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Government Shutdowns

Puja Seam
Brad Shron

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I. FUNDING LAPSES AND GOVERNMENT SHUTDOWN

A. What Leads to Funding Gaps

Under current statutory law and federal constitutional law funds may not be drawn on the U.S. Treasury or obligated by federal officials unless appropriated by law.¹ The regular activities of most federal agencies are funded by annual appropriations contained in the thirteen regular appropriations bills. In the event these regular appropriations bills are not passed by the beginning of the fiscal year, October 1, Congress relies on temporary or interim funding most often in the form of one or more continuing resolutions.² The failure to pass regular appropriations bills and continuing resolutions after the beginning of the fiscal year leads to a funding gap or funding lapse (used interchangeably in this paper).³ Depending on the number of regular appropriations that have yet to be enacted, funding gaps can lead to partial shutdowns of affected agencies or even a complete federal government shutdown. What it means for a partial or full government shutdown to occur is discussed in Part I.B of this briefing paper.

Delays in passing regular appropriations bills have been a consistent problem in the last several decades. In every year during the twenty-five year period between fiscal year 1952 and

¹ U.S. CONST., art. I, § 9, cl. 7 (explaining what is often referred to as the Appropriations Clause); The Antideficiency Act, 31 U.S.C. 1341 (2000) (barring agencies from continued operations in the absence of appropriations). For a full discussion of the features and legislative history of the Antideficiency Act, see Cong. Research Service, *Federal Budget, Accounting, and Financial Management Laws: Summaries of Selected Provisions* 1-8, CRS report 96-626 (July 16, 1996).

² A continuing resolution (CR) provides continuing appropriation in the form of a joint resolution. CRs usually fund activities with restrictions such as not permitting new activities to be initiated and retaining existing conditions and limitations on program activity. See Robert Keith, Cong. Research Services, *Preventing Federal Government Shutdowns: Proposals for an Automatic Continuing Resolution* 1 (Oct. 18, 1999).

³ Funding gaps may occur on October 1 or they may occur any time a continuing resolution expires and another continuing resolution or regular appropriations act is not enacted immediately after.

fiscal year 1976, Congress and the President were unable to enact all thirteen of the appropriation acts on time with the exception of fiscal year 1953.⁴ Congress responded to these delays by increasing the length of time available to act on annual appropriation measures by moving the start of the fiscal year from July 1 to October 1 in the Congressional Budget Act of 1974.⁵ Despite these changes, there have been only four instances in which all thirteen of the regular appropriations acts were enacted on time between fiscal year 1977 through fiscal year 2004.⁶ See Table I. Thus, continuing resolutions (CRs) were used almost every year to continue funding to government agencies except in three fiscal years during this period.⁷ The CRs ranged in number from one to six except for fiscal year 1996 when fourteen separate measures were enacted to provide continuing appropriation.⁸

In this way, CRs, which date from at least as early as the 1870s, have been an integral part of the annual appropriations process since the period following World War II.⁹ There are two main types of CRs—interim or full-year continuing resolutions. Interim CRs provide temporary funding until a specific date or until the regular appropriations bills are passed. In contrast, full-year CRs provide continuing appropriation through the end of the fiscal year and

⁴ See Keith, *supra* note 2, at 2 n.2 (explaining that the FY1953 regular appropriation measures were enacted after the start of the fiscal year on July 1, 1952 continuing resolution were not used. A supplemental appropriation measure for FY1953, section 1414 of P.L. 82-547 (July 15, 1952), “resolved technical legalities” arising from the delayed enactment of appropriations).

⁵ See *id.*

⁶ The four years when the regular appropriations acts were enacted on time are fiscal years 1977, 1989, 1995, and 1997. See *id.*

⁷ At least one CR has been enacted each year since fiscal year 1954 through fiscal year 2004 except for in fiscal years 1989, 1995, and 1997. In 1977, although all thirteen appropriations bills became law on or by the deadline, two CRs were enacted to provide funding for certain unauthorized activities that had not been included in the regular appropriation acts. See Keith, *supra* note 2, at 2; Sandy Streeter, Cong. Research Service, *Continuing Appropriations Acts: Brief Overview of Recent Practices* 5 (Nov. 30, 2004).

⁸ See Keith, *supra* note 2, at 2.

⁹ See Streeter, *supra* note 7, at 5.

effectively are regular appropriations acts for the fiscal year.¹⁰ Each type of CR has been used depending on the level of conflict between Congress and the President over budgetary issues.

The GAO describes CRs from the 1960s as often shorter in length and duration as well as less comprehensive in terms of the number of agencies for which it contained funding. Beginning in the early 1970s, however, conflict between Congress and the President over budget issues led to an increase in delay of enactment of the appropriations bills, and consequently, the nature, scope, and duration of CRs began to change.¹¹ In contrast to earlier years, the fiscal year 1985 CR was 363 pages long and contained an authorization measure.¹² Moreover, in the 1980s, often the final CR enacted would provide funding for the remainder of the fiscal year simply as stop-gap funding in lieu of the regular appropriations acts.¹³ A GAO Report from 1986 characterized the changed use of CR as significant:

Continuing resolutions have become lengthier and more complicated, and have had longer durations. These temporary funding measures have faced impediments, and their enactment has been delayed as they have become the vehicle for unfinished legislative business and detailed appropriations provisions. As such, they have contributed to prolonging congressional debate, funding uncertainty, and, in some instances, delays in payments to recipients of government programs.¹⁴

Once again, as the political climate changed in fiscal years 1988 to 1995, there was relative agreement on budget priorities and appropriations acts passed more readily such that CRs were more limited and used mainly to provide interim funding for briefer periods.¹⁵ See Table I.

¹⁰ For a more detailed explanation of CRs, see Streeter, *supra* note 7, at 8-9.

¹¹ See Streeter, *supra* note 7, at 7.

¹² GEN. ACCT. OFF., APPROPRIATIONS: CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES, REPORT TO THE CHAIRMAN, COMMITTEE ON RULES, HOUSE OF REPRESENTATIVES 3 (Jan. 1986) [hereinafter GAO APPROPRIATIONS].

¹³ See Keith, *supra* note 2, at 2.

¹⁴ See GAO APPROPRIATIONS, *supra* note 12, at 3.

¹⁵ See Streeter, *supra* note 7, at 7.

TABLE 1. REGULAR APPROPRIATIONS BILLS ENACTED BY DEADLINE AND CRs, FY1977-2004

Fiscal Year	Presidential Administration	Party in Control of Congress:		Regular Appropriations Bills:		
		Senate	House	Approved by Oct. 1	Enacted in CRs	CRs Enacted
1977	Ford	D	D	13	0	2
1978	Carter	D	D	9	1	3
1979	Carter	D	D	5	1	1
1980	Carter	D	D	3	3	2
1981	Carter	D	D	1	5	2
1982	Reagan	R	D	0	4	4
1983	Reagan	R	D	1	7	2
1984	Reagan	R	D	4	3	2
1985	Reagan	R	D	4	8	5
1986	Reagan	R	D	0	7	5
1987	Reagan	R	D	0	13	5
1988	Reagan	D	D	0	13	5
1989	Reagan	R	D	13	0	0
1990	G.H.W. Bush	D	D	1	0	3
1991	G.H.W. Bush	D	D	0	0	5
1992	G.H.W. Bush	D	D	3	1	4
1993	G.H.W. Bush	D	D	1	0	1
1994	Clinton	D	D	2	0	3
1995	Clinton	D	D	13	0	0
1996	Clinton	R	R	0	0	13
1997	Clinton	R	R	8	0	0
1998	Clinton	R	R	1	0	6
1999	Clinton	R	R	1	0	6
2000	Clinton	R	R	4	0	7
2001	Clinton	R	R	2	0	21
2002	Bush	D	R	0	0	8
2003	Bush	R	R	0	0	8
2004	Bush	R	R	3	0	5

Source: Based on Streeter, *supra* note 7, at 6, table 2 (provides greater detailed information regarding these numbers)

Historically, funding gaps are not uncommon. As discussed above, Congress has often failed to meet deadlines for the completion of appropriations bills.¹⁶ During the twenty-four fiscal years between fiscal year 1977 and 2000, there were seventeen funding gaps. See Table II. One or more funding gaps occurred in twelve of these years while in fiscal years 1983, 1985, and

¹⁶ See Pete V. Domenici, *Fighting the Good Fight: Washington's Quest for a Balanced Budget, Symposium: The 1995-1996 Budget Impasse and Its Implications for the Budgetary Process*, 16 ST. LOUIS U. PUB. L. REV. 17, 17 (1996) (providing insight from Senator Domenici's experience as Chairman of the Budget Committee of the United States Senate).

1996 there were two funding gaps in a single fiscal year, and in fiscal year 1978 there were three.¹⁷ The gaps ranged in duration from merely one day to a record of twenty-one full days with six of the seven lengthiest funding gaps occurring prior to fiscal 1981. This is important to note because two formal opinions were issued by Attorney General Benjamin Civiletti in 1980 and 1981 that changed the consequences of a funding lapse and forced shutdown in the absence of appropriations bills or continuing resolutions.¹⁸ These opinions' interpretation of what is and is not permitted under the Antideficiency Act and related threat to enforce the Act against future violations, discussed in great detail in Part II of this paper,¹⁹ increase the possibility of a government shutdown during a funding gap.

TABLE II. APPROPRIATIONS FUNDING GAPS: FY1977-2000

Fiscal Year	Date Gap Commenced (AT MIDNIGHT OF DATE INDICATED)	full day(s) of Gaps	date Gap Terminated (TERMINATED DURING DATE INDICATED DUE TO ENACTMENT OF REGULAR APPROPRIATIONS OR CONTINUING RESOLUTIONS)
1977	Thurs., 9-30-76	10	Mon., 10-11-76
1978	Fri., 9-30-77 Mon., 10-31-77 Wed., 11-30-77	12 8 8	Thurs., 10-13-77 Wed., 11-09-77 Fri., 12-09-77
1979	Sat., 9-30-78	17	Wed., 10-18-78
1980	Sun., 9-30-79	11	Fri., 12-09-77
1981	---	---	---
1982	Fri., 11-20-81	2	Mon., 11-23-81
1983	Thurs., 9-30-82 Fri., 12-17-82	1 3	Sat., 10-02-82 Tues., 12-21-82
1984	Thurs., 11-10-83	3	Mon., 11-14-83
1985	Sun., 9-30-84 Wed., 10-3-84	2 1	Wed., 10-3-84 Fri., 10-05-84
1986	---	---	---
1987	Thurs., 10-16-86	1	Sat., 10-18-86
1988	Fri., 12-18-87	1	Sun., 12-20-87

¹⁷ See Keith, *supra* note 2, at 3.

