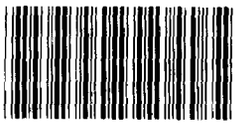
BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Funding Gaps Jeopardize Federal Government Operations



Interruptions in Federal agency funding at the beginning of the fiscal year and operating on continuing resolutions have become the norm rather than the exception. Over the past 20 years, 85 percent of the appropriations bills for Federal agencies have passed after the start of the fiscal year.

During the usual deliberations process on appropriations for fiscal year 1981, it became clear that a funding gap might develop. In response to the President's request for an opinion of the Antideficiency Act, the Attorney General ruled that the Act required agencies to terminate operations when appropriations expire, and promised to enforce the criminal penalties of the Act in cases of future willful violation. This resulted in substantial confusion throughout the Federal Government.

GAO recommends that Congress enact permanent legislation to allow all agencies to incur obligations, but not expend funds, when appropriations expire (except where a program's authorization has expired or Congress has expressly indicated otherwise).

PAD-81-31
MARCH 3, 1981

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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To the President of the Senate and the
Speaker of the House of Representatives

This report addresses the problems created by late appropriations and interruptions in funding which occur when continuing resolutions are not passed before the beginning of the fiscal year. It describes the factors which delay the enactment of funding legislation. It also recommends action to prevent the confusion and decrease the costs that have been associated with funding gaps.

Copies of this report have been sent to the Secretary of Treasury, the Attorney General, and the Director of the Office of Management and Budget.

Comptroller General
of the United States

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COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

FUNDING GAPS JEOPARDIZE FEDERAL GOVERNMENT OPERATIONS

D I G E S T

Instances when Federal managers have not had approved budget authority with which to carry out their responsibilities at the beginning of the fiscal year have become the norm rather than the exception.

Congress can provide for continued operations by passing a continuing resolution that provides temporary funding until appropriations bills have been passed. Over the past 20 years, however, 85 percent of the appropriations bills for Federal agencies have been passed after the beginning of the fiscal year. This has required 74 continuing resolutions. In the last 2 fiscal years, even the continuing resolutions have been late. These funding interruptions, or gaps, of 1979 and 1980 resulted in unnecessary costs and extensive confusion. (See pp. 1 to 2, 7 to 9.)

Under the Antideficiency Act, Federal agencies are prohibited from incurring obligations in advance of appropriations without congressional approval. (See p. 2.)

In the past, most Federal managers continued to operate during periods of funding gaps while minimizing all nonessential operations and obligations, believing that Congress did not intend that agencies close down while the appropriations measures were being passed. (See p. 2.)

During the normal deliberations process on appropriations for fiscal year 1981, it became clear that a funding gap might develop. In April 1980, the President had asked the Attorney General

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appropriations bills) are a major cause of gaps. Their numbers have increased, delaying the passage of regular appropriations because they often embody volatile political issues, such as abortion and congressional pay raises. Riders have also increasingly been attached to continuing resolutions. (See pp. 10 to 13.)

FUNDING GAPS HAVE BEEN COSTLY

GAO determined that gaps are costly. Besides lost productivity of Federal workers, gaps have resulted in:

--a loss of about $1 million to issue split or late paychecks in October 1979. (See pp. 14 to 16, 29.)

--a loss of about $1.1 million to prepare agency plans for a possible gap in October 1980 (See pp. 19, 27 to 29.)

PROBLEMS RELATED TO THE ATTORNEY GENERAL'S OPINION

Agencies were uncertain how to respond to the Attorney General's opinion and what activities they would be able to continue if appropriations expired. (See pp. 18 to 20.)

Guidance from the Department of Justice and OMB was inconsistent. Neither provided clear instructions for agencies to follow. Some agencies in Washington, D.C., Atlanta, and Denver delayed preparing plans for a shutdown until October 1, and others made rather detailed plans for shutting down. Both the lack of guidance and their own belief that they would not be forced to shut down when funds expired delayed some agency planning. (See pp. 21 to 23, 31 to 33.)

Last-minute instructions from OMB, with the Attorney General's concurrence, prevented the implementation of shutdown plans that several agencies in Washington, D.C. may otherwise have implemented when funding expired on October 1. (See pp. 24 to 27.)

to issue an opinion of the Antideficiency Act. The Attorney General stated that Federal managers must act immediately to terminate all operations when their current appropriations expire. Most importantly, the Attorney General stated that the Department of Justice would strictly enforce the criminal provisions of the Antideficiency Act in cases of future willful violations. (See pp. 2 to 3.)

In September 1980, it became evident that many appropriations acts would not be passed by the start of fiscal year 1981. This, plus the Attorney General's decision to enforce the Act, created confusion within Federal agencies. Employees became unsure of whether they would be allowed to report to work. Finally, a few hours after the start of fiscal year 1981, Congress passed a continuing resolution that provided authority with which to continue operations. A crisis was averted, but because the effect of such events on normal Government operations is so significant, GAO decided to identify and develop alternative approaches to this problem. (See pp. 4 to 6, 14 to 24.)

To determine how agencies responded to gaps in funding both before and after the Attorney General's opinion, GAO developed a uniform set of questions, and interviewed members of 12 Cabinet Departments, 4 independent agencies, the Office of Management and Budget (OMB), and several agencies that administer large entitlement programs. GAO obtained agency plans to terminate operations in compliance with the Attorney General's opinion if a funding gap occurred. The work was conducted primarily in Washington, D.C., but included agencies in two regional offices --Atlanta and Denver. (See pp. 4 to 7.)

WHY FUNDING GAPS HAVE OCCURRED

Riders (congressional amendments on

bidden or made to require a two-thirds vote for passage. (See pp. 41 to 44.)

--Continuation of the pay of Federal civilian and military employees could be provided for in periods of expired appropriations. (See pp. 44 to 45.)

RECOMMENDATION TO CONGRESS

The Congress should enact permanent legislation to allow all agencies to incur obligations, but not expend funds, when appropriations expire (except where program authorization has expired or Congress has expressly stated that a program should be suspended during a funding hiatus pending further legislative action). This solution maintains congressional control over agency spending and provides clear instructions and guidance to agencies. It resolves the confusion and uncertainty which has accompanied past funding gaps and minimizes the costs associated with them. It provides the exception necessary to avoid the Antideficiency Act's restriction on incurring obligations in advance of appropriations. The Act is the basic statute preventing the unauthorized obligation or expenditure of Federal funds. (See pp. 45 to 46.)

The Congress should also study additional measures to relieve pressure on the budgetary process. Such measures could include shifting more programs to authorization and appropriations cycles of 2 or more years, and establishing and adhering to a reserve for fall and spring adjustments for emergencies and uncontrollable cost growth. (See pp. 46 to 47.)

AGENCIES COMMENTS

GAO provided the report in draft to the Department of Justice, OMB and the Department of the Treasury but did not

APPROACHES TO THE PROBLEM:

GAO developed criteria against which to evaluate approaches to the problem of funding gaps. (See pp. 34 to 37.) The approaches discussed in this report are as follows:

--Congress could enact permanent legislation authorizing agencies to incur obligations, but not expend funds, for continued operations during periods of expired appropriations (except where program authorization has expired or Congress has expressly stated that a program should be suspended during a funding hiatus pending further legislative action.) (See pp. 38 to 39.)

--The Antideficiency Act could be amended to allow agencies to incur obligations for continued operations when appropriations expire due to delays in enacting new appropriations. (See pp. 39 to 40.)

--The rules of both Houses could be amended to require all appropriations acts to include language conferring authority to continue to incur, but not liquidate, obligations at the level authorized until superseded by another funding measure, or attach instructions on suspending operations if funding is unavailable at the beginning of the fiscal year. (See p. 40.)

--A permanent continuing resolution could provide authority to continue all operations at some specified level, such as average expenditures for the prior fiscal year. (See p. 41.)

--Limitation and legislative riders on appropriations bills and continuing resolutions could be for-

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receive official comments from OMB or Treasury. The length of time provided for response (15 days) may not have been adequate. Any comments received subsequent to the report's publication will be forwarded to the appropriate congressional committees or offices.

A Department of Justice official provided official oral comments on the report, and suggested that information on the Attorney General's January 16, 1981, opinion be added to the report. This material has been added, and the full text of the opinion is contained in Appendix VIII. (See p. 49.)

CHAPTER 1

INTRODUCTION

In the last 20 years, the start of a new fiscal year has often found many Federal agencies in legal and budgetary limbo--a period during which they have no authority to incur obligations or to make payments. All three branches of the Federal Government derive their authority to operate--that is, to spend money--from Congress. As each Federal fiscal year draws to a close on September 30, continued Government operations depend on whether Congress has enacted appropriations; or in the absence of such acts, whether Congress has passed a continuing resolution that allows agencies to spend at some specified level. 1/ If Congress has taken neither action by October 1, in general, Federal agencies no longer have funds to meet payrolls and other expenses. 2/ When this situation occurs, affected agencies are caught in what has become known as an appropriations or funding gap.

GAPS IN FUNDING: AN INCREASING PHENOMENON

Instances when Federal managers have not had approved budget authority with which to carry out their responsibilities at the beginning of the fiscal year have become the norm rather than the exception. From FY 62 to FY 81, 32 gaps totalling 291 days, have occurred. Most frequently affected have been the Departments of Health and Human Services (formerly the Department of Health, Education, and Welfare (HEW)), Education (formerly part of HEW), and Labor. In fiscal years 1979 and 1980, budget authority for these agencies lapsed respectively 17 and 11 days.

1/Through the appropriations acts it passes, Congress grants budget authority to agencies, which permits them to incur obligations and hence to spend Federal funds. In this report, we use the terms "funds," "appropriations," "spending" and "money" to refer to budget authority granted in appropriations acts.

2/The Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344), established October 1 as the start of the fiscal year. Article I Section 9 of the Constitution precludes Federal spending without an appropriation.

APPENDIX

Moreover, the Attorney General swept aside, as a legal basis for continuing operations, the assumption that Congress does not intend that the Federal Government close down.

> "I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act." 1/

The problem at hand, the one we discuss in this report, is how will the Attorney General's opinion affect the operations of the Federal Government in the event of another appropriations gap. In our view, it is clearly not the intent of Congress to terminate, or to begin termination, of Federal Government operations during a funding hiatus. In an opinion (March 3, 1980) of the Comptroller General of the United States, issued at the request of the Chair of the House Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service, we observed that:

> "The only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted." 2/

However, we went on to conclude: "* * * we do not believe that the Congress intends that Federal agencies

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1/Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President (April 25, 1980), p. 4.

2/Opinion of the Comptroller General, in a letter from Elmer B. Staats to Rep. Gladys N. Spellman, B-197841 (March 3, 1980), p.3.

The Department of the Interior ran a close second. In FY 79 Interior experienced a 16-day gap and in FY 80 an 11-day gap.

Funding gaps pose a real dilemma for the heads of Federal departments and agencies. By law, they are prohibited from incurring obligations without congressionally approved authority to do so. The Antideficiency Act (31 U.S.C., Sect. 665(a)) states that no Federal official or officer may authorize Government obligations or expenditures in advance of or in excess of an appropriation, unless otherwise authorized by law. Yet Federal agencies have continued to operate during periods of expired funding, even though the Act carries criminal penalties for willful violators.

Operations during a funding hiatus do not, however, occur on a business-as-usual basis. Heads of departments are not unmindful of the precarious position in which a gap and the Antideficiency Act place them. Short of telling employees not to show up for work, Federal officials have responded to gaps by cutting or postponing all non-essential obligations--particularly personnel actions, travel, and the award of new contracts--in an attempt to continue the operations of programs for which they are responsible. Their actions have stemmed from the belief that Congress does not actually intend that the Federal Government shut down while agencies wait for the enactment of appropriations or the passage of a continuing resolution. Congress has implicitly lent credence to this view by making continuing resolutions effective retroactively to the beginning of the fiscal year. Moreover, to date Sect. 665(a) of the Antideficiency Act has not been enforced against agencies that continue to operate during a gap.

A recent interpretation of the Antideficiency Act by the Department of Justice has upset the delicately balanced status quo of Federal operations during a gap. In April 1980, at the request of the President, the Attorney General issued a formal opinion. He stated that when an agency's appropriation has expired, the head of the agency must take immediate action to terminate the agency's operations in an orderly way. The Attorney General concluded that agencies which incurred obligations for any purpose, including the pay of employees, during an appropriations gap were in violation of the Act. He also announced that the Department of Justice would, in appropriate cases in the future, begin enforcing the criminal provisions of the Antideficiency Act.

General's opinion should there be neither an appropriation nor a continuing resolution passed by October 1, 1980? (Implicit in any such plans, we felt, would be the department's interpretation of what constituted "emergency" services to protect life and property, as well as those activities otherwise "authorized by law.")

3. What steps, if any, were taken to implement these plans as October 1 approached with neither appropriations nor a continuing resolution in place?

4. What was the cost of developing and implementing contingency plans? (Included would be such costs as the loss of discount airfares for official travel, recalling personnel from travel status, and the preparation and distribution of department-wide directives for implementing a contingency plan.)

5. What would be the consequences, under a strict interpretation of the Antideficiency Act, as embodied in the Attorney General's opinion, of a nearly Government-wide shutdown due to expired appropriations?

To determine the frequency of past funding gaps and to identify which departments were affected by them, we obtained data from the Department of the Treasury, the Office of Management and Budget, and the Congressional Quarterly Almanac for the years 1962-79. 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.

