



**Congressional
Research Service**

Informing the legislative debate since 1914

Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations

Pat Towell

Specialist in U.S. Defense Policy and Budget

Amy Belasco

Specialist in U.S. Defense Policy and Budget

September 26, 2013

Congressional Research Service

7-5700

www.crs.gov

R41745

Summary

Through most of the second half of FY2013, funding for the Department of Defense (DOD), as for most other federal agencies, has been provided by the Consolidated and Further Continuing Appropriations Act, 2013, (P.L. 113-6), which will expire at 11:59 p.m. on Monday, September 30. If additional funding is not provided by then, DOD, like other agencies, will be subject to a lapse in appropriations during which agencies are generally required to shut down. In the past, however, the Office of Management and Budget (OMB) has identified a number of exceptions to the requirement that agencies cease operations, including a blanket exception for activities that “provide for the national security.” If the Administration approves of such exceptions in the current circumstances, many Department of Defense activities would continue, though other activities would halt.

As a result, during a lapse in appropriations, some DOD personnel would be “excepted” from furloughs, including all uniformed military personnel, while others would be furloughed and, thus, not be permitted to work. Even “excepted” military and civilian personnel who would continue to work and whose pay is normally provided through annual appropriations would not be paid, however, until after appropriations are subsequently provided for that purpose. Personnel who are not “excepted” would not be entitled to receive pay for the period during which they were furloughed although, in the past, Congress has provided for them to receive the pay they would have received if they had not been furloughed.

A frequent question is how federal employees’ compensation was affected during the last government shutdown in 1995-1996. There were two shutdowns at that time, one of five days, from November 13 through November 19, 1995, and one of 21 days, from December 15, 1995, through January 5, 1996. The first shutdown was not long enough to affect pay checks, and DOD was not affected by the second because defense appropriations were enacted on December 1, so funding was available. Moreover, by law, Congress provided back pay for employees who had been furloughed during the two shutdowns, although the government was not legally obligated to provide that pay.

The authority to continue some activities during a lapse in appropriations is governed by the Antideficiency Act, now codified at 31 U.S.C. 1341 and 1342, as interpreted by Department of Justice (DOJ) legal opinions and reflected in Office of Management and Budget (OMB) guidance to executive agencies. Subject to review by OMB, each agency is responsible for making specific determinations on which activities may continue during a shutdown and which may not. Legally, according to DOJ and OMB guidance, activities that may continue during a lapse in appropriations include (1) activities “necessary to bring about the orderly termination of an agency’s functions;” (2) administration of benefit payments provided through funds that remain available in the absence of new appropriations, including, in the case of DOD, military retirement benefits; (3) activities and purchases financed with prior year funds and ongoing activities for which funding has already been obligated; (4) activities undertaken on the basis of constitutional authorities of the President; and (5) activities related to “emergencies involving the safety of human life or the protection of property.” The Defense Department attributes its authority to carry on national security-related operations mainly to Section 1342 of the Antideficiency Act, which permits the continuation of activities to protect human life and property.

Current DOD guidance on operations in the event of a shutdown is not available. Guidance issued in April 2011, when a funding lapse was widely viewed as a real possibility, provided that

ongoing military operations, such as those in Afghanistan (and, at that time, in Iraq), could continue, along with training of forces that are assigned to potential future operations and a broad range of activities that, in DOD's view, were needed to support national security-related operations. In the past, these have included operation of DOD Dependent Schools and child care centers. DOD medical activities may also continue, including TRICARE services for dependents, though non-essential services such as elective surgery may not be provided in military medical facilities.

The 2011 DOD memo also pointed out that—as noted, above—the pay of military and civilian personnel could be interrupted, however, potentially imposing hardships on many families. Payments to vendors derived from multiyear appropriations could continue, but payments from current appropriations would not be permitted, which might result in some confusion and, potentially, disruptions to supplies of some material and services.

Another potential facet of DOD's preparation for a potential funding lapse is outlined in a 1998 Army memo giving general guidance for such situations. It directs commanders to educate their personnel regarding the potential effect on their personal financial situations if pay and benefit payments are suspended during a funding lapse. The Army memo also directs commanders to work with creditors and support agencies in the local community to minimize the disruption to Army personnel.

In setting its current policy for dealing with a shutdown, DOD is not bound either by its own 2011 guidance memo or by the 1998 Army guidance memo. However, those documents illustrate the factors involved in DOD's interpretation of applicable laws and regulations.

Contents

| | |
|--|----|
| Introduction..... | 1 |
| Recent Developments..... | 1 |
| Questions about DOD Operations During a Lapse in Funding | 2 |
| Authorities and Conditions Affecting DOD Operations in the Absence of Appropriations | 5 |
| The Antideficiency Act..... | 7 |
| OMB and Justice Department Guidance on DOD Activities Permitted During a Lapse in Appropriations..... | 8 |
| 2011 DOD Guidance on Operations During a Lapse of Appropriations | 11 |
| Examples of “Exempt” and “Non-Exempt” Activities (2011 DOD memo)..... | 12 |
| Examples of “Exempt” and “Non-Exempt” Activities from 1998 Army Memo | 18 |
| Assessing the Effects of a Government Shutdown on Defense | 23 |
| Effects on Military Operations | 23 |
| Effects on Military and Civilian Personnel | 24 |
| Effects of Limits on Expenditures on Contracting | 24 |

Contacts

| | |
|---------------------------------|----|
| Author Contact Information..... | 25 |
|---------------------------------|----|

Introduction

Through most of the second half of FY2013, funding for the Department of Defense (DOD), as for most other federal agencies, has been provided by the Consolidated and Further Continuing Appropriations Act, 2013, (P.L. 113-6), which will expire at 11:59 p.m. on Monday, September 30. If additional funding is not provided by then, DOD, like other agencies, will be subject to a lapse in appropriations.¹ In that event, agencies are generally required to shut down, although the Office of Management and Budget (OMB) has identified a number of exceptions to that rule, including a blanket exception for activities that “provide for the national security.”² Other than continuing to perform such “excepted” activities, agencies are generally required to terminate operations and personnel who are not performing “excepted” activities will be furloughed after working only long enough to ensure an orderly shutdown.³

Recent Developments

In a September 23, 2013, memorandum to all DOD employees, Deputy Secretary of Defense Ashton B. Carter said the department was preparing for the possibility of a funding lapse by updating its plans for executing an orderly shutdown of its non-excepted activities, in that case:

A lapse would mean that a number of government activities would cease due to a lack of appropriated funding. While military personnel would continue in a normal duty status, a large number of our civilian employees would be temporarily furloughed. To prepare for this possibility, we are updating our contingency plans for executing an orderly shutdown of activities that would be affected by a lapse in appropriations.⁴

Dr. Carter’s memo disclosed no detailed information about DOD’s current shutdown plans. Appended to the memo was a brochure, published in 2011 by the Office of Personnel Management (OPM), providing guidance to federal employees in the event of a shutdown furlough.⁵

¹ Military operations of the Department of Defense are normally funded through annual appropriations provided in the department of defense appropriations act and in the military construction, veterans affairs, and related agencies appropriations act. DOD also administers a number of civil affairs activities that are funded in other appropriations bills, including civil construction projects managed by the Army Corps of Engineers. The non-military functions of the Department of Defense are not addressed in this memo.

