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Shutdown II [4]

# Withdrawal/Redaction Sheet

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2009-1006-F

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### 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]

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. )

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The essential facts of this case are not in dispute:

On November 13, 1995, at midnight, Congressional appropriations for a substantial number of federal government operations lapsed. Pursuant to instructions from the Office of Management and Budget ("OMB"), federal departments and agencies of the government that were not funded by appropriations furloughed approximately 800,000 employees. These federal government departments and agencies, however, did not furlough approximately 1,000,000 civilian employees. Instead, OMB and the government departments and agencies required such employees to work without pay during the appropriations lapse -- and without any legally enforceable right to be paid for that period -- or be subject to discipline if they refused to work. Pursuant to OMB directives, the departments and agencies designated this large number of employees as performing emergency-related services necessary to protect against imminent danger to human life or property.

Plaintiffs, the American Federation of Government Employees ("AFGE") and individual federal government employees, filed a class action complaint challenging (1) the requirement that all designated employees work without pay during any appropriations lapse or be subject to discipline, and (2) the OMB directives pursuant to which the federal departments and agencies designate employees who purportedly perform emergency services, thus placing these employees in the position of being required to work without pay and without any lawful right to be paid during the appropriations lapse.

With their complaint, plaintiffs simultaneously filed a motion for a temporary restraining order ("TRO"). The Court denied that motion on November 17, 1995.

On November 19, 1995, Congress enacted and the President signed an appropriations bill to fund government operations, albeit at a diminished level, for one day. See H.J. Res. 123. And, on November 20, 1995, Congress enacted and the President signed an appropriations bill to further fund such reduced government operations, but only through December 15, 1995. See H.J. Res. 122. In these bills, Congress decided to appropriate funds for backpay for the federal employees who worked during the appropriations lapse, and for federal employees who were furloughed for that period. Congress did not appropriate money to pay federal employees required to work during any future appropriations lapse, nor did Congress enact legislation authorizing the federal departments and agencies to obligate the government to pay federal employees required to work during such a future lapse.

On November 20, 1995, the Court held a scheduling conference in this case. The Court ordered plaintiffs to file their motion for summary judgment by November 27, 1995, and ordered the governmental defendants to file any motion to dismiss by that same date. The instant memorandum is filed in support of plaintiffs' motion for summary judgment.

## STATEMENT OF FACTS

A. 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 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).

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 added.) 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, § 9, cl. 7 ("No money shall be drawn from the Treasury but in consequence of appropriations made by law"); Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) ("An officer or employee of the United States Government or 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 the 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. 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. See H.J. Res. 108 (Sept. 29, 1995). 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 many departments and agencies of the federal government, including appropriations for the pay of most federal government employees, lapsed.

As already discussed, on November 20, 1995, Congress enacted and the President signed, a further CR that provides appropriations on a reduced basis for most departments and agencies of the federal government that are funded on an annual basis. That CR will expire at midnight on December 15, 1995. As things presently stand, there is a significant prospect of another appropriations lapse -- perhaps an extensive appropriations lapse -- occurring after December 15.

OMB requires federal departments and agencies to maintain contingency plans to deal with such appropriations lapses. See Aug. 22, 1995 OMB Memorandum, Agency Plans for Operations During Funding Hiatus (Exhibit F to Declaration of Mark Roth ("Roth Decl.")). OMB issues directives to departments and agencies that govern the elements of these plans, including directives concerning what workforce, if any, can be maintained during a lapse. Federal government departments and agencies submit their contingency plans to OMB for review and approval. Id. In their contingency plans, acting pursuant to OMB directives, 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. Chapter 53 of Title 5 of the United States Code sets the pay of federal government employees. Under section 5331, the pay of most 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 added.) In addition, under 5 U.S.C. §§ 5341, et seq., the pay of employees classified as prevailing wage 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.

Nonetheless, employees who were designated by the federal departments and agencies were required to work without pay (or be subject to discipline) during the 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 Roth Decl.<sup>1</sup> The Government at no time stated that it had entered into a legally enforceable obligation to pay plaintiffs and other employees for the work that they were required to do -- and, under the Appropriations Clause of Art. I of the Constitution, such a commitment could not be made by the Executive Branch in the absence of a duly enacted appropriation. Thus, the Executive Branch has gone no further than to state that it would "'not contest its legal obligation to make payment for such services, even in the absence of appropriations.'" Id. (quoting Nov. 17, 1981 Stockman Memorandum).<sup>2</sup>

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<sup>1</sup> Certain contingency plans state that employees who are required to work shall 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). The contingency plans are Exhibits to the Hobbie Decl.

<sup>2</sup> The Stockman Memorandum was an exhibit to the defendants' opposition to plaintiffs' motion for a TRO.

C. Title 31 U.S.C. section 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 added.)

In determining which employees perform emergency-related services under 31 U.S.C. section 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.

The defendant departments and agencies prepared their contingency plans based on the directions received from OMB.

D. On November 19, 1995, Congress enacted and the President signed an appropriations bill to fund government operations, albeit at a diminished level, for one day. And, on November 20, 1995, Congress enacted and the President signed an appropriations bill to further fund reduced government operations, but only between November 21 and December 15, 1995.

In that latter bill, Congress decided to appropriate backpay for the federal employees who worked during the appropriations lapse and for federal employees who were furloughed for that period. Congress did not appropriate money to pay federal employees required to work during any future appropriations lapse, nor did Congress enact legislation authorizing the federal departments and agencies to obligate the government to pay federal employees required to work during such a lapse.

## ARGUMENT

### I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE MERITS

#### A. Plaintiffs Cannot Be Required to Work Without Pay

1. Nothing is more basic in our society and in the system of laws that has been established to govern the employment relationship in this country than that individuals cannot be required to work without pay. Here employees are being told that they must work for some indefinite period without being paid and without any legally binding commitment that they will be paid at some time in the future. If such individuals refuse to work under these circumstances, they are subject to discipline including the possible loss of their jobs. If they work under these circumstances, they must forego the opportunity to earn money in other ways during the period of the appropriations lapse, or even to collect unemployment insurance.<sup>3</sup> No private employer in this country could force an employee to work under these circumstances.

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<sup>3</sup> See Exhibit A to this memorandum (Memorandum for Washington Metropolitan Area Employees of the Department of Justice, dated Nov. 17, 1995, re Filing a Claim for Unemployment Compensation at 2 ("It is our understanding that employees who have continued to work during the lapse in appropriations are not eligible for unemployment compensation, even though it may not be certain when they will be paid. Please note that unemployment compensation must be repaid if legislation is enacted to pay employees retroactively for the furlough").

Plaintiffs' position is the simple one that the federal government has no right to do that which other employers may not do: force employees to work without pay. Under current federal law, the individual plaintiffs and the plaintiff class cannot be required to work without pay (subject to discipline) during a period of lapsed appropriations. Defendants' requirement that plaintiffs do so violates the law in three separate respects:

First, 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 clearly violate section 5332.<sup>4</sup>

"[W]here an act of congress declares that an officer of the government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly, that compensation can neither be enlarged nor diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress". Goldsborough v. United States, 10 F. Cas. 560, 562 (Cir. Ct. D. Md. 1840). See also, e.g., Glavey v. United States, 182 U.S. 595, 601 (1901) (recognizing "general principle that when an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled during his incumbency to be paid the salary prescribed by statute");<sup>5</sup> United States v. Andrews, 240 U.S. 90, 96 (1916)

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<sup>4</sup> For the same reasons, defendants violate Title 5 U.S.C. §§ 5341 et seq., under which prevailing wage rate federal employees are entitled to the prevailing wage rate of their individual local wage areas.

<sup>5</sup> As the Supreme Court explained:

(continued...)

("public policy forbade giving any effect whatever to an attempt to deprive by unauthorized agreement made with an official, express or implied, under the guise of a condition or otherwise, of the right to pay given by the statute"); Cochnow v. United States, 248 U.S. 405, 407 (1919) ("the creation of offices and the assignment of their compensation is a legislative function"), modified, 249 U.S. 588 (1919); 2 Op. O.L.C. 322 (1977) ("Where Congress has established a minimum salary for a position, either directly or by including it under the General Schedule or some comparable salary schedule, it is unlawful for the employing agency to pay less than the established salary"); 26 Op. Comp. Gen. 956, 959 (1947) ("[w]here compensation is fixed for any office or position by or pursuant to statute and there exists no specific authority for the payment of an amount less than that specifically provided, I am of the opinion that the amount so fixed must be paid to the person filling the office or position and that there can be no valid waiver of all or any part of the salary so provided").

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<sup>5</sup>(...continued)

If it were held otherwise, the result would be that the Heads of Executive Departments could provide, in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective positions for such compensation as the Head of a Department under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the Executive Department of the Government. Public policy forbids the recognition of any such power as belonging to the Head of an Executive Department. . . . Congress may control the whole subject of salaries for public officers. . . . [Glavey, 182 U.S. at 609-610.]

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. The Fair Labor Standards Act is applicable to federal employees and contains no exception for employees who are required to work during an appropriations lapse. Defendants' requirement that plaintiffs and members of the plaintiff class work without pay during a period of lapsed appropriations (or be subject to discipline) therefore also violates the Fair Labor Standards Act. See 2 Op. O.L.C. 322 (1977) ("under the Fair Labor Standards Act, which was made applicable to the Federal Government in 1974, see 29 U.S.C. §§ 203(d) and (e)(2) (1975 Supp.), it is unlawful to pay less than the minimum wage to an employee of the United States Government, 29 U.S.C. § 206").

Third, 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 violated 5 U.S.C. § 5332, 5 U.S.C. §§ 5341 et seq., and the Fair Labor Standards Act. That requirement thus constituted unlawful agency action in violation of section 706(2)(A) of the Administrative Procedure Act. And, because there was no lawful basis for defendants' requirement, it was also arbitrary and capricious under the Act. See McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995); see also Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 (1979).

2. Defendants have defended their unlawful requirement by relying on Title 31 U.S.C.

§ 1342. That provision states:

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 preservation of property. [Emphasis added.]

Defendants maintain that section 1342 authorizes "agencies to employ -- and enter into obligations to compensate for -- emergency personal services." Defs. Brief in Opp. to TRO at

9. That argument is wrong for three reasons.

First, as we stated in our reply brief in support of the motion for a TRO, the only relevance of this point is theoretical. Even assuming that section 1342 authorizes agencies to enter into such obligations, they have not done so. Defendants have declined to state affirmatively that they have entered into a legally enforceable obligation to pay plaintiffs for the work performed during an appropriations lapse.<sup>6</sup>

Second, all that section 1342 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 by Congress. The statutory phrase "employ personal services" cannot be interpreted, as the defendants would have it, to authorize defendants to conscript plaintiffs into government service without any current right to compensation or lawful commitment to pay at some time in the future.

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<sup>6</sup> Defendants have stated only that they "will not contest [their] legal obligation to make payment for such services, even in the absence of appropriations." Exhibit E to Defs. Brief in Opp. to TRO and Exhibit E to Roth Decl.

The plain 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." That plain meaning clearly applies with respect to federal government employment. See 30 Op. Atty. Gen. 129 (1913) ("The word "employ," as used in all these statutes [including now section 1342], manifestly suggests a contract for services to which compensation is an incident"); 30 Op. Atty. Gen. 51 (1913) (stating, after discussing section 1342 [then 34 Stat. 48], "I do not mean by anything I have said herein to intimate that persons may be appointed without compensation to any position to which Congress has by law attached compensation").<sup>7</sup> And, in any event, if Congress had intended in section 1342 to authorize federal agencies to conscript employees into unpaid government service it would have made that extraordinary and controversial intent clear. Cf. Ruckleshaus v. Sierra Club, 463 U.S. 680, 685 (1983); IUD v. API, 448 U.S. 607, 644 (1980).

What legislative history there is fully supports plaintiffs' argument that the word "employ" cannot be interpreted to mean "conscript" or require to work without pay. That

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<sup>7</sup> See also cases cited supra which evince that when the executive branch of the federal government "employ[s]" an individual, the word bears its plain meaning. Cf. also Jenkins Trucking, Inc. v. Emmons, 212 So. 2d 55, 56 (Fla. Dist. Ct. App. 1968) ("In this context, 'employ' is not ambiguous; rather, it can have only its everyday meaning, the engaging of one person by another to perform a service for a reciprocal compensation") (citing City of Youngstown v. First Nat. Bank, 106 Ohio 563, 140 N.E. 176, 178 (1922), followed in Mullins v. Henderson, 75 Cal. App. 2d 117, 170 P.2d 118, 128 (1946)); Drucker v. State Bd. of Medical Examiners, 143 Cal. App. 2d 702, 711, 300 P.2d 197, 203 (1956) ("when used in respect to a servant or hired laborer, the term [employ] is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in ordinary affairs and business of life") (quoting Black's Law Dictionary 657 (3d ed.)); Bingham v. Scott, 177 Mass. 208, 209, 58 N.E. 687, 688 (1900) ("when used in connection with matters of ordinary business, . . . , [employ] means, we think, service rendered or to be rendered for compensation, and is nearly or quite synonymous with 'hire'").

history shows that the general purpose of section 1342 was to prevent the governmental departments from incurring financial obligations over and above those authorized in advance by Congress. As Attorney General George Wickersham explained in 1913, a predecessor statute - which had simply prohibited present expenditures and contracts for future payments in excess of appropriations -- had not accomplished the full result desired:

because deficiencies continued to occur and claims for extra services or for unauthorized services continued to be presented in such a way as to put Congress under a moral compulsion to meet them. Accordingly, Congress added to Revised Statutes, section 3679, . . . the prohibition of "obligations" as well as "contracts," and prohibited, in addition to the above [two] matters theretofore specified by the section, the following further matters:

(3) Acceptance of voluntary service (i.e., service which, though not performed under the prohibited contract or obligation, still carried with it a quasi-contractual or moral right to compensation and --

(4) Employment of personal service in excess of that authorized by law (i.e., especially additional work imposed upon clerks outside regular hours). [30 Op. Atty. Gen. 51 (1913) (emphasis added)]<sup>8</sup>

As Attorney General Wickersham explained, Congress clearly understood the prohibition on the "employ[ment of] personal services" to refer to employment in its regular and usual sense. Indeed, it was precisely because "employ[ment of] personal services" created an entitlement to compensation that such employment was prohibited when in excess of appropriations. As the

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<sup>8</sup> See 39 Cong. Rec., 58th Cong., 3d Sess. pt. 4, 3687 ("I call attention to this particular limitation because we seek by it to prevent deficiencies in the future. It is a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they cannot make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them; . . . we seek by this amendment to in some respect, at least, cure that abuse"); 30 Op. Atty. Gen. 51 ("the evil at which Congress was aiming was . . . the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress").