Our work was conducted primarily in Washington, D.C. We conducted interviews with 12 departments and 4 independent agencies. We included all cabinet departments whose appropriations had not been passed by October 1, 1980 (this excluded only the Department of Transportation). We contacted the Office of Management and Budget, and two independent agencies--the Office of Personnel Management and the General Services Administration--because all would have central roles in implementing any departmental shutdown necessitated by expired appropriations. The two remaining independent agencies were chosen because of the possible effects of an Environmental Protection Agency (EPA) shutdown on State and local governments, and a Veterans Administration closing on benefit payments to veterans.

be closed during periods of expired appropriations." In our opinion, Congress expects agencies to continue to operate and incur obligations even in the absence of appropriations. In reaching this conclusion, we referred to the favorable comments of the Chair of the Senate Appropriations Committee about an internal General Accounting Office memorandum that reached the same conclusion. 1/ We also emphasized the specific language in recent continuing resolutions that ratify obligations incurred prior to and in anticipation of their enactment.

OBJECTIVES, SCOPE, AND METHODOLOGY

In light of the Attorney General's decision to enforce the criminal provisions of the Antideficiency Act, we wanted to find out whether gaps have disrupted agency operations in the past--and if so, to what extent did they affect agency costs and clientele. We felt historical data, which we derived from interviews and an analysis of available literature, would provide us with a sound basis from which to hypothesize about the effects of future gaps. We found that prior to the Attorney General's opinion, very little had been written about the Antideficiency Act and its effect on agencies whose appropriations had expired. With little past research on which to rely, we used professional judgment to develop a series of questions we felt were germane to the subject:

1. What was the response of departments and agencies to the lack of funds at the beginning of past fiscal years? How often had such situations occurred in the past?

2. What plans, if any, did departments and their agencies develop to implement the requirements of the Attorney

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1/On October 1, 1979, Senator Magnason requested that a memorandum to all employees from Richard Brown, GAO's Director of General Services and Controller, be printed in the Congressional Record as a guide to other agencies in the event of a funding gap. Brown's memorandum began:

> "Even though Congress has not yet passed an FY 80 GAO appropriation or continuing resolution, we do not believe that it is the intent of Congress that GAO close down until an appropriate measure has been passed."

determine the cumulative effects of a shutdown over a period of 30 days. However, some agencies did note that the consequences of a shutdown would vary depending on whether the shutdown was nearly Government-wide or limited solely to them. The hypothetical case presented in Appendix I draws both from the information agencies provided us and the probable consequence of a strict interpretation of the Antideficiency Act.

THE ATTORNEY GENERAL'S INTERPRETATION: A SYMPTOM OF THE PROBLEM

The difficulties that might arise as a consequence of the Attorney General's decision to enforce the Antideficiency Act are actually an outgrowth of more fundamental problems: why do funding gaps occur? What aspect of the congressional appropriations process prevents the timely enactment of money bills (or the continuing resolutions that authorize stopgap funding)? In researching the answer to this question, we found that appropriations "riders" are the predominant cause of untimely spending legislation and the funding gaps that frequently follow.

A rider is an amendment, often not germane to the bill to which it is added, that its sponsor hopes to get passed more easily by including it in other legislation. Riders become law when the bills embodying them do. Attaching a rider to an appropriations bill is a traditional and favored way of enacting substantive legislation without having to expose it to the regular authorizing process. Many riders focus on volatile political issues--issues of policy that are unrelated to the funding levels for Government programs that appropriations are supposed to address. A short review of the last 20 fiscal years illustrates the effect of riders on the appropriations process.

A HISTORY OF UNTIMELY APPROPRIATIONS

In the past 20 years, fully 85 percent of the appropriations bills for Federal agencies have been passed after the beginning of the new fiscal year. 1/ The foreign assistance and combined Labor and Health and Human Services bills have been chronically late--making the end of fiscal year deadline only once since 1962. Some bills have been only a few days late, but on eight occasions appropriations

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1/ This figure does not include appropriations bills for the District of Columbia which is not a Federal agency.

Two subdivisions of the Department of Health and Human Services, the Health Care Financing Administration and the Social Security Administration, were contacted because they administer entitlement programs involving millions of recipients. We also contacted the Federal Trade Commission because it is the only Federal agency that has actually begun to terminate its operations when appropriations expired.

To obtain some idea of how much and what kind of information about the Attorney General's opinion was communicated to Government field offices, we interviewed officials in selected field offices in Denver and Atlanta. These two cities were chosen because they have field offices with particularly large numbers of employees (e.g., Bureau of Land Management in Denver, Health and Human Services in Atlanta and Denver), activities unique to the region (e.g., Western Area Power Administration in Denver, and the Center for Disease Control in Atlanta), or because their headquarters said they had sent some form of instructions to their regional offices (e.g., HHS, EPA). Altogether we interviewed officials of 17 agencies in Denver, and 11 in Atlanta.

We asked officials what plans, if any, they made for complying with the Attorney General's opinion. Copies of these plans were obtained, as well as any directives sent to department officials to implement them. We based our interviews on a uniform set of questions designed to answer the five basic questions previously described. Categories of cost, such as lost travel discounts, managerial time spent devising contingency plans, and the costs of printing and distributing instructions to employees, were given to agencies to help them determine what costs they may have incurred in preparing and implementing any plans they had. However, we do not consider the cost figures cited in this report either complete or necessarily accurate. Rather, they are estimates prepared by department and agency officials who are knowledgeable of the circumstances to which the estimated costs pertain, and they are not supported by detailed accounting records. We did not attempt to verify the estimates. Moreover, not all departments provided cost estimates. Nevertheless, we believe that the data obtained provide a reasonable indicator of the costs incurred in the development of plans to comply with the Attorney General's opinion.

We also asked officials to develop a hypothetical case using a maximum period of 30 days, with intervals of 1, 5, 10, 15, 20, 25, and 30 days. This was designed to

Table 1

Late Enactment of Appropriation Bills a/
Over 20 Years (FY 62 - FY 81)

Appropriations b/	Late		Stratification of Late Appropriation Bills				
	Total number	Percent	Less than 1 month	1-3 months	3-6 months	6-9 months	9-12 months
Agriculture and related agencies	18 of 20	90	2	7	9	-	-
Defense	18 of 20	90	1	6	8	3	-
Energy-Water (public works)	16 of 20	80	-	6	9	-	1
Foreign assistance and related programs	19 of 20	95	1	2	7	6	3
HUD and independent agencies d/	18 of 20	90	1	9	8	-	-
Interior and related agencies	15 of 20	75	4	8	3	-	-
Labor, HHS, and related agencies	19 of 20	95	1	5	7	3	3
Legislative branch	17 of 20	85	4	7	5	-	1
Military construction	17 of 20	85	1	7	8	1	-
State, Justice, Commerce, Judiciary and related agencies	17 of 20	85	1	5	11	-	-
Transportation and related agencies	11 of 14 c/	79	1	6	3	-	1
Treasury, Postal, and Executive Office	13 of 20	65	5	7	1	-	-
Government-wide							
Total	198 of 234		22	75	79	13	9
Percent		85	9	32	34	6	4

a/ Late enactment after 6/30 for fiscal years 1962-76 and after 9/30 for subsequent fiscal years.

b/ Appropriations categories based on structure supplied by the Department of Treasury. Excludes the District of Columbia appropriations.

c/ Transportation and related agencies appropriation bill came into existence in FY 68.

d/ HUD funded as an independent agency prior to FY 67.

action was never completed during the fiscal year, and agencies continued their operations throughout the entire year under a continuing resolution. (See table 1.)

To improve the timely enactment of appropriations, among other purposes, Congress passed the Congressional Budget and Impoundment Control Act of 1974. The Act set a firm timetable for the consideration and enactment of spending bills. Initially, the budget timetable improved the situation. Except for several activities in HEW and the Energy Research and Development Administration, all appropriations for FY 77 were signed into law by October 1, 1976, the first day of that fiscal year. Timeliness, however, proved to be shortlived. Since FY 77, 65 percent of the appropriations acts have been late; in five cases, agencies have operated under a continuing resolution for an entire year.

Continuing resolutions have not prevented funding gaps.

When appropriations bills are not passed on time, Congress can assure the continued operations of agencies by passing a continuing resolution. Such resolutions are the traditional method of providing stopgap funds. Between FY 62 and FY 81, 74 resolutions (almost 4 per year and at least 1 in every year) were passed. But in 1967 Congress began to use resolutions as a mechanism for airing political differences. In reaction to a request from the administration for a 10 percent surcharge on corporate and personal income taxes, some members tried to attach spending limitation riders to the FY 68 continuing resolution. They felt that holding back Federal spending was preferable to raising taxes as a means of reducing a projected budget deficit and inflationary pressures on the economy.

The impasse that resulted between the House and the Senate over the proposed budget cuts delayed four of the six continuing resolutions enacted during FY 68. Five separate funding gaps, totalling 65 days, were recorded, affecting 10 departments. Activities within the Foreign Assistance, Military Construction, and Public Works appropriations bills were completely without funds for 20 days. For each of these expired appropriations, however, Congress subsequently approved funding to cover the cost of agency operations and salaries that were incurred during the period of the gap.

Dozens of riders--especially on the issues of busing, the congressional pay raise, and the 9-digit zip code--prolonged debate on the second resolution. During the last few days of deliberations, the Senate added 148 riders to the spending package before it went to final conference with the House. These measures included such items as $2.7 million for the Lake Placid Olympic Committee, $150,000 to fight the asparagus aphid, and $100,000 for pea research. Debate on the bill extended past the deadline into the early morning hours of December 16 before members agreed that the riders were jeopardizing all chances of enactment. As finally passed, the second continuing resolution was stripped of most of the riders and provided the funds needed to keep the Government operating through June 5, 1981, when Congress will be confronted with the problem again.

The political entanglements of recent years are likely to happen again and again if controversial and essentially substantive legislative issues continue to be debated during the appropriations process. Even the recent strict interpretation of the Antideficiency Act, though dramatizing the phenomenon of funding gaps, neither eliminates them nor improves the timeliness of appropriations bills.

Riders Clog the Appropriations Process

Riders--because of the politically sensitive issues they often embody--prevent Congress from completing action on money bills before the start of the fiscal year. They also delay the enactment of timely resolutions that would authorize temporary funds until the regular appropriations bills can be passed. In FY 72, for example, an amendment to a foreign aid bill called for withdrawing all U.S. troops from Indochina within 6 months and putting a ceiling on aid to Cambodia. Congressional deadlock over the rider was the major cause of four funding gaps, totalling 29 days. (See table 2.)

One year later, appropriations were delayed because of controversies about reconstruction aid to Vietnam and presidential impoundment of funds. Between FY 77 and FY 81, deadlocks over the use of Federal funds for abortion have been principally responsible for funding gaps amounting to 66 days. Other causes for recent delays include disagreements over water projects, congressional pay raises, and a convention center for Washington, D.C.

Fiscal year 1981 funding also suffers from the effect of riders in the appropriations process. Because agreements in the Senate could not be reached about budget ceilings, by October 1, 1980, Congress had completed action on only 3 of its 13 major annual appropriations bills. Passage of a continuing resolution to provide stopgap funds bogged down because of debate on an abortion rider, but in order not to risk enforcement of the Antideficiency Act, Congress did pass, in the afternoon of October 1, a continuing resolution authorizing funds until December 15, 1980.

During the ensuing 2-1/2 months, debates on non-fiscal type riders continued as Congress deliberated the passage of a second continuing resolution to make sure that agencies could continue operations after midnight on December 15. At stake were operating funds for several large Departments: Commerce, Justice, State, Labor, Health and Human Services and Treasury as well as the funds for foreign assistance, the postal service, and the legislative and judicial branches. 1/

1/In early December 1980, Congress cleared the Commerce, State, and Justice appropriations bill, but the President vetoed the bill because it contained an anti-busing amendment.

Table 2--Cont.

Funding Gaps in Federal Appropriations between FY 1981 and FY 1962

	Major Causes of Delay, Selected Years*
1981	16-hour gap result of disagreement on riders, busing, abortion, congressional pay increase.
1980	Congressional pay increase, abortion, Federal Trade Commission authority, various riders.
1979	Abortion, public works water projects, delays in passing authorizing legislation.
1978	Abortion, D.C. convention center
1977	Heavy preadjournment workload created by abortion issue.
1975	U.S. military aid to Turkey.
1974	Allocation of funds to States and localities for educational aid to the disadvantaged.
1973	Impoundment, reconstruction aid for North Vietnam.
1972	Foreign aid authorization, policy for withdrawing troops from Indochina, aid to Cambodia.
1970	Major delays in enacting appropriations bills, Federal spending and inflation issues related to Labor-HEW appropriations.
1968	Presidential request for a 10 percent surtax, proposed cuts in Federal spending.

*For years in which there were gaps of more than 4 days (except 1981).

