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# Shutdown of the Federal Government: Causes, Processes, and Effects

Clinton T. Brass

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# Shutdown of the Federal Government: Causes, Processes, and Effects

## **Abstract**

When federal agencies and programs lack appropriated funding, they experience a funding gap. Under the Antideficiency Act, they must cease operations, except in certain emergency situations or when law authorizes continued activity. Failure of the President and Congress to reach agreement on interim or full-year funding measures occasionally has caused government shutdowns, the longest of which lasted 21 full days, from December 16, 1995, to January 6, 1996. Government shutdowns have necessitated furloughs of several hundred thousand federal employees, required cessation or reduction of many government activities, and affected numerous sectors of the economy. This report discusses the causes, processes, and effects of federal government shutdowns, including potential issues for Congress.

## **Keywords**

government shutdown, Antideficiency Act, Congress, budget

## **Comments**

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# Shutdown of the Federal Government: Causes, Processes, and Effects

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## Summary

When federal agencies and programs lack appropriated funding, they experience a funding gap. Under the Antideficiency Act, they must cease operations, except in certain emergency situations or when law authorizes continued activity. Failure of the President and Congress to reach agreement on interim or full-year funding measures occasionally has caused government shutdowns, the longest of which lasted 21 full days, from December 16, 1995, to January 6, 1996. Government shutdowns have necessitated furloughs of several hundred thousand federal employees, required cessation or reduction of many government activities, and affected numerous sectors of the economy. This report discusses the causes, processes, and effects of federal government shutdowns, including potential issues for Congress.

For questions concerning the impact of a shutdown on a specific agency or program, congressional operations, or judicial operations,

- see the contact information for CRS subject matter experts who are listed in CRS Report R41723, *Funding Gaps and Government Shutdowns: CRS Experts*, coordinated by Clinton T. Brass;
- call CRS at 7-5700; or
- see the “Key Policy Staff” table at the end of this report.

For analysis of potential effects of a shutdown on the Department of Defense, see CRS Report R41745, *Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations*, by Pat Towell and Amy Belasco.

For analysis of the government’s contractual rights and how it could use these in the event of a shutdown, see CRS Report R42469, *Government Procurement in Times of Fiscal Uncertainty*, by Kate M. Manuel and Erika K. Lunder.

For discussion of funding gaps and a detailed chronology of two funding gaps that led to the two shutdowns of FY1996, see CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup.

For an annotated list of historical documents and other resources related to past government shutdowns, see CRS Report R41759, *Past Government Shutdowns: Key Resources*, by Jared C. Nagel and Justin Murray.

For links to agency shutdown plans (also sometimes called “contingency plans”) of varying dates, see the Office of Management and Budget’s (OMB’s) website, at <http://www.whitehouse.gov/omb/contingency-plans>.

## Contents

|  |    |
|--|----|
| Budget Negotiations and Choices.....                             | 1  |
| Causes of Federal Shutdowns.....                                 | 2  |
| OMB and Agency Shutdown Processes.....                           | 6  |
| Effects of a Federal Government Shutdown.....                    | 8  |
| Effects on Federal Officials and Employees.....                  | 8  |
| Executive Branch.....  | 10 |
| Legislative Branch.....  | 11 |
| Judicial Branch.....   | 11 |
| Examples of Excepted Activities and Personnel.....               | 12 |
| Effects on Government Operations and Services to the Public..... | 14 |
| Illustrations from FY1996 Shutdowns.....                         | 14 |
| Effects on Mandatory Spending Programs.....                      | 16 |
| More Recent Prospective Statements and Analyses.....             | 17 |
| Potential Issues for Congress.....                               | 18 |
| Quality and Specificity of Agency Planning.....                  | 18 |
| Availability of Updated Agency Shutdown Plans.....               | 19 |
| Possible National Security Implications.....                     | 20 |

## Contacts

|                                 |    |
|---------------------------------|----|
| Author Contact Information..... | 21 |
| Acknowledgments.....            | 21 |
| Key Policy Staff.....           | 21 |

## Budget Negotiations and Choices

It has been said that “conflict is endemic to budgeting.”<sup>1</sup> If conflict within Congress or between Congress and the President impedes the timely enactment of annual appropriations acts or continuing resolutions, a government shutdown may occur.

Specifically, during high-stakes negotiations over appropriations measures, several options present themselves to Congress and the President. The options include

- coming to agreement on regular appropriations acts before October 1, the beginning of a new fiscal year;
- using one or more interim continuing resolutions (CRs) to extend temporary funding beyond the beginning of a fiscal year, until negotiators make final decisions about full-year funding levels; or
- not agreeing on full-year or interim appropriations acts, resulting in a funding gap and a corresponding shutdown of federal activities.

If Congress and the President pursue the second or third options, they may agree on full-year appropriations after the beginning of the fiscal year. These agreements may use a full-year CR or, more commonly, regular appropriations acts, either singly or in omnibus legislation. Congress and the President frequently agree on full-year or interim funding without coming to an impasse.<sup>2</sup> On other occasions, however, Congress and the President may not come to an accommodation in time to prevent a funding gap.

This report discusses the causes of funding gaps and shutdowns of the federal government, processes that are associated with shutdowns, and how agency operations may be affected by shutdowns.<sup>3</sup> The report concludes with a discussion of potential issues for Congress.

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<sup>1</sup> Irene S. Rubin, “Understanding the Role of Conflict in Budgeting,” in Roy T. Meyers, ed., *Handbook of Government Budgeting* (San Francisco: Jossey-Bass, 1999), p. 30.

<sup>2</sup> For discussion, see CRS Report RL32614, *Duration of Continuing Resolutions in Recent Years*, by Jessica Tollestrup. For analysis of the potential functions and impacts of CRs, see CRS Report R42647, *Continuing Resolutions: Overview of Components and Recent Practices*, by Jessica Tollestrup; and CRS Report RL34700, *Interim Continuing Resolutions (CRs): Potential Impacts on Agency Operations*, by Clinton T. Brass. For more detailed discussion of the potential impacts of CRs, see CRS Congressional Distribution Memorandum, *Potential Impacts of Interim Continuing Resolutions (CRs) on Agency Operations and the Functioning of the Federal Government*, coordinated by Clinton T. Brass, July 8, 2008 (available on request).

<sup>3</sup> This report focuses on funding gaps and shutdowns that are associated with annual appropriations acts. It does not focus on shutdowns that may occur when a specific program or agency is funded by legislation other than annual appropriations acts, and the statutory authorization for the program or agency expires. Nevertheless, these “expired authorization” shutdowns are similar in many ways to broader “annual appropriations” shutdowns. An example of an expired authorization shutdown occurred in early 2010, when authorization for certain surface transportation programs and trust funds expired after 11:59 p.m. on February 28, 2010. The expiration caused a lapse in authority to expend funds that, among other things, affected certain construction projects on federal lands and required nearly 2,000 U.S. Department of Transportation employees to be furloughed. On March 2, 2010, P.L. 111-144 reauthorized these activities (124 Stat. 45). On April 15, 2010, P.L. 111-157 provided compensation to furloughed federal employees and ratified retroactively all “essential actions” taken during the lapse by federal employees, contractors, and grantees to “protect life and property and to bring about orderly termination of Government functions” (124 Stat. 1118).

## Causes of Federal Shutdowns

The federal fiscal year begins on October 1. For agencies and programs that rely on discretionary funding through annual appropriations acts, Congress and the President must enact interim or full-year appropriations by this date if many governmental activities are to continue operating.<sup>4</sup> If interim or full-year appropriations are not enacted into law, the time interval in which agency appropriations are not enacted is referred to as a “funding gap.”<sup>5</sup> A funding gap also may occur any time that interim funding in a CR expires and another CR (or regular appropriations bill) is not enacted immediately thereafter.<sup>6</sup> When a funding gap occurs, the federal government generally begins a “shutdown” of the affected activities, including the furlough of certain personnel and curtailment of agency activities and services.<sup>7</sup> There are some exceptions to this process, however, as explained later in this report. Programs that are funded by laws other than annual appropriations acts (e.g., entitlements like Social Security and other mandatory spending) also may be affected by a funding gap, if program execution relies on activities that receive annually appropriated funding.

