

CHAPTER 10

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

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CHAPTER 10

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

I. INTRODUCTION.

II. DEFINITIONS.

A. Continuing Resolution.

1. The Congressional resolution, in the absence of an appropriation act, providing authority for Agencies to continue current operations. Such continuing resolutions are subject to OMB apportionment in the same manner as appropriations DOD 7000.14-R, DOD Financial Management Regulation, vol. 1, Definitions.
2. [A]n interim appropriation to provide authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous CRA. A CRA has a fixed life. Defense Finance and Accounting Service-- Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000), para. 080401. [hereinafter DFAS-IN 37-1] (*available at* <https://dfas4dod.dfas.mil/library>).

- B. Funding Gap.** A funding gap occurs when previous budget authority expires and there exists no regular appropriations act or continuing resolution. DFAS-IN 37-1, para. 0805.

III. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS.

A. Continued Operations - Potential Antideficiency Act Violations.

1. The Comptroller General has opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a Continuing Resolution violates the Antideficiency Act (ADA). Representative Gladys Noon Spellman, B-197841, March 3, 1980 (unpub.).
2. The Attorney General has opined that absent an appropriations act or a Continuing Resolution, executive agencies must take immediate steps to cease normal operations. Opinion of the Attorney General, Apr. 25, 1980 (Appendix A).
3. In anticipation of a potential funding gap, the Clinton Administration requested updated guidance on the scope of permissible government activity. In response, the Department of Justice issued what is known as the "Dellinger Memo," which reemphasized the restricted level of allowable government activity. The Memo also noted, however, that a lapse in appropriations will not result in a total "government shut-down." DOJ Memorandum for Alice Rivlin, Office of Management and Budget, Aug. 16, 1995 (Appendix B).

B. Continued Operations - Permissible Activities.

1. The Office of Management and Budget (OMB) issues guidance concerning actions to be taken by agencies during funding gaps.
 - a. Agencies must develop contingency plans to conduct an orderly shutdown of operations.
 - b. During a funding gap, agencies may continue:
 - (1) Activities otherwise authorized by law, e.g., activities funded with multi-year or no-year appropriations;
 - (2) Activities authorized through extraordinary contract authority. See, e.g., 41 U.S.C § 11 (Food and Forage Act).
 - (3) Activities that protect life and property. See, e.g., 31 U.S.C. § 1342.

- (4) Activities necessary to begin phase-down of other activities. See Attorney General Opinion, Apr. 25, 1980 (Appendix A).
2. In 1990 Congress amended 31 U.S.C. § 1342, to restrict the authority of agencies to cite the safety of life or the protection of property as the basis for continuing operations. Congress excluded "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property" from the scope of permissible activities that may be continued during a funding gap. See Appendix C.
3. DFAS Guidance.
 - a. DFAS-IN 37-1, para. 0805, provides the following guidance concerning operations during a funding gap:
 - (1) Obligations may continue in the new fiscal year for minimum mission essential business.
 - (2) Neither prior year unexpired funds of multi-year appropriations nor revolving funds are impacted by the absence of a new appropriation or a CRA.
 - b. DFAS-IN 37-1, para. 1604, provides additional details concerning disbursements permitted during funding gaps. Such disbursements may be made:
 - (1) To liquidate prior-year obligations;
 - (2) To liquidate new obligations for unexpired multi-year appropriations;
 - (3) To liquidate obligations for revolving funds and trust funds (no year) while cash balances exist; and,
 - (4) To liquidate obligations made during a previous CRA.

4. In September 1995, DOD issued detailed guidance addressing what activities the military departments and other DOD agencies could perform during the absence of appropriations (i.e., a funding gap). This information as well as additional guidance can be found in Continuing Resolution Authority General Guidance (OASA-FMC, August 1998, found at <http://www.asafm.army.mil/pubs/cra/cra0898.doc> (See Appendix D)).
 - a. Activities that could continue during the funding gap:
 - (1) Units and the administrative, logistical, and maintenance functions required in support of major contingency tasking;
 - (2) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations;
 - (3) Units and personnel preparing for or participating in operational exercises;
 - (4) Functions or activities necessary to protect life and property or to respond to emergencies;¹
 - (5) Educational activities deemed necessary for immediate support of permissible activities;
 - (6) Educational activities not otherwise allowed if undertaken by active duty military personnel for other active military personnel only;
 - (7) Negotiation, preparation, execution, and administration of new/existing contracts for permissible activities/functions;²

¹ Among the activities exempted from the "shut-down" include: fire protection, physical security, law enforcement, air traffic control and harbor control, utilities, housing and food services for military personnel, trash removal, and veterinary services in support of exempt functions (i.e., food supply and service inspections).

