NLWJC- Kagan

Counsel - Box 007 - Folder 001

Shutdown [1]

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

DEPUTY DIRECTOR
FOR MANAGEMENT

To: Elena

March 5, 1996

MEMORANDUM FOR DESIGNATED HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Alice M. Rivlin
Director

SUBJECT: Planning for Agency Operations

The present continuing resolution expires on March 15th. The Congress is preparing to mark up legislation to provide for the remaining FY 1996 appropriations which we hope will be available by March 15. Nonetheless, we must continue to plan for the contingency that final passage may not be completed in a timely manner.

As in the past, OMB is responsible for ensuring that agency shutdown plans have been updated, especially in light of the full year funding provided for several programs in the continuing resolutions enacted in January. Therefore, please submit any changes in your plans to your OMB program examiner by Monday, March 11th.

We appreciate your ongoing cooperation.

DRAFT

DRAFT

December 12, 1995

cc: Lorraine Voles
Elena Kagan

MEMORANDUM FOR RON KLAIN
LORRAINE VOLES
MARY MARGARET OVERBEY

FROM: KUMIKI GIBSON

SUBJECT: VICE PRESIDENT'S PAY DURING SHUTDOWN

I understand that the Vice President does not want to receive his salary if the Federal government suffers another shutdown on December 15, 1995. Set forth below is background information about the Vice President's pay situation and various options available to him.

I. BACKGROUND

The Vice President is paid by Senate, and, like Senators, his salary is funded from permanent and indefinite appropriations. As a consequence, his pay is not interrupted during government shutdowns.

The Vice President is paid twice a month. His salary is deposited directly into his account with the Senate Federal Credit Union. His next "paycheck," to be received on December 20, 1995, will reflect his salary from December 1, 1995 through December 15, 1995; his January 5, 1996 "paycheck" will reflect his salary from December 15, 1995 to January 1, 1996. Any changes to the direct deposit process must be made at least one week prior to payday -- i.e., by December 13th for the December 20th paycheck and by December 29th for the January 5th paycheck.

II. OPTIONS

Set forth below is a discussion of the options available to the Vice President.

A. Return Funds to the United States Treasury

In the event of another shutdown, the Vice President could return his salary to the United States Treasury and ask Treasury to pay him when the furlough ends. Unfortunately, we will not be able to guarantee payment by Treasury at that later date. ?

B. Promise Not to Use the Salary Earned During Shutdown

A simpler approach would be to have the Vice President promise not to use any salary earned during the furlough period.

Rob Weiner
Dennis

He could accomplish this by transferring the appropriate amounts to a separate interest-bearing bank account or by having the Senate payroll office actually issue his paycheck and collecting them until the furlough ends.

This approach has at least two drawbacks -- both of which undermine our goal of exhibiting solidarity with furloughed Federal workers. First, we may have difficulty explaining to the public what the Vice President is actually doing with his salary. Perhaps more importantly, it is unclear whether we will be able to convince the public that the Vice President is not using his salary.

C. "Escrow" the Vice President's Salary with A Third Party

The Vice President could also ask a third party to hold his checks (if he stops having his salary deposited directly into his Senate account) or the amount of his salary until the furlough is over. This approach would allow the Vice President to say that he has "escrowed" his salary until the furlough is over, thus, establishing his good faith.

The major downside to this approach is that it is unclear who should serve as his escrow agent. One option is to have his accountant establish another bank account for the escrowed funds. **[MMO: Any other ideas?]**

III. RECOMMENDATION

I recommend that the Vice President escrow his salary with a third party. This is the only approach that (i) accomplishes our objective of evidencing solidarity and (ii) ensures that the Vice President will receive his full salary at the end of the furlough period. Both Lorraine and Mary Margaret concur in this recommendation. **[CAN I SAY THIS? DO YOU GUYS AGREE?]**

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

December 13, 1995

MEMORANDUM FOR GENERAL COUNSELS

From: Walter Dellinger

Re: Participation in Congressional Hearings during an Appropriations Lapse

Attached is a memorandum issued today for the Attorney General, which updates my memorandum dated November 16, concerning the Department of Justice's legal ability to respond to requests for testimony at congressional hearings during an appropriations lapse, in light of the fact that the appropriations bill for the legislative branch has been enacted into law.

The memorandum considers the issue of the relationship between unfunded functions of government to those functions that have been recently funded by appropriations bills covering the 1996 fiscal year. It concludes that to the extent that any of the Department's functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the Department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the Department's functions and activitives may continue.

Once again, I am circulating the memorandum to you because of the general applicability of the analysis.

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

December 13, 1995

**MEMORANDUM FOR JANET RENO,
ATTORNEY GENERAL**

From: Walter Dellinger,
Assistant Attorney General

Re: Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions during a Lapse in the Department's Appropriation

During the recent appropriations lapse we prepared for you a memorandum on the authority of the Department to participate in congressional hearings that were held during an appropriations lapse. See "Participation in Congressional Hearings during an Appropriations Lapse" (Nov. 16, 1995) ("November memorandum"). This memorandum is intended to update that earlier memorandum in light of subsequent congressional enactments, particularly the Act providing appropriations the legislative branch during the current fiscal year.

In his 1981 opinion, Attorney General Civiletti concluded that functions and activities could continue during a funding hiatus when authorization for their continuation was a valid inference from other funding decisions of the Congress. "Authority for the Continuance of Government Functions during a Temporary Lapse in Appropriations," 5 Op. O.L.C. 1, 5 (1981). Attorney General Civiletti identified as one of the categories of activities that may continue during a lapse those functions that are "authorized by necessary implication from the specific terms of duties that have been imposed on, or authorities that have been invested in" an agency. Id. He explained that this category includes unfunded functions that enable other funded functions to be executed. The primary example of this is social security benefits. Attorney General Civiletti opined that, although those who administer the social security benefit program are paid out of annual appropriations that could lapse, they could continue to administer the social security benefit program because the benefit itself is paid out of a permanent appropriation. Id. at 5 n.7.

In our November memorandum to you, we applied this principle to Department of Justice participation in congressional hearings:

> The Department's officers and employees may also participate in a hearing despite an appropriations lapse if authority for such participation arises by necessary implication from another specific statutory duty or duties. See 5 Op. O.L.C. at 3-5. In the context of congressional hearings, this exception permits the Department to participate where there is express authority or an express and specific appropriation for the hearing itself, and the Department's participation is necessary for the hearing to be effective, even though there is no specific authority or appropriation available for the Department to participate. This exception also operates where there is express authority for a specific Department official to participate -- such as might arise from a subpoena -- but no express authority for support or assistance of the witness. The Department would regard support and assistance to the otherwise authorized participation as being justified by necessary implication. This approach follows from the well-settled practice with respect to Social Security. See 5 Op O.L.C. at 5 n.7.

November memorandum, at 3.

By enacting the legislative branch appropriations bill, the Congress has now decided that the funded activities of the legislative branch for the current year should proceed (and the President has concurred). Should the Department again experience a funding lapse, that specific decision by the Congress to fund its own activities in the context of a funding lapse for other components of government will support an implication similar to the one drawn in the case of Social Security. Accordingly, the Department may continue activities such as providing testimony at hearings if "the Department's participation is necessary for the hearing to be effective." Id. The Department would also be authorized to perform other services that bear a similar relation to other funded functions of the legislative branch.

A similar implication can also be supported by the specific decisions that Congress has made to fund other agencies and departments of government so that their functions are to continue during a funding lapse.[1] To the extent that any of the Department's functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the Department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the Department's functions and activitives may continue. Although, as Attorney General Civiletti noted, it could be argued that the failure to appropriate funds for the Department's activities expresses a congressional conclusion that the execution of activities of

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[1] Since the last appropriations lapse, seven fiscal year 1996 appropriations bills have been enacted: Military Construction, Pub. L. No. 104-32; Energy and Water, Pub. L. No. 104-46; Agriculture, Pub. L. No. 104-37; Transportation, Pub. L. No. 104-50; Treasury, Postal, Pub. L. No. 104-52; Defense, Pub. L. No. 104-61; Legislative Branch, Pub. L. No. 104-53. Other actions of the Congress may also support such an implication; for example, a multi-year appropriation under circumstances in which Congress was aware that performance of the function or activity would necessarily span fiscal years.

other agencies that have otherwise been funded should nevertheless either be suspended or significantly damaged by virtue of the lack of funding for the Department, we conclude, consistently with Attorney General Civiletti's treatment of Social Security, that the decision to fund those other activities in this fiscal year "substantially belies this argument," 5 O.L.C. at 5 n. 7, and that the view presented here constitutes the better interpretation.

Chris Shrader - Shutdown 12/14

Latest writings on EEs who can work during lapse in approps.

Sent to Reno a memo

EEs can ~~respond to~~ support active the place in other branches of govt - if nec for effective execution of other functions.

About to send out to gen'l counsel.

Lead to some revisions of some plans.

Telecon Chris Shrader
12/5/95

Fax to me?

draft short
+
WD's memo to Reno.
+
everything else.

Written testimony –
elevates one more step?

Attached

Memo WD to Reno
re This testimony.

Just respond to q?
Anything diff?
– learned re how
a lg interp'd
largely disregard –
creates friction
incorp – into any further planning.

example

[illegible]

ONE HUNDRED FOURTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

[illegible]

November 28, 1995

The Honorable Walter Dellinger
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Dear Mr. Dellinger:

The House Civil Service Subcommittee will hold a hearing on Wednesday, December 6, 1995, on "The Government Shutdown: What's Essential?" This hearing will be held at 9:00 a.m in Room 2154, Rayburn House Office Building. This hearing is being held in furtherance of the Subcommittee's continuing oversight responsibilities and will address questions related to the planning and implementation of interruptions of routine government business.