Table 2

Funding Gaps in Federal Appropriations between FY 1981 and FY 1962
(numbers in columns = days that gaps occurred during the fiscal year)

Fiscal Year	Agriculture & Related Agencies	Defense	Energy-Water (Public Works)	Foreign Assistance & Related Programs	HUD & Independent Agencies	Interior & Related Agencies	Labor, HHS, & Related Agencies	Legislative Branch	Military Construction	State, Justice, Commerce, Judiciary, & Related Agencies	Transportation & Related Agencies	Treasury, Postal, & Executive Office	Total No. of Gap Days
1981*													
1980	11	11	0	11	11	11	11	11	11	26**	11	0	26
1979	10	12	17	17	0	16	17	0	0	9	0	9	17
1978	0	0	0	12	3	0	28	0	0	0	0	0	28
1977	0	0	10***	0	0	0	10***	0	0	0	0	0	10
1976	0	0	0	0	0	0	0	0	0	0	0	0	0
1975	26	7	0	39	0	0	16	0	26	4	0	0	39
1974	7	17	0	17	7	3	7	7	7	7	0	7	17
1973	0	11	0	18	0	0	18	0	10	10	0	0	18
1972	2	15	2	29	2	2	2	0	2	2	2	0	29
1971	0	0	0	0	0	0	0	0	0	0	—	0	0
1970	13	15	13	24	13	0	28	13	15	13	15	0	28
1969	0	4	0	4	0	0	0	0	0	0	0	0	4
1968	4	4	30	65	14	0	19	0	43	19	4	0	65
1967	0	0	0	0	0	0	4	0	4	4	—	0	4
1966	0	0	0	0	0	0	0	0	0	0	—	0	0
1965	0	0	0	6	0	0	0	0	0	0	—	0	6
1964	0	0	0	0	0	0	0	0	0	0	—	0	0
1963	0	0	0	0	0	0	0	0	0	0	—	0	0
1962	0	0	0	0	0	0	0	0	0	0	—	0	0
Total	73	96	72	242	50	32	160	31	118	94	32	16	291

* 16-hour gap affected all agencies. *** Programs within HEW and ERDA.

** Federal Trade Commission only.

negative consequences, both within the Federal Government and outside of it. In October 1979 (the beginning of the 1980 fiscal year), seven departments and related agencies were caught in an 11-day hiatus. One consequence of that gap was increased costs to the Government, which agencies estimate to be about $1 million for issuing "split" or late paychecks to some 1.1 million employees and an unknown amount in lost productivity. Another consequence, to which we cannot attach a cost, was that recipients of some Federal programs received their entitlement payments several days late.

Split paychecks increase direct costs and decrease productivity

When an agency's pay period extends into a period of expired appropriations, the only way it can pay its employees is to "split" the paychecks. Splitting paychecks means that agencies issue two paychecks, each covering a portion of a single pay period, instead of one check covering the entire pay period. On the normal payday employees receive a paycheck that covers only the period prior to the expiration of appropriations. The remainder of their normal 2-week salary is received late, after Congress has passed either an appropriations bill or a continuing resolution that restores budget authority to the agencies.

Splitting the payroll and issuing two checks, rather than one, increases the direct costs of normal payroll processing. The additional costs are for:

--The time expended to decide how to allocate taxes, allotments, and other payroll deductions between the two checks.

--The time and effort spent to prepare and test new or modified payroll computer programs.

--Computer time and associated costs to prepare and deliver split payroll computer tapes to Treasury disbursing offices.

--Handling associated with the second check, that is, issuing, delivering, processing through the banking system, and the ultimate payment and reconciliation by the Treasury.

Over the past several years, payroll splitting has become a recurring event for some agencies. During the 11-day gap that marked the beginning of FY 80, we found

CHAPTER 2

THE EFFECT OF THE ATTORNEY GENERAL'S OPINION ON AGENCIES' RESPONSES TO A FUNDING GAP

By 1980 many Federal agencies had learned to cope with the problems of conducting business during periods of expired appropriations. In essence, they attempted to abide by the spirit of the Antideficiency Act, short of closing down. Before the President asked for the Attorney General's opinion of the Act in April 1980, agencies had dealt with funding gaps internally, within the context of their budgeting and accounting functions.

FUNDING GAPS BEFORE 1980 HAD WIDE-RANGING CONSEQUENCES

As we pointed out in chapter 1, Federal officials did not believe that Congress, when it did not complete appropriations actions on time, wanted agencies to stop operating. Expired appropriations are not a new event. Gaps have occurred at least as far back as 1952. On that occasion--lasting 15 days--Congress subsequently ratified the obligations that were incurred during the period of the interruption. Congress has generally continued this practice. A recent example is the language in the continuing appropriations bills for FY 80, which states that:

> "All obligations incurred in anticipation of the appropriations and authority provided in this joint resolution are hereby ratified and confirmed if otherwise in accordance with the provisions of the joint resolution." 1/

Appropriations gaps increase agency costs, reduce employee morale, and have effects beyond the Federal workforce

Despite the eventual routine handling of funding disruptions, gaps lasting several or more days have caused

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1/Public Law 96-86, sect. 117; Public Law 96-123, sect. 108. However, in the continuing resolution for FY 81, enacted subsequent to the Attorney General's opinion, Congress has ratified only those obligations incurred to protect life or property, or to bring about an orderly agency shutdown. Public Law 96-369, sect. 107.

gap varies somewhat, depending on how long the disruption lasts and the scheduled timing of program payments. The willingness of State Governments to temporarily fund Federal entitlement programs is also a factor. The 11-day hiatus of FY 80 affected many recipients:

--About 100,000 GI bill education checks were delayed from 7 to 9 days.

--The Department of Housing and Urban Development delayed about $48 million in housing subsidy payments from October 1, 1979, until the continuing resolution was enacted on October 12.

--Payments to about 22,000 people disabled by black lung disease were delayed 10 days.

--A Department of Agriculture food program, supplemental food furnished to 1.6 million pregnant or nursing mothers and small children, was shut down completely in two States and was just a few days away from a nationwide shutdown.

--Supplemental security income benefits for all new applicants approved during October were delayed up to 2 days.

--Health Care Trust Funds lost between $1 million and $2 million in interest because Federal matching payments were delayed. The lost interest must be made up from general funds.

Had the FY 80 funding gap continued for another week or two, Federal payments would have been cut off to such large groups of beneficiaries as recipients of food stamps, veterans' compensation, and military retirement pay.

THE ATTORNEY GENERAL'S 1980 OPINION CHANGED THE RULES ON HOW TO DEAL WITH FUNDING GAPS

Midway through FY 80, the President asked the Attorney General to address the question of whether an agency can, under the Antideficiency Act, permit its employees to continue to work after appropriations have expired. To our knowledge, this was the first time in more than 50 years that the Department of Justice had been asked to formally consider the issue as a matter of law. The Attorney General issued his opinion on April 25, 1980. He stated:

that approximately 1.1 million Federal employees received split or late paychecks. The largest agency affected was the Department of Defense, involving some 617,000 civilian employees. The agencies identified were as follows:

Agency	No. of Employees
Defense	617,000
HHS (formerly HEW)	160,000
Agriculture	127,000 a/
Interior	77,000
Transportation	73,000
Labor	22,000
HUD	17,000
NASA	5,000
General Accounting Office	5,000
Total Employees	1,103,000

a/Agriculture prepared split payroll tapes but did not use them. It paid employees in full, 2 days late.

This estimate of about $1 million to process split payrolls is based on actual and estimated costs given to us by several of the agencies we interviewed and our judgment, which recognizes (1) overtime (including related fringe benefits) used by the Treasury to issue checks in a timely fashion, (2) management's time to respond to the situation, and (3) subsequent efforts undertaken to handle work that had been temporarily backlogged because of the split payroll crisis.

Another, greater but less tangible, cost that the Government incurs because of funding gaps is lost productivity. Clearly, employee morale suffers when paychecks are incomplete and late. Attention to duties drops while employees contemplate what they must do to compensate for their temporary reduction in income. Many suffer anxiety and embarrassment over how they will be able to pay their bills. Certainly time on the job is spent discussing the personal consequences caused by late and partial paychecks. In our opinion, the October 1979 funding gap adversely affected the productivity of many Federal employees.

Effects felt outside of the Federal Government

Many Federal programs that provide direct benefits to millions of Americans are funded annually. The extent to which a particular program is affected by an appropriations

already associated with funding gaps. Never before had heads of agencies been required to seriously plan the tasks and identify the staff that would be needed to begin closing down an agency's activities. Faced with a drastic change in the status quo, Federal officials felt compelled to take action to indicate compliance with the Act, or at least to avoid giving the appearance that they were in violation of it.

As had been the case for each of the last 4 fiscal years, Federal agencies expected that the end of FY 80 would be followed by a gap in funds for at least some agencies. Although there was a funding gap of only 16 hours in October 1980, the Federal Government did incur costs different from those incurred because of previous funding gaps. These costs, primarily for planning, are a direct consequence of the Attorney General's decision to enforce the criminal penalties of the Antideficiency Act. We estimate, based on agency data, that the process of planning for the brief gap that occurred cost almost $1.1 million. Much of this cost is associated with diverting top managers from their normal duties to the tasks of conceiving and developing plans and seeking formal and informal advice. The largest expense to the Government in September and October 1980 was lost productivity, which stemmed from employees' fears about whether they would be furloughed without pay on October 1, or shortly thereafter.

For example, if each of the approximately 2 million DOD employees lost 1 hour of productivity, as defense officials estimated, this would cost as much as $13 million based on DOD's average hourly salary cost. Another illustration of lost productivity cost was provided by the Department of Labor. Department of Labor officials estimated a half day per affected employee for a cost of about $1 million.

Another earlier cost of complying with the Attorney General's opinion, is the almost $700,000 the Federal Trade Commission (FTC) spent to shut its doors in May 1980. FTC's third continuing resolution expired on April 30, 5 days after the Attorney General changed the ground rules for coping with expired appropriations.

Exactly what agencies were supposed to do in order not to violate the Act if a funding gap occurred in October 1980 was never made clear--either by the Department of Justice or by the Office of Management and Budget. Besides lacking clear guidance, agency officials also had to overcome their personal feelings about the possibility of

"* * * on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted." 1/

The only exception in the Attorney General's view was that " * * * authority may be inferred from the Antideficiency Act itself for Federal officers to incur those minimal obligations necessary to closing their agencies." 2/

However, section 665(b) does provide one additional exception which the Attorney General's opinion did not discuss. Agencies may accept "voluntary" service from employees in "cases of emergency involving the safety of human life or the protection of property." 3/ In its September 30 guidelines, OMB discussed the life or property exception but gave no clear indication of its scope or extent.

Most agencies justified a range of activities, includ- the protection of computer tapes, under this provision. They did so on the practical basis that not to do so would cause irreparable harm in many cases to agency operations and make it impossible to quickly resume activities, such as benefit payments, once funds were restored. Certainly, for example, if the Social Security Administration's tapes containing beneficiaries' names and addresses were destroyed due to lack of maintenance during a funding gap, the harm to beneficiaries would be immediate and take years to rectify at great cost.

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

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1/ Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President (April 25, 1980), p.6.

2/ The Attorney General's opinion, p. 6.

3/ However, in a later opinion the Attorney General does discuss the life and property exception. See Opinion of the Attorney General in a letter from Benjamin R. Civiletti to the President (January 16, 1981), pp. 10-16.

Officials' attitudes complicated the planning process

Chief among the obstacles Federal officials had to overcome were their personal feelings about being forced to close their agencies. The common reaction of the agency officials we talked to was incredulity. That the Federal Government would shut its doors was, they said, incomprehensible, inconceivable, and unthinkable. In general, they felt that the Attorney General's opinion was legally correct, but that it ignored the practical ramifications of a Government-wide shutdown. Officials did not relish having to balance the legal demands and the practical difficulties imposed on them by the new ground rules for operating without funds. Although they showed real compassion for the problems they expected to surface if no funds were available by the start of the new fiscal year, we believe their attitudes were a factor in delaying agency planning processes.

Some officials believed that if FY 81 started off with a funding gap that forced the Government to close, Federal agencies would bear the brunt of public criticism when services were curtailed or temporarily suspended. During our interviews, it was clear to us that agency officials were genuinely interested in the welfare of the millions of Americans who depend on Federal program benefits. They were also concerned about protecting the reputation of the Government and the livelihood of their employees who might be furloughed without pay if a gap occurred.

Agency officials generally believed, given the strict interpretation of the Antideficiency Act by the Attorney General, that Congress would surely pass appropriations bills or a continuing resolution before the end of the fiscal year. To do otherwise, in their opinion, was to invite catastrophe. Officials said a long hiatus, involving many agencies, would impose severe hardships on millions of Americans--especially the elderly, the poor, and the very young--and would drastically disrupt our national economy.

Clear guidance did not emerge

Apparently the Office of Management and Budget had some difficulty in preparing and disseminating advice to agencies about what to do in case of an appropriations gap. An early OMB proposal required agencies to submit contingency plans by July 31, 1980. When OMB officials realized the full implications of this requirement, they toned it down to a suggestion that agencies develop plans. The outcome was that OMB issued nothing until the end of August

shutting down their agencies. The events between April 25, 1980, the day the Attorney General issued his opinion, and September 30, the last day of FY 80, were described to us by many Federal officers as chaotic and confusing. This confusion drastically affected the agencies' ability to make plans for a potential shutdown. Help from OMB was not forthcoming until August 1980, when agencies were directed to develop plans for an orderly shutdown, if a funding gap occurred. Some officials told us that OMB's guidelines were vague and inconsistent; they did not state whether planning should take place before or during a gap, nor did they distinguish between a temporary suspension and a termination. Officials said there is quite a difference between the two. Moreover, some Federal officials were frustrated because Justice and OMB did not always answer their questions about what agency activities could be considered essential under a narrow interpretation of the Act's protection of life and property clause.

