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Government Shutdowns

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Table of Contents

I. INTRODUCTION.....	3
II. LEGAL FRAMEWORK.....	4
A. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	4
B. INTERPRETATIONS OF ANTI-DEFICIENCY ACT PROVISIONS	6
i. <i>Government Accountability Office (GAO) Approach v. Civiletti Opinions</i>	6
ii. <i>Remaining Legal Questions</i>	10
iii. <i>Post-Civiletti Opinions</i>	13
III. PREPARING FOR AND IMPLEMENTING GOVERNMENT SHUTDOWNS	17
IV. RECENT SHUTDOWN EXPERIENCES.....	20
A. OCTOBER 2013 SHUTDOWN.....	21
B. DECEMBER 2018–JANUARY 2019 SHUTDOWN.....	26
V. AUTOMATIC CONTINUING RESOLUTIONS.....	33
VI. CONCLUSION	39
VII. APPENDIX I: APPROPRIATIONS FUNDING GAPS SINCE 1977	41
VIII. APPENDIX II: RELEVANT ANTI-DEFICIENCY ACT PROVISIONS.....	42
IX. APPENDIX III: TAXONOMY OF POST-CIVILETTI OPINIONS	46
X. APPENDIX IV: ACR PROPOSALS	48

I. Introduction¹

On January 16, 2019, twenty-six days into the most recent shutdown, Speaker Nancy Pelosi suggested re-scheduling President Donald Trump's State of the Union address, given that the Department of Homeland Security and U.S. Secret Service were still unfunded and might be unable to meet the event's security needs.² The next day, President Trump retaliated by delaying Speaker Pelosi's planned travel to Brussels, Egypt, and Afghanistan.³

By the time the shutdown began affecting decision-makers, though, it had already generated significant consequences—including a break in Supplemental Nutrition Assistance Program (SNAP) benefit distribution between late January and March⁴ and a halt to funding for Native American tribes.⁵ The list of shutdown consequences grew over time, and several commentators have suggested that a temporary stop in air travel through La Guardia airport on January 25, 2019 ultimately Congress' and the president's decision to end the shutdown later that day.⁶

While government shutdowns have significant consequences, it is remarkable that (1) the U.S. government *can* shut down, and (2) the U.S. can withstand thirty-five days of shutdown

¹ This paper is an update of Puja Seam & Brad Shron, *Government Shutdowns* (Harv. L. School, Briefing Paper No. 11).

² Press Release, Congresswoman Nancy Pelosi, Pelosi Sends Letter to President Trump Concerning the State of the Union Address (Jan. 16, 2019), <https://pelosi.house.gov/news/press-releases/pelosi-sends-letter-to-president-trump-concerning-the-state-of-the-union-address>.

³ Letter from Donald J. Trump, U.S. Pres., to Nancy Pelosi, Speaker, House of Representatives (Jan. 17, 2019), <https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-speaker-house-representatives-nancy-pelosi/>.

⁴ Dottie Rosenbaum, *Many SNAP Households Will Experience Long Gap between Monthly Benefits Despite End of Shutdown*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 4, 2019), <https://www.cbpp.org/research/food-assistance/many-snap-households-will-experience-long-gap-between-monthly-benefits>.

⁵ Mitch Smith & Julie Turkewitz, *Shutdown Leaves Food, Medicine, and Pay in Doubt in Indian County, N.Y.* TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/us/native-american-government-shutdown.html?module=inline>; see also Z. Byron Wolf, Veronica Stracqualursi & Devan Cole, *102 (and Counting) Very Real Direct Effects of the Partial Government Shutdown*, CNN (Jan. 24, 2019), <https://www.cnn.com/2019/01/10/politics/shutdown-effects-list/index.html> (citing Smith & Turkewitz).

⁶ Ellie Kaufman & Rene Marsh, *The Government Shutdown Ended after Only 10 Air Traffic Controllers Stayed Home*, CNN (Feb. 6, 2019), <https://www.cnn.com/2019/02/06/politics/ten-air-traffic-controllers-shutdown/index.html>; Mary Schlangenstein & Alan Levin, *NYC Flight Disruptions Put Spotlight on FAA as Shutdown Drags On*, BLOOMBERG (Jan. 25, 2019), <https://www.bloomberg.com/news/articles/2019-03-25/michael-avenatti-is-charged-with-trying-to-extort-nike>.

conditions. This budget briefing paper explores those two phenomena. First, it explains the legal framework that makes shutdowns possible and how interpretations of that framework have shifted over time—originally allowing for liberal spending during a shutdown period, then radically restricting government operations during a shutdown, and currently allowing for significant exceptions to an ostensibly harsh rule. Second, it investigates how agency discretion in determining exceptions can mitigate a shutdown’s consequences. Third, it considers automatic continuing resolutions (ACRs)—an innovation that attempts to prevent shutdowns.

II. Legal Framework

a. Relevant Constitutional and Statutory Provisions

Government shutdowns are the product of funding lapses. To avert funding lapses, Congress must pass twelve⁷ annual appropriations bills, or it must enact a continuing resolution (CR) to fund the government between the lapse of the previous appropriations bills and the passage of the next appropriations bills or CR.⁸ If OMB expects a funding lapse to last longer than one day, the federal government will shut down.⁹

Appropriation statistics tend to start at 1977—the year that the Congressional Budget and Impoundment Control Act of 1974 took effect and the fiscal year first began on October 1.¹⁰ Since then, with the exception of fiscal years 1989, 1995, and 1997, Congress has enacted a CR

⁷ COMM. FOR A RESPONSIBLE FED. BUDGET, APPROPRIATIONS 101 (2018), <http://www.crfb.org/papers/appropriations-101>.

⁸ CLINTON T. BRASS ET AL., CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 2 (2018).

⁹ *Id.*

¹⁰ See also U.S. GOV’T ACCOUNTABILITY OFF., PAD-81-31, FUNDING GAPS JEOPARDIZE FEDERAL GOVERNMENT OPERATIONS 5 (1981) (“However, we asked departments to provide data only since FY 77, the year that the Congressional Budget and Impoundment Control Act of 1974 was fully implemented. We chose that year because it corresponds with the changeover to the October 1 start of the fiscal year and because any recommendations developed from our findings would have to consider the requirements of the new congressional budget process under the 1974 law.”).

every year.¹¹ Additionally, fifteen fiscal years since 1977 have featured funding gaps lasting one day or more, and the federal government has experienced twenty shutdowns overall.¹² (The government shut down three times in fiscal year 1978, and then twice in fiscal years 1983, 1985, and 1986.)¹³

Two legal authorities make funding gaps consequential. The first is the U.S. Constitution, which bans Treasury withdrawals in the absence of appropriations.¹⁴ The second is the Anti-Deficiency Act, which Congress first passed in 1905¹⁵ and which provides for a general ban on spending unappropriated funds and bars the government from “accept[ing] voluntary services.”¹⁶ In her article, *Congress’ Power of the Purse*, Katie Stith describes the Anti-Deficiency Act’s history and contextualizes it as a cornerstone of the Principle of Appropriations Control, which “prohibit[s] expenditure of any public money without legislative authorization.”¹⁷ Along with the Principle of the Public Fisc,¹⁸ the Principle of Appropriations Control restrains the executive branch.¹⁹ It provides a particularly powerful check “in areas that inherently require significant discretion” and where Congress might otherwise lack influence.²⁰

The Anti-Deficiency Act currently codifies its ban on spending unappropriated funds at 31 U.S.C. § 1341(a)(1), which forbids “officers or employees” from

(A) mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation;

¹¹ KATE P. McCLANAHAN ET AL., CONG. RESEARCH SERV., R42647, CONTINUING RESOLUTIONS: OVERVIEW OF COMPONENTS AND PRACTICES tbl. 2 (2019).

¹² JAMES V. SATURNO, CONG. RESEARCH SERV., RS20348, FEDERAL FUNDING GAPS: A BRIEF OVERVIEW tbl. 1 (2019). This statistic excludes the March 2018 shutdown. Saturno’s table is reproduced at *infra* Appendix I.

¹³ *Id.*

¹⁴ U.S. CONST. art. I, § 9, cl. 7.

¹⁵ Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1370–71 (1988). Congress first banned the spending of unappropriated funds in 1820. *Id.* at 1370.

¹⁶ 31 U.S.C. § 1341(a)(1) (2018); 31 U.S.C. § 1342 (2018).

¹⁷ Stith, *supra* note 15, at 1345, 1374–77.

¹⁸ *Id.* at 1345 (explaining that the Principal of the Public Fisc “assert[s] that all monies received from whatever source by any part of the government are public funds”).

¹⁹ *Id.*

²⁰ *Id.*

- (B) involv[ing] either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
- (C) mak[ing] or authoriz[ing] 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) involv[ing] 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 1985.²¹

The Anti-Deficiency Act backs this provision with a threat to “subject [violators] to appropriate discipline including, when circumstances warrant, suspension from duty without pay or removal from office,”²² as well as criminal sanctions—which can max out at a \$5,000 fine and up to two years imprisonment.²³

Meanwhile, the prohibition against accepting voluntary services—first asserted in 1884²⁴—is currently codified at 31 U.S.C. § 1342. It contains an exception for “emergencies involving the safety of human life or the protection of property.”²⁵ In 1990, Congress clarified that the exception “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.”²⁶

b. Interpretations of Anti-Deficiency Act Provisions

While Congress has consistently imposed limits on the spending of unappropriated money, the Department of Justice (DOJ) and Office of Management and Budget (OMB)—which have played active roles in interpreting and enforcing the Anti-Deficiency Act—have oscillated in their views of a funding lapse’s consequences.

i. Government Accountability Office (GAO) Approach v. Civiletti Opinions

²¹ 31 U.S.C. § 1341(a)(1) (2018).

²² 31 U.S.C. § 1349 (2018).

²³ 31 U.S.C. § 1350 (2018).

²⁴ Stith, *supra* note 15, at 1372–73.

²⁵ 31 U.S.C. § 1342 (2018).

²⁶ 31 U.S.C. § 1342 (2018).

Prior to April 1980, the U.S. government continued to operate during funding lapses.²⁷ In a March 3, 1980 letter to the House of Representatives, the then-General Accounting Office²⁸ (for simplicity, also abbreviated as GAO) argued that, although “continu[ing] . . . operat[i]ons during periods of expired appropriations . . . legally produce widespread violations of the Antideficiency Act,” the GAO “do[es] not believe that the Congress intends that federal agencies be closed during periods of expired appropriations.”²⁹ In a 1981 report, the GAO explained that agencies should respond to funding lapses by “attempt[ing] to abide by the spirit of the Antideficiency Act, short of closing down.”³⁰

This interpretation still limited agency activities. For example, in October 1979—during an 11-day shutdown that affected seven departments—agencies “split paychecks,” a practice in which agencies pay for work produced before a funding lapse during the appropriate pay period, but then delay paying for work produced during a funding lapse until the first post-funding lapse pay period.³¹ During the same shutdown, affected agencies failed to send various payments—including those associated with GI bill education, housing subsidies, and “supplementary security” income programs.³² Still, the 1981 GAO report does not describe agencies furloughing employees or limiting their workloads in response to funding gaps.³³

Attorney General Benjamin Civiletti’s April 1980 letter triggered a dramatic departure from past practice. Civiletti harshly criticized GAO’s view, claiming its “conclusions [were]

²⁷ BRASS ET AL., *supra* note 8, at 5 (“For years leading up to 1980, many federal agencies continued to operate during a funding gap, ‘minimizing all nonessential operations and obligations, believing that Congress did not intend that agencies close down, while waiting for the enactment of annual appropriations acts or CRs.’”).

²⁸ *History*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/about/what-gao-is/history/> (last visited May 4, 2019).

²⁹ U.S. GOV’T ACCOUNTABILITY OFF., B-197841 L/M (1980).