¹⁸ Domenici, *supra* note 16, at 19 citing to GEN. ACCT. OFF., GOVERNMENT SHUTDOWN, PERMANENT FUNDING LAPSE LEGISLATION NEEDED: A REPORT TO THE HOUSE SUBCOMM. ON THE CIVIL SERVICE, 102d Cong., 2d. Sess., 7-8 (1991).

¹⁹ See *infra* note 89.

1989	---	---	---
1990	---	---	---
1991	Fri., 10-05-90	3	Tues., 10-09-90
1992	---	---	---
1993	---	---	---
1994	---	---	---
1995	---	---	---
1996	Mon., 11-13-95 Fri., 12-15-95	5 21	Sun., 11-19-95 Sat., 1-6-96
1997	---	---	---
1998	---	---	---
1999	---	---	---
2000	---	---	---

Source: Keiths, *supra* note 2, at 4; Kosar, *infra* note 41, at 6.

B. The Experience of Recent Government Shutdowns

In the past, funding gaps have led to government shutdowns that resulted in wide-reaching furloughs²⁰ of federal employees for multiple days and the shutdown of federal agencies, while in other instances they have resulted in minimal disruption often because the funding gap occurred over a weekend. *See* Table II. Focusing on some of the most recent funding gaps that resulted in government shutdowns is helpful in providing context for the relevant statutory and constitutional law and whether it truly governs what happens during a shutdown. The law that governs government shutdowns is discussed in detail in Part II of this paper, but these examples illustrate the events leading to a shutdown, the consequences of funding gaps, and the scope of government shutdowns.

In November 1981, a funding gap began when a CR expired at midnight on Friday, November 20. On the following Monday morning, President Reagan vetoed further CRs causing the first government shutdown in his administration over spending levels for domestic programs.

²⁰ In this context, “furlough” means sending workers home and placing them in a temporary, non-duty, non-pay status. Certain employees are exempted from furloughs. Examples of such employees include presidential appointees, members of Congress, uniformed military personnel, and any other federal employees deemed “essential.” Furloughs are generally credible for retaining benefits, seniority, and salaries retroactively. *See* Kosar, *infra* note 41, at 3; *see also* *infra* note 64; Part II of this paper.

Later that same day, the confrontation between President Reagan and Congress ended when a further CR was signed into law that evening.²¹ Workers that were furloughed were told they would not receive pay, but Congress later voted to pay them anyway. The cost of shutting down federal offices was estimated at approximately \$82 million,²² but since it did not extend beyond one day and was not fully initiated in all the agencies it offers less insight into the effects of a longer and more complete shutdown.²³

Another dramatic conflict between President Reagan and the House of Representatives led to the fourth and fifth funding gaps of the Reagan administration in late September and early October 1984. Even as October 1 of approached, Congress remained deadlocked over a variety of issues, such as military aid to Nicaragua and various “pork-barrel” water projects, and consequently, ended up debating CRs rather than the regular appropriations bills.²⁴ A first interim measure approving three CRs was approved October 3 and a second interim measure approving the final CR was approved October 4, but the second measure came too late to stop President Reagan from initiating a shutdown of all nonessential activities,²⁵ which included eight Cabinet-level departments and several independent federal agencies as well as the furloughing of 500,000 nonessential employees.²⁶ This second shutdown on October 4 lasted only one day, but

²¹ See Keith, *supra* note 2, at 5; *Weekend Contest Produces 3-Week Funding Accord; Government Shutdown Ends and Funding Gap Led to Sweeping Shutdown...But No Lapse in Essential U.S. Services*, Cong. Q. Wkly Report at 2324-2327 (November 28, 1981).

²² See Diane Grant, *Reagan Shuts Government; Democrats Object*, CONG. Q. WKLY REPORT, Oct. 6, 1984, at 2420. Although the costs are not broken out in detail, it seems the media is quoting cost estimates based on the cost of salaries for federal workers even when they did report to work and from lost revenues estimates from agencies that collect fees and other revenue such as the IRS.

²³ See generally Hearings on S.J. Res. 58 or H.R.J. Res. 350, *Hearings before the House or Representatives Comm. on Rules, Subcomm. on Legislative Process*, 94th Cong., 1st Sess. 1, 1-2 (April 21, 1982) (statement of Mr. Charles A. Bowsher, Comptroller General of the U.S.) (discussing the effects of funding gaps).

²⁴ See Dale Tate et. al., *Last Minute Appropriations Bill Tripped Up*, CONG. Q. WKLY REPORT, Oct. 6, 1984, at 2417.

²⁵ See *id.*

²⁶ See Grant, *supra* note 22, at 2420 (listing the affected Cabinet-level departments as: Agriculture, Defense, Interior, Labor, Health and Human Services, Education, Transportation and Treasury, and smaller agencies such as the Office of Personnel Management).

the closing of federal offices was predicted to cost the government approximately \$65 million.²⁷

Again, all furloughed workers were compensated although they did not work.²⁸

On October 1, 1990, no appropriations bills had been enacted by President George H.W. Bush and the Democratic Congress in large part due to disagreements related to the growth in funding of domestic discretionary programs to keep pace with inflation.²⁹ A CR was enacted providing funding through October 5 prior to the start of the Columbus Day weekend.³⁰ A second CR to provide funding through October 12 was vetoed by President Bush and a government shutdown began on October 6. It eventually ended on October 9 due to the passage of yet a third CR lasting until later that month.³¹ This budget battle required two more CRs before a final agreement was reached.³²

In a report to the House of Representatives, the GAO described this shutdown as causing “significant adverse effects and...not convey[ing] to the public an image of a well-managed government...the shutdown...disrupted government operations, and adversely affected employee morale.”³³ The GAO reported that the net cost of the shutdown, estimated from summary data on the administrative costs of the shutdowns, salary costs/savings, and estimates of lost revenue, was almost \$3.4 million dollars over the three day weekend. On a percentage-basis, over 75% of the cost came from the Department of the Interior and the Smithsonian where many government

²⁷ See *id.*

²⁸ *Id.*

²⁹ See Phil Kuntz, *Appropriations: Battle Over Cuts Begins Anew After House Rejection*, CONG. Q. WEEKLY REPORT, Oct. 6, 1990, at 3123.

³⁰ See GEN. ACCT. OFF., DATA ON EFFECTS OF 1990 COLUMBUS DAY WEEKEND FUNDING LAPSE 2 (1990) [hereinafter GAO 1990 COLUMBUS DAY].

³¹ *Id.*

³² *Fourth Stopgap Bill Enacted*, CONG. Q. WKLY REPORT, Oct. 27, 1990, at 3579.

³³ See GEN. ACCT. OFF., *Government Shutdown, Permanent Funding Lapse Legislation Needed: A Report to the House Subcomm. on the Civil Service*, 102d Cong., 2d. Sess., 7-8 (1991) [hereinafter GAO PERMANENT FUNDING]. For more information on the Columbus Day weekend shutdown, see generally GAO 1990 COLUMBUS DAY, *supra* note 30, 7-36 (providing detailed facts on each agency and the impact).

activities continued and employees worked over the weekends.³⁴ Additionally, the GAO estimated the net cost of the shutdown to be more than \$189 million had the shutdown occurred on three non-holiday weekdays.³⁵

The most recent government shutdowns occurred during President Clinton's administration. Both were highly contentious and occurred about one month apart during fiscal year 1996.³⁶ As the most recent shutdowns, these provide the most insight into what actually may occur during future government shutdowns as well as in lengthier shutdowns; however, like the earlier shutdowns they were not complete shutdowns of the federal government. The regular appropriations bills funded roughly one-third of the government during that fiscal year while the remainder of federal spending was funded pursuant to permanent law that did not require annual appropriations.³⁷

The key budgetary issues that could not be resolved between President Clinton and a Republican-controlled Congress centered on several entitlement programs, whether the budget should be balanced, and how this should be done. President Clinton submitted a fiscal year 1996 budget that essentially maintained the status quo using Office of Management and Budget (OMB) numbers.³⁸ In contrast, Republican-controlled Congress passed a budget resolution in June 1995 based on Congressional Budget Office (CBO) projections³⁹ that proposed steep cuts in

³⁴ See GAO PERMANENT FUNDING, *supra* note 33, at 21-22 (calculating in 1990 dollars).

³⁵ See *id.* at 39.

³⁶ See generally GEORGE HAGER AND ERIC PIANIN, MIRAGE: WHY NEITHER DEMOCRATS NOR REPUBLICANS CAN BALANCE THE BUDGET, END THE DEFICIT, AND SATISFY THE PUBLIC 259-303 (1997) (providing a more detailed account of the political circumstances leading up to these shutdowns); Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck,"* 35 HARV. J. ON LEGIS. 589, 600-09.

³⁷ See Domenici, *supra* note 16, at 2 citing to H.R. Rep. No. 491, 104th Cong., 2d Sess. 16 (1996) (providing the conference report for the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), discussing the percentage of the budget that is "discretionary spending") and *Two Year Budget Process: Hearings before the Subcomm. on Financial Management and Accountability*, 104th Cong., 2d Sess. (1996) (testimony of Mr. James Blum, Deputy Director of the Congressional Budget Office).

³⁸ See Domenici, *supra* note 16, at 2.

³⁹ See ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 199-201 t.9-2 (2000) (detailing the FY1996 budget process).

many social programs, reduced the size of the federal government, and tried to balance the budget in seven years by implementing a large tax cut. Because the numbers projected by the OMB were more favorable to the President's budget than those of the CBO, Republicans accused the President of using overly-optimistic numbers and a dishonest scoring system.⁴⁰

The first shutdown, November 14 through 19, was triggered by the expiration of a CR agreed to on September 30, 1995, and by President Clinton's vetoes of a second CR and a short-term debt limit extension bill to avoid a possible breach of the statutory debt limit.⁴¹ Both the vetoed bills contained provisions that the President had signaled he would reject, such as cuts in spending for Medicare and Medicaid. As a result of the impasse, nearly 800,000 non-essential⁴² workers were furloughed on November 14.⁴³ Non-essential workers included those personnel that process new claims for Social Security and Veterans benefits, work in the National Park System, review and process loan applications for federal loans, process passport and visa

⁴⁰ See George Hager, *Special Report – Budget Battle Came Sooner Than Either Side Expected*, CONG. Q. WEEKLY REPORT at 3503 (Nov. 18, 1995).

⁴¹ See Kevin R. Kosar, Cong. Research Serv., *Shutdown of the Federal Government: Causes, Effects, and Process* 2, CRS report 98-844 (Sept. 20, 2004). Funding gaps may also be triggered if debt limit extensions are not enacted. For a full discussion of the debt ceiling, see Briefing Paper No. 11.