We found that the degree to which agencies prepared for a possible FY 81 gap ranged from "planning to plan" to the development of detailed plans that specified:

(1) those functions authorized by law to continue. (Many agencies felt confident, despite the Attorney General's opinion, that at least some of their activities would be legally exempt from the Antideficiency Act. Some agency attorneys believed that obligations could be incurred for those functions for which appropriation authority already existed--for example, no-year and multi-year appropriations.)

(2) those activities that would cease.

(3) the number of employees to be furloughed at various times during a funding gap.

The single common element we found was that many agencies in Washington, D.C., Atlanta, and Denver did not complete final plans for a shutdown, hoping that funding authority would not expire. Other departments, bureaus, and offices finished plans for handling a possible FY 81 gap, but their respective agency heads considered these plans to be drafts, and they were never approved. Only one agency prepared a comprehensive agency-wide plan and only two regional offices--one each in Denver and Atlanta--were given orders to implement any part of any plan. One department did send a memo to all employees describing which programs and benefits would continue during a gap.

OMB and Attorney General fail to respond to some agency inquiries

Neither 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. Officials said their questions were an attempt to obtain opinions about whether certain agency activities could be construed as fitting within the protection of life and property clause of the Antideficiency Act.

The lack of response, in essence, left these agencies to their own devices. Some made extensive use of their legal counsels for opinions on what activities could reasonably be argued as protecting life and property. One agency tended to consider any activities that were questionable as nonessential and candidates for shutdown. These agencies were very concerned with not giving the appearance of violating the Act. Some agency officials said that the lack of guidance made planning more difficult.

Many plans were developed, but few were considered final

Of the 18 agencies we interviewed, 13 (9 cabinet-level and 4 independent) developed detailed plans for most of their major units. The specifics in these plans were quite diverse. Some units planned to furlough almost everyone after September 30. Other plans specified: (1) essential functions and how those functions were identified, (2) the number of personnel required to continue essential functions, (3) the number of people to be furloughed on the first and subsequent days of a funding gap, (4) tasks that would be performed on each day of a gap, and (5) an estimate of the time required to achieve complete shutdown.

Five of the agencies (four cabinet-level departments and one independent agency) did not prepare detailed plans. In most cases, however, they had formulated guidelines for preparing such plans, should the need arise. Generally, their strategy was to begin the detailed planning on the first day of the funding hiatus. Many officials were convinced that either funds would be forthcoming before October 1, 1980, or, if a gap did occur, the Attorney General would reverse his April opinion and allow agencies to operate as they had in the past.

Officials of the Departments of State and Defense said that one reason they did not prepare detailed plans was that they were confident that their appropriations would

1980. A similar attempt by the Office of Personnel Management (OPM) to issue a question-and-answer bulletin also resulted in nothing being issued. In late August, OPM concluded that there was considerable confusion surrounding the effort to provide guidance.

On August 28, 1980, a month before the end of FY 80, OMB issued a bulletin containing policy guidance and instructions to agencies about what actions to take if Congress did not approve budget authority before midnight on September 30. The bulletin said that agencies faced with funding interruptions must develop plans for an orderly shutdown and act to make sure they are in a position to limit activities to only those related to an orderly shutdown. However, it also stated that the scope and detail of the plan should be commensurate with the likelihood that a shutdown would be necessary and with the complexity of shutting down the agency.

The August 28 requirement is broad enough to allow agencies to develop detailed plans whenever they wish, either before a gap occurs or after it occurs. The bulletin's ambiguity directly delayed the planning process of one agency, who interpreted OMB's guidance to mean that it could start to plan on the first day of a hiatus. This interpretation could also have been a factor for the delay in planning of several other agencies.

In the August 28 bulletin, OMB stated that all actions contributing to an orderly shutdown should be conducted in a way that would facilitate reactivation once Congress made funds available. This instruction suggests that agencies should plan for a temporary suspension of operations. Yet, within the same bulletin, OMB discusses the transfer of property and records to the General Services Administration and to OPM for disposition. These statements imply that agencies should prepare for a permanent termination.

According to some agency officials, OMB's instructions were contradictory and consequently created confusion for the planners. Some agencies decided to disregard the instructions that implied a permanent closing because the agencies had not included any such activities in their draft plans. The plans of other agencies, however, did include inventory and boxing of records for disposition. Agency officials expressed to us the senselessness of such work, pointing out that it would have to be undone when funds were restored. The consequence, they suspected, would be to double the costs of a shutdown. Indeed, unpacking records after funds were restored added significantly to the costs of FTC's brief shutdown in May 1980.

to continue and those necessary to start an orderly shutdown, and to identify the tasks and employees needed to complete a shutdown after October 6. These agencies employed almost 500,000 people. When added to the 970,000 civilians in the Defense Department, these instructions assured that at least 70 percent of the Federal civilian workforce would be on the job during the first 6 days of a funding gap.

On the last day of FY 80, with the concurrence of the President and the Attorney General, OMB issued instructions telling agencies what to do in case Congress did not pass a continuing resolution before October 1. OMB said that all Federal employees could report to work on October 1, and, beginning on that day, agencies could continue three types of activities: those authorized by law, those that protect life and property, and those necessary to begin phasing out other activities. OMB's September 30 memorandum cited examples of activities agencies could continue under existing statutes:

--Those that provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.

--Those that provide for benefit payments and the performance of contract obligations under no-year and multi-year authority, or other funds still available for those purposes.

The instructions also furnished a list of those activities considered essential to the protection of life and property:

--Medical care of inpatients and emergency outpatient care;

--Activities essential to ensuring continued public health and safety, including safe use of food and drugs and safe use of hazardous materials;

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

--Border and coastal protection and surveillance;

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

be passed on time. In the event of an interruption, according to these officials, their agencies would continue normal operations because their activities are essential to protecting national security.

All officials we interviewed told us that their agency's plans were not final or official because they had not been reviewed or approved by top managers. When we asked about the status of the planning process, several officials said that while plans were well underway in late September, they were in no hurry to complete them because they hoped that an appropriations gap would not occur. Other agency representatives were not so blunt, but they implied that they, too, were delaying the completion of plans.

We suspect that agencies had two main reasons for delaying the planning process. First, plans may have been prepared just to give the appearance of complying with the Attorney General's decision--thereby insulating agency heads from possible prosecution. Second, if the plans had been deemed official, agency heads might have been expected to implement them. Of course, implementing the plans could have resulted in furloughing thousands of people on the first day of a hiatus, a very unpleasant prospect. It is interesting to note that when some agencies issued instructions during the last few days of September 1980, telling every employee to report to work on October 1--if for no other reason than to help shut down the agency--few agencies mentioned that the shutdown would take place according to a previously prepared plan.

FUNDING GAP IS AVERTED JUST BEFORE THE START OF FISCAL YEAR 1981

A series of actions took place a few days before October 1, 1980, that would have allowed all Government employees to work on October 1 (and in many instances through October 6), whether a continuing resolution was passed or not. These events had the effect of negating the Attorney General's opinion of April 1980, and alleviated officials concerns about public criticism, employees' livelihood and Federal program recipients. Moreover, the Attorney General's January 1981 opinion seems to approve at least some of OMB's instructions for use in cases of future funding gaps.

Starting on September 25, 1980, and continuing through September 30, several Federal agencies told their employees to report to work for the period October 1 through October 6. In the event funding lapsed, agencies instructed their supervisors to limit activities to those allowed by law

consultation with the Office of Management and Budget, that applicable law and common sense permit the Department of Justice to carry on certain activities according to the following precepts: [Emphasis added.]

(1) All employees are to report to work as usual on Wednesday morning and until notified to the contrary;

(2) All ongoing litigation and investigations may be continued;

(3) No new cases may be filed or investigations begun, unless to fail to take action would risk causing the United States major harm, or would risk the running of a statute of limitation or the award of a default judgment, or some similar disadvantage to the Government;

(4) No activity of an administrative nature may continue unless it is essential either for the winding down of the activities of the component or for the protection of life and property."

The Justice Department also told FTC that it could continue law enforcement activities during a funding gap. This meant that, unlike the May 1, 1980 gap, when FTC was forced to cease all activities and begin to shut down, ongoing law enforcement investigations and hearings could be continued. This guidance included support staff and services for the allowable activities.

A HIGH PRICE TAG FOR A FUNDING GAP THAT DID NOT OCCUR

For all practical purposes, the beginning of FY 81 was not accompanied by an interruption in funding for any agency. If this had been the case for FY 80, the Federal Government would not have incurred any additional costs, nor would the productivity of many Federal employees been adversely affected. However, the circumstances leading up to FY 81 were different because of the Attorney General's opinion. The different circumstances had a price.

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

--Law enforcement and criminal investigations;

--Emergency and disaster assistance;

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

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

--Activities necessary to maintain protection of research property.

We were unable to locate any agency in Washington that did anything other than conduct its normal business on October 1, even though technically a funding gap existed for the first 16 hours of that day. Our discussions with agency officials indicate that OMB's last-minute guidelines, in contrast to the Attorney General's strict interpretation of the Antideficiency Act, were so liberally worded that all employees could continue to perform their normal duties. Some officials pointed out the irony in the fact that many of the essential activities listed in the September 30 instructions were exactly the same ones they had asked OMB and the Attorney General to clarify earlier in the year.

On October 1, 1980, Congress passed a continuing resolution and the President signed it the same day. The potential crisis was delayed until December 15, when the October continuing resolution expired. Congress did not pass another continuing resolution for activities normally covered by regular appropriations bills until early on the morning of December 16. On the previous day, OMB issued instructions identical to those of September 30.

By concurring with OMB's directives, the Attorney General appeared to have expanded allowable agency activities--at least for a very brief period--when appropriations expire. This was further substantiated by a memorandum issued to the litigating units of the Department of Justice by the Associate Attorney General on September 30. The memorandum, in part, states:

"The Attorney General has decided, after

Although there was only a 16-hour funding gap at the beginning of FY 81, the need to comply with the Attorney General's opinion of the Antideficiency Act caused Federal agencies to incur more costs than they had incurred during the 11-day gap of the previous year. A comparision of costs follows:

	FY 80	FY 81
	($ in millions)	
Direct Costs		
Split paychecks	$ 1.0	-0-
Planning	-0-	$ 1.1
Intangible Costs		
Lost productivity	unknown	unknown

In addition, FTC absorbed shutdown costs of about $700,000 due to the temporary cessation of its normal activities on May 1, 1980, as a result of expired funding and the Attorney General's opinion. Most of the cost, nearly $600,000, was for salaries.

The FTC experience illustrates the impact of an agency shutdown

The FTC experience of May 1, 1980, could be considered insignificant when compared to the daily cost of running the entire Federal Government. However, it does provide some insight into certain events and it depicts on a small scale the impact of an agency shutdown. We believe the FTC experience is worthy of note. The following is a synopsized chronology of the events of FTC's shutdown:

April 30 (Wed.) After it was apparent that the Congress could not enact new funding in time, FTC managers began to plan intensively for closing the Commission and for briefing supervisory staff. As a result of this effort, agency effectiveness and productivity was shifted from normal business to closedown operations. For example, court hearings, the taking of depositions, and travel plans after April 30, were all cancelled.

Based on agency data, we estimated that, in calendar year 1980, agency planning activities, which may have served no practical purpose other than giving the appearance of complying with the Attorney General's opinion, cost the Government about $1.1 million. This cost is based on estimates of about $1.0 million provided by 13 of the 18 agencies we interviewed. We projected the planning costs for the agencies that did not submit estimates on the basis their size, structure, and the degree to which they prepared plans in relation to those that did provide cost estimates. Included in the agencies' estimated costs are labor for developing the guidance and preparing the plans, printing and distributing plans and memoranda, travel costs incurred by the premature recalling of some travelers and lost airfare discounts due to cancelling travel around the beginning of the fiscal year, and fringe benefits related to labor costs. Most of the costs pertain to diverting top managers from their normal duties.

The largest expense to the Government in FY 80 was the lost productivity resulting from employees' concern over whether they would be furloughed without pay. The loss of productivity was widespread, as reflected in the following statements from different Federal agency officials:

--The lost time and production are impossible to calculate. There was much production lost as the entire office was discussing little but the shutdown and the probability thereof for several days.

--There was a lot of productivity lost because many employees were worried about what was happening.

--Everyone spent a good deal of time standing around and talking about what would happen. The loss of productivity and reduced morale was substantial, but unmeasurable, in dollar terms.

--The possibility of a gap had a debilitating influence on headquarter's operations. It was a major topic of conversation and adversely impacted on work at all levels. A lot of time and productivity was wasted.

WHAT HAPPENED OUTSIDE WASHINGTON

Regional offices in Atlanta and Denver differed in the amount of planning they performed to prepare for a possible shutdown. For the most part, little planning was done because most offices in both regions decided to wait until October 1 to formulate detailed plans. They, like Washington offices, did not believe that Congress would permit the Federal Government to close.

In Atlanta, EPA, VA, and the Health Care Financing Administration made no plans until guidelines were issued from Washington headquarters. Once guidelines were received, most planning was informal. At the Department of Energy, the Center for Disease Control, and VA plans were discussed at regular staff meetings. EPA reported that Washington informed them daily of the status of their funding, hence they decided to postpone detailed contingency plans until a gap occurred.

SSA, on the other hand, estimated that they used 28 staff hours to tailor Washington's guidelines to fit the Atlanta office. As with other agencies, much of this time was spent determining which people would be necessary to begin an orderly shutdown. GSA in Atlanta was told by the Washington office that the agency would probably remain open Government-wide because its services are essential for securing Government records.