² For contract actions not within the scope of the original contract and that are in direct support of permissible activities, the contracting officer will cite one of the following three authorities in support of the new obligation: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) 41 U.S.C. § 11 for

- (8) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;
- (9) Legal support for any permitted activities;
- (10) MWR activities to the extent operated by NAF personnel; and
- (11) Child care activities.

b. Activities required to be suspended during the funding gap:

- (1) Basic, skill, and qualification training which will obligate current FY funds;
- (2) Military Personnel Selection Boards and Administrative Boards;
- (3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel;
- (4) Department of Defense Dependents Schools; and,
- (5) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in otherwise non-exempt activities using current FY funding.

5. Funding Gap Issues.

- a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan for such gaps.

obligations covered by the Food and Forage Act , and (3) 31 U.S.C. § 1342 for obligations for protection of life and property against imminent danger.

- b. Efficient operation of government is clearly compromised. See General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76, B-241730, June 6, 1991; General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, No. PAD-81-31, Mar. 3, 1981.

- c. What if we incur unauthorized obligations? See, e.g., Department of Defense Appropriations Act, 1993, § 9049, Pub. L. No. 102-396, 106 Stat. 1876 ("All obligations incurred in anticipation of this Act are hereby ratified and confirmed if otherwise in accordance with this Act.").

IV. CONTINUING RESOLUTIONS.

A. Legal Implications of Continuing Resolutions.

- 1. If Congress fails to pass, or the President fails to sign, an appropriation act before 1 October, a funding gap occurs unless Congress passes, and the President signs, interim legislation authorizing executive agencies to continue incurring obligations. This interim legislation is referred to as a Continuing Resolution. It is a statute that has the force and effect of law. See Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973). The first Continuing Resolution for FY 2002 began as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 2002, and for other purposes, namely:

Sec. 101. (a)(1) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for the fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint

resolution) which were conducted in the fiscal year 2001 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

* * *

The Military Construction Appropriations Act, 2002;

* * *

(b) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001, at a rate for operations not exceeding the current rate, and for which appropriations, funds, or other authority was made available in the following appropriations Acts:

(1) the Department of Defense Appropriations Act, 2001

* * *

H.J. Res. 65 (hereinafter referred to as the FY 2002 Continuing added).

2. A Continuing Resolution provides budget authority:
 - a. Until a fixed cut-off date specified in the Continuing Resolution;
 - b. Until an appropriations act replaces it; or
 - c. For an entire fiscal year, if no appropriations act is passed:

Sec. 107. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution

shall be available until

(a) enactment into law of an appropriation for any project or activity provided for in this joint resolution;

(b) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity; or

(c) October 16, 2001, whichever first occurs. FY 2002 Continuing Resolution.

B. Comparison of Continuing Resolutions with Appropriation Acts.

1. Appropriation acts appropriate specified sums of money.
2. Continuing Resolutions are temporary appropriation acts that normally appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations."

C. Governmental Operations During the Life of a Continuing Resolution.

1. New Starts. Continuing Resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. For example, the FY 2002 Continuing Resolution provided, in part:

Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for production in fiscal year 2001 or prior years, for the increase in production rates above those sustained with fiscal year 2001 funds, or to initiate, resume, or continue any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during the fiscal year 2001. . . .

2. Current rate. Continuing Resolutions frequently authorize operations at the "current rate." This represents an attempt by Congress to maintain the "status quo" of existing programs and rates of operation/production during the time frame between Appropriation Acts.

a. Continuing Resolutions use the "current rate" to establish the upper limit at which agencies may continue to fund a project or activity. For example, the FY 2002 Continuing Resolution contained the following language:

Sec. 101(a)(1). [W]henver the amount which would be made available or the authority which would be granted in these Acts . . . is different than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate. FY 2002 Continuing Resolution.

b. Comptroller General Interpretations.

(1) One-year appropriation. When the program in question was funded by a one-year appropriation in the prior year, the current rate equaled the total funds appropriated for the program for the previous fiscal year. To the Hon. Don Edwards, House of Representatives, B-214633, 64 Comp. Gen. 21 (1984); In the Matter of CETA Appropriations Under 1979 Continuing Resolution Authority, B-194063, 58 Comp. Gen. 530 (1979).

(2) Multi-year appropriations. When the unobligated balance can be carried over from the prior fiscal year (e.g., under a multi-year appropriation), the amount available under the Continuing Resolution equaled the amount available for obligation in the prior fiscal year (i.e., the "current rate") less any unobligated balance carried over into the present year. National Comm. for Student Financial Assistance-Fiscal Year 1982 Funding Level, B-206571, 61 Comp. Gen. 473 (1982).

3. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. 31 U.S.C. § 1512. Congress often includes language in a Continuing Resolution, such as that used in the FY 2002 CR, to ease the normal apportionment requirements:

Sec. 110. Appropriations and funds made available by or authority granted pursuant to this joint resolution *may be used without regard to the time limitations for submission and approval of apportionments* set forth in section 1513 of title 31, United States Code, but nothing herein shall be construed to waive any other provision of law governing the apportionment of funds. FY 2002 Continuing Resolution (emphasis added).