² The exception for national security was cited in OMB memos in 1980 and 1981 that are discussed below. Those memos, in turn, have been referenced by OMB guidance to agencies in years since then. OMB Circular A-11, which is periodically updated, also requires agencies to maintain plans for the orderly termination of operations in the event of a lapse in appropriations, with exceptions for personnel engaged in military, law enforcement, or direct provision of health care activities.

³ For a general discussion of government shutdowns because of funding lapses, see CRS Report RL34680, *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass.

⁴ The Carter memo is available at <http://www.defense.gov/documents/DSD%20Guidance-Potential%20Shutdown-23SEP13-Signed.pdf>.

⁵ The OPM attachment to the Carter memo was the 2011 version of the shutdown furlough brochure. The September 2013 version of the brochure is available at, OPM <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>.

Questions about DOD Operations During a Lapse in Funding

If the Administration follows past practice in defining exceptions to the requirement for agencies to shut down in the absence of appropriations, many DOD activities would continue during the period of a funding lapse, though other activities would halt. Some personnel would be “excepted” from furloughs, including all uniformed military personnel on active duty, while others would be subject to furlough. Even excepted military and civilian personnel who would continue to work during a lapse in appropriations and whose pay is normally provided through annual appropriations would not be paid, however, until after appropriations are subsequently provided for that purpose.

Although these basic principles are clear enough, their application in practice leaves room for a considerable degree of uncertainty. As a means of helping to address such uncertainty—in the absence of any publicly announced declaration of current policy—this report provides an overview of guidelines that, over the past 30 years, have governed planning for DOD operations in the event of a funding lapse, and it discusses their implications for a possible, impending shutdown. It also briefly reviews DOD guidance issued in 2011 and Department of the Army guidance issued in 1998 covering operations during a lapse in appropriations.

Among the questions the report address are whether uniformed military personnel would receive full pay in the event of a shutdown, and, if not, why military personnel were paid during the two most recent shutdowns in 1995 and 1996; whether DOD Dependent Schools would continue to operate during a shutdown; how a shutdown would affect operations of the Defense Finance and Accounting Service; and whether the “Feed and Forage Act,” 41 U.S.C. 11, which allows the Defense Department to obligate funds in advance of appropriations for certain purposes, might be invoked to provide additional flexibility during a funding lapse. Answers to some questions such as these are quite simple, to others complex, and to others uncertain.

Assuming that past Attorney General and OMB guidance will be followed in the event of an impending shutdown, brief answers to these questions are as follows:

- **Pay of uniformed military personnel:** Even though most or all uniformed personnel would likely be excepted from furloughs during a lapse in funding, as they have been in the past, no special provision allows the Defense Department to issue pay checks to them when appropriated funds are not available to do so. In this regard, uniformed personnel are treated no differently than excepted federal civilian employees who are similarly required to continue working during a shutdown but whose pay will be delayed until appropriations are enacted. If, therefore, current funding lapses on September 30, 2013, and appropriations are approved on October 10, military personnel would receive their full pay for the period October 1-15 on October 15, their next scheduled pay date. Otherwise, they would receive no pay on October 15. During the most recent government shutdowns at the end of 1995 and in early 1996, uniformed personnel were paid, as usual. But that is because the FY1996 defense appropriations act became law on December 1, 1995, so appropriations were available. At the time, there were two periods of funding lapses, the first of five days from Monday, November 13, through Saturday, November 19, 1995, and the second of 21 days, from Friday, December 15, 1995, through Friday, January 5, 1996. DOD was not affected by

the second, longer shutdown, and the first did not last long enough to have an effect on pay checks. If the defense appropriations bill had not been enacted before the second shutdown, however, military personnel would not have received a full pay check, as scheduled, on December 29, 1995.

- **Operation of DOD Dependent Schools:** According to quite detailed guidance prepared by the Army in 1998 (following the development of agency plans to implement a government shutdown in 1995 and 1996), the support that dependent schools provide to military personnel is directly enough related to national security that the schools may continue to operate during a shutdown.⁶ If that precedent is followed today, dependent schools would continue to operate. That outcome is not certain, however, since past precedents may be superseded by guidance that DOD is currently preparing. The 1998 Army guidance also concludes that child care may continue. It does not directly address policy on other family services, however, or on many other details of a shutdown. Army guidance gives base commanders considerable discretion in implementing policy, so there may be significant differences in the impact of a shutdown from one base to another.
- **Operation of the Defense Finance and Accounting Service:** Some DFAS operations would be likely to continue through the whole period of a funding lapse, others only long enough to terminate operations in an orderly way, and yet others might continue for a time, stop, and then restart later. Presumably, DFAS personnel needed to administer military retired pay and other retiree benefits would be expected to work during a funding lapse because the authority to distribute benefits drawn from multi-year funds, including retirement funds, is implied by the responsibility agencies have to provide payments to which recipients are entitled.⁷ Military pensions and other retirement benefits are entitlements financed through the military retirement and health care fund, which is available independently of annual defense appropriations.

In addition, under past precedents, DFAS personnel who handle regular payrolls may be expected to work long enough following the beginning of a shutdown to issue pay checks for amounts earned when appropriations were still available and to prepare to issue full pay if appropriations are provided in time to do so.⁸ In general, though, activities to implement a shutdown would not last long—OMB guidance reflects an assumption that most termination activities will take only a few hours rather than several days.⁹

⁶ Office of the Assistant Secretary of the Army (Financial Management and Comptroller), “Continuing Resolution Authority General Guidance,” August 24, 1998, p. 17, on line at <http://handle.dtic.mil/100.2/ADA351724>.

⁷ In reviewing the applicable law in 1980 and 1981, the Attorney General concluded that agencies 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.” This reasoning is the basis on which Social Security Administration personnel are authorized to continue to process Social Security checks even when appropriated funds for the agency lapse. See Opinion by Attorney General Benjamin Civiletti, January 16, 1981.

⁸ Army guidance cited above notes that DFAS will delay the distribution of pay as long as possible during a shutdown in order to provide full pay if appropriations are enacted, which implies that some DFAS payroll personnel, at least, will continue to work.

⁹ See, for example, Richard G. Darman, “Memorandum for Heads of Executive Departments and Agencies,” OMB Memorandum M-91-02, October 5, 1990: “*Shutdown*: If no CR is likely to be enacted on Tuesday, we will issue (continued...)”

Under past precedents, other DFAS operations might continue to the extent they are required to manage operations financed with unobligated balances of funds provided in prior fiscal years. Though new appropriations are not available during a funding lapse, a substantial amount of money provided to the Defense Department is available for obligation for more than one year, including funding for R&D, procurement, military construction, and purchases of material for inventories of stock funds. Army shutdown guidance in the past, which is discussed at length later in this report, provides that “Prior year funds may be obligated without restriction,” which implies that program administration, contract oversight, and auditing functions, some of which are carried out by DFAS, may also continue. To the extent pay of personnel is provided with prior year funds, expenditures are allowed, so some personnel may be eligible to continue receiving pay checks.

Additional DFAS operations might also continue to the extent they are determined to be needed to support ongoing DOD national security-related operations. Exactly how that would affect DFAS personnel, though, depends on a number of factors. Many DFAS personnel are paid through reimbursements from other appropriated accounts for services that DFAS provides to organizations within DOD. Again under past precedents, to the extent DFAS services are needed by DOD organizations whose national security-related operations will continue, those funds might continue to be available, as usual, to reimburse DFAS.¹⁰ It is quite possible that demand for DFAS services would decline initially as operations are curtailed and then resume later. In any case, even if funds are formally transferred to DFAS, and some DFAS personnel are therefore excepted from furloughs, in the absence of appropriations, it does not appear that funds would be available to issue pay checks to them.