⁴² The idea that certain federal employees are essential while others are non-essential seems to originate in the Attorney General's Opinions interpreting the Antideficiency Act's exception that permits voluntary services for emergencies. See 43 U.S. Op. Atty. Gen. 293, 301-03; *infra* Part II.A-B (discussing the Antideficiency Act including section 665(b) as amended by Congress in 1950 and the 1981 Attorney General's opinion). It is also possible the characterization of "essential" employees evolved from the 1981 Attorney General Opinion, which stated "[t]he Constitution and Antideficiency Act leave the Executive leeway to perform essential functions..." See 43 U.S. Op. Atty. Gen. at 300-01, 307. The Office of Management and Budget may have also contributed to the more widespread use of "essential" in the context of shutdowns by including the phrase "essential" in a 1980 memorandum to agencies stating that "[p]rior to initiation of orderly shutdown activities, agency heads will limit their operations to minimum essential activities..." Off. of Mgmt. and Budget, Bulletin No. 80-14 (Aug. 28, 1980) available at <http://www.opm.gov/furlough/adrconso.htm#Appendix%20A-5> (last visited April 15, 2005) [hereinafter OMB Aug. 1980]. The use of the term essential employee also seems synonymous with the Office of Personnel Management's use of the term "excepted employee" defined as "employees who are excepted from a furlough by law because they are (1) performing emergency work involving the safety of human life or the protection of property, (2) involved in the orderly suspension of agency operations, or (3) performing other functions exempted from the furlough." See OFF. OF PERSONNEL MGMT., *infra* note 69.

⁴³ See Hager, *supra* note 40, at 3503. After the end of the first shutdown, information was requested from the OMB in regards to what might happen to federal employees in the event of a second funding lapse. See GEN. ACCT. OFF., GOVERNMENT SHUTDOWN: FUNDING LAPSE FURLough INFORMATION 3-7 (Dec. 1995) (reporting estimates on the number of employees who may be subject to furlough should there be a second funding lapse in fiscal year 1996 appropriations authority commissioned and where particular agencies stood in terms of shutdown planning).

applications, distribute federally-subsidized fuel assistance, and support U.S. embassies.⁴⁴

Essential workers included uniformed military, air traffic controllers, border patrol officials, meat inspectors, and those who oversee financial markets and exchanges.⁴⁵

Additionally, during the partial shutdown, federal prisons and courts remained open, Amtrak was open, mail delivered, Medicaid, Medicare, Social Security and Veterans disability checks issued, and welfare and food stamps distributed.⁴⁶ In the midst of this shutdown, before an agreement was reached, President Clinton authorized 50,000 workers to return to work in order to process new claims for Social Security and Veterans Benefits by recharacterizing them essential workers.⁴⁷ There were concerns that further delays in returning to work would create such an enormous backlog, given the thousands of new applications authorized each day by these workers, that it would take months for these functions to return to normal. This shutdown ended four days later when Congress and the President were able to agree on another CR that would expire December 15, 1995, but the CR forced both sides to compromise political positions.⁴⁸

In addition to concerns about federal employees and government program activities that are standard in a shutdown, during this shutdown there was an additional complication related to the government defaulting on repayments it owed. Because President Clinton vetoed a bill that, among other things, extended the debt limit, there was a real possibility that the U.S. Treasury would not be able to borrow money it needed to pay its bills including a \$25 billion interest payment owed on November 15, 1995. The Treasury Department would have breached the debt

⁴⁴ See *Shutdown Touches Many Lives Across U.S.*, CNN (Nov. 19, 1995) at http://www.cnn.com/US/9511/debt_limit/11-18/wrap/impact.html (last visited March 29, 2005).

⁴⁵ See *Government Default Could Raise Interest Rates*, CNN (Nov. 9, 1995) at http://www.cnn.com/US/9511/govt_shutdown/index.html (last visited March 29, 2005).

⁴⁶ See *What's Open, Closed During Partial Government Shutdown*, CNN (Nov. 15, 1995) at <http://www.cnn.com/US/9511> (last visited March 29, 2005).

⁴⁷ See *Clinton Re-Opens Some Federal Functions*, CNN (Nov. 16, 1995) at <http://www.cnn.com/US/9511> (last visited March 29, 2005).

⁴⁸ See SCHICK, *supra* note 39, at 200-01.

ceiling and defaulted on payments it owed but for its ability to “un-borrow” money from the federal trust funds and lower the amount of federal debt.⁴⁹ This mechanism was sufficient to avoid a debt crisis in addition to the shutdown.

The second partial shutdown began on December 16, 1995 after President Clinton vetoed another CR upon the expiration of the CR that ended the first shutdown. Again, President Clinton believed the healthcare cuts were too harsh while Republicans accused him of using unreliable estimates in his budget.⁵⁰ This shutdown lasted a record twenty-one days; however fewer agencies and programs were affected with federal employees furloughed during this lengthier shutdown. *See Table II.* The estimate of federal employees furloughed by the second shutdown was 284,000 on January 2, 1996 while another 475,000 employees were deemed essential and remained at work.⁵¹ This is likely due in part to the fact that some funding bills were enacted between the end of the first shutdown and the beginning of the second⁵² and given the temporary amendments made to the Antideficiency Act during this time.⁵³

⁴⁹ Should the U.S. reach the debt ceiling and an extension to the debt limit is not passed, a funding gap will result as it does when Congress fails to pass appropriations bills or CRs. In this instance, the Treasury Department was able to avoid a funding gap and a default on interest payments owed on debt held by the public by “unborrowing” federal trust funds. Frequently, the Treasury borrows money from the federal trust funds in order to fund various intragovernmental loans. Since the definition of statutory debt that is applicable in measuring the U.S.’s amount of borrowing includes debt held by the public and the amounts the Treasury has borrowed from federal trust funds, by “unborrowing” these funds the Treasury was able to prevent a debt crisis during this first government shutdown. The Treasury “unborrows” these funds by deinvesting a portion of the trust funds. This means the money is borrowed from the trust funds without counting it and no interest payments are made on these borrowings. When more funding becomes available or the debt limit is raised by Congress, the trust fund is repaid with no other consequences. *See* Richard Kogan, *Balanced Budget Amendment Would Significantly Increase Risks of Government Default* (June 1997) available at <http://www.cbpp.org/BBADFLT.htm>; Richard Kogan, *Redefining the Debt Ceiling Poses Unnecessary Risks* (June 2004) available at <http://www.cbpp.org/6-22-04bud4.pdf>; *supra* note 45; Briefing Paper No. 11 (discussing the debt limit statute and this crisis in greater detail).

⁵⁰ *See* George Hager and Alissa J. Rubin, *As Budget Talks Break Down, Finger-Pointing Escalates*, CONG. Q. WEEKLY REPORT at 3789 (Dec. 16, 1995).

⁵¹ *See* Kosar, *supra* note 41, at 3.

⁵² *See* Kosar, *supra* note 41, at 3 n.8. Seven appropriations bills were enacted before the start of the second partial government shutdown. *See* SCHICK, *supra* note 39, at 199 t.9-2.

⁵³ *See infra* note **Error! Bookmark not defined.** (describing how the definition of “emergency” in the Antideficiency Act changed during the time between December 15, 1995 and January 26, 1996).

Finally, on January 5, public sentiment pushed Congress to pass “targeted” temporary spending measures to allow all furloughed federal employees to return to work as well as cover back pay for all federal employees through January 26, 1996; however, the targeted funds did not include operating funds for federal employees to perform all government activities.⁵⁴ Although full funding of all government activities was not provided for in this stopgap-funding, this stopgap measure is considered to have ended the shutdown on January 6, 1996.

In this bill passed on January 5, 1996 that ended the shutdown, specific programs received operating funds through the fiscal year. These programs were nutrition programs for the elderly (Meals on Wheels); child welfare programs; administration of unemployment insurance; assistance payments and foster care payments for American Indians; visitor services in the National Park system and related activities; passport, visa and American citizen services abroad; veterans compensation, pensions and education programs; and the operation of the District of Columbia with its own revenue. Programs that received funding through March 15, 1996 were Aid to Families with Dependent Children and foster care and adoption assistance to the states.⁵⁵ Eventually, after a series of other CRs were passed between January 26 and April 26, a final omnibus appropriations bill was enacted in late April to fund any agencies and programs not yet funded through fiscal year 1996.⁵⁶

At least one commentator writing on the government shutdowns of fiscal year 1996 has noted “policymakers substantially followed” the guidelines laid out by OMB on agency

⁵⁴ See H.R. 1643; *What's Ahead: Budget Fight Continues as Workers Return*, CONG. Q. WEEKLY REPORT at 3 (Jan. 6, 1996). Senator Dole led the Senate to pass a condition-free stop-gap bill on January 2 in order to allow government workers back to work through January 12. He had hope this would allow budget talks to resume without the pressure of having federal employees on furlough, but the House of Representatives rejected the bill almost immediately. See George Hager, *A Battered GOP Calls Workers Back to Job*, CONG. Q. WEEKLY REPORT at 53 (Jan. 6, 1996).

⁵⁵ See Hager, *supra* note 54, at 53.

⁵⁶ See Kosar, *supra* note 41, at 3; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34 reprinted in 1996 U.S.C.C.A.N. (110 Stat. 1321).

operations in the absence of appropriations.⁵⁷ Whether this commentator is correct, and whether past government shutdowns have complied with the law in this area, is difficult to assess and turns on both a close review of the OMB guidelines in this area as well as the statutory and constitutional basis for these guidelines, which include a number of Attorney General Opinions. While the OMB guidelines clarify and summarize the conclusions in the Attorney General Opinions, they also provide practical guidance and specific procedures for agencies on how to comply.

C. Agency Protocols for Government Shutdowns

The Office of Management and Budget (OMB) is charged with managing the federal shutdown of executive agencies, including instructing agencies on implementing a shutdown and monitoring the status of appropriations in order to notify agencies of a shutdown and when one has ended. The OMB has promulgated guidelines for agencies in the case of a funding gap and oversees advance planning for shutdowns due to funding gaps. These guidelines are based on a series of Attorney General's opinions and the Antideficiency Act.⁵⁸

A few months after the 1980 Attorney General's opinion was issued, the OMB issued a bulletin summarizing the conclusions of the Attorney General's opinion and alerting agencies to their new duties in the event of a funding lapse.⁵⁹ A later OMB memorandum issued in 1980 and another in 1981 provides greater clarification on which activities and employees may remain at work even in the absence of appropriations. These memoranda provide examples of agency activities that may continue and explain that these types of activities may be found under applicable statutes to:

⁵⁷ See Kosar, *supra* note 41, at 4. Cf. *infra* note Error! Bookmark not defined..

⁵⁸ See *infra* Part II (discussing in detail the Antideficiency Act and the AG opinions).

⁵⁹ See OMB Aug. 1980, *supra* note 42; *infra* Part II.A. (discussing the 1980 AG opinion)

(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 material;
- 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.⁶⁰

This memorandum goes on to instruct agencies to maintain the staff and support services necessary to continue the described functions.

