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The constitutionality of government shutdowns has never been tested in court, nor has the constitutionality of the related Anti-Deficiency Act. Analysis of the Act is virtually absent from published literature. This is surprising given the increasing frequency of federal government shutdowns.

The history behind the enactment of the Constitution clearly demonstrates that the Framers were interested in creating an effective government to replace the demonstratively ineffective government under the Articles of Confederation. Closing the government created by that endeavor is blatantly inconsistent with the intent of the Framers.

Shutdowns are fundamentally inconsistent with the constitutional plan of producing an effective, vigorous government. While the Anti-Deficiency Act makes some gestures towards preserving some of the attributes of the government during a "shutdown," those gestures are woefully inadequate. The Anti-Deficiency Act has its own constitutional difficulties.

The background to the adoption of the Constitution will first be analyzed, and then the implications for the constitutionality of the Anti-Deficiency Act will be discussed. Several different constitutional arguments will be examined, including a structural argument, the Take Care Clause argument, the Non-Delegation Doctrine, and the Oath argument.

I. Rebellions and Ineptitude

The problems under the Articles of Confederation are best illustrated by Shays's Rebellion, which came only months before the Constitutional Convention in Philadelphia.[1] Shays's Rebellion occurred in New England

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1. Shays's rebellion was frequently referenced during the convention. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 18, 48, 318, 406 (Max Farrand ed., 1911); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318, 332 (Max Farrand ed., 1911); James Madison, *Preface*

because of complaints about taxation and related property foreclosures for tax nonpayment.[2] This rebellion took place shortly after a first abortive attempt to hold a constitutional convention. However, not enough states had sent delegates for that convention to proceed. A second convention was called for, and partly because of Shays's Rebellion, enough states were now motivated to send delegates to the convention. That second constitutional convention produced the draft constitution that was eventually ratified.

The failure of the government under the Articles of Confederation to respond to Shays's Rebellion demonstrated the ineffectiveness of the existing government. Shays's Rebellion was only put down by the ad hoc organization of temporary militia, paid for by voluntary contributions from various merchants.[3] That temporary militia raided the federal armory in Springfield, Massachusetts, and with weapons from the armory put down the rebellion.[4]

The national government had proved incapable of responding to the emergency of a rebellion. Part of the reason for this inability was the bizarre manner of exercising executive power under the Articles of Confederation. Although a secretary of war had been appointed, that person could only act under directions of a committee of the Congress. The secretaries were effectively 'clerks' with Congress micromanaging everything.[5] In fact, "John Jay pronounced Congress 'unequal' to the task of wielding the executive power."[6]

to Debates in the Convention of 1787, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 539, 547 (Max Farrand ed., 1911). After discussing the Annapolis meeting Madison stated: "[T]he ripening incidents [between the Annapolis convention and the meeting of the delegates in Philadelphia] was the Insurrection of Shays in Massts. against her Govt; which was with difficulty suppressed, notwithstanding the influence on the insurgents of an apprehended interposition of the Fedl. troops." *Id.* at 547. No federal troops were ever involved.

2. *Shays' Rebellion*, U.S. HISTORY, www.ushistory.org/us/15a.asp (last visited Sept. 30, 2020).

3. *Id.*

4. General Shepard had taken possession of the armory under orders from Governor Bowdoin, and he used its arsenal to arm a militia force of 1,200. He had done this despite the fact that the armory was federal property, not state, and he did not have permission from Secretary of War Henry Knox. LEONARD L. RICHARDS, SHAYS' REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 27-28 (2002); *see also* JOSIAH GILBERT HOLLAND, 1 HISTORY OF WESTERN MASSACHUSETTS 285-86 (Samuel Bowles et al. eds., 1855).

5. Although the armory had been created by the government under the Articles of Confederation, no permission was received from the Secretary of War. *See* RICHARDS, *supra* note 4; HOLLAND, *supra* note 4.

6. SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 115 (2015) (ebook).

In sharp contrast, under the subsequently adopted Constitution, President George Washington promptly marshalled three states' militias and put down the next rebellion—the Whiskey Rebellion. The Whiskey Rebellion was also a tax protest, involving a tax of six cents a gallon for major whiskey producers, but nine cents a gallon for small producers.[7] The small producers were mostly west of the Appalachian Mountains. These producers protested, including by tarring and feathering federal tax collectors. President Washington called up the militias of three states and led them towards western Pennsylvania from Philadelphia—the capital.[8] That rebellion was quickly put down with no major confrontations and no serious bloodshed.

The next rebellion was the American Civil War. The pattern of rebellions almost every five years after independence was broken by Washington's prompt, effective action, thereby demonstrating that the new federal government could and would act.

II. Defects under the Articles of Confederation

Many of the defects of the national government under the Articles of Confederation were described by James Madison in his pamphlet, *Vices of the Political System of the United States*.[9] The want of sanctions by the Government of the Confederacy was among those defects listed.[10] Encroachments by the states on the federal authority, the laws of nations, and the rights of other states figured prominently in Madison's complaints.[11] Madison also mentioned the want of a guaranty of the states and their constitutions against internal violence.[12] In a letter of Madison's

7. *Id.*

8. The whiskey tax had been proposed by Alexander Hamilton as a tax on a luxury item. Washington was concerned about the reaction to the tax but polled various producers of whiskey and found they would accept it willingly. It helped that for major producers, the tax could even be lower. However, he obviously failed to seek the sentiment of producers from the west of the United States, which used whiskey as a substitute for currency and was a useful way of transporting crops from the west to eastern markets. The tax was ultimately repealed under the Jefferson administration, and the federal government subsequently relied on customs duties. This was the first and only time an American President went off to battle leading troops. Subsequently the capital moved to Washington, D.C. Peter Kotowski, *Whiskey Rebellion*, MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/whiskey-rebellion/ (last visited Sept. 30, 2020); *Whiskey Rebellion*, HISTORY, https://www.history.com/topics/early-us/whiskey-rebellion (last updated Sept. 13, 2019).

9. James Madison, *Vices of the Political System of the United States* (1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 166–69 (Philip B. Kurland & Ralph Lerner eds., 1987).

10. *Id.* at 167.

11. *Id.*

12. *Id.* Shays's Rebellion was not mentioned. The rebellion effectively ended February 3–4 of

to George Washington of April 16, 1787, about the potential contents of a new national constitution, Madison states, "An article should be inserted expressly guarantying the tranquility of the States against internal as well as external dangers."[13] It is clear that Madison was referencing Shays's Rebellion.

Want of power in Congress was perceived as a problem. Such concerns were shared by many leaders of the time. Richard Henry Lee mentions that want of power in a letter to George Mason of May 15, 1787: "[T]he cry is power, give Congress power."[14]

Lack of an ability to raise and spend money was one of the major problems for the government under the Confederation. Edward Carrington echoed this refrain, and specifically referenced "the late tumults in Massachusetts," as well as the "[d]elinquencies of the States in their foederal [sic] obligations."[15] Carrington went on, "Our tendency to anarchy and consequent despotism is felt, and the alarm is spreading."[16] Prior to the height of the outbreak in Massachusetts, John Jay wrote to Jefferson:

> The inefficacy of our government becomes daily more and more apparent. Our treasury and our credit are in a sad situation; and it is probable that either the wisdom or the passions of the people will produce changes. A spirit of licentiousness has infected Massachusetts, which appears more formidable than some at first apprehended.[17]

Jay specifically identified as a problem "[a] reluctance to taxes."[18] Earlier that same year, Rufus King wrote to Eldridge Gerry about the sad state of the representation of the states in Congress. He went on to state, "We are without money or the prospect of it in the Federal Treasury; and the States, many of them, care so little about the Union, that they take no measures to keep a representation in Congress."[19]

1787—only months before Madison's writing. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 97 (2005).