- **Authority to Obligate Funds Under the “Feed and Forage Act”:** The Feed and Forage Act, 41 U.S.C. 11, says, in part:

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 Department of Defense and ... the Coast Guard when it is not operating as a service in the Navy for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies.

During the Vietnam War, the law was used to provide funds when supplemental appropriations were delayed. In more recent years, it has been used mainly to provide short-term funding for unplanned military operations. If invoked during a funding lapse, the act would give DOD authority to obligate funds in advance of appropriations for the limited number of purposes specified. Use of the Feed and Forage Act during a funding lapse appears unnecessary, however, and it has never been invoked for that purpose. During earlier shutdowns, Attorney General and

(...continued)

instructions initiating a phase-down of activities for non-excepted employees. Such phase-down activities for non-excepted personnel, if called for, should be completed during the first *three hours* of the workday.” (Italics in original.)

¹⁰ According to Army guidance cited later in this report, during a lapse in appropriations, “Funded and automatic reimbursable orders may be accepted consistent with receipt of current year funded reimbursable authority” – i.e., reimbursable activities may continue to the extent funds are available to provide the reimbursements.

OMB guidance has allowed national security-related operations to continue. The authority for DOD to continue national security-related activities appears to be considerably broader than that provided by the Feed and Forage Act, which is limited in purpose and which does not directly provide authority to obligate funds for pay of military personnel.¹¹ Moreover, like the authority provided by the Antideficiency Act, the Feed and Forage Act permits only the obligation of funds and not disbursements until funds are subsequently appropriated—neither law allows the Defense Department to issue pay checks or to make other payments.¹² While invocation of the Feed and Forage Act during a shutdown is conceivable, it is not clear what purpose it would serve.¹³

Authorities and Conditions Affecting DOD Operations in the Absence of Appropriations

On the assumption that government operations in the event of a funding lapse will continue to be governed by guidance that has been followed over the past 30 years, the Department of Defense may continue, in the absence of appropriations, to carry on a quite broad range of activities. The most far-reaching authority that affects DOD is authority to continue activities that “provide for the national security.” Even DOD’s authority to provide for national security, however, may be constrained by legal limits on the financial procedures that are permitted when appropriations lapse. Among other things, in order to carry on activities that are permitted to continue, but for which appropriations have lapsed, funds may be obligated in advance of appropriations (i.e., legally binding contractual commitments may be made), but expenditures of funds that derive from such obligations (i.e., the payment of bills with checks or electronic remittances) are prohibited. As a result, though uniformed military personnel and many DOD civilian employees may be expected to continue in their duties during a funding lapse, those normally paid with current-year appropriated funds, including virtually all uniformed personnel and most civilians, will not receive pay until after appropriations become available. Nor will payments to vendors for goods and services be permitted if the payments derive from contracts entered into in advance of appropriations.

The legal authority under which the Department of Defense may continue operations in the event of a funding lapse is established by the Antideficiency Act, now codified at 31 U.S.C. 1341 and 1342. The legal interpretation of the conditions under which operations may continue has been established, in turn, by Department of Justice legal opinions and Office of Management and

¹¹ The Feed and Forage Act does not itself permit pay of personnel, but a different statute provides one exception. Section 2201(c) of Title 10 U.S. Code allows funding for an increase in the number of active duty troops to be incorporated into the list of activities that may be funded under 41 U.S.C. 11 – i.e., it indirectly expands the purposes for which funding under the Feed and Forage Act may be available. The provision applies only to funding for an increase in the number of active duty personnel, however, not to funding of current personnel levels.

¹² See U.S. Department of Defense, Office of the Under Secretary of Defense (Comptroller), “Budget Execution: Processes and Flexibility,” March 2009, p. 17, http://comptroller.defense.gov/execution/Budget_Execution_Tutorial.pdf, which says, with regard to the Feed and Forage Act: “These authorities require congressional notification and do not permit actual expenditures until Congress provides an appropriation of the requested funds.” The tutorial also notes that the authority to fund an increase in personnel under 10 U.S.C. 2210 “is of limited value since it provides only for obligations and not for expenditures (payments to members).”

¹³ The 2011 DOD guidance and 1998 Army shutdown guidance discussed in this mention the Feed and Forage Act as a potential source of authority, but neither discusses the circumstances under which it might be invoked.

Budget directives issued initially in 1980 and 1981, and that OMB has referred to in providing guidance on shutdowns since then. Agencies, including DOD, have also been required to prepare detailed plans for implementing a shutdown when lapses in appropriations were anticipated.

Key Department of Justice and OMB Guidance on Operations During a Lapse in Appropriations¹⁴

- An opinion by Attorney General Benjamin Civiletti on April 25, 1980, that found few exceptions to Antideficiency Act limits on funding in the absence of appropriations;
- A memorandum by OMB Director James McIntyre on August 28, 1980, that required agencies to submit plans for operations in the event of a lapse in appropriations;
- A memorandum by OMB Director James McIntyre on September 30, 1980, that provided guidance to agencies on operations permitted to continue during a lapse in appropriations;
- An extensive opinion by Attorney General Civiletti on January 16, 1981, reviewing in detail the legal basis for the guidance that OMB provided on September 30, 1980;
- A memorandum by OMB Director Richard Darman on November 17, 1981, that repeated the guidance provided by the September 30, 1980, OMB memorandum and that added some further guidance, including the point that obligations of funds may be permitted in advance of appropriations, but not expenditures;
- A memorandum by Assistant Attorney General Walter Dellinger on August 16, 1995, addressed to OMB Director Alice Rivlin, that found that a 1990 amendment to the Antideficiency Act provided no basis for altering earlier guidance on agency operations in the event of a lapse in appropriations;
- A memorandum to the heads of executive departments and agencies by OMB Director Rivlin on August 22, 1995, that conveyed the Dellinger memorandum and that required agencies to maintain contingency plans for a lapse in appropriations based on the September 30, 1980, and November 17, 1981, OMB memoranda.
- A memorandum for the heads of executive departments and agencies by OMB Director Lew on April 7, 2011 providing further guidance on contracting, grand administration, and payments processing during a lapse in appropriations;
- A memorandum for the heads of executive departments and agencies by OMB Director Burwell on September 17, 2013, providing further guidance on contracting, grand administration, and payments processing during a lapse in appropriations;

¹⁴ The April 25, 1980 and January 16, 1981 Civiletti opinions and the September 30, 1980 OMB memorandum are available as appendices in U.S. General Accounting Office, *Funding Gaps Jeopardize Federal Government Operations*, GAO Report PAD-81-31, March 3, 1981, on line at <http://archive.gao.gov/f0102/114835.pdf>. The other memoranda cited, except for the 2011 and 2013 OMB memos, are available on line as appendices to Office of Personnel Management, “Guidance and Information on Furloughs,” on line at <http://www.opm.gov/furlough/furlough.asp>. The 2011 OMB memo is available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-13.pdf>, while the 2013 OMB memo is available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf>.

Hereafter in this report, these opinions and memoranda are cited by author or agency and date. Other Department of Justice opinions related to operations in advance of appropriations have been issued as well.