Funding gaps and government shutdowns have occurred in the past when Congress and the President did not enact regular appropriations bills by the beginning of the fiscal year. They also have occurred when Congress and the President did not come to an agreement on stop-gap funding through a CR. As noted in another CRS report, six fairly lengthy funding gaps occurred from FY1977 to FY1980, ranging from 8 to 17 full days.<sup>8</sup> Subsequently, the durations of funding gaps shortened considerably. From FY1981 to FY1995, nine funding gaps occurred with durations of up to three full days. A significant exception to the trend occurred in FY1996, when President William J. Clinton and the 104<sup>th</sup> Congress engaged in extended negotiations over

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<sup>4</sup> Discretionary funding generally refers to budget authority (i.e., the authority to incur financial obligations that result in government expenditures) that is provided in and controlled by an annual appropriations act. Conversely, mandatory funding generally refers to budget authority that is provided in and controlled by laws other than annual appropriations acts. Some budget authority provided in annual appropriations acts for certain programs is treated as mandatory, however, because the relevant authorizing legislation entitles beneficiaries to receive payment or otherwise obligates the government to make payment. See U.S. Government Accountability Office (formerly the General Accounting Office; hereinafter GAO), *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, September 2005, pp. 46, 66; and CRS Report RS20129, *Entitlements and Appropriated Entitlements in the Federal Budget Process*, by Bill Heniff Jr.

<sup>5</sup> CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup. Some observers use alternative terms “lapse in appropriations” and “appropriations hiatus” instead of “funding gap.”

<sup>6</sup> The Office of Management and Budget (OMB) effectively has taken the view that if funding authority expires at the end of a day (e.g., Friday, April 8, 2011), but continuing or full-year authority is enacted at any time during the next day (e.g., Saturday, April 9, 2011; where enacted means signed by the President after passing both chambers of Congress), no funding gap or shutdown occurs. See OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, p. 3, and OMB Memorandum M-11-14, *Anticipated Enactment of a Continuing Resolution*, April 8, 2011, p. 1, at [http://www.whitehouse.gov/omb/memoranda\\_default/](http://www.whitehouse.gov/omb/memoranda_default/).

<sup>7</sup> Although a shutdown may be the result of a funding gap, the two events should be distinguished. This is because a funding gap may result in a total shutdown of all affected projects or activities in some instances, but not in others. For example, if a funding gap is of a short duration, agencies may not have enough time to complete a shutdown of affected projects and activities before funding is restored. In addition, OMB has previously indicated that a shutdown of agency operations within the first day of a funding gap may be postponed if it appears that a CR or regular appropriations bill is likely to be enacted on the first day of a funding gap. See *ibid.*

<sup>8</sup> CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup. These funding gaps occurred before the Department of Justice issued opinions in 1980 and 1981 about allowable agency activities during a funding gap. The opinions, which are discussed later, were restrictive in their implications about allowable agency activities compared to what agencies had done in the past during a funding gap.

budget policy. Two funding gaps and corresponding shutdowns, amounting to 5 full days and 21 full days, ensued.<sup>9</sup> There have been no similar funding gaps since FY1996.

The Constitution, statutory provisions, court opinions, and Department of Justice (DOJ) opinions provide the legal framework for how funding gaps and shutdowns have occurred in recent decades.<sup>10</sup> Article I, Section 9 of the Constitution states that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Federal employees and contractors cannot be paid, for example, if appropriations in the first place have not been enacted. Nevertheless, it would appear to be possible under the Constitution for the government to make contracts or other obligations if it lacked funds to pay for these commitments.<sup>11</sup> The so-called Antideficiency Act generally prevents this, however. The act prohibits federal officials from obligating funds before an appropriations measure has been enacted, except as authorized by law.<sup>12</sup> The act also prohibits acceptance of voluntary services and employment of personal services exceeding what has been authorized by law.<sup>13</sup> Exceptions are made under the act to the latter prohibition for “emergencies involving the safety of human life or the protection of property.” Therefore, the Antideficiency Act generally prohibits agencies from continued operation in the absence of appropriations. Failure to comply with the act may result in criminal sanctions, fines, and removal.

For years leading up to 1980, many federal agencies continued to operate during a funding gap, “minimizing all nonessential operations and obligations, believing that Congress did not intend that agencies close down,” while waiting for the enactment of annual appropriations acts or continuing resolutions.<sup>14</sup> In 1980 and 1981, however, U.S. Attorney General Benjamin R. Civiletti issued two opinions that more strictly interpreted the Antideficiency Act in the context of a funding gap, along with the law’s exceptions.<sup>15</sup>

The Attorney General’s opinions stated that, with some exceptions, the head of an agency could avoid violating the Antideficiency Act only by suspending the agency’s operations until the enactment of an appropriation. In the absence of appropriations, exceptions would be allowed only when there is “some reasonable and articulable connection between the function to be

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<sup>9</sup> For a detailed chronology and graphical depiction of the FY1996 appropriations process, including the two funding gaps, see CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup.

<sup>10</sup> For legal analysis of funding gaps, see GAO, *Principles of Federal Appropriations Law*, 3<sup>rd</sup> ed., vol. II, GAO-06-382SP, February 2006, chapter 6, pp. 6-146 - 6-159.

<sup>11</sup> For discussion, see prepared statement of Walter Dellinger, Assistant Attorney General, in U.S. Congress, Senate Committee on the Budget and House Committee on the Budget, *Effects of Potential Government Shutdown*, hearing, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., September 19, 1995, S.Hrg. 104-175 (Washington: GPO, 1995), p. 18. Some commentators, however, have expressed a contrary view. See Jim Schweiter and Herb Fenster, *Government Contract Funding under Continuing Resolutions*, 95 Fed. Cont. Rep. 180, note 17 (February 15, 2011).

<sup>12</sup> 31 U.S.C. §1341. The Antideficiency Act (31 U.S.C. §§1341-1342, §§1511-1519) is discussed in CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al., pp. 93-97. GAO provides information on the act, at <http://www.gao.gov/legal/lawresources/antideficiencybackground.html>.

<sup>13</sup> 31 U.S.C. §1342; see also §1515.

<sup>14</sup> U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, pp. i, 2, at <http://archive.gao.gov/f0102/114835.pdf>.

<sup>15</sup> 43 Op. Att’y Gen. 224 (Apr. 25, 1980), 43 Op. Att’y Gen. 293 (January 16, 1981). The Civiletti opinions are included in a GAO report as Appendices IV and VIII. See U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, at <http://www.gao.gov/assets/140/132616.pdf>. For a detailed discussion of exceptions to the Antideficiency Act, see U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, pp. 6-146 - 6-159.

performed and the safety of human life or the protection of property.” Apart from this broad category of “human life and property” exceptions to the Antideficiency Act, the Civiletti opinions identified another broad category of exceptions: those that are “authorized by law.” GAO later summarized the 1981 Civiletti opinion as identifying four sub-types of “authorized by law” exceptions.<sup>16</sup>

- Activities funded with appropriations of budget authority that do not expire at the end of one fiscal year, such as multiple-year and no-year appropriations (that is, when these multiple-year and no-year appropriations still have budget authority that is available for obligation at the time of a funding gap).<sup>17</sup>
- Activities authorized by statutes that expressly permit obligations in advance of appropriations, such as contract authority.<sup>18</sup>
- Activities “authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.” The Civiletti opinion illustrated this abstract concept by citing the situation when benefit payments under an entitlement program are funded from other-than-one-year appropriations (i.e., where benefit payments are not subject to a funding gap, because they are authorized by permanent entitlement authority),<sup>19</sup> but the salaries of personnel who administer the program are funded by one-year appropriations (i.e., the salaries are subject to a funding gap). In this situation, the Attorney General offered the view that continued availability of money for benefit payments would necessarily imply that continued administration of the program is authorized by law at some level and therefore excepted from the Antideficiency Act.<sup>20</sup>
- Obligations “necessarily incident to presidential initiatives undertaken within his constitutional powers,” such as the power to grant pardons and reprieves. GAO later expressed the view that this same rationale would apply to legislative branch agencies that incur obligations “necessary to assist the Congress in the performance of its constitutional duties.”<sup>21</sup>

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<sup>16</sup> The bulleted text here draws, in part, from *ibid.*, pp. 6-149 – 6-150. GAO also noted that the courts have added to the list of exceptions to the Antideficiency Act in certain circumstances (*ibid.*, p. 6-152).

<sup>17</sup> The term “multiple-year budget authority” refers to budget authority that remains available for obligation for a fixed period of time in excess of one fiscal year. The term “no-year budget authority” refers to budget authority that remains available for an indefinite period of time (e.g., “to remain available until expended”). See GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, September 2005, p. 22. In addition, agencies that receive most or all of their budget authority for their day-to-day operations through means that are not dependent on appropriations acts, such as the U.S. Postal Service and the Bureau of Consumer Financial Protection in the Federal Reserve System, would fall under this exception.