13. James Madison to George Washington, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 251.

14. Richard Henry Lee to George Mason (May 15, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 170. Lee goes on to warn about excessive grants of power, "that every free nation . . . has lost its liberty by the same rash impatience . . . ." *Id.*

15. Edward Carrington to Thomas Jefferson (June 9, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 171.

16. *Id.*

17. John Jay to Thomas Jefferson (Oct. 27, 1786), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 164–65.

18. *Id.* at 165.

19. Rufus King to Elbridge Gerry (Apr. 30, 1786), *reprinted in* 1 THE FOUNDERS'

Under the Articles, the Continental Congress could make treaties, as well as declare war and send and receive ambassadors. When that proved ineffective, Congress created a Department of Foreign affairs, headed by a single officer. But because the secretary was a 'clerk' this measure was a failure. The "clerk," John Jay, himself complained decrying the plight of hostages and in a letter to Washington said Congress was unequal to the task of wielding executive power and that Congress could never act with vigor and dispatch.[20]

The history is quite clear. Want of an effective national government, adequately funded, with an ability to act was a prime mover of those leaders who wanted a new form of government at the national level. It is fair to state that this desire underpins the entire constitution that emerged in September of 1787. For those who hold that Founders' intent should be a major interpretative touchstone for our Constitution, this desire for an effective government deserves recognition at the highest level.[21]

III. The Drafting of the Constitution

After the proposal of the draft constitution, the theme of the need for an energetic government (i.e. one that worked) continued. Alexander Hamilton stated, "[I]f we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities."[22] James Madison echoed that message in a letter to Thomas Jefferson stating, "This ground-work[23] being laid, the great objects which presented themselves were . . . to unite a proper energy in the Executive and a proper stability in the Legislative departments . . . ."[24]

During the ratification convention in Pennsylvania, James Wilson stated regarding the President:

> We secure *vigor*. We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them. Add to

CONSTITUTION, *supra* note 9, at 162.

20. PRAKASH, *supra* note 6.

21. The very first sentence of Federalist Paper No. 1 is: "After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America." THE FEDERALIST PAPERS NO. 1, at 49 (Alexander Hamilton) (John C. Hamilton ed., 1866).

22. THE FEDERALIST PAPERS NO. 23 (Alexander Hamilton), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 305.

23. Drafting of the Constitution.

24. James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 644.

> all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.[25]

In Federalist No. 70 Hamilton wrote, "Energy in the executive is a leading character . . . of good government. It is essential to the protection of community against foreign attacks: It is not less essential to the steady administration of the laws . . . ."[26]

A. The Take Care Clause

The Take Care Clause of the Constitution is also significant, for it mandates the most specific duty of the President.[27] During the Constitutional Convention little time was spent discussing it. The clause was drafted in the committee of style to read: "[H]e shall take care that the laws of the United States be duly and faithfully executed . . . ."[28] That draft was a minor rewrite of the language that emerged from the Committee of Detail: "It shall be his duty to provide for the due & faithful exec—of the Laws of the United States (be faithfully executed) to the best of his ability."[29] The changes have been described as follows:

> The changes . . . altered law execution in two important ways. First, they made law execution a duty and not merely a power. . . .
>
> Second, the Committee of Detail draft substituted a passive construction to describe law execution (that the laws "be faithfully executed"), which indicates its expectation that the President would oversee the execution of the law by others, rather than do it personally.[30]

The Convention then discussed the report of the Committee of Detail, but the basic structure of the powers of the presidency, as set forth by the Committee of Detail, went unquestioned.[31]

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25. James Wilson, *Pennsylvania Ratifying Convention* (Dec. 4, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 501 (Philip B. Kurland & Ralph Lerner eds. 1987).

26. THE FEDERALIST PAPERS NO. 70 (Alexander Hamilton), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 506.

27. U.S. CONST. art. II, § 3 ("He shall take care that the laws be faithfully executed . . . .").

28. Records of the Federal Convention, *reprinted in* 4 THE FOUNDERS' CONSTITUTION, 125 (Philip B. Kurland & Ralph Lerner eds. 1987).

29. *Id.* at 124–25.