Ultimately, federal agency plans, based on OMB guidance, determine which activities will continue in the event of a shutdown and which will not. Current agency plans have not generally been circulated publicly. However, some insight into DOD planning may be drawn from the guidance memorandum on operation during a funding lapse that the department issued in 2011.¹⁵

By the same token, a 1998 memo by the Army's Comptroller on management under a continuing resolution includes an relatively extensive list of activities that would be "exempt" from a shutdown and activities considered "non-exempt" in the event of a funding lapse.¹⁶ DOD operations in the event of a shutdown would also be governed by financial management procedures that would, in turn, affect how a shutdown is managed

The following discussion, (1) briefly reviews the legal basis for the Department of Defense to continue operations during a funding lapse and the attendant legal constraints on the scope of activities and the financial mechanisms that are permitted, (2) provides selected excerpts from DOD and Army guidance on activities that may continue during a funding lapse and those that may not, and (3) provides a brief overview of the possible impact of a lapse in funding on military and civilian personnel, on current military operations including operations in Afghanistan, and on day-to-day business operations of the Department of Defense.

The Antideficiency Act

The Antideficiency Act, now codified at 31 U.S.C. 1341 and 1342,¹⁷ generally prohibits the obligation or expenditure of funds exceeding amounts appropriated. It provides two quite broad exceptions, however:

- Section 1341 says that an employee of the United States Government may not "involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." Subsequent Attorney

¹⁵ The 2011 DOD contingency plan for a funding lapse is available at http://www.defense.gov/news/OSD_20111215govtshutdown.pdf

¹⁶ Office of the Assistant Secretary of the Army (Financial Management and Comptroller), *Continuing Resolution Authority General Guidance*, August 24, 1998, on line at <http://handle.dtic.mil/100.2/ADA351724>. Hereinafter, the document is referred to as "Army Continuing Resolution Guidance, August, 1998."

¹⁷ These provisions were formerly Sections 655(a) and 655(b) of Title 31, and were renumbered without substantive change in a recodification of Title 31 by P.L. 97-258, enacted on September 13, 1982. Attorney General opinions in 1980 and 1981 discussed in this memo refer to the earlier numbering. Section 1342 was also amended by P.L. 101-508, November 5, 1990. The current version of the Antideficiency Act reads, in part, as follows:

§ 1341. Limitations on expending and obligating amounts

(a)

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

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund ...

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

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

General opinions on operations permitted during a lapse in appropriations have been intended, in part, to identify what obligations in advance of appropriations should be considered to be “authorized by law.”

- Section 1342 says, in part, that “An officer or employee of the United States Government may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” One basis for Department of Defense operations to continue during a funding lapse is this authority to employ personnel to protect human life and property. Department of Justice opinions have found that the authority to employ personal services implies the authority to procure material that personnel may need to carry out their emergency responsibilities (see below for a discussion). OMB guidance to agencies on preparations for a shutdown has identified a quite extensive range of activities that are permitted to continue in the absence of appropriations in order to protect human life and property.

One other aspect of the Antideficiency Act is particularly important to consider in assessing the effect of a lapse in appropriations on government operations. The Antideficiency Act permits certain exceptions to the requirement that agency operations cease when appropriations are not provided. But, the exceptions permit only the obligation of funds in advance of appropriations for the excepted activities, not the expenditure of funds. Contracts for material and services may be signed, and personnel may continue to be employed, but the Antideficiency Act does not permit agencies to make payments to vendors or issue pay checks to personnel if the payments would have to be drawn from amounts obligated in advance of appropriations. To be absolutely clear, no money is actually available, but only the promise to provide funds at some time in the future.

OMB and Justice Department Guidance on DOD Activities Permitted During a Lapse in Appropriations

Attorney General opinions released in April 1980 and January 1981 and OMB memoranda issued in September 1980 and November 1981—and referred to repeatedly in later years—provide the basic guidance on activities that DOD and other executive branch agencies may be allowed to continue when appropriations are not provided. In general, these activities are understood to be “authorized by law” under Section 1341 of the Antideficiency Act or to permit the employment of personal services for emergencies involving the safety of human life or the protection of property under Section 1342. The principal activities that the Justice Department and OMB have determined may continue include the following.

- **Activities “necessary to bring about the orderly termination of an agency’s functions”:** The Attorney General found that agencies may obligate funds to shut down operations after a funding lapse under the terms of the Antideficiency Act itself, since “it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations.” In general, such activities are expected to be very limited—OMB guidance in 1995 said that “phase-down activities for non-expected

personnel, if called for, should be completed during the first *three hours* of the workday” following the expiration of funding.

- **Administration of benefit payments provided through funds that remain available in the absence of new appropriations:** The Attorney General found that departments are “authorized to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the payments themselves are not subject to a one-year appropriation.” This follows, he said, from the premise that funding is “authorized by necessary implication from the specific terms of duties that have been imposed on, or authorities that have been invested in, the agency.” The Social Security Administration, by this reasoning, may continue to pay personnel and to fund operations needed to manage pensions during a lapse in funding because of its responsibility to distribute benefits that are provided through a permanent trust fund that is not affected by a lapse in appropriations. Presumably, DOD administration of military retired pay and medical benefits may continue as well.
- **Activities and purchases financed with prior year funds and ongoing activities for which funding has already been obligated:** Substantial amounts of DOD funding are provided in accounts that are available for obligation for more than a year—R&D funding is typically available for two years, most procurement for three years, and shipbuilding funds for five years. Contract authority to procure material for stockpiles is also available as “no year” money. Contract authority provided under standing law and unobligated balances in the acquisition accounts remain available during a lapse in funding because they have previously been provided—only current-year funding is affected by a lapse in appropriations. Similarly, contracts which have already been signed, and which may require delivery of services or material as ordered, remain valid.¹⁸ Most significantly, obligations already made or new obligations made from funds appropriated in prior years may lead to expenditures of funds, in contrast to obligations made in advance of appropriations. Whether vendors may be paid during the period of a funding lapse, therefore, depends on which pot of money the funds are drawn from—some contractors may be paid as usual while others may not be. At the very least, a degree of confusion is likely. A further complicating factor is whether administrative personnel needed to manage contracts are permitted to continue working. To the extent that acquisition personnel are paid with annual appropriations—which is generally the case—personnel may be available to manage contracts only if they are excepted from a shutdown. It is not necessarily to be assumed that agencies have authority under the Antideficiency Act to except from furloughs personnel needed to administer the use of funds available from prior year appropriations or other sources. Both Army guidance in 1998 and recent draft DOD guidance, however, say that

¹⁸ There has been some discussion of the possibility that the military services could obligate funds for civilian pay for at least a month or so in advance, which would allow personnel to continue working and for pay checks to be issued for some time after a funding lapse. Such a prospect is at odds with longstanding procedures which require agencies to halt operations in the event of a funding lapse and for non-excepted personnel to be furloughed. Continuing resolution language stipulates that “only the most limited funding action of that permitted . . . shall be taken in order to provide for continuation of projects and activities” (P.L. 111-242, Section 110), which would appear to limit such advance obligations.

personnel may continue to administer activities financed with prior year or other available funds.