Only one regional office in Atlanta that we interviewed, the Heritage Conservation and Recreation Service in the Department of the Interior, actually implemented plans for a closedown on October 1. The day before, the regional director told all personnel, except those needed to begin closing the office, not to report to work on the following day.

The offices in Denver also showed considerable variation in the extent to which they planned for a cessation of operations. Most of the Denver offices--Agriculture's Soil Conservation Service, Food and Nutrition Service, and the Farmer's Home Administration, for example--reacted like the agencies in Atlanta: they made very few plans. GSA and the Western Power Administration said their activities--to protect life and property and to generate power--exempted them from closing down. The Water and Power Resource Service, believing they would be unaffected,

May 1 (Thurs.)	FTC staff devoted the entire day to only those activities associated with the orderly shutdown of agency operations, such as: (1) notifying appropriate parties of the cessation of FTC's normal business; (2) preparing files for permanent storage, transfer, or other disposition; (3) securing confidential information; (4) canceling meetings, hearings, and other previously arranged agency business; (5) documenting the status of cases and projects; and (6) identifying employees who would be required to perform the functions of orderly cessation.
May 2 (Fri.)	New funding was passed and signed into law late in the evening of May 1. FTC prepared directives to its staff, informing them that normal business could be resumed. As word was communicated throughout the agency, including the regional office structure, the work that was performed on May 1 was undone. For example, opening boxes of files that had been packed and rearranging them into an order necessary for work, calling outside parties and rescheduling meetings and hearings, and beginning to perform the double administrative duties, such as delivering two days of mail. For the most part, throughout the agency, all of May 2 was devoted to putting back into place what had been dismantled.
May 5 (Mon.)	FTC's conservative estimate is that at least half of Monday was devoted to reestablishing normal business by continuing the same kinds of activities that were performed on May 2.

FTC employs about 1,800 people, yet the expense related to this short shutdown--mainly lost productivity--was almost $700,000. Had many agencies begun to close on October 1, 1980, because of the 16-hour funding gap, the cost to the Government would probably have been many times greater than that incurred by FTC.

In the regions, the confusion was magnified because regional officials were dependent on headquarters for information about the status of their funding. Daily telephone conversations with Washington were the major means by which the regions kept abreast of developments in Congress.

Adding to the general uncertainty was OMB's September 30 memorandum, directing all Federal employees to report to work on October 1. The consequence of that eleventh-hour directive was that those regional offices that had started shutdown procedures on October 1 had to quickly alter their plans, at least for the first day of the fiscal year.

The overall lack of guidance, the dependence on Washington for information, and the last-minute reprieve from OMB (with the Attorney General's concurrence) all contributed to the uncertain and disjointed reaction of the Atlanta and Denver regional offices to the possibility of a funding gap and a subsequent cessation of agency functions.

did not notify their employees that a funding gap might occur because they thought doing so would disrupt normal agency activities. 1/

A few agencies in Denver, however, did actively prepare for, and intended to implement, shutdown procedures on October 1, 1980. Based on guidance received from Washington headquarters, EPA and the Department of Health and Human Services were fully ready to stop most of their activities. On October 1, HHS started the first phase of closing its doors in Denver. Officials suspended all contracts, grants, and procurement activities, as well as hiring, travel, and training. They recalled some people who were in travel status and prepared grantees and the Denver staff for termination of funding. HHS budget officers in Denver told us that no extra costs were incurred as a result of these closing-down activities.

HHS officials said they were notified by Washington that "no funds can be expended except as necessary to bring about the orderly termination of an agency's functions." The Denver office estimated that it would take all employees, working through October 6, to suspend operations not authorized to continue. By October 6, employees would be told whether they would be furloughed without pay or whether they could continue to work.

EPA's Denver office prepared to stop all operations, except those, in its judgment, necessary for health and safety. It issued no new travel orders, notified those already in travel status to prepare to return home, and terminated all new travel. EPA said that preparation for shutdown took all the time of four regional officials for the week prior to October 1, 1980. They said they planned to shut down virtually everything after an orderly closedown period.

Most of the regional officials we interviewed did not believe the Federal Government would close, thus they were unwilling to expend a lot of time and effort formulating plans when other matters demanded their attention. As October 1 approached, and Congress had not yet passed a continuing resolution, the situation became more confused.

1/The Water and Power Resource Service felt there was little risk in continuing normal operations because their appropriations bill had passed Congress, although the President had yet to sign it.

--be comprehensive, addressing all agency operations, not just some;

--provide clear and timely instructions for agencies to follow;

--assure that any eventual funding law will pay for appropriate obligations incurred during the period of expired appropriations;

--be politically acceptable; and

--prevent use of non-fiscal issues to delay appropriations.

Providing a long-range answer

The confusion that followed in the wake of the Attorney General's opinion can happen every year if some long-range solution is not found. The goals of management efficiency and cost minimization are best achieved by a solution that agencies can use to determine the proper course of action whenever appropriations expire and no new funding has been enacted. Any proposal offered should hold forth the possibility that it will not be subject to annual "eleventh hour" revision. Neither should it be easily affected by shifting political circumstances.

Maintaining congressional control of appropriations

Congress has a clear constitutional responsibility for appropriating public monies. Therefore, any solution should have the approval of the Congress and be a complementary part of the congressional appropriations and budgetary process. It should allow Congress to make its intentions known regarding appropriate agency response to expired appropriations.

Should be comprehensive

Any solution should address all the activities of a particular agency or department. It should resolve questions regarding which activities of an agency should continue to operate and which should begin shut-down operations. Any solution that addresses only part of an agency's activities or expenses will solve some problems but create others.

CHAPTER 3

ALTERNATIVE APPROACHES

The Attorney General's interpretation of the Antideficiency Act raised many more questions than it answered. To date, neither the Justice Department nor the OMB have issued detailed guidelines for interpreting the requirements of the Attorney General's opinion. 1/ The potential crises of October 1 and December 16, 1980, were averted by temporary last-minute instructions from OMB, with the Attorney General's concurrence. We believe that a more permanent solution is necessary to make sure that the confusion, uncertainty, and cost that characterized the expiration of the 1980 fiscal year and the first continuing resolution of FY 81 does not occur in the future.

We have established seven criteria by which to evaluate various alternative approaches to the problems presented by the untimely passage of appropriations acts or continuing resolutions and the Attorney General's opinion.

CRITERIA FOR EVALUATING ALTERNATIVES TO THE PROBLEMS PRESENTED BY EXPIRED APPROPRIATIONS

The criteria below address many questions and problems that we have discussed in this report. These problems arise both from the implications and requirements of the Attorney General's opinion, and the history of late passage of appropriations acts and continuing resolutions. The criteria we present here can serve as a useful analytical basis for evaluating various alternatives for resolving the current dilemma. We recognize that no solution could satisfy all our criteria, but the one chosen should meet as many of them as possible.

In our view, an optimal alternative should:

--provide a long-range answer;

--maintain congressional control of appropriations;

1/A new opinion, issued January 16, 1981, provides some legal basis for OMB's guidance of September 30 and December 15, 1980, and presents additional questions of interpretation.

congressional appropriations process, it should be politically acceptable to the members of Congress. It should, as nearly as possible, be politically neutral, giving neither advantages nor disadvantages to any particular group within Congress. The primary goal should be to prevent the chaos and confusion that enforcement of the Antideficiency Act and the late passage of appropriations can create.

Prevent use of non-fiscal issues to delay passage of appropriations

As we discussed in chapter 1, the use of limitation and legislative riders to appropriations measures has become, in recent years, the main cause delaying the passage of appropriations bills. The threat of shutting down entire Federal departments should not be used to resolve important issues of public policy that are related more to the substance of authorizing legislation than to the appropriations bills being debated. While the subject of appropriations riders is a difficult and sensitive issue, it must be addressed if delay in enacting appropriations acts and continuing resolutions is to be reduced. In each of the last 4 years, at least one department of Government has experienced a period of expired appropriations while Congress has been temporarily paralyzed by a disagreement over one or more riders. This is highly undesirable.

EVALUATION OF ALTERNATIVE APPROACHES

We have proposed a number of alternatives for reducing the uncertainty and confusion that surround a potential expiration of appropriations. These proposals are evaluated below.

(1) Enact permanent legislation authorizing agencies to incur obligations, but not expend funds, for continued operations during periods of expired appropriations (except where program authorization has expired or Congress has expressly stated that a program should be suspended during a funding hiatus pending further legislative action);

(2) Amend the Antideficiency Act to allow agencies to incur obligations when appropriations expire due to delays in enacting new appropriations;

(3) Amend the rules of both Houses of Congress to require language in all appropriations bills

Should provide clear and timely guidance for agencies

Not only should guidelines be comprehensive, but they should be clear and timely. Agencies must know what they are supposed to do and have sufficient notice to allow plans to be made and implemented in an orderly fashion. Agencies should not be required to wait until the last day of their appropriations to learn whether or not they are to continue normal operations or whether they must begin suspending some operations and services.

Timely notice enables agencies to inform beneficiaries and State and local governments of any reduction in service or monies that will be required during a funding gap. This both reduces uncertainty and confusion and is less costly than leaving agencies to guess whether they may have to institute shutdown procedures for all or part of their activities. It also allows time for State and local governments to make plans to temporarily finance and provide services administered and financed jointly with the Federal Government.

If it is the intent of Congress that an agency suspend operations during a period of expired appropriations, it is best that this is known sufficiently in advance to allow the agency to prepare for an orderly suspension. Conversely, if an agency is to continue to operate, timely notice allows the agency to avoid the expense of preparing for a suspension that may not be necessary.

Agencies have indicated to us that 2 weeks is the minimum time necessary to prepare for an orderly shutdown. We consider notice of a week or more a critical element of any solution to the problems associated with expired appropriations.

Should assure that appropriate obligations are paid retroactively

Where agencies have continued operations in accordance with guidance they have received, there should be some assurance that obligations incurred pending the approval of funding will be paid. In addition to salaries, expenses necessary to operate or shutdown the agency--such as utilities, supplies, and security--should be provided for as well.

Political acceptability

Since any solution will affect, in some way, the

One of the principal advantages of this proposal is that it would provide continuous incentives for Congress to act expeditiously to pass appropriations for agencies. Since neither employees nor contractors could be paid, and recipients of certain Federal entitlement programs (e.g., Supplemental Security Income, Veterans Education benefits) could not receive benefits, Congress would be less likely to prolong debate on politically sensitive riders and stretch the duration of any funding gap.

Should appropriations be delayed as long as they were in October 1979, there would again be the prospect of short paychecks for thousands of Federal employees, late benefit checks, and the temporary closing of some programs. There would still be the uncertainty about funding that contributes to lost productivity and low morale among Federal employees. We do not minimize the dislocations and consequences of any prolonged funding gap, but on balance believe this to be an approach that will be likely to bring about speedy enactment of agency appropriations while eliminating the need to close Government operations when appropriations expire.

Amend the Antideficiency Act

While the above proposal would create a broad exception to that portion of the Antideficiency Act which prohibits agencies from incurring obligations in advance of appropriations, Congress could also do this by amending the Act itself. It could amend the Act to indicate that agencies could incur obligations when appropriations or continuing resolutions expire. This amendment could either allow agencies to incur obligations only, or both incur and liquidate obligations at some specified level--such as the average level of expenditures for the previous fiscal year.

However, we believe that Congress should not amend the Antideficiency Act unnecessarily. The Act is the fundamental Federal statute designed to prevent the unauthorized obligation or expenditure of Federal funds. It is a sound statute which has withstood the test of time. The permanent legislation suggested in our first proposal would allow agencies to incur obligations for all necessary expenses when appropriations are delayed, but does not alter the language of the Act itself. Instead, it creates authority to incur obligations under the "authorized by law" exception of the Antideficiency Act. We believe an approach which works within the terms of the statute,

conferring authority to continue to incur, but not liquidate, obligations at the level authorized when the appropriation expires, or attach instructions on suspending operations if funding is unavailable at the beginning of the fiscal year;

(4) Provide a permanent continuing resolution to provide authority to continue all operations at some specified level, such as the average expenditures for the preceding fiscal year;

(5) Forbid limitation or legislative riders on appropriations bills and/or continuing resolutions, or require a two-thirds vote for passage of such riders;

(6) Provide for the pay of Federal civilian and military employees during any period of expired appropriations.

Provide permanent authority for agencies to incur obligations during funding gaps

One long-range comprehensive approach to the problem would be permanent legislation which would authorize agencies to incur obligations, but not expend funds, for continued operations during periods of expired appropriations (except where program authorization has expired or Congress has expressly stated that a program should be suspended during a funding hiatus pending further legislative action). This would not allow agencies to liquidate these obligations. Obligations would be charged to and paid for from the agencies' appropriations when enacted.

This alternative is long-range because it entails permanent legislation that would be automatically applicable whenever a funding-gap occurs. It preserves congressional control of appropriations because no funds could be disbursed from the Treasury until the Congress had appropriated them. It is comprehensive because it covers all activities of an agency, and eliminates all uncertainty about whether or not to close down an agency when appropriations expire. It would assure that valid obligations incurred would be charged against the agency's regular appropriations when enacted. Also, it should be politically acceptable because by maintaining the status quo until Congress acts, it would favor no particular faction or ideology within Congress.