4. High Initial Rates of Operation. Congress often prohibits agencies with high rates of operation early in the fiscal year from engaging in similar conduct during the life of the Continuing Resolution.

Sec. 112. Notwithstanding any other provision of this joint resolution, except section 107, for those programs that had high initial rates of operation or complete distribution of fiscal year 2001 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or others, *similar distributions of funds for fiscal year 2002 shall not be made* and no grants shall be awarded for such programs funded by this resolution *that would impinge on final funding prerogatives*. FY 2002 Continuing Resolution (emphasis added).

5. When the applicable appropriations act becomes law, expenditures made pursuant to the Continuing Resolution must be charged against the appropriations act:

Sec. 108. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law. FY 2002 Continuing Resolution.

6. Obligations incurred under Continuing Resolutions remain valid even if the appropriations finally passed by Congress are less than the amounts authorized by the Continuing Resolution. Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, B-200923, 62 Comp. Gen. 9 (1982); Staff Sergeant Frank D. Carr, USMC-Transferred Service Member-Dislocation Allowance, B-226452, 67 Comp. Gen. 474 (1988).

D. What Happens When Congress Decides to Reduce Government Operations -- The FY 1996 Continuing Resolution.

1. More Austere Conditions. In FY 1996 Congress required agencies to operate under more austere budgetary constraints during the Continuing Resolution period.
2. The Average of the Two Rates. The FY 1996 Continuing Resolution addressed the situation where the House version of an Act funded a project or activity at a different rate than the Senate version:

[Sec. 101](b) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this section as passed by the House as of October 1, 1995, *is different* from that which would be available or granted under such Act as passed by the Senate as of October 1, 1995, the pertinent project or activity shall be continued at a rate for operations *not exceeding the average of the rates permitted by the action of the House or the Senate* under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995
FY 1996 Continuing Resolution (emphasis added).

3. The Average Rate Less Five Percent. During the life of the 1996 Continuing Resolution, agencies were required to reduce the rate of some operations by five percent.

Sec. 115. Notwithstanding any other provision of this joint resolution, except section 106, the rates for operation for any continuing project or activity provided by section 101 that have not been

increased by the provisions of section 111 or section 112 *shall be reduced by 5 percent but shall not be reduced below the minimal level defined in section 111 or below the level that would result in a furlough.* FY 1996 Continuing Resolution (emphasis added).

4. Only One Version. Congress also provided fiscally restrictive language when addressing those situations where only one House of Congress had passed its version of an appropriations act as of 1 October 1995.

[Sec. 101](c) Whenever an Act listed in this section has been passed by only the House or only the Senate as of October 1, 1995, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House *at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower,* and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1995. FY 1996 Continuing Resolution (emphasis added).

5. Minimal Level. The 104th Congress provided agencies funding so that they could continue certain FY 1995 activities at a "minimal level," that is, at 90% of the "current rate" for FY 1995.

Sec. 111. Notwithstanding any other provision of this joint resolution, except section 106, whenever an Act listed in section 101 as *passed by both the House and Senate as of October 1, 1995, does not include funding* for an ongoing project or activity for which there is a budget request, or whenever an Act listed in section 101 has been passed by only the House or only the Senate as of October 1, 1995, and an item funded in fiscal year 1995 is not included in the version passed by the one House, . . . the pertinent project or activity may be continued under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 by increasing the rate for operations provided by section 101 to *a rate for operations not to exceed one that provides the minimal level* that would enable existing activities to continue. . . . For the

purposes of the Act, the *minimal level means a rate for operations that is reduced from the current rate by 10 percent.*³ FY 1996 Continuing Resolution

6. Furloughs. The initial 1996 Continuing Resolution offered agencies some relief from the "minimal level" rule. An agency could sustain operations at that rate of operations necessary to avoid furloughing Government employees, even if that rate exceeded the minimum level or rate otherwise required by the Continuing Resolution.

Sec. 112. *Notwithstanding any other provision of this joint resolution, except section 106, whenever the rate for operations for any continuing project or activity provided by section 101 or section 111 for which there is a budget request would result in a furlough of Government employees, that rate for operations may be increased to a level that would enable the furlough to be avoided. . . .* FY 1996 Continuing Resolution (emphasis added).

E. Determining Purpose Under a Continuing Resolution.

1. Continuing Resolutions provide interim funding for projects or activities conducted in the prior fiscal year. To determine whether a given program or activity is covered by the CR, the Comptroller General will look to prior year legislation and its history. Special Defense Acquisition Fund, B-214236, 66 Comp. Gen. 484 (1987). Generally, the scope of a Continuing Resolution's applicability is quite broad:

Sec. 106. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds are available under this joint resolution. FY 2002 Continuing Resolution.