³⁰ U.S. GOV’T ACCOUNTABILITY OFF., PAD-81-31, FUNDING GAPS JEOPARDIZE FEDERAL GOVERNMENT OPERATIONS 14 (1981).

³¹ *Id.* at 14–15.

³² U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 30, at 17.

³³ *See generally* *id.*

inconsistent” and “legally insupportable.”³⁴ Tying himself closely to the Anti-Deficiency Act’s blanket ban on “involv[ing] the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law,”³⁵ he found that “the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.”³⁶ As a result, the only employees excepted—or allowed to work³⁷—“during periods of ‘lapsed appropriations’ . . . [are those] necessary to bring about the orderly termination of an agency’s functions.”³⁸

Civiletti pushed against the argument that Congress had acquiesced to or intended to allow normal government operations during shutdowns. He noted that the Anti-Deficiency Act’s appropriation requirement had survived seven rounds of amendments, demonstrating Congress’ continued commitment to it.³⁹ Additionally, when providing retroactive appropriations at the end of shutdowns, Congress had never explicitly waived the Anti-Deficiency Act.⁴⁰ (Indeed, according to Civiletti, the need for retroactive appropriations itself reveals that the original expenditure required an appropriation.⁴¹) Lastly, Civiletti argued that the Anti-Deficiency Act was meant to re-establish Congress’ appropriations power, so “any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute.”⁴²

³⁴ Applicability of Antideficiency Act upon a Lapse in Agency Appropriations, 43 U.S. Op. Att’y Gen. 224, 227 (1980).

³⁵ *Id.* at 225 (quoting 31 U.S.C. § 665(a)).

³⁶ *Id.*

³⁷ BRASS ET AL., *supra* note 8, at 10 (explaining that “essential” is not the appropriate adjective for non-furloughed employees).

³⁸ Applicability of Antideficiency Act upon a Lapse in Agency Appropriations, *supra* note 34, at 224.

³⁹ *Id.* at 228.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 229.

GAO blasted Civiletti's opinion.⁴³ It said that the opinion "upset the delicately balanced status quo."⁴⁴ It relayed that government employees responded to the possibility of a government shutdown with "incredulity. That the Federal Government would shut its door was, they said, incomprehensible, inconceivable, and unthinkable."⁴⁵ GAO also shared agency frustration with OMB and DOJ leadership, writing that "[n]either OMB nor the Department of Justice would answer questions put to them by some agency officials who sought help in planning for a funding gap . . . Their lack of response, in essence, left these agencies to their own devices."⁴⁶

In January 1981, Civiletti departed from his strict 1980 opinion and crafted a much more lenient standard.⁴⁷ He claimed that the 1980 opinion applied specifically to "the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission would expire in April, 1980 without extension, and that the FTC might consequently be left without appropriations for a significant period."⁴⁸ Accordingly, a different standard would apply in the event of "a general congressional failure to enact timely appropriations, or . . . when no prolonged lapse in appropriations in such a situation is anticipated."⁴⁹

In the latter circumstances, Civiletti identified three categories of exceptions. First, he focused on the "'authorized by law' exception," then codified in 31 U.S.C. § 655(a). Civiletti effectively broke this exception into three sub-exceptions—for

⁴³ GAO's support for a more relaxed standard compared to DOJ's harsher standard is an interesting reversal of expectations. *See* Stith, *supra* note 15, at 1395 (describing GAO's relationship with the legislative branch and suggesting that Congress "could encourage or require the GAO to undertake a greater role in reviewing and proposing limitations on permanent and other open-ended authority" to reclaim its appropriations power).

⁴⁴ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 30, at 2.

⁴⁵ *Id.* at 21.

⁴⁶ *Id.* at 23.

⁴⁷ Alan L. Feld, *Shutting Down the Government*, 69 B.U. L. REV. 971, 989 (1989) (But the reasoning of the 1981 OAG fundamentally distorts the constitutional allocation of power over the governmental purse. While the 1981 OAG reaffirmed the power of the legislative process to control appropriations through inaction as well as action, it created wide areas of discretion that the President and executive branch subordinates may exercise during a period of lapse.").

⁴⁸ The President, 43 U.S. Op. Att'y Gen. 293, 294 (1981).

⁴⁹ *Id.* at 294–95.

obligations [that] are (1) funded by moneys, the obligational authority for which is not limited to one year, e.g., multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in the agency.⁵⁰ Second, Civiletti identified an exception, rooted in Article II, forbidding “Congress [from] depriv[ing] the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect.”⁵¹ Civiletti admitted that “no catalogue is possible” for the contours of this exception.⁵² Third, Civiletti addressed the Anti-Deficiency Act’s emergency exception, embedded in § 1342’s prohibition against accepting volunteer service. Civiletti interpreted this exception as featuring two requirements.

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.⁵³

To apply this exception, Civiletti suggested that OMB use “the common sense approach that has guided” the reapportionment of agency funds.⁵⁴

The exceptions Civiletti described in 1981 laid the groundwork for a significant expansion in government operations during funding lapses.⁵⁵ Given how staunchly Civiletti had opposed the pre-1980 landscape,⁵⁶ though, his 1981 exceptions raise the question of whether his grievances with pre-1980 shutdowns stemmed from substantive separation of powers concerns or from formalistic concerns about how agencies justified pre-1980 shutdown behavior.

ii. Remaining Legal Questions

⁵⁰ *Id.* at 298.

⁵¹ *Id.* at 299.

⁵² *Id.* at 300–01.

⁵³ *Id.* at 302.

⁵⁴ *Id.* at 304–05.

⁵⁵ See *infra* Part II.B.iii.

⁵⁶ See *supra* notes 34–42 and accompanying text.

Despite advocating a strict textualist approach, Civiletti—in his 1980 and 1981 opinions—still never justified obligating unappropriated funds on excepted employees—those employees who fall into an Anti-Deficiency Act exception and can work during a shutdown. Instead, both opinions assumed affirmative authority to fund government operations from exceptions to a statutory prohibition on spending.⁵⁷ They then focused on how narrowly (or broadly) to construe those exceptions.

Allowing the executive to except employees from a shutdown and to accrue entitlements to pay seems like a variant of “coercive deficiencies”—“*unauthorized* promise[s] to pay government funds in excess of appropriations” that “Congress was constrained by ‘moral’ considerations to fund” and that Congress sought to curtail with the Anti-Deficiency Act.⁵⁸ Remarkably, though, Congress and the courts have never questioned or limited this practice.

Congress could undermine the policy of excepting employees by providing excepted employees with backpay at the end of government shutdowns—mirroring its traditional treatment of furloughed employees. Doing so would repudiate the idea that those employees had accrued entitlements during the shutdown, without actually depriving excepted employees of pay. Instead, by silently allowing excepted employees to receive pay, Congress has implicitly accepted the premise that excepting employees is acceptable practice.

In the Government Employees Fair Treatment Act of 2019, Congress may have moved from implicitly to explicitly acknowledging employee exceptions.⁵⁹ However, in the long run, that acknowledgement might destabilize shutdown operations. The Government Employees Fair

⁵⁷ *Cf.* Support of the Army, 15 Op. Atty. Gen. 209, 210 (1877) (“Although exceptional and negative in its form, this provision in regard to contract for clothing . . . is to be deemed affirmative in its character; and the general provisions of section 3679 does not operate to exclude contracts for the purposes thus enumerated.”).

⁵⁸ Stith, *supra* note 15, at 1375–76.

⁵⁹ 31 U.S.C. § 1341(c)(1)(D) (2018).

Treatment Act, which addressed the treatment of furloughed and excepted employees during the December 2018 shutdown, passed on January 16, 2019.⁶⁰ It amended 31 U.S.C. § 1341 to allow excepted employees to “use leave” during shutdowns “on or after December 22, 2018.”⁶¹ The Office of Personnel Management (OPM) has interpreted the provision to allow excepted employees to “choose to remain in default status of being furloughed during any such authorized absence during the lapse” and collect pay when furloughed employees receive backpay.⁶² OPM acknowledged that employees have an incentive to select the latter option.⁶³ After all, even though excepted employees may prefer to go to work than to miss work out of a sense of obligation or to prevent a backlog of assignments from piling up, once they decide to miss work they would likely prefer to take furlough status than to use up their limited supply of vacation days.

The courts’ limited role in reviewing current DOJ policy stems partly from a selection challenge.⁶⁴ DOJ—even when breaking from previous policies—has refrained from bringing charges against Anti-Deficiency Act violators.⁶⁵ When excepted government employees have challenged shutdown policy, they have sued for late pay—not to challenge the framework that excepted them in the first instance. For example, in 2014, the Court of Federal Claims found that

⁶⁰ *Actions Overview: S.24 – Government Employee Fair Treatment Act of 2019*, CONG., <https://www.congress.gov/bill/116th-congress/senate-bill/24/actions>.

⁶¹ 31 U.S.C. §§ 1341(c)(1)(A), 1341(c)(3) (2018).

⁶² Memorandum from Margaret M. Weichert, Acting Direct., U.S. Office of Pers. Mgmt., to Heads of Exec. Dep’ts and Agencies (Jan. 23, 2019), <https://chcoc.gov/content/government-employee-fair-treatment-act-2019>.

⁶³ *Id.* (“We expect employees generally to choose to allow the default furlough status to be applied to any approved absence, since section 1341(c)(2) provides retroactive pay for furlough periods without charge to leave.”).

⁶⁴ *See also* Stith, *supra* note 15, at 1387 (“Often, however, when faced with an issue of executive compliance with appropriations limitations, courts have declined to decide cases on the merits, particularly in areas where the Executive’s constitutional powers are significant. Even where private parties have an interest or incentive to sue to enforce compliance with spending limitations, they may be held not to have ‘standing’ to bring suit.”).

⁶⁵ *See, e.g.*, *Applicability of Antideficiency Act upon a Lapse in Agency Appropriations*, *supra* note 34, at 230 (“This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations.”). *But see* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note , at 18–19 (“In our view, the Attorney General’s promise to invoke the criminal sanctions of the Antideficiency Act and investigate alleged future violators intensified the problems already associated with funding gaps.”).

excepted employees who worked overtime during the 2013 shutdown were entitled to overtime pay, and that the federal government had violated the Fair Labor Standards Act (FLSA) by failing to pay them until a payday after the shutdown's end.⁶⁶ The government only invoked the Anti-Deficiency Act to make the claim that it had "reasonable grounds for believing the failure 'was not a violation of the FLSA'" and should thus not have to pay liquidated damages.⁶⁷

iii. Post-Civiletti Opinions⁶⁸

As a result, Civiletti's opinions have remained largely unchallenged, and the three exception categories he described in 1981 still provide the foundation for defining excepted operations. Since 1981, though, DOJ opinions have expanded the exception categories, raising the question of how practically dissimilar the status quo is from the pre-1980 approach.

The "authorized by law" exception has been subjected to several rounds of expansion. In September 1995, Attorney General Walter Dellinger modestly expanded the exception when he categorized DOJ testimony in front of Congress as potentially subject to the "authorized by law" exception. Specifically, he found that DOJ testimony could fall into the "express authorization" sub-exception if backed by a subpoena.⁶⁹ Alternately, it could fall into the "necessarily implied authorization" sub-exception if backed by "necessary implication from another specific statutory duty or duties."⁷⁰ In December 1995, Dellinger made a more expansive adjustment. He found that the "necessarily implied authorization" also excepted DOJ employees whose "functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations."⁷¹ The December 1995 opinion transformed Civiletti's original exception for

⁶⁶ *Martin v. United States*, 117 Fed.Cl. 611, 615, 617–618 (2014).

⁶⁷ *Id.* at 627.

⁶⁸ For a chart depicting how the post-Civiletti opinions map onto Civiletti's exceptions, see *infra* Appendix III.

⁶⁹ Participation in Congressional Hearings During an Appropriations Lapse, 19 Op. O.L.C. 301 (1995).

