S.C. § 1342.

COUNT V

62. Plaintiffs incorporate by reference paragraphs 1-61 of the complaint.

63. The defendant federal departments and agencies have implemented in their contingency plans OMB's unlawful directions with respect to the designation of employees performing emergency-related services. Thus, the defendant departments and agencies have designated numerous employees as performing emergency-related services despite the fact that the suspension of such employees' services would not imminently threaten the safety of human life or the protection of property.

64. Plaintiffs and thousands of others have been unlawfully designated as employees performing emergency-related services.

65. Defendants' implementation of OMB's directions in their contingency plans exceeds the statutory authority set forth in 31 U.S.C. § 1342 and thus violates 31 U.S.C. § 1342.

COUNT VI

66. Plaintiffs incorporate by reference paragraphs 1-65 of the complaint.

67. OMB's directions to the defendant federal departments and agencies provide, and have been implemented by the defendant departments and agencies to provide, that numerous employees may

be designated as performing emergency-related services despite the fact that the suspension of such employees' services would not imminently threaten the safety of human life or the protection of property.

68. Because OMB's directions exceed the statutory authority set forth in 31 U.S.C. § 1342 and thus violate 31 U.S.C. § 1342, they constitute unlawful agency action. And, because OMB's directions have no lawful basis, they are also arbitrary and capricious. For both of these reasons, OMB's directions violate § § 702 and 706 of the Administrative Procedure Act.

COUNT VII

69. Plaintiffs incorporate by reference paragraphs 1-68 of the complaint.

70. The defendant federal departments and agencies have implemented OMB's unlawful directions with respect to the designation of employees performing emergency-related services in their contingency plans. Thus, the defendant departments and agencies have designated numerous employees as performing emergency-related services despite the fact that the suspension of such employees' services would not imminently threaten the safety of human life or the protection of property.

71. Because the implementation of OMB's directions by the defendant departments and agencies in their contingency plans exceeds the statutory authority set forth in 31 U.S.C. § 1342 and thus violates 31 U.S.C. § 1342, it is unlawful agency action. And, because the action has no lawful basis, it is arbitrary and

capricious. For both of these reasons, defendants' actions violate § § 702 and 706 of the Administrative Procedure Act.

RELIEF REQUESTED

WHEREFORE, plaintiffs request that the Court:

1. (a) Declare that defendants' requirement that federal government employees work without pay during a period of lapsed appropriations (or be subject to discipline) is unlawful;

(b) Enjoin the defendants from imposing that unlawful requirement on federal government employees.

2. In the alternative

(a) Declare that defendant OMB's directions are unlawful to the extent that those directions provide that defendants may designate employees as performing emergency-related services despite the fact that the suspension of the employees' duties would not imminently threaten the safety of human life or the protection of property;

(b) Enjoin defendant OMB to withdraw its unlawful directions to the federal departments and agencies;

(c) Declare that the defendant federal departments' and agencies' implementation of OMB's unlawful directions is itself unlawful; and

(d) Enjoin defendants to withdraw their unlawful implementation of OMB's unlawful directions.

3. Order defendants to pay plaintiffs' attorneys fees and costs; and

4. Order such other relief as may be just and proper.

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November 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF)
 GOVERNMENT EMPLOYEES, et al.,)
)
 Plaintiffs)
)
 v.)
)
 ALICE RIVLIN, as Director of the)
 OFFICE OF MANAGEMENT AND BUDGET)
 and OFFICE OF MANAGEMENT AND)
 BUDGET, et al.,)
)
 Defendants.)

Civil Action No. _____

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING ORDER

I. Introduction

On November 13, 1995, at midnight, Congressional appropriations for federal government operations lapsed. Pursuant to instructions from the Office of Management and Budget ("OMB"), federal government departments and agencies have shut down operations not funded by appropriations and furloughed approximately 800,000 employees.

Federal government departments and agencies have not furloughed approximately 1,000,000 civilian employees who have been designated as performing emergency services involving the safety of human life or the protection of property. Instead, OMB and the government departments and agencies have required such employees to work without pay during the appropriations lapse -- and without any lawful commitment to be paid for that period -- or be subject to discipline if they refuse to work.

Plaintiffs, the American Federation of Government Employees ("AFGE") and individual federal government employees, have filed a class action complaint challenging the legality of two aspects of the federal government shutdown: (1) The requirement that designated employees work without pay during the appropriations lapse or be subject to discipline; and (2) the rules governing the designation of emergency employees that permitted the federal departments and agencies to designate as emergency workers, for example, coin production workers in the United States Mint, clerical support staff for privatization efforts at the Office of Personnel Management, and art movers and preservers in the National Gallery of Art.

With their complaint, plaintiffs simultaneously filed a motion for a temporary restraining order that would enjoin the unlawful conduct of the governmental defendants. The factors considered in determining whether plaintiffs are entitled to a temporary restraining order ("TRO") are:

- (1) the likelihood that the party seeking the [TRO] will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a [TRO];
- (3) the prospect that others will be harmed if the court grants the [TRO]; and
- (4) the public interest in granting the [TRO].

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-73 (D.C. Cir. 1985);
Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). We show in this memorandum that plaintiffs fully satisfy the prerequisites for obtaining a TRO.

II. Background

A. AFGK is an union that represents 700,000 federal government employees in 105 federal departments and agencies. Declaration of Charles Hobbie ("Hobbie Decl.") ¶ 2. The individual plaintiffs are federal government employees who have been designated by their respective departments and agencies as employees who are required to work without pay (or be subject to discipline) during the appropriations lapse. Plaintiffs seek to represent a class composed of federal employees required to work without pay during a period of lapsed appropriations. The defendants herein are OMB and the named federal departments and agencies.

Title 5 U.S.C. § 3101 provides that "Each Executive agency . . . may employ such number of employees of the various classes recognized by chapter 51 of [title 5] as Congress may appropriate for from year to year." (Emphasis supplied). In the absence of a lawful appropriation, defendants have no authority to pay or to obligate themselves to pay the salaries of plaintiffs and the plaintiff class. See U.S. Const. Art. I, § , cl. 7. ("No money shall be drawn from the Treasury but in consequence of appropriations made by law"); Antideficiency Act, 31 U.S.C. § 1341(a)(1) ("An officer or employee of the United States Government or of the District of Columbia government may not . . . (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law").

On an annual basis, Congress enacts appropriations laws that authorize departments and agencies of the federal government to expend money in accordance with the terms set forth in the authorizing legislation. These laws fund operations of the federal government, including the pay of most federal government employees.

The 1994 annual appropriations laws expired by their terms on October 1, 1995. By that date, Congress had not yet completed work on most of the 1995 appropriations bills on October 1, 1995. Congress did, however, enact a Continuing Resolution ("CR") to fund, albeit on a reduced basis, the operations of most departments and agencies of the federal government that are funded by annual appropriations laws. That CR was signed into law by the President. It expired by its terms at midnight on Monday, November 13, 1995, at midnight. At that time, appropriations for the operations of most departments and agencies of the federal government -- including appropriations for the pay of most federal government employees -- lapsed.

OMB requires federal departments and agencies to maintain contingency plans to deal with such an appropriations lapse. See Aug. 22, 1995, OMB Memorandum, Agency Plans for Operations During Funding Hiatus. Federal government departments and agencies submit their contingency plans to OMB for review and approval. Id. In their contingency plans, federal departments and agencies set forth which employees will be furloughed without pay and

which employees will be required to work without pay during a lapse in appropriations. See Exhibits to Hobbie Decl. ¶ 4.

B. Under 5 U.S.C. § 5331, the pay of many federal department and agency employees is set by The General Schedule. By statute, such employees are "entitled to basic pay in accordance with the General Schedule," 5 U.S.C. § 5332(a)(1) (emphasis supplied).¹

Nonetheless, employees who are designated by the federal departments and agencies are required to work without pay (or be subject to discipline) during a lapse in appropriations. Hobbie Decl. ¶ 3. The fact that employees who are required to work will not be paid during the appropriations lapse is confirmed in several of the agency contingency plans² and has been repeated in public announcements by Administration officials, including Alice Rivlin, Director of the Office of Management and Budget.

¹ Under 5 U.S.C. §§ 5341 *et seq.*, the pay of employees classified as prevailing rate federal employees is set at the prevailing wage rate of their individual local wage areas, and such employees are entitled to pay at that wage rate.

² A number of department and agency contingency plans explicitly state that the work requirement will be backed by discipline in the event of a refusal by any employee to work. See, e.g., Contingency Plan, Employment and Training Administration of the Department of Labor, # (Sept. 6, 1995); Contingency Plan, Financial Management Services of the Department of Treasury, # (Sept. 6, 1995). Certain contingency plans state that employees who are required to work during the appropriations lapse will not be paid during the appropriations lapse. See e.g., Contingency Plan, Pension and Benefit Administration of the Department of Labor, # (Sept. 6, 1995); Contingency Plan, Mine Health and Safety Administration of the Department of Labor, # (Sept. 12, 1995) (attached as Exhibits to Hobbie Decl.).