³ The second Continuing Resolution passed by the 104th Congress increased this decrement to 25 percent.

2. To determine if a program is a new “project or activity,” the Comptroller General has looked at whether the agency had prior authority to carry out activities specifically identified in newly enacted legislation. Chairman, Nat'l Advisory Council on Extension and Continuing Educ., B-169472, 52 Comp. Gen. 270 (1972) (National Advisory Council’s review of certain programs not a new project or activity).

F. Relationship of a Continuing Resolution to Other Legislation.

1. A Continuing Resolution appropriates funds that are “not otherwise appropriated.” See e.g. Appendix E. The CRA does not apply to an agency program funded under another appropriation.
2. Specific inclusion of a program in a Continuing Resolution provides authorization and funding to continue the program despite expiration of authorizing legislation. Authority to Continue Domestic Food Programs Under Continuing Resolution, B-176994, 55 Comp. Gen. 289 (1975).

V. CONCLUSION.

APPENDIX A: OPINION OF THE UNITED STATES ATTORNEY GENERAL

APPLICABILITY OF THE ANTIDEFICIENCY ACT UPON A LAPSE IN AN AGENCY'S
APPROPRIATION

(43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16)

APRIL 25, 1980

MY DEAR MR. PRESIDENT:

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

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

involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

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

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.² On

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

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

each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although though Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.³

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.⁴ On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.⁵ However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.⁶ Neither are we aware that the Executive branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.⁷ Various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion,

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

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

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

⁶In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor. In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954). In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

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

however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

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

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

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

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

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive branch to carry out Congress' unambiguous mandates. It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventually appropriations.⁹ Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur

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

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

obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the apparent authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing legal authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

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

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

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

¹⁰See 21 Op. A.G. 288.

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

Respectfully,

BENJAMIN R. CIVILETTI

APPENDIX B

THE DELLINGER MEMO

APPENDIX C

1990 OMNIBUS BUDGET RECONCILIATION ACT AMENDMENT OF 31 U.S.C. § 1342.

31 U.S.C. § 1342. Limitations 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. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. *As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of the government the suspension of which would not imminently threaten the safety of human life or the protection of property.*

(emphasis added).

APPENDIX D

Continuing Resolution Authority General Guidance

Office of the Assistant Secretary of the Army (Financial Management & Comptroller)

SAFM-BUC-E

August 1998

(found at <http://www.asafm.army.mil/pubs/cra/cra0898.doc>)

Chapter 3 – Rules for Operation in the Absence of CRA

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 operational 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.

(e) Basic, skill, and qualification training which will obligate current year funds.

(3) Explanatory notes.

(a) Post deployment units will minimize all operations which will obligate current year funds required to prepare for follow-on operational or OPLAN tasking.

(b) Operational exercises are those exercises required to prepare units for operational, contingency or wartime taskings.

(c) Training exercises are those exercises designed to improve skill and task proficiency but not necessarily oriented towards specific operational, contingency or wartime taskings.

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 supplement exempt activities.

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

(c) National Guard and Reserve military technicians in units identified as available T+90 or less.

(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.

(f) Minimum number of personnelists to support exempt personnel once orderly shutdown has occurred.

(g) Civilians paid through prior appropriations, revolving, trust or nonappropriated funds.

(h) Support to international special events or commitments, as authorized by the Secretary of Defense.

(i) Host nation funded foreign national employees whose functions support exempt activities.

(j) Foreign national employees governed by country-to-country agreements that prohibit furloughs.

(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).

(3) Explanatory notes.

(a) Active duty military personnel and active duty reservists shall report for duty pursuant to Title 37, U.S. Code. Civilian personnel shall also report for duty unless specifically directed to do otherwise.

(b) Following a lapse in appropriations, a minimum number of essential civilian personnel will be retained to execute an orderly shutdown within a reasonable timeframe and may continue to work until the shutdown is completed.

(c) Civilian personnel paid from prior year appropriations may continue to work until prior year balances are exhausted.

(d) Foreign national employees paid by the host nation are subject to the same criteria for furlough as United States employees, depending on whether their functions support exempt activities. However, the host nation may elect to continue to pay the employees, even if they are furloughed.

(e) Foreign national employees paid with U.S. funds are also subject to the same furlough criteria as United States employees. However, their terms of employment may be governed by a Status of Forces agreement between the United States and the host nation, which means that their pay may not be controlled by U.S. laws. Depending on the terms of the agreement, it may be necessary to pay those employees, even if they are furloughed.

c. Protection of Life and Property.

(1) Exempt activities.

(a) Functions or activities to the extent necessary to protect life and property and for response to emergencies, including fire protection, physical security, law enforcement/counter terrorism, intelligence support to terrorist threat warnings, Explosive Ordnance Disposal operations, emergency salvage, subsafe program, nuclear reactor safety and security, air traffic control and harbor control, search and rescue, utilities, housing and food services for military personnel, and trash removal.