⁷⁰ *Id.*

⁷¹ Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions during the Lapse in the Department's Appropriations, 19 Op. O.L.C. 337 (1995).

activities “authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in *the agency*”⁷² by allowing the duties of one agency to trigger exceptions in another. Given how intertwined agency work is, this interpretation could have dramatic practical implications. For example, during the 2013 shutdown, the VA noted that sending benefit checks required it to interact with the IRS, Social Security Administration, and Department of Education.⁷³ Applying the December 1995 opinion, providing for a limited re-authorization of VA benefits would effect employee exceptions across multiple agencies.

Since 1981, DOJ has also expanded executive office operations during shutdowns, both by strengthening the theories underlying executive office exceptions and circumventing the Anti-Deficiency Act completely. In his 1981 opinion, Civiletti relied on vague references to the Constitution in crafting the executive employee exception.⁷⁴ In 1995, Dellinger noted that executive employees can fall under the “necessary implication” sub-exception⁷⁵ or (as Civiletti argued) under the standalone exception related to “the discharge of the President’s constitutional duties and powers.”⁷⁶ However, he also found that the President’s ability “to create and fill nonsalaried positions in the White House” allows the president to side-step appropriations and, with it, the Anti-Deficiency Act altogether. Further, because White House compensation is not “fixed by law” and “it is the position of the Comptroller General that compensation may be waived where the compensation is not fixed by law,” Dellinger argued that White House

⁷² The President, 43 Op. Att’y Gen. 293, 298 (1981) (emphasis added).

⁷³ *Effect of Government Shutdown on VA Benefits and Services to Veterans Before H. Comm. on Veterans’ Affairs*, 113th Cong. 8 (2013) [hereinafter *Effect of Government Shutdown on VA Benefits*].

⁷⁴ The President, 43 Op. Att’y Gen. at 299.

⁷⁵ Authority to Employ the Services of White House Office Employees during an Appropriations Lapse, 19 Op. O.L.C. 235 (1995).

⁷⁶ *Id.*

employees can work for free during a shutdown.⁷⁷ Again, this argument allows the White House to opt out of Anti-Deficiency Act restrictions.

Dellinger’s second and third arguments for executive employee exceptions stand out for relying on legal authorities outside of the Anti-Deficiency Act. In 2011, Deputy Assistant Attorney General Karl R. Thompson continued this trend, but by reading Annual and Sick Leave Act of 1951 (Leave Act) provisions into the Anti-Deficiency Act to expand the “authorized by law” exception.⁷⁸ Thompson began by noting that the Leave Act does not cover ““officer[s] in the executive branch . . . who [are] appointed by the President and whose rate of basic pay exceeds the highest rate payable under [the GS schedule],””⁷⁹ or ““officer[s] in the executive branch . . . who [are] designated by the President, except a postmaster, United States attorney, or United States marshal.””⁸⁰ Meanwhile, “[5 U.S.C. § 5508], which works in harmony with [the Leave Act],” describes officers covered by the Leave Act as ““not entitled to the pay of their offices solely because of their status as officers.””⁸¹ Similar to how Civiletti found an affirmative authority to spend funds in the Anti-Deficiency Act’s exceptions to spending prohibitions, Thompson then found that § 5508’s description of Leave Act-covered employees “suggests by negative implications that officers who are exempt . . . do earn their salaries by virtue of their status.”⁸² From there, Thompson concluded that Leave Act-exempt officers can fall under both the “necessary implication” and previously authorized sub-exceptions. Leave Act-exempt officers fall within the “necessary implication” exception because their employment “arises ‘by necessary implication from the specific terms of’ the President’s authority to appoint or

⁷⁷ *Id.*

⁷⁸ Authority to Employ White House Office Personnel Exempt from the Annual and Sick Leave Act under 51 U.S.C. § 6301(2)(X) and (XI) during an Appropriations Lapse, 2011 WL 7485436, at *1 (Apr. 8, 2011).

⁷⁹ *Id.* at *2 (quoting 5 U.S.C. § 6301(2)(x) (2018)) (alterations in original).

⁸⁰ *Id.* (quoting 5 U.S.C. § 6301(2)(xi) (2018)) (alterations in original).

⁸¹ *Id.* at *3 (quoting 5 U.S.C. § 5508 (2018)).

⁸² *Id.*

designate officials who can earn pay by virtue of their status.”⁸³ Similarly, because Thompson “interpret[s] sections 5508 and 6301 of the Leave Act and section 105 of title 3 as implicitly ‘authoriz[ing]’ the President ‘by law’ to incur such salary obligations in advance appropriations,” then “no further obligation in advance or in excess of appropriations is incurred when [Leave Act-exempt officers] ‘perform services.’”⁸⁴ As a result, their work during a shutdown is authorized by law.⁸⁵

Since 1981, only one DOJ opinion has addressed the emergency exception. That opinion—issued in December 1995—focused on clarifying the exception, rather than expanding its reach. In it, Dellinger first sanctioned “the practice of past administrations[, which] has been to assume the continued operation of the private economy [during a short shutdown].”⁸⁶ This assumption justified applying the emergency exception to “air traffic controllers, meat inspectors, and other similarly situated personnel.”⁸⁷ (Dellinger, though, explicitly left open whether the same assumption would be appropriate “in the context of an anticipated long period of lapsed appropriation”⁸⁸) Separately, Dellinger found that Civiletti’s standard for the emergency exception might be too lenient, given a 1990 amendment clarifying that, “‘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.”⁸⁹ As a result, Dellinger amended Civiletti’s second emergency exception requirement—which demanded “some reasonable likelihood that the safety of human life or the protection of property would be compromised, *in*

⁸³ *Id.* at *5 (quoting *The President*, 43 Op. Att’y Gen. 293, 298 (1981)).

⁸⁴ *Id.* at *6–7.

⁸⁵ *Id.* at *7.

⁸⁶ *Government Operations in the Event of a Lapse in Appropriations*, 1995 WL 17216091, at *4 (Aug. 16, 1995).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

some degree, by delay in the performance of the function in question”⁹⁰—by swapping the “in some degree” standard with the higher “in some significant degree” standard.⁹¹

III. Preparing for and Implementing Government Shutdowns

Outside of DOJ, the Civiletti letter and its progeny have given rise to an OMB bureaucracy specializing in shutdown preparation and implementation.

Circular No. A-11, an “annually revised” OMB budget guidance document, describes shutdown preparation.⁹² It asks that “Agency heads, in consultation with their general counsels . . . develop and maintain plans for an orderly shutdown in the event of a lapse in appropriations.”⁹³ In 2011, OMB updated Circular No. A-11 to ask that agencies re-submit these contingency plans every four years.⁹⁴ In 2015, OMB requested re-submission “every two years.”⁹⁵ Additionally, “regardless of whether the enactment of appropriations appears imminent,” OMB reaches out to agencies “one week prior to the expiration of appropriation bills” and encourages them to “review”—and, if necessary—“revise[]” contingency plans.⁹⁶

These contingency plans are central to shutdown preparation. They are comprehensive documents. They list “activities that will continue and those that will cease” during a shutdown and “estimate . . . the time (to the nearest half-day) needed to complete shutdown activities.”⁹⁷ Most importantly, they list the agency’s total (and per “component”) work force and total (and

⁹⁰ *Id.* at *6 (quoting *The President*, 43 Op. Att’y Gen. 293, 298 (1981)) (emphasis added).

⁹¹ *Id.*

⁹² BRASS, *supra* note 8, at 8.

⁹³ Office of Mgmt. & Budget, *Circular No. A-11: Preparation, Submission, and Execution of the Budget*, EXEC. OFFICE OF THE PRESIDENT 124.2 (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf>

⁹⁴ BRASS, *supra* note 8, at 9.

⁹⁵ *Id.*

⁹⁶ Office of Mgmt. & Budget, *supra* note 93, at 124.3; *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-86, 2013 GOVERNMENT SHUTDOWN: THREE DEPARTMENTS REPORTED VARYING DEGREES OF IMPACTS ON OPERATIONS, GRANTS, AND CONTRACTS 13 (2014) (“[F]or the last 2 weeks of September and through the first 2 weeks in October, [Office of Environmental Management] management was consumed by work concerning the shutdown.”).

⁹⁷ Office of Mgmt. & Budget, *supra* note 93, at 124.2.

per “component”) excepted work force.⁹⁸ Agencies have to provide a rationale for each employee exception—corresponding to the general “authorized by law” sub-exceptions, the presidential power exception, or the emergency exception.⁹⁹ Additionally, agencies must effectively create two employee exception lists—one in anticipation of a “short [appropriations] lapse (1-5 days),” and another for a “lapse that extends beyond that time period.”¹⁰⁰ OMB asks agencies to explain how (and why) their lists of excepted employees change between the short and long shutdown scenarios.¹⁰¹ Further, OMB requests that agencies “designate personnel responsible for implementing and adjusting the plan to respond to the length of the lapse in appropriations and changes in external circumstances.”¹⁰² During this process, agencies might recall—or re-categorize “furloughed” employees to “excepted” status—employees.¹⁰³

OMB’s request that agencies prepare to change their contingency plans during a shutdown reflects the fact that unanticipated needs can emerge over the course of a shutdown. For example, during the 2013 government shutdown, the National Institute of Health (NIH) recalled mailroom employees “to pick up mail that was delivered to NIH including bills that needed to be paid to keep the facilities minimally operational.”¹⁰⁴ Similarly, during the November 1995 shutdown, the Department of Health and Human Services (HHS) recalled workers involved in Medicare enrollment.¹⁰⁵ During the same shutdown, the Department of Veteran Affairs (VA) prepared to

⁹⁸ *Id.* at 124.2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 124.2.

¹⁰¹ *Id.* at 124.2.

¹⁰² *Id.* at 124.2.

¹⁰³ U.S. OFF. OF PERSONNEL MGMT., GUIDANCE FOR SHUTDOWN FURLOUGHES 9 (2015), <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>.

¹⁰⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 96, at 14.

¹⁰⁵ *Government Shutdown I: What’s Essential? Before the H. Subcomm. on Civil Service*, 104th Cong. 28 (1995) [hereinafter *Government Shutdown I*] (statement of Walter Broadnax, Deputy Secretary, Department of Health & Human Services).

recall 1,700 employees to help them disburse benefits, had the shutdown continued past November 20th.¹⁰⁶

OMB and agency officials have consistently maintained that recall decisions made during a shutdown stem from conversations between department members and OMB.¹⁰⁷ Still, in 1995, members of Congress repeatedly asked testifying assistant secretaries whether “[e]ither directly or indirectly, prior, during, or since the shutdown . . . any member of the White House staff influence[d] what categories of workers you stated were non-essential or essential.”¹⁰⁸ The line of questioning stemmed from a fear that the White House manipulates Anti-Deficiency Act exceptions to reduce the political costs of shutdowns.¹⁰⁹ However, it also highlights that, even if contingency plans are publicly available, they are created through generally opaque processes.

Contingency plans also explain the process of re-opening the government. Specifically, they define how agencies will “notify[] employees that the shutdown furlough has ended and that they are to return to work on a specified day Flexibilities available to supervisors if employees have problems returning to work . . . [and] Procedures for resuming program activities”¹¹⁰

Still, coming back from a shutdown is often more difficult than anticipated. After the 2013 shutdown, HHS and Department of Transportation officials acknowledged a decrease in “morale of employees.”¹¹¹ Shutdowns also trigger efficiency losses—for example, the Office of Energy Management, housed in the Department of Energy, “required 4 months to return to pre-shutdown

¹⁰⁶ *Id.* at 72 (statement of Eugene A. Brickhouse, Assistant Secretary for Human Resources and Administration, Department of Veteran Affairs).

¹⁰⁷ *See, e.g.,* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 96, at 21; *Government Shutdown I: What’s Essential? Before the H. Subcomm. on Civil Service*, 104th Cong. 207 (1995).

¹⁰⁸ *Government Shutdown I*, *supra* note 105, at 207.