<sup>18</sup> For explanation of contract authority, see *ibid.*, p. 21.

<sup>19</sup> In such a case, budget authority is available to make payments as a result of previously enacted legislation and is available without further legislative action. “Entitlement authority” refers to authority to make payments (including loans and grants) for which budget authority is not provided in advance by appropriations acts to any person or government if, under the provisions of the law containing such authority, the federal government is legally required to make the payments to persons or governments that meet the requirements established by law. See *ibid.*, pp. 22-23 and 47.

<sup>20</sup> See the section of this report titled “Effects on Mandatory Spending Programs” for more detailed discussion.

<sup>21</sup> U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, p. 6-150.

In 1990, in response to the 1981 Civiletti opinion, Congress amended 31 U.S.C. §1342 to clarify that “the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.”<sup>22</sup> DOJ’s Office of Legal Counsel (OLC) issued a memorandum in 1995 that interpreted the effect of the amendment (hereinafter, “1995 OLC opinion”).<sup>23</sup> The 1995 OLC opinion said one aspect of the 1981 Civiletti opinion’s description of emergency governmental functions should be modified in light of the amendment, but that the 1981 opinion otherwise “continues to be a sound analysis of the legal authorities respecting government operations” during a funding gap.<sup>24</sup> More recently, the Office of Management and Budget (OMB) summarized its interpretation of exceptions to the Antideficiency Act in memoranda that were issued to agencies in April and December 2011 (regarding FY2011 and FY2012 annual appropriations, respectively), and September 2013 (regarding FY2014 annual appropriations).<sup>25</sup>

Observers sometimes wish to contrast the effect of a government shutdown, on one hand, with the effect of the federal government reaching its statutory debt limit and not raising it, on the other. The two situations are distinct in terms of their effects on agency operations and federal government payments to liquidate obligations (see box).<sup>26</sup>

#### **Distinction Between a Government Shutdown and a Debt Limit Impasse**

In a government shutdown situation, Congress and the President do not enact interim or full-year appropriations for an agency. In this case, the agency does not have budget authority available for obligation for things like salaries or rent. Under the Antideficiency Act, the agency may obligate some funds in certain “excepted” areas, but these obligations are highly restricted. As a consequence, the agency must shut down non-excepted activities, and the federal government may not make actual payment for excepted or non-excepted activities until budget authority is provided.

In a debt limit impasse, by contrast, the government no longer has an ability to borrow to finance its obligations. As a result, the federal government would need to rely solely on incoming revenues to finance obligations. If this occurred during a period when the federal government was running a deficit, the dollar amount of newly incurred federal obligations would exceed the dollar amount of newly incoming revenues. In such a situation, an agency may continue to obligate funds, because it has budget authority available for obligation, provided that appropriations are in place. However, the Treasury Department may not be able to liquidate all obligations that result in federal outlays, due to a shortage of cash, which may result in delays in federal payments and disruptions in government operations.

<sup>22</sup> Ibid., p. 6-151, citing P.L. 101-508, 104 Stat. 1388, at 1388-621 (now codified at 31 U.S.C. §1342).

<sup>23</sup> U.S. Department of Justice, Office of Legal Counsel, *Government Operations in the Event of a Lapse in Appropriations*, memorandum from Walter Dellinger, Assistant Attorney General, for Alice Rivlin, Director, Office of Management and Budget, August 16, 1995, reprinted in U.S. Congress, Senate Committee on the Budget and House Committee on the Budget, *Effects of Potential Government Shutdown*, hearing, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., September 19, 1995, S.Hrg. 104-175 (Washington: GPO, 1995), pp. 77-85.

<sup>24</sup> Ibid., p. 78. In light of the intervening amendments, the 1995 OLC opinion required the safety of human life or the protection of property to be compromised “in some significant degree” in order for a function to be considered excepted.

<sup>25</sup> OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, pp. 4-6; OMB Memorandum M-12-03, *Planning for Agency Operations During a Lapse in Government Funding*, December 15, 2011, Attachment 1 (first three pages of non-paginated attachment); and OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, pp. 3-5.

<sup>26</sup> For further discussion of the federal debt limit, see CRS Report R41633, *Reaching the Debt Limit: Background and Potential Effects on Government Operations*, coordinated by Mindy R. Levit.

## OMB and Agency Shutdown Processes

OMB provides executive branch agencies with instructions on how to prepare for and operate during a funding gap in its annually revised *Circular No. A-11*.<sup>27</sup> The circular cites the two Civiletti opinions and the 1995 OLC opinion as background and guidance. The circular establishes two “policies” regarding the absence of appropriations:

- a prohibition on incurring obligations unless the obligations are otherwise authorized by law and
- permission to incur obligations “as necessary for orderly termination of an agency’s functions,” but prohibition of any disbursement (i.e., payment).

The circular also directs agency heads to develop and maintain shutdown plans. Prior to the 2011 revision of *Circular No. A-11*, the circular broadly indicated that the plans were to be submitted to OMB when initially prepared and also when revised. The plans themselves were required to contain summary information about the number of employees expected to be on-board before a shutdown and also the number of employees who would be “retained” (i.e., excepted from furlough) during a shutdown. With the August 2011 revision of the circular, however, OMB newly required that these plans contain more detailed information, be updated under certain conditions, and be updated at a minimum on a four-year schedule, starting August 1, 2014. OMB’s change in instructions occurred four months after Congress and the President almost came to an impasse in April 2011, on FY2011 appropriations. At the time, OMB instructed agencies to create or revise shutdown plans and to post them publicly on the Internet shortly before funding was scheduled to expire.<sup>28</sup> Because no shutdown occurred, however, it is not clear what the effects of a shutdown would have been under these plans.

Under OMB’s current instructions from *Circular No. A-11*, agency heads are to use the DOJ opinions and the circular, in consultation with the agencies’ general counsels, to “decide what agency activities are excepted or otherwise legally authorized to continue during an appropriations hiatus.”<sup>29</sup> Furthermore, plans are to address agency actions in two distinct time windows of a shutdown: an initial period of one to five days, which OMB characterized as a “short” hiatus, and a second period if a shutdown were to continue. Among other things, a shutdown plan is required to include

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<sup>27</sup> U.S. Executive Office of the President, Office of Management and Budget (hereinafter OMB), *Circular No. A-11: Preparation, Submission, and Execution of the Budget*, July 2013, Section 124, at [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc). See also CRS Report RS21665, *Office of Management and Budget (OMB): A Brief Overview*, by Clinton T. Brass.

<sup>28</sup> On April 8, 2011, OMB began to post on its website links to the shutdown plans that agencies and the Executive Office of the President developed under the 2010 version of *Circular No. A-11*. For the website, see OMB, “Agency Contingency Plans,” at <http://www.whitehouse.gov/omb/contingency-plans>. The posting occurred shortly before funding from an interim CR was due to expire at the end of the day. The FY2011 appropriations impasse was avoided before midnight with enactment of another interim CR (P.L. 112-8) and an announcement that the outline of an agreement had been reached on how to provide full-year funding for FY2011. A week later, with the enactment of P.L. 112-10, Congress and the President agreed on full-year funding for all 12 regular appropriations bills. OMB posted revised shutdown plans from many agencies on its website in December 2011, when Congress and the President neared a potential impasse on FY2012 funding. For OMB’s guidance to agencies related to FY2012 funding, see OMB Memorandum M-12-03, *Planning for Agency Operations During a Lapse in Government Funding*, December 15, 2011.

<sup>29</sup> OMB, *Circular No. A-11*, July 2013, Section 124.1.

- a summary of agency activities that will continue and those that will cease;
- an estimate of the time to complete the shutdown, to the nearest half-day;
- the number of employees expected to be on-board (i.e., filled positions) before implementation of the plan;
- the total number of employees to be retained, broken out into five categories of exceptions to the Antideficiency Act,<sup>30</sup> including employees
  1. who are paid from a resource other than annual appropriations;
  2. who are necessary to perform activities expressly authorized by law;
  3. who are necessary to perform activities necessarily implied by law;
  4. who are necessary to the discharge of the President’s constitutional duties and powers; and
  5. who are necessary to protect life and property.

After a plan provides this information for an agency as a whole, the plan is required to further break out some of the information by major “component” (e.g., bureau-size entity within a department).

