

plans for an orderly shutdown,¹³ and the Office of Personnel Management (OPM) indicated that a lapse in appropriations could affect agency operations with implications for whether employees should report to work on Saturday, January 20, 2018.¹⁴ Funding resumed on Monday, January 22, 2018, through another CR, which technically closed the funding gap for the entire day of Monday. Nevertheless, many federal agencies continued to shut down certain operations and furlough related employees on this weekday, because the CR that resumed funding was enacted during Monday evening, after working hours had already passed. OPM then announced late in the evening on January 22, 2018, that due to enactment of a CR, employees would be expected to return to work on Tuesday, January 23, 2018.¹⁵

The second FY2018 shutdown began after a CR expired at the end of the day on Thursday, February 8, 2018.¹⁶ In the hours after the CR's funding expired, OMB directed agencies to execute their shutdown plans,¹⁷ and OPM indicated that employees might be affected.¹⁸ A few hours later, in the morning of Friday, February 9, 2018, Congress and the President enacted another CR to extend funding. This prompted OMB and OPM to inform employees to come to work on the same day, that morning.¹⁹ From the perspective of prior OMB statements, a funding gap technically did not occur on February 9, 2018. However, given that OMB and OPM issued directions for a shutdown after funding expired, it is possible that some agency operations may have been affected in the few hours between expiration of the previous CR and enactment of the succeeding CR.²⁰

Legal Framework for How Shutdowns Have Occurred

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.²¹ Article I, Section 9, Clause 7 of the Constitution states, “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 have not been enacted in the first place.

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¹³ OMB Memorandum M-18-06 Revised, *Planning for Agency Operations During a Potential Lapse in Appropriations*, January 20, 2018, at <https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-06-Revised.pdf>.

¹⁴ OPM, “Snow and Dismissal Procedures,” January 20, 2018, at <https://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/status-archives/>.

¹⁵ OPM, “Snow and Dismissal Procedures,” January 23, 2018.

¹⁶ This occurred when Congress and the President were engaged with issues related to appropriations and the federal budget. The CR-provided funding had been extended through February 8, 2018, by P.L. 115-120.

¹⁷ OMB Memorandum M-18-10, *Status of Agency Operations*, February 8, 2018.

¹⁸ OPM, “Snow and Dismissal Procedures,” February 9, 2018 (see first entry with this date).

¹⁹ See OMB Memorandum M-18-11, *Reopening Departments and Agencies*, February 9, 2018; and OPM, “Snow and Dismissal Procedures,” February 9, 2018 (see second entry with this date).

²⁰ OMB reportedly referred to this several-hour time period as a “short-technical lapse.” See Eric Katz, “Government Funding Expires, but White House Expects ‘Short-Technical Lapse,’” Govexec.com, February 9, 2018, at <https://www.govexec.com/management/2018/02/government-funding-expires-white-house-expects-short-technical-lapse/145858/>.

²¹ The DOJ opinions were written to guide actions in the executive branch. The legislative and judicial branches are not guided officially by executive branch documents regarding the Antideficiency Act. However, the two branches continue to be guided by the Constitution and the act itself, and may look to executive branch guidelines as a point of reference. For legal analysis of funding gaps, see GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, GAO-06-382SP, February 2006, chapter 6, pp. 6-146 - 6-159, at <https://www.gao.gov/legal/appropriations-law-decisions/red-book>.

Nevertheless, it would appear to be possible under the Constitution for the government to make contracts or other obligations even if it lacks funds to pay for these commitments.²² Several provisions of law—which commonly are referred to as the Antideficiency Act—generally prevent this from happening, however. The act, which evolved over time and is located in Title 31 of the *U.S. Code*, prohibits federal officials from obligating funds before an appropriations measure has been enacted, except as authorized by law.²³ The act also prohibits federal officials from accepting voluntary services or employing personal services exceeding what has been authorized by law.²⁴ 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 administrative discipline including suspension without pay or removal from office.²⁵ The act makes exceptions to the prohibitions on acceptance of voluntary services and employment of personal services, however, for “emergencies involving the safety of human life or the protection of property.”²⁶