¹⁰⁹ *Id.* at 216 (“You are saying no, you got no further guidance? It seems to me that is a fairly political hot potato and, if I were sitting in the White House, I would say, ‘What nincompoop said we shouldn’t take applications in this area?’”).

¹¹⁰ Office of Mgmt. & Budget, *supra* note 93, at 124.2.

¹¹¹ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 96, at 24–25.

levels of contract activity.”¹¹² Not all of a shutdown’s consequences are quantifiable. GAO could not ascertain the effect of disrupted NIH grant distribution on ongoing research, but unnamed sources “expressed concern” that fear of shutdowns would lead to “smaller, more narrowly-defined project[applications]” in the future.¹¹³ Additionally, federal shutdowns have ripple effects across other levels of government, which rely on federal funds and grants.¹¹⁴ States might be able to step in to fill the funding gap, but they might also have to furlough their employees or limit services—adding to a shutdown’s toll on employment and services.¹¹⁵

IV. Recent Shutdown Experiences

While the U.S. government experienced seventeen shutdowns between 1977 and 1996, it experienced zero shutdowns between 1996 and 2012.¹¹⁶ Since then, though, shutdowns have made an impressive return—both in number and scale. In 2013, the U.S. government shut down for 16 days.¹¹⁷ In 2018, despite the fact that Republicans controlled the presidency and both houses of Congress, the U.S. government shutdown (arguably) three times.¹¹⁸ The first shutdown lasted from January 19 to January 22, 2018¹¹⁹ and revolved around a Democratic attempt to extract favorable treatment for Deferred Action for Childhood Arrivals (DACA) recipients.¹²⁰ The second shutdown lasted the night of February 8 to February 9, 2018.¹²¹ It began after

¹¹² *Id.* at 28.

¹¹³ *Id.* at 31–32.

¹¹⁴ NATALIE KEEGAN, CONG. RESEARCH SERV., R43467, FEDERAL AID TO STATE AND LOCAL GOVERNMENTS: SELECT ISSUES RAISED BY A FEDERAL GOVERNMENT SHUTDOWN (2014).

¹¹⁵ *Id.* at 15, 17.

¹¹⁶ SATURNO, *supra* note 12, at tbl. 1.

¹¹⁷ *Id.*

¹¹⁸ BRASS ET AL., *supra* note 8, at 4 (“From the perspective of prior OMB statements, a funding gap technically did not occur on February 9, 2018. However, given that OMB and OPM issued directions for a shutdown after funding expired, it is possible that some agency operations might have been affected . . .”). *But see* SATURNO, *supra* note 12, at tbl. 1.

¹¹⁹ SATURNO, *supra* note 12, at tbl. 1.

¹²⁰ Michael D. Shear, *How Washington Reached the Brink of a Shutdown*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/politics/timeline-daca-shutdown-trump.html>.

¹²¹ SATURNO, *supra* note 12, at tbl. 1.

Senator Rand Paul took a stand against rising deficits, and it "was so unanticipated that the Office of Management and Budget didn't tell federal agencies to prepare for it until Thursday evening."¹²² The last of the 2018 shutdowns began in late December and lasted for 34 days—breaking the previous record for longest shutdown (21 days).¹²³

This section describes the experiences of the 2013 shutdown and the last 2018 shutdown—the most significant of the recent shutdowns.

a. October 2013 Shutdown

The 2013 shutdown began on October 1, 2013, after the Republican-controlled House of Representatives passed a series of CRs that would have undermined the Affordable Care Act (ACA).¹²⁴ Reporting at the time highlights that turning the appropriations process into a renewed ACA debate was not a Republican Party objective, but rather a fringe idea that gained traction, until it prevented Speaker John Boehner from passing CRs that would not effect ACA.¹²⁵

Interestingly, while GAO had previously refused to interpret Congress' failure to pass CRs as an indication that Congress intended to shut down the government,¹²⁶ the 2013 Congress made

¹²² Mike DeBonis & Erica Werner, *Brief Government Shutdown Ends as Trump Signs Spending Bill*, WASH. POST (Feb. 9, 2018), https://www.washingtonpost.com/powerpost/congress-passes-sweeping-budget-bill-ending-brief-shutdown/2018/02/09/6021367e-0d69-11e8-8890-372e2047c935_story.html?utm_term=.21766c846c73; see also Amber Phillips, *The Drama of the Overnight Shutdown, Hour by Hour*, WASH. POST (Feb. 9, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/02/09/the-hour-by-hour-drama-of-the-overnight-shutdown/?utm_term=.6d259941d72f.

¹²³ SATURNO, *supra* note 12, at tbl. 1.

¹²⁴ Eric Krupke, *How We Got Here: A Shutdown Timeline*, NPR (Oct. 17, 2013), <https://www.npr.org/sections/itsallpolitics/2013/10/16/235442199/how-we-got-here-a-shutdown-timeline>; Burgess Everett, Jake Sherman & John Bresnahan, *Shutdown: Congress Sputters on CR*, POLITICO (Sept. 30, 2013), <https://www.politico.com/story/2013/09/house-senate-government-shutdown-097557>; Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), <https://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html>.

¹²⁵ See, e.g., Krupke, *supra* note 124.

¹²⁶ See *supra* notes 27–30 and accompanying text.

clear that it understood the consequences of a funding lapse.¹²⁷ It also timed its brinksmanship at a particularly dramatic moment, as the U.S. prepared to hit its debt limit by October 17th.¹²⁸

Congress' use of government shutdowns as a negotiating tool adds another element to the already-complicated separation of powers landscape. The Anti-Deficiency Act was passed to re-establish congressional authority over appropriations. It has been undermined by increasingly liberal interpretations, but it now enables Congress to threaten a shutdown—and the attendant confusion and efficiency losses—to extract policy concessions from the White House.¹²⁹

Still, Senate Democrats and President Barack Obama refused to compromise. On September 17, 2013, OMB's Director, Sylvia Burwell, sent a letter to agency and department heads warning about the possible expiration of appropriations on September 30, 2013 and asking them to review their shutdown plans.¹³⁰ At the time, not a single appropriations bill had passed Congress.¹³¹ From September 29th to September 30th, 2013, the House and Senate passed, and the President signed, H.R. 3210—the Pay Our Military Act,¹³² funding the Armed Forces and “civilian personnel [and contractors] of the Department of Defense (and the Department of Homeland Security in the case of the Coast Guard) whom the Secretary concerned determines are providing

¹²⁷ David Lawder, *Deadlocked Congress Takes U.S. Government to Brink of Shutdown*, REUTERS (Sept. 29, 2013), <https://www.reuters.com/article/us-usa-fiscal/deadlocked-congress-takes-u-s-government-to-brink-of-shutdown-idUSBRE98N11220130930>; Jake Sherman & John Bresnahan, *Boehner's Pivotal Moment*, POLITICO (Sept. 29, 2013), <https://www.politico.com/story/2013/09/government-shutdown-john-boehner-pivotal-moment-097535>.

¹²⁸ Krupke, *supra* note 124.

¹²⁹ Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups”*, 12 CORNELL J.L. & PUB. POL’Y 503, 520 (2003) (describing the 1995 government shutdown and arguing that “[a] threat not to appropriate any money for the executive branch is, under any circumstances, the equivalent of nuclear blackmail in a checks and balances system”).

¹³⁰ Memorandum from Sylvia M. Burwell, Dir., Office of Mgmt. & Budget, to Heads of Executive Departments and Agencies (Sept. 17, 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf/>.

¹³¹ *Appropriations for Fiscal Year 2014*, CONG., <https://www.congress.gov/resources/display/content/Appropriations+for+Fiscal+Year+2014>.

¹³² *Actions Overview: H.R. 3210*, CONG., <https://www.congress.gov/bill/113th-congress/house-bill/3210/actions>.

support to members of the Armed Forces”¹³³ On September 30, 2013, Burwell sent a follow-up letter to agencies and departments, asking them to “execute plans for an orderly shutdown due to the absence of appropriations.”¹³⁴

Unfortunately, OMB does not appear to have begun compiling and publishing agency contingency plans until 2015.¹³⁵ As a result, curating a picture of shutdown operations requires a piecemeal analysis of archived department web pages, congressional hearings,¹³⁶ and news articles. Still, this practice provides several interesting illustrations of how agencies and Congress respond to shutdowns.

First, several agencies took hardline positions at the start of the shutdown. Most strikingly, Washington D.C.’s mayor excepted the entire city government from the shutdown.¹³⁷ At the other extreme, the National Park Service, in line with past practice, shut down all of its parks.¹³⁸ In a strange reversal of the 1995 hearings, in which members of Congress accused agencies of re-opening services to blunt the shutdown’s political pain,¹³⁹ members of Congress accused the

¹³³ H.R. 3210, 113th Cong. § 2(a) (2013) (enacted). During the shutdown, Congress passed and the President signed H.J.Res. 91, the Department of Defense Survivor Benefits Continuing Appropriations Resolution of 2014—a CR for 2014. MCCLANAHAN ET AL., *supra* note 11, at tbl. 3, n. d; *see also* H.J.Res. 91, 113th Cong. (2013).

¹³⁴ Memorandum from Sylvia M. Burwell, Dir., Office of Mgmt. & Budget, to Heads of Executive Departments and Agencies (Sept. 30, 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2013/m-13-24.pdf>.

¹³⁵ *Agency Contingency Plans*, OFF. OF MGMT. & BUDGET, <https://obamawhitehouse.archives.gov/omb/contingency-plans>.

¹³⁶ *The Impacts of the Government Shutdown on Our Economic Security Before the S. Subcomm. On Commerce, Sci., and Transp.* 114th Cong. (2013) (Majority Staff Report for Chairman Rockefeller) (describing furlough practices of a variety of agencies).

¹³⁷ Darrell Curren, *Government Contracting in the Shadow of the October 2013 Federal Government Shutdown*, 44 PUB. CONT. L.J. 349, 363–64 (2015) (citing news reports).

¹³⁸ *As Difficult as Possible: The National Park Service’s Implementation of the Government Shutdown* Before the H. Comm. on Oversight and Government Reform and the H. Comm. on Natural Resources, 113th Cong. (2013) (“Nevertheless, the trajectory of this closure parallels 1995, 1996 to a remarkable degree.”); DEP’T OF INTERIOR, CONTINGENCY PLAN FOR OPERATIONS IN THE ABSENCE OF FY 2014 APPROPRIATIONS 7 (2013), <https://www.doi.gov/sites/doi.gov/files/migrated/shutdown/fy2014/upload/DOI-Summary-Contingency-Plan.pdf>.

¹³⁹ *See supra* notes 108–109 and accompanying text.

National Park Service of closing too many services in order to exacerbate the shutdown’s political pain.¹⁴⁰

Second, several agencies—whose spending practices originally insulated them from the shutdown—were eventually exposed to the shutdown’s consequences. In 2019 testimony before a House subcommittee, Julia C. Matta—GAO’s managing associate general counsel—explained how agencies might forestall a shutdown’s effects. For example, she noted that agencies could continue to operate if they (1) had an “available balance[] . . . from a prior fiscal year’s appropriations act . . . or from permanent authority made available outside the annual appropriations process,” (2) had the authority “to enter into obligations in advance of an appropriation,” or (3) had funds that they could reprogram.¹⁴¹ Matta, though, explained that the “pick-and-stick” rule—which requires agencies to “pick-and-stick” with one of two potential sources of funding for a particular use, even after one has been depleted—still applies during a shutdown.¹⁴²

The Nuclear Regulatory Commission (NRC) and VA both managed to delay shutting down. The Nuclear Regulatory Commission—which Congress funds on an annual basis¹⁴³—had not run through its entire budget by October 1, 2013.¹⁴⁴ However, by October 9, it ran out of funds

¹⁴⁰ *As Difficult as Possible*, *supra* note 138, at 3 (“One anonymous Park Service ranger told the Washington Times, ‘We’ve been told to make life as difficult for people as we can. It is disgusting.’ If true—and I have no reason to doubt the truthfulness of that quote—it is indeed disgusting and despicable that the Park Service would do this.”); *As Difficult as Possible*, *supra* note 138, at 6 (“The Obama administration’s barricading of these sites is not something that they are required to do; it is something that they are choosing to do.”).