Provide a permanent continuing resolution authorizing agencies to continue operations

A proposal introduced in the 96th Congress, H.R. 5720, would provide a permanent continuing resolution to spend at the level authorized on the last day of the preceding fiscal year until superceded by a new appropriation. This is very similar to and has much the same effect as the preceding proposal. Consequently, it also shares most of the same virtues and faults. One major difference is that any subsequent appropriation would be charged for expenditures made while the permanent resolution was in effect. A significant drawback is that H.R. 5720 does not provide for retroactive payment of comparability pay increases otherwise payable or other increased costs mandated by law. Since these were not expenditures authorized as of the last day of the preceding fiscal year, they would not be covered. This is an omission that could be corrected. Another disadvantage is that the last day of the fiscal year is traditionally one of higher than normal spending for many agencies. If Congress adopted this approach, we would suggest a level of spending based on average expenditures for the fiscal year.

Ban riders on appropriations and/ or continuing resolutions or require two-thirds vote for passage

Appropriations riders are of two basic types. Legislative riders make affirmative changes in existing law. This form of rider is not frequently offered on the floor of the House or Senate. More common are limitation riders, which bar the use of funds for a specific purpose or program. While not explicitly legislative in nature, they also effectively alter existing law. As discussed in chapter 1, the number of limitation riders offered in recent years on the floor of both chambers has risen dramatically. A congressional impasse on the provisions in such riders has resulted in expired appropriations for at least one cabinet department in each of the last 4 years. A restriction on limitation riders could take several forms and must apply to both Houses of Congress to be effective. One such proposal introduced in the 96th Congress, H.Res. 446, would provide that:

> No provision in any appropriation bill or amendment thereto changing existing law or having the effect of imposing any limitation not contained in existing law shall be in order.

rather than attempting to change it, is the best way to resolve the particular problem of delayed appropriations while maintaining the protection against unauthorized obligations and expenditures which the Antideficiency Act provides.

Provide continuing operating authority or instructions for terminating operations in appropriations acts

Another possibility that provides a long-range, comprehensive, and clear answer to agencies would be a change in the rules of both Houses which would require that appropriations bills contain language that authorizes agencies to incur, but not liquidate, obligations when the appropriation expires. The language could specify the level of obligations, such as the average level provided in the appropriations bill to which it is attached. Such a provision, by its very terms, would allow agencies to continue to operate until a new appropriation was passed. It would also maintain congressional control of expenditures, since agencies would be allowed to incur obligations only for the purposes and at the level specified in the appropriations act.

A variation of this would be a rule in each House of Congress requiring that appropriations acts contain either authority to continue operations when appropriations expire, or instructions on terminating or suspending operations. This would allow the committees, and Congress, to tailor instructions to individual departments and agencies as Congress sees fit. In either case, agencies would know in advance what their proper response should be to a funding gap.

Either variation may raise legal questions because both would violate the general congressional principal of not including substantive legislation in appropriations bills. Neither provides for any new services or expenditures that are mandated by authorizing statutes. Examples are the annual comparability increases for Federal employees or cost-of-living increases in various Government entitlement programs. To pay these expenses, other expenditures would have to be reduced. With either variation, there could still be partial paychecks for Federal workers, late benefit payments, and the productivity loss which has marked previous funding gaps.

of policy purposes, while removing the opportunity to use what is a short-term funding measure for the same purposes. When it is possible to attach riders to appropriations bills, the argument for attaching them to stop-gap funding bills is less persuasive. Since a continuing resolution is to provide funding only until regular appropriations bills can be passed, there seems little reason to encumber them with a variety of amendments unrelated to the level of funding allowable during the interim.

Two-thirds vote requirement

Another proposal would require a two-thirds majority of those voting in order to pass either limitation or legislative riders. This would surely reduce the number of successful riders. Since the most contentious and controverial riders would be unlikely to obtain the necessary two-thirds majority, such a requirement may discourage members from introducing them. If this were the result, it would have the salutary effect of encouraging members of Congress to renew and intensify their efforts to have such riders considered as part of authorizing legislation. The ease with which limitation riders can now be attached to an appropriations bill reduces the incentive for members of Congress to achieve the same goal through the authorization process.

A two-thirds vote rule should reduce the number of appropriations amendments that Congress would have to consider. The Senate added almost 150 legislative or limitation riders to the second continuing resolution of FY 81, but Congress eventually passed a simplified version on December 16 when agreement could not be reached on several controversial amendments. By reducing the number of riders introduced, a two-thirds rule should shorten the amount of time necessary to consider appropriations bills on the floor of each chamber. This could make it easier for Congress to pass appropriations bills or continuing resolutions on schdeule.

Even though a two-thirds rule may decrease the probability that a funding hiatus would occur, it does not eliminate such a possibility. Therefore, agencies would still need some guidance concerning the need to begin preparations for a shutdown. Thus, this approach is neither comprehensive nor is it timely because it does not provide instructions for agencies to follow in the event of expired appropriations. Such a rule would encounter opposition in Congress as well, for it deprives individual members of an important source of influence over Federal spending.

This would effectively forbid both legislative and limitation riders to appropriations bills. It would have the effect of limiting debate to the proper amount of an appropriation, and not whether monies should be spent for any specific purpose in the first place. (The proposal excerpted was designed for the House.) If such a ban were enacted that applied not only to floor amendments but to amendments by the appropriations committees, it would deprive the appropriations committees of one of their major sources of spending control. Most legislative riders are added by the appropriations committees. A ban only on floor amendments would assure that controversial amendments are not offered at the last minute. However, such a ban would increase the power of the appropriations committees at the expense of the individual members of Congress.

An outright ban on riders would encounter stiff resistance by members of both Houses of Congress and is unlikely to be approved. This approach is probably politically unacceptable to a significant number of members of both Houses. It does not meet our criterion of political neutrality. Any type of ban benefits one group in the Congress at the expense of others. Nor would such a ban be truly effective at forestalling the congressional impasses that have occurred in recent years. Amendments to alter the amount of money to be appropriated would still be in order. A member of Congress could achieve the same objective now attained through a limitation rider by simply offering an amendment that reduced the amount of an appropriation for any specific purpose included in the bill to some token sum, such as $50. However, since an appropriations bill does not appropriate for hundreds of specific functions, but aggregates of functions, the opportunities for such tactics would be fewer than currently exist. There is, for example, no line appropriation for funding abortions or enforcing school busing orders.

Perhaps more acceptable than a ban on riders in appropriations bills would be to forbid them on continuing resolutions. Though riders would probably continue to delay the passage of appropriations bills, a ban that applied only to continuing resolutions would increase the probability that continuing resolutions would be passed on time. Riders attached to continuing resolutions in 1979, and again in October and December 1980, were the cause of the 11-day gap of 1979, and prevented the passage of continuing resolutions in 1980 until previous funding measures had already expired. A ban applying only to continuing resolutions would be much more limited than one that applied to appropriations bills. It would allow Congress to continue to use appropriations bills for a variety

H.R. 5704 provides permanent authority to continue salaries during any period of expired appropriations. This has the advantage of certainty, but deprives Congress of immediate control over appropriations. However, long-term control is not diminished, since Congress can place appropriations ceilings on personnel expenditures in any subsequent continuing resolution or appropriations bill.

The critical deficiency of this category of measures is their lack of comprehensiveness.

RECOMMENDATION FOR CONGRESSIONAL ACTION

All of the alternatives discussed in this chapter are worthy of Congress' consideration. The variety of solutions already introduced by members of Congress indicates the widespread concern about the problems which the Congress continues to encounter in passing funding bills. In this report we have identified the considerable costs and management difficulties associated with expired appropriations. Both Government economy and service to the public require that something be done to alleviate the uncertainties, costs, and confusion that have characterized the beginning of the last 4 fiscal years.

We recommend that Congress enact permanent legislation to allow all agencies to incur obligations, but not expend funds, when appropriations expire (except where program authorization has expired or Congress has expressly stated that a program should be suspended during a funding hiatus pending further legislative action). This provides an across-the-board automatic approach and requires no annual action by Congress. It does not allow agencies to pay employees, contractors, or other expenses until an appropriations is enacted. It provides considerable incentive for Congress to pass some form of appropriations measure within a short period of time. It would entail some delayed entitlement payments, perhaps split paychecks for Federal employees, and some loss of productivity. However, it eliminates the uncertainty of whether employees should report to work if appropriations have not been enacted.

We firmly believe that the Antideficiency Act should remain unaltered. Our recommendation resolves the problems created by delayed appropriations while leaving the Act intact. It provides the exception necessary to avoid the Act's restriction on incurring obligations in advance of appropriations. However Congress chooses to address

It is also argued that a two-thirds requirement undermines the very reasons riders are offered--an inabiity to get floor consideration by other means. As already noted, however, it is now rather simple for a member of Congress to attach a limitation rider to an appropriations bills, and this encourages sidestepping the normal legislative process. One can also argue that if two-thirds of the members of either House favored the provisions of any specific rider, it would probably have been reported to the floor in any case. This does not answer the question of whether appropriations riders should be used to bypass the authorizing process in amending substantive law. This is a debate best left to Congress itself.

Proposals to guarantee pay for Federal employees

In the 96th Congress several bills (H.R. 5995, 5955, 5704, and 2289, S. 337, and 1884, 2124, H.Res. 470) were introduced to provide for the pay of Federal civilian and military employees during the period of any expired appropriations. These bills varied in their particulars, some providing for permanent appropriations (H.R. 5995, 5955, 5704), and others requiring annual action by Congress (S.337, S.1884, H.R. 2289, H.Res. 470).

Regardless of the manner in which funds were provided, all these proposals fail to meet the requirement of comprehensiveness. While the salaries of Federal employees would be paid, there would be no monies for utilities, rent, postage, supplies, and the other support services necessary to enable Federal employees to do their jobs. Nor do they provide money to pay the beneficiaries of various Government programs such as Black Lung or Supplemental Security Income. These proposals, by providing only our Federal salaries, cover only one part of the costs required for a functioning agency or department.

The proposals that require annual action by Congress do maintain congressional control of appropriations, but they are subject to the same delay and the addition of riders as appropriations bills (S.337 does prohibit unrelated amendments). Therefore, there is no assurance that these proposals would be passed before appropriations expired. Agencies would still not know, until perhaps the very day appropriations expired, if the salaries of personnel are authorized.

establish reserves in its First Concurrent Resolution for spring and summer reestimates, and in its Second Concurrent Resolution for the traditional spring supplemental. To be successful, these reserves must be used solely for their intended purposes, such as disaster relief.

The reserve could be used less if the President and appropriations committees included full cost levels in the budget and appropriations bills and specified necessary limitations on their use.

We plan to study these procedural changes further.

AGENCIES' COMMENTS

We provided the report in draft to the Department of Justice, the Office of Management and Budget and the Department of the Treasury. We did not receive official comments from OMB or Treasury. The length of time provided for response (15 days) may not have been adequate. For that reason, we will forward any comments received subsequent to the report's publication to the appropriate congressional committees or offices.

A Department of Justice official provided official oral comments on the report, and suggested that information on the Attorney General's January 16, 1981, opinion be added to the report. This material has been added, and the full text of the opinion is contained in Appendix VIII.

the problems created by delayed appropriations, we believe it should not amend the Antideficiency Act.

Additional changes requiring further consideration and study

In developing our recommendation, we concentrated on the problems created by funding gaps. Our study revealed, however, that funding gaps and continuing resolutions are only symptoms of a larger problem--pressures on the congressional budget process. In this period of severe budgetary constraints, these pressures are likely to continue to make consensus on funding bills extremely difficult. There is also a need to explore these pressures and adjust the congressional budget process to minimize them.

Currently, for example, a large number of programs require annual funding. Additionally, during the course of the fiscal year, funding estimates for emergency and uncontrollable programs are frequently adjusted. To deal with such problems, Congress could consider:

(1) shifting more programs to authorization and appropriations cycles of 2 or more years. Such an approach is especially suitable for programs and activities whose mission or level of operation and funding do not change significantly from year to year. To the extent that Congress can shift to longer authorization and appropriations cycles--and perhaps stagger them--the number of annual funding decisions would be reduced. Thus, Congress would have more time to concentrate on the funding decisions that must be made in any given year.

(2) establishing and adhering to a reserve for fall and spring adjustments for emergencies and uncontrollable cost growth. Miminum estimates for some emergency programs (e.g., fighting forest fires) and uncontrollable cost factors are traditionally included in the President's budget and the First Concurrent Resolution of Congress. An allowance for contingencies has been used in the past to cover some of these expected costs. Such budgetary pressures--such as the need for a third concurrent resolution--could be reduced if Congress could effectively

appropriations. However, even in these instances, if there are no administrative funds available to administer these programs, they too must also begin the orderly termination of operations.

3) protect life and property in emergency situations that constitute an immediate threat to life or property.

--Federal agencies must suspend operations with only the guidance provided by the Attorney General's opinion and OMB Bulletin 80-14 (August 28, 1980). OMB's memorandum of September 30, 1980 allowed agencies to continue almost all normal activities on October 1, 1980. However, since this memorandum was predicated on the assumption that passage of a continuing resolution was merely a few hours away, it would not apply to any situation in which funding was unavailable for a matter of days or weeks.

--That Congress has given no indication of whether it prefers agencies to continue functioning, and has passed neither appropriations nor continuing resolutions for any part of the Federal Government by midnight, September 30, 1980.

SERVICES AND FUNCTIONS AFFECTED THE FIRST DAY

On the first day, agencies throughout the Government would answer inquiries from the public with the response that all normal services were suspended until Congress had passed an appropriation or continuing resolution allowing the resumption of normal activities.

