



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

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## Summary

Funding for the Department of Defense, as for most other federal agencies, is being provided through a Continuing Resolution that may expire after April 8, 2011. If additional funding is not provided after then, DOD, like other agencies, may 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 most or all uniformed military personnel, while others would 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. A frequent question is how this compares to 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.

The authority to continue some activities during a lapse in appropriations is governed by the Anti-Deficiency 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 Anti-Deficiency Act that 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. Past guidance provides that ongoing military operations, such as those in Iraq and Afghanistan, may continue, along with training of forces that are assigned to potential future operations and a broad range of activities that, in DOD’s view, are 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. Pay of military and civilian personnel would soon be interrupted, however, potentially imposing hardships on many families. Payments to vendors derived from multiyear appropriations may continue, but payments from current appropriations would not be permitted, which may result in some confusion and, potentially, disruptions to supplies of some material and services.

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## Introduction

Since October 1, 2010, the Department of Defense (DOD), like most other federal agencies, has operated under a continuing resolution (CR) that has been extended five times, most recently through April 8, 2011.<sup>1</sup> If Congress cannot agree on full year funding or on additional temporary CRs by the time the current measure expires, DOD, like other agencies, may be subject to a funding lapse during which appropriations are not available.<sup>2</sup> In the absence of appropriations, agencies are generally required to shut down, and personnel may continue working only long enough to ensure an orderly termination of operations.<sup>3</sup>

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.”<sup>4</sup> If the Administration approves of such exceptions in the current circumstances, many Department of Defense activities would continue during the period of a funding lapse, though other activities would halt. Some personnel would be “excepted” from furloughs, including most or all uniformed military personnel, 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.

## Questions about DOD Operations During a Lapse in Funding

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, 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 what is known about current DOD planning for a shutdown. DOD officials have informed CRS that approved guidance for managing a shutdown is not available to be released, that plans are still under review and are subject to change, and that a

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<sup>1</sup> The most recent extension is P.L. 112-6, “Additional Continuing Appropriations Amendments, 2011,” enacted March 18, 2011.

<sup>2</sup> 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.

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

<sup>4</sup> 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.

number of precedents are being reconsidered, including whether all uniformed military personnel will be exempt from furloughs. A recent draft of DOD guidance on a shutdown has been discussed in the trade press, and a copy of the document has been posted on a press web site.<sup>5</sup> The draft guidance is generally consistent with earlier Army guidelines on a shutdown that are discussed at some length later in this report, but it has not been finalized and significant changes may very well be made.

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 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 April 9, 2011, and appropriations are not approved until after April 15, military personnel would not receive a full pay check on April 15, though they may receive partial pay for days worked from April 1-8.<sup>6</sup> If a lapse extends past the next pay day, scheduled on April 29, no pay would be provided. It is correct that uniformed military personnel were paid as usual during the most recent government shutdowns at the end of 1995 and in early 1996, 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

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<sup>5</sup> A copy of the draft memo is available on line from Federal News Radio at [http://www.federalnewsradio.com/pdfs/DoD\\_coop\\_031511.pdf](http://www.federalnewsradio.com/pdfs/DoD_coop_031511.pdf). The memo is discussed in Jared Serbu, “DOD Details Furlough Rules ... Just in Case,” *FederalNewsRadio.com*, March 15, 2011, on line at <http://www.federalnewsradio.com/?nid=35&sid=2307160>. The memo is also discussed in Marcus Weinberger, “Defense Shutdown Plans Outlined in Draft Memo,” *Federal Times*, March 11, 2011, on line at <http://www.federaltimes.com/article/20110311/DEPARTMENTS01/103110306/1001> and in Rick Maze, “Troop Pay Would Stop if Federal Government Shuts Down,” *Federal Times*, March 11, 2011, on line at <http://www.federaltimes.com/article/20110311/DEPARTMENTS01/103110304/1001>.

<sup>6</sup> Military personnel are normally paid on the first and fifteenth of each month, except on holidays or weekends, when checks are issued earlier – personnel may also choose to receive pay monthly. As CRS confirmed in discussions with DOD officials, military pay checks cover the immediately preceding period. In the event of a lapse after April 8, therefore, military personnel would, under past guidelines, be issued a check on April 15, 2011, to cover pay up to the date of the shutdown – i.e., through April 8 – but no additional amounts would be provided.

have an effect on pay checks. Had the defense appropriations bill 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.<sup>7</sup> If that precedent is followed today, dependent schools would continue to operate.<sup>8</sup> That outcome is not certain, however, since past precedents may be superseded by guidance that DOD is currently preparing – CRS has learned that the continuation of dependent school operations is one example of policies that are subject to review and that earlier policy may not be followed. 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.<sup>9</sup> 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.<sup>10</sup> In general, though, activities to implement a shutdown would not last long – OMB

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<sup>7</sup> 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>. CRS is not aware of any other publicly available information on DOD plans for implementation of a shutdown.