On behalf of the subcommittee, I request that you testify with respect to the Department of Justice's role in planning, implementing, and overseeing the shutdown in the executive branch. In particular, we ask that you address the following topics:

1. Has the Department of Justice provided advice to the President and executive agencies with respect to which functions of government and positions may continue after a lapse of appropriations in addition to your memorandum of August 16, 1995? If so, how?

2. Please summarize for the subcommittee the types of government functions and positions that may be continued under the Antideficiency Act.

3. Has the Department of Justice been involved in any way in monitoring agency compliance with the law during the current shutdown? If so, please describe these efforts.

4. Please summarize for the subcommittee the functions performed by Justice Department employees who have continued to work during the shutdown, and explain the Department's rationale for continuing that work under the applicable standards and guidelines?

5. No previous shutdown lasted more than 3 days. Did the Department of Justice make any assumptions with respect to the length of the shutdown? If so, what time frame was assumed, and how did it affect the Department's decisions with respect to the functions and positions that were continued after the lapse of appropriations?

6. How would your determination with respect to what functions or positions to continue change if the shutdown were to last:

a. 10 days

b. 30 days

c. 90 days

7. Please describe for the Subcommittee differences in the law that would affect the government's ability to manage its human resources if the limitation on spending resulted from a conflict with the debt ceiling rather than a lapse in appropriations.

We would also appreciate receiving copies of all guidance or policy directives the Department of Justice has issued (both internally and externally) with respect to the government shutdown.

8. Please provide a description of your agency's functions and activities that were continued during this interruption of routine operations. Please indicate any special funding mechanisms (e.g., carry forward, trust funds, fee accounts, reimbursable agreements) used to support these continuing activities.

9. Please estimate the total costs to your agency associated with the interruption of operations between November 14 and November 20, 1995. Please provide descriptions of any unusual costs imposed on the agency or other unanticipated consequences of this interruption of operations. Please provide, too, an estimate of any savings associated with this interruption of activities.

Committee rules require that 100 copies of the testimony be delivered to the Subcommittee 24 hours prior to the hearing. Accordingly, please deliver those copies to Room B371C, Rayburn House Office Building, no later than 9:00 am December 5, 1995. If you have any questions, please contact Edward J. Lynch of the Subcommittee staff at (202) 225-6427. Thank you for your cooperation and assistance, and we look forward to your testimony.

Sincerely,

John L. Mica
Chairman
Subcommittee on Civil Service

Telecon w
Chris / Neil

Q 1 - ADVICE

Nov 13 memo to Jack - shadow staff.

ORAL ADVICE
↓

ALL -
EXEC PRIV IN BACKGROUND
DELIB PROCESS

ON CONSULTATION w/ WH, MT GIVE IT UP.

Trying to craft response to Q - not misleading / doesn't raise a red flag -
so cute doesn't come running for memo.
Proposed draft - today.

Koshinnen told aps -
kick conflicts to next panel

John's line - way implemented was commendable.
thought there would be more glitches
inev. that some revisions made.

Next time - under review
learning from experience
ask aps to do it all over again.
plans

but won't lock us into plans. → prob - plans will be fundamentally what were implemented.

My Administration is continuing discussions with the Congress on the remaining spending bills, in order to protect necessary priorities in education, the environment and law enforcement. Over the past several days we have made progress in good faith discussions with the leadership of the House and Senate Appropriations Committees to close the gap between us on these issues. The decision I am making tonight is consistent with our understanding that these discussions will continue with the goal of reaching a satisfactory conclusion as rapidly as possible. We should promptly complete this task, so there is no unnecessary shutdown of the government.

-30-30-30-

Dickson

~~Nelson~~
~~51269~~
~~Tom 57415~~

Chris Shrader

3:15 today -

6 or 7 ops

"inconsistencies"

4 or 5 randomly selected ops - Panel 1

OMB/OPM/Justice - Panel 1 2

2 "brought too many in"

- Initiated by OMB - Bill Hatter
395-3842
for witnesses
3:15 cmt call

Walter/Jamie/AG - talk sometime
This aft.
DOJ concerns re whi
gets said.

Shutdown conv. Chris Shrader 12/1

- legislative
- duration
- experience

Agree w/ JQ - get more back. But
Solves prob but not really -
still can't pay people - payless payday
morale problems / no unemployment
But: Posture of "govt open" for wk or 2.

Prob: no legally defensible interp of Act.

Retail level - maybe adjustments.
(toward end of period - VA/SS)

Other examples - can go over
Damus - some gps - suffic
justif. (like some - policy reasons
for not doing)
Now do -
Not sure how many more people

For broadscale new interp.

"Chances not
That remote" →

Poss of appointment
of indep counsel -
felonious behavior
of Admin of f'ls.
Hard for AG not
to forward to Ct.
Maj of either jud
cmtes(?) can do
this. - competition.

Reason to
believe
(no thg
into acct
states of
mind)

Gen'l counsels - would they advise their bosses to comply.
Makes heads of dept liable.

Re Cong disregard -
One misinterp doesn't justify another.
Legally insupportable.

Judge in pending case –
could give partial relief –
say govt must at least
interpret ADA in good faith.

Pres or AG suspends enf – of ADA –
recent events have made it entirely
unsettled as to what law is –
Civ. memo needs to be rethought.
But then no one can work!
Bec. need an approp to make an
obligate.

2 options
no one / everyone
↙ ↘
imposs so do other

Also – we're creating uniformity –
if prob is confusion

succumbing to other 2 branches!

Duration –
some plans 2-week plans?!

Really doesn't neg any new
legal std
An OMB thing / not an OLC thing.

Look more closely at partic
agencies
See if we can make some
more broadscale exceptions

Mica's — Civil Service Cmte

Hearing - Dec 6
Koshinnen / Shrader / Veteras / one other agency
→ Treasury?

Long list of specific functions
Want to know who made decision to bring in
— why / justification

Q - How aggressive in pointing out massively illegal behavior of branch of govt asking these questions.

↓

CS - We ought to make point at some point.
Also - nothing to do w/ whether ee's "essential" is.

Monday - mtg w/ OMB.

Say: standing
In meantime....

Notes for meeting w/ Chris 12/1/95

1. Defer to Congressional interpretation of ADA - anything goes.

2. Change (broaden) interpretation of (related to above)
   a) emergency exception
   b) executive function exception

3. Change (narrow) interpretation re
   a) implicit authorizations - say not permitted
   b) assuming continuing funcs of priv econ - say won't ergo - create real emergency.

4. Plan for longer shutdown
   Duration affects shutdown plans.
   Say assumps re duration must be changed.

5. Say experience suggests need for more ees under either exception noted in (2) above
   See (2) above

Combine:
1. Duration
2. Experience
3. Other branches' interpretation

Re 4+5:
What specifically can we do differently?

Walter testimony?

Ask for leg amending ADA to conform w/ Cong practice?

Telecon Walter Dellinger 11/30

6th - Civil Service Oversight Cmte

Compliance w/ ADA.

Quick take - Civ. fucked this up. tried to domesticate lapse of approps.

- [related to our functions
But how do you do this, given tightening of Civ opin / ADA.

Prob 1

2nd prob - quickly run out of $. We have no $.

We're vulnerable on grounds that we let too many back - not the opposite.
Rifkind said - straight down the middle. Follow Civiletti.

Our legal opinion says we can do all this; if we change, entirely our responsib.

↓

Shutdown all airports
no Social Security.

Statute using same language (check this)

- Do you assume continuing functions of private economy?

- Also "implicit authorizations" - like people sending out SS checks

On other approach - defer to interp. of other 2 branches. Everyone is imp't.
No legal theory to back this up.

We can be more explicit abt how interp varies depending on duration. That will allow us to bring some more EEs in.

Chris has list of all things we could do after a talk to bring in more people.

Say in hearing -
you're lawless!

(But that puts us in a box if we want to be more lawless next time)

Telecon w/ Chris Shrader 11/30

Union - last Wed

US - Monday

1) ADA is unconst -
const prohibits obligs in advance of approps.

(wrong understanding of approps ← clause)

2) Overbroad interp of ADA -
bring too many people into wk.
insuffic anal of exceptions
(other than emergency)

They'll lose on SJ.

Should we win? Focus on those brought in wrongfully -
we can't bring them into wk.
Then - jud determ (long down the road) of
what ADA means (what exceptions mean).

Anyway to get us unstuck from Cir memo? (mid ground)

Don't have virtues of either extreme approach
- keep gov't running normally
- create really calamitous crisis.

Either one of these (espec 1) ^bt than where we were.

Figure out some theory? -
going thru all options take some time.

Tmrw morning 10 a.m.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

28-Nov-1995 12:05pm

TO: Elena Kagan

FROM: Kathleen M. Wallman
Office of the Counsel

SUBJECT: Shutdown Issues

Elena, welcome back. This is probably one of 8,000 e-mails that you have to read. When you have a moment, could you and I please talk about some issues that Walter Dellinger has highlighted and suggested we think about in the event that there is another possible shutdown in December? I understand that this is more or less in your bailiwick (is this right?) and can fill you in on what's on Walter's mind. Many thanks. KW

Thank her re timber.

Telecon w/ Teresa 11/29

1. What to do abt next shutdown.
   Keep same std?
   Or announce diff. std?
   Use std that Cong seemed to use --
   i.e. "essential" + everyone is!
   (Civiletti opin - sets middle course -
   + Cong amended the statute afterward)
   Gen'l discussion - is there a way to
   interpret act more broadly?

Judiciary
DOJ →
Commerce
Ed
HHS
State
HUD
Ed(?)

Walter to testify on the 8th.
Cong's view - made us g. our legal opin.
Pending outcome of that review - we
would apply same std as other branches
would use.
"Essentiality"

Union suit - briefs due next wk.
Will send me papers.

Legislation as above on expedited basis
(Pre-Dec 15)
Burden shouldn't fall on EEs, etc.
We can all agree on this, etc.

Any way to reduce
# of people sent home?