30. Michael W. McConnell, *James Wilson's Contributions to the Construction of Article II*, 17 GEO. J.L. & PUB. POL'Y 23, 43 (2019). James Wilson was a member of the five-member committee of Detail. The most detailed information we have regarding the workings of the Committee of Detail comes from Wilson's papers, but his own draft of Article II was not contained in those papers.

31. *Id.* at 46.

After the government commenced functioning under the new Constitution, William Rawle expressed an early view of the clause:

> "The president *shall take care that the laws shall be faithfully executed.*" The simplicity of the language accords with the general character of the instrument. It declares what is his duty, and it gives him no power beyond it. The Constitution, treaties, and acts of congress, are declared to be the supreme law of the land. He is bound to enforce them; if he attempts to carry his power further, he violates the Constitution.[32]

The Supreme Court has dealt with the Take Care Clause in a number of cases but has never explored its origin in any depth. They have held under the clause that the President had authority to appoint a guard to protect Justice Fields of the Supreme Court[33] and to discharge a postmaster from his office.[34] On the other hand, the President could not discharge a Commissioner of the Federal Trade Commission[35] nor authorize the seizure of steel mills during wartime.[36] In none of these cases did the opinions employ substantial investigation into the origins of the Take Care Clause.

Indeed, Jack Goldsmith and John F. Manning state the following:

> Two things stand out about the Court's reliance on the Take Care Clause . . . . The first is that . . . the Court treats the meaning of the clause as obvious when it is anything but that. The Court's decisions rely heavily on the Take Clare Clause but almost never interpret it, at least not in any conventional way. . . .
>
> The second striking element is that the functions that the Court ascribes to the Take Care Clause are often in unacknowledged tension with one another. For instance, deriving a strong prosecutorial discretion from the clause may collide with the scruple against dispensation[37] that the Court also reads into it. Similarly, the Court has said that the Take Care Clause precludes presidential lawmaking while also finding that the clause justifies the exercise of a presidential completion power—an

32. William Rawle, *A View of the Constitution of the United States* (1829), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 28, at 129 (emphasis added).

33. Cunningham v. Neagle, 135 U.S. 1 (1890).

34. Meyers v. United States, 272 U.S. 52 (1926).

35. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

36. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

37. Dispensation is the power to omit the execution of a law or, in other words, to dispense with its application. It was one of the royal prerogatives that was deliberately not given to the President in the Constitution.

> implied presidential authority to prescribe extrastatutory means when necessary to execute a statute.[38]

The history of the clause has been thoroughly traced though a seminal article by Kent, Leib, and Shugerman, *Faithful Execution and Article II*.[39] The authors sum up their extensive research:

> We contend that it imposed three interrelated requirements on officeholders: (1) a duty not to act *ultra vires*, beyond the scope of one's office; (2) a duty not to misuse an office's funds or take unauthorized profits; and (3) diligent, careful, good faith, honest, and impartial execution of law or office.[40]

They found that "take care" references have a long history in English jurisprudence. One reference is particularly trenchant in the instant case:

> Sir John Fortescue, Chief Justice of the King's Bench in the fifteenth century, attribute[d] England's "excellent Constitution" in part to the fact that the king "is circumscribed with Laws which are calculated for the good of the Subject . . . that is, to take care that the Laws be duly put in Execution, and that Right be done."[41]

The word "faithfully" was particularly important in that history. "[F]aithful was linked with words such as diligent, honest, due, careful, impartial, and skillful, suggesting an affirmative duty."[42]

The oath[43] required of the President by Article II includes a promise to "faithfully execute the office of President," and as Kent et al. conclude:

> The oath or command of faithful execution to an officeholder came to convey an affirmative duty to act diligently, honestly, skillfully, and impartially in the best interest of the public, a restraint against self-dealing and corruption, and a reminder that officeholders must stay within the authorization of the law and office.[44]

Kent et al. assert that "the record we uncovered cuts against presidential nonexecution on the basis of independent constitutional interpretation."[45] Moreover, they conclude that "[t]he Faithful Execution

38. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1838 (2016) (footnotes omitted).

39. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

40. *Id.* at 2112.

41. *Id.* at 2136 (quoting JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 133 (John Selden trans., London, 1775)).

42. *Id.* at 2146.

43. U.S. CONST. art. II, § 1.

44. Kent et al., *supra* note 39, at 2141.

45. *Id.* at 2186.

Clauses . . . underscore that '[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts.'"[46]

In other words, the President has no discretion to not enforce laws enacted by Congress, nor does he have discretion to pick and choose among them: *his duty is to faithfully enforce them all.*

IV. What Then Are the President's Duties When Congress Has Failed to Pass a Budget?

Government shutdowns are a relatively recent phenomenon. Although Congress enacted the Anti-Deficiency Act in 1884, broad shutdowns did not occur until after a set of legal opinions were issued in 1980 and 1981 by Attorney General Benjamin Civiletti which stated that the absence of funding required a government shutdown.[47] These opinions did not consider any potential constitutional issue regarding shutdowns, but only whether statutory provisions applied including the Anti-Deficiency Act. In neither Attorney General opinion was any consideration paid to whether the Constitution controlled, or indeed, whether the Anti-Deficiency Act might itself be unconstitutional. Only after these opinions did government shutdowns become somewhat routine.

It has become customary that after a shutdown, all governmental employees are paid for their wages lost during the shutdown. Only government contractors end up suffering financial loss from a shutdown but everyone is betrayed. However, as a result of 2019 amendments, the Anti-Deficiency Act now mandates payments to any federal employees or District of Columbia employees who are furloughed as a result of a shutdown, and any employees who are required to work are also to be paid.[48] What had been custom has now become law. In effect, furloughed government employees now receive paid vacations for workdays that they are prohibited from working, although the payments are subject to "enactment of appropriations Acts ending the lapse."[49]

46. *Id.* at 2187.

47. Authority for the Continuance of Gov't Functions During a Temporary Lapse in Appropriations, 5 Op. Att'y Gen. 1 (1981); Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation, 4A Op. Att'y Gen. 16 (1980).

48. 31 U.S.C. § 1341(c)(2) (2018).

49. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116–1, 133 Stat. 3 (2019); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116–5, 133 Stat. 10 (2019) (underlying policy for this statutory change is unclear).

Does the Anti-Deficiency Act authorize the President to shut down parts of the government? The short answer is that it can only do so if the Anti-Deficiency Act is itself constitutional. However, the apparent conflict with the basic purpose of the adoption of the Constitution—to produce an effective, vigorous government—suggests otherwise. Since the Attorney General opinions that underpin government shutdowns failed to consider any constitutional issue, this remains an open question. The Anti-Deficiency Act prohibition is associated with both a civil penalty[50] and with criminal penalties.[51]

The statute permits exceptions when public safety or property protection is implicated or emergency service is involved.[52] The Office of Personnel Management of the federal government or the appropriate District of Columbia public employer may designate an employee as exempted from the act and thus permitted to work. This process has not always worked well. For example, in one reported case a convicted cop killer escaped from custody because of a shutdown under Reagan and the removal of his experienced prison guards.[53] More recently, in connection with the Boeing Max 747 crashes, a government shutdown delayed FAA approval of a fix to the operating system of the airplanes—a fix that might have prevented the second Max 747 crash and thus the deaths of 157 people.[54] Certification delays by the FAA also delayed Delta Airlines' ability to utilize brand-new Airbus A220 jets.[55] It is clear that no one can fully foresee the consequences of shutting down any part of the

50. 31 U.S.C. § 1349 (2018) (indicating potential removal from office).

51. 31 U.S.C. § 1350 (2018) (declaring a fine up to $5000 and imprisonment for up to two years or both). In one of the few cases that mention the Anti-Deficiency Act, District Judge Smalkin stated: "[T]he court should not order such an expenditure . . . and if it were to do so, the undersigned judge could conceivably be open to criminal prosecution . . . , a situation that might mildly amuse some, but which ought to be avoided, if possible." U.S. v. Nave, 733 F. Supp. 1002, 1003 (D. Md. 1990).