C. Title 31 U.S.C. § 1342 is the purported predicate for defendants' claimed right to order federal employees to work without pay. That provision authorizes federal departments and agencies to "employ" federal employees during a lapse in appropriations only in "emergencies involving the safety of human life or the protection of property." That statutory provision contains an express definition of its operative term: The term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." (Emphasis supplied).

In determining which employees perform emergency-related services under 31 U.S.C. § 1342, OMB requires federal departments and agencies to follow rules set out by the Office of Legal Counsel of the Department of Justice. See Opinions of the Office of Legal Counsel of the Department of Justice, dated August 16, 1995 and January 16, 1981. According to the Office of Legal Counsel, an employee performs emergency services if there is "some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property" and "some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question." August 16, 1995 Opinion at 6.

Based on the direction received from OMB, in preparing their contingency plans, the defendant federal departments and agencies have designated vast numbers of employees as performing emergency related services despite the fact that the suspension of the employees' duties would not imminently threaten the safety of human life or the protection of property. For example, the contingency plans submitted to OMB designate all of the following employees as "emergency" workers: coin production workers in the United States Mint; clerical support staff for privatization efforts at the Office of Personnel and Management; art movers and preservers in the National Gallery of Art; mail processing personnel at the Securities Exchange Commission; governmental relations and public affairs staff in the Department of Housing and Urban Development; school maintenance workers at the Department of the Interior; civil litigation lawyers at the Department of Justice; statisticians in the Department of Labor; moonshine inspectors in the Bureau of Alcohol Tobacco and Firearms; IRS service center personnel; National Cemetery employees in the Department of Veterans Affairs; reference personnel at the National Archives; employees of the National Archives needed to publish a daily "emergency edition" of the Federal Register; employees in the Bureau of Educational and Cultural Affairs of the United States Information Agency who will continue to provide facilitative support for current grantees of the agency and for visitors; and employees in the Information Bureau of the United States Information Agency who will continue

to provide facilities support for current speakers and basic support to overseas operations. See Exhibits to Hobbie Decl. ¶ 4.

III. Argument

Plaintiffs are entitled to a TRO under the standard applied in this Circuit.

A. Plaintiffs Are Likely to Succeed On the Merits Of Their Claims for Declaratory and Injunctive Relief

1. Defendants' Requirement That Plaintiffs Work Without Pay Is Plainly Unlawful

(a) There are three bases for holding that defendants' requirement that plaintiffs work without pay during a lapse in appropriations is unlawful.

First, as noted above, Title 5 U.S.C. § 5332 provides that plaintiffs and members of the plaintiff class are "entitled to basic pay in accordance with the General Schedule." By requiring plaintiffs and members of the plaintiff class to work without pay during a period of lapsed appropriations (or be subject to discipline), defendants are in clear violation of 5 U.S.C. § 5332.

Second, Title 29 U.S.C. § 206(a) of the Fair Labor Standards Act requires defendants to pay plaintiffs and members of the plaintiff class at least the minimum wage specified in that Act. Defendants' requirement that plaintiffs and members of the plaintiff class work without pay during a period of lapsed

appropriations (or be subject to discipline) is therefore also in clear violation of the Fair Labor Standards Act.³

Finally, Title 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act authorizes a court to:

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

As demonstrated above, by requiring plaintiffs to work without pay during a period of lapsed appropriations, the federal department and agency defendants are violating 5 U.S.C. § 5332 and the Fair Labor Standards Act. That requirement thus constitutes unlawful agency action in violation of § 706(2)(A) of the Administrative Procedure Act. And, because there is no lawful basis for defendants' requirement, it is also arbitrary and capricious under the Act.⁴

(b) We anticipate that defendants will defend their action by arguing that Title 31 U.S.C. § 1342 authorizes them to require

³ The Fair Labor Standards Act also requires the timely payment of wages. As the Court of Appeals for the Ninth Circuit explained, "If a payday has passed without payment, the employer cannot have met his obligation to 'pay.'" Biggs v. Wilson, 1 F.3d 1537, 1539 (9th Cir. 1993).

⁴ Title 5 U.S.C. § 5341 et seq. provides that members of the plaintiff class who are prevailing wage rate employees are entitled to pay at the scheduled prevailing wage rate in the individual's local wage area. See 5 U.S.C. § 5343(f). Defendants' requirement that such employees work without pay is unlawful for the same reasons that defendants' requirement that employees entitled to compensation under the General Schedule work without pay is unlawful.

plaintiffs to work without pay. That provision, however, states only that:

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

All that this section does is authorize government officers and employees in specified emergency situations to "employ" personal services despite the fact that a certain kind of employment may not have been specifically authorized. The natural meaning of the phrase "employ personal services" is "engage a person's services in return for compensation." For example, Black's Law Dictionary (5th ed. 1979), states that "when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for a compensation." (citing Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123, Ala., 321 U.S. 590 (1944)).

OMB and its co-defendants would have this Court hold that the authorization to "employ personal services" is in fact a power to compel employees to render uncompensated services. The plain language of the Antideficiency Act does not support that result. And surely if Congress had intended to authorize federal agencies to conscript employees into unpaid government service it would have made that extraordinary and controversial intent

clear. Cf. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983);
IUD v. API, 448 U.S. 607, 644 (1980).⁵

Accordingly, for each of the independent reasons described in (a), defendants' requirement that plaintiffs work without pay is unlawful.

2. Defendants Have Unlawfully Continued The "Ongoing, Regular Functions Of Government" Notwithstanding The Absence Of Appropriations By Requiring Thousands Of Employees To Continue To Work, Even Though The Suspension Of Their Functions "Would Not Imminently Threaten The Safety Of Human Life Or The Protection Of Property"

Quite apart from defendants' orders that the employees they have designated as "essential" report to work without being paid during the lapse in appropriations, defendants' action is unlawful with respect to a large number of these employees -- including the plaintiffs to this action -- for the additional reason that defendants have misconstrued the Antideficiency Act

⁵ Moreover, the legislative history of the Antideficiency Act demonstrates that the Act was not written to address a lapse in appropriations. Instead, the initial drafters of the Act, which was originally enacted in 1870, and the legislators who amended the Act during the 20th century, intended to prevent the practice of executive branch agencies obligating monies in excess of those appropriated for authorized activities to force Congress subsequently to appropriate more money than it had originally intended to do. Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906). This legislative history -- like the language of the Act -- argues against reading the Act as an authorization for federal departments and agencies to enter into obligations in advance of appropriations.

to authorize the continued employment of many employees who do not meet the "emergency" criterion set out therein.⁶

The relevant portion of the Antideficiency Act, 31 U.S.C. § 1342, reads as follows (emphasis added):

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

It is, accordingly, unlawful for the government to continue to employ workers not falling within this "emergency" exception -- and that is so whether or not the government is able to pay them.

The recent history of section 1342 makes abundantly clear Congress' intent to prohibit the executive branch from continuing routine operations, during a lapse in appropriations, in the guise of providing "emergency" services as defendants are now doing. The last sentence of section 1342 -- the key to interpretation of the scope of the "emergency" exception -- was added by Congress in 1990 precisely in order to prevent the

⁶ As set out in the Complaint, the agency actions discussed in this section are in violation not only of 31 U.S.C. § 1342, but also of sections 702 and 706 of the Administrative Procedure Act ("APA"). The agencies' violation of the terms of section 1342 provides the basis for the challenge to their actions as "contrary to law" within the meaning of the APA. McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995).

executive branch from construing that exception in such an overly broad fashion.

That 1990 amendment came in response to a 1981 opinion issued by Attorney General Benjamin Civiletti. Attorney General Civiletti articulated the following standard under which agencies would be allowed to incur payroll obligations pursuant to the "emergency" exception:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

Authority for Continuance of Government Functions During a

Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1

(Jan. 1981), at 11 ("Civiletti Op.").⁷ As the legislative history of the 1990 amendment to section 1342 makes clear, it was intended to counter this overly broad interpretation of the statute's "emergency" exception. The conference report explains that the amendment was intended

to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of

⁷ Attorney General Civiletti's broad construction of the emergency exception was based in large part on the administrative interpretation given by OMB to the similar statutory language of 31 U.S.C. § 1515, which prohibits departments and agencies from apportioning appropriated funds in a manner that would result in expenditures at a rate that could not be sustained for the entire fiscal year without a deficiency appropriation, except in the case of "emergencies involving the safety of human life, [or] the protection of property" Civiletti Op. at 13. Whatever the force of that analogy in 1981, it has been largely dissipated by the 1990 amendment to section 1342.

appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990).