TABLE OF CONTENTS

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Tab B	1995 OLC Opinion
Tab C	Antideficiency Act of Legislative History
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Tab E	1980 Attorney General Opinion
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Tab H	1993 OMB Memorandum (Panetta memo)

A

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

August 14, 1995

MEMORANDUM FOR JANET RENO
ATTORNEY GENERAL

From: Chris Schroeder
Deputy Assistant Attorney General

Re: Briefing Materials on Government Operations in the Event of a Lapse in Appropriations

This briefing book contains materials relating to the question of government operations in the event of a lapse in appropriations. As of the present time, the major opinion on the question is that of Attorney General Civiletti, issued January 16, 1981. It is at Tab D. An earlier, shorter opinion on the same subject by Attorney General Civiletti is found at Tab E.

Under the Antideficiency Act, in the event of a lapse of appropriations, all employee functions must be suspended unless they are otherwise authorized by law or their continuation is necessary to prevent an emergency involving human safety or the protection of property. One aspect of the 1981 Civiletti opinion articulated a test for applying this emergency exception to government activities. We have prepared a draft memorandum suggesting a modification to single element of the 1981 formulation. In addition, the prepared memorandum summarizes the major conclusions of the 1981 opinion. The draft memorandum is at Tab B.

Other materials in this briefing book are:

Tab C: The Antideficiency Act (31 U.S.C. §§1341-42) and the relevant legislative history

Tab F: OMB Circular Bulletin No. 80-14, with supplements, which provides guidance to agencies on lapses in appropriations

B

Tab G: An October 5, 1990 memorandum from Richard Darman, Director of OMB, to agencies providing guidance on the then anticipated lapse in appropriations

Tab H: An October 21, 1993 memorandum from Leon Panetta, Director of OMB, to agencies providing similar guidance on the potential lapse in appropriations as of that date.

B

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

August 16, 1995

MEMORANDUM FOR ALICE RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

From: Walter Dellinger
Assistant Attorney General

Re: Government Operations in the Event of a Lapse in Appropriations

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.[1]

The Constitution 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. The treasury is further protected through the Antideficiency Act, which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, unless otherwise authorized by law. See 31 U.S.C. § 1341 et seq.[2]

In the early 1980s, Attorney General Civiletti issued two opinions with respect to the implications of the Antideficiency Act. See "Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations," 4A Op. O.L.C. 16 (1980); "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations," 5 Op. O.L.C. 1 (1981) (1981 Opinion). The 1981 Opinion has frequently been cited in the ensuing years. Since that opinion was written, the Antideficiency Act has been amended in one

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[1] We do not in this memorandum address the different set of issues that arise when the limit on the public debt has been reached and Congress has failed to raise the debt ceiling.

[2] For the purposes of this inquiry, there are two relevant provisions of the Antideficiency 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.

respect, and we analyze the effect of that amendment below. The amendment amplified on the emergencies exception for employing federal personnel by providing that "[a]s 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." 31 U.S.C. § 1342.

With respect to the effects of this amendment, we continue to adhere to the view expressed to General Counsel Robert Damus of the Office of Management and Budget that "the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General's earlier analyses; if anything, the amendment clarified that the Antideficiency Act's exception for emergencies is narrow and must be applied only when a threat to life or property is imminent." Letter from Walter Dellinger to Robert G. Damus, October 19, 1993. In order to ensure that the clarification of the 1990 amendment is not overlooked, we believe that one aspect of the 1981 Opinion's description of emergency governmental functions should be modified. Otherwise, the 1981 Opinion continues to be a sound analysis of the legal authorities respecting government operations when Congress has failed to enact regular appropriations bills or a continuing resolution to cover a hiatus between regular appropriations.

I.

Since the issuance of the extensive 1981 Opinion, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987 and 1990, lapses of funding ranging from several hours to three days actually did occur. While several of these occurred entirely over weekends, others required the implementation of plans to bring government operations into compliance with the requirements of the Antideficiency Act. These prior responses to the threat of or actual lapsed appropriations have been so commonly referred to as cases of "shutting down the government" that this has become a nearly universal shorthand to describe the effect of a lapse in appropriations. It will assist in understanding the true extent of the Act's requirements to realize that this is an entirely inaccurate description. 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.

The Antideficiency Act imposes substantial restrictions on obligating funds or contracting for services in advance of appropriations or beyond appropriated levels, restrictions that will cause significant hardship should any lapse in appropriations extend much beyond those we have historically experienced. To be sure, even the short lapses that have occurred have caused serious dislocations in the provision of services, generated wasteful expenditures as agencies have closed down certain operations and then restarted them, and disrupted federal activities. Nevertheless, for any short-term lapse in appropriations, at least, the federal government will not be truly "shut down" to the degree just described, simply because Congress has itself provided that some activities of government should continue even when annual appropriations have not yet been enacted to fund current activities.

The most significant provisions of the Antideficiency Act codify three basic restrictions on the operation of government activities. First, the 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. Second, when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations (except as to situations authorized by other law). Third, it restricts employing the services of employees to perform government functions beyond authorized levels to emergency situations, where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.[3] The 1981 Opinion elaborated on the various exceptions in the Antideficiency Act that permit some continuing government functions, and we will only summarize the major categories here:

- <u>Multi-year appropriations and indefinite appropriations.</u>

Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such

[3] These restrictions are enforced by criminal penalties. An officer or employee of the United States who knowingly and willfully violates the restrictions shall be fined not more than $5,000, imprisoned for not more than 2 years, or both. 31 U.S.C. §1350.

cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- Express authorizations: contracting authority and borrowing authority.

Congress provides express authority for agencies to enter into contracts or to borrow funds to accomplish some of their functions. An example is the "food and forage" authority given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the 1981 Opinion emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies' enabling or organic legislation is insufficient to support a finding of express authorization or necessary implication (the exception addressed next in the text), standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.

- Necessary implications: authority to obligate that is necessarily implied by statute.

The 1981 Opinion concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well. Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception. In addition, in a 1980 opinion, Atorney General Civiletti opined that agencies are by necessary implication authorized "to incur those minimal obligations necessary to closing [the] agency." The 1981 opinion reiterated this conclusion and consistent practice since that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.

- Obligations necessary to the discharge of the President's constitutional duties and powers.

Efforts should be made to interpret a general statute such as the Antideficiency Act 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. In this regard, the 1981 Opinion noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the "President's obligational authority . . . will be further buttressed in connection with any initiative that is consistent with statutes -- and thus with the exercise of legislative power in an area of concurrent authority -- that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry

out his constitutionally assigned tasks in the manner he contemplates." 1981 Opinion, at 6-7.[4]

- Personal or voluntary services "for emergencies involving the safety of human life or the protection of property."

The Antideficiency Act prohibits contracting or obligating in advance of appropriations generally, except for circumstances just summarized above. The Act also contains a separate exception applicable to personal or voluntary services that deal with emergencies. 31 U.S.C. § 1342. This section was amended in 1990. We will analyze the effects of that amendment in Part II of this memorandum.

Finally, one issue not explicitly addressed by the 1981 Opinion seems to us to have been settled by consistent administrative practice. That issue concerns whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make, consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded. The correct assumption in the context of an anticipated long period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear. However, with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of § 1342.

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[4] The Attorneys General and this office have declined to catalog what actions might be undertaken this heading. In 1981, for example, Attorney General Civiletti quoted Attorney General (later Justice) Frank Murphy. "These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action." 5 Op. O.L.C. at 7 n.9 (quoting 39 Op. Att'y Gen. 343, 347-48 (1939)). This power should be called upon cautiously, as the courts have received such executive branch assertions skeptically. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); George v. Ishimaru, 849 F. Supp. 68 (D.D.C.), vacated as moot, No. 94-5111, 1994 WL 517746 (D.C. Cir., Aug. 25, 1994). But see Haig v. Agee. 453 U.S. 280 (1981); In re Neagle, 135 U.S. 1 (1890).

II.

The text of 31 U.S.C. §1342, as amended in 1990, now reads:

> 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. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. 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.

31 U.S.C. § 1342. Because of the § 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.[5] This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

The central interpretive task under § 1342 is and has always been to construe the scope of the emergencies exception of that section. When the 1981 Opinion undertook this task, the predecessor to § 1342 did not contain the final sentence of the current statute, which was added in 1990. Examining that earlier version, the Attorney General concluded that the general language of the provision and the sparse legislative history of it did not reveal its precise meaning. However, the opinion was able to glean some additional understanding of the statute from that legislative history.

The Attorney General noted that as originally enacted in 1884, the provision forbade unauthorized employment "except in cases of sudden emergency involving the loss of human life or the destruction of property." 23 Stat. 17. He then observed that in 1950, Congress

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[5] The 1981 Opinion concluded that:

> [d]espite the use of the term 'voluntary service,' the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1994, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. This is, under [§ 1342], government officers and employees may not involve government in contract for employment, i.e., for compensated labor, except in emergency situations. 30 Op. Att'y Gen. 129, 131 (1913).

enacted the modern version of the Antideficiency Act and accepted revised language for § 1342 that originally had been suggested by the Director of the Bureau of the Budget and the Comptroller General in 1947. In analyzing these different formulations, the Attorney General stated that

> [w]ithout elaboration, these officials proposed that 'cases of sudden emergency' be amended to 'cases of emergency,' 'loss of human life' to 'safety of human life,' and 'destruction of property' to 'protection of property. These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern §[1341]. Act of September 6, 1950, Pub. L. No. 81-759, §1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment.

5 Op. O.L.C. at 9.

The 1981 Opinion also sought guidance from the consistent administrative practice of the Office of Management and Budget in applying identical "emergencies" language found in another provision. That other provision prohibits OMB from apportioning appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in cases of "emergencies involving the safety of human life, [or] the protection of property" -- phraseology identical to the pre-1990 version of § 1342.[6] Combining these two sources with the statutory text, the Attorney General articulated two

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[6] 31 U.S.C. § 1515 (recodified from § 665(e) at the time of the Civiletti opinion). Analyzing past administrative practice under this statute, Attorney General Civiletti found that:

> Directors of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include [FBI] criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C.§§ 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e). Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).

rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than § 1342 itself:

> 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.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, see Letter from Walter Dellinger to Robert G. Damus, October 19, 1993, we are aware of the possibility the second of these two rules might be read more expansively than was intended, and thus might be applied to functions that are not emergencies within the meaning of the statute. 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."