Following these memorandums, several other updated bulletins have been issued that remind agencies of what to do and how to operate lawfully in the absence of appropriations.⁶¹ Together these series of OMB memoranda constitute the current protocols agencies must follow when there is an interruption in government fund availability because Congress has failed to provide regular appropriations, a continuing resolution, or needed supplements. In addition to the

⁶⁰ OFF. OF MGMT. AND BUDGET, MEMORANDUM FROM THE DIRECTOR OF OMB TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Sept. 30, 1980). *See also* OFF. OF MGMT. AND BUDGET, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Nov. 17, 1981) (explaining that these examples were first circulated to agencies in September 1980 and remain in effect beginning November 21, 1981) *available at* <http://www.opm.gov/furlough/adrconso.htm#Appendix%20A-4>.

⁶¹ In addition to those OMB documents already described that were issued to agencies, other such OMB documents were updated or issued on August 20, 1982; October 5, 1990; August 22, 1995. These are available on the OPM website, see <http://www.opm.gov/furlough/adrconso.htm>. From the dates of these updates, it seems probable that OPM revises these documents in anticipation of possible funding gaps.

above, these guidelines remind agencies of what types of actions may be conducted during a funding gap, what plans an agency should make in anticipation of a funding gap, and when an agency should implement its shutdown plans. However, even with all of this guidance to agencies, room for agency and OMB discretion remains.

In the most recent OMB Circular, the OMB begins by reiterating that in the absence of appropriations federal officers are not permitted to “incur any obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law” although they “may incur obligations as necessary for orderly termination of an agency’s functions, but funds may not be disbursed.”⁶² Agencies are also required to plan in advance for how to proceed with an agency shutdown. OMB requires agencies to submit to them plans for an orderly shutdown when first prepared and upon all revisions. The plans must include information such as an estimate of how long it will take the agency to shutdown to the nearest-half day, the number of employees prior to implementation of the plan, the total number of employees retained under the plan because they perform “military, law enforcement, or direct provision of health care activities, or their compensation is financed by a resource other than annual appropriations.”⁶³ Additionally, agencies must decide based on prior guidance what activities are “essential” to operate their agencies during a funding gap⁶⁴ and must submit policy statements and legal opinions to support estimates that it will take more than one-half a day to complete a

⁶² See OFF. OF MGMT. & BUDGET, SECTION 124—AGENCY OPERATIONS IN THE ABSENCE OF APPROPRIATIONS, OMB CIRCULAR NO. A-11 (2004) [hereinafter OMB A-11 for 2004]. This document seems to be the most recent OMB document related to shutdowns although it is clear from its content prior OMB bulletins and memoranda remain applicable. The implications and limitations on federal officials to make obligations, including the source of these limits, the Attorney General opinions, are discussed in Part II of the briefing paper.

⁶³ See *id.*

⁶⁴ After the first FY1996 shutdown, the House Committee on Government Reform and Oversight held hearings to detail the process followed by the OMB and other agencies. For the details of this discussion including which government employees should be considered essential, see House Comm. on Gov’t Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What’s Essential?*, 104th Cong., 1st Sess. (Dec. 6 and 14 1995) available at 1995 WL 743429 (F.D.C.H.) (including testimony from several committee chairs discussing particular programs and agency personnel); 1981 OAG, *infra* note 86.

shutdown or if the number of employees needed to protect life and property would exceed five percent of the total number of employees prior to a shutdown.⁶⁵

The OMB also requires agencies to revise shutdown plans and submit them to OMB if it appears that a funding gap may occur in the near future. Once OMB has identified a funding gap in appropriations, and all available funds have been exhausted, agencies must begin an orderly shutdown of activities and notify OMB immediately when such activities are initiated.⁶⁶ Agency heads are responsible for determining the specific actions that will be taken as long as they “give primary consideration to protecting life and safeguarding Government property and records.”⁶⁷ The OMB guidelines remind agency heads to limit obligations to those needed to maintain “essential activities necessary to protect life and property,” and prepare employee notices of furlough.⁶⁸ During a furlough, the Office of Personnel Management are available to assist agencies in the technical matters related to personnel such as employee pay and benefit administration.⁶⁹

PART II. THE LEGAL ISSUES PRESENTED BY SHUTDOWNS

A. The Relevant Law

What has occurred in past government shutdowns—how decisions were made regarding the government activities and services that would remain open, and which employees of the government would remain at work while others were furloughed—is guided primarily by

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See Kosar, supra* note 41, at 5; OFF. OF PERSONNEL MGMT., GUIDANCE AND INFORMATION ON FURLoughS *at* <http://www.opm.gov/furlough/adrconso.htm> (providing furlough guidelines from the Office of Personnel Management on topics related to pay, insurance, service credit, retirement, and documentation) (last revised December 1998) (last visited April 15, 2005).

specific constitutional and statutory provisions as well as a series of formal opinions written by the Office of the Attorney General.

1. Constitutional and Statutory Prohibitions

The federal Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law...”⁷⁰ This constitutional provision, better known as the Appropriations Clause, sets out the basic tenet that the legislature maintains control over the way the federal government spends its money. While the ongoing, but often overlooked, debate surrounding the proper scope and interpretation of this “power of the purse” is discussed below, any analysis of the legal ramifications of a government shutdown must begin with the Anti-Deficiency Act, a statute originally enacted in 1870 to give force to the Appropriations Clause. Inherent in the main provisions of the Act, through all the forms it has taken since its enactment, is the prohibition against expenditures in excess of proper appropriation, including the incurrence of government obligations for contractual payments or for voluntary services in the absence of such appropriation. Appendix I outlines the progression of the Anti-Deficiency Act from its initial language, through the many amendments and recodifications, to its current form, codified as 31 U.S.C. §§1341 and 1342. This Appendix should be frequently consulted throughout the next section, as the significance of the opinions discussed can only be appreciated in light of the particular language in place at the time of the given memorandum.

2. The Opinions of the Attorney General

Part of the rationale behind the Anti-Deficiency Act is an attempt to address proper activities for federal agencies when there is a failure to appropriate funds for their respective operations. It is for this reason that the Attorney General, Office of Legal Counsel and GAO

⁷⁰ U.S. CONST. art. 1, § 9, cl. 7.

have focused on it in opining on the state of affairs during a lapse in appropriations, the foundational condition underlying a government shutdown. In large part because the judiciary has never explicitly taken up the issue of accepted conduct during such a lapse, these opinions provide the governing rules during a funding gap or government shutdown.⁷¹

One of the earlier Attorney General opinions commenting on the matter of appropriations lapses came on March 21, 1877 in an opinion entitled “Support of the Army.”⁷² Congress had adjourned weeks earlier without appropriating funds for the Army, and the question arose as to whether private, voluntary contributions could be provided as a substitute. At the time, the relevant statute, as demonstrated in Appendix I, focused on a general prohibition against contracts in excess of appropriation, with certain exceptions for items such as clothing, forage and shelter.

After noting the statute’s connection to the Appropriations Clause, the Attorney General emphasized the explicit exception for certain obligations -- which may or may not have provided the foundation for today’s “emergency” exception, since no opinion since has expressly cited such language in discussing the relevance of an “emergency” -- and concluded the War and Navy Department could enter into contracts for clothing, etc. without Congressional funding. However, the 1877 OAG set out that as to paying the Army itself, or contracting for ammunition,

⁷¹ See generally Alan L. Feld, *Shutting Down the Government*, 69 B.U.L.R. 971 (1989). In addition to Feld, Kate Stith and J. Gregory Sidak, in their respective articles, also rely on the Attorney General opinions as authoritative. See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988); J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162 (1989). Though all three articles were written in the 1980s, it does not appear that the courts have since clarified the situation. Stith explains that article II, § 2 obligates the Attorney General to render legal opinions to the President, while the Judiciary Act of 1789 authorizes the same. Stith, at 1372. Sidak [IN] particular discusses why the opinions are significant, arguing (i) they represent official interpretations of the Executive’s Article II powers by the Department of Justice, (ii) any potential bias is predictable and should not limit the opinion’s utility, (iii) they provide possible theories upon which the Court may ultimately base decisions and as a result, represent valuable precedent on separation of powers issues; and (iv) many members of past and present Courts held high positions in the Executive Branch prior to becoming Justices, demonstrating knowledge of constitutional questions within that branch. *Sidak*, 1989 DUKE L.J. at 1163, n.7.

⁷² Support of the Army, 15 Op. Atty. Gen. 209 (1877) [hereinafter 1877 OAG]

engineering material, medical supplies and civilian employees, no such statutory safe-harbor existed, and despite incurring no obligation, even voluntary contributions were too reminiscent of a contract.⁷³ The Attorney General reasoned that alternative funds required appropriation just as other government funding, even if not first paid into and then disbursed from the Treasury, and that regardless of whether there was a legal obligation to repay the financing, “it would certainly place the Government...under the strongest moral obligation to use every proper and reasonable effort that the donors or lenders should be reimbursed by Congress.”⁷⁴

The Attorney General concluded the opinion with two noteworthy comments regarding appropriations. The first asserted that Congress, and no outside source, should be responsible for funding the Army, since maintaining an Army without legislative appropriation would place the executive authorities in a “far from desirable” relationship with those providing support. Second, citing Article 2, Section 2 and Article 1, Section 8 of the Constitution, the last line of the opinion says simply “while by the Constitution the President is made the Commander-in-Chief [sic] of the Army, the authority to raise and support armies is given to Congress.”⁷⁵

There is an alarming gap of information and analysis regarding the policies and principles of proper activity during government shutdowns after the 1877 opinion and prior to 1980. There appears to be no relevant Attorney General opinions during that time that address the issue of appropriations lapses, and little if any scholarly commentary on what the state of affairs might have been, an especially curious abyss in light of the passage of the Budget Act and the initiation of a new budget process in 1974. In fact, the only real guidance comes from the Attorney

⁷³ *Id.* at 211.

⁷⁴ *Id.* See also Feld, *supra* note 71, at 975.

⁷⁵ *Id.* Feld comments that such a statement reaffirms both the division of authority between the Executive and Legislative branches in determining when to use military force and the principle of public, not private, decision-making over federal funding.

General opinion issued by Benjamin Civiletti on April 25, 1980,⁷⁶ whose substantive points are discussed in the subsection immediately following. For purposes of describing the status of spending during appropriations lapses prior to 1980, however, it is nevertheless necessary to take a closer look at the background Civiletti provides to his own analysis; that the 1980 OAG is considered the first of two “policy-setting” opinions demonstrates that the ideas he introduces and then eventually rejects for all intents and purposes describe what the situation was prior to the opinion itself.