Notwithstanding Congress' disavowal of the Attorney General's reading of the emergency exception, defendants have persisted in the broad interpretation of what constitutes an "emergenc[y] involving the safety of human life or the protection of property." Thus, in a recent memorandum to defendant OMB, which formed the basis for OMB's directives to all executive departments and agencies concerning contingency planning for a lapse in appropriations, Assistant Attorney General Walter Dellinger opined that "the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General's earlier analyses." Government Operations in the Event of a Lapse in Appropriations, Op. Off. Legal Counsel (Aug. 1995), at 2. Indeed, the Dellinger memorandum asserted that the guidance contained in the Civiletti opinion would retain its validity, notwithstanding the 1990 amendment, if the requirement of "some reasonable likelihood that the safety of human life or the protection of property would be compromised in some degree, by delay in the performance of the function in question," were simply modified to read "in some significant degree." *Id.* at 8 (emphasis added).

Not surprisingly, that modification has not resulted in any significant change in how the executive departments and agencies

have applied the emergency exception. That is evident from a cursory perusal of the contingency plans filed with OMB by the defendant departments and agencies. See Exhibits to Hobbie Decl., ¶ 4. Indeed, as is evident from what we have said above, the designations of employees who are to continue working on the basis of the "emergency" exception include many -- including the individual plaintiffs to this action¹ -- for whom it is impossible to discern the "imminent" threat to life or property on which such designations are to be based.

In many cases the agencies' shutdown plans evince no attempt to link their "emergency" designations to any such imminent threat, but rather simply rationalize the continuation of business as usual on the basis of the importance of the tasks they perform. For example, the United States Mint has determined

¹ As is evident from the declarations and position descriptions that are included in the Appendix, the individual plaintiffs do not perform functions that fall within the "emergency" exception. Ronal Walts is a laborer-leader at the United States Mint in Denver. Michelle Borden is a computer programmer/analyst at OPM Retirement Information Service. Joel Schatley is a psychiatric nursing assistant at the Veterans Administration Medical Center in Perry Point, Maryland. Jennie Isaac works in quality assurance, administering leases and contracts, in the General Services Administration. Walter Sheffield is a team leader of the facilities operations branch at the Environmental Protection Agency, involved in managing the agency's physical plant. Timothy Ashton and David Skultety are criminal investigators employed by the General Services Administration. Verett Kelley and Angela Green are employed at the Department of Labor; their involves reviewing and paying medical bills. Pamela Burke is a bill resolution clerk employed by the Department of Labor Workers Compensation Program. Quentin Cheeks is employed by the District of Columbia Department of Employment Services, D.C. Unemployment Insurance Commission, as a claims examiner.

that all of its functions will be "exempt from shutdown," reasoning as follows:

A shutdown of the Mint's circulating coinage operation would cause severe disruption to the nation's coin supply, with attendant economic disruption and loss. . . .

Any coin shortage, or the anticipation by the public of such a shortage, would have substantial impact as the normal flowback of coins to banks would be disrupted. . . . The danger that the public may fear a coin shortage is a real one; the Mint has already received alarmist calls from numismatic publications, speculating about a coin shortage should the Mint be forced to shutdown.

Coin shortages disrupt business in general because coins are a primary medium of exchange. In addition, a coin shortage would have a devastating impact on certain sectors of the economy that rely almost exclusively on coins, such as the vending machine industry, transit authorities, telephone companies, etc.

A Mint shutdown would also impact on our coinage metal suppliers and fabricators, who may similarly have to curtail their Mint related operations.

U.S. Mint, Justification for Exemption from Shutdown (App. 8).

Other agencies similarly have justified continuing to employ staff members on the basis of the perceived importance of their functions. OPM, for example, explains that it has

a compelling need for strong support in areas recently and soon to be privatized. The performance of our Training and Investigations areas is paramount to the success of their privatization efforts. Any lapse of performance in those areas will be detrimental to the privatized organizations and the individuals who work there.

Memorandum of James B. King to Alice M. Rivlin (App. 14). And the Bureau of Alcohol, Tobacco and Firearms ("BATF") intends to continue the "full function" of its Office of Legislative Affairs

because that office, inter alia, "conducts casework for the Congress which has direct impact on their constituents' business activities thereby affecting the private economy. For example, the Office of Legislative Affairs will typically coordinate the resolution of a constituent's problem involving licensing or tax payment which if delayed would have adverse impact on segments of the private economy." BATF Memorandum, App. 8.

In other cases, while agencies have endeavored to link their "excepted" activities to some imminent threat to life or property, the link is, at best, tenuous. Thus, the Department of Housing and Urban Development ("HUD") explains that

the following activities necessary to avoid imminent threat to the safety of human life and property should . . . continue:

the completion of asset sales conducted in FY 1995 that are not scheduled to be completed until FY 1996;

FHA premium and any other cash collections;

management of HUD-owned property and property where HUD is mortgagee-in-possession; and

completion of mortgage insurance actions pursuant to commitments entered into before October 1, 1995, and asset management.

Department of Housing and Urban Development: Programs that May be Continued in the Absence of FY 1996 Appropriations, at 9 (App. 4). HUD also plans to continue its "[r]eview of allocation plans for designating public housing for occupancy by disabled families, elderly families, or mixed populations," because "failure to do so in some cases could result in imminent threat to the safety of human life for people with disabilities who are

currently living in HUD-assisted housing because of their needs for structurally accessible housing, if they were to lose their housing." Id. at 12.

In yet other cases, agencies have simply designated certain employees as "essential" without further explanation. In many such cases, the link to imminent threats to life or property is difficult to discern. For example, in the Department of Labor ("DOL"), the Bureau of Labor Statistics intends to continue the employment of employees deemed "essential" in its Office of Commissioner, Office of Prices and Living Conditions, Office of Compensation and Working Conditions, Office of Publications, Office of Employment & Unemployment Statistics, Office of Administration, and various field offices. Bureau of Labor Statistics Plans to Suspend Operations (App. 7). Or, to take another example, DOL's Office of Public Affairs plans to continue "essential functions" such as "press secretary duties," "writing/planning," "public inquiries," "news release preparation/distribution," and "professional audiovisual support." OPA's Suspension of Operations Plan (App. 7).

The examples could be multiplied many times, but the point should be clear. In numerous cases, the defendant departments and agencies are making use of the "emergency" exception of the Antideficiency Act to do precisely what Congress intended through its 1990 amendment to forbid: to maintain the "ongoing, regular

functions of government." 31 U.S.C. § 1342.' We do not, of course, mean to suggest that these routine functions of government are not important. But that a function is important -- or "essential," as the agency designations often put it -- is not the test for whether it may continue in the absence of appropriations. Both the plain language and the legislative history of section 1342 make that quite clear. Only when the suspension of government functions would "imminently threaten the safety of human life or the protection of property" may the emergency exception be invoked.

**B. Plaintiffs Will Be Irreparably Harmed Unless
The Court Issues a TRO**

Unless this Court issues a TRO, plaintiffs and the plaintiff class will be required to work without pay during the lapse in appropriations in violation of law. Plaintiffs will have worked and will have incurred the expenses necessary to work, such as commuting, childcare, and clothing costs. And yet, under established law, there will be no remedy at law for the injuries to plaintiffs, because the Court cannot constitutionally order Congress to appropriate the money necessary to compensate plaintiffs for performing the services at issue.

' With respect to a number of the defendant departments and agencies, the proportion of the workforce that has been designated as carrying out "emergency" functions is in itself strong evidence that what is at issue here is in reality maintenance of the ongoing, regular functions of government. For example, of the 98,545 persons employed by the Department of Justice, 64,715 -- nearly two-thirds -- have been designated for emergency-related duty. See Department of Justice contingency plan (App. 6).

The law is clear that "[w]hen the relevant appropriation has lapsed . . . the federal courts are without authority to provide monetary relief." City of Houston, Texas v. Dept. of Housing and Urban Development, 24 F.3d 1421, 1428 (D.C. Cir. 1994). Thus, where, as here, an individual performs personal services for which no funds have been appropriated, he or she is at the mercy of Congress' appropriations authority. Congress may appropriate to compensate the individual for rendering personal services or not, as it chooses, and a court may not order Congress to exercise its appropriations power in this circumstance.

As the D.C. Circuit succinctly stated, "[i]t is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation." Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992). See also National Ass'n of Regional Councils v. Costle, 564 F.2d 583, 589 (D.C. Cir. 1977) ("if [budget authority] does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities"); Ambach v. Bell, 686 F.2d 974, 986 (D.C. Cir. 1982) ("[o]nce the [appropriated] chapter 1 funds are distributed to the States and obligated, they cannot be recouped. It will be impossible in the absence of a preliminary injunction [prohibiting the distribution of the funds] to award plaintiffs the relief they request if they should eventually prevail on the merits").

This uniform precedent establishes that plaintiffs and the plaintiff class will suffer irreparable harm if the TRO is not entered because they have no adequate remedy at law if they are required to work without pay during the lapse in appropriations.