The reasons for this change rest on our understanding of the function of the 1990 amendment, which comes from considering the content of the amendment, its structure and its sparse legislative history. That history consists of a solitary reference in the conference report to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:

> The conference report also makes conforming changes to title 31 of the United States Code 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. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990). While hardly articulating the intended scope of the exception, the conference report does tend to support what would otherwise be the most natural reading of the amendment standing alone: because it is phrased as identifying the functions that should be excluded from the scope of the term "emergency," it seems intended to limit the coverage of that term, narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute.

Beyond this, however, we do not believe that the amendment adds any significant new substantive meaning to the pre-existing portion of § 1342, simply because the most prominent feature of the addition -- its emphasis on there being a threat that is imminent, or "ready to take place, near at hand," see Webster's Third New International Dictionary 1130 (1986) -- is an idea that is already present in the term "emergency" itself, which means "an unforeseen

combination of circumstances or the resulting state that calls for immediate action" to respond to the occurrence or situation. Id. at 741.[7] The addition of the concept of "imminent" to the pre-existing concept of "emergency" is thus largely redundant. This redundancy does, however, serve to emphasize and reinforce the requirement that there be a threat to human life or property of such a nature that immediate action is a necessary response to the situation. The structure of the amendment offers further support for this approach. Congress did not alter the operative language of the statute; instead, Congress chose to enact an interpretive provision that simply prohibits overly expansive interpretations of the "emergency" exception.

Under the formulation of the 1981 Opinion, government functions satisfy § 1342 if, inter alia, the safety of human life or the protection of property would be "compromised, in some degree." It is conceivable that some would interpret this phrase to be satisfied even if the threat were de minimis, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision. The brief delay of routine maintenance on government vehicles ought not to constitute an "emergency," for example, and yet it is quite possible to conclude that the failure to maintain vehicles properly may "compromise, to some degree" the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to the near at hand and demanding of immediate response.

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[7] See also Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987) ("emergency" means "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action"); Webster's II New Riverside University Dictionary 427 (1988) ("an unexpected, serious occurrence or situation urgently requiring prompt action").

C

CROSS REFERENCES

Presumption that individuals' whereabouts is unknown if no application for refund of veteran's contributions to educational benefits program is received within specified time, see 38 USCA § 3232.

Transfer and disposition of balances in trust funds administered by Veterans' Administration representing moneys belonging to individuals whose whereabouts are unknown, see 38 USCA § 5504.

NOTES OF DECISIONS

Exhaustion of remedies 1

1. Exhaustion of remedies

States failed to exhaust their administrative remedies, and thus could not bring action against Comptroller General and Secretary of the Treasury claiming right pursuant to their unclaimed property laws to custody of monies belonging to their respective citizens and contained in United States Treasury trust fund receipt accounts for unpaid monies of individuals whose whereabouts were unknown, where states had not, in accordance with statutory and administrative scheme, contacted particular transferring agency, bureau or office and complied with its requirements for perfecting claim. State v. Bowsher, D.D.C.1990, 734 F.Supp. 525, affirmed 935 F.2d 332, 290 U.S.App.D.C. 166, certiorari denied 112 S.Ct. 584, 116 L.Ed.2d 609.

§ 1324. Refund of internal revenue collections

HISTORICAL AND STATUTORY NOTES

Internal Revenue Credit Provision Enacted Before January 1, 1978

Section 11116 of Pub.L. 101-508 provided that: "For purposes of section 1324(b)(2) of title 31 of the United States Code [subsec. (b)(2) of this section], section 32 of the Internal Revenue Code of 1986 [section 32 of Title 26, Internal Revenue Code] (as amended by this Act) shall be considered to be a credit provision of the Internal Revenue Code of 1954 enacted before January 1, 1978."

SUBCHAPTER III—LIMITATIONS, EXCEPTIONS, AND PENALTIES

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

[See main volume for text of (2); (b)]

(As amended Pub.L. 101-508, Title XIII, § 13213(a), Nov. 5, 1990, 104 Stat. 1388-621.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, referred to in subsec. (a)(1)(C) and (D), is classified to section 902 of Title 2, The Congress.

1990 Amendment

Subsec. (a)(1)(C), (D). Pub.L. 101-508, § 13213(a), added subpars. (C) and (D).

Legislative History

For legislative history and purpose of Pub.L. 101-508, see 1990 U.S.Code Cong. and Adm. News, p. 2017.

WEST'S FEDERAL PRACTICE MANUAL

Peculiarities of government contracts, see § 1522.

LAW REVIEW C

Pulling the purse strings of the Commander in Chief. Peter Raven-Hansen and William C. Banks, 80 Va.L.Rev. 833 (1994).

Rewriting the fiscal constitution: The case of Gramm-Rudman-Hollings. Kate Stith, 76 Cal. L.Rev. 593 (1988).

NOTES OF D

Administrative leave 6a
Contracts in excess of appropriations
Purchase of food 19a
Contracts or obligations authorized by law 10
Exercise of renewal rights 10a
Lapse of authorization 28

1. Construction of section with other laws

Violation of this section does not occur, when agency has insufficient current appropriations to satisfy award or judgment rendered against it, pursuant to section 612 of Title 41. 1984, 63 Op.Comp.Gen. 308.

6. —— Agents or officers of United States

Principles of apparent authority were inapplicable to bind United States to two million dollar settlement agreement of claim under Federal Tort Claims Act which was entered between assistant United States attorney and dependents of miner and which assistant United States attorney did not have actual authority to enter. White v. U.S. Dept. of Interior, M.D.Pa.1986, 639 F.Supp. 82, affirmed 815 F.2d 697.

Anti-Deficiency Act barred officials of Federal Government from entering into implied contracts to indemnify asbestos manufacturers for manufacturers' liability to shipyard workers exposed to asbestos while building, converting, or repairing ships for the Government during World War II. Johns-Manville Corp. v. U.S., 1987, 12 Cl.Ct. 1.

This section requires heads of federal agencies to expend fiscal year funds to prevent need for supplemental or deficiency appropriation, and requires them to avoid exhaustion of funds before end of appropriation period. 1985, 64 Op.Comp.Gen. 728.

Judicial or quasi-judicial awards do not involve deficiency created by administrative officer, under this section. 1984, 63 Op.Comp.Gen. 308.

6a. Administrative leave

The Merit Systems Protection Board has discretionary authority to retroactively grant administrative leave with pay, during a brief partial shutdown of the agency, to employees who were ordered not to report for work and were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full closedown, to the extent appropriated funds were available and adequate on the dates of the partial shutdown. 1983, 62 Op. Comp.Gen. 1.

10. Contracts or obligations authorized by law

Department of Education will not violate this section if total obligations it records for manda-

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 923.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1341(a)	31:665(a), (d)(2) (last sentence related to spending and obligations).	R.S. § 3679(a), (d)(2) (last sentence related to spending and obligations); Mar. 3, 1905, ch. 1484, § 4 (1st par.), 33 Stat. 1257; Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; restated Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765.
1341(b)	31:669 (words after semicolon)	Aug. 23, 1912, ch. 350, § 6 (words after semicolon), 37 Stat. 414.

Explanatory Notes

In subsection (b), the words "another amount available for obligation" are substituted for "any other fund" for consistency in the revised title.

Indemnity Contracts Covering International Short-Wave Radio Stations. Contracts for use of international short-wave radio stations and facilities may provide for indemnity of owners and operators of such stations against loss or damage on account of injury to persons or property arising from use of such stations or facilities, Acts July 5, 1946, c. 541, Title I, 60 Stat. 447; July 9, 1947, c. 211, Title I, § 101, 61 Stat. 280; June 3, 1948, c. 400, Title I, § 101, 62 Stat. 312; July 20, 1949, c. 354, Title I, § 101, 63 Stat. 451; Sept. 6, 1950, c. 896, ch. III, Title I, § 101, 64 Stat. 614; Oct. 22, 1951, c. 533, Title I, § 101, 65 Stat. 581; July 10, 1952, c. 651, Title I, § 101, 66 Stat. 554; Aug. 7, 1953, c. 340, Title III, § 301, 67 Stat. 420.

Similar provisions conferring this authority on the Office of the Coordinator of Inter-American Affairs and Office of War Information were carried in Acts Oct. 26, 1942, c. 629, Title II, 56 Stat. 996, 997; July 12, 1943, 3 p.m., E.W.T., c. 228, § 1, 57 Stat. 529, 532; June 28, 1944, c. 301, Title I, § 1, 58 Stat. 538, 539; July 17, 1945, c. 319, § 1, 59 Stat. 477.

Cross References

Administrative discipline for violation of subsec. (a) of this section, see section 1349 of this title.

Contracts for fuel by Secretary of Army without regard to current fiscal year, see section 11a of Title 41, Public Contracts.

Contracts for rent of buildings in District of Columbia not to be made until appropriation, see section 34 of Title 40, Public Buildings, Property, and Works.

Contracts in excess of specific appropriation, penalty for, see section 435 of Title 18, Crimes and Criminal Procedure.

Contracts not to exceed appropriation, see section 12 of Title 41, Public Contracts.

Contracts or purchases prohibited unless authorized or under adequate appropriation, see section 11 of Title 41.

Criminal penalty for violation of subsec. (a) of this section, see section 1350 of this title.

Pay fixed by administrative action, see section 5307 of Title 5, Government Organization and Employees.

Purchases from National Ocean Survey appropriation, see section 878 of Title 33, Navigation and Navigable Waters.

Reports on violations of subsec. (a) of this section, see section 1351 of this title.