- **Activities undertaken on the basis of constitutional authorities of the President:** The Attorney General found that the President has an inherent constitutional authority to obligate funds in advance of appropriations to carry out “not only functions that are authorized by statute, but functions authorized by the Constitution as well.” When the Constitution grants a specific power to the President, the Attorney General reasoned, “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.” This does not mean that the President can “legislate his own obligational authorities.” But in the opinion of the Attorney General, “the policy objective of the Antideficiency Act ... should not alone be regarded as dispositive of the question of authority.” The Attorney General did not specifically address whether this provides a basis for the President to direct that funds be obligated in advance of appropriations for reasons of national security. OMB memoranda since 1980 repeat the conclusion that funding may be continued to “Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life or property.” This wording might be read to imply that the authority of agencies to continue operations related to national security is independent of the authority to continue activities related to the safety of life or the protection of property. National security-related activities may, then, be among those for which obligations in advance of appropriations are considered to be “authorized by law” under Section 1341 of the Antideficiency Act and are permitted independently of Section 1342 and whether or not they protect life or property. For its part, however, the Defense Department has generally not cited any authority beyond that provided in Section 1342.
- **Activities that protect life and property:** OMB guidance periodically issued in preparation for a shutdown concludes that agencies have the authority to “Conduct essential activities to the extent that they protect life and property.”¹⁹ The guidance reflects Section 1342 of the Antideficiency Act. Section 1342, however, directly permits the obligation of funds only for employment of “personal services” and not for other purposes. Rather than accept such a limited view of what is permitted, the January 16, 1981, Attorney General opinion provided a basis for expanding the scope of activities permitted under Section 1342 to include the acquisition of material needed to respond to emergencies:

in emergency circumstances in which a government agency may employ personal services ... it may also ... 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

¹⁹ This phrasing was initially used in a memorandum issued by OMB Director James McIntyre on September 30, 1980, and repeated in a November 17, 1981, memorandum by OMB Director David Stockman. Subsequent OMB memoranda in advance of anticipated shutdowns refer to the 1980 and 1981 memoranda as guidance in preparing shutdown plans. See, for example, OMB Director Alice M. Rivlin, “Memorandum for Heads of Executive Departments and Agencies: Agency Plans for Operations During Funding Hiatus,” OMB Memorandum M-95-18, August 22, 1995, available on line as Appendix A-1 at <http://www.opm.gov/furlough/furlough.asp>.

statute “carries with it all means necessary and proper to carry out properly the purposes of the law.”

OMB memoranda provide a fairly long list of examples of activities permitted to continue on the grounds they protect life and property, including inpatient and emergency outpatient medical care; public health and safety activities; air traffic control; border protection; care of prisoners; law enforcement; disaster assistance; preservation of the banking system; borrowing and tax collection; power production and distribution; and protection of research property. The “protection of property” exception in itself appears to provide the basis for a quite wide range of government activities to continue.

2011 DOD Guidance on Operations During a Lapse of Appropriations

DOD’s most recent guidance for operating under a lapse of appropriation – which currently is being updated, was filed with OMB in 2011. The document, issued by then-Deputy Secretary of Defense William Lynn, begins with a cover memo laying out DOD policy in general terms:

Excerpts from

Office of the Deputy Secretary of Defense

“Guidance for Continuation of Operations in the Absence of Available Appropriations”

December 11, 2011

The Department will, of course, continue to prosecute the war in Afghanistan, including preparation of forces for deployment into that conflict. The DOD will also continue completion of the military commitment in Iraq. The Department must, as well, continue many other operations necessary for the safety of human life and protection of property, including operations essential for the security of our nation. These activities will be “excepted” from cessation; all other activities would need to be shut down in an orderly and deliberate fashion, including -with few exceptions -the cessation of temporary duty travel.

All military personnel will continue in a normal duty status regardless of their affiliation with excepted or non-excepted activities. Military personnel will serve without pay until such time as Congress makes appropriated funds available to compensate them for this period of service. Civilian personnel who are engaged in excepted activities will also continue in normal duty status and also will not be paid until Congress makes appropriated funds available. Civilian employees not engaged in excepted activities will be furloughed, i.e., placed in a non-work, non-pay status.

The responsibility for determining which functions would be excepted from shut down resides with the Military Department Secretaries and Heads of DOD Components, who may delegate this authority as they deem appropriate. The attached guidance should be used to assist in making this excepted determination. The guidance does not identify every excepted activity, but rather provides overarching direction and general principles for making these determinations. It should be applied prudently in the context of a Department at war, with decisions guaranteeing our

continued robust support for those engaged in that war, and with assurance that the lives and property of our Nation's citizens will be protected.

Examples of “Exempt” and “Non-Exempt” Activities (2011 DOD memo)

Following is an additional excerpt from the 2011 DOD shutdown planning guidance which, although not comprehensive, provides in more detail illustrative examples of the types of DOD activities that would and would not be excepted, in case of a lapse of appropriation.²⁰

Addition Excerpts from

Office of the Deputy Secretary of Defense

“Guidance for Continuation of Operations in the Absence of Available Appropriations”

December 11, 2011

The information provided in this document is not exhaustive, but rather illustrative, and is intended primarily to assist in the identification of those activities that may be continued notwithstanding the absence of available funding authority in the applicable appropriations (excepted activities). Activities that are determined not to be excepted, and which cannot be performed by utilizing military personnel in place of furloughed civilian personnel, will be suspended when appropriated funds expire. The Secretary of Defense may, at any time, determine that additional activities shall be treated as excepted.

Military Personnel

Military personnel are not subject to furlough. Accordingly, military personnel on active duty, including reserve component personnel on Federal active duty, will continue to report for duty and carry out assigned duties. In addition to carrying out excepted activities, military personnel on active duty may be assigned to carry out non-excepted activities, in place of furloughed civilian personnel, to the extent that the non-excepted activity is capable of performance without incurring new obligations.

Reserve component personnel performing Active Guard Reserve (AGR) duty will continue to report for duty to carry out AGR authorized duties. Reserve component personnel will not perform inactive duty training resulting in the obligation of funds, except where such training directly supports an excepted activity, and may not be ordered to active duty, except in support of those military operations and activities necessary for national security listed in Attachment 2, including fulfilling associated pre-deployment requirements. Orders for members of the National Guard currently performing duties under 32 U.S.C. 502(f) will be terminated unless such duties are in support of excepted activities approved by the Secretary of Defense.

Movement of military personnel will be limited as follows:

²⁰ In this excerpt, as in the original document, some of the material is formatted as bulleted lists. Footnotes to the excerpted material are from the original document.,

- 1) Moves TO an excepted activity will continue.
- 2) Moves FROM an excepted activity will continue only to the extent the commander of the excepted activity determines it essential to mission (e.g., overburden of local infrastructure), or required to enhance support of excepted activities.
- 3) Accession and training moves associated with recruitment and initial entry training will continue, along with subsequent movement to first station when required by “1” above.
- 4) Movement to comply with separation instructions will continue.

Civilian Personnel

Civilian personnel, including military technicians, who are not necessary to carry out or support excepted activities are to be furloughed. Only the minimum number of civilian employees necessary to carry out excepted activities will be exempt from furlough. Positions that provide direct support to excepted positions may also be deemed excepted if they are critical to performing the excepted activity. Determinations regarding the status of civilian positions will be made on a position by position basis, using the guidance in this document. Determinations shall be made for all positions, including those in the Senior Executive Service or equivalent, as well as those located overseas.