For years leading up to 1980, many federal agencies continued to operate during a funding gap, “minimizing all nonessential operations and obligations, believing that Congress did not intend that agencies close down,” while waiting for the enactment of annual appropriations acts or CRs.²⁷ In 1980 and 1981, however, then-U.S. Attorney General Benjamin R. Civiletti issued two opinions that more strictly interpreted the Antideficiency Act, along with the law’s exceptions, in the context of a funding gap.²⁸

The Attorney General’s opinions addressed “the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations.”²⁹ In brief, the 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 performed and the safety of human life or the protection of property.”³⁰ In addition, “there must be some reasonable likelihood that the safety of human life or the protection of property would be

²² 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, 104th Cong., 1st sess., September 19, 1995, S.Hrg. 104-175 (Washington, DC: 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).

²³ 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 (out of print; available to congressional clients on request). GAO provides information on the act, at <https://www.gao.gov/legal/appropriations-law-decisions/resources>.

²⁴ 31 U.S.C. §1342.

²⁵ 31 U.S.C. §§1349(a), 1350, 1518, and 1519.

²⁶ 31 U.S.C. §1342.

²⁷ GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, pp. i, 2.

²⁸ 43 Op. Att’y Gen. 224 (April 25, 1980) (hereinafter, “1980 Civiletti opinion”), 43 Op. Att’y Gen. 293 (January 16, 1981) (hereinafter, “1981 Civiletti opinion”). The Civiletti opinions are available in electronic form in the appendices of a GAO report. See GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, Appendices IV (1980 Civiletti opinion) and VIII (1981 Civiletti opinion), at <https://www.gao.gov/products/PAD-81-31>. For a detailed discussion of the history of, and exceptions to, the Antideficiency Act, see GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, pp. 6-146 - 6-159.

²⁹ 1981 Civiletti opinion, in GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, Appendix VIII, p. 76.

³⁰ *Ibid.*, p. 86.

compromised, in some degree, by delay in the performance of the function in question.”³¹ Apart from this broad category of “human life and property” exceptions to the act, the Civiletti opinions identified another category: those exceptions that are “authorized by law.” GAO later summarized the 1981 Civiletti opinion as identifying four sub-types of “authorized by law” exceptions:³²

- 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.³³ These activities may continue when the multiple-year and no-year appropriations still have budget authority that is available for obligation at the time of a funding gap. 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 annual appropriations acts, such as the U.S. Postal Service, would fall under this exception.
- Activities authorized by statutes that expressly permit obligations in advance of appropriations, such as contract authority.³⁴
- 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),³⁵ 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.³⁶
- 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.”³⁷

³¹ Ibid.

³² Portions of this text draw from GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, pp. 6-149 - 6-150. GAO also noted that the courts have added to the list of exceptions to the Antideficiency Act (ibid., p. 6-152).

³³ 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.

³⁴ For an explanation of contract authority, see ibid., p. 21.

³⁵ In this case, budget authority is available to make payments as a result of previously enacted legislation and is available without further legislation. “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.

³⁶ See the section of this report titled “Effects on Mandatory Spending Programs” for a more detailed discussion.

³⁷ GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, p. 6-150.

For its part, the 1980 Civiletti opinion included in the “authorized by law” exception an inference that federal officers may, in the temporary absence of appropriations, exercise authority to incur minimal obligations necessary to closing their agencies in an orderly way.³⁸ Subsequently, OMB interpreted this exception to fall under the “necessary implication” sub-type of the “authorized by law” exception.³⁹

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.”⁴⁰ DOJ’s Office of Legal Counsel (OLC) issued a memorandum in 1995 (hereinafter “1995 OLC opinion”) that interpreted the effect of the amendment.⁴¹ 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 (suggesting that the phrase “in some degree” be replaced with “in some significant degree”),⁴² but that the 1981 opinion otherwise “continues to be a sound analysis of the legal authorities respecting government operations” during a funding gap.⁴³