Most significantly, Civiletti notes how Congress had amended the Antideficiency Act seven times between 1905 and 1975, leaving the basic principles of the Act untouched but continually strengthening the requirements that agencies apportion their spending throughout the fiscal year. He adds that the legislative history of these amendments indicates no intention by Congress to permit administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. In fact, one source notes commentary from a Senator on the 1950 amendments, which further tightened the ability to incur a deficiency (see Appendix I), stating, “I think it is time that Congress should look to it that the Departments of the Government shall not control matters of appropriation, but that Congress shall control them.”⁷⁷

Civiletti then mentions three agency lapses that occurred in the 1950s, and says that while Congress would enact provisions ratifying interim obligations, there is no explanation in such provisions about the effect of lapses on these agencies. As to the four lapses occurring between 1977 and 1980, Civiletti writes, “various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their

⁷⁶ Applicability of the Antideficiency Act Upon a Lapse in Agency Appropriation, 43 U.S. Op. Atty. Gen. 224 (1980) [hereinafter 1980 OAG]

⁷⁷ Colonel Richard D. Rosen, “Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse,” 155 Mil. L. Rev. 1 (February 1998)

budgeting and accounting functions,” and it is based on this language that leads one to the belief that the internal reviews of which he speaks accounted for the general position on appropriations lapses prior to 1980.

Briefly, the GAO report referred to by Civiletti actually came on the day of its own appropriations lapse.⁷⁸ In it, the GAO refused to close, maintaining Congress had not intended it or other federal agencies to shutdown during a lapse, and directed its employees to simply limit new obligations to those essential for day-to-day operations. In addition, although acknowledging a violation of the Anti-Deficiency Act for employers or employees who paid or were paid during an appropriations lapse, the GAO nevertheless supported legislation that permitted such continuous pay. Its rationale was that past experience demonstrated approval of agencies remaining operational during lapse, and that legislation was needed to avoid consistent violations for those who continued the practice.⁷⁹

The OMB – presumably the “agency of the Executive branch” referred to by Civiletti -- took a similar approach as to agency behavior during lapse, advising the avoidance of activities like nonessential obligations, hiring and grant-making. However, the OMB was joined by the Justice Department (in a clear indication of how the Attorney General would soon come down on the issue) in opposing the legislation.⁸⁰

With this background in mind, and faced with the recent expiration of temporary appropriations for the independent Federal Trade Commission (FTC), the Attorney General was

⁷⁸ *Id.* at 977-79 (citing GAO Memorandum of October 1, 1979, reprinted in 125 Cong. Rec. 26,794 (1979); *Federal Pay Continuity Act: Hearings on H.R. 5995 Before the Subcomm. On Compensation and Employment Benefits of the House Comm. on the Post Office and Civil Serv.*, 96th Cong., 2d Sess., at 80 (1980)).

⁷⁹ *Id.*

⁸⁰ *Id.*

asked to opine as to what activities the FTC could undertake during the lapse.⁸¹ In a clear demonstration of the policy shift likely to occur, Civiletti states that this request “apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.”⁸²

Civiletti was not swayed by the premise underlying the GAO and OMB reports, and the 1980 OAG set out his position that incurring obligations to pay employees without proper appropriation was prohibited. In setting out the bases for his view, the opinion first noted the contradiction in any conclusion that excepting employee pay obligations from the Act was both unlawful (violating the Act) and authorized (from Congressional intent). Writing, “I believe...that legal authority for continued operations either exists or it does not,” the Attorney General explained that if Congress authorized continued operations during lapse, the agency simply could not be contravening the statute. If, on the other hand, the Act made it unlawful to continue work during lapse, then no Congressional authority to keep agencies open could be inferred from the Act itself.⁸³

He next turned to the language and history of the Act, including debates, amendments and reenactments, to say there was no foundation for inferring an implicit exception during a period of lapsed appropriations. There was no other statute permitting agencies to incur obligations to pay employees during lapse – making the “unless authorized by law” exception unavailable – and further reaching was “mere speculation.”⁸⁴ The GAO’s reliance on Congress’ eventual ratification of these obligations in the recent past was misplaced, not only because legal authority could not be inferred from expectations about future Congressional acts, but because

⁸¹ Feld, *supra* note 71, at 976. See Table III below for a summary of Feld’s proposed approaches for an agency confronted with a funding lapse.

⁸² 43 U.S. Op. Atty. Gen. at 227.

⁸³ 43 U.S. Op. Atty. Gen. at 227-28.

⁸⁴ *Id.* at 228.

such ratification would simply not be necessary if there was this inferred legal authority to incur such obligations in the first place.⁸⁵ According to Civiletti, these post-lapse confirmations were nothing more than Congress providing legal authority where none existed before, creating a more appropriate inference that Congress did not otherwise empower such actions in advance of appropriations. In line with the OAG opinion 100 years earlier, the opinion also declared that any implied exception would run contrary to the main purpose of the Act, which was to insure that Congress controlled the use of government funds.⁸⁶

Building upon these considerations, Civiletti concluded with what he perceived to be the legal ramifications of the opinion. First, unless authorized by law, federal agencies should incur no obligations during lapse that could not lawfully be funded from previous appropriations. Second, he announced the intention of the Justice Department to enforce the Act's criminal provisions, but acknowledged that any proper program termination would necessarily involve expenditure of funds. As a result, though incurring employee pay obligations did not fall within the "authorized by law" exception to the Act, there was inferred legal authority under that safe-harbor for agencies to "incur those minimal obligations necessary" for shutting themselves down.⁸⁷

⁸⁵ Feld notes that the OAG's position is that if authority to obligate existed without the need for later ratification, then this apparent authority would create judicially enforceable obligations. He argues, however, that legal doctrine on this point is to the contrary, and cites a number of Supreme Court and other cases he believes support this contention by holding unenforceable obligations incurred by Executive branch officials outside the scope of their authority. Feld, *supra* note 71, at 978, n.40.

⁸⁶ *Id.* at 228-29.

⁸⁷ *Id.* In his discussion, Feld compares the OAG result with that of the GAO, saying the former replaced the latter's "relatively painless curtailment of discretionary obligations" with a ban on all new obligations, except those necessary to close down the agency. Feld, *supra* note 71, at 979. He notes that the 1980 OAG relied on the Act itself to underscore its conclusion, rather than citing Court cases that Feld himself believes "persuasive...if not controlling." *Id.* at 980, n.46 (citing holdings from the 1870s and 1920s and 30s that appear to stand for the proposition that Congressional appropriation is needed to incur contractual obligations).

While the situation in 1980 had the potential for minor disruption, Congress' failure to enact 11 of 13 appropriations bills or continuing resolutions by October 1980 for Fiscal Year 1981 led to greater concern over the consequences of a lapse in appropriations. Where only the FTC or GAO was affected previously, agencies possibly influenced by the absence in funding included many executive branch agencies dealing with everything from the military, Coast Guard and presidential travel to individual grants and social security payments.⁸⁸ As a result, the opinion issued on January 16, 1981 by Attorney General Civiletti⁸⁹ -- widely regarded as the most important of its ilk -- sought to backtrack somewhat on the rigidity of the 1980 OAG, but in so doing, opened itself up on a certain degree of criticism.

The intention to create greater flexibility is apparent from the outset, as the opinion begins by summarizing the conclusions of the 1980 OAG but explicitly distinguishing the circumstances. The FTC was confronted with only a temporary appropriations lapse and never suggested its operations involved emergency functions concerning the safety of human life or the protection of property. As a result, the 1980 OAG "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."⁹⁰

However, some experts observe the Attorney General had neither a biased position nor institutional stake in the outcome of the FTC's operations, since the President and Congress were of the same political party and the FTC was an independent agency outside the structure of the Executive branch. Since an FTC shut-down would involve only minor inconvenience to that

⁸⁸ Feld, *supra* note 71, at 981.

⁸⁹ 43 U.S. Op. Atty. Gen. 293 (1981) [hereinafter 1981 OAG]

⁹⁰ *Id.* at 294-95.

branch – and the agency was actually viewed as having more of a connection to Congress – there was less incentive in the 1980 OAG to depart from the conclusion of legislative control through the appropriations process.⁹¹ In contrast, the 1981 OAG came at the tail end of President Carter’s presidency, and involved a number of agencies of the Executive branch, opening the opinion up to some skepticism on whether Civiletti put more emphasis on the distinctions than was actually necessary, simply to achieve his objective of greater presidential discretion.

The scene set, Civiletti first addresses the “unless authorized by law” exception in what is now Section 1341(a)(1)(B).⁹² Prefacing the discussion by asserting that the legal authority to incur obligations in advance of appropriations is “not uncommon” (e.g. in multi-year and no-year appropriations), he declares that should a particular agency’s regular one-year appropriation lapse, the exception permits the agency to continue obligating funds only to the extent they are: (1) utilizing funds whose obligational authority is not limited to one-year, (2) authorized by statutes that expressly permit obligations in the absence of appropriations, or (3) authorized by necessary implication from the specific duties imposed on the agency. This conclusion is also based on the premise outlined in the 1980 OAG, namely that statutory authority to incur obligations without appropriations can be both express or implied, but not inferred from the broad authority often appearing in statutes governing government agencies.⁹³

⁹¹ Feld, *supra* note 74 at 980.

⁹² Refer again to Appendix I for the exact language of the Antideficiency Act at the time of the 1981 OAG – though it appears any distinctions are relatively immaterial. One exception might be that Section 1341(a)(1)(B) now specifically mentions that no contract or obligation may be incurred *before* an appropriation is made, unless authorized by law, whereas the language in 1981 makes no mention of timing. Civiletti expressly states that the underlying requirement of the Act to look to the circumstances under which statutes imply authority to create obligations is a relevant inquiry “in any event and *not merely during lapses in appropriations...*” (emphasis added). It is possible, then, that the addition of language regarding appropriations in today’s statutes affects that particular argument.

⁹³ *Id.* at 296-98. In fact, in a footnote, the Attorney General notes that this third exception permits the rebuttable inference (via contrary legislative history or congressional action) of authority to continue the administration of a benefit or entitlement program (like social security) to the extent of the remaining benefit funding. The rationale behind such a position is that while the salaries of the employees who issue benefit checks are annually appropriated, the payments themselves are part of trusts receiving permanent appropriations (i.e. under the umbrella

However, the Attorney General recognized the situation at the time involved a more Government-wide lapse rather than a particular agency, and as a result, claimed further insight into Executive authority was needed. Since the President is the sole official who performs **explicit** Constitutional as well as statutory functions, Congress could not deny the President these powers by refusing to grant him minimum obligational authority through appropriations.⁹⁴ The opinion uses the President's pardon power under Article II, § 2, cl. 1 as the example of a Constitutional function, a tactic questioned by Feld due to the lack of significant expense needed to carry out that power and the opinion's failure to cite certain cases undermining the relationship between appropriations and the pardon power.⁹⁵ Other sources have questioned whether the pardon power is even applicable considering that while Congress may not interfere with the President's grant of a pardon, it does not necessarily follow that the Treasury is then obligated financially to the pardon recipient regardless of Congressional intentions.⁹⁶

For those powers **not specifically enumerated** in the Constitution, Civiletti frames the question as whether the Antideficiency Act should be interpreted as denying the President obligational authority in connection with those powers. He answers in the negative, writing "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

of the first exception). Therefore, the Attorney General inferred that since the benefit payments must continue, the intent must be to permit those who administer such benefits to continue working as well. In so doing, the 1981 OAG refused to accept that Congress' failure to appropriate for such services was indicative of a desire to halt such payments, noting the formula employed by Congress to calculate entitlements as a sign of an intent to continue funding. *Id.* at fn. 7; Feld, *supra* note 71, at 982. Feld also points out that the 1981 OAG followed the strictures of the 1980 OAG in refusing to try and predict whether Congress would eventually provide necessary appropriations as a means of determining the question of an agency's continued operation. Instead, he says, the opinion relied on the entitlement character of the program to resolve the ambiguity between conflicting permanent and one-year appropriations, though he nevertheless remains unsure as to whether it was the permanence or entitlement aspect of the program that was determinative in allowing continued operation. *Id.*

⁹⁴ 1981 OAG at 299. The debate surrounding this Presidential "power of the purse" is addressed in the next section.