Court stated in Hagan v. United States, 671 F. 2d 1302, 1305 (Ct. Cl. 1982), "the thrust of the [predecessor to § 1342] is that Congress does not wish to honor pay claims founded on moral considerations or so-called quasi contracts for which pay is not available. Congress does not want employees to work or be worked in the expectation of having Congress retroactively honor their claims."

For example, in discussing the incorporation of a substantially identical clause in the Urgent Deficiency Act of May 1, 1884, the chair of the House conferees stated:

This provision was inserted by the House because, under a practice which has grown up, clerks in the Departments here and perhaps Government employees elsewhere, having been employed, as it may be said, after hours, have demanded additional compensation for service thus rendered. [15 Cong. Rec. 48th Cong., 1st Sess., pt. 4, 3410.]<sup>9</sup>

And, these House conferees added a predecessor emergency exception to the general prohibition on the employment of personal services in recognition of the fact that "there had been, and might again be, occasions when the life-saving organization of the Government might require the service of persons not regularly provided for by law; and for this reason the clause I have just quoted [the emergency exception] was added." Id. at 3411.

In sum, both the plain language and the legislative history provide that the term "employ personal services" in section 1342 means to hire in exchange for compensation. Thus, the emergency exception to the Anti-Deficiency Act authorizes the federal defendants only to

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<sup>9</sup> The House conferees proposed that the solution for the problem created by the predecessor to § 1342's prohibition on the employment of personal services in excess of appropriations was for the Executive Departments to be empowered to require employees to work additional hours without compensation when necessity required it. Id. At present, of course, the federal departments and agencies have no such legal authority.

"employ" plaintiffs' services during an emergency. It does not authorize defendants to require plaintiffs to work without pay, and that requirement violates the law.<sup>10</sup>

Third, even assuming <sup>15r</sup> arguendo that defendants had entered into an obligation to pay plaintiffs for their work, and that the Anti-Deficiency Act authorized defendants to do so, the Act so interpreted would violate the Appropriations Clause of the Constitution.<sup>11</sup> The Appropriations Clause provides that "No money shall be drawn from the Treasury but in consequence of appropriations made by law." U.S. Const. Art. I, § 9, cl. 7. This power is sweeping. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not . . . previously sanctioned by Congress." Reeside v. Walker, 52 U.S. 272, 190 (1850).<sup>12</sup>

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<sup>10</sup> Nothing in section 1342 provides for the payment of compensation (other than from appropriated funds) during an appropriations lapse. During such a lapse, by definition, no money has been appropriated to pay such compensation. And such lapses have no preestablished duration. An appropriations lapse could, if the Executive and Legislative Branches are at loggerheads, last for weeks or even months. Employees who are required to work while receiving no pay during such a lapse would be deprived of the prompt and regular payment of compensation which is for most employees necessary to the support of themselves and their families; and which is required by the governing statutes that we have discussed above.

<sup>11</sup> Indeed, if defendants at some point change their position and claim that they have entered into a legal obligation to pay plaintiffs for the work that they perform during an appropriations lapse pursuant to the Anti-Deficiency Act, plaintiffs will seek leave to amend their complaint to allege that the Anti-Deficiency Act so interpreted violates the Appropriations Clause of the Constitution. Plaintiffs forbore from alleging such a claim because the defendants have steadfastly avoided stating that they have entered into such an obligation. Instead, defendants carefully state only that they will not contest their legal obligation to pay plaintiffs at some later point for work performed during an appropriations lapse.

<sup>12</sup> See also The Federalist No. 58, at 359 (J. Madison) (C. Rossiter, ed. 1961):

(continued...)

The Clause forbids actions by executive and judicial officials that effectively result in the disbursement of public funds without a Congressional appropriation, because the Clause is a "valid reservation of Congressional control over funds in the Treasury" on "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government." Office of Personnel Management v. Richmond, 496 U.S. 414, 425 (1990). See id. at 427-28 (the Clause prohibits the use of equitable estoppel by the judiciary to compel benefit payments not authorized by Congress); Hart v. United States, 118 U.S. 62, 67 (1886) (the Clause prohibits the use of a Presidential pardon to order reparations without Congressional authorization); Knote v. United States, 95 U.S. 149, 154 (1877) ("however large . . . may be the power of pardon possessed by the President, . . . there is this limit to it, as there is to all his powers, it cannot touch moneys in the Treasury of the United States, except expressly authorized by Act of Congress"); Rochester Pure Waters District v. Environmental Protection Agency, 960 F.2d 180, 185 (D.C. Cir. 1992) (the Clause prohibits a federal court from overturning an appropriations rescission); Maryland Dept. of Human Resources v. U.S. Dept. of Agriculture, 976 F.2d 1462, 1482 (4th Cir. 1992) (the Clause prohibits a federal court from forbidding a federal agency to recoup food stamp overissuances).

It is an elemental principal of statutory interpretation that statutes should be interpreted to avoid their unconstitutionality. Thus, even if defendants claim that they have an obligation to pay plaintiffs for the work performed during an appropriations lapse and even if the

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<sup>12</sup>(...continued)

[T]he purse -- that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.

Anti-Deficiency Act were interpreted to authorize defendants to obligate themselves, the Act so interpreted would be unconstitutional. Our position is therefore that the Act should not be so interpreted.

For all of these reasons, defendants' requirement that plaintiffs work without pay and without any legally enforceable right to pay during an appropriations lapse violated the federal pay statutes cited above.

B. The OMB Directive Defining "Emergency" Situations Clearly Violates Section 1342 of Title 31

There is a second and independent reason why plaintiffs and others similarly situated cannot be required to continue to work in the absence of appropriations to pay their salaries: the Anti-Deficiency Act forbids government departments and agencies from accepting plaintiffs' services -- whether paid or "volunteer" -- in the absence of appropriations, unless the suspension of those employees' job functions would "imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342. Yet a directive issued by defendant OMB unlawfully instructs the departments and agencies of the government, including those that are defendants to this action, to conduct their operations during a lapse in appropriations in a manner that results -- contrary to the express language of section 1342 -- in continuation of the "ongoing, regular functions of government" 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."

Defendant OMB's unlawfully broad construction of the "emergency" provision of the Anti-Deficiency Act thus calls upon the defendant agencies to require that thousands of

employees, including the plaintiffs to this action,<sup>13</sup> continue to work in the absence of appropriations to pay them, even though they do not meet the "emergency" criterion of the statute.<sup>14</sup>

The relevant portion of the Anti-Deficiency 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.

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<sup>13</sup> As is evident from the declarations and position descriptions that were included in the Appendix to plaintiffs' TRO motion, the individual plaintiffs do not perform functions that fall within the "emergency" exception. Ronald Waltz 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 jobs involve 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.

<sup>14</sup> 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 violations of the terms of section 1342 provides the basis for the challenge to the agency actions as "contrary to law" within the meaning of the APA. McDonnell Douglas Corp. v. Widnall, *supra*, 57 F.3d at 1164; see also Chrysler Corp. v. Brown, *supra*, 441 U.S. at 318-19.

It is, accordingly, unlawful for the government to continue to employ workers not falling within this "emergency" exception.

Nonetheless, on August 22, 1995, OMB Director Alice Rivlin issued a directive to "heads of executive departments and agencies," attached to Roth Decl. as Exhibit F, instructing them to conform their plans for a lapse in appropriations to an attached legal opinion provided to Rivlin on August 16 by Assistant Attorney General Walter Dellinger of the Office of Legal Counsel. Government Operations in the Event of a Lapse in Appropriations, Op. Off. Legal Counsel (Aug. 1995) (hereafter "Dellinger Op."). As we demonstrate in what follows, that opinion construes section 1342 in a manner that cannot be squared with either its plain language or its legislative history. Indeed, the Dellinger opinion, which OMB directed all executive departments and agencies to follow, reads the emergency provision so broadly as to permit, in large measure, the "ongoing, regular functions of government" to continue in the absence of appropriations -- which is precisely what section 1342 prohibits. Accordingly, the OMB directive is contrary to law.

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. 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 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.").]

Attorney General Civiletti began his analysis of the "emergency" exception of what is now section 1342 by acknowledging that under the statute, as enacted in 1884, "Congress initially contemplated only a very narrow exception . . . , to be employed only in cases of dire necessity." Id. at 12 (emphasis added).<sup>15</sup> His determination that the exception should nonetheless be construed far more broadly, as set forth above, was based on two considerations.

First, the Attorney General noted that Congress had changed the wording of the statute when its modern version was enacted in 1950. Where originally the statute had referred to "cases of sudden emergency involving the loss of human life or the destruction of property," the 1950 version deleted the word "sudden," changed "loss of human life" to "safety of human life," and substituted "protection of property" for "destruction of property." As the Attorney General acknowledged, the intent of these changes is not explained in the legislative history. Id. at 12.

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<sup>15</sup> That conclusion finds support not only in the language of the statute, but also in the early construction given it in the opinions of the Comptroller General, which uniformly construe the emergency exception narrowly. See Voluntary Services in Emergencies, 2 Comp. Gen. 799 (June 12, 1923) (action of vessel in changing course in response to distress call of troop carrier involved an emergency); Voluntary Services -- Towing of Disabled Navy Airplane, 10 Comp. Gen. 248 (Dec. 2, 1930) (action of motorboat in towing downed Navy airplane to shore did not involve emergency where the sea was not rough and there was no danger to the airplane or its personnel); Bonds -- Acting Postmasters -- Volunteers, 13 Comp. Gen. 108 (Oct. 17, 1933) (no emergency permitted compensation of a substitute upon death of postmaster at post office that had no other employees); Acceptance of Voluntary Service, 12 Comp. Gen. 155 (Sept. 21, 1905) (diphtheria epidemic requiring disinfection of life-saving station constituted emergency).

Nonetheless, he "infer[red] from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment." Id.

At the time Attorney General Civiletti wrote his opinion, that inference was, at best, speculative. (As we show below, the 1990 amendment removes all bases for that speculation.) Surely the inference could not rest on the change from "emergency involving the loss of human life or the destruction of property" to "emergency involving the safety of human life or the protection of property," for this amendment is merely stylistic; it simply changes the perspective of the phrase from post facto (human life has been lost or property has been destroyed) to pre facto (the safety of human life or the protection of property is at issue). Both versions mean the same thing. Nor could the change from "sudden emergency" to "emergency" justify the Attorney General's inference that a significant broadening of the emergency provision was intended. The most obvious explanation for that change -- and surely the most appropriate interpretation in the absence of any explanation in the legislative history that a substantive change was intended -- is simply the redundancy of the term "sudden emergency." As Assistant Attorney General Dellinger observed in his 1995 memorandum, the term "emergency" is defined as "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action." Dellinger Op. at 9 n.7 (emphasis added) (quoting Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987)). The concept of suddenness, like that of imminence, "is an idea that is already present in the term 'emergency' itself." Id. at 8.

The second basis for Attorney General Civiletti's broad construction of the emergency provision was 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. But whatever force that analogy may have had in 1981, it has been dissipated by the 1990 amendment to section 1342.

The 1990 amendment added the following definition to the existing language of section 1342:

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. (Emphasis added.)

As the legislative history of the amendment makes clear, it was intended to prevent what Congress believed to be an 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 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 Attorney General Civiletti's reading of the emergency exception, Assistant Attorney General Dellinger's August 1995 memorandum to OMB, to which OMB directed that all executive departments and agencies conform, opined that "the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General's earlier analyses." Dellinger Op. at 2. Indeed, the Dellinger analysis gave so little weight to the 1990 amendment as to insist that "we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment." *Id.* at 8 (emphasis added). No more

need be done, concluded the memorandum, than to modify the Civiletti opinion's 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," to read "in some significant degree." Id. (emphasis added).<sup>16</sup>

Thus, the OMB's directive that is at issue here is predicated on the 1981 Civiletti memorandum that was disapproved by Congress in 1990, with only a single change that was not

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<sup>16</sup> Assistant Attorney General Dellinger's broad interpretation of the emergency exception also rested in part on his "assumption that the private economy will continue operating during a lapse in appropriations." Dellinger Op. at 5. That assumption is critical to a determination of whether numerous government employees, such as air traffic controllers or meat inspectors, qualify as performing functions "involving the safety of human life or the protection of property." Thus, as Dellinger noted, "air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded." Id. The Dellinger opinion adopted "the practice of past administrations . . . to assume the continued operation of the private economy, so that air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of § 1342." Id.

Yet that assumption is not only a classic self-fulfilling prophecy -- clearly the airlines will continue to operate only if the air-traffic control towers are staffed -- but it is flatly contradicted by Dellinger's own analysis. Earlier in his memorandum, Dellinger stated:

Were the federal government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation's airports would be closed and commercial air travel and transport would be brought to a standstill. . . . Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. [Id. at 2 (emphasis added).]

In addition, it has long been established that the term "property," as used in section 1342, refers to "property in which the Government has an immediate interest or in connection with which it has some duty to perform." Voluntary Services, 9 Comp. Gen. 182, 185 (Nov. 8, 1902). Thus, there is no merit to the suggestion that employees can be designated as emergency workers whenever suspension of their functions would result in a threat to the property of private businesses. See Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order at 23 (discussing the "devastating impact on certain sectors of the economy that rely almost exclusively on coins," which would result from a closing of the Mint).

designed to change the conduct of the departments and agencies to which the directive was addressed -- i.e., not to change the conduct that Congress in 1990 intended to change. Indeed, press reports have indicated that only about 800,000 of some 2.1 million federal employees -- only about 38 percent -- were furloughed during the November 14-19 lapse in appropriations. E.g., Barr, Government Shutdown Could Idle 800,000, Washington Post, Nov. 9, 1995, at A21. Thus, to a large extent, government continued its "ongoing, regular functions," notwithstanding the command of section 1342.

That conclusion is supported, as well, by a cursory review of the contingency plans filed with -- and approved by -- OMB, see Exhibits to Hobbie Decl. ¶ 4, pursuant to which, for example, the U.S. Mint plans to maintain full operations during a lapse in appropriations in order to avoid a coin shortage and its attendant disruption of business,<sup>17</sup> and the National Gallery

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<sup>17</sup> The Mint, which determined that all of its functions would be "exempt from shutdown," explained that decision as follows in the plan it submitted to OMB:

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 businesses 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.

(continued...)

of Art plans to continue the employment of "art registrars, art movers and art preservers" to "accept delivery/prepare for shipment of and install art." National Gallery of Art, Smithsonian Contingency Plan at 2 (App. 15). Indeed, the agency plans prepared pursuant to the unlawful OMB directive and submitted to OMB designate as "essential,"<sup>18</sup> and therefore as required to work during an appropriations lapse, thousands of employees for whom it is impossible to discern the "imminent" threat to life or property on which such designations are to be based.<sup>19</sup>

In sum, OMB's unlawful directive leads directly to what Congress intended through its 1990 amendment to forbid: maintaining the "ongoing, regular functions of government," 31 U.S.C. § 1342,<sup>20</sup> notwithstanding the absence of appropriations to pay the employees required to carry out those functions. We do not, of course, mean to suggest that these routine functions

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<sup>17</sup>(...continued)

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, Treasury Department Contingency Plan (App. 8).]