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1. Construction c

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ernment obligations under contracts were either determinable in advance, or could be avoided through separate action by Navy. 1984, 63 Op. Comp.Gen. 145.

15. —— Implied contracts

Even if there were implied-in-fact contract term pursuant to Defense Production Act requiring government to indemnify Agent Orange manufacturer for any tort suits brought by veterans, term itself could not operate to bind government; Anti-Deficiency Act precluded enforcement of any such term, as manufacturer presented no appropriation or statutory exemption which would authorize indemnification. Wm. T. Thompson Co. v. U.S., 1992, 26 Cl.Ct. 17.

16. —— Leases

Contracting officer complied with requirements of Anti-Deficiency Act (ADA) requiring consideration of indeterminate costs as current obligations in awarding government lease, where solicitation for offers (SFO) specifically recited possibility of termination of lease, which was engaged for one year with additional one-year options for up to 19 additional terms, and required submission of costs of termination by bidders. Aerolease Long Beach v. U.S., Fed.Cl. 1994, 31 Fed.Cl. 342.

19. —— Purchase of equipment or supplies

Requiring Government to forego economic price adjustment if it purchased units for subsequent program years of multiyear contract would not create any obligations for Government to purchase units for all program years and their options, and, thus, Anti-Deficiency Act was inapplicable. Beta Systems, Div. of Velcon Filters, Inc. v. U.S., 1989, 16 Cl.Ct. 219.

19a. —— Purchase of food

Although payment on contracts for thermostabilized diced turkey and beef stew entrees for military personnel would violate "Buy-American" provision of Department of Defense Appropriations Act, Dec. 29, 1981, 95 Stat. 1565, because Canadian corporation's operations in preparing those entrees involved production, processing and manufacturing, awards did not violate this section which prohibits officers and employers from authorizing expenditures when funds have not been appropriated. Southern Packaging and Storage Co., Inc. v. U.S., D.C.S.C.1984, 588 F.Supp. 532.

20. —— Salary or wages

Under former section 665(a) of this title [now this section] an agency cannot lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. 1980 (Counsel-Inf.Op.) 4A Op.O.L.C. 16.

24. Indemnification

Anti-Deficiency Act precluded government contractor's enforcement of any implied indemnification agreement with government in connection with costs of defending and settling product liability suits arising from defoliant manufactured by contractor for military purposes, absent prior appropriation to cover costs of indemnity or statutory exemption, as required for government agent to have authority to enter binding agreement. Hercules Inc. v. U.S., 1992, 25 Cl.Ct. 616.

28. Lapse of authorization

Activities of an agency continue to be authorized, notwithstanding the lapse of a specific authorization and its appropriation, to the extent that they were authorized prior to the enactment of the specific authorization. 1982 (Counsel-Inf.Op.) 6 O.L.C. 555.

§ 1342. Limitation on voluntary services

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. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. 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.

(As amended Pub.L. 101–508, Title XIII, § 13213(b), Nov. 5, 1990, 104 Stat. 1388–621.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Pub.L. 101–508, § 13213(b), added 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."

Legislative History

For legislative history and purpose of Pub.L. 101–508, see 1990 U.S.Code Cong. and Adm. News, p. 2017.

CROSS REFERENCES

Acceptance of voluntary and uncompensated services by National Council on the Handicapped, see 29 USCA § 783.

Applicability of this section to the administration of the Corporation for National and Community Service, see 42 USCA § 12651g.

Archivist of the United States, author accept and utilize voluntary and uncompen services, see 44 USCA § 2105.

Commission on Leave, voluntary services provided by Commission members, see 29 USCA § 2635.

Gratuitous services of officers of certain reserve components, acceptance by Secretary of Defense, see 10 USCA § 10212.

NOTES OF DE

Service in advance of appropriations 9

2. Persons limited by section

Under this section, agent cannot bind government by unauthorized act of accepting voluntary services after employee's retirement, even where agent is unaware of limitation on his authority. 1985, 65 Op.Comp.Gen. 21.

Former section 665(b) of this title [now this section] prohibits the Department of Justice from accepting uncompensated services by students who are "given assignments that would aid the Department in its mission". 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 185.

5. Compensation for work voluntarily performed

Former section 665(b) of this title [now this section] permits the appointment of attorneys and investigators from the private sector and permits the payment of a nominal sum to those

§ 1343. Buying and leasing passenger mot

HISTORICAL AND STA

Maximum Purchase Price of Motor Vehicles; Intelligence Activities Exception

Pub.L. 103–139, Title VIII, § 8105, Nov. 11, 1993, 107 Stat. 1464, provided that: "During the current fiscal year and thereafter, monetary limitations on the purchase price of a passenger motor vehicle shall not apply to vehicles purchased for intelligence activities conducted pursuant to Executive Order 12333 [set out as a note under section 401 of Title 50, National Defense] or successor orders."

Maximum Purchase Price of Motor Vehicles; Exception

Pub.L. 103–329, Title VI, § 604, Sept. 30, 1994, 108 Stat. 2416, provided that: "Unless otherwise specifically provided, the maximum amount allowable during the current fiscal year in accordance with section 16 of the Act of August 2, 1946 (60 Stat. 810) [this section], for the purchase of any passenger motor vehicle (exclusive of buses, ambulances, law enforcement, and undercover surveillance vehicles), is hereby fixed at $8,100 except station wagons for which the maximum shall be $9,100: *Provided*, That these limits may be exceeded by not to exceed $3,700 for police-type vehicles, and by not to exceed $4,000 for special heavy-duty vehicles: *Provided further*, That the limits set forth in this section may not be exceeded by more than five percent for electric or hybrid vehicles purchased for demonstration under the provisions of the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of

why no emergency exception in 1341? meaningful at all? (Any that volunteers ok, but not paid???)

Act to create 5-year budget resolutions that would be enforced by points of order against exceeding committee allocations for both the first year and the total of the 5 years covered by the budget resolution. Section 601(b) of the conference agreement also creates temporary points of order in the Senate against violating the discretionary spending limits.

The conference agreement codifies section 273 of the Balanced Budget and Emergency Deficit Control Act of 1985 as part of the Congressional Budget Act without change. Following the Senate bill, the conference agreement allows for display of the increase in the debt as a measure of the deficit, display of Federal retirement trust fund balances, and the creation in budget resolutions of pay-as-you-go provisions similar to reserve funds established in budget resolutions since 1987. The conference agreement standardizes the language of points of order, corrects a precedent in the Senate that effectively kills amendments between Houses if points of order under the Congressional Budget Act are sustained against them (*see* Senate Precedent PRL19860313-003 (Mar. 13, 1986) (LEGIS, Rules database)), and similarly makes clear that if a point of order under the Act is sustained against a bill, the bill should be sent back to committee instead of the calendar, so that the committee may then take corrective action to improve the bill. The conference agreement makes clear that amendments between the Houses on budget resolutions are covered in the Senate under section 305(c), which also deals with conference reports on budget resolutions. The conference agreement also repeals section 202 of public law 100-119, the exceptions to which the conferees believe had come to be abused (*see* W. Dauster, CONGRESSIONAL BUDGET ACT ANNOTATED 567-77 (1990)) and codifies the Byrd Rule on extraneous matter in reconciliation bills (*see id.* at 593-650; section 20001 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390-91 (Apr. 7, 1986), amended by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 7006, 100 Stat. 1874, 1949-1950 (Oct. 21, 1986), and amended by the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 20.5, 101 Stat. 754, 784-85 (Sept. 29, 1987)).

The conference report also makes conforming changes to title 31 of the United States Code to make clear that funds sequestered are not available for expenditure and 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.

X. DEFINITION

Current law

Section 257 of Gramm-Rudman-Hollings defined the terms "automatic spending increase," "budget outlays," "budget authority,"

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Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations

Statutory authority for an agency to incur obligations in advance of appropriations need not be express, but may be implied from the specific duties that have been imposed upon, or of authorities that have been invested in, the agency.

The "authorized by law" exception in the Antideficiency Act exempts from that Act's general prohibition not only those obligations for which there is statutory authority, but also those obligations necessarily incident to initiatives undertaken within the President's constitutional powers.

A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some degree by delay in the performance of the function in question.

January 16, 1981

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have asked my opinion concerning the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations, such as the government sustained on October 1, 1980. As you know, some initial determination concerning the extent of these authorities had to be made in the waning hours of the last fiscal year in order to avoid extreme administrative confusion that might have arisen from Congress' failure timely to enact 11 of the 13 anticipated regular appropriations bills,[1] or a continuing resolution to cover the hiatus between regular appropriations. The resulting guidance, which I approved, appeared in a memorandum that the Director of the Office of Management and Budget circulated to the heads of all departments and agencies on September 30, 1980. Your request, in effect, is for a close and more precise analysis of the issues raised by the September 30 memorandum.

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980, opinion to you concerning the applicability of the Antideficiency Act, 31 U.S.C. § 665, upon lapses

[1] Prior to October 1, 1980, Congress had passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. No. 96-367, 94 Stat. 1331 (Oct. 1, 1980).

in appropriations, 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980). That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agenices are not, in general, authorized by law to employ the services of their employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

The events prompting your request for my earlier opinion included the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission (FTC) would expire in April, 1980, without extension, and that the FTC might consequently be left without appropriations for a significant period.[2] The FTC did not then suggest that it possesses obligational authorities that are free from a one-year time limitation. Neither did it suggest, based on its interpretation of the law at that time, that the FTC performs emergency functions involving the safety of human life or the protection of property other than protecting government property within the administrative control of the FTC itself. Consequently, the legal questions that the April 25, 1980, opinion addressed were limited. Upon determining that the blanket prohibition expressed in § 665(a) against unauthorized obligations in advance of appropriations is to be applied as written, the opinion added only that the Antideficiency Act does permit agencies that are ceasing their functions to fulfill certain legal obligations connected with the orderly termination of agency operations.[3] The opinion did not consider the more complex legal questions posed by a general congressional failure to enact timely appropriations, or the proper course of action to be followed when no prolonged lapse in appropriations in such a situation is anticipated.