In general, the OMB circular refers to employees who are to be furloughed as “released,” and employees who will not be furloughed as “retained” or “excepted.”<sup>31</sup> OMB’s circular also instructs agencies to take personnel actions to release employees according to applicable law and Office of Personnel Management (OPM) regulations.<sup>32</sup>

OMB documents and guidance from previous funding gaps and shutdowns may provide insights into current and future practices. OPM has provided links to, and retyped copies of, previous OMB bulletins and memoranda for reference.<sup>33</sup> These and other OMB documents also have been reproduced in several legislative branch documents.<sup>34</sup>

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<sup>30</sup> OMB provided guidance to help agencies interpret categories like these in memoranda that were issued during the near-impasses on FY2011 appropriations (in April 2011), FY2012 appropriations (in December 2011), and FY2014 appropriations (in September 2013). See, respectively, OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, pp. 4-6; OMB Memorandum M-12-03, *Planning for Agency Operations During a Lapse in Government Funding*, December 15, 2011, Attachment 1 (first three pages of non-paginated attachment); and OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, pp. 3-5.

<sup>31</sup> In congressional hearings that focused on the first FY1996 shutdown, some witnesses expressed regret that the terms “nonessential” and “essential” had been used to describe employees subject to furlough, and not subject to furlough, respectively. Use of the term “nonessential” was demeaning, they suggested. See U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What’s Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 48, 228-229, at <http://www.archive.org/details/governmentshutdo00unit>.

<sup>32</sup> OPM maintains a website with guidance, historical OMB and DOJ documents, and frequently asked questions about furloughs, at <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/>.

<sup>33</sup> See *ibid.* The reproduced OMB documents include, in chronological order:

(1) OMB Bulletin No. 80-14, *Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations*, August 28, 1980 (citing the 1980 Civiletti opinion and requiring agencies to develop shutdown plans);

(2) OMB Memorandum, *Agency Operations in the Absence of Appropriations*, November 17, 1981 (referencing OMB Bulletin No. 80-14; saying the 1981 Civiletti opinion remains in effect; and providing examples of “excepted activities” (continued...))

# Effects of a Federal Government Shutdown

## Effects on Federal Officials and Employees

Effects of a shutdown may occur

- in anticipation of a potential funding gap (e.g., planning),
- during an actual gap (e.g., furlough and curtailed operations), and
- afterwards (e.g., working to reduce accumulated backlogs of work).

An immediate shutdown effect is the “shutdown furlough” of certain federal employees—that is, placement of the employees in a temporary, nonduty, nonpay status.<sup>35</sup> Shutdown furloughs are not considered a break in service and are generally creditable for retaining benefits and seniority.

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(...continued)

that may be continued under a funding gap);

(3) OMB Bulletin No. 80-14, Supplement No. 1, *Agency Operations in the Absence of Appropriations*, August 20, 1982 (“updating” OMB Bulletin No. 80-14 and newly requiring agencies to submit contingency plans for review by OMB);

(4) OMB Memorandum M-91-02, *Agency Operations in the Absence of Appropriations*, October 5, 1990 (referencing OMB Bulletin No. 80-14; stating that OMB Bulletin No. 80-14 was “amended” by the OMB Memorandum of November 17, 1981; saying the 1981 Civiletti opinion remains in effect; and directing agencies on a Friday how to handle a funding gap that begins during the weekend);

(5) OMB Memorandum M-95-18, *Agency Plans for Operations During Funding Hiatus*, August 22, 1995 (referencing OMB Bulletin No. 80-14, as amended; citing the 1981 Civiletti opinion; transmitting to agencies the 1995 OLC opinion as an “update” to the 1981 Civiletti opinion; and directing agencies to send updated contingency plans to OMB);

(6) OMB *Circular No. A-11*, Section 124, July 2013 (misabeled online as linking to the August 2011 version of the circular) (providing annually issued guidance to agencies on shutdown-related topics); and

(7) OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013 (referring to *Circular No. A-11*, OLC legal opinions, and OPM Web guidance; providing detailed directions on what to do during the coming days in the context of FY2014 appropriations negotiations; and providing additional guidance on exceptions to the Antideficiency Act, contracts, grants, information technology, travel, conducting an “orderly shutdown,” and payment to excepted employees for time worked).

<sup>34</sup> See U.S. Congress, Senate Committee on the Budget and House Committee on the Budget, *Effects of Potential Government Shutdown*, hearing, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., September 19, 1995, S.Hrg. 104-175 (Washington: GPO, 1995), pp. 77-85; U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, Appendices V, VI, and VII; and U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What’s Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 99-112, 121-131, and 428-430.

<sup>35</sup> See <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Shutdown-Furlough>. This OPM website provides detailed questions and answers about shutdown furloughs in a document titled *Guidance for Shutdown Furloughs*. The website also explains the distinction between shutdown furloughs and another type of furlough: “administrative furloughs.” In brief, the website says a shutdown furlough (also called an emergency furlough) occurs when there is a lapse in appropriations. An affected agency would have to shut down any activities funded by annual appropriations that are not excepted by law. Typically, an agency will have very little to no lead time to plan and implement a shutdown furlough. An administrative furlough, by contrast, is a planned event by an agency which is designed to absorb reductions necessitated by downsizing, reduced funding, lack of work, or any budget situation other than a lapse in appropriations. Furloughs that would potentially result from sequestration would generally be considered administrative furloughs. For more information about sequestration, see CRS Report R42972, *Sequestration as a Budget Enforcement Process: Frequently Asked Questions*, by Megan S. Lynch.

There appears to be no guarantee that employees placed on shutdown furlough would receive pay for the time they are placed on furlough. This may be the case, because if furloughed employees are prohibited from coming to work during a shutdown, the government arguably would not be incurring a legal obligation to pay them. Several considerations, including personnel costs, future productivity, and retention, might be weighed when assessing the issue of retroactive pay for furloughed staff. However, in the case of excepted employees, OMB has stated several times in detailed, shutdown-related guidance to agencies that

[w]ithout further specific direction or enactment by Congress, all excepted employees are entitled to receive payment for obligations incurred by their agencies for their performance of excepted work during the period of the appropriations lapse. After appropriations are enacted, payroll centers will pay all excepted employees for time worked.<sup>36</sup>

Nevertheless, in historical practice, federal employees who have been furloughed under a shutdown (i.e., those who were not excepted) generally have received their salaries retroactively as a result of legislation to that effect.<sup>37</sup>

As noted earlier, the two most recent funding gaps and corresponding shutdowns occurred in FY1996.<sup>38</sup> The first, which lasted five full days between November 13-19, 1995, resulted in the furlough of approximately 800,000 federal employees.<sup>39</sup> It was caused by the expiration of a continuing resolution agreed to on September 30, 1995 (P.L. 104-31), and by President Clinton's veto of a second continuing resolution.<sup>40</sup> The second FY1996 partial shutdown of the federal

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<sup>36</sup> See OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, p. 16; OMB Memorandum M-12-03, *Planning for Agency Operations During a Lapse in Government Funding*, December 15, 2011, Attachment 1 (last two pages of non-paginated attachment); and, for the text excerpted above, OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, pp. 15-16.

<sup>37</sup> Various legislative provisions addressed the topic of retroactive salary payment after the FY1996 shutdowns. For instance, a CR provision required that employees who were furloughed during the first FY1996 shutdown period be paid retroactively (P.L. 104-56, Section 124, 109 Stat. 553, November 20, 1995). In addition, the CR language ratified and approved “[a]ll obligations incurred in anticipation of the appropriations made and authority granted by this Act for the purposes of maintaining the essential level of activity to protect life and property and bring about orderly termination of Government functions.” This provision was extended by P.L. 104-94, which applied to the second FY1996 shutdown period (110 Stat. 25, January 6, 1996). Separate legislation explicitly provided FY1996 funding, through January 26, 1996, for salaries of employees who were excepted from furlough and who worked during either of the shutdown periods on projects and activities that were continuing from the previous fiscal year (P.L. 104-92, Section 301, 110 Stat. 19). This legislation also explicitly said all officers and employees of the federal government and the District of Columbia were deemed to be excepted employees from December 15, 1995, through January 26, 1996, during and beyond the second shutdown period (P.L. 104-92, Section 310). It should be noted that affected employees did not receive compensation until funding for their agencies was enacted.

<sup>38</sup> This paragraph was prepared by Jessica Tollestrup, Analyst on Congress and the Legislative Process (jtollestrup@crs.loc.gov, 7-0941) and Clinton T. Brass, Specialist in Government Organization and Management (cbrass@crs.loc.gov, 7-4536) and also draws on CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup, and CRS Report 95-906, *Shutdown of the Federal Government: Effects on the Federal Workforce And Other Sectors*, by James P. McGrath (September 25, 1997, out of print; available upon request).