C. Defendants Will Not Be Harmed -- And the Public Interest Will Be Served -- If Defendants Are Prohibited From Engaging In Unlawful Agency Conduct

Plaintiffs have amply demonstrated their likelihood of success on the merits in Part A. In so doing, plaintiffs showed that the governmental defendants are engaged in unlawful agency conduct. It would be odd indeed for defendants to argue that they -- federal government departments and agencies -- would be harmed by a TRO requiring them to cease violating federal law. And, in fact, there would be no harm to defendants.

The defendant federal departments and agencies may employ only such employees "as Congress may appropriate for from year to year." 5 U.S.C. § 3101. Defendants have no legitimate interest in operating beyond the scope of their appropriated funds by requiring employees to work without pay. The Constitution locates in Congress the authority to appropriate money, see U.S. Const., Art. I, § 9, cl. 7, and thus the responsibility for making the "difficult judgments . . . as to the common good." Office of Personnel Management v. Richmond, 496 U.S. 414, 428 (1990).

That latter point is determinative also of where the public interest in this proceeding lies. The interest of all citizens and of the government, in sum the public interest, is vested in

the constitutional functioning of our federal system of government. By requiring employees to work without pay, the defendant federal departments and agencies have arrogated unto themselves judgments about the common good that are Congress' to make. An order entering a TRO prohibiting the unlawful federal agency and department conduct would serve the public good by preserving the Constitution's allocation of responsibilities between the executive and legislative branches.

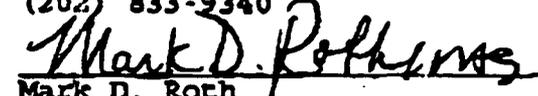
IV. CONCLUSION

Wherefore, for all the reasons set forth in this memorandum in support of plaintiffs' motion for a TRO, plaintiffs request that the Court enter the TRO set forth in plaintiffs' proposed order.

Respectfully submitted,



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INTRODUCTION

Defendants move to dismiss this action for lack of an actual case or controversy.¹ On November 20, 1995, Congress passed and the President signed legislation which authorizes both continuing agency operations through December 15, 1995, and retroactive payment for all federal employees (including all plaintiffs). H.J. Res. 122, Pub.L. No. 104-56 ("continuing resolution").

Emphatically, then, no plaintiff today -- nor any other federal employee -- has been or is being required to work without pay. At the time of the TRO hearing in this case, the Court noted that "not one plaintiff ha[d] alleged that he or she has failed to receive a paycheck." Transcript of Court Ruling, 11/17/95 ("Ruling") at 10. The Court also noted that "Congress has always appropriated funds to compensate government employees for their services rendered" during a lapse in appropriations. The Court therefore found that it was "purely speculative" whether "anyone will ever be denied a paycheck for services rendered during this budgetary impasse." Id.

The Court's holding concerning the speculative nature of plaintiffs' injury applies a fortiori now, in light of passage of the recent legislation. It is not only purely speculative but also counterfactual that any plaintiff -- or any other federal employee -- would lose a day of pay because of a lapse in appropriations.

¹ Defendants submit this motion at this time pursuant to the Court's Order of November 22, 1995. In moving to dismiss at this time, defendants do not waive any other objections which they might have to plaintiffs' action. See, e.g., Rule 12(b)(1), 12(h), Fed.R.Civ.P.

That this eventuality might someday occur is dependent upon a chain of assumptions and multiple variables.

To begin, there is no basis to assert now that appropriation legislation governing some or all federal agencies will not be passed into law by December 15th.² Such legislation could be in the form of a short-term continuing resolution, or long-term agency operating legislation. It is impossible to know at this time which agencies would be covered by such legislation but, in any event, federal employees at these agencies could not claim injury. Nor does anyone know at this time when any appropriation lapse for an agency will occur, the agencies affected, the duration of any such lapse, whether they might alter or adjust their existing contingency plans in a way that affects a plaintiff, whether any paychecks might be missed -- and paychecks would be unlikely to be missed prior to early January 1996 if a lapse of longer duration than the recent lapse occurs on December 16, 1995 -- or whether

² Since commencement of this lawsuit, Congress has approved and the President has signed appropriation legislation governing the Department of Energy, Energy and Water Development Appropriations Act 1996, Pub. L. No. 104-46 (November 14, 1995); the Department of Transportation, Pub. L. No. 104-50 (Nov. 15, 1995); and the Department of the Treasury, the Office of Personnel Management, the General Service Administration, and the National Archives. P.L. No. 104-52 (Nov. 19, 1995). Further, defendant Securities and Exchange Commission was not at all affected by the recent lapse in appropriations, nor would it be affected by a lapse occurring on December 15, 1995. Declaration of Diane Campbell, attached as Exhibit A, ¶¶ 5, 6. A declaration going to the Court's jurisdiction will not convert a jurisdictional motion into one for summary judgment -- see Moir v. Greater Cleveland Transportation Co., 895 F.2d 266, 269 (6th Cir. 1990); Augustine v. United States, 704 F.2d 1074, 1079 (9th Cir. 1983).

Congress will once again, as it always has in the past, authorize payment for services rendered during the lapse.

Article III of the Constitution limits this Court's subject-matter jurisdiction to actual cases and controversies. Whether analyzed in terms of standing, ripeness, or mootness, the lack of any present injury, and the unlikelihood of any future injury, undermine plaintiffs' request that this Court adjudicate this matter, and instead mandate its dismissal. We demonstrate in Part I of our Argument that the Court should dismiss this action for want of an actual case or controversy. Even assuming, arguendo, that the Court finds an actual case or controversy, however, we demonstrate in Part II that prudential considerations closely related to Article III should prompt the Court to withhold review.

STATUTORY AND REGULATORY BACKGROUND

Defendants set forth the general statutory and regulatory background governing this case in Defendants' Memorandum In Opposition To Plaintiffs' Motion For A Temporary Restraining Order, 11/15/95 ("Def. Mem."), at 4-8. Since that time, of course, Congress has passed the continuing resolution, which provides appropriations through December 15, 1995. Pub.L. No. 104-56, § 106. Section 107 provides that the continuing resolution shall cover "all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution." Further, legislation governing appropriation

authority has been passed for several government agencies. See note 2, supra.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS ACTION FOR LACK OF AN ACTUAL CASE OR CONTROVERSY

Article III of the Constitution allows federal courts to adjudicate only actual, ongoing cases or controversies. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Article III's case or controversy requirement is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated." Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 476 (1982). Rather, the requirement is "founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975).

Thus, the "threshold question in every federal case, determining the power of the court to entertain the suit" is "whether a 'case or controversy' exists between the plaintiff and the defendant." Warth v. Seldin, 422 U.S. at 498. The case-or-controversy requirement "ensures that the court will undertake resolution only of issues that are concrete and sharply focused, and bars the court from addressing disputes that are imagined rather than real." Community For Creative Non-Violence v. Hess, 745 F.2d 697, 700 (D.C. Cir. 1984). Federal courts have no authority to decide "questions that cannot affect the rights of litigants in the case before them," and must confine themselves to

resolving "real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Lewis, 494 U.S. at 477.

The Article III case or controversy requirements apply as forcefully to declaratory relief as to any other form of relief. Golden v. Zwickler, 394 U.S. 103, 108 (1969); Penthouse International Limited v. Meese, 939 F.2d 1011, 1018 (D.C. Cir. 1991). The pertinent inquiry for declaratory relief is whether the facts alleged, under all the circumstances "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id., quoting Preiser v. Newkirk, 422 U.S. 395, 402 (1975) (emphasis supplied in Preiser); see also City of Houston v. HUD, 33 F.3d 1421, 1429 n.6 (D.C. Cir. 1994).

Finally, the Article III case or controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate." Lewis, 494 U.S. at 477. It is "not enough that a dispute was very much alive when suit was filed . . . The parties must continue to have a 'personal stake in the outcome of the lawsuit.'" Id.; see also United States Parole Commission v. Geraghty, 445 U.S. 388, 397 (1980); Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990).

The doctrines of standing, ripeness and mootness are interrelated; each has its roots firmly set in Article III, and, as we show below, each requires dismissal of this action.

A. Plaintiffs Lack Standing To Maintain This Action Because Any Future Injury To Them Is Altogether Conjectural And Speculative

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," T & S Products, Inc. v. United States Postal Service, ___ F.3d ___, 1995 WL 627752 (D.C. Cir. 1995), "perhaps the most important of the [Article III] doctrines." Allen v. Wright, 465 U.S. 737, 750 (1984). To meet Article III standing doctrine requirements, the plaintiff must make three showings: that he has "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;" that the injury "fairly can be traced to the challenged action;" and that the injury is "likely to be redressed by a favorable decision." Valley Forge, 454 U.S. at 472. The injury required for Article III standing is an "invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "Particularized" means that the injury must affect the plaintiff in a personal and individual way." Id. at 560 n.1. This "injury-in-fact" requirement constitutes the "irreducible constitutional minimum of standing." Marathon Oil Company v. Federal Energy Regulatory Commission, ___ F.3d ___, 1995 WL 627762 (D.C. Cir. 1995).