Following the expiration of appropriations, a minimum number of civilian employees may be retained as needed to execute an orderly suspension of non-excepted activities within a reasonable timeframe.

Senate-confirmed officials appointed by the President are not subject to furlough. Their immediate office personnel necessary to support excepted activities may be exempt from furlough at the discretion of the appointee.

Foreign national employees paid with host country funds are exempt from furlough. Additionally, foreign national employees governed by country-to-country agreements that prohibit furloughs are exempt from furlough.

Civilian personnel whose salaries are paid with expired appropriations and later reimbursed from a non-DOD source (e.g., the Foreign Military Sales Trust Fund) are not exempt from furlough solely on that basis. Personnel whose salaries are paid from a DOD appropriation or fund that has sufficient funding authority (e.g., multiyear appropriations with available balances from prior years) will not be subject to furlough. Heads of activities may, on their authority, require the return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.

Temporary Duty (TDY) Travel

In the absence of appropriations, TDY travel scheduled to begin after the shutdown occurs should be cancelled, except as noted below. Any TDY travel that began prior to the shutdown should, except as noted below, be terminated as quickly as possible, but in an orderly fashion.

All TDY travel in direct support of the war in Afghanistan and the transition in Iraq, and other travel directly related to safety of life and protection of property, as well as foreign relations (e.g.,

negotiating international agreements), may be undertaken or continued only if approved, in writing, by the appropriate approval authority ... and only in the most limited circumstances.....

Contracts

Contractors performing under a contract that was fully obligated upon contract execution (or renewal) prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not. However, new contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed unless the contractor is supporting an excepted activity. No funds will be available to pay such new contractors until Congress appropriates additional funds. The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is required under the contract and the contract is not required to support an excepted activity. In cases where new obligation is required and the contract is not required to support an excepted activity, the issuance of a stop work order or the termination of the contract will be required.

The Department may continue to enter into new contracts, or place task orders under existing contracts, to obtain supplies and services necessary to carry out or support excepted activities even though there are no available appropriations. It is emphasized that this authority is to be exercised only when determined to be necessary -where delay in contracting would endanger national security or create a risk to human life or property.

Additionally, when authorized by the Secretary of Defense, contracts for covered items may be entered into under the authority of the Feed and Forage Act.

Protection of Life and Property/National Security²¹

- *Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations.*
- *Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations.*
- *Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS)*

²¹ Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture) are not excepted activities.

and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties.

- *Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers.*
- *Activities required to operate, maintain, assess, and disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements. Activities necessary to carry out or enforce treaties and other international obligations.*

Safety of Persons and Protection of Property

- *Response to emergencies, including fire protection, physical and personnel security, law enforcement/counter terrorism, intelligence support to terrorist threat warnings, Explosive Ordnance Disposal operations, emergency salvage, sub-safe program, nuclear reactor safety and security, nuclear weapons, air traffic control and harbor control, search and rescue, utilities, housing and food services for military personnel, and trash removal.*
- *Emergency repair & non-deferrable maintenance to utilities, power distribution system buildings or other real property, including bachelor enlisted quarters (BEQ), bachelor officers' quarters (BOQ), and housing for military personnel.*
- *Repair of equipment needed to support services for excepted activities, including fire trucks, medical emergency vehicles, police vehicles, or material handling vehicles.*
- *Monitoring and maintaining alarms and control systems, utilities, and emergency services.*
- *Receipt/safekeeping of material delivered during shutdown.*
- *Control of hazardous material and monitoring of existing environmental remediation.*
- *Oil spill/hazardous waste cleanup, environmental remediation, and pest control, only to the extent necessary to prevent imminent danger to life or property.²²*
- *Safe storage or transportation of hazardous materials, including ammunition, chemical munitions, photo processing operations.*
- *Emergency reporting response and input to the National Response Team and coordinating with Environmental Protection Agency (EPA) and other agencies on fire, safety, occupational health, environmental, explosive safety for vector borne disease management.*

²²Activities in support of environmental requirements which are not necessary to prevent imminent threat to life or property are not excepted activities.

- *Activities, both in the Continental United States (CONUS) and overseas, required for the safety of DOD or other U.S. Government employees or for the protection of DOD or other U.S. Government property.*
- *Defense support to civil authorities in response to disasters or other imminent threats to life and property, including activities of the U.S. Army Corps of Engineers with respect to responsibilities to state and local governments that involve imminent threats to life or property.*
- *Foreign humanitarian assistance in response to disaster or other crises posing an imminent threat to life.*
- *Emergency counseling and crisis intervention intake screening and referral services. Suicide and substance abuse counseling.*
- *Counterdrug activities determined to be necessary for the protection of life or property.*
- *Operation of mortuary affairs activities and attendant other services necessary to properly care for the fallen and their families.*
- *Other activities authorized by the Secretary of Defense to provide for the safety of life or protection of property.*

Medical and Dental Care²³

- *Inpatient care in DOD Medical Treatment Facilities and attendant maintenance of patient medical records.^{24 25}*
- *Acute and emergency outpatient care in DOD medical and dental facilities.*
- *Private Sector Care under TRICARE.*
- *Certification of eligibility for health care benefits.*
- *Veterinary Services that support excepted activities (i.e., food supply and service inspections).*

Acquisition and Logistic Support

- *Contracting, contract administration, and logistics operations in support of excepted activities.*
- *Activities required to contract for and to distribute items as authorized by the Feed and Forage Act (e.g., clothing, subsistence, forage, fuel, quarters, transportation, and medical and hospital supplies).*
- *Central receiving points for storage of supplies and materials purchased prior to the shutdown.*

²³ Contingency planning in medical command headquarters not immediately necessary to support excepted activities is not an excepted activity.

²⁴ Elective surgery and other elective procedures in DOD medical and dental facilities are not excepted activities.

²⁵ Surgery to continue recovery of function/appearance of Wounded Warriors is an excepted activity.

Education and Training²⁶

- *Education and training necessary to participate in or support excepted activities;*
- *DOD Education Activity (DODEA) educational activities.*²⁷

Legal Activities

- *Litigation activities associated with imminent or ongoing legal action, in forums inside or outside of 000, to the extent required by law or necessary to support excepted activities.*
- *Legal support for excepted activities, including legal assistance for military and civilian employees deployed, or preparing to deploy, in support of military or stability operations.*
- *Legal activities needed to address external (non-judicial) deadlines imposed by non-DOD enforcement agencies, to the extent necessary to continue excepted activities.*

Audit and Investigation Community

- *Criminal investigations related to the protection of life or property, including national security, as determined by the head of the investigating unit, and investigations involving undercover activities.*
- *Counterterrorism and counterintelligence investigations.*

Morale, Welfare and Recreation/Non-appropriated Funds

- *Morale, Welfare, and Recreation (MWR) and Non-Appropriated Fund (NAF) activities necessary to support excepted activities, e.g., operation of mess halls; physical training; child care activities required for readiness.*²⁸

Financial Management

- *Activities necessary to control funds, record new obligations incurred in the performance of excepted activities, and manage working capital funds.*²⁹

²⁶ Installation education centers may continue to operate utilizing military personnel, so that private agencies such as colleges and universities may provide courses for which payment has already been made. Civilian employees on TDY for training or education associated with non-excepted activities should be returned to their home stations as part of the orderly closedown of operations. Civilian personnel on PCS orders attending training or educational activities should remain in place.