<sup>18</sup> The widespread use of the expansive term "essential" to describe those employees who qualified under the emergency exception is indicative of the extent to which the OMB's unlawful directive set agency practice free from any mooring in the language of section 1342. "Essential" is no part of the statutory formulation.

<sup>19</sup> While our contention as to the unlawfulness of the OMB directive on which these agency plans were based is grounded first and foremost in the terms of that directive itself (including the Dellinger memorandum which it directs the agencies to follow), the shutdown plans adopted by these agencies and approved by OMB provide additional illumination of the extent to which the OMB directive is contrary to the terms of section 1342.

<sup>20</sup> With respect to a number of the defendant departments and agencies, the proportion of the workforce that was 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 -- were designated for emergency-related duty. See Department of Justice contingency plan (App. 6).

of government are not important -- or even "essential." But that a function is important, or "essential," 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," 31 U.S.C. § 1342 (emphasis added), may the emergency exception be invoked. For this reason as well, defendants cannot lawfully require plaintiffs and others similarly situated to work without pay in the absence of appropriations to pay their salaries.

## II. THE DOCTRINES OF DEFERENCE, JUSTICIABILITY, AND STANDING DO NOT BAR THE RELIEF PLAINTIFFS SEEK

What we have said to this point is sufficient to demonstrate plaintiffs' entitlement to summary judgment and to the declaratory judgment they seek. In view of the compressed briefing schedule, however, and in light of concerns the Court and defendants have already expressed with regard to issues such as deference to administrative construction, justiciability, and standing, we address in this Part the contentions we anticipate defendants will raise with regard to those issues. We will, of course, respond more specifically in our reply brief to whatever arguments defendants may advance on these or other non-merits issues.

### A. No Deference Is Due Defendants' Construction Of The Anti-Deficiency Act or the Federal Pay Statutes

It is important, at the outset, to make plain that any claim of deference for defendants' construction of the Anti-Deficiency Act or of the federal pay statutes would be misplaced. Both questions presented by plaintiffs' motion for summary judgment present pure questions of law for this Court to decide.

Defendants' briefing at the TRO stage suggests that they may argue that the Court should defer to their construction of the statute under the doctrine of Chevron U.S.A., Inc. v. Natural

Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron established the following rule of statutory construction:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [*Id.* at 842-43.]

For multiple reasons, the Chevron line of cases does not help defendants. As we show in the merits portion of this brief, defendants' construction of the Anti-Deficiency Act and the other statutes at issue is so far off the mark that it could not be considered a "permissible" or "reasonable" construction, even if Chevron deference were otherwise appropriate. In this Part, however, we address a more fundamental point -- that the Chevron analysis does not apply here, and thus no deference is due defendants' interpretation of the Anti-Deficiency Act or the other statutes at issue.

In the first instance, the question whether federal employees may be required to work without pay is clearly a pure question of statutory law not committed to the interpretation of any agency. Either such a requirement violates the federal statutes we have cited or it does not. Similarly, nothing in 31 U.S.C. § 1342 entrusts construction of the "emergency" exception to any agency. The statute sets forth a clear, simple, and self-contained mandate and does not delegate to any "expert" agency the role of amplifying or filling in the interstices of that mandate.

There are, in short, two flaws in any Chevron argument defendants could advance: (1) interpretation of the legal issues raised by this case has not been entrusted to any agency; and (2) those issues involve pure questions of law that are the province of the judiciary.

1. In the first place, it is clear that no deference is due defendants' interpretation of the Anti-Deficiency Act (or any other relevant statute) because under Chevron deference is accorded only to an agency's construction of a "statute which it administers." Id. at 842. As the Supreme Court has explained, "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." Department of the Treasury v. FLRA, 494 U.S. 922, 933 (1990) (emphasis added). Thus, "[a] precondition to deference under Chevron is a congressional delegation of administrative authority." Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990). Therefore, "[b]efore [a court] may defer to an agency's construction of a statute, [it] must find either explicit or implicit evidence of congressional intent to delegate interpretive authority." Linemaster Switch Corp. v. United States Environmental Protection Agency, 938 F.2d 1299, 1303 (D.C. Cir. 1991); see also City of Kansas City v. Department of Housing & Urban Dev., 923 F.2d 188, 191-92 (D.C. Cir. 1991) ("[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of Chevron."). Such "intent to delegate" cannot be presumed simply from the statute's failure to negate a claimed administrative power of interpretation. Railway Labor Exec.

Ass'n v. NMB, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), amended, 38 F.3d 1224 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1392 (1995).<sup>21</sup>

Thus, it is well established that the courts are not to defer to an agency interpretation of a statute that has not been entrusted to its administration. New Mexico v. Watkins, 969 F.2d 1122, 1131-32 (D.C. Cir. 1992) (per curiam); Illinois National Guard v. FLRA, 854 F.2d 1396, 1400 (D.C. Cir. 1988).<sup>22</sup> And that is necessarily the case when a statute is broadly addressed to all agencies; in that case the courts will not defer to any agency's interpretation of the statute. Association of American Physicians v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993) (Federal Advisory Committee Act); FLRA v. U.S. Dep't of the Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989) (Privacy Act and Freedom of Information Act ("FOIA")), cert. denied, 493 U.S. 1055 (1990); Reporters Committee v. U.S. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987) (FOIA), rev'd on other grounds, 489 U.S. 749 (1989).

For these reasons, there is no basis for according any deference to defendants' construction of the Anti-Deficiency Act or any of the other statutes at issue here. That statute has not been entrusted to the administration of any agency.<sup>23</sup> Rather, it is a general statute that

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<sup>21</sup> As Chief Judge Edwards noted for the en banc D.C. Circuit, "Were courts to presume a delegation of power [to interpret a statute] absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well." 29 F.3d at 671 (emphasis in original).

<sup>22</sup> Even when an agency is construing its governing statute, it is entitled to no deference when the issue before it requires interpretation of the interaction between that statute and another, as to which it has no administrative authority. Johnson v. U.S. Railroad Retirement Board, 969 F.2d 1082, 1088 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1842 (1993).

<sup>23</sup> While the Department of Justice is, of course, authorized to bring criminal prosecutions for willful violations of the Anti-Deficiency Act, 31 U.S.C. § 1350, that

(continued...)

"applies to all government agencies." Reporters Committee, 816 F.2d at 734. It imposes upon all government departments and agencies the prohibitions against involving the government in obligations in advance of appropriations, and against accepting voluntary services or employing personal services except in emergency situations.<sup>24</sup> As no particular agency is charged with administering this statute, there is no basis for any deference to defendants' construction of the statute as authorizing them to require federal employees to continue to work without pay in the absence of appropriations, or to their construction of the Fair Labor Standards Act or any other statute that is relevant to this case.<sup>25</sup> Nor is there any basis for deference to the interpretation by OMB or the Justice Department of the "emergency" provision of section 1342.

Indeed, in the instant case deference to agency constructions of the Anti-Deficiency Act would be particularly inappropriate, as the very purpose of that statute was to preserve

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<sup>23</sup>(...continued)

prosecutorial authority provides no basis for deference:

Where Congress does not give an agency authority to determine (usually formally) the interpretation of a statute in the first instance and instead gives the agency authority only to bring the question to a federal court as the "prosecutor," deference to the agency's interpretation is inappropriate. [Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995).]

See also United States v. Western Electric Co., 900 F.2d 283, 297 (D.C. Cir.) (per curiam), cert. denied, 498 U.S. 911 (1990).

<sup>24</sup> Both section 1341 and section 1342 are cast in the following form: "An officer or employee of the United States Government or of the District of Columbia government may not . . . ."

<sup>25</sup> Of course, to the extent defendants' construction of the relevant statutes as authorizing them to conscript employees to work without pay during an appropriations hiatus has been articulated only as their litigating position in this case, it is entitled to no deference. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988).

Congress' constitutional authority over appropriations by reigning in the departments and agencies, which consistently tended to place Congress in the position of having little choice but to appropriate funds for obligations the agencies had incurred. See Fenster & Volz, The Antideficiency Act: Constitutional Control Gone Astray, 11 Public Contract L.J. 155, 158-62 (1979). Thus, it is inconceivable that Congress intended that the courts defer to the agencies' own construction of that statute. Cf. Reporters Committee, 816 F.2d at 734 (no deference appropriate where the purpose of FOIA, disclosure of government-held information, is in tension with the agencies' natural reluctance to part with that information).

For these reasons, Chevron and its progeny have no application to this case. Instead, the Court must construe the Anti-Deficiency Act and other relevant statutes de novo.

b. Even if Chevron deference were otherwise applicable here, there would still be no basis for such deference with regard to the issues presented by this Motion for Summary Judgment, because that motion raises only "pure question[s] of statutory construction for the courts to decide." INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987). Courts are to decide those questions by employing the "traditional tools of statutory construction." Id.

Chevron deference to "reasonable" agency interpretations of statutes the agency is charged with administering is applicable only in a gap-filling manner with respect to questions about which Congress did not have an intent. As the Court has explained:

**The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. [Id. at 447-48 (quoting Chevron, 467 U.S. at 843 n.9).]**

If these traditional tools permit the Court to ascertain congressional intent, then "there is no gap for the agency to fill." Railway Labor Exec. Ass'n v. NMB, 29 F.3d at 671.

That is the case here. As we demonstrated in the merits portion of this brief, the plain language and legislative history of the Anti-Deficiency Act and the various pay statutes we have cited leave no "gap" for the agencies to fill. The question whether the government can conscript its employees to work without pay during a lapse in appropriations raises a purely legal issue of statutory construction. The language of the pay statutes and the Fair Labor Standards Act impose a clear duty to compensate federal employees for their work. Those statutes leave no room for agency judgment as to whether employees should be compensated. Similarly, the Anti-Deficiency Act, as amended in 1990, defines "emergency" at length and with specificity. Again no gap is left for any government agency to fill with respect to this statutory definition. The question whether the OMB directive misconstrues the statute and is thus contrary to law raises a purely legal question that falls within judicial authority to decide.

Accordingly, the legal issues presented by this motion are of the type as to which "[t]he judiciary is the final authority." Chevron, 467 U.S. at 843 n.9. Even if Chevron deference were otherwise applicable here -- which it is not -- there would be no ground for deferring to defendants' interpretation of the statutes at issue.

**B. This Is An Appropriate Case for Judicial Review**

Defendants have in the past contended that this case is not appropriate for judicial review, because it would require the Court to intrude in an area that is the exclusive domain of the political branches. Nothing could be further from the truth.

The Supreme Court spoke directly to, and rejected, a virtually identical argument in an equally delicate context -- that of potential interference with the executive's control of foreign

relations. See Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986). In that case, several wildlife conservation groups brought an action for declaratory and injunctive relief. The plaintiffs alleged that, pursuant to an Executive Agreement between the United States and Japan, the Secretary of Commerce had breached his statutory duties with respect to the enforcement of international whaling quotas. In the Supreme Court, petitioners, who were Japanese trade groups, argued that the case was "unsuitable for judicial review because [it] involve[d] foreign relations and that a federal court, therefore, lacks the judicial power to command the Secretary of Commerce, an executive branch official, to dishonor and repudiate an international agreement." Id. at 229. Petitioners contended that the danger of "embarrassment from multifarious pronouncements by various departments on one question" bar[red] any judicial resolution of the instant controversy." Id. (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

The Court flatly rejected the argument. First, it observed that "Baker carefully pointed out that not every matter touching on politics is a political question." Japan Whaling Ass'n, 478 U.S. at 229. The political question doctrine excludes from judicial review only "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Id. at 230.

In contrast, the Supreme Court held, the Judiciary plainly has:

the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. [Id. (emphasis added).]

In language of critical importance here, the Court then stated:

We are cognizant of the interplay between these Amendments and the conduct of the Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. [Id. (emphasis added).]

The Court of Appeals for this Circuit, too, has recently rejected defendants' argument that this Court should refrain from fulfilling its constitutional "responsibility" simply because a case involves a matter of concern to the political branches. In Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991), a Gulf War soldier challenged the authority of the Food and Drug Administration ("FDA") to promulgate Rule 23(d) which, for the period of the Gulf War, allowed the Department of Defense to use two experimental drug products on soldiers without obtaining their informed consent. The District Court indicated that "[o]nly the electoral branches -- Congress and the President -- . . . are competent authorities in matters of military discipline and strategy" and held that FDA's Rule 23(d) was not reviewable.

The Court of Appeals reversed. The court stated that "[i]n contrast to the turbulent background of this litigation, Doe's facial challenge to Rule 23(d) is a straightforward one with a commonplace cast. Doe contends that, in promulgating Rule 23(d), the FDA stepped outside its statutory authority." Id. at 1380. Thus, the Court held:

The FDA's Rule 23(d), we recognize, unquestionably involves a military matter: it allows the FDA to grant the Department of Defense a waiver of informed consent requirements in certain battlefield or combat-related situations. But the judgment Doe asks the court to make does not entail judicial review of the existence of a military exigency. Rather, Doe's facial attack asks simply whether the law that governs FDA action permits the measure which the non-military agency has taken. The question thus presented is thus meet for judicial review. . . . [Id. at 1381 (emphasis added).]

In a second decision relevant here, the Court of Appeals refused to refrain from hearing a case in which a member of Congress challenged the provisions of the Ethics Reform Act. See Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994). That Act set up a mechanism for annual cost of living adjustments for members of Congress and established a quadrennial pay raise system. The Court held that judicial review of such a claim was plainly appropriate:

Mr. Boehner's claim that the Ethics Reform Act unconstitutionally interferes with the amount and timing of his pay is a straightforward challenge to the constitutionality of a public law that directly affects his private interest as a government employee. He raises no "dispute properly within the domain of the legislative branch," but a case or controversy quintessentially within the judicial power of the United States. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department to say what the law is"). . . . Accordingly, it would be an abuse of our equitable discretion not to hear Mr. Boehner's case. [*Id.* at 160-61 (emphasis added) (citations omitted).]

Like the plaintiffs in Japan Whaling Ass'n, Doe v. Sullivan, and Boehner v. Anderson, the plaintiffs here are asking the Court to construe legal standards set in statutes and to declare their meaning. Judicial review was conceived and established for this very purpose. The fact that this case concerns a subject that is of national interest and arises in a politically charged context does not diminish the Court's responsibility "to say what the law is," Marbury v. Madison, 5 U.S. at 177. See Baker v. Carr, 369 U.S. at 217 ("[t]he doctrine [that precludes judicial review] is one of 'political questions,' not one of 'political cases'").

