

## The Government Shutdown and the Law (October 29, 2025)

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In this article, Bassin examines what the law says about taxation and other government functions during a government shutdown.

Three decades ago, I was serving as a Justice Department attorney during one of the earliest government shutdowns. Having been designated “essential” (but only on some days), I was instructed to represent the United States in ongoing civil litigation. Since I was not getting paid, I took some time to research the law surrounding a government shutdown. Three decades and at least five shutdowns later, I am revisiting that research. Here is what I have learned.

Since the Middle Ages and the Magna Carta, the Anglo-American governmental systems have limited the executive’s authority to unilaterally operate the government without the consent of the citizenry. By taking the “power of the purse” from the monarchy, these systems required the king to obtain consent from (at least portions) of the citizenry on many matters regarding taxation and spending. That principle provides the foundation for our representative form of government (as opposed to a monarchy or autocracy).

The U.S. Constitution incorporates that principle. Spending and taxation authority reside in Congress under Article I, section 8 of the Constitution; the executive has no independent taxing or spending power. Article I, section 9 precludes unauthorized spending, providing that “no Money shall be drawn from the Treasury, but in consequence of appropriations made by law.” The U.S. Code expounds upon the constitutional prohibition. Under title 31, section 1341(a), no one may “make or authorize an expenditure or obligation” absent a lawful appropriation. Similarly, under section 1342, government officers and employees “may not accept voluntary services for the government . . . except for emergencies involving the safety of human life or the protection of property.” Emergencies are narrowly defined to exclude

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“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). Neither statute allows for current payment of volunteers, although section 1341(c) mandates that any federal employee furloughed or required to work without pay shall be paid immediately after the lapse in appropriations ends. Anyone violating these rules has committed a felony punishable by up to two years in prison.<sup>1</sup>

Setting aside some nuances, three basic prohibitions emerge. Absent an appropriation passed by Congress and signed into law by the president, anyone — including the president — can go to jail if they:

- obligate the government to pay for goods or services;
- require another government employee to perform a job with or without pay; and
- allow their subordinates to perform their duties as “volunteers” if the volunteers’ duties do not involve an emergency and are not required to prevent an imminent threat to the safety of human life.

Even if Congress and the president informally agree, designation of an employee or their functions as “essential” makes no difference; that vague terminology has no basis in the Constitution or the statutory law.

The plain statutory language and the Constitution govern many commonplace situations during a shutdown:

- *Can the government continue to collect taxes?* Much of the process is automated. However, to the extent that the process is not automated (for example, opening the mail and processing checks), the answer is no. The IRS employees still working during the shutdown are not volunteers; most have been required to report under pain of being furloughed. Even if they were volunteers, their supervisors could not allow them to work because performance of their duties does not involve an imminent threat to the safety of human life. No one can be paid until the shutdown is over.
- *Can the military pay soldiers?* National defense surely involves situations that present an imminent threat to human life. But military commanders may not require soldiers to “voluntarily” serve without pay. The imminent threat to human life exception would not authorize commanding officers to accept volunteers, and whether a sailor on board an aircraft carrier in the Persian Gulf can even be said to be a “volunteer” is debatable. Regardless, the sailors’ families living in the United States will not receive the sailors’ pay until the shutdown is over. (Defense Secretary Pete Hegseth has announced that

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the Department of Defense has reallocated research funds to pay the salaries of soldiers.<sup>2</sup> Whether that is legal under appropriations law remains to be seen.)

- *Can government employees pay benefits to farmers, contractors, universities, or veterans?* In general, no one can issue checks when there is no appropriation. Even if funds for paying the benefits were available from some trust fund or unexpired appropriation, the government cannot pay the employees who process and send the benefits checks. Those employees may not volunteer to work without pay, and their supervisors cannot allow them to volunteer because issuing benefits checks is not required to prevent an imminent threat to the safety of human life.
- *Can the courts operate?* For civil matters, almost surely no. Even if all involved were volunteers, the conduct of virtually all civil litigation does not implicate any imminent threat to the safety of human life. Volunteers (and only volunteers) might be able to conduct criminal litigation involving an imminent threat to the safety of human life.

Absent a new appropriation, these (and other) functions of government cannot continue.

We all should recognize that this is an untenable scenario. No one would argue that it is good policy to leave the borders unguarded, soldiers unpaid, government benefits suspended, or the courts largely closed. However, the current jury-rigged system in which government operations continue (or not) based upon some vague notion of what is “essential” does not comport with either the Constitution or the U.S. Code.

Ultimately, our Founding Fathers probably had it right. A lapse in appropriations should be extremely painful. The prospect of a government shutdown ought to hang like a sword of Damocles over the heads of our elected officials, regardless of party or ideology. The current shutdown will surely produce enough blame to pass amongst all our elected leaders. One thing is for sure: Even the threat of it ought to focus everyone’s attention.

### FOOTNOTES

<sup>1</sup> 31 U.S.C. section 1350.

<sup>2</sup> Ben Johansen and Jennifer Scholtes, “Pentagon Will Pay Military Troops, Trump Says, Shifting \$8B,” Politico, Oct. 11, 2025.