<sup>8</sup> The unofficial draft guidance referred to above also provides that dependent schools will continue to operate “to the extent required by law.” The reference may be to state laws which require a certain number of days of schooling.

<sup>9</sup> 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.

<sup>10</sup> Army guidance cited later in this memo 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.

guidance reflects an assumption that most termination activities will take only a few hours rather than several days.<sup>11</sup>

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 memo, 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.<sup>12</sup> 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

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<sup>11</sup> 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 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.)

<sup>12</sup> 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.

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 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.<sup>13</sup> Moreover, like the authority provided by the Anti-Deficiency 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.<sup>14</sup> While invocation of the Feed and Forage Act during a shutdown is conceivable, it is not clear what purpose it would serve.<sup>15</sup>

## **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 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.

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<sup>13</sup> 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.

<sup>14</sup> 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](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).”

<sup>15</sup> The 1998 Army shutdown guidance discussed in this memo and unofficial DOD draft guidance recently cited in the press, mention the Feed and Forage Act as a potential source of authority, but neither discusses the circumstances under which it might be invoked.



The legal authority under which the Department of Defense may continue operations in the event of a funding lapse is established by the Anti-Deficiency 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 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 Appropriations<sup>16</sup>**

- An opinion by Attorney General Benjamin Civiletti on April 25, 1980, that found few exceptions to Anti-Deficiency 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 Anti-Deficiency 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.

Ultimately, Federal agency plans, based on OMB guidance, determine which activities will continue in the event of a shutdown and which will not. Agency plans have not generally been circulated publicly, however. Some insight into DOD planning is available from Army guidance

<sup>16</sup> 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>. Pages in the on-line version are mixed up, however, though all are available. Congressional offices are invited to contact the author of this report for a correctly paged version of the relevant appendices. The other memoranda cited 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>. 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.

on management of a funding lapse that, among other things, provides examples of activities that would be “exempt” from a shutdown and activities considered “non-exempt.” The available guidance was issued by the Office of the Assistant Secretary of the Army (Financial Management and Comptroller) in August 1998 and appears to be based on shutdown plans prepared in response to OMB directives.<sup>17</sup> 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. In addition, as discussed earlier, the trade press has released a leaked draft of recent DOD guidance for a shutdown, though this guidance remains subject to change.

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 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 Iraq and Afghanistan, and on day-to-day business operations of the Department of Defense.

## **The Anti-Deficiency Act**

The Anti-Deficiency Act, now codified at 31 U.S.C. 1341 and 1342,<sup>18</sup> 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 General opinions on operations permitted during a lapse in appropriations have

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<sup>17</sup> 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>. CRS is not aware of any other publicly available information on DOD plans for implementation of a shutdown. Hereafter, the document is referred to as “Army Continuing Resolution Guidance, August, 1998.”

<sup>18</sup> 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 Anti-Deficiency 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.

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 Anti-Deficiency Act is particularly important to consider in assessing the effect of a lapse in appropriations on government operations. The Anti-Deficiency 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 Anti-Deficiency 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.

## **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 Anti-Deficiency 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:

- **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 Anti-Deficiency 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-excepted 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.<sup>19</sup> 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 Anti-Deficiency 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 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

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<sup>19</sup> 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.

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 Anti-Deficiency 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.”<sup>20</sup> The guidance reflects Section 1342 of the Anti-Deficiency 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 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

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<sup>20</sup> 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>.

“protection of property” exception in itself appears to provide the basis for a quite wide range of government activities to continue.

## **Army Guidance on “Exempted” and “Non-Exempted” Activities**

As noted earlier, the most detailed available DOD guidance on operations during a lapse in appropriations is from an Army 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 are “exempt” from a shutdown and those that are not. What follows are selected excerpts from the Army guidance on key policy directives. The next section of this report provides excerpts of examples of activities “exempted” from a shutdown and those not exempted.