### C. Plaintiffs Have Standing To Raise These Claims

Standing to sue -- that is, the existence of injury in fact -- is determined at the time an action is filed. See Federal Express Corp. v. ALPA, 67 F.3d 961 (D.C. Cir. 1995) ("[t]he question of justiciability must be decided on the facts in existence at the time the suit was filed") (citing Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988)).

At the time plaintiffs filed this action and continuing through today, there were in effect OMB directives to the other defendant departments and agencies. Pursuant to those unlawful directives, plaintiffs were required by force of discipline to work without pay during an appropriations lapse -- no matter how long that lapse would have continued -- and indeed to work without any legally enforceable right to compensation for that work after the period of lapse has ended. By these directives and requirements, plaintiffs suffered a direct injury -- a direct violation of their statutory rights under the federal wage statutes, including section 5332 and the Fair Labor Standards Act. See supra Part I.A.1. Plaintiffs were thus clearly aggrieved by defendants' unlawful directives and requirements and had standing to challenge them.

In addition, as an incident of defendants' unlawful actions challenged herein, members of the plaintiff class suffered a second, direct injury that is an independent source of standing to challenge defendants' unlawful acts. For employees designated as performing emergency-related services and required to work during the appropriations lapse, the government cancelled any right to take leave during the lapse -- including leave previously requested and granted. See Roth Decl. ¶¶ 2-7 and Exhibits thereto. Federal government employees who were required to work during the appropriations lapse and who had intended to take and been granted leave or who wished to take leave that would routinely have been granted were not permitted to do so during the lapse. See, e.g., Declaration of Arthur B. Egger, Jr. (declarant's approved leave to visit his mother who is terminally ill with cancer was cancelled; declarant reported to work); Declaration of James L. Turner (approved leave for court appearance cancelled; declarant reported to work); Declaration of Renee Lange (approved leave to travel to California cancelled while declarant was already in California)(all attached to Motion for Summary Judgment). This blanket cancellation of any right to take leave for employees required to work during the lapse

caused a direct and irreparable injury to any members of the plaintiff class who wished to take leave during this period. Neither another leave day nor pay can make an individual whole for the opportunities lost as a result of the denial of leave for a specified event or day.

Both of these injuries to plaintiffs and the plaintiff class are direct and immediate. With respect to the first, it is well established that the injury required by Article III "can be found in the invasion of a statutory right created by Congress." Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1326 & n.50 (D.C. Cir. 1986). See also Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). Here, as noted, defendants' requirement that plaintiffs work without pay and without any legally enforceable right to pay is an immediate and direct invasion of plaintiffs' legally protected rights under the federal pay statutes. Under the law of the Supreme Court and of this Circuit, plaintiffs therefore have standing to challenge defendants' unlawful directives.

For example, in Redden v. ICC, 956 F.2d 302, 306-07 (D.C. Cir. 1992), the ICC granted to CSX an abandonment exemption that would apply only if CSX sold its rail line to a "carrier." Employees of CSX filed suit against the ICC claiming that the abandonment exemption provided them with less protection than the law required. The court of appeals held that the CSX employees had standing to bring the suit because they alleged a direct injury as a result of the ICC's challenged order, despite the fact that CSX had not met, and might never have met, the conditions imposed on the exemption -- sale of the line to a carrier. See id. at 307 (observing that "if a non-carrier should acquire the line, then . . . the disabling effect of the exemption will have turned out to be meaningless" and holding that "this prospect does not render the employees' injury too speculative"). See also Simmons v. ICC, 934 F.2d 363, 367 (D.C. Cir. 1991) (finding that employees had standing to challenge the conditions placed on a sale although the injury could occur only if the buyer of a line were a "carrier" and the

prospective buyer was not a non-carrier; the court stated that "the 'possibility' of the buyer being deemed a carrier . . . though seemingly unlikely under recent precedent, was great enough"). Cf. Boehner v. Anderson, 30 F.3d 156, 160 (D.C. Cir. 1994) (a government employee "clearly has standing to challenge the operation of a law that directly determines his rate of pay").

The existence of plaintiffs' injury (and hence plaintiffs' standing) -- both the result of defendants' unlawful directives and requirements -- is not called into question by the pendency of legislation that may, if enacted, ultimately provide a remedy for that injury. If, as defendants suggest, pending legislation vitiates a plaintiff's injury in fact, it would also render that case moot. But that is not the law. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 53 n.15 (1980) ("We are advised that pending in the Florida Legislature at the present time are [two bills]; that both bills leave the substance of §§ 659.141(1) and 660.10 intact for the express purpose of not mooting out pending litigation; and that action on these bill will be taken before the legislature adjourns. As of the date this opinion is filed, §§ 659.141(1) and 660.10 remain in effect so that the case has not become moot, whatever the ultimate disposition of the pending bills") (emphasis added); Student Press Law Center v. Alexander, 778 F. Supp. 1227, 1231 (D.D.C. 1991) ("Defendants suggest that this action has become moot because the House of Representatives and the Senate both have approved legislation altering the FERPA to exclude all law enforcement records. 'All that now remains is for the final measure to be reported out of conference committee, approved by both houses, and signed by the President.' (Defendants' Supp. Memorandum at 1.) Defendants' argument is patently wrong. Until the proposed measure actually becomes law, this action remains a live case or controversy.") (Emphasis added); Atlantic Coast Demo. v. Board of Chosen Freeholders, 893 F. Supp. 301, 308 (D.N.J. 1995) ("defendants note that the United States Senate has recently passed a bill that would

retroactively authorize municipal waste flow regulations, and that a similar bill was recently reported to the House floor by the Commerce Committee. . . . Because Congress may affirmatively authorize states to regulate interstate commerce, passage of this bill would resolve the controversy over the New Jersey waste flow regulations. Nonetheless, congressional bills, even those overwhelmingly passed by one house of Congress, often stall in the legislative process, and defendants have not cited the Court to any authority that it should abstain from granting preliminary injunctive relief based on the contingency that Congress might enact the law at issue".<sup>26</sup>

Plaintiffs are plainly injured by defendants' unlawful directives and requirements which invade plaintiffs' protected rights under the federal pay statutes. This injury gives rise to standing.<sup>27</sup>

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<sup>26</sup> We will refute in our response to defendants' brief in support of its motion to dismiss defendants' equally incorrect argument that the passage of another temporary CR moots this case.

<sup>27</sup> In opposing plaintiffs' motion for a TRO, defendants argued that plaintiffs' claim that they were injured by defendants' unlawful requirement that they work without pay was undermined by the Judgment Fund. Specifically, defendants took the position that, if Congress refused to appropriate money to pay plaintiffs, plaintiffs could recover under that Act. This argument is incorrect.

Section 1304 of Title 31 appropriates "necessary amounts to pay final judgments, awards, compromise settlements, and interests and costs specified in the judgments or otherwise authorized by law" when three conditions are satisfied:

(i) payment is not otherwise provided for; (ii) payment is certified by the Comptroller General; and (iii) the judgment, award, or settlement is payable under a specified statutory provision.

There are several barriers to any executive agency commitment to plaintiffs that they may recover any earned compensation from the Judgment Fund. For example, the Comptroller General, who is an officer of the legislative branch, has held that payment from the Judgment Fund is inappropriate where Congress has expressly or impliedly indicated its intent to limit appropriations to a specified amount. See Matter of Monies for Land Condemnation, 54 Comp. Gen. 799, 800 (1975) (holding that "inasmuch as the Congress

(continued...)

The second injury to the plaintiff class, too, is direct and immediate. The cancellation of all leave -- including leave previously approved -- directly injures employees who are required to alter their personal plans as a result of the government's unlawful directives and conduct. There is no requirement that standing injury be economic, *see, e.g., Japan Trade Assoc. v. American Cetacean Society, supra; Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (injury to "recreational, aesthetic, scientific, and educational interests of members" creates standing), *cert. denied*, 434 U.S. 1031 (1978). The injury to federal government employees that is caused by the blanket

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<sup>27</sup>(...continued)

established a specific dollar limitation on the amount which could be appropriated," no funds in excess of that appropriation could be used); *Matter of: To the Honorable Strom Thurmond*, 66 Comp. Gen. 158, 160 (1986) (holding that Judgment Fund is not available when "some appropriation or fund under the control of the agency [is] legally available to pay the judgment" regardless of the "sufficiency of [such] funds"); *id.* at 161 (reasoning that obligations resulting from normal agency activities "should be funded like other program activity" through "the appropriations process").

It is unclear whether, in defendants' view, members of the plaintiff class could obtain payment of their salaries during the period when appropriations are lapsed -- at the times when compensation would be paid in the regular course -- by recourse to the Judgment Fund. The duration of any such lapse is, of course, indeterminate -- and the lapse of November 14-19 was certainly of indeterminate length at the time this action was brought. If it is defendants' position that plaintiffs cannot obtain payment of their compensation by this means during such a period of indeterminate duration, the Judgment Fund could not save plaintiffs from having suffered injury, and could not prevent them from having standing to bring this lawsuit. If, on the other hand, it is defendants' position that plaintiffs could receive their pay on a regular basis during a lapse in appropriations, the result would be that continuing government operations -- for which Congress had appropriated no monies -- would be funded through the Judgment Fund. Such a result would not only lead, as the authorities cited in the preceding paragraph make clear, to a violation of the statute authorizing the Judgment Fund, but to grave and obvious constitutional problems under the Appropriations Clause. The Judgment Fund is not an appropriate mechanism for funding the basic operations of the federal government.

cancellation of any right to take leave during an appropriations lapse by itself gives rise to standing.<sup>28</sup>

### CONCLUSION

For the reasons set forth in this memorandum, plaintiffs respectfully request that the Court grant summary judgment to plaintiffs and issue a declaration that defendants' requirement that plaintiffs work without pay during an appropriations lapse is unlawful. In addition, plaintiffs request that the Court declare that defendant OMB's directive to federal departments

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<sup>28</sup> For the reasons laid out in text, the cases cited to the parties by the Court offer no comfort to defendants. Neither involves the government's issuance of unlawful directives that directly invade the plaintiff's protected statutory rights. See Marathon Oil Co. v. FERC, No. 94-1698, 1995 WL 627762 (D.C. Cir. Oct. 27, 1995) (holding that petitioners lacked standing to challenge a FERC action where that action would have no necessary legal significance bearing on the IRS' decision whether to grant [petitioners] the tax credit they sought); T&S Products, Inc. v. U.S. Postal Service, No. 94-5219, 1995 WL 627752 (D.C. Cir. Oct. 27, 1995) (holding that T&S lacked standing to challenge the Postal Service's sole source program because it "only involved postal areas where T&S has no existing contracts and because progression of the program to areas where T&S does have contracts is contingent upon the results of a customer satisfaction survey that has yet to be completed").

and agencies incorporating the Dellinger Opinion of August 1995 violates the emergency exception to the Anti-Deficiency Act.

Respectfully submitted,

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Attorneys for Plaintiffs

November 27, 1995

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. )  
 )

---

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), plaintiffs move for summary judgment in the above-captioned case. The grounds for this motion, which are more fully set forth in plaintiffs' accompanying memorandum of points and authorities, as well as the supporting declarations, and exhibits, are that there is no dispute as to any material fact and plaintiffs are entitled to judgment as a matter of law. Specifically, plaintiffs state as follows:

1. On November 13, 1995, at midnight, Congressional appropriations for a substantial number of federal government operations lapsed. Approximately 800,000 federal government employees were furloughed, but approximately 1,000,000 civilian employees who were designated as performing emergency services involving the safety of human life and the protection of property were not furloughed.

2. The Office of Management and Budget ("OMB") and the government departments and agencies required the latter group of employees to work without pay during the appropriations lapse -- and without any legally enforceable right to be paid for that period -- or be subject to discipline if they refused to work.

3. Defendants' requirement that plaintiffs work without pay during the period of an appropriations lapse violates the pay provisions of chapter 53 of Title 5 of the U.S. Code, the Fair Labor Standards Act, and section 706(2)(A) of the Administrative Procedure Act.

4. In the alternative, defendant OMB's directive that instructs the defendant departments and agencies which employees may be designated as employees performing emergency-related services during an appropriations lapse violates section 1342 of Title 31 of the U.S. Code.

WHEREFORE, plaintiffs respectfully request that the Court grant their motion for summary judgment and enter the proposed order that is attached.

Respectfully submitted,



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Attorneys for Plaintiffs

November 27, 1995

## DECLARATION OF MARK D. ROTH

Mark. D. Roth, under penalty of perjury, declares as follows:

1. My name is Mark Roth. I presently hold the position of General Counsel for the American Federation of Government Employees ("AFGE"). In that capacity, I have personal knowledge of the facts set forth in this declaration.

2. In July of 1995, the Office of Personnel Management (OPM) revised and updated its guidance on furloughs. On August 1, 1995, because it had received "a number of inquiries related to agency shutdown procedures in the event that fiscal year 1996 appropriation bills are not passed . . .," Allan D. Heuerman, Acting Director of Office of Personnel Management's Human Resources Systems Service, distributed the updated guidance to all agency Directors of Personnel. The Guidance at pp. 13 and 14 (Answers to Questions 35 and 37) clearly states that "if employees have been granted leave for a day subsequently designated as a furlough day, that leave is automatically canceled because the necessity to furlough supersedes leave rights," including leave granted under the Family and Medical Leave Act of 1993. (Exhibit A).

3. Pursuant to this Guidance, agencies canceled all previously approved annual, sick, and court leave. For example, by memorandum faxed November 14, 1995, Calvin R. Edwards, Assistant Director of Human Resource Management, Bureau of Prisons, advised all Prisons' Chief Executive Officers and Human Resource officials that, "Since the necessity to furlough supersedes leave rights, no annual or sick leave can be approved. S&E excepted employees who would otherwise be in a sick or annual leave status and are unable to report for work must be placed in a furlough status until they return to work." (Exhibit B).

By memorandum also dated November 14, 1995, Warden Charles H. Stewart, Jr. canceled all "annual, sick, court leave, or leave for bone marrow or organ donation" during the furlough period, as well as all Family and Medical Leave Act leave. (Exhibit C). AFGE represents, as exclusive bargaining representative, all non-supervisory personnel nationwide employed by the Bureau of Prisons.

4. On November 17, 1995, Allan Heurman, Acting Director of Office of Personnel Management's Human Resources Systems Service, again updated OPM's furlough guidance and faxed the supplemented guidance to all Agency Personnel Director further clarifying that employees, excepted or non-excepted, who were on approved leave when the furlough took effect and after cannot take previously approved leave - annual leave, sick, or other paid leave during the lapse in appropriations: "When an employee is not at work and performing the duties determined by the employing agency . . . he or she cannot be in a paid leave status. Therefore, agencies must take one of the following actions: (1) cancel any approved leave and require the employee to report for work; or (2) furlough the employee for the period of the employee's absence . . ." (Exhibit D).