A litigant alleging only future injury "confronts a significantly more rigorous burden to establish standing." United Transportation Union v. Interstate Commerce Commission, 891 F.2d 908, 913 (D.C. Cir. 1989) (emphasis supplied). For such a litigant, "the harm must be 'entirely impending,'" Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979), and both "real and immediate," and not "conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). It is insufficient for the plaintiff to allege that he "can imagine circumstances in which he could be affected by the agency's action." United States v. Students Challenging Regulatory Procedures (SCRAP), 412 U.S. 669, 689 (1973). If the plaintiff fails to demonstrate a real and immediate injury, no other inquiry is relevant and the complaint should be dismissed. Schlesinger v. Reservists Committee To Stop The War, 418 U.S. 208, 227 n.16 (1974).

Plainly, because of November 20th continuing resolution, no plaintiff is suffering any present injury attributable to the practices he or she challenges. No plaintiff is presently required to work without pay, and no plaintiff missed a day of payment attributable to the recent lapse in appropriations.³ Plaintiffs

³ Plaintiffs may contend that the "wrong" they suffered is the mere requirement that they work during a lapse in appropriations. See Complaint, ¶¶ 52, 57. But this cannot be the concrete and particularized injury necessary to meet the injury-in-fact requirement of the standing doctrine. The Court recognized as much when it noted that "not one plaintiff ha[d] alleged that he or she has failed to receive a paycheck," and that it was therefore "purely speculative" whether "anyone will ever be denied a paycheck for services rendered during this budgetary impasse." Ruling at 10. At this point, there is only
(continued...)

are flatly wrong when they suggest that it is sufficient to establish their standing only at the outset of the case. Transcript, 11/20/95, at 9. See Lewis, 494 U.S. at 477 ("not enough that a dispute was very much alive when suit was filed. . . . The parties must continue to have a 'personal stake in the outcome of the lawsuit'"). Those plaintiffs who cannot establish their standing throughout the litigation may not continue as plaintiffs. Wagshal v. Foster, 28 F.3d 1249, 1252 (D.C. Cir. 1994). Here, none of the plaintiffs can establish standing.

Some are working pursuant to appropriations bills that cover their agencies' operations for fiscal year 1996. For example, plaintiff Borden is an employee of the Office of Personnel Management, Complaint, ¶ 4, and plaintiffs Issac, Ashton and Skutley are employees of the General Services Administration, Complaint, ¶¶ 7, 9, 10, which is funded for Fiscal Year 1996 through P.L. No. 104-52. See note 2, supra. In addition, plaintiff Walz, an employee of the United States Mint, a component of the Department of the Treasury, is paid pursuant to a revolving trust fund available for numismatic operations and programs, 31 U.S.C. § 5134, and therefore not affected by the recent lapse in appropriations or the continuing resolution. See Transcript, 11/16/92, at 41-42.⁴

³(...continued)

a "purely speculative" fear of future injury, rather than a concrete and particularized injury.

⁴ Public Law No. 104-52 broadens this revolving fund to apply to all operations of the Mint.

As to those who may find themselves working in a lapse situation at some subsequent time -- and it is not possible to say at this point which plaintiffs might be required to work during such a lapse, or when that lapse might occur -- the likelihood of their future injury is indeed remote. Future injury for such plaintiffs would depend upon the hypothetical chain of events and multiple variables described at the outset, involving the uncertainty of any future lapse in appropriations -- when it might occur, and which agencies and which plaintiffs might be affected. Given this uncertainty, it is clear that no one in the federal government today faces an "entirely impending," or "real and immediate" future injury.

Rather, the likelihood of future injury is founded upon conjecture and contrary-to-fact hypotheses at least as speculative as that which the Supreme Court found insufficient to meet Article III requirements in Lyons. The complainant in that case alleged that he had been injured by an unjustified "chokehold" administered by a Los Angeles policeman, and that he "justifiably fears that any contact he has with the Los Angeles Police officers may result in his being choked and strangled to death." The Court held that the request for injunctive relief forbidding the use of such chokeholds failed Article III requirements, finding no realistic threat to the complainant. 461 U.S. at 106-07. It was unduly speculative whether he "was likely to suffer future injury from the use of the chokeholds by police officers." Id. at 105. Because Lyons had not made a showing that he was realistically threatened by a repetition

of his past experience, "he has not met the requirements for seeking an injunction in federal court." Id. at 109.

Following Lyons, the court of appeals in Branton v. Federal Communications Commission, 893 F.2d 906, 909 (D.C. Cir. 1993), found that the imminence required under Article III was lacking for a petitioner who challenged a Federal Communications Commission decision not to take action against a broadcaster who had used indecent language on one of its programs. "While there is, of course, some chance that somewhere, at some time, the petitioner may again be exposed to a broadcast indecency as a result of the Commission's decision," the court held that that possibility was "far too remote and attenuated to establish a case or controversy under Article III." Id.⁵ The threat here of injury at some point in the future is at least as remote and unrealistic as that facing the complainant in Lyons, and the petitioner in Branton.

Further, one principal purpose of the Article III standing requirement is to "assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a

⁵ See also Energy Transportation Group, Inc. v. Maritime Administration, 956 F.2d 1206, 1215 (D.C. Cir. 1992) (where transportation group could "only suffer competitive harm if it enters the market for carrying [liquid natural gas] to the U.S. in the future, and it has shown little evidence that such entry is probable . . . potential harm is too speculative to satisfy Article III's requirement that the injury be . . . not 'conjectural' or 'hypothetical'"); United Transportation Union, 891 F.2d at 913 (allegation that petitioners "stand to be hurt" by proposed agency rule is "'unadorned speculation' . . . [which] seems but a shadow in the midst"); Harrington v. Bush, 553 F.2d 190, 208 (D.C. Cir. 1977) ("that the alleged harm is to occur in the future can . . . lessen the concreteness of the controversy and thus mitigate against a recognition of standing").

debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Valley Forge, 454 U.S. at 472. In this way, the court can decide the case "with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." Id.

Here, the Court cannot know the circumstances surrounding any future injury. It cannot know at this point whether any given plaintiff will be designated an excepted employee during the next lapse in appropriations; it cannot know when that lapse will occur; and it cannot know the precise requirements of the particular agency contingency plan designating excepted employees, or whether that lapse will result in any excepted federal employee missing a paycheck. The "concrete factual context" so essential to Article III standing is altogether missing, indicating that plaintiffs cannot come close to demonstrating that harm to them is "entirely impending," Babbitt, 442 U.S. at 298, or that they face a future injury that is "real and immediate." Lyons, 461 U.S. at 102. Rather, the injury which plaintiffs face is, as the Court has already found, "purely speculative," and entirely insufficient to meet Article III standing requirements.⁶

⁶ An organizational plaintiff such as the American Federation of Government Employees ("AFGE") has standing only if it can show that its members would otherwise have standing to sue in their own right, International Union, UAW v. Brock, 477 U.S. 274, 282 (1986), a showing which cannot be made here. In addition, AFGE would have to show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id. To the degree that
(continued...)

B. This Action Is Not Ripe For Decision

Ripeness enters the Article III "case or controversy" picture in the "determination whether the requisite injury is in sharp enough focus and the adverseness of the parties concrete enough to permit a court to decide a real controversy and not a set of hypothetical possibilities." Martin Tractor Co. v. Federal Election Commission, 627 F.2d 375, 379 (D.C. Cir. 1980). The ripeness doctrine seeks to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." Abbott Laboratories v. Gardner, 387 U.S. 136, 147-48 (1967). Ripeness is also designed to protect agencies from judicial interference "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id. Courts determine ripeness by evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id.

⁶(...continued)
plaintiffs challenge the manner in which specific agencies apply statutory standards in determining excepted functions, they would have difficulty making this showing because of the very fact-specific circumstances surrounding any agency's designation of excepted employees and functions. Finally, AFGE would have to show that the "interests it seeks to protect are germane to [its] purpose." Id. The Court could legitimately ask how it is germane to AFGE's purpose to ask the Court to issue an order which would take away from plaintiffs and other excepted employees the obligation the United States has recognized to pay them for services rendered during a lapse, and place them in the furlough category, for which the United States has recognized no such obligation. See Def. Mem., Ex. E at 3; Transcript, 11/16/95, at 28-33.

The nature of the injury figures in both the fitness and hardship inquiries. If the injury asserted is one which will occur in the future, its occurrence must be "reasonably certain and clearly describable for the action to be deemed 'ripe' for adjudication." Martin Tractor, 627 F.2d at 379. "The mere potential for future injury is insufficient to render an issue ripe for review." Alascom, Inc. v. Federal Communication Commission, 727 F.2d 1212, 1217 (D.C. Cir. 1984) (emphasis in original). A petitioner "cannot show hardship by positing a speculative or hypothetical future harm." National Resources Defense Council v. United States Equal Protection Agency, 859 F.2d 156, 167 (D.C. Cir. 1988). In order to be "ripe for review," the "disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." Public Service Commission v. Wycoff Company, 344 U.S. 237, 244 (1952).

