Protocols Exist for Operating the Government During a Shutdown but Not During a Debt Ceiling Crisis

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The U.S. federal government once again confronts twin fiscal crises. Absent intervening legislation, the government's appropriations will largely lapse on October 1, 2021, prompting a shutdown. Separately, the secretary of the Treasury has informed Congress that, on approximately October 18, 2021, the federal government will exhaust its borrowing authority under the statutory debt ceiling.[1] Unless legislation is enacted to lift or suspend that limitation, there may be insufficient cash on hand to meet all of the government's obligations, causing what some call a "debt ceiling crisis."

Although the government shutdown and the debt ceiling crisis are occasionally conflated, they have distinct effects on government operations and on parties interacting and transacting with the government. A government shutdown occurs when federal agencies experience a lapse in their legal authority to incur financial obligations. Many federal employees cannot continue working during a shutdown and many contracts and grants are not awarded. By contrast, in a debt ceiling crisis, the government generally retains the authority to incur obligations, but may lack the cash to pay all of its obligations on time.

Government operations during a shutdown are controlled by rules that, albeit complex, are well-established and elaborated by past practice. The debt ceiling crisis, however, is unprecedented and little is known about the way the federal government would operate in it.

Government Operations During a Shutdown

The Antideficiency Act, 31 U.S.C. § 1341, prohibits officers and employees of the federal government from entering into obligations in excess of appropriations.[2] Appropriations that fund much of the federal government's current operations will expire at 11:59 p.m. on Thursday, September 30, 2021.[3] If no further appropriations legislation (such as a resolution continuing current appropriations levels) is enacted, the Antideficiency Act will generally deprive federal agencies of their authority to enter contracts, make grants, employ personnel and incur other financial obligations.

Yet some governmental functions continue even during a shutdown. Guidance promulgated during past shutdowns (or near-shutdowns) by the White House Office of Management and Budget (OMB) and the Department of Justice's Office of Legal Counsel has authorized agencies to obligate funds during a shutdown for, among other things:

- activities funded by multi-year or indefinite appropriations;
- activities necessary to the discharge of the president's constitutional duties and powers (likely including the conduct of foreign diplomacy and the exercise of the commander-in-chief powers);
- activities that, if suspended, would adversely affect the execution of certain funded functions (*e.g.*, the unfunded disbursement activities for funded social security benefits); and

[1] Letter from Janet L. Yellen to Nancy Pelosi, Oct. 28, 2021.

[2] 31 U.S.C. § 1341(1)(A)-(B) ("An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. …").

[3] See Consolidated and Further Continuing Appropriations Act, 2021 (P.L. 116-260).

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- activities that, if suspended, would imminently threaten the safety of human life or the protection of property (*e.g.*, air traffic control).[4]

Federal agencies must maintain updated contingency plans for operations during a shutdown, consistent with guidance from the OMB.[5] The plans are collected on the OMB website.

For example, with respect to the federal government's litigation responsibilities, the Department of Justice's plan indicates that criminal matters would continue without interruption.[6] Civil litigation, however, would be curtailed or postponed to the extent that this can be done without compromising to a significant degree the safety of human life or the protection of property. This plan assumes the courts would continue operating (albeit possibly at a reduced level) during the shutdown.

Government Operations During a Debt Ceiling Crisis

In contrast to the well-documented government shutdown procedures, no formal guidance is available about the operational effects of a debt ceiling crisis. There is no past practice to draw on, because the statutory debt ceiling has always been raised or suspended before the crisis came to a head. Nor do shutdown procedures generally offer a reliable analogy for a debt ceiling crisis, because the problem they address (lack of authority to obligate funds under the Antideficiency Act) differs from the principal problem during the crisis (inability to borrow when cash is insufficient to meet obligations).

Some information has been made public about operational options the Treasury considered during the (ultimately averted) brush with the debt ceiling in the summer of 2011. For example, according to a subsequent report from the Treasury's inspector general, the "range of options" included "asset sales; imposing across-the-board payment reductions; various ways of attempting to prioritize payments; and various ways of delaying payments." While the Treasury concluded that none of the options "could reasonably protect the full faith and credit of the U.S., the American economy, or individual citizens from very serious harm," Treasury officials told the inspector general "that organizationally they viewed the option of delaying payments as the least harmful among the options under review."[7] The inspector general's report does not indicate whether a final choice was made among the options.

Moreover, whereas a government shutdown occurs at a fixed time when statutory appropriations lapse (typically midnight of October 1), the timing of a debt ceiling crisis (and the government's exhaustion of extraordinary measures to avoid it) depends on the flows of outlays and revenues. Estimating these flows has been more challenging during the pandemic.

Conclusion

The government shutdown and the debt ceiling crisis have much in common: They are both borne of an absence of legal authority — be it authority to spend or authority to borrow — and can therefore be resolved by legislation. For this reason, both types of disruptions can fairly be characterized as self-inflicted crises.

But the operational consequences of the two crises are quite distinct. Shutdowns have immediate effects on government operations. These may be disruptive and often wasteful, but they are relatively well understood — or at least flow from a well-understood body of law and practice.

A debt ceiling crisis, by contrast, is largely a legal *terra incognita*. Although its immediate operational impact may be less abrupt and severe than that of a shutdown, its consequences are not well understood and are not the subject of established, tested protocols. Hence, a debt ceiling crisis poses a more serious crisis of confidence in the orderly operation of government.

[4] *See* OMB, Frequently Asked Questions During a Lapse in Appropriations, Sept. 23, 2021; OMB Memorandum 18-05-REV, Jan. 19, 2018; OMB Memorandum 13-22, Sept. 17, 2013; Office of Legal Counsel, Memorandum Opinion for the Director of the Office of Management and Budget, Government Operations in the Event of a Lapse in Appropriations (Aug. 16, 1995).

[5] *See* OMB Circular A-11, section 124.2.

[6] U.S. Department of Justice FY 2022 Contingency Plan, Sept. 24, 2021.

[7] Letter from Eric M. Thorson to Orrin G. Hatch, Aug. 24, 2012.