⁹⁵ 1981 OAG at 299; Feld, *supra* note 71, at 983.

⁹⁶ Rosen, *supra* note 77.

funds in advance of appropriations had the Antideficiency Act not been enacted.”⁹⁷

Accordingly, he concludes that the Antideficiency Act simply isn’t the only source of law or exercise of congressional power that must be considered in determining proper Presidential activity during an appropriations lapse. Acknowledging “no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations,” he suggests that certain factors are available to assist in the inquiry. These include whether (a) the functions to be performed would assist the President in fulfilling a particular constitutional role, (b) Congress has otherwise authorized those functions to be within Presidential control, especially if such authorization is more narrowly drawn than the Antideficiency Act, (c) the initiative is of an urgent nature, and (d) there is a likelihood the funds would be obligated in advance of appropriations.⁹⁸

In sum, he determines that the “authorized by law” language exempts not only obligations in a period of appropriations lapse for which there is express or implied authority in Congressional statutes, but also “those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.”⁹⁹

This conclusion is one that is curious in light of the emphasis given to Congressional control throughout the 1980 OAG (both in rejecting the GAO opinions and denying the use of implied exceptions going against the purpose of the Act). Though related to the larger idea of the “power of the purse” (discussed later), many reviews of the 1981 OAG have hit on this potential inconsistency both across the various opinions and within the 1981 OAG itself. For example, some have noted that while the opinion states that the President “cannot legislate his

⁹⁷ *Id.* (emphasis added). Feld notes the importance of the opinion’s seemingly overlooked endorsement of subordinate action to questions regarding the scope of permissible Executive branch activity and the idea of legislative control of the spending process as outlined in previous opinions.

⁹⁸ *Id.* at 300-01.

⁹⁹ *Id.* at 301.

own obligational authorities,” it nevertheless maintains that the Antideficiency Act – a product of Congress – cannot prevent him from obligating funds required for certain responsibilities.¹⁰⁰ In addition, skepticism has been expressed for the opinion’s admitted inability to catalogue these implied constitutional powers – creating a great uncertainty in practice, and much debate, as to exactly how far this flexibility extends -- as well as the failure to mention the Appropriations Clause and where in that provision lies the possibility of Presidentially-created obligational authority.¹⁰¹

Regardless, the opinion then moves on for an analysis of the emergency exemption as it existed at the time (see Appendix I).¹⁰² Framing the debate as one regarding the scope of this emergency exemption, Civiletti looks to the legislative and administrative history of the language used (both in the Antideficiency Act and other budget contexts)¹⁰³ and gleans two principles that guide the identification of those functions for which government officers may employ compensated services. First, there must be some reasonable and articulable connection between the performed function and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that delaying performance of the question would endanger the safety of human life or protection of property.

¹⁰⁰ Rosen, *supra* note 77.

¹⁰¹ *Id.*

¹⁰² The Attorney General notes that despite the language of the statute, the provision’s concern is not so much agencies’ acceptance of uncompensated services as it is the avoidance of claims for compensation arising from the authorized completion of services by non-employees or from government employees performing overtime services. *Id.* at 302.

¹⁰³ In particular, the Attorney General looks to revisions of the Act in 1950 that changed previous clauses from ‘cases of sudden emergency’ to ‘cases of emergency,’ ‘loss of human life’ to ‘safety of human life’ and ‘destruction of property’ to ‘protection of property.’ See Appendix I. Thus, an inference is made that the emergency exception was intentionally broadened. Additionally, he looks to the OMB’s consistent use of what he argues is a similar exception in then Section 665(e) to allow deficiency apportionments, an action passively accepted by Congress by its failure to amend the provision. Past activities considered qualifying “emergencies” included FBI criminal investigations, legal services by the Dept. of Agriculture in relation to meat inspection programs, the protection of commodity inventories by the Commodity Credit Corporation and the investigation of aircraft accidents by the National Transportation Safety Board. *Id.* at 303-05.

These rules are extended even further by the Attorney General in announcing that in addition to those circumstances in which an agency may employ personal services, the emergency exception also gives agencies the authority to incur obligations in advance of appropriations for “material to enable the employees involved to meet the emergency successfully.”¹⁰⁴ This conclusion is based on the assumption that Congress intended those employed to deal with emergencies to have the resources needed to accomplish such tasks.¹⁰⁵

The 1981 OAG serves as the baseline for those Department of Justice opinions that followed on the topic of appropriate activity during periods of lapsed appropriations. Some opinions remained general in nature and simply confirmed the basic tenets outlined by Attorney General Civiletti. For example, a memorandum submitted by the Deputy Assistant Attorney General of the Office of Legal Counsel in September 1982 mimicked the 1981 OAG by holding that should the Federal Railroad Administration face a lapse in appropriations, it could continue those operations either currently authorized by substantive legislation (i.e. one dealing with regulation, education or enforcement) or fitting within the emergency exception of the Antideficiency Act, though it declined to address the extent of activities permitted within the latter.¹⁰⁶

¹⁰⁴ *Id.* at 306.

¹⁰⁵ *Id.* (citing a District Court case that holds statutes are ordinarily inferred to permit all means necessary and proper to properly carry out its purposes). To demonstrate, the Attorney General maintains that since Congress has allowed the Government to hire firefighters, it also must have intended that water and fire trucks would be available. *Id.* Feld remains skeptical of such an inference, commenting that the exception does not create broad obligatory discretion only if it applies to unforeseen emergencies. He suggests it is possible the 1981 OAG has two unspoken limitations: (1) obligations incurred for material is limited by prior practice such that lapses cannot be used to acquire out of the ordinary items; (2) an implicit understanding that appropriations lapses do not last long, limiting the amount of time available to acquire material. As to this last limitation, Feld adds that unlike the 1980 OAG, the 1981 OAG stands for the proposition that an agency estimate the duration of a lapse should not be shut-down if doing so is actually more costly than keeping it open. Feld, *supra* note 71, at 970-71.

¹⁰⁶ Continuation of Agency Activities During a Lapse in Both Authorization and Appropriation, 6 U.S. Op. Off. Legal Counsel 555 (September 17, 1982).

Other opinions discussed in more significant detail the effects of the rules set out in the 1981 OAG on particular undertakings. A December 1981 memorandum by the Assistant Attorney General addressed Civiletti's second principle for meeting the emergency exception to the Act. It found that where witnesses have been ordered, prior to a period of lapse, to appear in court during such lapse in the Department of Justice's appropriation and lacked the independent financial ability to return home, there was a sufficient likelihood of endangering the witness' safety to allow for a cash disbursement "in an amount sufficient to permit the witnesses to return home, or, if travel is impracticable at that time, to secure overnight accommodations and meals."¹⁰⁷

Though he appears to frame it in terms of the emergency exception and not under the more appropriate "authorized by law" exemption, Assistant Attorney General Theodore Olson also surmised that providing for the return home of witnesses constituted part of the orderly termination of the court's business. However, he made sure to qualify that notion by saying the orderly termination of business wouldn't authorize all witness fees or other prior obligations. In so doing, the opinion confirmed a point implicit throughout the 1981 OAG that authority for a given activity would depend on an analysis of the totality of the circumstances.¹⁰⁸

However, over a decade later, and in the midst of what is shown in Part I of this paper as the worst government shutdown in history, Assistant Attorney General Walter Dellinger issued a number of opinions that purported to follow the Civiletti opinions and its progeny, but in some ways appears to have turned them on their heads.

¹⁰⁷ Payment of Travel Costs to Witnesses During a Period of Lapsed Appropriations, 5 U.S. Op. Off. Legal Counsel 429, 430 (December 23, 1981).

¹⁰⁸ *Id.* at 430-431.

The official opinion issued in September 1995 reiterated the ideas set out in an earlier – and more oft-cited – memorandum written for the OMB in August 1995.¹⁰⁹ This September opinion addressed the same issues, but in the context of the authority of White House employees to continue working during an appropriations lapse.¹¹⁰ The opinion itself is divided into three sections, each addressing distinct authorization categories for employing services during lapse, and mirroring the outline of the August memo.¹¹¹ The first is “Excepted Functions,” which states that White House employees may continue to work if performing functions fitting under either the “authorized by law” or “emergency” exception. The opinion builds off the information provided in the August 16th memorandum, which according to secondary sources, suggested that check-writing and distributing functions necessary to disburse benefits that operate under indefinite appropriations was one example of such an “Excepted Function.” Though this notion seems to add quite a bit to the Civiletti opinion – namely the foundation for additional allowable activities which forms the basis for much of the OMB guidelines – Dellinger also confirmed the idea from previous opinions that “Excepted Functions” also included those minimal duties necessary to closing up an agency during a lapse in appropriations and the contracting for materials essential to the performance of emergency services; again, however, it must be noted that while the OMB opinions in 1980, current OMB guidelines and apparently Assistant Attorney General Dellinger referred to the idea of “essential” workers, such a term is nowhere to

¹⁰⁹ For whatever reason, this memorandum was not available through any of the many typical resources, or the Office of Legal Counsel itself. However, the September opinion sufficiently summarizes the earlier memorandum’s contents. Secondary research, in addition, has said that the August 16, 1995 memorandum confirmed that the 1981 OAG continued to be of sound legal analysis regarding government operations during an appropriations lapse, though, as discussed below, such a statement is not entirely accurate.

¹¹⁰ Authority to Employ the Services of White House Office Employees During an Appropriations Lapse, 19 U.S. Op. Off. Legal Counsel No. 235 (September 13, 1995).

¹¹¹ The opinion emphasizes that no employee can actually receive his/her salary during lapse, but under the exceptions to the Antideficiency Act, obligations can be incurred such that salary is received post-lapse.

be found in the Civiletti opinions, suggesting again that Dellinger did more than simply confirm the principles of the 1981 OAG.