¹⁴¹ Julia C. Matta, Managing Assoc. Gen. Counsel, U.S. Gov’t Accountability Office, Testimony before the House Subcomm. on Interior, Env’t, and Related Agencies, Comm. on Appropriations (Feb. 6, 2019), <https://www.gao.gov/assets/700/696771.pdf>.

¹⁴² *Id.*

¹⁴³ U.S. NUCLEAR REGULATORY COMM’N, CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2019 (2018), <https://www.nrc.gov/docs/ML1802/ML18023B460.pdf>.

¹⁴⁴ Geof Brumfiel, *The Nuclear Regulatory Commission Temporarily Closes*, NPR (Oct. 9, 2013), <https://www.npr.org/sections/thetwo-way/2013/10/09/231014820/the-nuclear-regulatory-commission-temporarily-closes>; Pam Padtke Russell, *NRC Plans to Shut Down Next Week*, CQ ROLL CALL WASHINGTON ENERGY BRIEFING (Oct. 4, 2013).

and had to apply its contingency plan—leading to the furlough of 3,600 of its 3,900 employees on October 10.¹⁴⁵ The VA had a similar experience. The Veterans Health Administration’s 2014 appropriations were approved in March 2013,¹⁴⁶ but Veteran Benefits Administration (VBA)—which had reduced its benefit claim backlog by 193,000 in the six months prior to the shutdown—had no such luck.¹⁴⁷ After stretching the “roughly five days of carry over funding available in its General Operating Expense (discretionary) account for staff and operating expenses” for seven days, it furloughed 7,800 of its 23,897 employees.¹⁴⁸

Third, several agencies recalled workers. The Department of Defense recalled 90% of its furloughed employees without explanation.¹⁴⁹ Similarly, the National Oceanic and Atmospheric Administration recalled some of its employees in anticipation of Tropical Storm Karen—although it re-furloughed them once the storm passed.¹⁵⁰

During the shutdown, then-Speaker John Boehner attempted to re-open the government. Nevertheless, he struggled to unite his coalition, with sources suggesting he was “20-30 votes short of the target” on October 15th.¹⁵¹ However, by 10:17pm on October 16th—with the debt limit set to expire on October 17th—the House passed H.R. 2775.¹⁵² President Obama promptly

¹⁴⁵ Brumfiel, *supra* note 144; Russell, *supra* note 144.

¹⁴⁶ *Effect of Government Shutdown on VA Benefits*, *supra* note 73, at 2.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ *Id.* at 44.

¹⁴⁹ Craig Whitlock, *Pentagon to Recall Most Furloughed Workers, Hagel Says*, WASH. POST. (Oct. 5, 2013), https://www.washingtonpost.com/politics/pentagon-to-recall-most-furloughed-workers-hagel-says/2013/10/05/eb7ed346-2deb-11e3-8ade-a1f23cda135e_story.html?utm_term=.79f6be43e02a.

¹⁵⁰ Sam Hananel, *Some Furloughed Workers Recalled to Duty*, NBC WASHINGTON (Oct. 16, 2013), <https://www.nbcwashington.com/news/local/Some-Furloughed-Workers-Recalled-to-Duty-227983921.html>. The NOAA experience was not well-documented, and this article appears to be the only source describing how certain NOAA employees were recalled and then placed back on furlough, thus exemplifying the difficulty of comprehensively tracking shutdown experiences.

¹⁵¹ Eyder Peralta & Scott Neuman, *As It Happened: The Fight over the Debt Ceiling Shutdown*, NPR (Oct. 16, 2013), <https://www.npr.org/sections/thetwo-way/2013/10/16/235263755/hours-ahead-of-debt-ceiling-congress-scrambles-for-a-deal> (quoting Jake Sherman & John Bresnahan, *Warring Factions Sink Boehner Plan*, POLITICO (Oct. 15, 2013), <https://www.politico.com/story/2013/10/warring-gop-factions-sink-john-boehner-plan-government-shutdown-debt-ceiling-098375#ixzz2hshghSi0>).

¹⁵² *Id.*

signed it.¹⁵³ (The Senate had passed it earlier that day.)¹⁵⁴ H.R. 2775 provided a continuing resolution and debt limit increase.¹⁵⁵ It also provided backpay to furloughed federal and state employees, and it reimbursed states that paid employees who would otherwise have been paid by the federal government.¹⁵⁶ However, in an indication of the Republican Party’s internal conflict, only 87 of the House’s 231 Republicans voted to end the shutdown.¹⁵⁷

*b. December 2018–January 2019 Shutdown*¹⁵⁸

Echoing the 2013 shutdown, the 2018 shutdown began after a faction of House Republicans decided to interject a major policy discussion in the appropriations process. This wrinkle in the appropriations process was unexpected. By September 28, 2019, Congress had enacted nine of the year’s 12 appropriations bills—and the Senate Appropriations Committee celebrated its role in overseeing “the most spending bills enacted on time since Fiscal Year 1997.”¹⁵⁹ However, progress on the final three appropriations bills of the year stalled. On September 28, Congress passed a CR to fund unfunded agencies until December 7.¹⁶⁰ On December 7, Congress enacted another CR—this one providing funding until December 22.¹⁶¹ On December 20, House Republicans passed an amended version of H.R. 695—the final minibus—which included \$5 billion in border wall funding.¹⁶² On December 21, the Senate did not vote on the amended

¹⁵³ *Actions Overview: H.R. 2775*, CONG., <https://www.congress.gov/bill/113th-congress/house-bill/2775/actions>.

¹⁵⁴ *Id.*

¹⁵⁵ H.R. 2775, 113th Cong. §§ 106, 1002 (2013).

¹⁵⁶ H.R. 2775, 113th Cong. §§ 115–16(2013).

¹⁵⁷ Aaron Blake, *How Republicans Voted on the Shutdown/Debt Ceiling Compromise*, WASH. POST. (Oct. 17, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/10/17/how-republicans-voted-on-the-shutdowndebt-ceiling-compromise/?utm_term=.132c8a80cf73.

¹⁵⁸ The below narrative is largely based on the 2017 FEDERAL BUDGET CALENDAR (on file with author).

¹⁵⁹ Press Release, U.S. Senate Comm. on Appropriations, President Signs Def. Package into Law, Enacts Most On-Time Spending Bills in Two Decades (Sept. 28, 2018), available at <https://www.appropriations.senate.gov/news/president-signs-defense-package-into-law-enacts-most-on-time-spending-bills-in-two-decades>.

¹⁶⁰ H.R. 6157, 115th Cong. § 105 (2018).

¹⁶¹ H.J.Res. 143, 115th Cong. (2018).

¹⁶² Press Release, U.S. House of Representatives Comm. on Appropriations, Appropriations Comm. Chairman Frelinghuysen Statement on House Passage of Continuing Resolution (Dec. 20, 2018), available at

bill,¹⁶³ and OMB Director Mick Mulvaney sent a letter to heads of executive departments and agencies, requesting that they “now execute plans for an orderly shutdown due to the absence of appropriations.”¹⁶⁴

Because the shutdown was so recent, GAO has yet to issue reports on its effects. Additionally, while the House Ways and Means Committee has requested that Treasury Secretary Steven Mnuchin testify regarding the recall of IRS employees during the shutdown,¹⁶⁵ Secretary Mnuchin has rejected the invitation.¹⁶⁶ Still, because OMB now compiles and publishes all agencies’ contingency plans, significant resources exist for studying both the preparation for the shutdown and the shutdown itself.

Many agencies changed their contingency plans in the lead-up to or during the shutdown. Between December 17—one week prior to the start of the shutdown—and January 25—the day the shutdown ended—32 agencies updated their contingency plans.¹⁶⁷ (21 of those agencies changed their contingency plans between December 17 and December 22, and 11 between December 23 and January 25.) Comparing the number of agencies affected by the shutdown that changed their contingency plans to the number of agencies affected by the shutdown is surprisingly difficult.¹⁶⁸ However, it is worth noting that HHS was the only agency that changed

<https://web.archive.org/web/20181221215528/https://appropriations.house.gov/news/documentsingle.aspx?DocumentID=395457>.

¹⁶³ Burgess Everett & John Bresnahan, *Inside the Frantic Negotiations that Failed to Avert a Shutdown*, POLITICO (Dec. 21, 2018), <https://www.politico.com/story/2018/12/21/government-shutdown-congress-trump-border-wall-negotiations-1074189>.

¹⁶⁴ Memorandum from Mick Mulvaney, Dir., Office of Mgmt. & Budget, to Heads of Executive Departments and Agencies (Dec. 21, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/12/M-19-06-Status-of-Agency-Operations.pdf>.

¹⁶⁵ Donna Borak, *House Democrat Calls on Mnuchin to Appear for Hearing on IRS Shutdown Plan*, CNN (Jan. 17, 2019), <https://www.cnn.com/2019/01/17/politics/house-ways-and-mean-mnuchin-irs-shutdown/index.html>.

¹⁶⁶ Lauren Fox, Donna Borak & Caroline Kelly, *House Committee Cancels Shutdown Hearing after Mnuchin Declines to Appear*, CNN (Jan. 24, 2019), <https://www.cnn.com/2019/01/23/politics/ways-and-means-cancels-hearing-mnuchin/index.html>.

¹⁶⁷ See *infra* Table 1.

¹⁶⁸ One could, for example, run through the number of bills given continuing appropriations in Pub. L. No. 115-245, Div. C, §§ 101 (2018), amended by H.J. Res. 143, 115th Cong. (2019) and JUSTIN MURRAY, CONG. RESEARCH

its contingency plan between December 17 and January 25 that had been funded prior to the shutdown.¹⁶⁹

Table 1: Government Agencies that Updated Contingency Plans between Dec. 17 and Jan. 25

Agency	Date of Contingency Plan Change ¹⁷⁰	Funded Prior to Shutdown (Y/N) ¹⁷¹
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SERV., R40858, LOCATE AN AGENCY OR PROGRAM WITHIN APPROPRIATIONS BILLS, tbl. 1 (2019) list of agencies and their associated appropriation bills. However, the list is inconclusive.

¹⁶⁹ See Shefali Luthra, *How the Federal Shutdown Is Affecting Health Programs*, NPR (Jan. 3, 2019), <https://www.npr.org/sections/health-shots/2019/01/03/681982370/how-the-federal-shutdown-is-affecting-health-programs> (explaining how the shutdown might affect HHS, even though it had already received appropriations).