Among the major, first-day consequences of a Government-wide lack of appropriations:

Commercial air traffic ceases

Air traffic controllers could safely guide airborne aircraft to their destinations, but no flights would be allowed to take off. Once all aircraft were safely on the ground, air traffic controllers would be furloughed. International air traffic destined for the United States would have to be cancelled at its point of origin. Commercial and private aircraft make some 193,000 takeoffs and landings each day in the United States.

A HYPOTHETICAL CASE OF THE POSSIBLE EFFECT OF STRICT COMPLIANCE WITH THE ANTIDEFICIENCY ACT IN THE EVENT OF A PROLONGED GOVERNMENT-WIDE FUNDING GAP

In the circumstances we describe here, if the Antideficiency Act were strictly enforced--without any exceptions, such as activities necessary for health and safety--it would have devastating effects. The repercussions would be immediate and widespread. On the first day air traffic controllers and FBI agents would be furloughed, Social Security offices would close, and air, land, and sea traffic would be halted at U.S. borders. As the days passed, the adverse effects of a Government-wide lack of appropriations would intensify. If there were no appropriations for as long as 2 weeks, virtually every Federal employee and the vast majority of Americans who depend in one way or another on Government services and benefits would begin to be affected.

The Attorney General's opinion April 1980 fundamentally altered the environment in which Federal agencies must prepare for a period of expired appropriations. His decision to strictly enforce the provisions of the Antideficiency Act severely narrows the range of activities agencies could continue during the course of any funding hiatus. To illustrate what would happen if the Act were strictly enforced, we developed a hypothetical case covering a 30-day period of expired appropriations. While it is unthinkable that a funding hiatus would continue for such a long time, our case helps in understanding the full implications of strictly applying the Antideficiency Act, and its criminal sanctions. We did not try to canvas the entire Government in constructing our case, but have instead tried to illustrate the timing of some of the most significant effects of any extended period of expired appropriations.

ASSUMPTIONS

In creating our hypothetical case, we assumed the following:

--The Antideficiency Act will be narrowly interpreted to allow only those activities necessary to:

1) suspend operations until funds are available, at which time normal activities and services will resume.

2) continue functions for which appropriations remain available, for example, no-year and multi-year

All Federal cemeteries close

The Veterans Administration would close the Federal cemetery system by noon of the first day. Funeral home directors would be notified that all funerals had been postponed until funds were available to operate. About 822 deceased veterans are buried each day in Federal cemeteries.

THE FIRST WEEK--
DAYS 1 TO 7

By the end of the first week, about 570,000 Federal employees would be furloughed. Some departments and independent agencies would have furloughed all staff except those necessary to complete the suspension of activities. Except for the Department of Defense, Public Health Service doctors and hospitals, and Veterans Administration hospitals, all agencies would be reduced to skeleton staffs--perhaps 10 percent of their normal employment. Staff reductions and the lack of funds would affect other services as well.

Social security offices close

While October benefit payments for Social Security retirement and disability would be paid on September 30; no administrative expenses to process new applications and pay any Social Security benefits for any following months would be authorized. (The number of beneficiaries grows at the rate of about 1,700 per day, 50,000 per month.) Although Social Security Administration expenses are charged against the Social Security Trust Fund from which benefits are paid, Congress sets an annual appropriations limitation on the amount of administrative expenses that may be incurred. Thus, even though a directive from the Secretary of HHS indicated that all administrative activities necessary to continue such payments could continue, a restrictive interpretation of the Antideficiency Act would prohibit such activities.

Black lung benefits stop

The Department of Labor would be unable to pay some 71,200 miners, survivors and dependents $60 million in monthly black lung benefits. An additional $1.4 million in medical service payments would also be frozen. A nearly equal number of black lung recipients paid by the Social Security Administration would also be affected.

Customs begins closing borders

The U.S. Customs Service would have to begin the monumental task of sealing all U.S. borders, harbors, and airports to incoming persons, cargo, and traffic. In FY 79, Customs processed over $200 billion worth of imported goods. Daily, Customs processed about 130,000 foreign mail parcels and cleared more than 220,000 cars, trucks, and buses; 440 ships; 1220 aircraft; and 740,000 persons entering the U.S.

Coast guard planes and boats return to base

Routine patrol of coastal waters, and inspection of ships by the Coast Guard would stop on the first day. Personnel could remain on call to respond to emergency, life-threatening situations, such as a sinking ship, but only a few communications personnel necessary to monitor radio communication would remain on active duty. During an average day, the Coast Guard responds to 227 search and rescue calls and assists about 500 persons.

Criminal justice system grinds to a halt

The Department of Justice would need to maintain the prison system, protect undercover agents, Government witnessess and informants, and provide court security services to the judicial branch. However, criminal litigation and investigations conducted by U.S. Attorneys, the Drug Enforcement Administration, and the Federal Bureau of Investigation would not generally qualify as essential activities under the protection of life and property exemption. Each month, about 12,500 criminal complaints are referred to U.S. attorneys nationwide, and about 2,500 criminal cases are terminated.

400,000 Federal employees furloughed

About one-fifth of the Federal civilian workforce, some 400,000 employees, would be furloughed the first day. This would increase the nation's unemployment rate about 0.4 of one percent. Excluding the Departments of Defense and State, most of the remaining employees would be engaged in shutdown activities.

totally shutdown by the end of the second week, except for a caretaker force to protect property and secure buildings. New consequences include:

Partial paychecks for Federal civilian employees

All 2 million civilian, Federal employees would have paychecks due during this period. Only salaries and wages earned through September 30 could be paid, however. Since this date fell in the middle of a pay period in 1980, all employees would receive partial paychecks.

Military personnel receive no pay

Normally paid on the 15th and 30th of each month, some 1.7 million active military personnel would receive no paychecks at the end of the second week.

Furloughed Federal employees file for unemployment compensation

Federal workers, like any other, are entitled to unemployment compensation when laid off for 7 days or more. Consequently, Federal employees furloughed on October 1 through October 8 could file for such benefits during this period. At least 570,000 Federal employees would be eligible.

Utility crisis for low-income households

Almost 1 million families residing in public housing projects would face the prospect of having their heat and other utilities disconnected for lack of payment, unless utility companies were willing to await late payment once appropriations were passed and checks could be processed.

THE THIRD AND FOURTH WEEKS--DAYS 16 TO 30

Most severely affected by the first 2 weeks of any funding gap would be Federal employees and those individuals and companies who make extensive use of aircraft and border crossings, as well as the financial community if Treasury could not redeem outstanding securities. In the latter part of a 30-day funding hiatus, a wide variety of entitlement recipients would be affected. These include people who are largely or totally dependent on the Federal Government for their daily expenses--recipients of Social

Department of Treasury unable to redeem securities

Unless it were ruled that it would endanger the safety of United States property (including the value of the dollar in foreign markets), the Treasury would be unable to redeem U.S. securities which became due during a funding hiatus, and could not issue new securities to finance government operations, including interest on the national debt. While Treasury has permanent borrowing authority to carry out these functions, it could not pay its employees to do so. Since auction and redeemption of U.S. securities and notes occurs every week, and involves several billion dollars, the effects on U.S. and world financial markets would be immediate, devastating and incalculable.

Housing assistance unavailable

The Department of Housing and Urban Development could not process approximately 25,000 to 30,000 monthly applications (about 100,000 persons) from the nation's poor and elderly for housing assistance.

Community development block grants could not be issued

Some 3,000 communities across the country would not receive community development block grants. This could trigger layoffs by local governments.

Much of Federal Goverment is closed down

Virtually the entire departments of Housing, Education, Health and Human Services, Transportation, Energy, as well as the Food and Drug Administration, Environmental Protection Agency, and National Aeronautics and Space Administration would begin almost total suspension of operations. Affected as well would be the Meat Inspection Service of the Department of Agriculture, the agricultural price support operations of the Commodity Credit Corporation and mine safety inspections by the Department of Labor.

THE SECOND WEEK--DAYS 8 TO 15

The effects of a funding hiatus identified above would intensify during this time. Some agencies would be

Federal civilian and military retirement checks frozen

November retirement checks worth about $2.3 billion to military and civilian retirees could not be paid. Since Congress limits the administrative costs available for processing civilian retirement, no monies could be paid from the trust funds for November benefits. Military retirement would be completely without funds to pay benefits, since Congress annually appropriates the funds for these payments.

A few services would be unaffected

As previously mentioned, the Attorney General's opinion allows services and functions to continue if (1) appropriations remain available (i.e., no-year and multi-year appropriations); and (2) they are otherwise authorized by law. The Antideficiency Act allows agencies to accept "voluntary" services for the emergency protection of life and property. Some activities would qualify for these exemptions. For example, Comprehensive Employment and Training Act programs operated by State and local sponsors would continue since the Department of Labor normally carries over a fund balance and the appropriations bill provides for a 2-year availability of funds. Many education programs would continue because they are funded 1 year in advance. Since the school year normally begins 1 month before the end of the Federal fiscal year, most education funds for the 1980-81 academic year were included in FY 1980 appropriations.

Some services are authorized by law to continue, such as unemployment compensation, which is administered by the States with benefits paid from a trust fund. Recent appropriations bills have authorized HHS to award grants to the States for Aid to Families with Dependent Children (AFDC), Medicaid, Social Services, and Child Support Enforcement in September of the current fiscal year for the first quarter of the following fiscal year.

The Attorney General's opinion also specifically mentions 41 U.S.C. sec. 11 as a statute that authorized contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the armed forces." While this statute provides for the operations of active military personnel and equipment, it does not provide for the pay of military personnel. However, active military personnel would be entitled to retroactive payment for their salaries during the time of any funding hiatus.

Security, Supplemental Security Income, Food Stamps, Veterans Compensation and Pensions, and Federal civilian and military retirement. Literally millions of people would be affected. The effects on the personal lives of many of these recipients would be catastrophic--they would have no money to pay rent and utilities or to buy groceries and other essentials.

WIC program winds down

After 15 days, the Supplement Feeding Program for Women, Infants, and Children (WIC) would begin to shut down nationwide. As happened in 1979, programs in some States would shutdown prior to this time. Some 2 million women, infants, and children would be affected.

Child nutrition programs close

Unless school districts or States could pick up the deficit, the Special Milk, School Lunch and School Breakfast programs would begin to close down. This would affect some 28.6 million school children, who consume some 194 million half-pints of milk, 500 million lunches, and 70 million breakfasts every month. Each month 210 million free lunches, and 58 million free breakfasts are served to children from families with incomes at or below the official poverty level.

Elderly feeding program jeapordized

If some 13 million meals per month to elderly citizens were to be continued, States and localities would have to temporarily provide the funds to pay for them.

No food stamps issued

While food stamps would be issued for the month of October, the program would begin to close down unless States were willing to loan the program money to keep it going into November. About $800 million in food stamps are issued each month to some 20 million recipients.

Veterans benefits suspended

Veterans compensation, pensions and readjustment benefit payments could not be made for the month of November, since there would be no money to pay them. This would affect 2 million pension, 2.6 million compensation, and 451,000 readjustment payments to veterans and survivors, of deceased veterans valued at about $1.1 billion.

THE ANTIDEFICIENCY ACT (31 U.S.C. 665)

Sec.665(a)

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve 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.

Sec.665(b)

No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Under the exception of emergency protection of life and property, the treatment of end-stage renal disease (kidney failure) could continue, for recipients would soon die without it. The Public Health Service and Veterans Administration hospitals could remain open but could treat only emergency, life-threatening injuries or diseases.

It is unclear whether laboratory animals used in ongoing experiments could be fed and watered under the provision for the protection of property. Such care protects the integrity of costly and lengthy medical research in which the animals are used, but the danger to the animals is not immediate. Most agencies who had such animals included their care under the protection of property provision.

Security services for Federal buildings and property could be maintained. Obligations could be incurred for personnel and utilities necessary to secure and maintain Government computers and tapes as part of shutdown activities. Without such measures tapes could be destroyed containing information which, if duplicable at all, would take years and millions of dollars to replicate. Computers must be properly cooled if they are not to be severely damaged.

SUMMARY

Though no Government-wide funding gap is likely to continue for nearly as long as a month, in past years individual cabinet departments have been without funds for as long as 20 days. To construct a hypothetical case for a Government-wide hiatus of 1 month highlights the enormous number of people who would be affected by any prolonged appropriations gap. The effects would extend far beyond Government employees and services to many areas of the private sector, including air transportion, international trade and travel, and banking.

By October 1, 1980, only the Military Construction, Energy and Water, and Department of Transportation appropriations bills had been passed. As outlined in this chapter, strict compliance with the provisions of the Antideficiency act could have had devastating consequences--both on the public and private sectors--if an October 1980 funding gap had lasted as long as the 11-day gap of 1979. It is difficult to believe both that Congress could intend that adherence to the Antideficiency Act should create such confusion, and that Congress would let this happen.

APPENDIX III

> obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all of the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose * * *."

As applicable to your inquiry, section 665(a) prohibits any officer or employee, unless specifically authorized by statute, from incurring any obligation on the part of the United States to pay money for any purpose prior to the enactment of an appropriation for that purpose.

We are aware of no statute which permits Federal agencies to incur obligations for the pay of employees in the absence of an appropriation for that purpose. Therefore, the "unless" clause of section 665(a) is not applicable.