5. On November 14, 1995, James B. King, Director of the Office of Personnel Management, responded to a letter from John Sturdivant, National President of AFGE, requesting information regarding the furlough of Federal employees during an appropriations lapse. Attached to this declaration as (Exhibit E) is a true and accurate copy of the November 14, 1995, letter received from Mr. King.

6. Attached to this declaration as (Exhibit F) is a true and accurate copy of a August 22, 1995, memorandum from Alice Rivlin to the Heads of Executive Departments and Agencies regarding agency plans for operations during a funding hiatus.

7. I have been advised by numerous AFGE officers that Agencies consistently complied with the OPM directives and canceled previously approved leave granted both excepted and non-excepted employees.

I declare under penalty of perjury that the above information is true and correct.

  
Mark D. Roth

# INTERAGENCY ADVISORY GROUP

UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT  
WASHINGTON, DC 20415

AUG 1 1995

Secretariat  
1900 E St., NW

## MEMORANDUM TO DIRECTORS OF PERSONNEL

FROM:   
Allan D. Pederman, Acting Associate Director  
Human Resources Systems Service

SUBJECT: OPM's Updated Guidance on Furloughs

In the past several weeks, we have received a number of inquiries related to agency shutdown procedures in the event that fiscal year 1996 appropriation bills are not passed by October 1, 1995. Consequently, we are providing agencies with the attached publication, *Guidance and Information on Furloughs*, which was updated in July 1995.

The attached guidance and information includes questions and answers on various personnel management aspects of furloughs. The appendices contain guidance from the Office of Management and Budget on agency shutdown, sample furlough notices, and a list of names and telephone numbers of OPM contacts.

Finally, copies of the attached information and guidance are available on OPM's Mainstreet computer bulletin board in the employee and labor relations forum (ELR forum) under file area "ALL OTHER." If you have any questions or comments regarding this memorandum or furlough in general, please call the Employee Relations Policy Center at (202) 606-2920.

Attachment

EXHIBIT A

# Guidance and Information on Furloughs



Revised July 1995



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A. Yes. The general rule is that an employee is entitled to pay for a holiday so long as he or she is in a pay status on either the workday preceding a holiday or the workday following a holiday. The employee is paid for the holiday based on the presumption that, but for the holiday, the employee would have worked. (45 Comp. Gen. 291 (1965)) (Note: A holiday should not be the first or last day of the period covered by a furlough.)

34. Q. If employees are furloughed on the last workday before a holiday and the first workday after a holiday, will they be paid for the holiday?

A. No. If a furlough includes both the last workday before the holiday and the first workday after the holiday, the employee is not entitled to pay for the holiday because there is no longer a presumption that, but for the holiday, the employee would have worked on that day. (See Comptroller General opinion B-224619, August 17, 1987.)

### Requests for Leave during Furlough

35. Q. If employees request annual, sick, court, military leave, or leave for bone marrow or organ donation after receiving a notice proposing specific days of furlough, can the requests be denied for those days that coincide with the dates of furlough? If an agency has approved requests for these categories of leave before issuance of the proposed furlough notice, can the approval be rescinded and the employees furloughed on the days that coincide with the dates of furlough?

A. The answer to both questions is yes. However, the agency may choose to furlough the employees at another time if there is no requirement that the employees be furloughed at a given time or in a given order. The agency may designate whichever days it chooses as furlough days. If employees request leave for a day designated as a furlough day, the agency is not required to grant leave. Further, if employees have been granted leave for a day subsequently designated as a furlough day, that leave is automatically canceled because the necessity to furlough supersedes leave rights. To avoid confusion, it is advisable to state in the furlough notice that any annual, sick, court, military leave, or leave for bone marrow or organ donation approved for use on the furlough days is canceled if this is the intent of agency management. Furlough days are nonworkdays. Annual, sick, court leave, and leave for bone marrow or organ donation cannot be granted on a nonworkday. However, military leave must be charged on a nonworkday when the nonworkday occurs wholly within the period of military leave for military duty. Employees who serve as witnesses or jurors on furlough days will retain all monies received from the court.

36. Q. If an employee properly schedules "use-or-lose" annual leave before the start of the third biweekly pay period prior to the end of the leave year, but is

unable to use some or all of the scheduled leave because of a furlough, does the furlough constitute an "exigency of the public business" that would permit an agency to restore the leave after the beginning of the new leave year?

A. Employees in this situation should make every effort to reschedule "use-or-lose" annual leave for use before the end of the current leave year. However, if this is not possible, agency heads (or their designees) may exercise their discretionary authority to determine that an employee was prevented from using his or her leave because of an exigency of the public business--namely, the need to furlough employees because of lack of work or funds.

37. Q. If an employee is on leave under the Family and Medical Leave Act of 1993 (FMLA) during furlough days, do the furlough days count towards the 12-week entitlement to FMLA leave?

A. No. Similar to the answers provided in questions 35, 36, 38, and 39, an employee cannot take leave (either paid or unpaid) under the FMLA on days that coincide with the dates of furlough. Therefore, the furlough days cannot be counted towards the 12-week entitlement to FMLA leave.

#### Leave Without Pay (LWOP)

38. Q. If employees are on approved LWOP, can the LWOP be terminated and the employees furloughed?

A. Yes. The LWOP can be terminated, but if there is no expectation that the employees may return to duty on the proposed furlough days, it is unnecessary to cancel the LWOP, since there is no work or funds involved. However, if the employees may potentially return to duty during the approved LWOP, the agency may propose to furlough on the days of approved LWOP and cancel the LWOP.

#### Leave in Lieu of Furlough

39. Q. May agencies allow employees to use leave without pay (LWOP) in place of furlough? How about annual or sick leave?

A. Agencies may allow employees to elect days of LWOP instead of furlough days. LWOP would be a nonpay status and accomplish the same cost savings. However, agencies may not require employees to take a specified number of days or hours of LWOP. Annual or sick leave is not appropriate if the furlough is for lack of funds because the employees would be in a pay status, contrary to the intent of the furlough.

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Dept.	Phone #	
Fax #	Fax #	

MEMORANDUM FOR CHIEF EXECUTIVE OFFICERS  
 HUMAN RESOURCE ADMINISTRATORS  
 HUMAN RESOURCE MANAGERS

FROM: CALVIN R. EDWARDS, ASSISTANT DIRECTOR  
 HUMAN RESOURCE MANAGEMENT DIVISION

SUBJECT: GUIDANCE DURING FURLOUGH PERIOD

WE HAVE RECEIVED MANY QUESTIONS FROM THE FIELD ABOUT SICK LEAVE FOR S&E "EXCEPTED" EMPLOYEES DURING THE FURLOUGH PERIOD. SINCE THE NECESSITY TO FURLOUGH SUPERSEDES LEAVE RIGHTS, NO ANNUAL OR SICK LEAVE CAN BE APPROVED. S&E EXCEPTED EMPLOYEES WHO WOULD OTHERWISE BE IN A SICK OR ANNUAL LEAVE STATUS AND ARE UNABLE TO REPORT FOR WORK MUST BE PLACED IN A FURLOUGH STATUS UNTIL THEY RETURN TO WORK. THIS DOES NOT APPLY TO THOSE EMPLOYEES PAID FROM UNICOR, B&F, AND TRUST FUND MONIES. EMPLOYEES DO NOT NEED TO RECEIVE WRITTEN NOTIFICATION PRIOR TO PLACEMENT IN A FURLOUGH STATUS FOR THESE PURPOSES. HOWEVER, THEY SHOULD BE GIVEN WRITTEN NOTICE WHEN THEY RETURN TO WORK.

IN ADDITION TO THE ABOVE, ALTHOUGH MANY PROVISIONS OF THE MASTER AGREEMENT MAY BE OVERRIDDEN DURING THIS EMERGENCY FURLOUGH PERIOD, IT SHOULD BE UNDERSTOOD THAT THERE ARE ALSO MANY PROVISIONS OF THE MASTER AGREEMENT THAT CAN BE REASONABLY COMPLIED WITH. IN VIEW OF THIS, PLEASE USE YOUR BEST JUDGEMENT IN MAKING DECISIONS THAT ARE IN CONFLICT WITH THE MASTER AGREEMENT UNDER THE "DECLARATION OF EMERGENCY" PROVISIONS FOUND IN ARTICLE 3, SECTION C.

EXHIBIT B

DATE: NOVEMBER 14, 1995

TO: ALL CONCERNED STAFF

FROM: CHARLES H. STEWART, JR.  
WARDEN

SUBJECT: LEAVE REQUESTS DURING GOVERNMENT EMPLOYEE FURLOUGH

ALL BUREAU OF PRISONS STAFF HAVE BEEN DECLARED ESSENTIAL EMPLOYEES AND ARE BEING CONSIDERED "EXCEPTED" FOR THE DURATION OF THE LAPSE IN FEDERAL FUNDING. THE PRESENCE OF BUREAU OF PRISONS STAFF IS ESSENTIAL FOR THE PROTECTION OF LIFE AND PROPERTY. ACCORDINGLY, ANNUAL, SICK, COURT LEAVE, OR LEAVE FOR BONE MARROW OR ORGAN DONATION IS CANCELLED DURING THE FURLOUGH PERIOD.

EMPLOYEES WHO HAVE PROPERLY SCHEDULED "USE OR LOSE" ANNUAL LEAVE AND ARE UNABLE TO USE SOME OR ALL OF THE SCHEDULED LEAVE BECAUSE OF THIS STIPULATION, SHOULD MAKE EVERY EFFORT TO RESCHEDULE THE "USE OR LOSE" ANNUAL LEAVE FOR USE BEFORE THE END OF THE CURRENT LEAVE YEAR.

EMPLOYEES ARE PROHIBITED FROM TAKING LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT DURING THIS PERIOD OF TIME, ALSO.

ALL TRAVEL FOR EMPLOYEES OTHER THAN THOSE FUNDED BY UNICOR, B & F, AND TP, WILL BE DISCONTINUED AND THE STAFF WILL BE RETURNED TO HIS/HER REGULAR DUTY STATION, UNLESS THE TRAVEL IS REQUIRED FOR THE SAFE AND ORDERLY OPERATION OF INSTITUTIONS.

ADDITIONAL INFORMATION CONCERNING THE CONDITIONS SURROUNDING THIS SITUATION MAY BE OBTAINED THROUGH A MEMORANDUM POSTED IN THE FRONT SALLY-PORT, ISSUED BY DIRECTOR HAWK ON NOVEMBER 13, 1995.

EXHIBIT C

**LAG FAX TRANSMITTAL**  
U.S. OFFICE OF PERSONNEL MANAGEMENT  
1900 E STREET NW., WASHINGTON, DC 20415

**Deliver to agency Personnel Director or equivalent (i.e.,  
Director of Human Resources, Personnel Officer, etc.)**

November 17, 1995

**TO: DIRECTORS OF PERSONNEL**

**FROM: OFFICE OF COMPENSATION POLICY**

**SUBJECT: SUPPLEMENTAL Q's & A's ON FURLOUGH ISSUES**

The Office of Personnel Management has issued additional guidance to agency personnel directors concerning the use of leave by employees affected by a lapse in appropriations. This guidance is in addition to the guidance previously provided by OPM on August 1, and September 6, 1995. The full text of the guidance is attached. In addition, it may be downloaded electronically by following the instructions below.

Mainstreet	PayPerNet
Dial (via modem) (202) 606-4800	Dial (via modem) (202) 606-2675
Select [1] Forums	Select [J]oin a Conference
Select [O] Compensation and Leave Policy	Select [5] Pay Administration Conference
Select [F] File Areas	Select [E]ile Directories
Select [1] Compensation and Leave	Select [3] Compensation and Leave
Type d	
Press the enter key	Follow prompts to download the file named:
Type the filename*** you wish to download	
	FURL_LVE.WPS (WordPerfect 5.1)
	or
	FURL_LVE.TXT (ASCII)
The filenames posted:	
FURL_LVE.WPS (WordPerfect 5.1 document)	
or	
FURL_LVE.TXT (ASCII text format)	

For further information you may contact the Office of Compensation Policy, Compensation Administration Division, on (202) 606-2858, or the Office of Labor Relations and Workforce Performance on (202) 606-2920.

TRANSMITTAL Message ..... MSG- FAX

EXHIBIT D

# INTERAGENCY ADVISORY GROUP

UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT  
WASHINGTON, DC 20415

Secretariat  
1300 E St., NW

NOV 17 1995

## MEMORANDUM FOR DIRECTORS OF PERSONNEL

FROM:   
ALLAN D. HEURMAN  
ASSOCIATE DIRECTOR  
FOR HUMAN RESOURCES SYSTEMS

SUBJECT: Supplemental Q's and A's on Furlough Issues

The following supplemental questions and answers have been prepared in response to questions received by the Office of Personnel Management and the Office of Management and Budget on furlough issues affecting both excepted and nonexcepted employees since the lapse in appropriations that began on November 14, 1995.

As used below, the term "EXCEPTED EMPLOYEES" refers to employees who are excepted from a furlough because they are performing functions related to national security, protection of life or property, or the orderly suspension of agency operations. (Employees in organizations not affected by the lapse in appropriations are governed by the regular leave rules.) OPM will provide additional Q's and A's as the need arises.

- Q1. NONEXCEPTED EMPLOYEES reported for work at different times on Tuesday, November 14, and worked varying periods of time before departing on furlough after OMB instructed agencies to implement their phase-down plans. May nonexcepted employees who reported for work on November 14 be considered to have been furloughed for a uniform period of time on that day, or should agencies determine the number of furlough hours on a case-by-case basis for each nonexcepted employee?
- A1. OPM recommends that agencies make an effort to determine, on a case-by-case basis, the amount of time each nonexcepted employee worked on Tuesday, November 14. The remaining period of time in the employee's regularly scheduled tour of duty (after taking into account part-time work schedules, uncommon tours of duty, or previously approved flexible or compressed work schedules) would then be considered furlough time, even if the employee had previously been scheduled to take paid or unpaid leave later in the day.
- Q2. How should agencies treat EXCEPTED or NONEXCEPTED EMPLOYEES who were on approved leave on November 14 when the furlough took effect and did not report for work for the rest of the day?