52. 31 U.S.C. § 1342 (2018).

53. Deanna Paul, *A Government Shutdown Once Allowed a Convicted Cop Killer to Escape Prison. Here's How.*, WASHINGTON POST (Jan. 11, 2019), https://www.washingtonpost.com/history/2019/01/11/previous-government-shutdown-allowed-convicted-cop-killer-escape-prison-heres-how/. His experienced guards were recalled from the hospital to the prison. An unarmed teenager was left to guard him; the means of his escape is unknown.

54. Heather Timmons, *Ethiopian Airlines Crash Came After US Shutdown Delayed Boeing 737 Max Fixes*, QZ.COM (March 12, 2019), https://qz.com/1570266/ethiopian-airlines-crash-us-shutdown-delayed-boeing-737-max-fixes/. The airline pilots' union sent two letters—one Jan. 2, 2019 and the other Jan. 10, 2019—warning the President of the dangers associated with the shutdown in airline production and monitoring. Both the House and Senate leaders were also warned.

55. Ben Walsh, *Delta Air Lines Says the Government Shutdown is Costing It Millions*, BARRONS (Jan. 15, 2019), https://www.barrons.com/articles/delta-airlines-earnings-government-shutdown-51547565791.

government. It is also worth noting that since the issuance of Civiletti's opinions, the federal government has been shut down for a total of 162 days, or nearly 5 ½ months.[56] This is not an inconsequential amount of time for large segments of the federal government not to be functioning. To assume this is inconsequential blinks reality.

V. The Take Care Clause

As seen above, the Take Care Clause requires the President to exercise diligent, careful, good faith, honest, and impartial execution of his office and ensure that the law is carried out. Since the Framers distinctly refused to extend the Dispensation power to the President, the President has no power under the Constitution to distinguish between the laws that are to be enforced. Only if Congress gives him power to suspend a law (assuming that Congress itself has the power to do so) can any such distinction be drawn. But any such delegation may run afoul of the doctrine of Excessive Delegation of Legislative Power.

VI. Excessive Delegation of Legislative Power

Only two cases exist in which the Supreme Court has held that an excessive delegation of legislative power was attempted by Congress: *Panama Refining Co. v. Ryan*[57] and *Schechter Poultry Corp. v. U.S.*[58] In neither did Congress attempt anything as broad as it did in the Anti-Deficiency Act. Moreover, in neither of those cases did Congress arguably grant the President broad power not only *not granted, but rejected*, by the Framers of the Constitution. Only a single narrow suspension power was granted in the Constitution, and that was to Congress, i.e., the power to suspend the writ of Habeas Corpus "in Cases of Rebellion or Invasion the

56. Mihir Zaveri, Guilbert Gate & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html.

57. Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935). Congress had given the President the power to criminalize shipment of oil beyond that permitted by an extraction state without specifying any standards for the President's actions.

58. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The President had been given power to promulgate codes of fair competition drawn up by private commercial groups. The cases require that discretion be "canalized within banks." The exceptions in the Anti-Defamation Act for public safety or property protection are incredibly broad. Arguably anything related to property or safety, which would include any defense related or foreign affairs related matter, as well as commerce related including the FAA, the FTC, the FCC, the FDA, the Justice Department, the Bureau of Prisons, the Coast Guard, and even the National Forests and National Parks potentially fit within these "exceptions." For all intents and purposes the discretion is boundless.

public Safety may require it."[59] To be sure, Congress was further commanded not to draw money from the Treasury except through Appropriations by Law but that was a Constitutional command to Congress not to the President.[60]

The history involving the English King's suspension power controversy culminated with Parliament's enactment of the English Bill of Rights of 1689 which declared both the exercise of dispensing power and suspending power illegal.[61] This was well known to many of the Framers of our Constitution. The state delegations to the Constitutional Convention unanimously vetoed the idea that the President would have the power to suspend the laws.[62]