¹⁷⁰ INTERNAL REVENUE SERV., FISCAL YEAR 2019: LAPSED APPROPRIATIONS CONTINGENCY PLAN (TAX YEAR 2018 FILING SEASON) (2019), https://home.treasury.gov/system/files/266/IRS-Lapse-in-Appropriations-Contingency-Plan_Filing-Season_2019-01-15.pdf; <https://home.treasury.gov/system/files/266/SIGTARP-Shutdown-Plan-122018.pdf>; TREASURY INSPECTOR GEN. FOR TAX ADMINISTRATION, BUREAU SHUTDOWN PLANS DURING PERIODS OF LAPSED APPROPRIATIONS (2018), https://home.treasury.gov/system/files/266/TIGTA_Shutdown_Plan_v37.pdf; U.S. DEP'T OF AGRIC., FY 2019: SUMMARY OF ACTIVITIES TO BE CONTINUED IN THE EVENT OF A GOVERNMENT SHUTDOWN (2019), <https://www.usda.gov/sites/default/files/documents/usda-shutdown-plan-summary-3.pdf>; *Agency Contingency Plans*, OFF. OF MGMT. & BUDGET, <https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/> (linking to and dating agency contingency plans);

¹⁷¹ Pub. L. No. 115-245, Div. C, §§ 101(4)–(6), 101 (9)–(10) (2018), *amended by* H.J. Res. 143, 115th Cong. (2019) (providing continued funding for Financial Services and General Government, the Department of Homeland Security, Interior, Environment, and Related Agencies, the Department of State, Foreign Operations, and Related Programs, and the Department of Housing and Urban Development through December 21); MURRAY, *supra* note 168, at tbl. 1 (noting that the Chemical Safety and Hazard Investigation Board, Smithsonian Institute, United States Holocaust Memorial Museum, Environmental Protection Agency, and Udall Foundation are funded through the Interior, Environment, and Related Agencies appropriation package, that the Millennium Challenge Corporation, U.S. Africa Development Foundation, the United States Commission for the Preservation of America's Heritage Abroad, Peace Corps, and US Agency for International Development are funded through the State, Foreign Operations, and Related Programs appropriations package, that the Postal Regulatory Commission, Selective Service System, Administrative Conference of the United States, National Archives and Records Administration, D.C., and Securities and Exchange Commission are funded through the Financial Services and General Government appropriations package, and that the Executive Office of the President has divisions funded through both the Interior, Environment, and Related Agencies and Financial Services and General Government appropriation packages); J. Christopher, Chairman, CFTC, Statement on Operations in the Event of a Lapse of Appropriations (Dec. 21, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement122118>; COURT SERVICES AND OFFENDER SUPERVISION AGENCY, <https://web.archive.org/web/20190110021750/https://www.csosa.gov/> (archived on Jan. 10, 2019); DEP'T OF TREASURY, <https://web.archive.org/web/20181222085200/https://home.treasury.gov/> (archived on Dec. 22, 2018); INT'L BOUNDARY WATER COMM'N, U.S. SECTION FY 2019 ABSENCE OF APPROPRIATIONS PLAN 2 (2018), https://www.ibwc.gov/Files/FY19_Absence_of_App_22Dec2018.pdf; Fredreka Schouten, *As 2020 Candidates Emerge, the Shutdown Has Shuttered Agency that Polices Elections*, CNN (Jan. 17, 2019), <https://www.cnn.com/2019/01/17/politics/2020-candidates-federal-election-commission-shutdown/index.html>; *Shutdown Halts Federal Workers from Challenging HR Actions*, BLOOMBERG L. (Dec. 27, 2018), <https://news.bloomberglaw.com/daily-labor-report/shutdown-halts-federal-workers-from-challenging-hr-actions>; Brian Stelter, *Voice of America's Journalists Aren't Getting Paid. They're Still Reporting the News*, CNN (Jan. 20, 2019), <https://www.cnn.com/2019/01/20/media/voice-of-america-shutdown/index.html>; Maya Weber & Bryan Scheid, *With Shutdown in Question, US CFTC Has Plan for Limited Staff to Oversee Markets*, S&P GLOBAL (Dec.

Chemical Safety and Hazard Investigation Board	12/19/18	N
Commodity Futures Trading Commission	12/19/18	N
Consumer Product Safety Commission	12/18/18	N
Court Services and Offender Supervision Agency	12/18/18	N
Department of Health and Human Services	12/18/18	Y
Department of Homeland Security	12/17/18	N
Department of Housing and Urban Development	12/21/18	N
Department of Transportation	12/18/18	N
DC Courts	12/18/18	N
Executive Office of the President	12/21/18	N
Federal Election Commission	12/17/18	N
International Boundary and Water Commission	12/19/18	N
Millennium Challenge Corporation	12/20/18	N
Postal Regulatory Commission	12/21/18	N
Selective Service System	12/18/18	N
Smithsonian Institution	12/18/18	N
Department of Treasury		
<i>Special Inspector General for the Troubled Asset Relief Program</i>	12/20/18	N
<i>Treasury Inspector General for Tax Administration</i>	12/17/18	N
<i>Internal Revenue Service</i>	1/11/19	N
US African Development Foundation	12/18/18	N
US Agency for Global Media	12/17/18	N
US Commission for the Preservation of America's Heritage Abroad	12/20/18	N
US Holocaust Memorial Museum	12/19/18	N
US Merit Systems Protection Board	12/18/18	N
Administrative Conference of the United States	12/24/19	N
Department of Agriculture	1/4/19	N
Environmental Protection Agency	1/14/19	N
Federal Communications Commission	1/10/19	N
National Archives and Records Administration	1/14/19	N
Peace Corps	1/10/19	N
Public Defender Service for the District of Columbia	1/9/19	N
Securities and Exchange Commission	1/2/19	N
Udall Foundation	1/10/19	N
US Agency for International Development	1/15/19	N

21, 2018), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/122118-with-shutdown-in-question-us-cftc-has-plan-for-limited-staff-to-oversee-markets>.

Agencies did not always change their excepted employees list dramatically. For example, the Department of Homeland Security—whose border security operations motivated the shutdown—actually marginally decreased its percent of employee exceptions. It went from excepting 212,220 of its 242,136 employees (approximately 87.6%) in its March 23, 2018 contingency plan to 212,699 of its 245,405 employees in its December 17, 2018 shutdown plan (approximately 86.6%).¹⁷²

However, other agencies saw dramatic changes in their exception list. For example, in one of the most publicized stories of the shutdown,¹⁷³ the IRS went from excepting 9,946 of its 79,868 employees (or approximately 12.5% of its workforce) in its December 3, 2018 contingency plan to 46,052 of its 80,265 employees (approximately 57.4%) in its January 11, 2018 contingency plan.¹⁷⁴ 32,116 of the new exceptions stemmed from changes to the Wage & Investment office’s exception plan, and the “necessary implication” sub-exception justified 32,706 new exceptions.¹⁷⁵ Moreover, 30,481 of the recalled workers returned to work in Submission Processing and Accounts Management Centers to help process tax refunds and Form 1040Xs.¹⁷⁶

¹⁷² Compare U.S. DEP’T OF HOMELAND SEC., PROCEDURES RELATING TO A LAPSE IN APPROPRIATIONS (Mar. 23, 2018), <https://web.archive.org/web/20181227182009/https://www.dhs.gov/sites/default/files/publications/DHS%20Contingency%20Plan%203-23-2018%20FINAL%20-%20508%20Compliant.pdf>, with U.S. DEP’T OF HOMELAND SEC., PROCEDURES RELATING TO A LAPSE IN APPROPRIATIONS (Dec. 17, 2018), https://www.dhs.gov/sites/default/files/publications/DHS%20Procedure%20Related%20to%20a%20Lapse%20in%20Appropriations%20%2812-20-2018%29%20-%20FINAL%20..._0.pdf

¹⁷³ Richard Gonzales, *IRS Recalling 46,000 Workers to Handle Tax Returns Despite Partial Shutdown*, NPR (Jan. 15, 2019), <https://www.npr.org/2019/01/15/685724017/irs-recalling-46-000-workers-to-handle-tax-returns-despite-partial-shutdown>.

¹⁷⁴ Compare INTERNAL REVENUE SERV., *supra* note 170, at Appendix B, with INTERNAL REVENUE SERV., FISCAL YEAR 2019: LAPSED APPROPRIATIONS CONTINGENCY PLAN (NON-FILING SEASON – DECEMBER 8-31, 2018) Appendix B (2018), https://web.archive.org/web/20181222072030/https://home.treasury.gov/system/files/266/IRS-Lapse-in-Appropriations-Contingency-Plan_Nonfiling-Season_2018-12-03.pdf.

¹⁷⁵ Compare INTERNAL REVENUE SERV., *supra* note 170, at Appendix B, with INTERNAL REVENUE SERV., *supra* note 174, at Appendix B.

¹⁷⁶ INTERNAL REVENUE SERV., *supra* note 170, at 124–25, Appendix B.

The jump may not be as dramatic as it seems—since the December 3, 2018 contingency plan predicted a shutdown outside of filing season, whereas the January 11, 2018 update applied to filing season.¹⁷⁷ Still, the updated IRS contingency plan—like its predecessors—never justifies its exceptions beyond categorizing them. So, the updated plan never explains what statute “necessarily implie[s]” that the IRS file tax returns during a shutdown.

Regardless of the underlying motivations, expanded exceptions reveal that the effect of shutdowns on the general population can be reduced—but at the expense of federal workers. Working during the day prevents excepted employees from finding temporary jobs, as their furloughed counterparts often do.¹⁷⁸ Additionally, excepted employees usually cannot file for unemployment benefits—unlike furloughed employees.¹⁷⁹

The federal government, though, can also reduce the effect of a shutdown by exploiting loopholes in existing appropriations. For example, the U.S. Department of Agriculture (USDA) announced that it would evade the shutdown’s effects by issuing February food stamp benefits by January 20, 2019.¹⁸⁰ USDA justified the distribution by pointing out that the last-passed CR allowed it to make distributions within 30 days of December 21, 2018.¹⁸¹ Further, while agencies have historically sought to distance their shutdown actions from the appearance of

¹⁷⁷ *IRS to Release Shutdown Contingency Plan Covering Filing Season*, RIA FEDERAL TAX UPDATE (Jan. 8, 2019).

¹⁷⁸ Jack Healy, *From Federal Worker to Uber Driver: Odd Jobs to Make Ends Meet in the Shutdown*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/government-shutdown-moonlighting-uber.html>.

¹⁷⁹ U.S. OFFICE OF PERS. MGMT., FACT SHEET: PAY AND BENEFITS INFORMATION FOR EMPLOYEES AFFECTED BY THE LAPSE IN APPROPRIATIONS (2019), <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/fact-sheet-pay-and-benefits-information-for-employees-affected-by-the-lapse-in-appropriations.pdf>. *But see* Caroline Kelly, *Some States Moving to Give Unemployment Benefits to Federal Employees Working without Pay*, CNN (Jan. 25, 2019), <https://www.cnn.com/2019/01/23/politics/states-unemployment-essential-workers/index.html> (explaining how states attempted to change unemployment insurance policies during the shutdown).

¹⁸⁰ Press Release, U.S. Dep’t of Agric., USDA Announces Plan to Protect SNAP Participants’ Access to SNAP in February (Jan. 18, 2019), <https://www.fns.usda.gov/news-item/usda-announces-plan-protect-snap-participants-access-snap-february>.

¹⁸¹ *Id.*; *see also* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Div. C § 110 (2018), *amended by* H.J. Res. 143, 115th Cong. (2019).

presidential influence,¹⁸² USDA stated that it decided to seek SNAP-distribution solutions “[a]t the direction of President Donald J. Trump.”¹⁸³ Additionally, although issuing SNAP benefits certainly helped SNAP beneficiaries, it was an imperfect solution. Once SNAP funds expire, SNAP cards freeze.¹⁸⁴ As a result, the early issuance of funds that would quickly expire forced SNAP beneficiaries to rapidly spend their benefits on food that would last them for over one month,¹⁸⁵ and it forced supermarkets to confront a potentially large and unanticipated spike in purchases.¹⁸⁶

The shutdown finally ended on January 25, 2019, when the Senate passed and the president signed H.J. Res. 28, a CR funding the government until February 15, 2019.¹⁸⁷ Interestingly, while the House’s support of border wall funding triggered the shutdown, the swearing in of the new Congress on January 3, 2019 led the House to switch from Republican to Democratic control.¹⁸⁸ So, between January 3 and January 25, the House passed 10 continuing resolutions that would fund the government and withhold border funding, including H.J. Res. 28 on January 23, 2019.¹⁸⁹ Meanwhile, the Republican-controlled Senate, which had originally refused to even vote on a CR promising border wall funding, temporarily refused to consider any of the House-

¹⁸² See *supra* notes 107–109 and accompanying text.

¹⁸³ Press Release, *supra* note 180.

¹⁸⁴ *Q&A for SNAP Recipients in the Event of a Government Shutdown*, U.S. DEP’T OF AGRIC., <https://www.fns.usda.gov/snap/2015-qas>.

¹⁸⁵ Rosenbaum, *supra* note 4.