- A2. Both **EXCEPTED** and **NONEXCEPTED EMPLOYEES** should be charged the appropriate kind of leave for the approximate period of time from the beginning of each individual employee's normal workday until the time other similarly situated employees departed from work after receiving furlough notices. The remaining period of time in the employee's regularly scheduled tour of duty would be considered furlough time. However, an agency may subsequently terminate the furlough if the employee's services are required for excepted activities following the absence and the employee is able to report for work.
- Q3. After Tuesday, November 14, may **EXCEPTED EMPLOYEES** take previously approved annual leave, sick leave, or other paid leave during the lapse in appropriations?
- A3. No. When an employee is not at work and performing the duties determined by the employing agency to be allowable activities in compliance with the Antideficiency Act, he or she cannot be in a paid leave status. Therefore, agencies must take one of the following actions:
- (1) cancel any approved leave and require the employee to report for work; or
  - (2) furlough the employee for the period of the employee's absence from duty. An agency may subsequently terminate the furlough if the employee's services are still required for excepted activities following the absence.
- Q4. May **EXCEPTED EMPLOYEES** be granted new requests for annual leave, sick leave, or other paid leave during the lapse in appropriations?
- A4. No. If an **EXCEPTED EMPLOYEE** requests paid leave or is unavailable to be at work and perform the duties determined by the employing agency to be allowable activities in compliance with the Antideficiency Act, the agency must take one of the following actions:
- (1) deny the request for leave and require the employee to report for work; or
  - (2) furlough the employee during the period of unavailability. An agency may subsequently terminate the furlough if the employee's services are still required for excepted activities following the absence.

Questions may be directed to the Office of Compensation Policy, Compensation Administration Division, on (202) 606-2858, or the Office of Labor Relations and Workforce Performance on (202) 606-2920.



UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT

WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

NOV 14 1995

John N. Sturdivant  
National President  
American Federation of Government Employees  
80 F Street, N.W.  
Washington, DC 20001

Dear Mr. Sturdivant:

This responds to your letter requesting information regarding the furlough of Federal employees and reiterates the information provided by telephone to Mr. Charles Hobbie, Deputy General Counsel.

In the absence of either an appropriation or a continuing resolution, Federal employees who are performing activities designated by their agencies as "excepted" or "emergency" (those activities involving the safety of human life or the protection of property) are required to report to work as regularly scheduled. In the event of a furlough, employees who are "excepted" remain in their regularly scheduled duty/paid status. Non-excepted employees, i.e. employees subject to furlough, are placed in a non-duty, non-paid status.

Because "excepted" employees remain in a duty/paid status, they are subject to the rules and regulations of such a status with respect to being subject to disciplinary action for misconduct, including failure to report to work. The furlough has no effect on the particular penalty an agency may impose. As in other situations where misconduct occurs, the appropriate penalty is determined on a case by case basis. Management maintains its right to initiate disciplinary action in the interest of the efficiency of the service; the employee maintains the right to appeal and or grieve the action as set out in law, rule, or regulation.

With regard to paying excepted employees during a lapse in appropriation, OMB issued a memorandum from David A. Stockman on November 17, 1981 (this memorandum was included as Appendix A3 in OPM Guidance and Information on Furloughs) which states in part:

"This memorandum is principally directed towards the ability of agencies to obligate funds in the absence of appropriations. It should be made clear that, during a appropriations hiatus, funds may not be available to permit agency

EXHIBIT E

payment of obligations. All personnel performing excepted services, including activities incident to the orderly suspension of agency operations, should be assured that the United States will not contest its legal obligation to make payment for such services, even in the absence of appropriations."

I hope this information is helpful.

Sincerely,

*[Handwritten signature]*  
James B. King  
Director

*Thanks again for your hard work on behalf of our employees!*  
*Jai*

RECEIVED  
NOV 14 1995  
GENERAL COUNSEL



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

THE DIRECTOR

August 22, 1995

M-95-18

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:

Alice M. Rivlin *AMR*  
Director

SUBJECT:

Agency Plans for Operations During Funding Hiatus

OMB Bulletin 80-14, dated August 28, 1980 (and amended by the OMB Director's memorandum of November 17, 1981) requires all agencies to maintain contingency plans to deal with a possible appropriations hiatus. The bulletin requires agency plans to be consistent with the January 16, 1981 opinion of the Attorney General on this subject.

The Office of Legal Counsel of the Department of Justice has issued an opinion dated August 16, 1995 that updates the 1981 opinion. A copy of the August 16th opinion is attached. You should review your plans in light of this opinion, make any changes necessary to conform to the opinion, and otherwise ensure your plan is up to date.

Please send a copy of your updated plan to your OMB program examiner no later than September 5, 1995. Any questions should be directed to your program examiner.

Attachment

EXHIBIT F

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. motion	Home Address. [partial] (3 pages)	11/27/1995	P6/b(6)

### COLLECTION:

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

### FOLDER TITLE:

Shutdown II [4]

2009-1006-F  
vz95

### 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]

DECLARATION OF ARTHUR B. EGGLEER, JR.

Under penalty of perjury, I, Arthur B. Eggleer, Jr. hereby declare as follows:

1. My name is Arthur B. Eggleer, Jr. My address is P6/(b)(6)

[001]

P6/(b)(6)

I am currently employed by the Naval Air Station, Meridian, MS as a fire fighter, General Schedule (GS)-6.

2. My principal job duties are involved with fire protection and suppression. All firefighters at NAS Meridian were deemed to be emergency personnel during the period of lapsed appropriations and we continued to work our normal shifts of 24 hours on duty and 24 hours off duty.

3. Prior to the period of lapsed appropriations, I had applied for and had been granted annual leave for Sunday, November 19, 1995, for the purpose of visiting my Mother, who is hospitalized and in the final stages of terminal cancer.

4. I was advised by my supervisor that during the period of lapsed appropriations, all leave was cancelled. Notwithstanding the fact that my leave had been approved prior to the period of lapsed appropriations and notwithstanding the fact that my Mother is terminally ill, I believed I would be disciplined if I did not report for duty on November 19, 1995.

5. In addition, I was further advised by my employer that, although I was required to work during a period of lapsed appropriations, I would not be paid unless and until Congress appropriates money to pay me.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: 11-27-95

  
Arthur B. Cooper, Jr.

**DECLARATION OF RENEE' LANGE**

Under penalty of perjury, I, Renee' Lange, hereby declare as follows:

1. My name is Renee' Lange. My address is

P6/(b)(6)

P6/(b)(6)

I am currently employed by the

Veterans' Administration Medical Center, Vancouver, WA as a Housekeeper. I am a Wage Grade-25.

2. My principal job duties are involved with housekeeping at the Medical Center. All housekeepers were determined by the VAMC Vancouver to be emergency personnel during the furlough period.

3. I had applied for and had been granted annual leave almost one year ago for the period beginning November 13 through November 17, 1995 to travel to California. I left prior to the actual expiration of the Continuing Resolution on November 13, 1995.

4. Prior to November 13, I was advised by my supervisor that in the event there was a lapse in appropriations, all leave would be cancelled. I was further advised by my employer that, although I would be required to work during a period of lapsed appropriations, I would not be paid unless and until Congress appropriates money to pay me. Notwithstanding this, because of my long standing plans, I left town prior to the actual lapse in appropriations.

5. Upon my return to Vancouver, WA I was advised by my supervisor that all leave had been cancelled and that because I was out of town, I was therefore, furloughed and could not return

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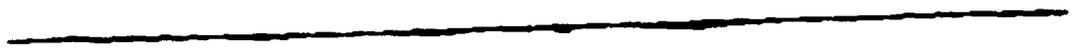
282 639 6441 TO 913607585357--65 P.03/03

to work even though all other housekeepers were deemed to be emergency personnel and I was again advised that I would receive no pay for the period of lapsed appropriations unless specific legislation providing for pay was enacted.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: 11-27-95

Renee Lange  
Renee Lange



DECLARATION OF JAMES L. TURNER

Under penalty of perjury, I, James L. Turner, hereby declare as follows:

1. My name is James L. Turner. My address is P6(b)(6) [out]

P6(b)(6)

I am currently employed by the U.S. Department of Justice, Federal Correctional Institution, Sandstone, MN, as an Inventory Management Specialist. My General Schedule level is GS-9.

2. My principal job duties are as follows: I am in charge of all institution property. I additionally handle procurement for the institution and the inmate trustfund commissary, which involves the stocking of personal items, e.g., magazines and cigarettes, for sale to inmates.

3. During the week of November 13, 1995, I was instructed by my employer that even if the federal government shut down, I was required to work. My employer had previously approved my request to be in an annual leave status on November 14, 1995. I requested leave to attend to personal matters. Those personal matters required that I be present in court on November 14, 1995.

4. My employer informed me that my approved annual leave for November 14, 1995 was canceled and that I was expected to work on November 14, 1995.

5. I believed that if I refused to work, I would be subjected to discipline. I was also informed by my employer that, although I was required to work, I would not be paid unless



## INTRODUCTION

The plaintiffs in this action, the American Federation of Government Employees and several individual federal government employees, ask this Court for an unprecedented and legally unwarranted temporary restraining order ("TRO"), whose main purpose appears only to be to seek publicity regarding the current budget impasse between the executive and legislative branches. Based upon no colorable legal claim, plaintiffs would have this Court engage in extensive review and monitoring of numerous complex personnel decisions made by virtually every federal department and agency. Indeed, the extraordinary relief sought by the plaintiffs would have this Court micro-manage the personnel decisions affecting hundreds of thousands of federal employees by sending them home.

The Court should decline plaintiff's invitation to enter the fray. Plaintiffs' request for a TRO revolves around the Anti-Deficiency Act, 31 U.S.C. § 1341 et seq. ("the Act") and the manner in which defendants have applied the Act during the current budget impasse (or "lapse" in appropriations), where appropriation measures to fund most federal agencies have not been passed by both houses of Congress and signed by the President. The Act, inter alia, prohibits officers and employees of the federal government from entering into obligations in advance of appropriations and from employing personnel except in emergencies or where otherwise authorized by law. Plaintiffs' case revolves around the exception for emergencies, but as we shall see, there are numerous other exceptions to the

restrictions of the Act, pursuant to which many federal employees (including some of the plaintiffs) are presently working.

Plaintiffs make two separate but related arguments concerning the Act. First, plaintiffs contend that defendants, rather than placing them on unpaid furlough status, have illegally required them and other federal employees to work during the current lapse "without pay (or be subject to discipline)," to use plaintiffs' formulation. This, they contend, violates three separate statutory provisions.

Memorandum In Support Of Plaintiffs' Motion For A Temporary Restraining Order ("Pl. Mem."), at 8-11. The upshot of this argument by plaintiffs is that the Act does not allow any agency services to be performed during the lapse, even emergency services. Under plaintiffs' theory, this Court would have to order all federal employees (including the judiciary and Congress) to go home and not work.

In contrast, plaintiffs' second argument appears to concede (or to assume, arguendo) that the Act authorizes emergency services to be performed during the lapse. Nonetheless, they contend that, in determining permissible activities under the Act, defendants have applied a broader concept of emergency services than that permitted by the Act. Pl. Mem. at 11-19.

For a host of reasons, the Court should reject both arguments and deny plaintiffs' request for temporary injunctive relief. Plaintiffs can show no likelihood of success on the merits because they seek an interpretation of the Act which would

eviscerate its terms. Argument, Part IA. Further, the Court is required to provide substantial deference to defendants' interpretation of the Act. Id. Part IB. Moreover, plaintiffs have no injury, but only a speculative concern that they might not be paid for their services after the termination of the lapse and have therefore failed to establish their standing. Id., Part IC. This simply a generalized grievance with public policy. Id.

Further, there are strong -- indeed compelling -- reasons why this Court should refuse to exercise its equitable authority. The government and the public's strong interest in an orderly shutdown of government activities and the maintenance of a government capable of insuring the safety of human life and the protection of property should caution the Court not to engage in the intrusive oversight which plaintiffs seek. Argument, Part ID. Moreover, defendants' overnight analysis of the underlying factual basis for plaintiffs' claims reveals that that basis is severely flawed. Id., Part IE.

Further, plaintiffs, having no injury, cannot establish irreparable injury sufficient to warrant preliminary injunctive relief. Argument, Part IIA. Further, the only injury plaintiffs identify -- the speculative possibility that they might not be paid in the aftermath of the lapse -- can be remedied in several ways by money damages, thereby undermining any claim to irreparable injury. Id., Part IIB. Finally, there is a strong public interest in not granting plaintiffs the relief they seek, which would "shut down" the government in unfathomable ways and

thereby jeopardize human life and property. Clearly, the public and third parties would be very ill-served by the relief which plaintiffs seek. Id., Part III.

#### STATUTORY AND REGULATORY BACKGROUND

The Anti-Deficiency Act implements the constitutional requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, cl. 7. For the purposes of the Court's inquiry, there are two relevant provisions of the Act. The first provides that "[a]n officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). The second provides that "[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 1990, Congress added to the latter provision the following sentence: "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." Id.

Even in the absence of appropriations, therefore, the Act does not bar the federal government from entering into contracts

or money payment obligations which are "authorized by law." Nor does it preclude the rendering of personal services for "emergencies involving the safety of human life or the protection of property." In 1981, then-Attorney General Civiletti addressed both these statutory phrases in an often-cited opinion.

"Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations," 5 Op. O.L.C. 1 (1981) ("1981 Op.," attached as Exhibit A). In August 1995, the Department of Justice's Office of Legal Counsel reexamined the 1981 Opinion in light of the 1990 amendment to the Act, and in large measure reaffirmed its conclusion. "Government Operations In The Event Of A Lapse In Appropriations," ("1995 Op.," attached as Exhibit B).

The 1981 Opinion had analyzed at length the exception for personal or voluntary services "for emergencies involving the safety of human life or the protection of property." 1981 Op. at 10-17. That Opinion articulated two rules for identifying emergency functions for which government officers may enter into obligations to pay for personal services in excess of legal authority:

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.

1981 Op. at 11.

The 1995 Opinion focused on this articulation in light of the 1990 amendment. It concluded that although the 1981 Opinion constituted a fair reading of the Act in light of the amendment, to "forestall possible misinterpretations, the second criteria's use of the phrase 'in some degree' should be replaced with the phrase, 'in some significant degree.' 1995 Op. at 8. The 1995 Opinion concludes that this modification "clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response." Id. at 9. Significantly, the 1995 Opinion also noted that although the Act "does not by itself authorize paying employees in emergency situations," it "does authorize entering into obligations to pay for such labor." Id. at 6.

The 1981 Opinion also identified other circumstances which permit some continuing government functions. Briefly, they are:

1. Multi-year and indefinite appropriations, such as Social Security, which is an indefinite appropriation that is not funded through an annual appropriation. 1981 Op. at 3-4; 1995 Op. at 3-4.

2. Express contracting authority and borrowing authority for an activity where Congress expresses its intention to have the activity continue despite an appropriations lapse. 1981 Op. at 4; 1995 Op. at 4.