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of § 665(a) excepts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that § 665(b) expressly permits the

[2] FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. No. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. No. 96-240, 94 Stat. 342. Prior to April 30, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. No. 96-252, 94 Stat. 374 (May 28, 1980), would precipitate a lapse in appropriations for a significantly longer period.

[3] *See* note 11, *infra*.

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government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

I.

Section 665(a) of Title 31, United States Code provides:

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropiation or fund in excess of the amount available therein; *nor shall any officer or employee involve the Government in any contract or obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.* (Emphasis added.)

Under the language of § 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. Att'y Gen. 288, 291 (1870).

A more complex problem of interpretation, however, may be presented with respect to obligational authorities that are not manifested in appropriations acts. In a few cases, Congress has expressly authorized agencies to incur obligations without regard to available appropriations.[4] More often, it is necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations. This, of course, would be the relevant legal inquiry even if Congress had not enacted the Antideficiency Act; the second phrase of § 665(a) clearly does no more than codify what, in any event and not merely during lapses in appropriations, is a requirement of legal authority for the obligation of public funds.[5]

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[4] *See, e.g.*, 25 U.S.C. § 99; 31 U.S.C. § 668; 41 U.S.C. § 11.

[5] This rule has, in fact, been expressly enacted in some form for 160 of the 191 years since Congress first convened. The Act of May 1, 1820, provided:

> [N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or

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Previous Attorneys General and the Comptrollers General have had frequent occasion to address, directly or indirectly, the question of implied authority. Whether the broader language of all of their opinions is reconcilable may be doubted, but the conclusions of the relevant opinions fully establish the premise upon which my April 25, 1980, memorandum to you was based: statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies. The authority must be necessarily inferrable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested in, the officers or employees purporting to obligate funds on behalf of the United States. 15 Op. Att'y Gen. 235, 240 (1877).

Thus, for example, when Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment. *E.g.*, 30 Op. Att'y Gen. 332, 333 (1915); 30 Op. Att'y Gen. 186, 193 (1913); 28 Op. Att'y Gen. 466, 469–70 (1910); 25 Op. Att'y Gen. 557, 563 (1906). On the other hand, when authority for the performance of a specific function rests on a particular appropriation that proves inadequate to the fulfillment of its purpose, the responsible officer is not authorized to obligate further funds for that purpose in the absence of additional appropriations. 21 Op. Att'y Gen. 244, 248–50 (1895); 15 Op. Att'y Gen. 235, 240 (1877); 9 Op. Att'y Gen. 18, 19 (1857); 4 Op. Att'y Gen. 600, 601–02 (1847); *accord*, 28 Comp. Gen. 163, 165–66 (1948).

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsi-

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of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

3 Stat. 567, 568. The Act of March 2, 1861, extended the rule as follows:

> No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

12 Stat. 214, 220. Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

> [I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of appropriations.

Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 595, 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

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bilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations. For example, Attorney General McReynolds concluded, in 1913, that the Postmaster General could not obligate funds in excess of appropriations for the employment of temporary and auxiliary mail carriers to maintain regular service, notwithstanding his broad authorities for the carrying of the mails. 30 Op. Att'y Gen. 157, 161 (1913). Similarly, in 1877, Attorney General Devens concluded that the Secretary of War could not, in the absence of appropriations, accept "contributions" of materiel for the army, *e.g.*, ammunition and medical supplies, beyond the Secretary's specific authorities to contract in advance of appropriations. 15 Op. Att'y Gen. 209, 211 (1877).[6]

Ordinarily, then, should an agency's regular one-year appropriation lapse, the "authorized by law" exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, *e.g.*, multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.[7] A nearly government-wide lapse, however, such as occurred on October 1, 1980, implicates one further question of executive authority.

Unlike his subordinates, the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well. To take one obvious example, the President alone, under Article II, § 2, clause 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum

[6] *Accord*, 37 Comp. Gen. 155, 156 (1957) (Atomic Energy Commission's broad responsibilities under the Atomic Energy Act do not authorize it to enter into a contract for supplies or services to be furnished in a fiscal year subsequent to the year the contract is made); 28 Comp. Gen. 300, 302 (1948) (Treasury Department's discretion to establish reasonable compensation for Bureau of the Mint employees does not confer authority to grant wage increases that would lead to a deficiency).

[7] It was on this basis that I determined, in approving the September 30, 1980, memorandum, that the responsible departments are "authorized by law" to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation. Certain so-called "entitlement programs," *e.g.*, Old-Age and Survivors Insurance, 42 U.S.C. § 401(a), are funded through trust funds into which a certain portion of the public revenues are automatically appropriated. Notwithstanding this method of funding the entitlement payments themselves, the costs connected with the administration of the trust funds are subject to annual appropriations. 42 U.S.C. § 401(g). It might be argued that a lapse in administrative authority alone should be regarded as expressing Congress' intent that benefit payments also not continue. The continuing appropriation of funds for the benefit payments themselves, however, substantially belies this argument, especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula. In the absence of a contrary legislative history to the benefit program or affirmative congressional measures to terminate the program, I think it proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.

obligational authority sufficient to carry this power into effect. Not all of the President's powers are so specifically enumerated, however, and the question must consequently arise, upon a government-wide lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

In my judgment, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. § 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952):

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Following[8] this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and

[8] A majority of the Supreme Court has repeatedly given express endorsement to Mr. Justice Jackson's view of the separation of powers. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976); *United States* v. *Nixon*, 418 U.S. 683, 707 (1974); *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 273 n.5 (1974).

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39 Op. Att'y Gen. 343, 347–48 (1939).

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competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes—and thus with the exercise of legislative power in an area of concurrent authority—that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates. In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations.[9] Clearly, such an exercise of power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President.[10] Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

In sum, I construe the "authorized by law" exception contained within 31 U.S.C. § 665(a) as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential intiatives undertaken within his constitutional powers.

II.

In addition to regulating generally obligations in advance of appropriations, the Antideficiency Act further provides, in 31 U.S.C. § 665(b):

> No officer or employee of the United States shall accept voluntary service for the United States or employ per-

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[9] As stated by Attorney General (later Justice) Murphy:

> [T]he Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

39 Op. Att'y Gen. 343, 347–48 (1939).

[10] One likely category into which certain of these functions would fall would be "the conduct of foreign relations essential to the national security," referred to in the September 30, 1980, memorandum.

> sonal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Despite the use of the term "voluntary service," the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § 665(b) was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. That is, under § 665(b), government officers and employees may not involve the government in contracts for *employment, i.e.,* for compensated labor, except in emergency situtations. 30 Op. Att'y Gen. 129, 131 (1913).

Under § 665(b), it is thus crucial, in construing the government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history—of which Congress is fully aware—of the interpretation of an identical phrase in a related budgeting context, suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than § 665(b) itself. 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.

As originally enacted in 1884, the provision forbade unauthorized employment "except in cases of *sudden* emergency involving the loss of human life or the *destruction* of property." 23 Stat. 17. (Emphasis added.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the government's "life-saving stations." One Senator cautioned:

> In other words, at the life-saving stations of the United States, for instance, the officers in charge, no matter what the urgency and what the emergency might be, would be prevented [under the House-passed bill] from using the absolutely necessary aid which is extended to them in such cases because it had not been provided for by law in a statute.

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create new obligational authority.

15 Cong. Rec. 2,143 (1884) (remarks of Sen. Beck); *see also id.* at 3,410–11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now § 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. § 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the Bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that "cases of sudden emergency" be amended to "cases of emergency," "loss of human life" to "safety of human life," and "destruction of property" to "protection of property." These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b). Act of September 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

This interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. § 665(e), which prohibits the apportionment or reapportionment of appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in, among other circumstances, "emergencies involving the safety of human life, [or] the protection of property." § 665(e)(1)(B).[11] Directors

[11] As provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of §§ 665(b) and 665(e)(1)(B) should not be deemed *in pari materia* and given a like construction. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973), although at first blush, it may appear that the consequences of identifying a function as an "emergency" function may differ under the two provisions. Under § 665(b), if a function is an emergency function, then a federal officer or employee may employ what otherwise would constitute unauthorized personal service for its performance; in this sense, the emergency nature of the function triggers additional obligational authority for the government. In contrast, under § 665(e)(1)(B), if a function is an emergency function, OMB may allow a deficiency apportionment or reapportionment—this permitting the expenditure of funds at a rate that could not be sustained for the entire fiscal year without a deficiency—but the effect of such administrative action would not be to trigger new obligational authority automatically. That is, Congress could always decline to enact a subsequent deficiency appropriation, thus keeping the level of spending at the previously appropriated level.)

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reapportionment, Congress did not appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reapportionments do not create new obligational authority, they frequently impose a necessity for further appropriations as

Continued

of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include Federal Bureau of Investigation criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e).[12] Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).[13]

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980, memorandum, as illustrative of the areas of government activity in which emergencies involving the safety of human life and the protec-

compelling as the government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

[12] In my April 25, 1980, memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. 43 Op. Att'y Gen. No. 24, at 1 [4 Op. O.L.C.—(1980)]. The functions that, in my judgment, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under § 665(b), of the agency's property by its own employees until such protection can be arranged by another agency with appropriations; compliance, within the "authorized by law" exception to § 665(a), with statutes providing for the rights of employees and the protection of government information; and the transfer, also under the "authorized by law" exception to § 665(a), of any matters within the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions in advance of appropriations only to the minimum extent necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgment, expects.

[13] The Supreme Court has referred repeatedly to the:

> venerable rule that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969) (footnotes omitted). Since enacting the modern Antideficiency Act, including § 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of § 665(e). At no time has Congress altered this interpretation of § 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. *Compare* 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980).