The question then boils down to this: Does Congress have the power to delegate to the President the power to suspend laws without itself violating the Article II Constitutional text that commands that the President take care that the laws be faithfully executed? Moreover, the question is not whether Congress's power of the purse can be employed. The questions of whether executive agents may continue to do their jobs executing the law, and whether they can also be paid for their service are distinct.[63] To be sure, Congress is further commanded not to draw money from the Treasury except through Appropriations by Law, but nowhere in that clause is there a hint that Congress can impede the President's Article II power and duty to see the laws be faithfully executed.[64]

VII. The Oaths

There are two oath clauses in the Constitution. One is the Presidential Oath contained in Article II: "execute the Office of President of the United States, and . . . to the best of my Ability, preserve, protect and defend the Constitution of the United States."[65] The second oath clause is in Article

59. U.S. CONST. art. I, § 9.

60. *Id.* ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

61. BILL OF RIGHTS, (1688) 1 W. & M. sess. 2, c. 2 (U.K.) ("Dispensing Power. That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parliament is illegal. Late dispensing Power. That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall.").

62. James Madison, 1 THE RECORDS OF THE FEDERAL CONVENTIONS OF 1787, *supra* note 1, at 103–04.

63. Indeed, at the present time, the only issue is when they can be paid, not whether.

64. U.S. CONST. art. I, § 9. *See supra* text accompanying note 61.

65. U.S. CONST. art. II, § 1, cl. 8. The last clause provides the text of the oath: "I do solemnly

VI—applicable to Senators and Representatives, Members of the several State Legislatures as well as to all executive and judicial officers both of the United States and of the several States. The second oath is more succinct: "to support this Constitution."[66] While this second oath provision is seldom the subject of litigation, it must be remembered that each executive branch official who has taken this oath, is independently and directly bound by the Constitution, and thus, not subject only to Presidential directions. Each executive official is subject to the laws of the United States as well.

It is fair to say that today we place little credence on oath taking. However, that has not always been the case. During the early period of common law, an accused person was not permitted to testify on their own behalf, for that would require taking an oath, and breaking an oath condemned that person's soul to damnation. It was presumed that anyone accused would lie.[67]

The history of the requirement of oath taking and its meaning in 17th century England is traced in *Faithful Execution and Article II*.[68] Blackstone summarized the convoluted history by stating that "English law imposed 'a limitation [on] the king's prerogative,' which was 'a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws.'"[69] Subsequent to the Glorious Revolution, "Parliament specif[ied] new, simpler versions of the oaths of allegiance and supremacy . . . [which in] the coronation oath now also required upholding the 'Protestant Reformed Religion Established by Law,' further cementing the Anglican basis of England's monarchy and government class, and making the upholding of statutory law and the established Protestant church keys to the monarch's execution of office."[70]

Oaths including pledges of faithful execution were frequently required in the early era of the English colonization of the new world. Besides requirements that public officials subscribe to oaths, even incorporated churches required oaths of faithful execution by vestrymen and other

swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." *Id.*

66. U.S. CONST. art. VI, cl. 3.

67. "It was considered certain that the defendant's fear of punishment, whether he was guilty or innocent, would cause him to perjure himself, and to avoid this, he was not allowed to testify." Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L. Q. 454, 456 (1962) (citing 1 WHARTON, CRIMINAL EVIDENCE, 903 (10th ed. 1912)).

68. Kent et al., *supra* note 39, at 2149–62.

69. *Id.* at 2159 (footnotes omitted).