3. Government functions funded through annual appropriations which must continue despite a lapse in

appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well, e.g., check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. 1981 Op. at 6; 1995 Op. at 4.

4. Legal obligations attendant to an orderly termination of agency operations. 1981 Op. at 2; 1995 Op. at 4.<sup>1</sup>

5. Obligations necessary to the discharge of the President's constitutional duties and powers to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the executive. 1981 Op. at 7-10; 1995 Op. at 4-5.<sup>2</sup>

In 1995, OMB issued "General Guidance On Agency Operations In The Absence of Appropriations" (attached as Exhibit C). OMB noted that "[e]mployees of affected agencies performing non-excepted activities (as discussed in the Department of Justice opinions) may not perform any services other than those involved in the orderly suspension of non-excepted activities; excepted activities that may be continued are generally those that are

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<sup>1</sup> This aspect of the 1981 opinion was based upon a 1980 opinion in which Attorney General Civiletti opined that agencies are by necessary implication authorized "to incur those minimal obligations necessary to closing [the] agency." 1995 Op. at 4.

<sup>2</sup> In addition, the 1995 Opinion recognized that, although not mentioned in the 1981 Opinion, the consistent administrative practice had been to assume that the private economy would continue operating during a lapse in appropriations. 1995 Op. at 5.

authorized by law or that protect life and property." OMB also noted that agency heads were to "make the determinations that are necessary to operate their agencies during an appropriations hiatus (within the guidance established by the Department of Justice opinions and this memorandum, and pursuant to normal agency processes for the resolution of issues of law and policy."

#### ARGUMENT

##### I. PLAINTIFFS' CLAIMS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

##### A. Defendants Have Not Violated Any Statutes

In support of plaintiffs' argument that the Anti-Deficiency Act does not authorize defendants to "require that plaintiffs work without pay during a period of lapsed appropriations (or be subject to discipline)," Pl. Mem. at 9, plaintiffs cite two statutes regulating federal pay, 5 U.S.C. § 5332, which states that most federal employees are "entitled to basic pay in accordance with the General Schedule," and 29 U.S.C. § 206(a) of the Fair Labor Standards Act, which requires federal agencies to pay certain federal employees at least the minimum wage specified in the Act (we will refer to these as "the federal pay statutes").<sup>3</sup> Pl. Mem. at 8-9.

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<sup>3</sup> Plaintiffs also contend that this "requirement" is unlawful agency action, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). Pl. Mem. at 9. However, the APA adds nothing to plaintiffs' substantive claim, which must rest on plaintiffs' (erroneous) view that the two other statutes preclude the employ of all personal services under the Act.

Plaintiffs' argument "proves too much" and would render the Act a nullity. The Act plainly authorizes federal agencies to employ the services of employees for "emergencies involving the safety of human life or the protection of property." The federal pay statutes do not address the circumstance of a lapse in appropriations.<sup>4</sup> Nor, on their face, could either even remotely be considered as barring or "trumping" the Act's authorization to allow agencies to employ -- and enter into obligations to compensate for<sup>5</sup> -- emergency personal services.

Yet, plaintiffs' interpretation would preclude federal agencies from utilizing the services of employees for any purpose. Plaintiffs' proposed order would restrain defendants "from requiring any federal employee to work without pay (or be subject to discipline) in the absence of an appropriation covering the employee's position." Proposed Temporary Restraining Order (emphasis supplied).<sup>6</sup> See also Complaint, Relief Requested, ¶ 1(a) (plaintiffs ask Court to declare that "defendants' requirement that federal government employees work

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<sup>4</sup> In a tepid footnote, plaintiffs suggest that the Act "was not written to address a lapse in appropriations." Pl. Mem. at 11 n.5. The 1981 Opinion makes clear that the Act's applicability to lapses in appropriations is long-standing and that Congress has never suggested that it should not be so applicable. See 1981 Op. at 4-5 n.5.

<sup>5</sup> 1995 Op. at 6.

<sup>6</sup> We understand that plaintiffs' proposed order was not filed with their TRO Application. In the event that it is not part of the record, it is attached here as Exhibit D.

without pay during a period of lapsed appropriations (or be subject to discipline) is unlawful").

Under plaintiffs' view, during a lapse in appropriations, the federal pay statutes would preclude the FAA from staffing air control facilities, and require the FBI, DEA, ATF and the Customs Service to stop interdicting and investigating criminal activity. Under plaintiffs' interpretation, the federal pay statutes would require the INS to leave the country's borders unprotected during a lapse, and would require VA hospitals to abandon patients and close their doors. The President would be prevented from a meaningful exercise of his commander-in-chief power and from protecting our national security interests by his conduct of foreign affairs. Presumably, the federal pay statutes would not permit government lawyers to defend the instant or similar suits, or this Court to adjudicate such suits.

While reasonable minds might differ as to whether a given activity of a given agency comes within the definition of "emergencies involving the safety of human life or the protection of property" (plaintiff's second issue), plaintiffs' first argument reads this exception out of the Act altogether. Plaintiffs cite no cases, and we know of none, which indicate, even remotely, that the other statutes were designed to "trump" the Act and work the deleterious results which plaintiffs seek. The Court should not interpret them or the Act in this crabbed manner.

B. Plaintiffs Have No Likelihood Of Success On  
The Merits of Their Second Claim Because  
Defendants' Application of The Act Rests Upon  
A Fully Reasonable Interpretation of The Act

Plaintiffs disagree with the manner in which several agencies have drawn the demarcation point between "emergencies involving the safety of human life or the protection of property," for which agencies may under the Act make obligations for payment, and "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property," for which agencies may not make obligations for payment.

It is plaintiffs' burden, however, to show that the demarcations violate the Administrative Procedure Act, whose standard of review under the APA is highly deferential. Indeed, the agency actions are entitled to a presumption of validity. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). The APA provides that agency action may be set aside only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2).

Here, the scope and breadth of the determinations which must be made, and the lack of a statutory definition of what it means to protect life or property, place the agency actions at the outer limits of APA review. Indeed, it is questionable whether review is appropriate at all given the substantial discretion lodged in the agency. There are dozens of agencies performing

hundreds of missions, many of them inter-related, which require the unique perspective of agency expertise. While plaintiffs and even the Court may have made some different choices, the actual determinations cannot be set aside, even if review is available, unless the plaintiffs prove that the agencies failed to consider the relevant factors and committed a "clear error of judgment." North Buckhead Civic Association v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990), quoting, Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851, 1861 (1989).

Here, the agencies used for guidance the 1995 Opinion, which reexamined and modified on one respect the 1981 Opinion, and otherwise reaffirmed that Opinion. The approach taken by the agencies, particularly in light of the Opinion, cannot be reasonably called unreasonable, given the myriad determinations which had to be made to continue necessary government operations during the looming shutdown. Indeed, given the high stakes for failing to recognize and protect certain activities during this time period, the agencies' unique expertise in these areas, and the great discretion accorded the agencies to make the necessary demarcations. Plaintiffs simply cannot meet their burden of showing that the agency determinations were erroneous.

C. Plaintiffs Lack Standing To Maintain This Action Because Their Claims Of Injury Are Entirely Speculative And Constitute No More Than Shared Generalized Grievances

Plaintiffs' Complaint alleges that "[i]n 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." Complaint, ¶ 32. Plaintiffs also allege that they have been "informed" that employees required to work during the lapse "must work without pay unless and until Congress appropriates money to pay their wages and salaries." Complaint, ¶ 37. Plaintiffs' first argument, concerning the purported "illegality of requiring plaintiffs to work without compensation during the lapse" therefore reduces to speculation that, after termination of the lapse, Congress might not appropriate funds to pay for services performed during the lapse. Such speculative claims fail to meet bedrock standing requirements.

1. Most conspicuously, such speculation fails to meet the "injury-in-fact" requirement of the standing doctrine, an incident to the requirement of Article III, § 2 of the federal constitution that federal courts may adjudicate only actual cases and controversies. Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 471 (1982). Article III requires at an "irreducible minimum" that the plaintiff make three showings, the first being that he has "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. at 472.<sup>7</sup> A plaintiff who has not yet sustained an injury must show that the threat of future injury is both "real and immediate,"

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<sup>7</sup> The other requirements for Article III standing are that the injury "fairly can be traced to the challenged action" and be "likely to be redressed by a favorable decision." Valley Forge, 454 U.S. at 472.

and not "conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

Plaintiffs do not allege that any plaintiff has missed any paycheck. Although the federal government has been in numerous lapse situations in the past,<sup>8</sup> plaintiffs do not allege that anyone required to work during such situations was not eventually paid for services performed during the lapse. Plaintiffs' purported injury is therefore neither real nor immediate, but altogether conjectural and hypothetical (which also indicates that plaintiffs have made no showing of irreparable injury, as required for preliminary injunctive relief, as discussed more fully infra). 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).<sup>9</sup>

2. Plaintiffs' inability to articulate any specific injury associated with their second argument strongly suggests that their disagreement with the manner in which defendants have

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<sup>8</sup> See 1995 Op. at 2.

<sup>9</sup> Plaintiffs make no attempt to articulate any independent injury to themselves associated with their second argument, that defendants have misapplied the Act by applying a broader conception of emergency services than that permitted by the Act. Assuming, as the Court must, that the Act permits defendants to require the continued services of some of their employees, it is difficult to see how inclusion of plaintiffs within this group injures them. If plaintiffs are suggesting that they should not be included within this group, that they should not be required to render services during the lapse, and that they would prefer to spend their normal working hours on non-work related activities, they make no explicit contention to this effect.

applied the Act to specific agency activities runs afoul of the proscription against judicial adjudication of "'generalized grievance,' pervasively shared and most appropriately addressed in the representative branches." Valley Forge, 454 U.S. at 475. Standing to sue may not be predicated upon an interest which is held by all members of the public. United States v. Richardson, 418 U.S. 166, 176-79 (1974); Schlesinger, 418 U.S. at 220. In contending that defendants have "designated thousands of employees as performing emergency related services despite that fact that the suspension of the employees' duties would not imminently threaten the safety of human life or the protection of property," Complaint, ¶ 16, plaintiffs have stated what amounts to a generalized grievance concerning executive branch decisions which is insufficient to establish a party's standing.

D. The Court Should Exercise Its Discretion  
Not to Hear This Case or Not to Grant Relief

Plaintiffs' challenge to the myriad applications of the Act and the 1995 Opinion highlights the intrusive and unworkable nature of the judicial intervention which they seek. In O'Shea v. Littleton, 414 U.S. 488 (1974), the Supreme Court refused to approve an injunction that would inject the federal courts into the daily conduct of state criminal proceedings. 414 U.S. at 502. The Court found that an injunction, which would be "nothing less than an ongoing federal audit of state criminal proceedings," would conflict with principles of equitable restraint. Id., at 500-502. The very strong interests at stake here, particularly the orderly shutdown of government activities

and the maintenance of a government capable of insuring the safety of human life and the protection of property, strongly counsel this Court not to engage in a similar "audit" of numerous agencies' individualized decisions as to how these interests can be advanced in the face of a lapse in appropriations.

Indeed, the strong governmental and public interest in an orderly shutdown and the protection of human safety and public property is an important factor not just for the purpose of determining whether preliminary relief would be appropriate, but also for determining whether the Court should contemplate any equitable relief -- preliminary or final. Under principles of equity, plaintiffs have no absolute right to the declaratory and injunctive relief they seek. Rather, such relief is within the discretion of the Court. See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

As the Romero-Barcelo Court emphasized, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Id. at 312. Likewise, "[a]mong the factors to be considered in deciding whether to grant declaratory relief in a particular case is the public interest vel non in resolving the controversy." National Wildlife Federation v. United States, 626 F.2d 917, 924 (D.C. Cir. 1980). While sometimes the "great public importance of an issue militates in favor of its prompt resolution," there are other times where "the public interest dictates that courts exercise restraint in

passing upon crucial issues." Id. The courts should therefore "strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948).<sup>10</sup>

The most important principles to be considered here are "the adversity of the interests of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment." Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643 (3d Cir. 1990). Thus, the request for equitable relief "should be denied where 'it will not terminate the controversy or serve a useful purpose.'" Winpisinger v. Watson, 628 F.2d 133, 141 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980). Applying those principles and admonitions here cautions strongly against granting the declaratory and injunctive relief sought by plaintiffs.

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<sup>10</sup> See also U.S. ex re. Greathouse v. Dern, 289 U.S. 352, 360 (1933) (declining to issue a writ of mandamus that would have been "burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee;" noting also, that "in its sound discretion[,] a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest"); Borough of Bethel Park v. Stans, 319 F. Supp. 971, 980 (W.D. Pa. 1970), aff'd, 449 F.2d 575 (3d Cir. 1971) ("Even if plaintiffs had so prevailed [on the merits], injunctive relief in their favor would be denied as detrimental to the public interest. Taking a new census would result in a loss of over \$200 million to American taxpayers."); West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066, 1069 (D.D.C. 1970) ("Finally, it would not be in the public interest to enjoin the taking of the Census under these circumstances where the Bureau made substantial efforts to devise a system whereby as many persons as possible will be included in the Census count.").

The practical effect of granting plaintiffs the relief they want would be a far more onerous and widespread shutdown of the government, with a greater burden on the public which relies on the government for everything from air traffic control to meat inspection. Further, broadening the shutdown would not benefit the other federal employees who have already been furloughed. Similarly, the relief which plaintiffs would obtain from such drastic action - a furlough -- would not even inure to their own benefit.<sup>11</sup> Nor would it conclude the situation which gave rise to the lawsuit, since Congress must enact the appropriation bills necessary to get the government fully up and running again, and the President must sign them. While plaintiffs may hope that a broader furlough will push the issue and result in legislative and/or executive branch compromises necessary for appropriations bills to be passed, such "hope" would be speculative at best and, further, use of the judicial system to effect that political goal would be particularly inappropriate.<sup>12</sup>

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<sup>11</sup> Plaintiffs claim that they are being forced to work without pay. As discussed supra, that claim is speculative at best and unlikely in any event since congressional leaders have indicated their intention not to have federal employees bear the economic brunt of the impasse between Congress and the Administration. See Part IB, supra. But even assuming that plaintiffs' fears are reasonable, plaintiffs would be more likely to receive pay as excepted workers than furloughed ones. In seeking to force the government to furlough them and many others, they are not obtaining any relief that either benefits them or outweighs the substantial burden to the general public.

<sup>12</sup> According to a Washington Post article of November 11, 1995, at A5, John Sturdivant, president of AFGE, "acknowledged that his lawsuit, if successful, 'could have the ultimate effect of having more people sent home,' but said the closing of more

(continued...)