¹⁸⁶ Helena Bottemiller Evich, *Billions in Food Stamp Payments to Come Early Because of Shutdown*, POLITICO (Jan. 11, 2019), <https://www.politico.com/story/2019/01/11/shutdown-food-stamp-scramble-benefits-1081210>.

¹⁸⁷ *Actions Overview: H.J.Res.28 – Further Additional Conditional Appropriations Act, 2019*, CONG., <https://www.congress.gov/bill/116th-congress/house-joint-resolution/28/actions>.

¹⁸⁸ N.Y. Times, *116th Congress Updates: House Approves Plan to Reopen Government, but It’s Not Likely to Pass Senate*, N.Y. TIMES (Jan. 3, 2019), <https://www.nytimes.com/2019/01/03/us/politics/new-congress.html>.

¹⁸⁹ Press Release, House Comm. on Appropriations, *House Passes Tenth Bill to Reopen Government, End Trump Shutdown* (Jan. 24, 2019), <https://appropriations.house.gov/news/press-releases/house-passes-tenth-bill-to-reopen-government-pay-federal-employees> (“Since January 3, the House has passed 10 bills to reopen the federal government. That includes this Continuing Resolution for Homeland Security, a package of six conferenced appropriations bills, a CR through February 28, an emergency disaster appropriations bill that included a CR through February 8, four individual bipartisan Senate appropriations bills, a package of six bipartisan Senate appropriations bills, and a CR for Homeland Security through February 8.”).

passed CRs without assurances that President Trump would not veto it.¹⁹⁰ On January 22, Senate Majority Leader Mitch McConnell scheduled two votes for January 24th—one on a continuing resolution that included \$5.7 billion of border wall funding and protections for DACA recipients, and another that offered no border wall funding.¹⁹¹ Neither passed.¹⁹² The following day, the Senate passed H.J. Res. 28.¹⁹³

While Congress authorized backpay to furloughed employees during the shutdown through the Government Employees Fair Treatment Act, it waited until H.J. Res. 28 to provide backpay for state employees furloughed as a result of the federal shutdown and to reimburse state governments that kept programs affected by the government shutdown open.¹⁹⁴

V. Automatic Continuing Resolutions

Automatic continuing resolutions (ACRs) offer a potential shutdown solution. They would go into effect whenever Congress fails to pass appropriation bills or CRs, thus preventing a funding lapse from ever taking place. An ACR would reduce the consequences of failing to pass appropriations bills to below even the pre-1980 level, when funding lapses would still have minor effects on funding.¹⁹⁵ (Given how many exceptions have been built into the Civiletti framework, though, an ACR regime may not be that much more lenient than the current regime.)

¹⁹⁰ *But see* STATUS OF APPROPRIATIONS BILLS, FIRST SESSION, ONE HUNDRED SIXTEENTH CONGRESS (2019), <https://www.govinfo.gov/content/pkg/CCAL-116scal-2019-01-28/pdf/CCAL-116scal-2019-01-28-pt10.pdf> (showing that the Senate placed H.R. 266 and H.R. 268 on January 15 and January 22, respectively).

¹⁹¹ Sheryl Gay Stolberg & Julie Hirschfeld Davis, *Senate Leaders Plan Competing Bills to End Shutdown*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/government-shutdown-senate.html>.

¹⁹² Annie Daniel, Jasmine C. Lee & Sara Simon, *How Every Senator Voted on Ending the Government Shutdown*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/politics/government-shutdown-live-vote.html>; Sean Sullivan & Paul Kane, *'This is your Fault': GOP Senators Clash over Shutdown inside Private Luncheon*, WASH. POST (Jan. 24, 2019), https://www.washingtonpost.com/powerpost/this-is-your-fault-gop-senators-clash-over-shutdown-inside-private-luncheon/2019/01/24/cde0ca22-2045-11e9-8b59-0a28f2191131_story.html?utm_term=.59be8023623f.

¹⁹³ *Actions Overview*, *supra* note 187.

¹⁹⁴ H.J. Res. 28, 116th Cong. § 1 (2019).

¹⁹⁵ *See supra* note 27–33 and accompanying text.

Congress has expressed an interest in ACRs since the 1980s.¹⁹⁶ However, despite its persistent flirtations with ACRs, Congress has only ever enacted one: the Pay our Military Act, which guaranteed funding for the military during the 2013 shutdown.¹⁹⁷ One other ACR has passed Congress, only to fall to a presidential veto.¹⁹⁸ No other ACR proposal has passed a single chamber of Congress.¹⁹⁹

ACRs generate several design choices. The simpler of the two relates to whether or not the ACR will sunset.²⁰⁰ Outside of the budget context, sunset provisions are popular amongst small government advocates, since they retire laws by default.²⁰¹ Assuming that laws become outdated, this prevents the accumulation of unnecessarily restrictive laws.²⁰² In the budget context, this argument still holds water. George K. Yin, for example, argues that sunset provisions improve the budget process, since they force Congress to regularly confront the costs of its provisions.²⁰³

Still, sunset provisions also allow Congress to game the reconciliation process, which prevents filibusters. After all, the Byrd rule excludes legislation that would increase the deficit beyond the budget window from the reconciliation process.²⁰⁴ So, limiting an ACR's timeframe to a given budget window would allow it to slip past the Byrd rule. This is a notable feature, given fears that proposed ACR sunset provisions have been meant to hamstring the minority

¹⁹⁶ JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R41948, AUTOMATIC CONTINUING RESOLUTIONS: BACKGROUND AND OVERVIEW OF RECENT PROPOSALS tbl. 1–2 (2015). Tables 1 and 2 are reproduced at *infra* Appendix IV.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ *Id.*; ROBERT KEITH, CONG. RESEARCH SERV., RL30339, PREVENTING FEDERAL GOVERNMENT SHUTDOWNS: PROPOSALS FOR AN AUTOMATIC CONTINUING RESOLUTION 8–9 (2000).

¹⁹⁹ TOLLESTRUP, *supra* note 196, at tbl. 1–2.

²⁰⁰ *Id.* at 4.

²⁰¹ Vern McKinley, *Sunrises without Sunsets: Can Sunset Laws Reduce Regulation?*, 4 REG. 57 (1995), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/1995/10/v18n4-6.pdf>.

²⁰² *Id.*

²⁰³ George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. Rev. 174, 201–02 (2009) (“Yet by adopting the credit as a temporary measure and then extending it only in short-term increments, Congress has had to take its cost into account in the legislative process for every one of its over twenty-five years of existence, a period far longer than that of any budget window thus far.”).

²⁰⁴ Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. Rev. 656, 665 (2007).

party. In 1999, Senate Democrats noted that the Republican-proposed ACR, which would sunset after two years, would, “until the end of this administration[,] . . . give[] more leverage to the congressional majority at the pence of the minority and the White House.”²⁰⁵

Nevertheless, the more complicated ACR choice relates to funding amount. In a 1986 report, GAO catalogued possible ACR funding arrangements. These included a “current rate approach”—in which the ACR simply funds government operations at the current rate²⁰⁶—and a “current operating level approach,” in which the ACR funds the government at the level necessary to support operations at the same level.²⁰⁷ GAO also offered more novel strategies—including one in which the ACR sets funding at the level set in “legislation passed by either house,” at the “[l]evel representing [the] lower of House[-] or Senate[-passed] actions,” or at the level the president suggests in his budget.²⁰⁸ Another category of ACRs guarantees reduced spending. These spending cuts can take the form of across-the-board “graduated reduction” policies that “decrease [spending] by a set percent at regular intervals” or of one-time “fixed reduction[.]” policies.²⁰⁹ Alternately, these spending cuts can focus on certain programs—for example, by limiting cost of living adjustments to entitlement programs or cutting expenditures for certain “support services.”²¹⁰

Expressing a preference for “easy to implement” solutions that enable “stable services” and “stable operations,” “provide incentives for the Congress to act on appropriations bills” and preserve congressional authority over appropriations, GAO evaluated each of the models it

²⁰⁵ S. Rept. 106-15, at 10.

²⁰⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO/AFMD-86-16, APPROPRIATIONS: CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES 34 (1986).

²⁰⁷ *Id.* at 34.

²⁰⁸ *Id.* at 34–35.

²⁰⁹ *Id.* at 35.

²¹⁰ *Id.* at 35–36.

described.²¹¹ GAO found that the “current rate approach” and “legislation passed by either house approach” performed best.²¹² However, it dismissed the “legislation passed by either house approach” because, by excluding the president from the appropriations process, it would shift “political advantage” too dramatically.²¹³

Despite GAO’s preference for current rate ACRs, all of the ACRs that Congress has considered—either in committee or through floor amendments—have been operations-based.²¹⁴ GAO originally criticized current operations approaches for dulling Congress’s incentives to pass new appropriations bills, relative to the current rate approach²¹⁵—presumably because it insulates Congress from the risk that last year’s rate will no longer cover an equal number of operations this year. However, Congress’ operations-based ACR proposals have often included cost- or operation-capping provisions.²¹⁶ For example, the Budget Process Reform Act of 1991 (H.R. 298) called for an ACR set “at a rate of operations not in excess of the rate of operations provided for such program, project or activity in [the most recent appropriation] Act,” but not “exceed[ing] the appropriation for such program, project, or activity in the most recent appropriation Act.”²¹⁷

Other suggested ACRs, while capping operations cost, do not seem responsive to GAO’s concerns that operations-based metrics will reduce the political costs for failure to pass

²¹¹ *Id.* at 37–38.

²¹² *Id.* at 39.

²¹³ *Id.* at 39–40.

²¹⁴ See *infra* notes 216–220; see TOLLESTRUP, *supra* note 196, at tbl. 1–2; Richard Kogan, *Proposal for Automatic Continuing Resolutions Would Likely Make It Harder to Pass Regular Appropriations Bills*, CTR. ON BUDGET & POL’Y PRIORITIES (June 24, 2004), <https://www.cbpp.org/archiveSite/6-22-04bud3.htm>.

²¹⁵ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 206, at 66. GAO also criticized the current operations approach as less “easy to implement.”

²¹⁶ *But see* H.Amdt.709, H.R. 853, 106th Cong. § 631 (2000), reprinted in 164 CONG. REC. H3,128 (daily ed. May 16, 2000); H.Amdt. 1298, H.R. 3756, 104th Cong. § 90002 (1997) (“Appropriations and funds made available, and authority granted for a program, project, or activity for fiscal year 1998 pursuant to this title shall be at 100 per cent of the rate of operations that was provided for the program, project, or activity in fiscal year 1997 in the corresponding regular appropriation Act for fiscal year 1997.”).

²¹⁷ H.R. 298, 102d Cong. § 401 (1991).

appropriations. Rather, like S. 672—which offered an ACR set at 98% of last year’s operations²¹⁸—they view pegging future operations at lower rates an advantage of the ACR, not a disadvantage intended to incentivize the traditional appropriations process. Some of these bills have capped operations at whichever is lowest: the rate suggested in the last passed appropriations bill or joint resolution, the rate suggested in the president’s budget, or “the annualized rate of operations provided for in the most recently enacted joint resolution making continuing appropriations for part of that fiscal year.”²¹⁹ Other bills follow that model, but—reflecting a view of Congress’ central role in appropriations—switch “the president’s budget” entry out for “the rate of operations provided for in the regular appropriations bill as passed by the House of Representatives or the Senate for the fiscal year in question.”²²⁰ Lastly, H. Amdt. 1298 to H.R. 3756 offered an operations rate set at the lowest of all the previously described options: the rate suggested in the last passed appropriations bill or joint resolution, “the rate of operations provided for in the House or the Senate passed appropriation bill for the fiscal year in question.” the rate suggested in the president’s budget, or “the annualized rate of operations provided for in the most recently enacted joint resolution making continuing appropriations for part of that fiscal year.”²²¹

Of the ACR proposals to date, the “End Government Shutdowns Act,” introduced during the 20182019 shutdown, best embodies GAO’s concerns regarding Congress’ incentives. The End Government Shutdowns Act combines the current operations approach with the “graduated

²¹⁸ S. 672, 105th Cong. § 702(b) (1997).