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In suggesting the foregoing principles to guide the interpretation of § 665(b), I must add my view that, in emergency circumstances in which a government agency may employ personal service in excess of legal authority other than § 665(b), it may also, under the authority of § 665(b), ~~it may also, under the authority of § 665(b),~~ incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully. In order to effectuate the legislative intent that underlies a statute, it is ordinarily inferred that a statute "carries with it all means necessary and proper to carry out effectively the purposes of the law." *United States* v. *Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (three-judge court), *aff'd*, 386 U.S. 270 (1967). Accordingly, when a statute confers authorities generally, those powers and duties necessary to effectuate the statute are implied. *See* 2A J. Sutherland, Statutes and Statutory Construction § 55.04 (Sands ed. 1973). Congress has contemplated expressly, in enacting § 655(b), that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the government to hire firefighters must surely have intended that water and firetrucks would be available to them.[14]

III.

The foregoing discussion articulates the principles according to which, in my judgment, the Executive can properly identify those functions that the government may continue upon lapses in appropriations. Should a situation again present itself as extreme as the emergency that arose on October 1, 1980, this analysis should assist in guiding planning by all departments and agencies of the government.

As the law is now written, the Nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the

[14] *Accord*, 53 Comp. Gen. 71 (1973), holding that, in light of a determination by the Administrator of General Services that such expenses were "necessarily incidental to the protection of property of the United States during an extreme emergency," *id.* at 74, the Comptroller General would not question General Services Administration (GSA) payments for food for GSA special police who were providing round-the-clock protection for a Bureau of Indian Affairs building that had been occupied without authority.

Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,
BENJAMIN R. CIVILETTI

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Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation

If, after the expiration of an agency's appropriation, Congress has not enacted an appropriation for the immediately subsequent period, the agency may obligate no further funds except as necessary to bring about the orderly termination of its functions, and the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purpose the government's money is to be spent and how much for each purpose.

Because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized to employ the services of their employees upon a lapse in appropriations.

April 25, 1980

THE PRESIDENT

MY DEAR MR. PRESIDENT: You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980, opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees, violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

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[2] Act of March 3, 1905, ch. 1484, § 4, 3
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93-198, § 421, 87 Stat. 789 (1973); Pub.
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[3] The prohibition against incurring obl
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Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[1] On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.[2] On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.[3]

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.[4] On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.[5] However, the legislative history of these provisions

[1] An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. *See* 15 Op. Att'y Gen. 209. *See also* 25 U.S.C § 99 and 31 U.S.C. § 668.

[2] Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 789 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

[3] The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

[4] In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

[5] Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.[6] Neither are we aware that the Executive Branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.[7] Various agencies of the Executive Branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grantmaking, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion,[8] indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

[6] In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor.

In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954).

In 1956, Congress' temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

[7] Pub. L. 94–473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

[8] The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

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[9] Pub. L. 94–473, § 108, 90 Stat. 2066
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In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive Branch to carry out Congress' unambiguous mandates.

It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventual appropriations.[9] Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the *apparent* authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing *legal* authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the

[9] Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

Antideficiency Act is to insure that Congress will determine for what purposes the government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) (remarks of Rep. Dawes).

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.[10]

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,
BENJAMIN R. CIVILETTI

[10] *See* 21 Op. Att'y Gen. 288.

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

Bulletin No. 80-14, Supplement No. 1 August 20, 1982

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Agency Operations in the Absence of Appropriations

1. Purpose. This supplement updates OMB Bulletin No. 80-14, dated August 28, 1980, and requires the submission of contingency plans for review by OMB. The purpose of the review is to assure adequate contingency planning and Government-wide compliance with the provisions of the Antideficiency Act.

2. Background. OMB Bulletin No. 80-14 instructed agencies to develop plans for an orderly shutdown in the event of a funding hiatus. It became necessary to carry out these plans during the November 1981 hiatus. In reviewing that experience and the operational plans in effect during the period immediately preceding enactment of the March 31, 1982 Continuing Resolution, certain difficulties were observed:

-- some agencies have not fully complied with the requirements of OMB Bulletin 80-14, and do not have fully operational contingency plans;

-- disparities appear to exist between some agencies as to the definition of activities necessary to protect life and property; and

-- disparities appear to exist between some agencies as to the time necessary to complete the orderly shutdown of nonexcepted activities.

3. Actions required:

a. Amend the date that appears in section 2 to January 16, 1981.

b. Delete the last sentence of subsection 3.c.

c. Add subsection 3.d. as shown in the attachment.

David A. Stockman
Director

Attachment

Attachment

Material to be added to
OMB Bulletin No. 80-14,
Section 3

d. Reporting. The plans required in subsection c will be submitted to OMB by September 15, 1982.

The following information will be provided with the plans:

(1) Estimated time to the nearest one-half day to complete the shutdown in accordance with the plan.

(2) Number of employees expected to be on-board before implementation of the plan.

(3) Total number of employees to be retained under the plan because (a) they are engaged in military, law enforcement, or direct health care activities, or (b) their compensation is financed by other than annual appropriations.

(4) Number of employees, not otherwise exempt, to be retained to protect life and property.

Within the guidance established by the Attorney General's opinion of January 16, 1981, and this bulletin, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.

If it is estimated that more than one-half day will be needed to complete the shutdown or that the number of employees to be retained to protect life and property will exceed five percent of the number of employees on board at the beginning of the hiatus less those exempt for reasons specified in item (3) above, agencies will submit policy statements and legal opinions supporting those estimates.

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

November 17, 1981

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: David A. Stockman

SUBJECT: Agency Operations in the Absence of Appropriations

Public Law 97-51, the Continuing Resolution enacted by the Congress on September 30, 1981 to provide for appropriations for all Executive and Judicial branch accounts, will expire on midnight Friday, November 20. No regular appropriations bills for Fiscal Year 1982 have been submitted to the President during the period of the Continuing Resolution, and the House of Representatives and Senate are presently considering widely divergent Second Continuing Resolutions. There is, therefore, a possibility that no appropriations will be enacted as of November 21.

Under the circumstances, you should begin orderly planning to deal with this possibility.

OMB Bulletin 80-14, dated August 28, 1980, requires all agencies to maintain contingency plans to deal with the eventuality of an appropriations hiatus. Additionally, the opinion of the Attorney General dated January 16, 1981, attached, remains in effect.

Examples of excepted activities were developed when the Executive Branch last faced the possibility of an apprioriations hiatus, and were sent to agencies by former OMB Director James McIntyre on September 30, 1980. They are:

> Beginning [November 21, 1981], agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities. Primary examples of activities agencies may continue are those which may be found under applicable statutes to:
>
> 1. Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.
>
> 2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.
>
> 3. Conduct essential activities to the extent that they protect life and property, including:
>
> a. Medical care of inpatients and emergency outpatient care;

b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous materials;

c. The continuance of air traffic control and other transportation safety functions and the protection of transport property;

d. Border and coastal protection and surveillance;

e. Protection of Federal lands, buildings, waterways, equipment and other property owned by the United States;

f. Care of prisoners and other persons in the custody of the United States;

g. Law enforcement and criminal investigations;

h. Emergency and disaster assistance;

i. Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;

j. Activities that ensure production of power and maintenance of the power distribution system; and

k. Activities necessary to maintain protection of research property.

You should maintain the staff and support services necessary to continue these essential functions.

In addition, the following policies will be in effect in the event of a November 21 appropriations hiatus:

1. All employees performing non-excepted activities defined by this memorandum and by the Attorney General's opinion of January 16, 1981, are permitted to perform no services other than those involved in the orderly suspension of agency operations.

2. With regard to non-excepted agency activities and agency personnel performing them, particular attention should be paid to those provisions of the Antideficiency Act that do not permit agency acceptance of voluntary, i.e. non-excepted services. Accordingly, in the event that the appropriations hiatus continues measurably beyond Monday, November 23, 1981, agency heads will be required to make determinations as to whether non-excepted personnel have completed all phasedown tasks incident to the orderly suspension of agency operations. At such time, the services of those employees can no longer be accepted in the absence of appropriations.

3. 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 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.

4. Agencies are requested to report promptly to OMB staff who normally handle their budgets any major disruptions of activities or services that may or will imminently result from the absence of appropriations.

5. Within the guidance established by the Attorney General's opinion of January 16, 1981, and this memorandum, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.

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

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Bulletin No. 80-14 August 28, 1980

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations

1. Purpose and Coverage. This Bulletin provides policy guidance and instructions for actions to be taken by Executive Branch agencies when failure by the Congress to enact either regular appropriations, a continuing resolution, or needed supplementals results in interruption of fund availability. This Bulletin does not apply to specific appropriations action by the Congress to deny program funding. In the instance of partial funding interruptions, e.g., failure of the Congress to act on program supplementals, special procedures beyond those outlined in this Bulletin may be warranted. In such cases, OMB representatives responsible for the affected agency's budget estimates should be consulted.

2. Background. The Attorney General issued an opinion on April 25, 1980 that the language and legislative history of the Antideficiency Act (31 USC 665) unambiguously prohibits agency officials from incurring obligations in the absence of appropriations. The essential elements of the Attorney General's advice are that:

a. In the absence of new appropriations, Federal officers may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.

b. Under authority of the Antideficiency Act, Federal officers may incur obligations as necessary for orderly termination of an agency's functions, but no funds may be disbursed.

c. Under its enforcement responsibilities, the Department of Justice will take actions to apply the criminal provisions of the Antideficiency Act in the future when violations of the Act are alleged under such circumstances.

3. Actions required. Agencies faced with funding interruptions must take steps to forestall interruptions in operations and assure that they are in a position to limit their activities to those directly related to orderly shutdown of the agency.

a. Reallocation of funds prior to shutdown. Prior to initiation of orderly shutdown activities, agency heads will limit their operations to minimum essential activities and will reallocate to the extent permitted by law all available funds in order to forestall the fund interruption date as long as possible. Reallocation of funds will be made subject to the following requirements:

(1) Reallocation below the appropriation and fund account level will be accomplished by telephonic revision to allotments and suballotments (such revisions will be documented and immediately reflected in formal written changes to the regular allotment/suballotment documents).