<sup>39</sup> The figure of 800,000 federal employees was frequently cited at the time. For example, see U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What's Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 6 and 265; and U.S. President (Clinton), The White House, Office of the Press Secretary, “Statement by the President,” November 19, 1995, at <http://clinton6.nara.gov/1995/11/1995-11-19-president-statement-on-signing-appropriations-bills.html>.

<sup>40</sup> H.J.Res. 115. A measure that would have temporarily increased the debt limit, H.R. 2586, also was vetoed on November 13, 1995. As of November 13, three of the 13 regular appropriations acts for FY1996 had been enacted: the Military Construction Appropriations Act (P.L. 104-32), the Agriculture, Rural Development, Food and Drug (continued...)

government lasted 21 full days between December 15, 1995, and January 6, 1996.<sup>41</sup> The shutdown was triggered by the expiration of a continuing resolution enacted on November 20, 1995 (P.L. 104-56), which funded the government through December 15, 1995. On January 2, 1996, the estimate of furloughed federal employees was 284,000.<sup>42</sup> Another 475,000 excepted federal employees continued to work in nonpay status. There was a total of eight continuing resolutions from January 6, 1996, until April 26, 1996, when the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (P.L. 104-134) was enacted. This consolidated appropriations act provided budget authority for agencies and programs not covered in the FY1996 annual appropriations acts that had already become law. A graphical depiction of the FY1996 appropriations process, including the two funding gaps, is available in another CRS report.<sup>43</sup>

## Executive Branch

Among the three branches of the federal government, the executive branch is the largest in number of personnel and size of budgets. Several types of executive branch officials and employees are not subject to furlough. These include the President, presidential appointees, and federal employees deemed “excepted.”<sup>44</sup> OPM has described “excepted” employees, who are required to work during a shutdown, as “employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations.”<sup>45</sup> Nevertheless,

(...continued)

Administration, and Related Agencies Appropriations Act (P.L. 104-37), and the Energy and Water Development Appropriations Act (P.L. 104-46). Therefore, 10 regular appropriations bills remained unenacted at the start of the first shutdown.

<sup>41</sup> As of December 15, 1995, four additional regular appropriations acts for FY1996 had been enacted: the Department of Transportation and Related Agencies Appropriations Act (P.L. 104-50); the Treasury, Postal Service, and General Government Appropriations Act (P.L. 104-52); the Legislative Branch Appropriations Act (P.L. 104-53); and the Department of Defense Appropriations Act (P.L. 104-61). Therefore, six regular appropriations bills remained unenacted at the start of the second shutdown. These included the (1) Department of Interior and Related Agencies Appropriations Act, (2) Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, (3) Department of Commerce and Related Agencies Appropriations Act, (4) Foreign Operations, Export Financing, and Related Programs Appropriations Act, (5) Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, and (6) District of Columbia Appropriations Act.

<sup>42</sup> Fewer employees, agencies, and programs were affected, because some funding bills were enacted during and after the first shutdown, and before the second shutdown.

<sup>43</sup> CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup.

<sup>44</sup> For additional discussion, see U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, pp. 6-149 - 6-150. According to guidance that OPM issued, individuals appointed by the President (Senate-confirmed and not Senate-confirmed) whose basic pay exceeds the highest rate payable under the General Schedule are not subject to 5 U.S.C. §6301, relating to annual and sick leave, and are not subject to furlough. OPM has explained that “[t]he salary of such a Presidential appointee is an obligation incurred by the year, without consideration of hours of duty required. Thus, the Presidential appointee cannot be placed in a nonduty, nonpay status.” See question #16 from PDF version of OPM Web page providing guidance on furloughs, dated February 25, 2011, at <http://nhpa.org/docs/LockoutFurloughGuidanceandInformation.pdf>. See also OPM’s response to Frequently Asked Question #4, in OPM, *Guidance for Administrative Furloughs*, March 25, 2013, pp. 2-3, at <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Administrative-Furlough>.

<sup>45</sup> See OPM, *Guidance for Shutdown Furloughs*, December 2011, p. 2, at <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Shutdown-Furlough>. OPM refers agencies to DOJ opinions regarding how to determine which employees are designated to be performing excepted or non-excepted functions. These “excepted” employees for purposes of a shutdown should be clearly distinguished from employees whom agencies may designate as “emergency” employees for purposes of weather, natural disaster, power failure, or other events that result in (continued...)

excepted employees who are normally paid from annual appropriations would not receive pay during the shutdown period.

## Legislative Branch<sup>46</sup>

Due to their constitutional responsibilities and a permanent appropriation for congressional pay, Members of Congress are not subject to furlough.<sup>47</sup>

During a funding gap, congressional employees whose pay is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives would not be paid if there is no appropriation to fund legislative branch activities. Any decision regarding requirements that a congressional employee continue to work during a government shutdown would appear to fall to his or her employing authority.<sup>48</sup> Activities of legislative branch agencies would likely also be restricted, in consultation with Congress, to activities required to support Congress with its constitutional responsibilities or those necessary to protect life and property.<sup>49</sup>

## Judicial Branch<sup>50</sup>

If a funding gap had occurred in FY2013, the judiciary would have continued to operate using funds derived from court filing and other fees and from no-year appropriations.<sup>51</sup> The judiciary

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dismissal or closure. The latter category of “emergency” employees may vary substantially across agencies and over time, depending on “each agency’s unique mission requirements and/or circumstances.” For discussion, see OPM, *Washington, DC, Area Dismissal and Closure Procedures*, November 2012, pp. 8-9, at <http://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/handbooks/>.

<sup>46</sup> This section was prepared by Ida A. Brudnick, Specialist on the Congress ([ibrudnick@crs.loc.gov](mailto:ibrudnick@crs.loc.gov), 7-6460), and R. Eric Petersen, Specialist in American National Government ([epetersen@crs.loc.gov](mailto:epetersen@crs.loc.gov), 7-0643).

<sup>47</sup> P.L. 97-51; 95 Stat. 966; September 11, 1981 (2 U.S.C. §31 note). Additional information regarding compensation for Members of Congress, including actions in the 112<sup>th</sup> Congress, is available in CRS Report 97-615, *Salaries of Members of Congress: Congressional Votes, 1990-2013*, by Ida A. Brudnick.

<sup>48</sup> Congressional employing authorities include the following: individual Members of Congress for staff working in personal offices; chairs of individual House, Senate, and joint committees for committee staff; Members who hold leadership positions for staff in their respective leadership offices; and House or Senate officers or officials for staff working in those offices. In April 2011, in the context of deliberations over FY2011 appropriations, the House Committee on House Administration posted related guidance and issued “Dear Colleague” letters. Planning for operations under a lapse of appropriations was also discussed in U.S. Congress, House, *First Semiannual Report on the Activities of the Committee on House Administration*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 112-137 (Washington: GPO, 2011), pp. 19-20. For questions regarding congressional and legislative branch operations, see the “Key Policy Staff” table at the end of this report.

<sup>49</sup> For additional discussion, including the status of legislative branch agencies and personnel, see U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, pp. 6-149 - 6-150, and U.S. GAO, Letter from James F. Hinchman, GAO General Counsel, to John J. Kominski, Library of Congress General Counsel, B-241911, October 23, 1990, at <http://archive.gao.gov/lglp2pdf23/087761.pdf>.

<sup>50</sup> This section was prepared by Barry J. McMillion, Analyst on the Federal Judiciary ([bcmcmillion@crs.loc.gov](mailto:bcmcmillion@crs.loc.gov), 7-6025); Denis Steven Rutkus, formerly a Specialist on the Federal Judiciary at CRS; and Lorraine H. Tong, formerly an Analyst in American National Government at CRS.