More recently, OMB summarized its interpretation of exceptions to the Antideficiency Act in a series of similar, detailed memoranda. The memoranda were issued to agencies in April and December 2011 (regarding FY2011 and FY2012 annual appropriations, respectively), September 2013 (regarding FY2014 annual appropriations), and January 2018 (regarding FY2018 annual appropriations).⁴⁴

Notably, the opinions of OLC and OMB do not permit outlays—such as the issuance of checks, disbursement of cash, or electronic transfer of funds—to liquidate federal obligations for operations that lack appropriated funding during a shutdown. Rather, OLC and OMB have interpreted the Antideficiency Act as including exceptions that provide only the authority to incur obligations that will be paid upon enactment of appropriations in the future.

³⁸ 1980 Civiletti opinion, in GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, Appendix IV, p. 67.

³⁹ See, for example, OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, pp. 5-6.

⁴⁰ GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, p. 6-151, citing provisions in P.L. 101-508, 104 Stat. 1388, at 1388-621, that currently are codified at 31 U.S.C. §1342.

⁴¹ 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, 104th Cong., 1st sess., September 19, 1995, S.Hrg. 104-175 (Washington, DC: GPO, 1995), pp. 77-85. The 1995 OLC opinion also may be found in electronic form, at <https://www.justice.gov/opinion/file/844116/download>.

⁴² That is, 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” for a function to be considered excepted. The opinion concluded that “the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to [be] near at hand and demanding of immediate response.” *Ibid.*

⁴³ *Ibid.*, p. 78.

⁴⁴ 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); OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations*, September 17, 2013, pp. 3-5; and OMB Memorandum M-18-05 Revised, *Planning for Agency Operations During a Potential Lapse in Appropriations*, January 19, 2018 (pp. 3-5 of unpaginated PDF file).

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 on federal government payments to liquidate obligations (see **Box 2**).

Box 2. Distinction Between a Government Shutdown and a Debt Limit Impasse

In a shutdown situation, Congress and the President have not enacted interim or full-year appropriations for an agency for part or all of a fiscal year. An expectation exists, however, that these appropriations will be enacted in the future. In this case, the agency temporarily does not have budget authority available for obligation for things like salaries, rent, or grants to states. 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 (i.e., outlays) for excepted or non-excepted activities until budget authority is provided, or unless another source of budget authority is utilized.

In a debt limit impasse, by contrast, the government no longer has an ability to borrow to finance its obligations.⁴⁵ In such a situation, an agency may continue to obligate any available budget authority that has previously been enacted. However, the Department of the Treasury may not be able to liquidate all obligations that are due to be paid, because of a shortage of cash. As a result, the federal government would need to rely solely on incoming revenues to finance obligations. If this occurs during a period when the federal government is running a deficit, the dollar amount of newly incurred federal obligations would exceed the dollar amount of newly incoming revenues. This may result in delays in federal payments and disruptions in government operations.

OMB and Agency Processes for Shutdown Planning

Annual Instructions for Agencies

In the annually revised *Circular No. A-11*, OMB provides instructions to executive branch agencies on how to prepare for and operate during a funding gap.⁴⁶ The circular cites the two Civiletti opinions and the 1995 OLC opinion as background and guidance. The circular also 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. These plans sometimes also have been called “contingency 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 periodically, with a minimum frequency of a four-year schedule starting August 1, 2014. OMB’s change in instructions occurred four months after

⁴⁵ For further discussion of the federal debt limit, see CRS Report R41633, *Reaching the Debt Limit: Background and Potential Effects on Government Operations*, by D. Andrew Austin et al.

⁴⁶ OMB, Circular No. A-11: Preparation, Submission, and Execution of the Budget, June 2018, §124, at <https://www.whitehouse.gov/omb/circulars/>. For information about OMB, see CRS Report RS21665, *Office of Management and Budget (OMB): A Brief Overview*, by Clinton T. Brass.