(b) Emergency repair and non-deferrable maintenance to utilities, power distribution system buildings or other real property including BEQ, BOQ and housing for military personnel.

(c) Repair of equipment needed to support exempted services, including fire trucks, medical emergency vehicles, police vehicles, or material handling vehicles.

(d) Voice and data communications that support exempt activities.

(e) Civilian personnel directly involved in the exempted activities, including security guards, individuals to monitor and maintain alarms and control systems, utilities, and emergency services. This category includes the National Communications System

personnel who staff the National Coordinating Center for Telecommunications and civilian personnel at the White House Communications Center.

(f) Minimum number of personnel for receipt and safekeeping of material delivered during shutdown.

(g) Minimum number of personnel to control hazardous material and monitor existing environmental remediations.

(h) Minimum number of personnel required to perform statutory responsibilities of the Defense Mapping Agency for marine and aeronautical navigation.

(i) Security maintenance and ADP operators associated with protecting property at the Defense Clearance and Investigations Index facility that supports DoD law enforcement efforts.

(j) Oil spill and hazardous waste cleanup, environmental remediation, and pest control, only to the extent necessary to prevent imminent danger to life or property.

(k) Civilian Army Corps of Engineer personnel with responsibilities to local and state governments that involve imminent threats to life or property.

(l) Civilian specialists responsible for safe storage or transportation of hazardous materials, including ammunition, chemical munitions, photographic processing operations.

(m) USD(A&T) personnel responsible for providing emergency reporting response and input to the National Response Team and coordinating with EPA and other agencies on fire, safety, occupational health, environmental, explosive safety for vector borne disease management.

(2) Non-exempt activities. Environmental activities which are not necessary to prevent imminent threat to life or property.

(3) Explanatory notes.

(a) No new remediation activities, except those exempted above, may be started.

(b) Unit commanders may, on their authority, require return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.

d. ADP and Communications.

(1) Exempt activities.

(a) ADP centers, including megacenters, supporting exempt functions with a minimum number of civilian personnel.

(b) Operation and maintenance of command, control and communications systems.

(c) Telecommunications centers and phone switches on installations.

(d) Secure conference capability at military command centers.

(2) Non-exempt activities. Personnel and activities associated with planning and acquisition of future ADP, telecommunications, and command and control systems.

e. DOD Medical and Dental Care.

(1) Exempt activities.

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

(b) Contingency planning in major medical command headquarters.

(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 (both CONUS and OCONUS).

(d) Routine physicals, preventive dental procedures, or other routine medical procedures (including vaccinations) in DoD Medical Treatment Facilities for non-active duty personnel (both CONUS and OCONUS).

(e) Persian Gulf Illness Hotlines.

e. Training and Education.

(1) Exempt activities.

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

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

(c) Installation education centers may continue to operate using borrowed military manpower so that private agencies such as colleges and universities may provide courses purchased with previously available funding.

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

(2) Non-exempt activities.

(a) At installation education centers, new registrations which require current year funding will not be conducted.

(b) Education other than for exempted activities.

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

(d) Basic, skill, and qualification training which will obligate current year funds.

(3) Explanatory notes.

(a) Training and education of active duty military personnel, reserve component personnel, and military technicians is governed by the National Security exemption. Both active duty and National Guard or Reserve personnel will cease training unless their unit is providing direct support to ongoing exempt activities. All military personnel performing non-exempt training in a TDY status should return to their home station as expeditiously as possible within carrier availability. This policy will result in additional costs and waste, however, under the law, no other option is available.

(b) Training and education of civilian personnel in support of exempt activities is permitted. All other civilian training will be terminated. Civilians participating in non-exempt training or education will be furloughed and civilian personnel on TDY for such purposes should be returned to their home stations as part of the orderly shutdown of operations.

(c) Civilian instructors at military schools, training centers, and military academies will be subject to the same furlough criteria as other employees. In other words, if the activity has not been identified as part of the National Security exemption, or as a protection of life and property exemption, the instructors will be furloughed. However, the schools may continue to operate, if feasible, using military instructors and borrowed military personnel.

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 funding.

(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 or 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.

(e) Recruiting advertising using current year funding will not be utilized.

(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).

(1) Exempt activities.

(a) PCS moves funded with prior year funds for active duty, reserve, and civilian personnel may continue till completion and will be paid.

(b) TDY travel for active duty, reserve, and civilian personnel funded and completed in the previous fiscal year will be paid.

(c) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in exempted activities may be authorized during a lapse in appropriations, but payment cannot be made until appropriations become available.

(d) PCS moves of military personnel terminating their service and returning to their home of record will continue to be processed as part of the orderly shutdown of operations.