<sup>51</sup> Background information provided to CRS on January 29, 2013, by staff of the Administrative Office of the U.S. Courts.

estimated that these funds, if used cautiously, could have sustained judiciary activities for approximately 10 working days after an appropriations lapse.<sup>52</sup>

If a lapse in appropriations were to continue to exist after various fee balances like these were exhausted, the judiciary would continue to operate under the terms of the Antideficiency Act, which the judiciary said allows “essential work” to continue during a lapse in appropriations.<sup>53</sup> Such “essential work” includes powers exercised by the judiciary under the Constitution, including activities that support the exercise of Article III judicial powers (i.e., the resolution of cases).<sup>54</sup> Consequently, in the judicial branch, judges would not be subject to furlough, nor would core court staff and probation and pretrial services officers whose service is considered essential to the continued resolution of cases. Each court would be responsible for determining the number of court staff and officers needed to support the exercise of its Article III judicial powers.<sup>55</sup> Such staff performing “essential work” functions would report to work in a non-pay status while other staff would be furloughed.<sup>56</sup>

Protected by a constitutional prohibition against a diminution in their pay, Supreme Court Justices and other Article III judges would continue to be paid during a lapse in appropriations.<sup>57</sup> Also, in the judiciary’s view, other judicial officers, such as U.S. Claims Court judges, U.S. magistrate judges, and U.S. bankruptcy judges, would continue to be paid as well. Staff, however, would not be paid until Congress enacts an appropriation.<sup>58</sup>

## **Examples of Excepted Activities and Personnel**

Previous determinations of excepted activities and personnel would not necessarily hold for any future shutdown. However, past experience may inform future OMB and agency decisions. The near-impasses in April and December 2011 regarding enactment of FY2011 and FY2012 annual appropriations, respectively, resulted in executive branch agencies posting a substantial amount of information on the Internet about their plans for a potential shutdown, including information about excepted and non-excepted personnel and activities.<sup>59</sup> In September 2013, in the context of FY2014 annual appropriations, OMB directed agencies to update these plans and prepare for their potential release.<sup>60</sup> These plans might provide insight into questions of whether government activities at specific agencies and programs, and in specific situations, would continue or cease, at least according to interpretations of law at the time.

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Article III, Section 1 of the Constitution provides that the Supreme Court’s Justices and judges “in such inferior Courts as the Congress may ... establish,” shall “receive for their Services, a Compensation, which shall not be diminished during the Continuance in office.” In addition to Supreme Court Justices, this constitutional provision applies to judges receiving appointment to the U.S. District Courts, U.S. Circuit Courts of Appeals, and U.S. Court of International Trade.

<sup>58</sup> Background information provided to CRS on September 23, 2011, and January 29, 2013, by staff of the Administrative Office of U.S. Courts.

<sup>59</sup> OMB, “Agency Contingency Plans,” at <http://www.whitehouse.gov/omb/contingency-plans>.

<sup>60</sup> OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, p. 2.

More generally, OMB memoranda may provide insights into which activities and personnel might be considered to be excepted. In April and December 2011, then-OMB Director Jacob J. Lew outlined several categories of exceptions to the Antideficiency Act and provided further explanation on how agencies should interpret the categories.<sup>61</sup> OMB Director Sylvia M. Burwell provided similar guidance in September 2013.<sup>62</sup> Three decades earlier, an OMB memorandum of November 17, 1981, from Director David A. Stockman to the heads of executive agencies, identified “examples of excepted activities.”<sup>63</sup> The memorandum, which still was in effect for the FY1996 shutdowns, explained

Beginning [on the first day of the appropriations hiatus], agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities. Primary examples of activities agencies may continue are those which may be found under applicable statutes to:

1. Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.
2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.
3. Conduct essential activities to the extent that they protect life and property, including:
  - a. Medical care of inpatients and emergency outpatient care;
  - b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous materials;
  - c. The continuance of air traffic control and other transportation safety functions and the protection of transport property;
  - d. Border and coastal protection and surveillance;
  - e. Protection of Federal lands, buildings, waterways, equipment and other property owned by the United States;
  - f. Care of prisoners and other persons in the custody of the United States;
  - g. Law enforcement and criminal investigations;
  - h. Emergency and disaster assistance;
  - i. Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;

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<sup>61</sup> OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, pp. 4-6; and OMB Memorandum M-12-03, *Planning for Agency Operations During a Lapse in Government Funding*, December 15, 2011, Attachment 1.

<sup>62</sup> OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, Attachment 1.

<sup>63</sup> OMB Memorandum, *Agency Operations in the Absence of Appropriations*, November 17, 1981.

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.

## Effects on Government Operations and Services to the Public

### Illustrations from FY1996 Shutdowns

The effects of the two FY1996 shutdowns on government activities and the public received extensive attention. Although the effects on the public of any future shutdown would not necessarily reflect past experience, past events may be illustrative of effects that are possible.<sup>64</sup> Several examples follow that were reported in congressional hearings, news media, and agency accounts, about the operations and services of executive branch agencies.<sup>65</sup>

- **Health.** New patients were not accepted into clinical research at the National Institutes of Health (NIH) clinical center; the Centers for Disease Control and Prevention ceased disease surveillance; and hotline calls to NIH concerning diseases were not answered.<sup>66</sup>
- **Law Enforcement and Public Safety.** Delays occurred in the processing of alcohol, tobacco, firearms, and explosives applications by the Bureau of Alcohol, Tobacco, and Firearms; work on more than 3,500 bankruptcy cases reportedly was suspended; cancellation of the recruitment and testing of federal law-enforcement officials reportedly occurred, including the hiring of 400 border patrol agents; and delinquent child-support cases were delayed.<sup>67</sup>

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<sup>64</sup> In 1981, GAO developed a “hypothetical case” of the possible effects of a 30-day government-wide funding gap and shutdown, which the agency characterized as “unthinkable.” After the release of the first Civiletti opinion concerning compliance with the Antideficiency Act, GAO characterized the opinion as “fundamentally alter[ing] the environment in which Federal agencies must prepare for a period of expired appropriations.” Previously, interpretation of the Antideficiency Act had been much less strict, as noted earlier in this report. The results of GAO’s illustrative survey are available in U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, pp. 48-56.

<sup>65</sup> The examples are drawn from more extensive discussion in CRS Report 95-906, *Shutdown of the Federal Government: Effects on the Federal Workforce And Other Sectors*, by James P. McGrath (out of print; available upon request). Many of the examples come from media accounts during and after the second shutdown and agency accounts in congressional hearings after the first FY1996 shutdown. For more information, see U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What’s Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), at <http://www.archive.org/details/governmentshutdo00unit>. For additional documentation about the effects of past shutdowns, see CRS Report R41759, *Past Government Shutdowns: Key Resources*, by Jared C. Nagel and Justin Murray.

<sup>66</sup> U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What’s Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), p. 23; and Stephen Barr and Frank Swoboda, “Jobless Aid, Toxic Waste Cleanup Halt,” *Washington Post*, January 3, 1996, p. A1.

<sup>67</sup> U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What’s Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 62 and 228, at <http://www.archive.org/details/governmentshutdo00unit>; and Stephen Barr and David Montgomery, “At Uncle Sam’s No One Answers,” *Washington Post*, November 16, 1995, p. A1.

- **Parks, Museums, and Monuments.** Closure of 368 National Park Service sites (loss of 7 million visitors) reportedly occurred, with loss of tourism revenues to local communities; and closure of national museums and monuments (reportedly with an estimated loss of 2 million visitors) occurred.<sup>68</sup>
- **Visas and Passports.** Approximately 20,000-30,000 applications by foreigners for visas reportedly went unprocessed each day; 200,000 U.S. applications for passports reportedly went unprocessed; and U.S. tourist industries and airlines reportedly sustained millions of dollars in losses.<sup>69</sup>
- **American Veterans.** Multiple services were curtailed, ranging from health and welfare to finance and travel.<sup>70</sup>
- **Federal Contractors.** Of \$18 billion in Washington, DC, area contracts, \$3.7 billion (over 20%) reportedly were affected adversely by the funding lapse; the National Institute of Standards and Technology (NIST) was unable to issue a new standard for lights and lamps that was scheduled to be effective January 1, 1996, possibly resulting in delayed product delivery and lost sales; and employees of federal contractors reportedly were furloughed without pay.<sup>71</sup>

In a February 1996 letter, OMB provided other information about the FY1996 shutdowns. The information, which later was included in a congressional hearing print, included a list of effects from the shutdowns, lists of agencies and corresponding numbers of employees who were said to be excepted or not excepted from furlough, and a cost estimate of \$1.4 billion for the shutdowns.<sup>72</sup>

During the FY1996 government shutdowns,<sup>73</sup> the federal courts generally operated with limited disruption to their personnel.<sup>74</sup> In the absence of appropriated funds, the judiciary used fee

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<sup>68</sup> Dan Morgan and Stephen Barr, "When Shutdown Hits Home Ports," *Washington Post*, January 8, 1996, p. A1.

<sup>69</sup> Thomas W. Lippman, "Inconvenience Edges Toward Emergency," *Washington Post*, January 3, 1996, p. A11.

<sup>70</sup> U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What's Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 115-117.

<sup>71</sup> Peter Behr, "Contractors Face Mounting Costs from Government Shutdowns," *Washington Post*, January 23, 1996, p. C1; U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What's Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), p. 270, at <http://www.archive.org/details/governmentshutdo00unit>; and Peter Behr, "Latest Federal Shutdown Hits Contractors Hard," *Washington Post*, December 22, 1995, p. D1.