70. *Id*. (footnotes omitted).

officials.[71] In every colony the assembly created offices and specified by oath or command that officeholders were bound to faithfully execute them.[72] Such officials numbered in the hundreds, from gagers of casks, managers of public lotteries, treasurers, and town clerks, to sergeants major of the militia. The list goes on and on.[73] Faithful execution was consistent with staying within authority, abiding by the law, following the intent of the lawgiver, and eschewing self-dealing and financial corruption.[74] Both civil and criminal law as well as parliamentary impeachments helped to define faithfulness in office.[75] Civil actions included actions to remove a person from office.[76]

The Framers of the Constitution were thus well acquainted with not only oaths but requirements of faithfulness and with the potential consequences for breaches of duties ascribed to officeholders. "By the eighteenth century, faithful execution was widely used to describe the proper role of a magistrate—to duly, impartially, and vigorously execute the laws."[77] "[O]aths of allegiance and faithful execution for state officials" were among the first things done by the newly independent state governments.[78] Each of the states required its chief magistrate be under oath to faithfully execute the office, abide by and faithfully apply the law, and had no power to suspend the laws or to dispense with their application to specific persons.[79] The Continental Congress also imposed similar oaths and bonds for faithful execution of offices throughout its existence. John Jay, for example, as Secretary of Foreign Affairs took an oath of fidelity to the United States and an oath "for the faithful execution" of his trust.[80] Indeed, future delegates to the Constitutional Convention, Elbridge Gerry, Gouverneur Morris, John Rutledge, James Madison, Roger Sherman, Hugh Williamson, and John Dickinson had each drafted "resolves," or resolutions, of the Congress imposing oaths of faithful execution.[81]

With that background, the command that both the President and each executive official of the federal government by oath should faithfully

71. *Id*. at 2165.
72. *Id*.
73. *Id*. at 2166–68.
74. *Id*. at 2169.
75. *Id*. at 2170.
76. *Id*. at 2171.
77. *Id*. at 2172.
78. *Id*.
79. *Id*. at 2175–76.
80. *Id*. at 2177.
81. *Id*. at 2178 (footnote omitted).

execute their offices is plain. Neither can any official, President included, claim any power to suspend or dispense with the laws. All of these officials have fiduciary duties to execute the laws. Members of Congress also are bound by an oath, and only if they have some granted power to suspend the laws may they do so. It is submitted that nowhere in Article I, Section 8 is such a power included, and indeed, the fact that a single suspension power is granted (with restrictions) in Article IX suggests that Congress simply has no such power under the Constitution. Moreover, the Anti-Deficiency Act stands in stark opposition to the motivating thrust of the Framers of the Constitution: a demand for an effective, active government at the federal level.

VIII. Conclusion

It is clear that several serious constitutional problems exist with regard to the Anti-Deficiency Act. First, it apparently violates the structural implications of the underlying reasons for the adoption of the Constitution. Second, it arguably violates the Take Care Clause of Article II in interfering with the President's constitutional duties. Third, the Anti-Deficiency Act is arguably an excessive delegation of legislative power, a delegation of power so sweeping as to be beyond any President's power to manage either by him or herself or as delegated to the executive branch Office of Professional Management. Fourth, it appears blatantly inconsistent with the promise to the American people of an effective government to "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty."[82]

Government employees should thus continue to perform their legally mandated functions despite a failure of authorized appropriations. When they will get paid is a separate matter and since their eventual payment is now guaranteed by statute once the funding crisis is resolved, there is simply no excuse for failure to perform.[83] Some politicians may rue the lack of the political tool of government shutdowns, but the Constitution was adopted with greater purposes in mind. In the words of Alexander

82. U.S. CONST. pmbl. A former colleague of mine, George Anastaplo, believed that the preamble to the U.S. Constitution was woefully unrecognized for its importance. *See* George Anastaplo, *Two "Preambles" for the Preamble of the Constitution of 1787*, George Anastoplo's Blog (Oct. 8, 2013), https://anastaplo.wordpress.com/2013/10/08/two-preambles-for-the-preamble-of-the-constitution-of-1787/.

83. The Fair Labor Standards Act of 1938, 29 U.S.C. § 203, commands timely payments by employers, but does not apply to the federal government, so nonpayment does not violate federal law.

Hamilton, "[T]he vigor of government is essential to the security of liberty."[84]

84. THE FEDERALIST PAPERS NO. 1, at 51 (Alexander Hamilton) (John C. Hamilton ed., 1866).