(e) Travel funded from .0015 contingency limitation (for USACIDC mission travel) or .0017 extraordinary military expenses limitation.

(f) Government transportation tickets funded with prior year appropriations will remain valid.

(g) Travel advances may be paid only if the travel order was approved during the previous fiscal year or a previous CRA period.

(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.

(3) Explanatory notes. All personnel performing official travel that does not support exempt activities should return to their home station as expeditiously as possible within carrier availability. This policy will result in additional costs and waste, however, under the law, no other option is available. Obligations are permitted for both TDY and PCS requirements in support of exempt activities; however, no disbursements are authorized. Under this policy, payment of travel advances or reimbursement of expenses for submitted travel vouchers will not be disbursed. While government charge cards may be used to incur obligations in support of exempt activities, the traveler is responsible for payment of the charge card bill when it is

presented. Personnel should also be aware that government charge card privileges may be suspended in the event of a shutdown.

h. Army Working Capital Fund (AWCF) and Other Revolving Funds.

(1) Exempt activities.

(a) AWCF/revolving fund activities may continue to operate until cash reserves are exhausted.

(b) When cash reserves are exhausted, AWCF/other revolving fund activities in direct support of exempted activities must continue.

(c) AWCF activities may continue to accept orders financed with previously available funds, or unfunded orders from exempt organizations. Unfunded orders will be posted to accounts receivable, but will not actually be billed until appropriations are enacted.

(d) BRAC activities may continue to operate until unobligated balances are exhausted.

(2) Non-exempt activities. AWCF/revolving fund activities which provide support to non-exempt activities.

(3) Explanatory notes.

(a) Revolving funds may continue to operate utilizing prior year unobligated balances.

(b) Prudent management actions should be taken to sustain operations and minimize operational impact, including: delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives.

(c) Inter-AWCF billings will be suspended.

(d) Current year ledger transactions to military personnel accounts will be suspended.

(e) Managers may perform advance billing.

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.

(c) Administration of contracts for exempt activities, including combat support and combat service support.

(d) Receipt, recordation and safe storage of material shipped and/or delivered under existing contracts.

(e) Contract payment, so long as DFAS remains operational pursuant to AWCF instructions and a valid invoice or bill, properly certified for payment, is presented.

(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.

(c) Supervision and inspection of ongoing construction contracts, unless the civilian salaries are paid from prior year appropriations.

(d) Contract reconciliation and closeout procedures.

(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.

j. Legal Activities.

(1) Exempt activities.

(a) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session after a lapse in appropriations.

(b) Legal support for exempted activities.

(2) Non-exempt activities. All other legal activities.

k. Audit and Investigation Community.

(1) Exempt activities.

(a) Personnel participating in an ongoing criminal investigation or working undercover.

(b) Personnel required to support an emergent criminal investigation if authorized by the Secretary of Defense.

(2) Non-exempt activities. All other members of the audit and investigation community.

l. Trust Funds.

(1) Exempt activities.

- homes).
- (a) Trust funds conducting exempted activities (for example, retirement homes).
- (b) Trust funds with management activities routinely paid from trust fund resources.
- (c) Trust funds managed by Defense Finance and Accounting Service (DFAS) so long as DFAS operates.
- (d) Trust funds managed by borrowed military personnel.

(2) Non-exempt activities. All other trust fund activities.

m. Morale Welfare & Recreation/Non-Appropriated Funds.

(1) Exempt activities.

- (a) Activities funded entirely through NAF sources.
- (b) Child care activities.
- (c) MWR activities operated by NAF personnel, or those using borrowed military personnel to replace civilian employees paid by appropriated funds.

(2) Non-exempt activities. All MWR activities staffed by civilian employees paid from appropriated funds who are not replaced using borrowed military manpower.

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 AWCF 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.
- (c) Preparation of year-end closing statements and financial reports for the previous fiscal year.
- (d) Investigation of Anti-deficiency Act violations.
- (e) Research and correction of problem disbursements.
- (f) Adjustments to prior year funds related to programs and contracts that do not support exempt functions/operations.

APPENDIX E

FY 2002 CONTINUING RESOLUTION TEXT AND
OMB APPORTIONMENT BULLETIN

[DOCID: f:publ044.107]

[[Page 115 STAT. 253]]

Public Law 107-44
107th Congress

Joint Resolution

Making continuing appropriations for the fiscal year 2002, and for other purposes. <<NOTE: Sept. 28, 2001 - [H.J. Res. 65]>>

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2002, and for other purposes, namely:

Sec. 101. (a)(1) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

(A) the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002;

(B) the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, notwithstanding section 15 of the State Department Basic Authorities Act of 1956, section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1));

(C) the Energy and Water Development Appropriations Act, 2002;

(D) the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, notwithstanding section 10 of Public Law 91-672 and section 15 of the State Department Basic Authorities Act of 1956;