The second section, “Non-salaried Positions,” addresses the President’s statutory authority to appoint and fix the pay of employees, including those in the White House, and asserts as a result he may appoint non-salaried, voluntary services who will not come under the prohibitions of the Act since there is no obligation to pay.¹¹² Additionally, it is the Assistant Attorney General’s position that although non-salaried employees ostensibly cannot receive an obligation for later payment, in fact, they do have the potential for just such payment if Congress enacts a “lookback” appropriation, as it has often done in the past.

The final section deals with waiver of salary, saying an employee may not waive compensation which is fixed by statute, but may do so if appointed pursuant to the President’s general power to appoint and fix salaries. However, with waivers of salary, it is “highly unlikely” that compensation could be later received even if pursuant to a lookback appropriation.¹¹³

Only months later, Dellinger submitted another opinion, this time confronting the question of the participation of Justice Department officials and employees in Congressional hearings taking place during a Justice Department appropriations lapse.¹¹⁴ Addressing the issue as one of when participation in such hearings constituted an “excepted function,” Dellinger found that participation was permissible when the officer or employee was Senate-confirmed, a

¹¹² The President’s authority here emerges from 3 U.S.C. § 105. The opinion adds that the same power allows the President to appoint White House employees who have been furloughed from their salaried positions to new, non-salaried positions, thereby occupying more than one position simultaneously.

¹¹³ *Id.*

¹¹⁴ Participation in Congressional Hearings During an Appropriations Lapse, 19 U.S. Op. Off. Legal Counsel No. 301 (November 16, 1995).

subpoena was issued, appropriated funds were available for participation or if there were other express or necessarily implied authorization.¹¹⁵

According to Dellinger, if an officer is appointed by the President and confirmed by the Senate, he or she is entitled to a salary without regard to whether they perform any services during the lapse, and therefore it cannot be said that they are incurring prohibited obligations in performing any services (not simply participation in Congressional hearings). He adds an important limitation, however, in finding that support personnel of these Senate-confirmed officers may not assist those officers unless qualifying individually under one of the Act's exceptions.

He then moves on to discuss the two major exceptions to the Act. As to the Section 1342 emergency exemption, the opinion is upfront in saying, “in the highly unusual event that suspension of the Department’s participation in a congressional hearing would imminently threaten the safety of human life or the protection of property, the Department may legally participate in the hearing.”¹¹⁶

As to Section 1341(a)(1)(B) and the “otherwise authorized by law” language, Dellinger identifies two subsets of the exception – express and necessarily implied authorizations – that parallel those set out by Civiletti years before. Though acknowledging there is no statute that gives express authorization to Justice Department personnel to participate in Congressional hearings during lapse, he says such authority would exist if a subpoena is issued. His rationale lies with the fact that departmental precedent holds that during lapses, government attorneys are to comply with court orders requiring continuation of litigation even if the litigation itself is not excepted under the Act.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The implied authorization, on the other hand, mandates Department participation where it is necessary for the Congressional hearing to be effective, even if no specific appropriation is available, provided that there is express authority for the hearing itself. Interestingly, he adds that in light of the “well-settled practice with respect to Social Security,” support and assistance of these witnesses is implicitly permissible so long as there is explicit authority for a specific official to testify.¹¹⁷

He ends the opinion with a tone last seen at the end of the 1980 OAG (and certainly not seen throughout most of the 1981 OAG), in that it acknowledges some form of inherent Congressional power. In those instances where Congress decides to continue a hearing in which the Act prevents Justice Department officials from participating, there is no “grave constitutional question” presented, such that Congress is not encroaching on any constitutional role of the President, “however unwise or counterproductive a decision might be. So long as the President retains a means of making legislative recommendations, Congress generally is not obligated to grant the executive a platform at its hearings.”¹¹⁸

Clearly then, while purporting to follow many of the basic tenets of the Civiletti opinions, the doctrine set out by Dellinger in the above opinions signaled either an intentional change in perspective on proper activity during lapse, or an unintentional complication of the outline provided by earlier opinion. As shown in Part I, the OMB would look to incorporate many of Dellinger’s comments into its guidelines.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

TABLE III: THREE POSSIBLE AGENCY APPROACHES TO FUNDING LAPSE

Action	Advantages	Disadvantages	Examples
Incur no additional expense	Complies literally with Anti-Deficiency Act	Risks losses to government property investment Disrupts agency's client servicing	1877 OAG (complied with literal language in place at the time)
Incur expenses as needed to minimize total cost to government, assuming permanent termination of program	Protects existing property against loss	Creates need for future start-up cost if program does in fact continue Disrupts agency's client servicing	1980 OAG; 1981 OAG, but President's "minimum obligation authority" creates uncertain exception; Dellinger opinions, but with exceptions for excepted and other personnel
Incur expenses as needed to minimize total cost to government, assuming program will continue at current level	Usually lowest total cost due to high probability of continued funding Minimum disruption to agency's client servicing		1980 GAO

Source: Derived from Alan L. Feld, *Shutting Down the Government*, 69 B.U.L.R. 971, 977 (1989); "Examples" column added by authors of this briefing paper.

B. PROBLEMATIC ISSUES

1. Power of the Purse – Generally

Perhaps the most general example of potential controversy consists of the differing views of the President's inherent Constitutional powers, an issue permeating many of the arguments put forth by the various officials of the Justice Department. Briefly, as discussed in detail in

previous briefing papers for Professor Howell Jackson,¹¹⁹ there is a fundamental disagreement over the proper interpretation of the separation of powers granted by the Constitution.

On one side are commentators like Kate Stith, who have argued that “the exercise by Congress of its power of the purse is a structural imperative,”¹²⁰ such that Congress simply must authorize funds for the President to carry out certain limited activities. While she acknowledges that there may be the need to reach beyond the Constitution in times of emergency, it is clear that she believes the use of this exception should be limited to times of “necessity and self-preservation.”¹²¹ In all other instances, Congress, and not the Executive branch, is the ultimate arbiter of every penny of appropriation, and there is simply no other exception.

As to the Antideficiency Act in particular, Stith is surprised to find that there has been little exploration among Congress, executive agencies and academics regarding the extent of the Act’s prohibitions, which she says confirms her Principle of Appropriations Control – that no federal employee may obligate or spend funds in excess of that allotted by Congress.¹²²

On the opposite end of the spectrum is J. Gregory Sidak, whose thesis is that the President may legally obligate funds of the U.S. Treasury provided that Congress has failed in its Constitutional duty to appropriate enough monies to perform his Constitutional duties and prerogatives, which invariably gives the Executive much greater leeway than the more strict textual interpretation undertaken by Stith.¹²³ This separation of powers interpretation, then, sees the Constitution as granting the President an implied power to incur obligations during a government shutdown brought on by a lapse in Congressional appropriation.

¹¹⁹ See, e.g. “War and Appropriations.” Adam Fletcher & Francis (Draft April 5, 2005)

¹²⁰ Stith, *supra* note 70.

¹²¹ *Id.* at note 35.

¹²² *Id.*

¹²³ Sidak, *supra* note 70.

2. Bias of the Attorney General Opinions

A related issue is found in the potential bias of the opinions of the Attorney General's office in favor of the Executive branch of which it is a part – an extremely relevant debate given that these opinions seemingly constitute the current authority on proper funding activity during a government shutdown. Just as there is a relative dearth in literature on government shutdowns as a whole, there is not a great deal written about the potential effects of having a department in the Executive branch determining the law (though not binding, it remains distinctly persuasive) for both the Executive and Legislative prongs of the federal government. At the end of his survey of the 1981 OAG, however, Alan Feld does address the possible ramifications of the subtle shift in policy that opinion had in comparison to its predecessors.

Not hiding his view on the “power of the purse” debate, Feld writes that the 1981 OAG (and presumably, its progeny) “fundamentally distorts the constitutional allocation of power” over federal funding.¹²⁴ He acknowledges that the opinions served to confirm to some degree the authority, emphasized in other opinions as late as the 1980 OAG, of the legislature to direct the appropriations process. However, it is his contention that the opinions grant an unrestricted amount of discretion to the President and his subordinates, all the more so the longer the shutdown drags on. In addition, though Congress has the ability to limit this self-provided flexibility, it is Feld’s belief that there is little incentive for such action given that the opinions themselves only affect Congress in those rare instances of prolonged shutdown and not on a daily basis. In effect, the 1981 OAG “subtly tips the scales toward the executive branch” and “undermines the most viable limitation that legislation and the Constitution places on executive discretion.”¹²⁵

¹²⁴ Feld, 69 BULR at 989.

¹²⁵ *Id.*

In their more general debate on the “power of the purse,” Stith and Sidak also inevitably broach the subject of the Attorney General Opinions. Stith claims that while Sections 1341(a)(1)(A) and (B) of the Antideficiency Act stand for the proposition that all expenditures beyond those appropriated are prohibited, the opinions have read the Act with a subtle twist, namely that federal officials cannot impose future obligations on the Treasury. As to Section 1342, she maintains the opinions have manipulated the statute in a way that now permits “truly” voluntary service (that which has no right or expectation of payment), instead of the more general prohibition against employment of persons without appropriations to pay them.¹²⁶

Predictably, Sidak is more understanding of the view outlined in many of the Attorney General opinions that there are certain express and implied constitutional powers and obligations of the President that must be fulfilled even in the absence of appropriation. The idea put forth by Attorney General Civiletti that the Constitution grants some minimal obligational authority to the President fits nicely with his overall conception of the proper scope of the Executive spending power. He cites the 1981 OAG favorably, and notes how the theories outlined therein can be extended to all of the Executive’s article II responsibilities – including national defense.

III. REFORM PROPOSAL TO PREVENT SHUTDOWNS

A. Automatic Continuing Resolutions

The adoption of automatic continuing resolutions (ACRs) is the primary reform concept considered to address the problems of extensive reliance on CRs, the occurrence of funding gaps, and potential federal government shutdowns. The main feature of ACR proposals is the creation of “a mechanism to ensure a fallback source of funding or activities, at a restricted level, in the

¹²⁶ Stith, *supra* note 70.

event the timely enactment of appropriations is disrupted,”¹²⁷ meaning a default amount of funding will become available automatically to keep agencies running if new appropriations are not made through regular appropriation bills or CRs after October 1. Although these proposals are focused on a single concept of automatically continuing appropriations, a variety of such proposals exist and are discussed in Congress regularly most often in the form of a bill such as “Government Shutdown Prevention Act.”¹²⁸

Proposals for ACRs vary primarily over duration and the funding level of the ACR.¹²⁹ The duration issue involves whether the ACR should provide appropriations for a short interval, remain in effect through the full fiscal year, or even last indefinitely. The most common proposals for an indefinite ACR focus on continuing appropriations for military and civilian pay and benefits. On the issue of what level of funding an ACR should provide, most of these proposals would keep funding for the new fiscal year at the level consistent with the prior fiscal year or some lower percentage from the prior year. Other proposals have suggested taking the lower of the amount appropriated by the individual House- and Senate-passed appropriations bills.¹³⁰

The specific structure that an ACR takes will determine the specific advantages and disadvantages of this reform. Given this consideration, in 1986 the House of Representatives Rules Committee requested that the GAO offer their assessment of various automatic funding approaches. Despite the breadth and depth of this report, the GAO failed to recommend any

¹²⁷ See Keith, *supra* note 2, at 6.