### **General Guidance**

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

1. General... Based on the Constitution (“No money shall be drawn from the Treasury, but in consequence of appropriations made by law...”) it is technically illegal to disburse in the absence of appropriations. ...
2. Army Operations in the Absence of CRA or Appropriations. In the event of a funding gap, the Deputy Secretary of Defense will decide when to implement OMB guidance concerning the continuation of agency operations in the absence of appropriations...
  - a. OMB Guidance concerning operations in the absence of appropriations directs that –
    - (1) Federal agencies will develop plans for operations in the absence of appropriations, which clearly define those activities that must be continued, and those that may be terminated, in the event of a government shutdown. Activities that must be continued are termed as “exempt” from shutdown procedures, and those functions and personnel that support those activities are also considered “exempt.” “Exempt” activities are generally defined as those that must be continued in order to maintain national security or provide protection of life and property. DoD exempt and non-exempt activities are detailed in paragraph 8, below...
    - (5) Civilian employees paid from current year appropriations whose functions support non-exempt activities shall engage in orderly shutdown activities. These civilians will be furloughed in accordance with Federal civilian personnel processes... Employees who support exempt activities shall not be furloughed, but shall continue to report for work. It should be noted that the furlough directive does not apply to employees covered by available prior year funds...
    - (5) [Numbered as in original]. All military personnel shall continue to report for duty.
  - b. The determination of “exempt” and “non-exempt” activities is decided at the local commander’s level. While this practice may result in a lack of uniformity in levels of exemption for different organizations performing similar missions, the intent is to

allow maximum flexibility at the local level in execution, consistent with the overall intent of terminating operations. Commanders should carefully review their missions and functions in developing a shutdown plan, to ensure that operations are reduced to minimum levels required to perform exempt activities. Reduced staffing or functional levels may be appropriate even for exempt activities. Local commanders will have the flexibility to change the status of an activity as events warrant, and to expand or reduce staffing or functional levels as appropriate. For example, an activity initially classified as “non-exempt” may need to be reclassified if a funding gap continues for an extended period.

3. Personnel and Payroll Policies

- a. Exempt and non-exempt civilian personnel. During a shutdown of DoD activities due to the absence of appropriations, only civilian personnel whose functions support exempt activities are to remain on duty. All civilians whose functions are determined to be “non-exempt” will be placed on a furlough status. Because no disbursements of any kind may be made during such a shutdown (with the exception of prior year available funds and applicable trust and revolving funds), “exempt” civilian personnel will receive no pay during the shutdown, although the pay earned will be provided upon termination of the shutdown. By the same token, all payments of benefits and allowances will be suspended; these will, however, accrue during the shutdown period and will be disbursed upon termination of the shutdown. “Non-exempt” personnel will be furloughed; that is, they will be placed in a “non-pay” status, during which time pay and benefits will not accrue. Furloughed personnel cannot expect to be paid retroactively for the time during which they were furloughed unless legislative relief is provided. It is incumbent upon Commanders to educate their personnel as to the potential effects of a shutdown on their personal financial situation and to ensure that personnel are given adequate warning so that they can make provisions to support themselves and their families during the period when their pay and benefits are suspended. Commanders should also actively work with local creditors and support agencies to minimize the disruption to Army personnel. All personnel must be proactive in working with creditors to reschedule debt repayments under these circumstances...
- c. Military personnel: During a shutdown of DoD activities due to the absence of appropriations, all active duty military personnel and all reservists on active duty are to remain on duty, although not necessarily performing their normal duty assignment. Because no disbursement of any kind may be made during such a shutdown (with the exception of prior year available funds and applicable trust and revolving funds), military personnel will not receive pay during the shutdown, although the pay earned will be provided upon termination of the shutdown. By the same token, all payments of benefits and allowances will be suspended; these will, however, accrue during the shutdown period and will be disbursed upon termination of the shutdown. It is incumbent upon Commanders to educate their personnel as to the potential effects of a shutdown on their personnel financial situation and to ensure that personnel are given adequate warning so that they can make provisions to support themselves and their families during the period when their pay and benefits are suspended. Commanders should also actively work with local creditors and support agencies to minimize the disruption to Army personnel. All personnel must be proactive in working with creditors to reschedule debt repayments under these circumstances. The key point that both the creditor and the soldier should remember is that the pay and benefits are only suspended and that the soldier will receive all pay and benefits earned. Because military personnel remain on active duty in a furlough situation, leave usage procedures will not change. Military personnel may be granted leave at the discretion of the commander.