In Consolidated Edison Co. v. Herrington, 752 F. Supp. 1082 (D.D.C. 1990), aff'd, 927 F.2d 1227 (T.E.C.A 1992), Judge Harold Greene dismissed as unripe a request for declaratory and injunctive relief in a situation similar to that facing the plaintiffs here. The case was brought by three manufacturing and utility companies with an interest in a Department of Energy ("DOE") escrow fund created as a result of DOE's settlement of crude oil overcharges. Just as the plaintiffs here contend that they might some day lose pay because of a lapse in appropriations, the plaintiffs in

Herrington contended that the fund might prove insufficient to meet their claims in full. Judge Greene found that the plaintiffs' claims "involve nothing more than a mere potential for future injury." 727 F. Supp. at 1085.

The key issue in the case, whether the fund would meet plaintiffs' claims in full, depended upon "the outcome of a number of future events, none of which can be anticipated or predicted with certainty." 727 F. Supp. at 1085. The court found that plaintiffs' arguments about the sufficiency of the fund "sit atop a pyramid of predictions and assumptions, one piled on top of another, about what claimants will do, what [DOE's adjudicative unit] will do and what the various courts that hears these claims will do." Id. "It is this very kind of hypothesizing about future events that the ripeness doctrine was intended to prevent," the court held. Id.

We have already seen in this case the "pyramid of predictions and assumptions," and the "hypothesizing about future events" which the Court would have to make in order to find an injury to any of the plaintiffs. Any claim that a plaintiff may at some future time miss a paycheck because of a lapse in appropriations is "not reasonably certain." Martin Tractor, 627 F.2d at 379. Rather, it is very uncertain. See Def. Mem. at 14, 25-28 & Ex. E at 3.

Plaintiffs can do no better than allege the "mere potential for future injury," which, under Alascom, is "insufficient to render an issue ripe for review." 727 F.2d at 1217.⁷

C. Because Of The Passage Of The Continuing Resolution, This Action Is Moot

Federal courts may not "give opinions upon moot questions or abstract propositions," or "declare principles or rules of law which cannot affect the matter in issue in the case before it." Church of Scientology of California v. United States, 506 U.S. ___, 113 S. Ct. 447, 449 (1992), quoting Mills v. Green, 159 U.S. 651, 653 (1895). No controversy is presented "when the question sought to be adjudicated has been mooted by subsequent developments." Flast v. Cohen, 392 U.S. 83, 95 (1968). A case is moot when "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). In an action for injunctive relief, "there must be some present harm left to enjoin," for "[o]nce the movant is no longer in harm's way, a motion for an injunction becomes moot." Taylor v. Resolution Trust Corp., 56 F.3d 1497, 1502 (D.C. Cir. 1995).

⁷ Plaintiffs may contend that their action is ripe for review because they intend to raise "purely legal issues." That a case presents only legal issues is not, in itself, sufficient to render the case ripe for review. Alascom, 727 F.2d at 1217. Indeed, that is the essence of seeking an advisory opinion from the Court. Lewis, 494 U.S. at 477; Penthouse, 939 F.2d at 1018. Moreover, it is unlikely that a challenge to the manner in which defendants have interpreted statutory directives to determine excepted functions could ever be purely legal in nature. Even if plaintiffs were to eliminate all factual issues from their challenge, defendants might be required to present extensive factual evidence to rebut the challenge.

Assuming that plaintiffs might have been in "harm's way" during the recent lapse in appropriations, their claims have since been rendered moot by the continuing resolution. Their position is therefore analogous to that of the plaintiff in Golden v. Zwickler. In that case, Zwickler had been convicted of distributing anonymous literature concerning a Congressman in connection with an election campaign, in violation of state statute. Zwickler asserted in his complaint that he wished to distribute such literature in a future election and sought a declaratory judgment that the statute infringed his first amendment rights. By the time the case reached the Supreme Court, the Congressman who was the subject of Zwickler's handbills had left the House of Representatives. Justice Brennan, writing for the unanimous Court, held that a case or controversy no longer existed.

Justice Brennan found that it was "most unlikely that the Congressman would again be a candidate for Congress," and therefore the parties did not have adverse legal interests of "sufficient immediacy and reality" to warrant judicial relief. 394 U.S. at 109. It was "wholly conjectural" that "another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint." Id. Zwickler's assertion that the Congressman might again run for elected office was "hardly a substitute for evidence that this is a prospect of 'immediacy and reality.'" Id. The power of federal courts "arises only when the interests of litigants require use of this judicial authority for

their protection against actual interference. A hypothetical threat is not enough." Id. at 110.⁸

Given passage of recent appropriation legislation, whatever questions plaintiffs might raise about the legality of the requirement that some designated federal employees continue to work during a lapse in appropriations, or whatever objections any plaintiff might have to his or her agency's contingency plans identifying such workers, have lost their character as a "present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract issues of law." Hall v. Beals, 396 U.S. 45, 48 (1969). Any judicial resolution of the issues plaintiffs now seek to litigate would amount to an advisory opinion, based upon a hypothetical, imagined threat. Article III, however, permits the exercise of the Court's judicial authority only for "protection against actual interference," Zwickler, 394 U.S. at 110, and precludes the Court from protecting plaintiffs against imagined future injury.

D. This Action Fails To Meet The "Capable of Repetition, Yet Evading Review" Exception To Mootness

Plaintiffs contend that this case fits within an exception to the mootness doctrine for cases "capable of repetition, yet evading review." Transcript, 11/20/95, at 5-6, 11. The court need not reach this issue if it concludes that plaintiffs lack standing or that the issues they seek to adjudicate are not ripe. City of

⁸ See also Lewis, 494 U.S. 472 (challenge to statute moot when statute amended); Clarke v. United States, 915 F.2d 699, 704-05 (D.C. Cir. 1990) (case moot when statute expired).

Houston, 24 F.3d at 1429 (where specific claim moot, forward-looking relief may be available "so long as the plaintiff has standing to bring such future challenge and the request for declaratory relief is ripe").

Further, the capable-of-repetition doctrine "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." Lyons, 461 U.S. at 109. The doctrine requires at a minimum that there be "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." United States v. W.T. Grant, 345 U.S. 629, 633 (1953). It is "not enough that the plaintiff can imagine circumstances in which he could be affected by the agency's action." Prieser v. Newkirk, 422 U.S. at 403.

To show that the case meets the repetition prong of the exception, the plaintiff must demonstrate that "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." Clarke, 915 F.2d at 703 (emphasis supplied). It is simply not enough that someone, at sometime, might suffer the same harm. Murphy v. Hunt, 455 U.S. 478, 482 (1982) (dismissing defendant's challenge to a state law denying pretrial bail to those accused of violent sex crimes as moot after defendant's conviction because there was no likelihood that the defendant would be arrested for a similar offense and denied bail

in the future); see also Knights of KKK v. District of Columbia, 972 F.2d 365, 370 (D.C. Cir. 1992) (it is the "likelihood of the plaintiff's encountering a similar problem in the future that matters") (emphasis supplied).

In estimating the likelihood of an event occurring in the future, the "natural starting point is how often it has occurred in the past." Clarke, 915 F.2d at 704. Where "there are too many variables to allow a prediction that [plaintiffs] will again be subject to [the] action" complained of, the "capable of repetition" requirement is not met. Grano v. Barry, 733 F.2d 164, 167 (D.C. Cir. 1984).

Here, there is at best a "mere possibility" which keeps this case alive, and no "cognizable danger of a recurrent violation." W.T. Grant, 345 U.S. at 633. The possibility that any plaintiff will be ever be injured at some time in the future is remote, based on a multitude of variables and counterintuitive speculation similar to that which the court of appeals in Grano found failed to meet the "capable of repetition" exception.

In that case, the City of Washington and a private developer, the Carr Company, sought to demolish historic Rhodes Tavern and received approval to do so from the Joint Committee on Landmarks. The plaintiff and others who objected to its demolition were able to draft and place on the ballot a referendum seeking the voters' view on whether the Tavern should be preserved, which could then be

transmitted to Congress and become law.⁹ Prior to the referendum, the plaintiffs obtained an injunction restraining the demolition process, pending outcome of the referendum which ultimately passed and became law. The court held that issues surrounding the validity of the injunction were moot, and that the case clearly failed to meet the "reasonable expectation" component of the capable-of-repetition exception, finding that there were "too many variables to allow a prediction that appellants will again be subject to action of this sort." 733 F.2d at 167.