(E) the Department of the Interior and Related Agencies

Appropriations Act, 2002;

(F) the Legislative Branch Appropriations Act, 2002;

(G) the Military Construction Appropriations Act, 2002;

(H) the Department of Transportation and Related Agencies Appropriations Act, 2002;

(I) the Treasury and General Government Appropriations Act, 2002; and

(J) the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002:

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Provided, That whenever the amount which would be made available or the authority which would be granted in these Acts as passed by the House and Senate as of October 1, 2001, is different than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate: Provided further, That whenever there is no amount made available under any of these appropriations Acts as passed by the House and Senate as of October 1, 2001, for a continuing project or activity which was conducted in fiscal year 2001 and for which there is fiscal year 2002 funding included in the budget request, the pertinent project or activity shall be continued at the rate for current operations under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(2) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House as of October 1, 2001, is different from that which would be available or granted under such Act as passed by the Senate as of October 1, 2001, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(3) Whenever an Act listed in this subsection has been passed by only the House or only the Senate as of October 1, 2001, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House at a rate for operations not exceeding the current rate and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001: Provided, That whenever there is no amount made available under any of these appropriations Acts as passed by the House or the Senate as of October 1, 2001, for a continuing project or activity which was conducted in fiscal year 2001 and for which there is fiscal year 2002 funding included in the budget request, the pertinent project or activity shall be continued at the rate for current operations under the

authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(b) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001, at a rate for operations not exceeding the current rate, and for which appropriations, funds, or other authority was made available in the following appropriations Acts:

(1) the Department of Defense Appropriations Act, 2001, notwithstanding section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1)); and

(2) the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001; and

(3) the District of Columbia Appropriations Act, 2001.

Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for production in fiscal year 2001 or prior years, for the increase in production rates above those sustained with fiscal year 2001 funds, or to initiate, resume, or continue any project, activity, operation, or

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organization which are defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element and for investment items are further defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item which includes a program element and subprogram element within an appropriation account, for which appropriations, funds, or other authority were not available during fiscal year 2001: Provided, That no appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

Sec. 103. Appropriations made by section 101 shall be available to the extent and in the manner which would be provided by the pertinent appropriations Act.

Sec. 104. No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2001.

Sec. 105. No provision which is included in an appropriations Act

listed in section 101(a) but which was not included in the applicable appropriations Act for fiscal year 2001 and which by its terms is applicable to more than one appropriation, fund, or authority shall be applicable to any appropriation, fund, or authority provided in this joint resolution.

Sec. 106. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Sec. 107. <<NOTE: Expiration date.>> Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 16, 2001, whichever first occurs.

Sec. 108. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

Sec. 109. No provision in any appropriations Act for fiscal year 2002 listed in section 101(a) that makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation shall be effective before the date set forth in section 107(c) of this joint resolution.

Sec. 110. Appropriations and funds made available by or authority granted pursuant to this joint resolution may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United States Code, but nothing herein shall be construed to waive any other provision of law governing the apportionment of funds.

Sec. 111. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.

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Sec. 112. Notwithstanding any other provision of this joint resolution, except section 107, for those programs that had high initial rates of operation or complete distribution of fiscal year 2001 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or

others, similar distributions of funds for fiscal year 2002 shall not be made and no grants shall be awarded for such programs funded by this resolution that would impinge on final funding prerogatives.

Sec. 113. Activities authorized by sections 1319 and 1336(a) of the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.) may continue through the date specified in section 107(c) of this joint resolution.

Sec. 114. Activities authorized by title V of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, may continue through the date specified in section 107(c) of this joint resolution.

Sec. 115. Activities authorized by section 7 of the Export-Import Bank Act of 1945 (12 U.S.C. 635f) and section 1(c) of Public Law 103-428, may continue through the date specified in section 107(c) of this joint resolution.

Sec. 116. Activities authorized by chapter 2 of title II of the Trade Act of 1974 shall continue through the date specified in section 107(c) of this joint resolution.

Sec. 117. Activities authorized by subsection (f) of section 403 of Public Law 103-356 may continue through the date specified in section 107(c) of this joint resolution.

Sec. 118. Notwithstanding any other provision of this joint resolution, except section 107, the Library of Congress may temporarily transfer to the revolving fund established under section 103 of Public Law 106-481 amounts to continue program operations at a rate not exceeding the rate under authority applicable prior to October 1, 2001.

Sec. 119. Of amounts provided by section 101 of this joint resolution, for projects and activities that would be funded under the heading "International Organizations and Conferences, Contributions to International Organizations" in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, \$100,000,000 may be made available only pursuant to a certification by the Secretary of State that the United Nations has taken no action in calendar year 2001 prior to the date of enactment of this Act to increase funding for any United Nations program without identifying an offsetting decrease elsewhere in the United Nations budget and cause the United Nations to exceed the budget for the biennium 2000-2001 of \$2,535,700,000.