4. Execution of New Funds.

- a. Obligation authority is granted to the extent that approved program has been released by HQDA for execution, at rates not exceeding the amounts apportioned under the most recent CRA. New obligation authority and program authority will not be released in the event of a funding gap.
  - b. Funded and automatic reimbursable orders may be accepted consistent with receipt of current year funded reimbursable authority. New obligation authority and program authority will not be released in the event of a funding gap.
  - c. Disbursements are authorized only for liquidation of obligations incurred during previous CRA periods. Disbursements of obligations incurred during a funding gap are not authorized.
5. Execution of Prior Year Unexpired Funds. Prior year unexpired funds of multi-year appropriations are not impacted by the absence of new appropriations. Prior year unobligated balances are apportioned in full at the beginning of the new fiscal year by OMB letter, and are immediately available for obligation and disbursement. Prior year funds may be obligated without restriction, for the same purposes for which the funds were originally appropriated....
7. Obligation and Disbursement of Funds...
- b. Pay of civilian employees. Obligations for civilian pay which is paid from current year appropriations are normally incurred by pay period. However, when the last day of the fiscal year or the previous CRA falls in the middle of a pay period, obligations are incurred only through the last day of fund availability... In the event of a funding gap, disbursement is authorized only for that portion of the pay period which has been obligated... A decision must be made to either split the payroll to disburse only the obligated portion of the pay period as a separate transaction, or to wait until an appropriation or CRA is enacted and pay the entire pay period as a single transaction. The decision will be made by the Defense Finance and Accounting Service (DFAS), and is delayed as long as possible...
  - c. Pay of military personnel. Obligations for military pay are normally incurred in monthly installments. When the last day of a previous CRA falls in the middle of a pay period, obligations are incurred only through the last day of fund availability... In the event of a funding gap, disbursement is authorized only for that portion of the pay period which has been obligated... The decision to delay the military payroll is also made by DFAS. Mid-month payroll checks are prepared automatically prior to the actual payday. Computer tapes, which are sent to Federal Reserve Banks and are used to credit military members' accounts, are also prepared in advance of the actual pay day. The decisions to overpouch/overlabel military pay and to delay forwarding of the tapes to Federal Reserve Banks are delayed as long as possible. If mid-month pay must be delayed, DFAS will issue special instructions via message.

## **Examples of "Exempt" and "Non-Exempt" Activities**

The remainder of the 1998 Army guidance is comprised of an outline of exempt activities that are permitted to continue during the period of a funding lapse and of non-exempt activities that are required to be shut down. Below is a copy of the entire initial section that identifies activities in support of national security that are exempt and related activities that are not exempt from a shutdown. The document makes a distinction between military units available for short-term contingency tasks, which are directed to continue in operation, and units not tasked to deploy until 90 or more days after the onset of an operation, which are expected to shut down. This distinction is quite likely to be out of date since the beginning of extensive rotational deployments in Iraq and Afghanistan following the invasion of Iraq in 2003.



Following the outline of “national security” activities, the excerpts reprinted here show a few, selected, illustrative guidelines – the entire breakdown is available, as noted, on line (see footnote 11).

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

8. DoD Exempt and Non-Exempt Activities.

a. 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.
- (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.

b. 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).
- e. 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
- e. Training and Education. [numbered as in original]
  - (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...
- f. 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.

g. 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...

i. Contracting activities.

(1) Exempt activities.

- (a) Contracts for functions that would otherwise be exempt if performed by government employees.
- (b) New contracts for exempted 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...

n. 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**

During a shutdown of the government, the maximum level of funding available to agencies to carry on permitted operations is no greater than the amount in the most recently expired appropriations. At present, the Department of Defense is operating under a continuing resolution

that provides funding for almost all programs and activities at the FY2010 level. In all, the amount available falls short of the amount requested for FY2011 by about \$23 billion, or 4%.<sup>21</sup> A critical issue for DOD is that available funding is not allocated to budget accounts as requested – \$13.6 billion of the decline compared to the request is in operation and maintenance accounts. As a result, DOD has warned that ongoing training is being curtailed, and that a substantial amount may need to be transferred from procurement accounts into the operating accounts to sustain planned activities.

The effects of a shutdown, however, would go beyond the results of operating within the constraints of a continuing resolution. A shutdown could disrupt day-to-day operations, impose financial hardships on military and civilian personnel, and create uncertainty on the part of contractors, some of whom may be reluctant to deliver material or services because payments may not be made.

## **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 recent unofficial DOD draft guidance that has been released in the press. 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).

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<sup>21</sup> For detailed figures and a discussion of issues in following a CR, see Stephen Daggett, “Effects of Extending the Current FY2011 Continuing Resolution for a Full Year on Department of Defense Programs,” CRS Congressional Distribution Memo, February 16, 2011, available to congressional offices by request to CRS.

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. These guidelines, it is important to note, may be subject to further review.

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, would almost inevitably disrupt operations to some degree. As Army guidance illustrates, DOD efforts to distinguish activities that are directly enough related to national security to continue during a lapse in appropriations from 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 Anti-Deficiency 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 April 9 and extends past April 15, pay checks deposited on April 15 would provide no more than eight days – for April 1-8 – of pay. Pay due on April 29 would not be available at all if a shutdown extends that far.

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 – i.e., 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 operations of the Department would lapse and operations could continue only under the Anti-Deficiency Act exceptions that allows 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.

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