To make that prediction, the court indicated, one would have to suppose:

that the Carr Co. would again attempt to demolish a District of Columbia building with alleged historical significance, that the Joint Committee on Landmarks would approve, that an initiative to save the building would once more be put to a referendum, and that a trial court would issue an injunction preventing demolition pending the outcome of the referendum. Appellants have adduced no evidence creating a reasonable expectation that any of these things will reoccur, much less that all of them will.

733 F.2d at 167-68. Here, too, as discussed above, the Court would have to make a long series of suppositions, based upon numerous variables, before concluding that any plaintiff could reasonably be expected to lose pay because of a requirement that he or she work during a lapse in appropriations.

⁹ The court noted that the precise substantive effect of the complicated initiative appeared to be a "matter of dispute" at the time the case reached the court of appeals. 733 F.2d at 167 n.1.

Moreover, in determining the likelihood of irreparable injury to plaintiffs, the Court found in its ruling that it was "entirely appropriate and reasonable" to consider the fact that Congress has "always appropriated funds to compensate government employees for their services rendered" during a lapse in appropriations. Ruling at 10. In assessing the reasonable expectation component of the capable-of-repetition exception, it is not only "entirely appropriate and reasonable" to take this consistent past Congressional practice into account, but also mandated as the "natural starting point" under Clarke.

Finally, if a plaintiff were required to work without pay during some future lapse in appropriations that lasted long enough to deprive him or her of some portion of his or her regular pay, there is simply no reason to believe that the action in that instance would evade review. Of course, if any future lapse in appropriation is like all those in the past, in which no excepted employee loses a day of pay, there would not be a judicially cognizable injury in the first place, no plaintiff would have standing, and there would be nothing to review. This is not a basis upon which the Court may assert authority to adjudicate this case. Schlesinger, 418 U.S. at 227 ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing").

II. PRUDENTIAL CONSIDERATIONS ALSO REQUIRE DISMISSAL OF THIS ACTION

This case should be dismissed for lack of standing and ripeness, and because it is moot. But even if the Court were to disagree, strong prudential considerations derived from Article III militate in favor of withholding review. In Chamber of Commerce v. United States Department of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980), the court of appeals recognized that a court may refuse to entertain a suit which, while "not actually moot, is so attenuated that considerations of prudence and comity . . . counsel the court to stay its hand, and to withhold relief it has the power to grant."

The court in Chamber of Commerce described the prudential mootness doctrine as the "cousin" of constitutional mootness, a "melange of doctrines relating to the court's discretion in matters of remedy and judicial administration." 627 F.2d at 291. As such, the prudential mootness doctrine is another application of the general principle that even where a plaintiff might meet Article III case or controversy requirements, in certain situations the better practice for the court is to refrain from exercising its authority. See Def. Mem. at 15-20.

In Chamber of Commerce, the plaintiff challenged an agency decision to provide funds to enable a consumer organization to intervene in a regulatory proceeding before the department. During the pendency of the suit, the organization's participation in the proceeding came to an end and all monies requested by it were paid. Subsequently, Congress imposed a moratorium on further intervenor-

funding, and the agency stayed further intervenor-funding pending congressional approval. 627 F.2d at 290-91. The court of appeals held that events that transpired after institution of the suit had caused it to become "so attenuated and remote as to warrant dismissal . . . pursuant to the court's discretionary authority to grant or withhold declaratory relief." Id. at 290.

Similarly, in DeArellano v. Weinberger, 788 F.2d 762 (D.C. Cir. 1986), the plaintiff challenged United States military intrusions into his private ranch in Honduras. When U.S. military personnel and facilities withdrew from Honduras, the court found that the controversy had become "too attenuated to justify the extraordinary relief sought through equity's intervention." Id. at 764. See also Hess, 745 F.2d at 700.

Here, too, even assuming that the passage of the recent legislation does not render this action moot in a constitutional sense, the passage of that legislation so attenuates the action as to plaintiffs that the Court should refrain from exercising its equitable authority.

CONCLUSION

The Court should dismiss this action.

Respectfully submitted,

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Assistant Attorney General

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United States Attorney

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SUSAN K. RUDY

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Civil Division, Room 1054

901 E Street, N.W.

Washington D.C. 20530

Telephone: (202) 514-4778

DATE: November 27, 1995

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Defendant's Motion To Dismiss, Memorandum Of Points And Authorities and Exhibit in support, will, by agreement of the parties, be served by fax and hand delivery on November 28, 1995, upon the following:

Virginia A. Seitz
John M. West
Bredhoff & Kaiser
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036;

and sent by first class mail, postage prepaid to the following:

Mark D. Roth
Charles A. Hobbie
American Federation of
Government Employees
80 F Street, N.W.
Washington, D.C. 20001

Date: 11/27/95


THOMAS H. PEEBLES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES, et al.,)
)
Plaintiffs)
)
v.) Civ. Act. 95-2115 (EGS)
)
ALICE RIVLIN, as Director of the)
OFFICE OF MANAGEMENT AND BUDGET)
and OFFICE OF MANAGEMENT AND)
BUDGET, et al.,)
)
Defendants.)
_____)

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. AFGE is a union that represents 700,000 federal government employees in 105 federal departments and agencies. Declaration of Charles Hobbie ("Hobbie Decl.") ¶ 2 (attached to Plaintiffs' Motion for a Temporary Restraining Order ("TRO")). The individual plaintiffs are federal government employees who were designated by their respective departments and agencies as employees required to work without pay (or be subject to discipline) during the appropriations lapse. See Declarations of plaintiffs (attached to Plaintiffs' Motion for a TRO).

2. On an annual basis, Congress enacts appropriations laws that authorize departments and agencies of the federal government to expend money in accordance with the terms set forth in the authorizing legislation. These laws fund operations of the federal government, including the pay of most federal government employees.

3. The 1994 annual appropriations laws expired by their terms on October 1, 1995. By that date, Congress had not yet

completed work on most of the 1995 appropriations bills.

4. Before October 1, 1995, Congress enacted a Continuing Resolution ("CR") to fund, albeit on a reduced basis, the operations of most departments and agencies of the federal government that are funded by annual appropriations laws. See H.J. Res. 108. That CR was signed into law by the President. It expired by its terms at midnight on November 13, 1995. At that time, appropriations for the operations of most departments and agencies of the federal government, including appropriations for the pay of most federal government employees, lapsed.

5. The Office of Management and Budget ("OMB") requires federal departments and agencies to maintain contingency plans to deal with an appropriations lapse. See Aug. 22, 1995 OMB Memorandum, Agency Plans for Operations During Funding Hiatus (Exhibit F to Declaration of Mark Roth). Federal government departments and agencies submit their contingency plans to OMB for review and approval. Id. In their contingency plans, federal departments and agencies set forth which employees will be furloughed without pay and which employees will be required to work without pay during a lapse in appropriations. See Exhibits to Hobbie Decl. ¶ 4.

6. Employees who were designated by the federal departments and agencies were required to work without pay (or be subject to discipline) during a lapse in appropriations. Hobbie Decl. ¶ 3. This fact was confirmed in a November 14, 1995, letter from James King, the Director of the Office of Personnel Management, to AFGE's President, John Sturdivant. See Exhibit E to Declaration

of Mark Roth.

7. Neither the OMB nor any defendant has ever stated that it has a legally enforceable obligation to pay plaintiffs and other employees for the work that they are required to do during an appropriations lapse. Instead, the Director of the Office of Personnel Management references a government memorandum in which it is stated that the United States will "'not contest its legal obligation to make payment for such services, even in the absence of appropriations.'" Id. (quoting Nov. 17, 1981 Stockman Memorandum).

8. Defendants cancelled all leave for employees required to work without pay during the appropriations lapse that commenced on November 13, 1995. See Roth Decl. ¶¶ 2-4, 7 & Exhibits thereto.

9. In determining which employees perform emergency-related services under 31 U.S.C. § 1342, OMB requires federal departments and agencies to follow rules set out by the Office of Legal Counsel of the Department of Justice. See Opinions of the Office of Legal Counsel of the Department of Justice, dated August 16, 1995 and January 16, 1981. According to the Office of Legal Counsel, an employee performs emergency services if there is "some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property" and "some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question." August 16, 1995 Opinion at 6.

10. The defendant departments and agencies prepared their contingency plans based on the directions received from OMB. See Exhibit F to Declaration of Mark Roth.

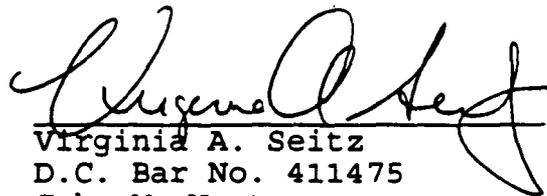
11. On November 19, 1995, Congress enacted and the President signed a CR to fund government operations for one day. See H.J. Res. 123.

12. On November 20, 1995, Congress enacted and the President signed a CR to further fund government operations, but only between November 21 and December 15, 1995. See H.J. Res. 122.

13. In the bills described above, Congress decided to appropriate backpay for the federal employees who worked during the appropriations lapse and for the federal employees who were furloughed for that period.