²⁷ DODEA summer school activities are non-excepted activities.

²⁸ Activities funded entirely through NAF sources will not be affected. Military personnel may be assigned to carry out or support non-excepted MWR activities, where deemed necessary or appropriate, to replace furloughed employees.

²⁹ Preparation of financial reports, research and correction of problem disbursements, adjustments to prior-year funds (excepted as noted above) including those related to programs and contracts that do not support excepted activities, and approval of the use of currently available funds to pay obligations against closed accounts are not excepted activities.

- *Activities necessary to effect upward adjustment of obligations and the reallocation of prior-year unobligated funds in support of excepted activities.*

Working Capital Fund/Revolving Fund³⁰

- *Defense Working Capital Fund (DWCF)/ Revolving Fund (RF) activities with positive cash balances may continue to operate until cash reserves are exhausted.*
- *When cash reserves are exhausted, DWCF/RF activities must continue operations in direct support of excepted activities.*
- *DWCF/RF activities may continue to accept orders financed with appropriations enacted prior to the current fiscal year or unfunded orders from excepted organizations. Unfunded orders will be posted to accounts receivable and not actually billed until appropriations are enacted.*

Examples of “Exempt” and “Non-Exempt” Activities from 1998 Army Memo

Somewhat more detailed than the 2011 DOD guidance memo is the Army guidance document released in August 1998 by the Office of the Assistant Secretary of the Army (Financial Management and Comptroller) entitled “Continuing Resolution Authority General Guidance.” Chapter 3, entitled “Rules for Operations in the Absence of CRA,” provides an extensive, though by no means complete, list of activities that were deemed at the time to be “exempt” from a shutdown and those that were not.

The excerpts reprinted here shows an illustrative selection of the 1998 Army guidelines—the entire breakdown is available, as noted, on line (see footnote 6).

**Excerpts from
Office of the Asst. Secretary of the Army (Financial Management and Comptroller)
“Continuing Resolution Authority General Guidance”
August 1998**

National security.

(1) Exempt activities.

(a) Units identified in and administrative, logistics and maintenance functions required to support Joint Staff contingency program major regional contingency tasking.

³⁰ DWCFs/RFs are not directly impacted by a lapse in annual appropriations. Management actions should be taken to sustain operations and minimize operational impact resulting from late approval of annual appropriations. Management actions which could be taken to conserve cash reserves include delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives. Inter-DWCF/RF billings will continue unless a suspension request is approved by the Office of the Under Secretary of Defense (Comptroller). Approval may be requested for advance billing of funded customer orders. Plan guidance for excepted activities is applicable to DWCF/RF internal operations.

(b) Units and personnel tasked in direct support of the Single Integrated Operations Plan (SIOP).

(c) Activities and functions of the Combatant Commander's, Subordinate Component Commander's and Supporting Commander's headquarters and OSD, Joint Staff, Service and DOD Agency staffs necessary to ensure operations and maintenance integrity of essential C4I systems.

(d) Units and activities required to operate, maintain, assess and disseminate the collection of intelligence data necessary to support tactical and strategic indications, warning, and supporting force enhancement roles.

(e) Forward based combat, combat support and combat service support units.

(f) Forward deployed units executing CJCS or CINC operations/deployment orders, those units in operation work-up status to execute those orders and those units and activities required in direct support of those tasks.

(g) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations.

(h) Units and personnel preparing for or participating in operational exercises.

(i) Essential operational training necessary to execute operational, contingency and wartime tasking.

(2) Non-exempt activities.

(a) Forces identified as available T+91 and beyond.

(b) All other units not in direct support of exempted units, functions or activities.

(c) Technical intelligence information collection, analysis and dissemination functions not in direct support of exempted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture).

(d) Training exercises not essential to the execution of wartime, contingency or OPLAN tasking.

Military and Civilian Personnel.

(1) Exempt activities.

(a) All active duty military personnel and all reservists on active duty. Duty assignments may be changed by local commanders to support exempt activities.

(b) Reserve Components in direct support of exempted activities...

(d) Senate-confirmed officials appointed by the President and their immediate office personnel

(e) *Civilian personnel in direct support of exempted activities, and additional civilian personnel designated by the Secretary of Defense.*

(2) Non-exempt activities.

(a) *Civilian personnel (including host nation funded foreign national employees) not in direct support of exempted activities.*

(b) *Military Personnel Selection Boards and Administrative Boards.*

(c) *Civilian personnel whose salaries are paid with annual appropriations and later reimbursed from another source (e.g., the Foreign Military Sales Trust Fund).*

....

DOD Medical and Dental Care.

(1) Exempt activities.

(a) *Direct patient care personnel in DOD facilities (including Uniformed Services Treatment Facilities) including doctors, nurses, medical technicians, dentists, and essential support personnel (cooks, custodians, etc.).*

(b) *Contingency planning in Medical Treatment Facilities.*

(c) *All inpatient care in Medical Treatment Facilities*

(d) *All acute and emergency outpatient care in DOD medical and dental facilities*

(e) *DOD health care contracts for inpatient care/acute outpatient care, including medical supplies.*

(f) *Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and TRICARE contracts.*

(g) *Veterinary services that support exempted activities (e.g., food supply and service inspections).*

(h) *Minimum civilian personnel necessary to provide certification of eligibility for health care benefits.*

(2) Non-exempt activities

(a) *Civilian administrative staff in Medical Treatment Facilities and dental facilities not involved in exempted patient care.*

(b) *Civilian personnel in major medical command headquarters who are not involved in contingency planning.*

(c) *Elective surgery in DOD Medical Treatment Facilities for non-active duty personnel...*

(d) *Routine physicals, preventive dental procedures, or other routine medical procedures (including vaccinations) in DOD Medical Treatment Facilities for non-active duty personnel...*

(e) *Persian Gulf Illness Hotline.*

Training and Education.

(1) Exempt activities.

(a) *Educational activities deemed necessary for immediate support of exempted activities.*

(b) *Educational activities not otherwise exempted if undertaken by active duty military personnel for other active duty military personnel only...*

(d) *Department of Defense Dependents Schools and Section 6 Schools...*

Recruiting.

(1) Exempt activities.

(a) *Military recruiters may continue to staff recruiting offices and may contact prospective recruits if administrative office expenses have been paid with prior year funds.*

(b) *Military staff of Military Enlistment Processing Stations (MEPS) will report for duty.*

(c) *Recruiting advertising purchased with prior year funds will continue to be utilized.*

(2) Non-exempt activities.

(a) *Official vehicles cannot be used to transport recruiters of prospective recruits.*

(b) *New enlistment contracts cannot be executed.*

(c) *New recruits are not permitted to report to MEPS, or to report for induction.*

(d) *Civilian administrative staff and contract physicians assigned to MEPS will not report for duty.*

(3) *Explanatory notes. The Secretary of Defense reserves the right to reverse the above guidance and resume normal recruiting activities after a lapse of 5 working days to avoid longer term disruption that would impair readiness. Resumption of recruiting activity is not automatic after 5 days and may be implemented only by direction of the Secretary of Defense.*

Permanent Change of Station (PCS and Temporary Duty (TDY))...

(2) *Non-exempt activities. PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in non-exempt activities during a lapse in appropriations will not be authorized. Non-exempt personnel on TDY will return to home station as part of shutdown procedures...*

Contracting activities.

(1) Exempt activities.