<sup>72</sup> See U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What's Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 266-270 (letter, list of effects, and cost estimate); pp. 272 and 274 (list of agencies and estimates of employees to be excepted or not excepted as of November 15, 1995, apparently corresponding to the first shutdown); and p. 273 (list of agencies and estimates of employees to be excepted or not excepted, in a document dated February 2, 1996, and apparently corresponding to the second shutdown), at <http://www.archive.org/details/governmentshutdo00unit>. The list provided on pages 272 and 274 includes agencies that already had received full-year appropriations and therefore may not represent a full accounting of actual furloughs. According to OMB, a portion of shutdown-related costs corresponded to pay for furloughed employees, and additional costs were anticipated from backlogs of work (*ibid.*, p. 226). With regard to costs, President Clinton said that total costs for the two shutdowns amounted to "a billion-and-a-half dollars." See U.S. President (Clinton), The White House, Office of the Press Secretary, "Radio Address by the President to the Nation," press release, January 20, 1996, at <http://clinton6.nara.gov/1996/01/1996-01-20-presidents-weekly-radio-address-regarding-budget.html>.

<sup>73</sup> This paragraph was prepared by Barry J. McMillion, Analyst on the Federal Judiciary ([bcmcmillion@crs.loc.gov](mailto:bcmcmillion@crs.loc.gov), 7-6025); Denis Steven Rutkus, formerly a Specialist on the Federal Judiciary at CRS; and Lorraine H. Tong, formerly an (continued...)

revenues and “carryover” funds from prior years to support what it considered its essential function of hearing and deciding cases.<sup>75</sup> Internal judiciary guidelines, according to the official publication of the U.S. courts, recognized the “unique function of the Judiciary” and anticipated that all activities “essential to maintain and support the exercise of the judicial power of the United States during a funding lapse” would continue.<sup>76</sup> The funding lapse, however, did affect some court functions, with some judges entertaining motions for continuances in civil cases and at least one district court announcing it would not start any new civil jury trials. An appellate court, it also was reported, had to reschedule several arguments because government lawyers were unable to attend. During the November 1995 government shutdown, lack of funding resulted in furloughs of most of the staff of the federal judiciary’s two support agencies, the Federal Judicial Center and the Administrative Office of the U.S. Courts.<sup>77</sup> During the second shutdown, prior to the judiciary’s decision to use fee revenues and carryover funds to continue essential functions, some courts did furlough personnel “on a limited basis.”<sup>78</sup>

## Effects on Mandatory Spending Programs

Programs that are funded by laws other than annual appropriations acts—for example, some entitlement programs—may, or may not, be affected by a funding gap. Specific circumstances appear to be significant. For example, although the funds needed to make payments to beneficiaries may be available automatically pursuant to permanent appropriations, the payments may be processed by employees who are paid with funds provided in annual appropriations acts. In such situations, the question arises whether a mandatory program can continue to function during a funding gap, if appropriations were not enacted to pay salaries of administering employees. As noted earlier in this report, according to the 1981 Civiletti opinion, at least some of these employees would not be subject to furlough, because authority to continue administration of a program could be inferred from Congress’s direction that benefit payments continue to be made according to an entitlement formula.<sup>79</sup> That is, obligating funds for the salaries of these personnel would be excepted from the Antideficiency Act’s restrictions during a funding gap. However,

(...continued)

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<sup>74</sup> See “An Inside Look at the Shutdown,” *The Third Branch: Newsletter of the Federal Courts*, Washington, DC, December 1995, at [http://www.uscourts.gov/News/TheThirdBranch/95-12-01/An\\_Inside\\_Look\\_At\\_the\\_Shutdown.aspx](http://www.uscourts.gov/News/TheThirdBranch/95-12-01/An_Inside_Look_At_the_Shutdown.aspx); also, “Active, Long, and Contentious First Session of Congress Closes,” *The Third Branch*, Washington, DC, February 1996, at [http://www.uscourts.gov/News/TheThirdBranch/96-02-01/Active\\_Long\\_and\\_Contentious\\_First\\_Session\\_of\\_Congress\\_Closes.aspx](http://www.uscourts.gov/News/TheThirdBranch/96-02-01/Active_Long_and_Contentious_First_Session_of_Congress_Closes.aspx).

<sup>75</sup> The judiciary also uses non-appropriated funds to offset its appropriations requirement. The majority of these non-appropriated funds are from fee collections, primarily from court filing fees. These monies are used to offset expenses within the Salaries and Expenses account. In some instances, the judiciary also has funds which may carry forward from one year to the next. These funds are considered “unencumbered,” because they result from savings from the judiciary’s financial plan in areas where budgeted costs did not materialize. According to the judiciary’s budget submission to Congress, such savings are usually not under its control (e.g., the judiciary has no control over the confirmation rate of Article III judges and must make its best estimate on the needed funds to budget for judgeships, new rent costs, and technology funding for certain programs).

<sup>76</sup> “An Inside Look at the Shutdown,” *The Third Branch*, Washington, DC, December 1995, at [http://www.uscourts.gov/News/TheThirdBranch/95-12-01/An\\_Inside\\_Look\\_At\\_the\\_Shutdown.aspx](http://www.uscourts.gov/News/TheThirdBranch/95-12-01/An_Inside_Look_At_the_Shutdown.aspx).

<sup>77</sup> Ibid.

<sup>78</sup> Background information provided to CRS on April 7, 2011, by staff of Administrative Office of the U.S. Courts.

<sup>79</sup> See this report’s earlier discussion of the “authorized by law” exceptions to the Antideficiency Act and the 1981 Civiletti opinion, reprinted in U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, p. 82 (footnote 7). For further discussion, see U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, pp. 6-149 - 6-150.

such a determination would depend upon the absence of contrary legislative history in specific circumstances.

Nevertheless, the experience of the Social Security Administration (SSA) during the FY1996 shutdowns illustrates what might happen over a period of time in these situations. The lack of funds for some employees' salaries, for example, may impinge eventually on the processing and payment of new entitlement claims. SSA's administrative history describes how 4,780 employees were allowed to be retained during the initial stages of the first shutdown.<sup>80</sup> The majority of these employees were "in direct service positions to ensure the continuance of benefits to currently enrolled Social Security, SSI and Black Lung beneficiaries." Avoidance of furloughs was possible, because "appropriations were available to fund the program costs of paying benefits, [which] implied authority to incur obligations for the costs necessary to administer those benefits." SSA furloughed its remaining 61,415 employees. Before long, however, SSA and OMB reconsidered. SSA had not retained staff to, among other things, respond to "telephone calls from customers needing a Social Security card to work or who needed to change the address where their check should be mailed for the following month." SSA then advised OMB that the agency would need to retain 49,715 additional employees for direct service work, including the processing of new claims for Social Security benefits. Further adjustments were made during the considerably longer second shutdown, in response to increasing difficulties in administering the agency's entitlement programs.

### **More Recent Prospective Statements and Analyses**

In 2011, the federal judiciary commented about the potential consequences of a shutdown on its operations and services.<sup>81</sup> According to a judiciary press release, in the event of a funding lapse for FY2011 appropriations, the judiciary was prepared to keep the federal courts operating for about two weeks by using non-appropriated funds (as it did during the 1995-1996 government shutdowns).<sup>82</sup> However, once that funding was exhausted, the federal court system would face "serious disruptions." At that point, federal courts, "following their own contingency plans," would "limit operations to essential activities":

For the federal courts, this would mean limiting activities to those functions necessary and essential to continue the resolution of cases. All other personnel services not related to judicial functions would be suspended.

The jury system would operate as necessary, although payments to jurors would be deferred. Attorneys and essential support staff in federal defender offices and court-appointed counsel would continue to provide defense services as needed, but again, payments would be

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<sup>80</sup> See SSA's "History of SSA 1993 - 2000," chapter 5, at <http://www.ssa.gov/history/ssa/ssa2000chapter5.html>.

<sup>81</sup> This discussion of judiciary operations was prepared by Barry J. McMillion, Analyst on the Federal Judiciary ([bmcillion@crs.loc.gov](mailto:bmcillion@crs.loc.gov), 7-6025); Denis Steven Rutkus, formerly a Specialist on the Federal Judiciary at CRS; and Lorraine H. Tong, formerly an Analyst in American National Government at CRS. For additional information related to the Judiciary's contingency planning for a government shutdown during FY2011, see CRS Congressional Distribution Memorandum, *Government Shutdown: Possible Effects on Federal Judiciary Operations*, by D. Steven Rutkus and Lorraine H. Tong, April 8, 2011 (available from Barry J. McMillion at [bmcillion@crs.loc.gov](mailto:bmcillion@crs.loc.gov)mailto:).