Sec. 120. Notwithstanding any other provision of this joint resolution, in the event that H.R. 1088, the Investor and Capital Markets Fee Relief Act, or other legislation to amend section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), and sections 13(e), 14(g), and 31 of the Securities Exchange Act of 1934 (15 U.S.C. 78m(e), 78n(g), and 78ee), is enacted into law during the period covered by this joint resolution, the fees, charges, and assessments authorized by such sections, as amended, shall be deposited and credited as offsetting

collections to the account that provides appropriations to the Securities and Exchange Commission.

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Sec. 121. Collection and use of maintenance fees as authorized by section 4(i) and 4(k) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136a-1(i) and (k)) may continue through the date specified in section 107(c) of this joint resolution.

Prohibitions against collecting "other fees" as described in section 4(i)(6) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136a-1(i)(6)) shall continue in effect through the date specified in section 107(c) of this joint resolution.

Sec. 122. Notwithstanding section 106 of this joint resolution, funds made available in Public Law 107-38 are not limited by the terms and conditions of this joint resolution.

Approved September 28, 2001.

LEGISLATIVE HISTORY--H.J. Res. 65:

CONGRESSIONAL RECORD, Vol. 147 (2001):

Sept. 24, considered and passed House.

Sept. 25, considered and passed Senate.

<all>

Office of Management and Budget (Text Only)

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September 27, 2001

BULLETIN NO. 01-10

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2002

1. **Purpose and Background.** H. J. Res 65 will provide continuing appropriations for the period October 1 through October 16, 2001. I am providing an automatic apportionment for amounts provided by this continuing resolution (CR), and any extensions of this CR, as specified in section 2. This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-34.

Further, I am providing an automatic apportionment of any unobligated balances available on October 1, 2001, from the amounts transferred from the Emergency Response Fund to individual agency accounts pursuant to the determination of the President on **September 21, 2001**.

2. **Automatic Apportionments.** Calculate the amount automatically apportioned through the period ending October 16, 2001 (and any extensions of that period) by multiplying the rate (amount) provided by the CR by the lower of:

- the percentage of the year covered by the CR, or
- the historical seasonal rate of obligations for the period of the year covered by the CR.

See the Attachment to this Bulletin for more detailed instructions on calculating the amount automatically apportioned.

Under an automatic apportionment, all of the footnotes and conditions placed on the prior year apportionment remain in effect.

The CR expires at midnight on Tuesday, October 16, 2001.

3. **Written Apportionments.** If a program requires an amount different from the total amount automatically apportioned, you must request a written apportionment

/s/

Mitchell E. Daniels, Jr.

Director

Attachment

Calculating the Automatic Apportionment

Calculate the amount automatically apportioned through the period ending October 16, 2001 (and any extensions of that period) by multiplying the **rate (amount) provided by the CR** by the lower of:

- the **percentage of the year** covered by the CR (rounded to the nearest tenth), or
- the **historical seasonal rate** of obligations for the period of the year covered by the CR.

1. What is the rate (amount) provided by the CR? The rate (amount) provided by the CR could be one of the following *annual* amounts:

- the *current rate*, calculated as follows:
 - take the net amount enacted in FY 2001, i.e., add any supplemental appropriations and subtract any rescissions; and
 - add the unobligated balance carried forward to FY 2001 (if any); or
- the rate of operations *not exceeding the current rate*, calculated as follows:
 - take the net amount enacted in FY 2001, i.e., add any supplemental appropriations and subtract any rescissions;
 - add the unobligated balance carried forward to FY 2001 (if any), and
 - subtract the unobligated balance at the end of FY 2001 (if any).

2. Which of the annual amounts do I use?

If	Then use
The project or activity meets <u>all</u> the following criteria: <ul style="list-style-type: none"> • zero funded in the Act passed by both houses by October 1 or is zero funded in the Act passed by the one house by October 1; • included in the President's budget request; • was conducted in FY 2001; and • is included in an act other than the Department of Defense Appropriations Act, 2001, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001, or the District of Columbia Appropriations Act, 2001. 	FY 2001 (the <i>current rate</i>)
All other cases	The rate of operations <i>not exceeding the current rate</i> .

3. Does the continuing resolution affect the availability of funds that would be available if H. J. Res. 65 had not been enacted?

No. The availability of any part of the budgetary resources for an account that is not determined by current action of the Congress (such as permanent appropriations, public enterprise and other revolving funds, reimbursements and other income, and balances of prior year budget authority) are not affected by H. J. Res. 65.

Most of these budgetary resources must be apportioned by OMB before obligation. This Bulletin does not apportion those budgetary resources, except unobligated balances on October 1, 2001, from amounts transferred from the Emergency Response Fund to individual agency accounts pursuant to the determination of the President on **September 21, 2001**.