14. At no time has Congress appropriated money to pay federal employees required to work during any future appropriations lapse.

Respectfully submitted,



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Attorneys for Plaintiffs

November 27, 1995



Washington, D. C. 20530

November 17, 1995

**MEMORANDUM FOR WASHINGTON METROPOLITAN AREA EMPLOYEES
OF THE DEPARTMENT OF JUSTICE**

FROM: Stephen R. Colgate
Assistant Attorney General
for Administration

SUBJECT: Filing a Claim for Unemployment Compensation

Attached is the information needed to file a claim for unemployment compensation if you have been furloughed due to the lapse in appropriations.

The completed claim should be sent to the unemployment compensation office for the jurisdiction in which you work. We are sending you information for the jurisdiction shown as your official duty station in our records.

All local jurisdictions (District of Columbia, Maryland, and Virginia) have adopted special claims procedures for furloughed employees. To speed up claims processing, the Department will electronically report your wages to the unemployment compensation office.

To file a claim, you should:

- complete the form according to the instructions provided, **EXCEPT** that you should disregard instructions that the agency must complete, sign, or file the form (the electronic report meets these requirements);
- be sure to write "U.S. Department of Justice" at the top of your claim or in the agency address block;
- attach copies of your furlough notice and a recent earnings and leave statement; and
- mail the claim directly to the address of the unemployment compensation office shown in the

**OFFICE OF UNEMPLOYMENT COMPENSATION****IMPORTANT NOTICE****TO ALL FEDERAL EMPLOYEES IN THE DISTRICT OF COLUMBIA:**

You can file for unemployment insurance benefits if you are furloughed on or after November 13, 1995, due to the absence of a FY 1996 Appropriations or Continuing Resolution. If you are unemployed as the result of a government wide or agency wide shut down and want to file, please complete the "Initial Claim For Furloughed Federal Government Employees" form provided with this letter to you by your personnel authority and return to the designated staff of your personnel office. This form must also be completed by your personnel office.

Your claim will be processed upon receipt of your claim form from your agency if the furlough lasts more than one week. After processing, you will be mailed your first biweekly payorder card along with instructions and other information about your claim. The effective date of your claim will be the first day that the furlough begins. The District of Columbia has a one-week waiting period.

YOU MAY NOT USE THIS PROCESS FOR THE FILING OF ANY UNEMPLOYMENT CLAIM EXCEPT FOR A CLAIM RESULTING FROM A GOVERNMENT WIDE OR AGENCY WIDE FURLOUGH. Unemployment claims resulting from agency downsizing and/or normal terminations will continue to be taken using the regular in-person claim taking process.

IF YOU ARE PAID RETROACTIVELY FOR THE FURLOUGH PERIOD, YOU WILL BE REQUIRED TO PAY BACK ANY UNEMPLOYMENT INSURANCE BENEFITS YOU RECEIVED.



"Helping People Help Themselves"

- Item 17. Indicate unemployment compensation status with "X"
- Item 18. Enter citizenship status (If an alien, indicate green card alien registration number.
- Item 19. Indicate Retirement status with a "X".
- Item 20. Indicate whether worked for Federal Government in past 30 days with a "X".

Items 21 through 26: Leave blank: To be completed by DCDOES Staff only.

Items 27 through 30, please print clearly when furnishing this information.

Item 27. Preprinted.

Item 28. Enter all gross wages information in federal civilian service amounts and the account number.

Item 29. Attach documentary proof showing federal civilian employment. (Federal Agency letterhead notice or the SF-8)

Item 30. Already preprinted

Item 31: Please have furlougee sign.

Item 32: Please have Agency Representative sign. This form is not complete unless it is signed and dated. Please enter signer's title and telephone number.

The claim form must be signed by both the employee and an authorized agency representative.

Initial Claim For Furloughed Federal Government Employees

Claimant: Please complete items Numbered 1 through 20 (Please Print Clearly)

1. Claimant's Name: (Last First Mi.)			21. Claim Taker/Local		
2. Social Security Number:			22. Claim Type: <input type="checkbox"/> New <input type="checkbox"/> Additional		
3. Street Address			23. Ward		
4. City		5. State	6. Zip Code		
7. Sex <input type="checkbox"/> Female <input type="checkbox"/> Male		8. Education		9. Mental Status	
10. Date of Birth		11. Ethnic		12. Union	
13. Telephone Number		14. Duty Station Address		16. Dates of Employment From: To	
15. Employer's Mailing Address (Federal Agency)					
17. Have you claimed, received, or applied for unemployment compensation in the past twelve months? If "Yes" enter date, city, and state of the claim. <input type="checkbox"/> Yes <input type="checkbox"/> No					
18. (Check One) I am a citizen or national of the U.S. <input type="checkbox"/> Yes <input type="checkbox"/> No I am in a satisfactory immigration status <input type="checkbox"/> Yes <input type="checkbox"/> No Alien Registration Number _____					
19. Did you receive, will you receive, or are you receiving payment under any type of retirement plan, pension, social security, IRA, KEOGH, etc., based upon previous employment? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, How much monthly? _____					
20. Have you worked for the Federal Government for at least the past 30 days? <input type="checkbox"/> Yes <input type="checkbox"/> No					

Federal Agency: Please complete Gross Wages Information for Items Numbered 27 through 29

27. Base Period July 1, 1994 June 30, 1995		Code Calendar Quarter	28. Annual Salary in Federal Civilian Service				29. Documentary evidence (Federal Agency Notice or SF-8) Showing Federal Civilian employment.				
Quarter Ending	Year		WAGES				ACCOUNT NUMBER				
9-30	94	3rd Qtr									
12-30	94	4th Qtr									
3-31	95	1st Qtr									
6-30	95	2nd Qtr									
30. Reason for Separation: Furlough											

I, the claimant, understand; that penalties are provided by law for an individual making false statements to obtain benefits; that any determination based on this affidavit is not final; it is subject to correction upon receipt of wage and separation information from the Federal agency for which I worked; that benefit payments made as a result of such determination may be adjusted on the basis of information furnished by the Federal agency; and that any amount overpaid may have to be repaid or offset against future benefits.

I, the claimant, swear, or affirm, that the above statements, to the best of my knowledge and belief, are true and correct.

31. Signature of Claimant _____ Date _____

I HEREBY witness the signature of this claimant and CERTIFY that the claimant has met the registration requirements of this state.

32. Signature of Federal Agency Representative/Title _____ Telephone Number _____ Date _____

UNEMPLOYMENT COMPENSATION FOR FEDERAL GOVERNMENT
EMPLOYEES IN THE DISTRICT OF COLUMBIA

Questions and Answers

Q. What Benefits Are Furloughed Federal Government Employees Entitled To Who Work in the District of Columbia?

A. Federal employees who are unemployed as a result of a furlough are entitled to the same benefits as any employee on a temporary layoff. Benefits are based on gross weekly earnings. In the District, benefits are calculated at approximately 50% of the employee's gross weekly wage up to a maximum weekly benefit of \$347 per week. The minimum amount of benefits is \$50 per week.

Q. Are All Federal Employees Entitled To District of Columbia Benefits?

A. No. The federal employee's duty station determines the state in which the claim is filed. Federal employees whose duty station is in the District of Columbia will receive benefits calculated on the above formula. Employees outside the District of Columbia will receive benefits based on the formula in the state in which their duty station is located. The determining factor is where the duty station is located, not the location of the agency headquarters or payroll office.

Q. How Long Must the Furlough Continue For Federal Employees To Be Eligible For Benefits?

A. The District of Columbia has a one-week waiting period. Therefore, the first week of unemployment is not compensable and no benefits may be paid for the first week claimed. If a furlough should last longer than one week, the second week and succeeding weeks are compensable.

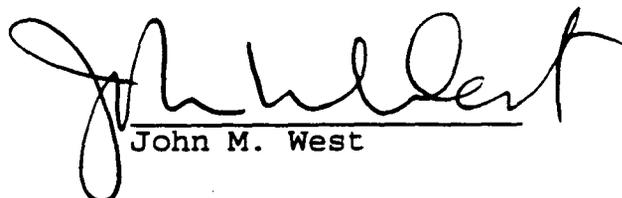
Q. How Will Furloughed Federal Employees Apply For Benefits?

A. To handle the anticipated large volume of claims, Federal agencies are being provided a special self-filing claim form with instructions on how the claim must be filed. The claim forms and instructions will be distributed by agency personnel authorities should it become necessary.

Certificate of Service

I hereby certify that by agreement of the parties the foregoing Motion for Summary Judgment was served on defendants by facsimile transmission on this 27th day of November, 1995, and will be hand delivered with all attachments on the 28th day of November, 1995, to:

Thomas Peebles
Susan Rudy
Joseph Lobue
Attorneys, Department of Justice
Civil Division, Room 1054
901 E. Street, N.W.
Washington, D.C. 20530


John M. West