(2) Agencies that have specific statutory authority to reallocate and transfer funds between appropriation and/or fund accounts will effect the transfers in accordance with current standard fiscal procedures. Such transfers generally will be effected on Standard Form (SF) 1151, "Nonexpenditure Transfer of Funds" (see OMB Circular No. A-11, section 21.2, for a description of when expenditure transfers might be required). This Bulletin does not convey new authority to transfer funds.

(3) For this purpose adjustment to amounts contained in OMB apportionments may be made without submission of a reapportionment request.

b. Orderly shutdown activities. When all available funds, including reallotted/reallocated funds, are exhausted, orderly shutdown activities must begin. Each agency head must determine the specific actions that will be taken; however, all actions must contribute to orderly shutdown of the agency and give primary consideration to protecting life and safeguarding Government property and records. Such actions should be accomplished in a way that will facilitate reactivation when funds are made available. Agency heads will notify OMB, OPM, Treasury, and GSA immediately when shutdown activities are being initiated. These central agencies will be responsible for notifying their own regional offices, except as noted in paragraph (3).

(1) Appropriations and funds. Agency heads will limit obligations incurred to those needed to maintain the minimum level of essential activities necessary to protect life and property; to process the necessary personnel actions; to process the personnel payroll for the periods prior to fund interruption; and to provide for orderly transfer of custody of property and records to the General Services Administration (GSA) and the Office of Personnel Management (OPM) for disposition.

(2) Personnel and personnel records. Necessary personnel actions will be taken to release employees in accordance with applicable law and Office of Personnel Management's regulations. Preparation of employee notices of furlough and processing of personnel and pay records in connection with furlough actions are essential shutdown activities. Agencies should plan for these functions to be performed by employees who are retained for orderly termination of agency activities, as long as those employees are available. As soon as agencies determine the date after which they will no longer be able to maintain custody of personnel records, they should notify the Office of Personnel Management to arrange for orderly transfer of custody of the personnel records to OPM and GSA, jointly, for caretaking and protection of the records. If necessary to protect the interests of individual employees during the period when all employees of the agencies are on furlough, OPM will provide access to the appropriate personnel records to retrieve information and/or process personnel actions, e.g., separation-transfer of an employee who secures employment in another agency. Guidance for planning such actions and relevant questions and answers as to employees' benefits will be provided separately by OPM.

(3) Property and nonpersonnel records. Inventories of property and records will be made to assure protection of the Government's interests and the claims of affected private entities and individuals (including vendors and beneficiaries of Federal programs). Upon determination that agency funds are no longer available, agency officials should contact the appropriate Regional Administrators, General Services Administration, for assistance in determining the disposition of agency records, real and personal property, and outstanding requisitions, contracts, grants and related items. Detailed guidance on such matters are contained in:

-- 41 CFR 101-11.4; Dispositions of records.

-- 41 CFR 101-43 and 101-47; Disposition of personal property and real property.

-- FPMR 101-36.5, 101-37.203(c), and 101-37.307-1; Dispositions of automatic data processing, communications, and telephone equipment.

-- GSA motor pool accounting and record system operations guide; Disposition of motor vehicles.

The transfer to the General Services Administration of property and records shall not be made until 30 days have elapsed from the start of shutdown activities and then only after a determination is made that the funding hiatus will continue indefinitely.

c. Planning. Agency heads should develop plans for an orderly shutdown that reflect the policy and guidance provided in this Bulletin. Such plans necessarily will be tailored to each agency's needs in recognition of the unique nature of its funding sources, missions, and authorities. While every agency should have a plan, the scope and detail of the plan should be commensurate with the likelihood that shutdown will be necessary and with the complexity of shutting down the agency.

4. Effective dates. The instructions in this Bulletin are effective immediately and remain in effect until rescinded.

5. Inquiries. Budgetary questions should be directed to the OMB representatives responsible for review of each agency's budget estimates.

Fiscal procedures questions should be directed to the Division of Government Accounts and Reports, Bureau of Government Financial Operations, Department of the Treasury, Treasury Annex #1, Washington, D.C. 20226 (Telephone: (202) 566-5844).

Agency officials may obtain additional information and technical assistance on personnel matters by contacting their agency officer at the Office of Personnel Management.

Property and nonpersonnel records disposition questions should be directed to Office of Plans, Programs, and Financial Management, General Services Administration, Washington, D.C. (Telephone: (202) 566-1807).

James T. McIntyre, Jr.

James T. McIntyre, Jr.
Director

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

THE DIRECTOR

October 5, 1990

M-91-02

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Richard G. Darman

SUBJECT: Agency Operations in the Absence of Appropriations

The Continuing Resolution (CR) expires at midnight tonight, October 5, 1990. We have no indication yet whether Congress will act today and pass a CR. The President has stated that it is his intention not to sign a CR until there has been satisfactory Congressional progress on the budget. At this point, there has clearly not been satisfactory Congressional action. Therefore, beginning tomorrow morning (Saturday), October 6th, the head of each agency must be prepared to implement his or her existing plan for closing down operations funded by accounts that have not received appropriations.

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 plans to deal with such an appropriations hiatus. Furthermore, the Attorney General's opinion dated January 16, 1981, supporting this bulletin, remains in effect. In general:

- Employees of affected agencies performing non-excepted activities (as discussed in the Attorney General's opinion) 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 authorized by law or that protect life and property.

- Agencies may not permit voluntary performance of non-excepted services.

Implementation of this shutdown process will be particularly difficult because any lapse of appropriations will occur over a weekend (with a Monday holiday).

- Weekend Employees -- Agency shutdown plans should be implemented for non-excepted weekend employees,

who should be instructed to report for their first scheduled work turn for the sole purpose of engaging in orderly shutdown activities. Excepted weekend employees should be instructed to report for work and to perform their excepted activities.

- All Other Employees -- All regular employees performing non-excepted activities, as well as excepted employees, should be instructed to report for work on Tuesday, October 9th, as scheduled.

Over the weekend and during the day on Tuesday, we will provide further instructions, depending on the status of appropriations action, as follows:

- Normal Operations: If a CR that suspends sequester is clearly likely to be enacted on Tuesday (or has been enacted over the weekend), agencies will be instructed to operate in a normal manner.

- Shutdown: If no CR is likely to be enacted on Tuesday, we will issue instructions initiating a phase-down of activities for non-excepted employees. Such phase-down activities for non-excepted personnel, if called for, should be completed during the first three hours of the workday.

- Sequester: If (on or before Tuesday) a CR is enacted that does not suspend sequester, you should begin implementing your sequester plan.

Please address any question to your OMB budget examiner(s), or to OMB Acting General Counsel Robert Damus (395-5044), or Associate General Counsel for Budget Rosalyn Rettman (395-5600).

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

THE DIRECTOR

October 21, 1993

MEMORANDUM FOR HEADS OF DESIGNATED EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Leon E. Panetta
Director

SUBJECT: Agency Operations in the Absence of Appropriations

The Continuing Resolution (CR) expires at midnight tonight, October 21, 1993. We have no indication yet whether Congress will act today and pass either a CR or the remaining individual appropriations bills. At this point, it appears the full year appropriations for agencies receiving funding in the acts listed below will not be enacted before the CR expires. Therefore, beginning tomorrow morning, Friday, October 22nd, the head of each designated agency must be prepared to implement his or her existing plan for closing down operations funded by accounts that have not received appropriations.

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 plans to deal with such an appropriations hiatus. Furthermore, the Attorney General's opinion dated January 16, 1981, supporting this bulletin, remains in effect.

In implementing shutdown plans, affected agencies should be aware of the 1990 amendment of 31 U.S.C. 1342. That section, relied upon in the Attorney General's 1981 opinion, provides an exception from the Anti-Deficiency Act in cases of "emergencies involving the safety of human life or the protection of property." The 1990 amendment added the following:

> "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."

In general, under the Attorney General's opinion:

- Employees or affected agencies performing non-excepted activities (as discussed in the Attorney General's opinion) 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 authorized by law or that protect life and property, as clarified by the 1990 amendment to 31 U.S.C. 1342.

- Agencies may not permit voluntary performance of non-excepted services.

Specific instructions for Friday morning, October 22nd, are as follows:

- All <u>excepted</u> employees identified pursuant to your agency's plan and the Attorney General's opinion of January 16, 1981, should be instructed to report to work on October 22nd and to perform their excepted duties.

- All <u>regular</u> employees performing non-excepted activities should be instructed to report for work on Friday, October 22nd, as scheduled.

During the day on Friday, we will provide further instructions, depending on the status of appropriations action, as follows:

- If a second CR or appropriations bill for one or more agencies is clearly likely to be enacted on Friday, affected agencies will be instructed to operate in a normal manner.

- If no CR or appropriations bill for an agency is likely to be enacted on Friday, OMB will issue instructions initiating a phase-down of activities for non-excepted employees of the affected agency or agencies. Such phase-down activities for non-excepted personnel, if called for, should be completed during the first <u>three hours</u> of the workday.

Please address any questions to your OMB budget examiner(s), or to OMB Acting General Counsel Robert Damus (395-5044), or Associate General Counsel for Budget Rosalyn Rettman (395-5600).

<u>Designated Executive Departments and Agencies</u>

Designated Executive departments and agencies are those receiving funding in the following appropriations Acts:

- Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1994;
- Department of Defense Appropriations Act, 1994;
- District of Columbia Appropriations Act, 1994;
- Energy and Water Development Appropriations Act, 1994;
- Department of the Interior and Related Agencies Appropriations Act, 1994;
- Department of Transportation and Related Agencies Appropriations Act, 1994;
- Treasury, Postal Service, and General Government Appropriations Act, 1994; and
- Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1994.

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