For the purposes of your inquiry, we shall assume that each of the agency's employees has been properly appointed to an authorized position, has taken the oath of office, has entered on duty, and has executed the affidavits concerning loyalty, striking, and purchase of office required by statute. Under these circumstances, an employee who reports for work under the direction or with the consent of his or her supervisor is entitled to be paid for the time worked, and the United States is legally bound to pay the employee. The entitlement of the employee and the liability of the Government exist independently of any appropriation although, of course, funds may not be disbursed to pay the employee unless an appropriation for that purpose is enacted. Cf. Strong v. United States, 60 Ct. Cl. 627, 630 (1925); Collins v. United States, 15 Ct. Cl. 22, 36 (1879).

It follows that in permitting employees to work during a period of expired appropriations, a supervisory officer or employee incurs an obligation on behalf of the Government to pay the salaries of these employees for the period of time worked. Since there are no funds available at the time the obligation was incurred, he has violated the Antideficiency Act.

It makes no difference legally that some or all of the employees involved are willing to work without pay, taking a chance that the Congress will eventually rescue the agency by enacting an appropriation to cover the deficiency obligations incurred. Subsection (b) of section 665 was enacted precisely to cover this kind of situation. It provides:

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-197841

March 3, 198[illegible]

The Honorable Gladys Noon Spellman
Chair, Subcommittee on Compensation and
Employee Benefits
Committee on Post Office and Civil Service
House of Representatives

Dear Madam Chair:

You have requested our interpretation of section 665(a) of title 31 of the United States Code, part of the so-called "Antideficiency Act." Specifically, you asked whether under this Act, an agency can legally permit its employees to come to work after the expiration of the agency's appropriation for one fiscal year and prior to the enactment of either a regular appropriation or a continuing resolution appropriating funds for the subsequent fiscal year.

For the reasons indicated below, it is our opinion that any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which the Congress has not enacted an appropriation for the pay of these employees violates the Antideficiency Act.

Section 665(a) of title 31 of the United States Code provides:

> "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve 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."

As we stated at 42 Comp. Gen. 272, 275 (1962), this and other similar statutes:

> " * * * evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in

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It thus appears that the Congress expects that the various agencies of the Government will continue to operate and incur obligations during a period of expired appropriations.

Despite what we perceive as the intent of Congress that Federal agencies continue to operate during periods of expired appropriations, such operations legally produce widespread violations of the Antideficiency Act. For this reason, we recently commented favorably on the general intent of both H.R. 5995 and H.R. 5704, in bill reports to the Chairman of your Committee. See B-197584, February 5, 1980; B-197059, February 5, 1980.

Sincerely yours,

Comptroller General
of the United States

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"No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property."

In the absence of express statutory authority to the contrary, we have held that unless there is an agreement in writing that the person rendering the services does so gratuitously (a term not necessarily synomous with "voluntarily") with no expectation of ever being paid, acceptance of such services is a violation of section 665(b). See 26 Comp. Gen. 956 (1947); 7 Comp. Gen. 810, 811 (1928). A violation of either subsection subjects the official committing the violation to the administrative or possibly even criminal penalties of section 665(i)(1).

During a period of expired appropriations, the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted.

However, we do not believe that the Congress intends that federal agencies be closed during periods of expired appropriations. For example, at the start of the period of expired appropriations at the beginning of the current fiscal year, Senator Magnuson, the Chairman of the Senate Committee on Appropriations, cited with approval a memorandum to employees from GAO's Director of General Services and Controller. Senator Magnuson requested that the memorandum be printed in the Congressional Record as a guide to other agencies. The memorandum began as follows:

"Even though Congress has not yet passed an FY 1980 GAO Appropriation or Continuing Resolution, we do not believe that it is the intent of Congress that GAO close down until an appropriate measure has been passed." (125 Cong. Rec. S13784 (daily ed., October 1, 1979)).

Further, in enacting a continuing resolution after the start of a fiscal year, the Congress generally makes it effective retroactive to the beginning of the fiscal year, and includes language ratifying obligations incurred prior to the resolution's enactment. For example, the first fiscal year 1980 continuing resolution, Public Law 96-86, provided as follows in section 117:

"All obligations incurred in anticipation of the appropriations and authority provided in this joint resolution are hereby ratified and confirmed if otherwise in accordance with the provisions of the joint resolution."

APPENDIX IV

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations. 1/ On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

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

1/ An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. See 15 Op. A.G. 209 (1877). See also 25 U.S.C. § 99 and 31 U.S.C. § 668.

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

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

APPENDIX IV

Office of the Attorney General
Washington, D. C. 20530

April 25, 1980

The President
The White House
Washington, D.C. 20500

My Dear Mr. President:

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

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

> involve 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.

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branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

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

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

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

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

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

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956. 4/ On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse. 5/ However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations. 6/ Neither are we aware that the Executive branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year. 7/ Various agencies of the Executive

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

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

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

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

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

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

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

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

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

Very respectfully,

Benjamin R. Civiletti
Attorney General

10/ See 21 Op. A.G. 288 (1896).

DOJ-1980-04

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

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

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) [remarks of Rep. Dawes].

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

APPENDIX V

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

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

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

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

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

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

APPENDIX V

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

Bulletin No. 80-14 August 28, 1980

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

James T. McIntyre, Jr.

James T. McIntyre, Jr.
Director

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

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

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

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

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

3. Conduct essential activities to the extent that they protect life and property, including:

   a. Medical care of inpatients and emergency outpatient care;

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

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

   d. Border and coastal protection and surveillance;

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

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

   g. Law enforcement and criminal investigations;

   h. Emergency and disaster assistance;

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

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

   k. Activities necessary to maintain protection of research property.

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

Questions concerning these matters will be addressed to the Office of Legal Counsel in the Department of Justice and the Office of Management and Budget.

APPENDIX VI

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

September 30, 1980

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: James T. McIntyre, Jr.
Director

SUBJECT: Agency Operations in the Absence of Appropriations

As of 2:00 p.m. today, the Congress had not completed action on a continuing resolution for fiscal year 1981.

As you know, the Attorney General has determined that the Antideficiency Act requires that in the absence of appropriations no further obligations may be incurred except for the orderly termination of operations or as otherwise authorized by law.

We have informed the Congress of the grave consequences of failure to enact that resolution by midnight, September 30. On several occasions the President has discussed with congressional leaders his serious concern and the need for urgent action on the continuing resolution. While we expect the Congress to complete its action very soon, prudent action requires adequate preparation for the possibility of no continuing resolution, however slight the possibility might be.

Each agency must now have in place a contingency plan, as outlined in OMB Bulletin No. 80-14 dated August 28, 1980, and must be prepared to put that plan into effect. Your General Counsels and budget officials have participated in discussions of this subject.

In the absence of appropriations, all staff should report to work on Wednesday, October 1.

Beginning October 1, agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities. Primary examples of activities agencies may continue are those which may be found under applicable statutes to:

1. Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.

2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.

3. Conduct essential activities to the extent that they protect life and property, including:

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

   b. Border and coastal protection and surveillance;

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

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

   e. Law enforcement and criminal investigations;

   f. Emergency and disaster assistance;

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

   h. Activities necessary to maintain protection of research property.

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

So long as a continuing resolution is not enacted, new grants, contracts and other new obligations may not be incurred; new employees may not be hired.

Questions concerning these matters will be addressed to the Office of Legal Counsel in the Department of Justice and the Office of Management and Budget.

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

December 15, 1980

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: James T. McIntyre, Jr.
Director

SUBJECT: Continuing Resolution

As of 4:00 p.m. today, the Congress had not completed action on a continuing resolution. If the resolution is not enacted by midnight tonight, the determination by the Attorney General applicable to the absence of appropriations will be in effect. That ruling is that no further obligations may be incurred except for the orderly termination of operations or as otherwise authorized by law.

Agencies that have received appropriations are not affected by this memorandum. If the continuing resolution has not been enacted by midnight tonight, the determination will apply to activities covered by the following appropriations:

Foreign assistance and related programs
Departments of Labor, Health and Human Services, and Education and related agencies
Legislative Branch
Departments of State, Justice, and Commerce, the Judiciary, and related agencies
Treasury Department, the United States Postal Service, the Executive Office of the President, and certain independent agencies

Certain other programs lacking authorization to continue will also be affected.

Each agency must now have in place a contingency plan, as outlined in OMB Bulletin No. 80-14 dated August 28, 1980, and must be prepared to put that plan into effect. Your General Counsels and budget officials have participated in discussion of this subject.

In the absence of appropriations, all staff should report to work on Tuesday, December 16.

Beginning December 16, affected agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities. Primary examples of activities agencies may continue are those which may be found under applicable statutes to:

1. Conduct foreign relations essential to the national security or the safety of life and property.

2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.

employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

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

2/ The FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. 96-240, 94 Stat. 342. Prior to April 30, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. 96-252, 94 Stat. 374 (May 28, 1980), would precipitate a lapse in appropriations for a significantly longer period.

3/ See note 11 infra.

APPENDIX VIII

Office of the Attorney General
Washington, D. C. 20530

January 16, 1981

The President
The White House
Washington, D.C. 20500

My Dear Mr. President:

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

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980 opinion to you concerning the applicability of the Anti-deficiency Act, 31 U.S.C. § 665, upon lapses in appropriations. That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized by law to employ the services of their

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1/ Prior to October 1, 1980, Congress had passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. 96-367, 94 Stat. 1331 (Oct. 1, 1980).

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are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. A.G. 288, 291 (1870).

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

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

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

> [N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

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

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

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the Government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of § 665(a) excepts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that § 665(b) expressly permits the Government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

I

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

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

(Emphasis added.) Under the language of § 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the Government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that

that have been invested in, the officers or employees purporting to obligate funds on behalf of the United States. 15 Op. A.G. 235, 240 (1877).

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

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsibilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations. For example, Attorney General McReynolds concluded, in 1913, that the Postmaster General could not obligate funds in excess of appropriations for the employment of temporary and auxiliary mail carriers to maintain regular service, notwithstanding his broad authorities for the carrying of the mails. 30 Op. A.G. 157. Similarly, in 1877, Attorney General Devens concluded that the Secretary of War could not, in the absence of appropriations, accept "contributions" of material for the army, e.g., ammunition and medical supplies, beyond the Secretary's specific authorities to contract in advance of appropriations. 15 Op. A.G. 209. 6/

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

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

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5/ (Continued from p. 4.)
Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

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

Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

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functions authorized by the Constitution as well. To take one obvious example, the President alone, under Art. II, § 2, cl. 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect. Not all of the President's powers are so specifically enumerated, however, and the question must consequently arise, upon a Government-wide lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

In my judgment, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, Crowell v. Benson, 285 U.S. 22, 62 (1932), and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. § 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952):

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

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

Unlike his subordinates, the President performs not only functions that are authorized by statute, but

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

power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President. 10/ Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

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

II

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

9/ (Continued from p. 9.)

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

39 Op. A.G. 343, 347-48 (1939).

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

> autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Id. at 635. 8/ Following this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes--and thus with the exercise of legislative power in an area of concurrent authority--that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates. In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations. 9/ Clearly, such an exercise of

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8/ A majority of the Supreme Court has repeatedly given express endorsement to Mr. Justice Jackson's view of the separation of powers. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Buckley v. Valeo, 424 U.S. 1, 122 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); National Association of Letter Carriers v. Austin, 418 U.S. 264, 273 n.5 (1974).

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

> [T]he Executive has powers not enumerated in the statutes--powers derived not from statutory grants but from the

involving the loss of human life or the destruction of property." (Emphasis supplied.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the Government's "life-saving stations." One Senator cautioned:

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

15 Cong. Rec. 2143 (1884) (remarks of Sen. Beck); see also id. at 3410-11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now § 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. § 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the Bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that "cases of sudden emergency" be amended to "cases of emergency," "loss of human life" to "safety of human life," and "destruction of property" to "protection of property." These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b). Act of Sep. 6, 1950, ch. 896, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

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

Under § 665(b), it is thus crucial, in construing the Government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history--of which Congress is fully aware--of the interpretation of an identical phrase in a related budgeting context, suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than § 665(b) itself. First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

As originally enacted in 1884, the provision forbade unauthorized employment "except in cases of sudden emergency

of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include FBI criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601 et seq., the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e). 12/ Most important,

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11/ (Continued from p. 13.)
appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reapportionments do not create new obligational authority, they frequently impose a necessity for further appropriations as compelling as the Government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

12/ In my April 25, 1980 memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. The functions that, in my judgment, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under § 665(b), of the agency's property by its own employees until such protection can be arranged by another agency with appropriations; compliance, within the "authorized by law" exception to

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

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

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reapportionment, Congress did not

APPENDIX VIII

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980 memorandum as illustrative of the areas of government activity in which emergencies involving the safety of human life and the protection of property might arise. To erect the most solid foundation for the Executive branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its General Counsel, considers to be the agency's emergency functions.

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

under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b). 13/

12/ (Continued from p. 14.)
§ 665(a), with statutes providing for the rights of employees and the protection of government information; and the transfer, also under the "authorized by law" exception to § 665(a), of any matters within the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions in advance of appropriations only to the minimum extent necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgment, expects.

13/ The Supreme Court has referred repeatedly to the:

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

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes omitted). Since enacting the modern Antideficiency Act, including § 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of § 665(e). At no time has Congress altered this interpretation of § 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. Compare 43 Op. A.G. No. 26 (1980).

Government to hire firefighters must surely have intended that water and firetrucks would be available to them. 14/

III

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

As the law is now written, the nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,

BENJAMIN R. CIVILETTI
Attorney General

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

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