(a) *Contracts for functions that would otherwise be exempt if performed by government employees.*

(b) New contracts for exempt activities...

(2) Non-exempt activities.

(a) Administration of existing contracts for non-exempt activities.

(b) Negotiation, preparation and execution of new contracts for non-exempt activities...

(d) Contract reconciliation and closeout activities.

(3) Explanatory notes.

(a) Contracts funded with current year funds that do not support exempt activities, will be terminated when available funding has been exhausted. Contract terms should be structured to allow for orderly termination of the contract in the event of a funding gap and for reinstatement of the contract when funds become available. Contracting officers should work with contractors to minimize the impact of a lapse in funding. It should be understood that termination of a contract due to a funding gap is beyond the control of the contracting officer or contracting activity, and that contractor protests of such a termination are not generally considered to be justified.

(b) For contract actions, options, and modifications, not within the scope of the original contract, in direct support of exempt activities, the contracting officer will cite one of three authorities for these obligations: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) 41 U.S.C. 11 for obligations covered by the Feed and Forage Act, and (3) 31 U.S.C. 1342 for obligations for protection of life and property against imminent danger...

Financial Management.

(1) Exempt activities.

(a) Minimum essential personnel needed to record new obligations incurred in the performance of exempt functions/operations, and to manage AWCR [Army Working Capital Fund] cash.

(b) Obligation adjustment and reallocation of prior year unobligated funds in support of exempt functions/operations.

(2) Non-exempt activities.

(a) Preparation of budget submission data.

(b) Closing of accounts that expired in the previous fiscal year...

(d) Investigation of Anti-deficiency Act violations.

Assessing the Effects of a Government Shutdown on Defense

Effects on Military Operations

The 1998 Army guidance on a shutdown directs that “All military personnel shall continue to report for duty.” Not all units will continue to operate, however, and military personnel may be assigned to other than their regular duties. Among the units and activities that the Army identifies as being exempt from a shutdown are:

- Forward deployed units executing ... operations..., those units in operation work-up status..., and those units and activities required in direct support of those tasks;
- Forward based combat, combat support and combat service support units;
- Units identified in and administrative, logistics and maintenance functions required to support Joint Staff contingency program major regional contingency tasking;
- Units and personnel tasked in direct support of the Single Integrated Operations Plan (SIOP);
- Essential operational training necessary to execute operational, contingency and wartime tasking.

Similar guidelines are reflected in the 2011 DOD guidance. These guidelines specifically identify a number of named military operations which are directed to continue, along with supporting operations. Operations such as those in Iraq and Afghanistan would continue, units preparing for deployment would carry on their training and other deployment preparations, and activities needed to support operations and training would continue. In addition, units identified for deployment in plans for major regional contingencies would remain active, as would units assigned to carry out strategic nuclear operations (i.e., in support of the SIOP).

The legal authority for critical military operations to continue, therefore, is reasonably clear. Army guidance also provides that all other activities needed, in the view of local commanders, to support these “exempt” activities, may carry on, including logistics, intelligence, communications, and contracting functions. Guidance also defines quite broadly the range of activities that are permitted to continue in support of operational forces, including personnel support activities such as defense dependent schools and child care, temporary duty travel in support of exempted activities, and new contracts for exempted activities. The Administration is free to change these guidelines, based on its own interpretation of relevant laws and regulations.

Nonetheless, though authority to sustain ongoing military operations is clear in principle, a lapse in appropriations, if it were to extend for more than a very limited period of time, could disrupt operations to some degree. As the DOD and Army guidance illustrate, efforts to distinguish between, on the one hand, those activities that are sufficiently important for national security to warrant continuation during a lapse in appropriations and, on the other hand, activities that do not directly support national security involve difficult, and to some degree, arbitrary judgments. Unit training would continue for some combat units, but not for others, depending on their place in

force generation plans. Medical personnel would continue to provide services to active duty personnel, but not to dependents or retirees who might normally receive non-emergency services in the same facilities. Issuance of some contracts would continue during a shutdown, but other contracting activity, perhaps done by the same people, would not. Local commanders would have the authority to make final judgments on the need for activities to support necessary capabilities, with the result that decisions on what activities may continue and what must be shut down may not be consistent across the whole force.

Effects on Military and Civilian Personnel

Virtually all military personnel and most civilians are normally paid out of annual appropriations. In the event of a lapse in appropriations, such funds would not be available. Exceptions to Antideficiency prohibitions on funding permit obligations of funds in advance of appropriations, but not expenditures. Military personnel and civilian personnel paid through annual funds, therefore, cannot be issued pay checks. Personnel, whether excepted from a furlough or not, would be subjected to financial hardships if a lapse in appropriations extends past a normal pay date, since no disbursements may be made even for amounts that are earned by those who are not on furlough. For uniformed military personnel, if a funding lapse begins on October 1 and appropriations are approved on October 10, military personnel would receive their full pay for the period October 1-15 on October 15, their next scheduled pay date. Otherwise, they would receive no pay on October 15.

For DOD civilians, who are paid on the same bi-weekly schedule as other non-military federal employees, the situation is more complicated. The last federal bi-weekly pay period the begins in FY2013 runs from Sunday, September 22, through Saturday, October 5. If FY2014 appropriations have not been enacted by October 5, excepted employees who remained at their jobs would be paid only for the six working days (out of 10) that fell within FY2013, receiving no pay for the four days worked in FY2014.

The hardships that a sudden stop in pay would impose on military and civilian personnel, would, of course, vary depending on individual circumstances. Families with a second income and with substantial savings might be able to manage with few problems. Others, particularly deployed personnel with young families and limited savings, might be affected very badly. As the Army guidance notes, a key responsibility on the part of local commanders would be to assist families affected by financial hardships, by, for example, working with local credit unions, other lenders, and creditors to accommodate gaps in military and civilian pay.

Effects of Limits on Expenditures on Contracting

In the event of a lapse in funding, the Defense Department would have the authority to obligate funds for goods and services needed to sustain its continuing operations—that is, it can sign contracts with a binding commitment to pay providers—but it does not have authority to issue checks for amounts obligated in advance of appropriations. It is not clear that all vendors would be willing to provide goods or services under those circumstances, particularly if a shutdown appears likely to continue for an extended period.

There is also likely to be a considerable amount of confusion among contractors because funds remaining available from prior years can continue to be distributed, but not new funds. In DOD appropriations acts, funding for R&D is typically available for obligation for two years, for most

procurement for three years, and for shipbuilding for five years. Contract authority to purchase stocks of material for inventories is not limited by fiscal year. Unobligated balances of funds for those purposes would remain available even in the absence of new funding.

Money for operation and maintenance, however, is generally available for obligation for only one year, so most funding for day-to-day operations of the department would lapse and operations could continue only under the Antideficiency Act exceptions that allow the obligation of funds, but not disbursements. Whether vendors could be paid, therefore, depends on which pot of money obligations are made from, and money for more immediate, readiness-related activities would generally not be used to make prompt payments.

Under the circumstances, the Defense Department can be expected to sustain its most important operations, but not without some difficulties in managing the acquisition of material and services from vendors.

Author Contact Information

Pat Towell
Specialist in U.S. Defense Policy and Budget
ptowell@crs.loc.gov, 7-2122

Amy Belasco
Specialist in U.S. Defense Policy and Budget
abelasco@crs.loc.gov, 7-7627