Not only would equitable relief harm the public interest, plaintiffs' attempt to interject the courts into this matter would directly "intrude on the responsibilities . . . of the coordinate branches." National Wildlife Federation, 626 F.2d at 924. Decisions relating to appropriations and which employees federal agencies should deem essential in a shutdown situation are vested in, and best left to, the coordinate branches of government which will ultimately have to resolve the present budget impasse in any event. As the District of Columbia Circuit so aptly stated in National Wildlife Federation, where the plaintiffs asked the court "to intervene in wrangling over the federal budget and budget procedures . . . Such matters are the archetype of those best resolved through bargaining and accommodation between the legislative and executive branches. We are reluctant to afford discretionary relief when to do so would intrude on the responsibilities - including the shared responsibilities - of the coordinate branches." Id. See also Winpisinger, 628 F.2d at 141 (court should decline to hear case which "would set a precedent by placing the judiciary in the middle of myriads of fundamental decisions that the framers of the Constitution considered they were vesting in the executive branch of government."); Moore v. U.S. House of Representatives, 733 F.2d 946, 955 (D.C. Cir. 1984) (prudential considerations would counsel against court granting declaratory relief in this

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<sup>12</sup> (...continued)  
federal offices would increase pressure on Congress to resolve its differences with President Clinton."

case involving coordinate branches, even though court found that plaintiffs had standing).

E. An Analysis of Plaintiffs' Factual Claims Also Indicates That Plaintiffs Are Unlikely To Prevail On The Merits

While the compressed briefing schedule did not permit defendants' counsel to conduct a detailed analysis of plaintiffs' many factual claims concerning defendants' purported "misapplication" of the Act, or engage in extensive consultations with each of the 17 defendant agencies, the review of plaintiffs' claims which they were able to conduct reveals that those claims are seriously flawed.

Plaintiffs broadly criticize the contingency plans prepared by numerous federal agencies as an overly broad application of the Act's emergency exception. See generally Pl. Mem. at 14-18. However, a closer examination of these contingency plans reveals that, in many cases, the emergency exception to the Act has nothing to do with the portions of the plans relied upon by plaintiffs. In the remaining cases, the agencies' determinations fully accord with the language and purpose of the Act.

For example, plaintiffs argue that OPM has "justified continuing to employ staff members on the basis of the perceived importance of their functions." Pl. Mem. at 16. However, an examination of OPM's contingency plan reveals that approximately 90% of the personnel involved were retained to provide benefits and services for which there was no lapse in appropriations either because funds are available from a revolving fund, a trust

fund, or other funds that are not subject to the annual appropriations process.

Similarly, plaintiffs argue that the Bureau of Labor Statistics and the Office of Public Affairs of the Department of Labor (DOL) have deemed employees to be "essential" notwithstanding the absence of any link to imminent threats to life or property. Pl. Mem. at 18. However, in both cases, the affected employees were determined to be "essential" only insofar as necessary to terminate the operations of the agencies. In that regard, the BLS plan states explicitly as follows:

The Bureau will cease all ongoing operations effective close of business, September 29. Any activity carried out after that date will be related to the suspension of operations.

Attachment 7 to Hobbie Declaration. The contingency plan prepared by DOL's Office of Public Affairs states as follows:

OPA employees will cease all ongoing operations at the close of business, September 30, 1993. After that date, all activities will be related to the suspension of operations.

Id. Thus, plaintiffs' suggestion that these agencies were "making use of the 'emergency' exception of the Antideficiency Act . . . to maintain the 'ongoing, regular functions of government'" (Pl. Mem. at 18-19) is patently absurd.

Plaintiffs' critique of the contingency plan prepared by the Department of Housing and Urban Development (HUD) is equally unwarranted. As the HUD contingency plan reflects, several functions of the agency are operated by funds outside of the regular appropriations process through, among other sources, the

insurance funds maintained by the Federal Housing Administration. Therefore, use of these funds would not even implicate the Anti-Deficiency Act. Attachment 4 to Hobbie Declaration at 2-3. Moreover, even if that were not the case, the link between the limited actions identified by the agency and the need to preserve its property are hardly "tenuous" as plaintiffs claim.

For example, plaintiffs would apparently have the agency ignore cash collections and refuse to manage property in its possession. Both actions are critical to the preservation of the agency's property. Similarly, plaintiffs criticize the agency's decision to complete asset sales conducted in fiscal year 1995. Yet if these sales were not consummated in accordance with the agency's agreements, it would not only be liable for breach of contract, but would also be required to exercise management and control over the assets for the duration of any lapse of appropriations.

Finally, plaintiff's criticism of the contingency plan prepared by the Bureau of the Mint is erroneous and unjustified. As the Director of the Office of Management and Budget stated in a November 17, 1981 memorandum to all federal agencies, essential activities that are necessary to protect the life and property of American citizens include those necessary to "the preservation of the essential elements of the money and banking system of the United States . . . ." Exhibit E hereto. The Director of the Bureau of the Mint determined that the termination of the Mint's activities "would cause a severe disruption to the nation's coin

supply" which is "a primary medium of exchange" for business transactions. Attachment 8 to Hobbie Declaration. Moreover, such a coin shortage would have a "devastating impact on certain sectors of the economy that rely almost exclusively on coins . . . ." Plaintiffs' contention that such a disruption would not create an emergency that "imminently threatens" the property of the affected businesses is therefore without merit.<sup>13</sup>

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<sup>13</sup> For many of the same reasons, the employment of the individual named plaintiffs is fully consistent with the Act. Plaintiff Ronald Floyd Waltz (Compl., ¶ 5) is employed by the United States Mint and was retained for the reasons set out in the text above. Plaintiff Michelle Borden is employed by OPM in the agency's Retirement Information Service (Compl. ¶ 4) the activities of which relate to a program funded by a trust fund rather than annual appropriations. Plaintiffs Jennie Isaac and Walter Sheffield are employed by the General Services Administration (GSA) and the Environmental Protection Agency (EPA), respectively. Compl. at ¶¶ 7-8. The contingency plans submitted by both agencies reflect that certain activities of both agencies also would not be affected by the lapse in appropriations. Attachments 10 and 11 to Hobbie Declaration.

Plaintiff Verett Kelley, Angela Green and Pamela Burke are all employed by the Office of Worker Compensation Programs of the Department of Labor. Declarations of Angela Y. Green, Verrett Kelley and Pamela Burke. As the contingency plan submitted by that Office reflects, the agency intends to confine the activities of all of its employees, including plaintiffs, to terminating the processing of workers' compensation claims, notifying the affected parties, and "consolidat[ing] and secur[ing] records for storage and eventual transfer." Attachment 7 to Hobbie Declaration. Plaintiffs Timothy G. Ashton and David Skultety (Compl. ¶¶ 9 and 10) are employed as criminal investigators by the GSA. GSA's contingency plan states that certain personnel were to be designated by the Inspector General or Deputy Inspector General "to conduct essential activities to protect life and property, including pursuing or directly supporting law enforcement and criminal investigations or other legal proceedings that cannot be deferred." Attachment 11 to Hobbie Declaration. The duties described are fully consistent with the language of the Anti-Deficiency Act. Finally, plaintiff Joel T. Schatley (Compl. ¶ 6) is a nursing assistant who directly "provides patient care" to psychiatric patients in a VA Medical  
(continued...)

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE  
IRREPARABLE INJURY

The overriding prerequisite to the granting of any preliminary injunctive relief is the existence of irreparable harm resulting from the absence of an adequate remedy at law. Sampson v. Murray, 415 U.S. 61, 88 (1974) ("Sampson"). It is well settled that economic impact, even relatively severe economic distress, does not constitute irreparable injury. As stated in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam), reviewing this issue in the context of a stay pending appeal:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.

(Emphasis supplied). Moreover, the Court's holding in Sampson is particularly applicable here. In Sampson, the Court held that hardship from loss of federal employment does not constitute irreparable injury sufficient to support a preliminary injunction. An "insufficiency of savings or difficulties in immediately obtaining other employment -- external factors common to most discharged employees and not attributable to any unusual factors relating to the discharge itself -- will not support a finding of irreparable injury, however severely they may affect a particular individual." 415 U.S. at 92 n. 68.

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<sup>13</sup> (...continued)  
Center. The VA could hardly withhold such care without creating an emergency involving the safety of human life.

Moreover, the Court noted the historical denial of all equitable relief by federal courts in disputes involving the discharge of government employees and the well-established rule that "the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'." Id. at 83 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961)). The Court also considered the traditional unwillingness of equity courts to enforce personal service contracts. Sampson, 415 U.S. at 83. Further, the Court found that a showing of loss of income and damage to one's reputation simply does not rise to the level of the irreparable injury necessary to obtain injunctive relief. Id. at 91-92. See also Voinovich v. Cleveland Board of Education, 539 F.Supp. 1100, 1102 (N.D. Ohio 1982) (where plaintiffs' employment contracts were not renewed and they sought damages for breach of contract, alleged injuries did not rise to level of irreparable harm).

Surely, if a discharged employee is not entitled to injunctive relief, a fortiori, plaintiffs simply facing temporary loss of pay, which are likely to be of limited duration, should be unable to show irreparable harm. Moreover, plaintiffs have adequate remedies at law.

To the extent that plaintiffs would be subject to discipline for misconduct, including failure to report to work, they would have an appeal to the Merit Systems Protection Board on the disciplinary action, if that action met the statutory standard set forth in 5 U.S.C. § 7512. The Civil Service Reform Act

("CSRA"), Pub. L. 95-454, 92 Stat. 1111 et seq. (codified in various sections of 5 U.S.C.) -- as "an integrated scheme of administrative and judicial review," United States v. Fausto, 484 U.S. 439, 445 (1988) -- provides the exclusive remedy for wrongful personnel actions. See, e.g., Kleiman v. Department of Energy, 956 F.2d 335, 338 (D.C. Cir. 1992); Ryon v. O'Neill, 894 F.2d 199, 204 (6th Cir. 1990); Towers v. Horner, 791 F.2d 1244, 1246-47 (5th Cir. 1986); Weatherford v. Dole, 763 F.2d 394 (10th Cir. 1985); Carducci v. Reagan, 714 F.2d 171, 175 (D.C. Cir. 1983).<sup>14</sup>

To the extent that plaintiffs would claim that they are entitled to pay under theories outside the scope of the CSRA, they may also have other remedies available to them. Pay claims have been held to be for "money damages" and thus the exclusive jurisdiction is the Tucker Act.<sup>15</sup> Thus, for example, in a suit for pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 210 et seq., upon which plaintiffs rely, the Tucker Act is the exclusive jurisdictional basis. Parker v. King, 935 F.2d at 1177. "[I]t is firmly established that where the real effort of

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<sup>14</sup> Subsequent judicial review of MSPB decisions can then be sought in the United States Court of Appeals for the Federal Circuit, 5 U.S.C. § 7703(b)(1), which has exclusive jurisdiction over final orders or decisions of the MSPB. 28 U.S.C. § 1295(a)(9).

<sup>15</sup> See 28 U.S.C. § 1491; 28 U.S.C. § 1346(a)(2); Hubbard v. Administrator, EPA, 982 F.2d 531, 539 (D.C. Cir. 1992 (en banc)); Parker v. King, 935 F.2d 1174, 1177-78, reh. en banc denied, 948 F.2d 1298 (11th Cir. 1991), cert. denied, 112 S. Ct. 3055 (1992); Zumerling v. Devine, 769 F.2d 745, 748 (Fed. Cir. 1985); Graham v. Henegar, 640 F.2d 732, 734-35, reh. denied, 646 F.2d 566 (5th Cir. 1981).

the complaining party is to obtain money from the federal government, the exclusive jurisdiction of the court of claims over non-tort claims exceeding \$10,000 cannot be evaded or avoided by framing a district court complaint to appear to seek only injunctive, mandatory or declarative relief against government officials or the government itself." Bakersfield City School District of Kern County v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979). The essence of plaintiffs' claims is that designated employees would be entitled to payment under the FLSA or the Anti-Deficiency Act. Assuming that they are not limited to the CSRA remedial scheme, these are the kind of potential claims that may be presented in Court of Federal Claims.

Finally, even if plaintiffs were ultimately successful on the merits of their case in this Court and thereby awarded payment for their services, there may be another adequate means to satisfy that award. Specifically, the Judgment Fund, 31 U.S.C. § 1304, provides a permanent, indefinite appropriation for the satisfaction of judgments. The very purpose of this fund was to create a centralized, government-wide means to pay judgments without being constrained by concerns about whether adequate funds existed in agency appropriations to satisfy judgments. See Bath Iron Works v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994). Therefore, in the unlikely event that plaintiffs were successful in this action, they simply cannot contend that appropriated funds would not be available to satisfy a monetary award. Therefore, since their injury is purely monetary and

could be later redressed, injunctive relief is entirely inappropriate.

III. INJUNCTIVE RELIEF WOULD POSE EXTRAORDINARY HARM TO THIRD PARTIES AND THE PUBLIC INTEREST

It is difficult to conceive of a harm to the public interest more severe than the complete cessation of governmental functions which plaintiffs advocate here. Indeed, the harm would clearly be so catastrophic that plaintiffs assiduously avoid even addressing it, offering instead mere platitudes about serving "the public good by preserving the Constitution's allocation of responsibilities between the executive and legislative branches." Pl Mem. at 22. Of course, as noted earlier, this same principle counsels against the judiciary involving itself in what must ultimately be a legislative and executive resolution.

The clear import of plaintiffs' argument that no one should work in the absence of appropriations, however, would be to wreak havoc upon the public. As the 1995 Opinion states:

Were the federal government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation's airports would be closed and commercial air travel and transport would be brought to a standstill. Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping. The country's borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result. In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate. Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. Were the federal government to shut down, medicare payments for vital operations and medical services would cease. VA

hospitals would abandon patients and close their doors. These are simply a few of the significant impacts of a federal government shut down. Cumulatively, these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.

1995 Op. at 2-3. Not only would there be severe harm to the public at large but also specific harm to third parties around the world -- e.g. companies, investors, travellers, and restaurants and food distributors.

Even under their alternative theory that the designation of emergency personnel has been too broad, the harm to third parties and the public interest would be extraordinary. Plaintiffs blithely contend that there will be no harm because agencies will simply be following the law. See Pl. Mem. at 21. Yet, this contention merely begs the question of who decides which personnel is performing emergency services. The public's interest is plainly best served by permitting the agencies who have been charged by Congress with certain statutory missions and who are in the best position to know the role that their personnel play in furthering those missions. In any event, the Court should err on the side of caution by deferring to the agency's determination of who is performing emergency functions. A mistaken judgment that someone is not performing an emergency function would, by definition, be extremely harmful to the public

interest, since it would "imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

CONCLUSION

The Court should deny plaintiff's application for a TRO.

Respectfully submitted,

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