²¹⁹ S. 93, 106th Cong. § 402 (1999); S. 558, 106th Cong. § 2 (1999).

²²⁰ H.Amdt.613, H.R. 4663, 108th Cong. (2004), *reprinted in* 150 CONG. REC. H4,986 (daily ed. June 24, 2004) (noting that “the lower of these two version shall be ignored for any project or activity for which there is a budget request if no funding is provided for that project or activity in either version”); H.Amdt. 621 H.R. 4663, 108th Cong. (2004), *reprinted in* 150 CONG. REC. H5,021 (daily ed. June 24, 2004); S.Amdt. 13, S. 1, 110th Cong. (2007), *reprinted in* 153 CONG. REC. S321 (daily ed. Jan. 10, 2007); H.R. 3800, 108th Cong. § 141 (2004).

²²¹ H.R. Amdt. 1298, H.R. 4663, 104th Cong. (1996), *reprinted in* 142 CONG. REC. H7,693 (1996).

reduction” approach.²²² It suggests an ACR that would fund government activities at the current rate of operations for the first 120 days, but then reduce the rate of operations “by 1 percentage” and continue to do so “[f]or every subsequent 90-day period” without a new appropriations bill.²²³

Operations approaches, though—even when tempered by cost- or operation-capping mechanisms—might have pay-as-you-go (PAYGO) implications.²²⁴ PAYGO requires that automatic sequestrations or additional revenue-raising actions offset any increase in spending.²²⁵ This can shape an ACR’s consequences in two ways. First, the continuing operations approach can lead to an expected increase in outlays and, thus, to sequestrations.²²⁶ The Congressional Budget Office (CBO) predicted this outcome in 1999, when it estimated that S. 558 would produce \$330 million in “net changes in outlays that are subject to pay-as-you-go procedure” in 2000 and \$130 million in 2001.²²⁷ Second, in the event that the ACR generates surpluses, the ACR mechanism would make it easier to spend that surplus on tax cuts spending on government services.²²⁸

PAYGO aside, other reasons justify the chilled response to ACRs. ACRs would save public and private actors the monetary costs and Congress the reputational costs associated with shutdowns.²²⁹ They would also put an end to budget brinksmanship—in which Congress uses the threat of a shutdown as a bargaining chip in policy debates.²³⁰ However, by taking away the

²²² *Supra* notes 207–209 and accompanying text.

²²³ S. 104, 116th Cong. § 2 (2019).

²²⁴ CONG. BUDGET OFF., CONGRESSIONAL BUDGET COST ESTIMATE: S. 558, GOVERNMENT SHUTDOWN PREVENTION ACT (1999); TOLLESTRUP, *supra* note 196, at 11–12.

²²⁵ TOLLESTRUP, *supra* note 196, at 11–12; S. Rep. No. 106-15, at 15 (1999).

²²⁶ CONG. BUDGET OFF., *supra* note 224, at 3; TOLLESTRUP, *supra* note 196, at 11–12.

²²⁷ CONG. BUDGET OFF., *supra* note 224, at 3.

²²⁸ S. Rep. No. 106-15, at 15 (1999) (“These proposals would create a built-in bias toward spending entire on-budget surpluses on tax cuts.”).

²²⁹ TOLLESTRUP, *supra* note 196, at 6–7.

²³⁰ TOLLESTRUP, *supra* note 196, at 8.

threat of a shutdown, ACRs may also decrease the benefits of compromise.²³¹ After all, regardless of how much or little parties strive for compromise, the government will remain open. In 1999, this point concerned Senate Democrats, who warned that “under this [ACR-creating] bill, a congressional majority could decide to pass bills in which they want increases and not pass bill[s] in which the Administration or a minority in Congress wants increases.”²³² Further, by decreasing Congress’ drive to pass new appropriations bills, it increases the likelihood that Congress will use the ACR formula—which is derived from a previous year’s needs and, as a result, entrenches the “status quo.”²³³ Additionally, even though CRs are preferable to shutdowns, they still create uncertainty, so making their use low-cost could have negative implications.²³⁴

VI. Conclusion

Since 1980, the consequences of government shutdowns have shifted from paralyzing to manageable. While concerns about separation of powers and Congress’ central role in appropriations have lingered in the background, a series of DOJ opinions and an OMB infrastructure have facilitated this shift. Further, the October 2013 and December 2018 to January 2019 shutdowns reveal how agencies adapt to shutdown conditions. Today, Congress’ on-and-off interest in ACRs provide a possible solution to shutdowns. However, it is unclear how much of a practical difference formally halting shutdowns would make. Additionally, ACR

²³¹ Kogan, *supra* note 214 (arguing that ACRs “would provide strong incentives for Members of Congress who oppose various appropriations bills to impede progress on them”); TOLLESTRUP, *supra* note 196, at 10.

²³² S. Rep. No. 106-15, at 10.

²³³ TOLLESTRUP, *supra* note 196, at 9–10; *see also* S. Rep. No. 106-15, at 10 (1999) (“[T]his legislation would have the effect of reducing the leverage of those who want to change appropriation levels to respond to new conditions and changing needs, or to reflect new priorities within or outside the government.”).

²³⁴ Richard Kogan & Paul N. Van de Water, *Automatic Continuing Resolutions Not a Good Solution for Government Shutdowns*, CTR. ON BUDGET & POL’Y PRIORITIES (Jan. 30, 2009), <https://www.cbpp.org/research/federal-budget/automatic-continuing-resolutions-not-a-good-solution-for-government>; *see generally* U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-368T, BUDGET ISSUES: CONTINUING RESOLUTIONS AND OTHER BUDGET UNCERTAINTIES PRESENT MANAGEMENT CHALLENGES (2018).

solutions would have significant effects on Congress' appropriations process and might further muddle the appropriations process' implications for separation of powers.

VII. Appendix I: Appropriations Funding Gaps Since 1977²³⁵

Fiscal Year	Final Date of Budget Authority	Full Day(s) of Gap	Date Gap Terminated
1977	Thursday, 9/30/76	10	Monday, 10/11/76/
1978	Friday, 9/30/77	12	Thursday, 10/13/77
1978	Monday, 10/31/77	8	Wednesday, 11/09/77
1978	Wednesday, 11/30/77	8	Friday, 12/09/77
1979	Saturday, 9/30/78	17	Wednesday, 10/18/78
1980	Saturday, 9/30/79	11	Friday, 10/12/79
1982	Friday, 11/20/81	2	Monday, 11/23/81
1983	Thursday, 9/30/82	1	Saturday, 10/02/82
1983	Friday, 12/17/82	3	Tuesday, 12/21/82
1984	Thursday, 11/10/82	3	Monday, 11/14/83
1985	Sunday, 9/30/84	2	Wednesday, 10/03/84
1985	Wednesday, 10/03/84	1	Friday, 10/05/84
1987	Thursday, 10/16/86	1	Saturday, 10/18/86
1988	Friday, 12/18/87	1	Sunday, 12/20/87
1991	Friday, 10/05/90	3	Tuesday, 10/09/90
1996	Monday, 11/13/95	5	Sunday, 11/19/95
1996	Monday, 12/15/95	21	Saturday, 01/06/96
2014	Monday, 9/30/13	16	Thursday, 10/17/13
2018	Friday, 1/19/18	2	Monday, 1/22/18
2019	Friday, 12/21/18	34	Friday, 1/25/19

SATURNO, *supra* note 12, at tbl. 1.

²³⁵ SATURNO, *supra* note 12, at tbl. 1.

VIII. Appendix II: Relevant Anti-Deficiency Act Provisions²³⁶

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</p> <p>Amended emergency exception to say: No officer or employee of the United State 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>

²³⁶ Source: Seam & Brad Shron, *supra* note 1, at Appendix I.

<p>At the time of the 1980 and 1981 OAG opinions</p>	<p>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]</p>	<p>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]</p>
<p>1982</p>	<p>Re-codified as § 1341: (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; (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.</p>	<p>Re-codified as § 1342: 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>
<p>1990</p>	<p>Added: (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 (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: 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 (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>
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*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.
- (1) 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.

IX. Appendix III: Taxonomy of Post-Civiletti Opinions

Civiletti Exception	Source	Expansions
For “obligations [that] are . . . funded by moneys, the obligational authority for which is not limited to one year, e.g., multi-year appropriations”	31 U.S.C. § 1341(a)(1) (2018).	
For “obligations [that] are . . . authorized by statutes that expressly permit obligations in advance of appropriations”	31 U.S.C. § 1341(a)(1) (2018).	Can encompass DOJ testimony before Congress. Participation in Congressional Hearings During an Appropriations Lapse, 19 Op. O.L.C. 301 (1995).
For “obligations [that] are . . . authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in the agency.”	31 U.S.C. § 1341(a)(1) (2018).	Can encompass DOJ testimony before Congress. Participation in Congressional Hearings During an Appropriations Lapse, 19 Op. O.L.C. 301 (1995). Encompasses functions that are necessary to support “funded functions.” Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions during the Lapse in the Department’s Appropriations, 19 Op. O.L.C. 337 (1995).
For presidential activities	Article II “Necessary implication” sub-exception. Authority to Employ the Services of White House Office Employees during an Appropriations Lapse, 19 Op. O.L.C. 235 (1995). President’s hiring authority and comptroller general pay opinions. Authority to Employ the Services of	

	<p>White House Office Employees during an Appropriations Lapse, 19 Op. O.L.C. 235 (1995).</p> <p>“Necessary implication” and “authorized by law” sub-exceptions, by way of the Annual and Sick Leave Act. Authority to Employ White House Office Personnel Exempt from the Annual and Sick Leave Act under 51 U.S.C. § 6301(2)(X) and (XI) during an Appropriations Lapse,” 36 Op. O.L.C. 1 (2011).</p>	
For emergencies		<p>“[A]ssume the continued operation of the private economy.” Government Operations in the Event of a Lapse in Appropriations, 1995 WL 17216091 , at *4 (Aug. 16, 1995).</p>

X. Appendix IV: ACR Proposals

Table 1: Committee Action on ACR Proposals

Congress	Bill No.	Introduced	Committees (Subcommittees)	Hearings	Reported
102 nd	H.R. 298	1/03/1991	Rules (Legislative Process)	9/18/1991, 9/25/1991 (Legislative Process)	
			Appropriations		
			Government Operations		
105 th	S. 672	4/30/1997	Appropriations		S. Rept. 105-16
106 th	S. 93	1/19/1999	Budget	1/27/1999	
			Governmental Affairs	1/27/1999	
106 th	S. 558		Governmental Affairs		S. Rept. 106-15
106 th	H.R. 853	2/25/1999	Appropriations		H.Rept. 106-98 (Part I)
			Budget	5/20/1999	H.R. 98 (Part 2)

Source: TOLLESTRUP, *supra* note 196, at tbl. 1.

Table 2: Floor Action on ACR Proposals

Congress	Amdt. No.	Bill No.	Date First Considered	House Floor Action	Senate Floor Action	Resolving Differences	Presidential Action
104 th	H.Amdt. 1298	H.R. 3756	7/17/1996	Point of order sustained			

105 th	H.Amdt. 99	H.R. 1469	5/15/1997	Passed, 227/197	Substituted, text o S. 672 by U.C.	H.Rept. 105- 119	Vetoed
106 th	H.Amdt. 709	H.R. 853	5/16/2000	Failed, 173- 236			
108 th	H.Amdt. 613	H.R. 4663	6/24/2004	Failed, 111- 304			
108 th	H.Amdt. 621	H.R. 4663	6/24/2004	Failed, 88-326			
110 th	S.Amdt. 13	S. 1	1/10/2007			Motion to waive Budget Act failed, 25- 72; amendment failed	

Source: TOLLESTRUP, *supra* note 196, at tbl. 2.