¹²⁸ See generally 143 Cong. Rec. H2732-06, 105th Cong., 1st Sess. (May 15, 1997) (debating H.R. 1469); 143 Cong. Rec. H3832-01, 105th Cong., 1st Sess. (June 17, 1997) (discussing the need for a Government Shutdown Prevention Act); 144 Cong. Rec. E26-02, 105th Cong., 2d. Sess. (July 24, 1998) (debating S. 547); 145 Cong. Rec. S501-01, 106th Cong., 1st Sess. (Jan. 19, 1999) (reading into the record H.R. 142); 146 Cong. Rec. H3093, 106th Cong., 2d Sess. (May 16, 2000) (debating a proposed amendment that includes an ACR).

¹²⁹ See Keith, *supra* note 2, at 6.

¹³⁰ Richard Kogan, Center on Budget and Policy Priorities, *Proposal for Automatic Continuing Resolutions Would Likely Make It Harder to Pass Regular Appropriation Bills* 1 (June 2004) available at www.cbo.gov (last viewed April 7, 2005).

changes from the existing process.¹³¹ The GAO studied approaches that differed in regards to duration, level of funding, and scope of programs permitted to continue operation.¹³² The GAO did suggest that the most easily administered proposal would be an ACR that maintains the status quo by providing funding at the previous year's rate. They also suggested it would reduce potential for immediate bias in favor of either the incumbent administration or the Congress and had the advantages of stability and continuity of operations and services. The chief disadvantage they cited is it would be impossible to predict how long Congress would permit the status quo to continue. Given the possibility that political stalemates may continue for years, such an ACR would leave the government unable to address future needs of the country.¹³³

Advocates of reform proposals for ACRs suggest several key advantages of imposing ACRs, all of which relate to the importance of preventing a government shutdown based on the perceived negative consequences of shutdowns. Supporters note the significant costs of funding gaps and shutdowns such as program inefficiencies from the disruption including paying federal employees for work they did not perform and the personal costs to employees of late paychecks and interrupted travel.¹³⁴ Additionally, they cite to the private sector's economic costs of shutdowns, including disruption in the timely payment to government contractors and businesses dependent on federal activities, the disruption of services to program beneficiaries and the

¹³¹ See GAO APPROPRIATIONS, *supra* note 12, at 5. In this lengthy report, the GAO analyze statistically 90 past CRs over the period between 1960-85, consider the different structural incentives behind the passage of regular appropriation bills and CRs, identified the varying approaches to CRs, and did a comparative analysis of the fifty states and other nations procedures for continuing appropriations. *Id.* As a response to the problems temporary funding lapses and government shutdowns, in 1981 and then again in 1991, the GAO did recommend Congress enact permanent legislation that would authorize agencies to incur obligations, but not expense funds, when agency appropriations expire. This is not as broad in scope as an ACR. See GAO PERMANENT FUNDING, *supra* note 33, at 9-10.

¹³² See GAO APPROPRIATIONS, *supra* note 12, at 12, 16.

¹³³ See *id.* at 4.

¹³⁴ See Keith, *supra* note 2, at 7.

public, and the negative perception and psychological effects on the ability of elected officials to govern. The 21-day fiscal year 1996 shutdown was estimated to cost taxpayers \$44 million per day and is often cited as an example of how expensive shutdowns are for the country.¹³⁵ Finally, promoters suggest that ACRs may have the affirmative benefit of promoting cooperation in the final negotiations over legislation.

In contrast, those who argue against the adoption of ACRs raise concerns relating to the disincentives or negative incentives created by automatically continuing appropriations. The primary drawback critics cite is that an ACR would “engender inequalities and undermine accountability” required by the delegation to Congress of “power of the purse.”¹³⁶ They fear that a failure to require legislators to engage in a deliberative process would diminish electoral accountability as it would offer legislators an “out” from difficult policy decisions as well as diminish the opportunity to participate and influence decisionmaking.¹³⁷ One senator even labeled attempts to pass a Government Prevention Shutdown Act as the “Congressional Responsibility Prevention Act.”¹³⁸

Opponents of ACR proposals worry that while currently failing to appropriate is not a possibility for Congress and the President, the presence of a fallback mechanism may increase inefficiencies and the time it takes to negotiate or reach agreements. In turn, this could lead to a greater acceptance of the status quo and an overall less responsive and effective government. Critics also worry that an ACR may create the bizarre incentive of having those legislators who hope to reduce or retain status quo funding trying to thwart congressional actions or progress

¹³⁵ See 145 Cong. Rec. E26-02, 106th Cong., 1st Sess. (Jan. 7, 1999) (quoting Hon. George W. Gekas (R-PA)).

¹³⁶ See Keith, *supra* note 2, at 7.

¹³⁷ *Id.*

¹³⁸ See 143 Cong. Rec. S4137-02, 105th Cong., 1st Sess. (May 8, 1997) (quoting Senator Byrd (D-WVa) arguing against the passage of S. 547).

towards a vote.¹³⁹ Others argue that the chief effect of an ACR would be to disrupt the appropriations process, making appropriations bills harder to pass, and supplanting the regular appropriations bills and that it would increase the likelihood Congress failed to work out agreements, which may encourage minority factions to use filibusters to block appropriations bills to which they objected since there would be no threat of a government shutdown.¹⁴⁰

Moreover, dissenters believe that certain structures of an ACR, such as those that would rely on the lower amount of funding as passed in the individual House or Senate appropriations bills, could disrupt funding for certain entitlement programs such as pensions, Medicaid, supplemental social security income, and food stamps by failing to provide sufficient appropriations.¹⁴¹ Opponents of ACRs argue the ease with which Congress can pass a CR does not make the disadvantages of the ACR worthwhile. They cite as evidence the number of CRs Congress has passed in recent years and that the shutdowns of fiscal year 1996 were deliberate as part of a political plan to make President Clinton accept the congressional budget plan rather than representative of structural problems in the budget process.

¹³⁹ See Keith, *supra* note 2, at 7-8.

¹⁴⁰ See Kogan, *supra* note 130, at 2.

¹⁴¹ *Id.* at 3.

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APPENDIX I. RELEVANT ANTIDEFICIENCY ACT PROVISIONS

Year	Current 31 U.S.C. § 1341	Current 31 U.S.C. § 1342
At the time of the 1877 AG opinion	<p>Section 3679 of the Revised Statutes: 'No Department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations.'</p> <p>Section 3732 of the Revised Statutes: '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 shall not exceed the necessities of the current year.'</p>	
1884		<p>Act of May 1, 1884, ch. 37, 23 Stat. 15 Added first "emergency" exception: To enable the Secretary of the Interior to pay the employees temporarily employed and rendering service in the Indian Office from January first up to July first, eighteen hundred and eighty-four, two thousand one hundred dollars, and <i>hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property</i></p>
1950		<p>Act of September 6, 1950, Ch. 896, §1211, 64 Stat. 765 Amended emergency exception to say: No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.</p>
At the time of the 1980 and 1981 OAG opinions	What would be re-codified as 31 U.S.C. § 1341(below) was then codified as 31 U.S.C. § 665(a) [with identical language]	What would be re-codified as 31 U.S.C. § 1342 (below) was then codified as 31 U.S.C. § 665(b) [with identical language]

1982	<p>Re-codified as § 1341:</p> <p>(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not-</p> <ul style="list-style-type: none"> (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; <p>(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.</p> <p>(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.</p>	<p>Re-codified as § 1342:</p> <p>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.</p>
1990	<p>Added:</p> <p>(a)(1)(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</p> <p>(a)(1)(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.</p>	<p>Added:</p> <p>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.</p>
1996		<p>For the period Dec. 15, 1995 through Jan. 26, 1996 only, section temporarily amended:</p> <p>(1) to add a new provision that all officers and employees of the United States Government or the District of Columbia government were to be deemed to be performing services relating to emergencies involving the safety of human life or the protection of property AND</p> <p>(2) deleting the provision that the term "emergencies involving the safety of human life or the protection of property" did 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.*</p>

*P.L. 104-92 was entitled "Continuing Appropriations." Title III made "FY 1996 appropriations to pay the salaries of Federal employees excepted from the Antideficiency Act who were continuing projects and activities conducted in FY 1995 and work during periods when there was otherwise no funding authority for their salaries." Specifically, Section 306 declared that appropriations and funds made available and authority granted pursuant to this title would be available until the earlier of: (1) enactment into law of an appropriation for any project or activity provided for in this title; (2) enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity; or (3) January 26, 1996. Section 310 amended the Antideficiency Act in the way outlined above. Section 311 declared that Federal employees considered excepted from furlough during any period in which there is a lapse in appropriations with respect to the agency activity in which the employee is engaged would not be considered to be furloughed when on leave, and would be subject to the same leave regulations as if no lapse in appropriations had occurred. Section 312 declared that, beginning on January 2, 1996, any Federal employee excepted from furlough who was not being paid due to a lapse in appropriations would be deemed to be totally separated from Federal service and eligible for unemployment compensation benefits with no waiting period for such eligibility to accrue. Section 313 deemed any Federal employees returning to work under this title to have returned at the first regularly scheduled opportunity after December 15, 1995.

The Antideficiency Act in its Current Form

31 U.S.C.A. § 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.

(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.

31 U.S.C.A. § 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.

APPENDIX II. RELEVANT ATTORNEY GENERAL OPINIONS

Support of the Army, 15 Op. Atty. Gen. 209 (1877)

Applicability of the Antideficiency Act Upon a Lapse in Agency Appropriation, 43 U.S. Op. Atty. Gen. 224 (1980).

Authority for the Continuing of Government Functions During a Temporary Lapse in Appropriations, 43 U.S. Op. Atty. Gen. 293 (1981).

Payment of Travel Costs to Witnesses During a Period of Lapsed Appropriations, 5 U.S. Op. Off. Legal Counsel 429, 430 (December 23, 1981).

Continuation of Agency Activities During a Lapse in Both Authorization and Appropriation, 6 U.S. Op. Off. Legal Counsel 555 (September 17, 1982).

Authority to Employ the Services of White House Office Employees During an Appropriations Lapse, 19 U.S. Op. Off. Legal Counsel No. 235 (September 13, 1995).

These opinions can be found in a number of locations, including:

- <http://www.usdoj.gov/olc/opinions.htm>
- Westlaw – Database identifier: AG
- Lexis – Database identifier: USAG