<sup>82</sup> U.S. Administrative Office of the U.S. Courts, "What Happens to Courts if the Federal Government Closes?" press release, April 5, 2011, at [http://www.uscourts.gov/News/NewsView/11-04-05/What\\_Happens\\_to\\_Courts\\_if\\_the\\_Federal\\_Government\\_Closes.aspx](http://www.uscourts.gov/News/NewsView/11-04-05/What_Happens_to_Courts_if_the_Federal_Government_Closes.aspx).

deferred. Courts would determine the number of probation office staff needed to maintain service to the courts and the safety of the community.<sup>83</sup>

The judiciary also advised judges and court unit executives, in the event of a funding lapse, to post information on their individual court websites about what operations would continue during and after the initial two-week period.<sup>84</sup>

Most executive branch agencies posted shutdown plans on OMB's website in April and December 2011, as noted earlier in this report, in anticipation of potential shutdowns related to FY2011 and FY2012 funding.<sup>85</sup> With regard to the plans, most agencies created both a Web page describing shutdown procedures as well as distributable PDF documents. The resources covered many topics in addition to information that OMB *Circular No. A-11* required about excepted and non-excepted employees. Additional topics included shutdown precedents, guidelines, furlough policies, and frequently asked questions. Documents also addressed availability of government services, unemployment compensation for federal employees, union concerns, and information about past shutdowns. As noted earlier, in September 2013, OMB directed agencies to update these plans and prepare for their potential release, in the context of FY2014 annual appropriations.<sup>86</sup>

Some prospective analyses also have been conducted in specific policy areas. For example, CRS issued a report that analyzes government procurement in times of fiscal uncertainty. The report provides an overview of the various options that the government has, pursuant to the terms of its contracts or otherwise, when confronted with actual or potential funding gaps, funding shortfalls, or budget cuts.<sup>87</sup> During the near-impasse on FY2011 appropriations in April 2011, another CRS analysis examined the potential effects of a shutdown on Department of Defense (DOD) operations and personnel.<sup>88</sup>

## Potential Issues for Congress

### Quality and Specificity of Agency Planning

In December 1995, Representative John L. Mica, chairman of the Subcommittee on Civil Service of the House Committee on Government Reform and Oversight, convened a hearing that focused on the first FY1996 shutdown and potential implications for the future.<sup>89</sup> Among other things,

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<sup>83</sup> Ibid.

<sup>84</sup> Background information provided to CRS on April 7, 2011, by staff of Administrative Office of the U.S. Courts.

<sup>85</sup> The plans were posted online, at OMB, "Agency Contingency Plans," at <http://www.whitehouse.gov/omb/contingency-plans>.

<sup>86</sup> OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, Attachment 1.

<sup>87</sup> CRS Report R42469, *Government Procurement in Times of Fiscal Uncertainty*, by Kate M. Manuel and Erika K. Lunder.

<sup>88</sup> CRS Report R41745, *Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations*, by Pat Towell and Amy Belasco.

<sup>89</sup> See U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Government Shutdown I: What's Essential?* hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., December 6 and 14, 1995 (Washington: GPO, 1997), pp. 1-3.

then-Chairman Mica raised concerns about the shutdown’s planning and execution by agencies and OMB, saying “the execution of the shutdown was, in many instances, disorganized and illogical, at best, and oftentimes chaotic experience.”<sup>90</sup> As an example, he cited the “recall of more than 50,000 Social Security personnel [three days into the furlough], raising questions about whether they should have been furloughed in the first place.”<sup>91</sup> In addition, then-Ranking Member James P. Moran expressed interest in clarifying the distinction between excepted and non-excepted activities and employees. If similar issues were currently of concern, Congress might consider lawmaking and oversight options related to the quality and specificity of agency shutdown planning. The shutdown plans that agencies released in April and December 2011, in the wake of negotiations on FY2011 and FY2012 appropriations, might provide a starting point for such attention.

## Availability of Updated Agency Shutdown Plans

OMB’s *Circular No. A-11* requires executive agencies to submit to OMB “plans for an orderly shutdown in the event of the absence of appropriations.”<sup>92</sup> OMB has required the development and maintenance of these shutdown plans since 1980. Prior to the circular’s 2011 revision, the circular broadly indicated that the plans were to be submitted to OMB when initially prepared and also when revised. With the August 2011 revision of the circular, however, OMB newly required that these plans be updated whenever there is a change in the source of funding for an agency program, or “any significant modification, expansion, or reduction in agency program activities.”<sup>93</sup> In any case, plans are required to be updated and submitted to OMB with a minimum frequency of once every four years, starting August 1, 2014.

The April and December 2011 releases of agency shutdown plans on the Internet—on OMB’s website and on agency websites—brought a new level of transparency to agency shutdown planning. However, each release occurred on the final day of funding availability before an interim CR was scheduled to expire, and in the context of negotiations where an impasse seemed to many observers to be a possibility. Before the April 2011 release, it was not clear the extent to which agency shutdown plans ever had been made publicly available or systematically shared with Congress and agency stakeholders for scrutiny and feedback. It remains to be seen over time whether these shutdown plans will remain a permanent fixture of federal agency and OMB websites. Similarly, it is not clear if any updated plans will be made available to Congress and the public, except at a time determined by OMB or a sitting President. Scrutiny over agency shutdown plans may provide incentives for agencies to improve the quality of the plans, should it become necessary at some point for agencies to execute the plans, and may inform budget policy debates about the potential impacts of shutdowns. On the other hand, such inquiries may distract agency personnel from other duties and raise sensitive issues regarding what activities and employees should be considered to be excepted from Antideficiency Act restrictions.

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<sup>90</sup> Ibid., p. 2.

<sup>91</sup> Ibid.

<sup>92</sup> OMB, *Circular No. A-11: Preparation, Submission, and Execution of the Budget*, August 2012, Section 124, p. 1.

<sup>93</sup> Ibid., pp. 1-2.

## Possible National Security Implications<sup>94</sup>

A federal government shutdown could have possible negative security implications,<sup>95</sup> as some entities wishing to take actions harmful to U.S. interests may see the nation as physically and politically vulnerable.<sup>96</sup> The Antideficiency Act is silent regarding which specific organizations would be excepted in whole or part from a government shutdown. The act's provisions and historical guidance from OMB, however, suggest that entities that perform a national security function may be allowed to continue many of their operations.<sup>97</sup> Historically, individuals responsible for supporting the nation's global security activities, public safety efforts, and foreign relations pursuits have been excepted from furloughs that accompany a government shutdown.<sup>98</sup>

The actions that are taken in anticipation of a government shutdown may lessen the negative effects of an incident of national security significance occurring during this period. How agencies and OMB prepare for a government shutdown may have short- and long-term consequences if an incident occurs during a period of reduction in government services or soon after a resumption of all government activities. Should federal government organizations traditionally not viewed as an excepted part of the security apparatus be shut down, and subsequently become needed during a crisis or emerging situation, the nation's ability to respond to an incident could be delayed. Such a situation could result in increased risk to the nation and a longer recovery time as services and support activities normally provided to non-federal entities may not be available when needed. Some security observers may offer concerns that the longer the duration of a government shutdown, the more at-risk the nation becomes as enemies of the U.S. may seek to exploit perceived vulnerabilities.

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<sup>94</sup> This section was prepared by John Rollins, Specialist in Terrorism and National Security (jrollins@crs.loc.gov, 7-5529).

<sup>95</sup> While an incident of national security significance could entail actions undertaken by a group of individuals, response and recovery efforts associated with a catastrophic natural disaster also may be an issue of concern.

<sup>96</sup> For information and analysis related to possible security vulnerabilities during periods of government uncertainty, see CRS Report R42773, *2012-2013 Presidential Election Period: National Security Considerations and Options*, by John W. Rollins.

<sup>97</sup> For example, see OMB Memorandum, *Agency Operations in the Absence of Appropriations*, November 17, 1981. See also U.S. Department of Defense, *Guidance for Continuation of Operations in the Absence of Available Appropriations*, April 7, 2011, at [http://www.defense.gov/home/features/2011/0411\\_govtshutdown/OSD\\_04092-11.pdf](http://www.defense.gov/home/features/2011/0411_govtshutdown/OSD_04092-11.pdf).

<sup>98</sup> Responsibility for overseeing the nation's security interests are shared by organizations within the intelligence, law enforcement, and national and homeland security communities. For discussion of the effect of a government shutdown on Department of Defense related activities, see CRS Report R41745, *Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations*, by Pat Towell and Amy Belasco.

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