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EFFECTS OF POTENTIAL GOVERNMENT SHUTDOWN

Y 4. B 85/2: S. HRG. 104-175

Effects of Potential Government Shu...

JOINT HEARING
 BEFORE THE
 COMMITTEE ON THE BUDGET
 UNITED STATES SENATE
 AND THE
 HOUSE OF REPRESENTATIVES
 COMMITTEE ON THE BUDGET
 ONE HUNDRED FOURTH CONGRESS
 FIRST SESSION

SEPTEMBER 19, 1995



Printed for the use of the Committees on the Budget

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WASHINGTON : 1995

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EFFECTS OF POTENTIAL GOVERNMENT SHUTDOWN

TUESDAY, SEPTEMBER 19, 1995

U.S. SENATE,
U.S. HOUSE OF REPRESENTATIVES,
COMMITTEES ON THE BUDGET,
Washington, DC.

The committees met, pursuant to notice, at 9:33 a.m., in room D-106, Dirksen Senate Office Building, the Hon. Pete V. Domenici (chairman of the Senate Budget Committee) and the Hon. John R. Kasich (chairman of the House Budget Committee) presiding.

Senators present: Domenici, Lott, Gregg, Snowe, Abraham, Frist, Exon, Lautenberg, Simon, and Conrad.

Representatives present: Kasich, Hobson, Shays, Miller, Franks, Molinari, Myricki, Shadegg, Radanovich, Sabo, Orton, Pomeroy, Woolsey, Meek and Doggett.

OPENING STATEMENT OF CHAIRMAN KASICH

Chairman KASICH. Since we have a bipartisan contingent here, why don't we go ahead and get started. Bill Orton will be the ranking Democrat here, and hopefully Mr. Sabo is on his way. I think the Senate is tied up with votes.

Anyway, I want to welcome the witnesses here this morning. Director Rivlin and Mr. Dellinger, no relation, I take it, to the famous Dellinger.

Mr. DELLINGER. No, sir, but my wife worked a bit at the FBI and she heard a lot about that.

Chairman KASICH. Anyway, the purpose of the hearing this morning is to talk about what plans we have and what the schedule is and what are some of the potential scenarios of two separate events that will occur. One, of course, is the October 1st deadline on our appropriations bills. Let me just for a second, Director, tell you where we are on that.

As you know, the House and the Senate are trying to resolve as many differences in a conference committee with the appropriations bills and we will get as many as practical to the President by the deadline. For those that have not yet been completed, Chairman Livingston is currently working on a CR, a continuing resolution for those that do not know all the terms, the way in which we would fund the level of government until all the appropriations bills are completed.

We will send both the completed appropriations bills and those that are not completed the continuing resolution to the White House so that in fact you will have an opportunity to sign and an

opportunity to move things forward. Of course, it will then be up to the President essentially to decide whether he wants to sign the bill or not. Perhaps he is going to have disagreements with it, but the bottom line is that we are working up both the bills and the continuing resolution to make sure the Government continues to function.

Part of the purpose of the meeting this morning is in case the President would in fact veto those bills and there would not be a funding resolution. We would like to explore the Anti-Deficiency Act, which is an act that provides for health and safety delivery. I know Mr. Dellinger has upgraded the Civiletti memos which are more of a micro-definition of what this means.

Essentially, if we in fact do not have a continuing resolution or all the appropriations bills signed, the idea that the entire Federal Government closes down is, of course, overstated and we would like to spend some time hearing your views on that, Mr. Dellinger, and, of course, finding out what the impact of what we will now call the Dellinger memos and the Anti-Deficiency Act has in terms of what your priorities are, and which pieces of government would remain open.

Then, of course, we face the situation with the debt ceiling and we would anticipate at this point that the debt ceiling would be tied to the reconciliation bill. When you use terms like that, I guess you might as well speak in Latin, because nobody but a handful of people inside the beltway understand it. The reconciliation bill is essentially locking into law the specific changes in entitlement programs. So you have got appropriations bill on one side, and then on the other side you have the changes in entitlements.

We will attach the debt ceiling in all likelihood—these things are all subject to change, based on what we think is in the best interests of our country—we will in all likelihood attach the debt ceiling to these changes in entitlement programs and send that also to the White House, and again it will be up to the White House to decide whether they want to sign that bill or not.

Of course, we also have the option of extending the debt ceiling on a short-term basis, where perhaps we can get agreement on that. I do not know at this point, and we do not need to presume that what we send down is necessarily going to be vetoed.

I think it is important today that we outline what the impact of all these things can be, what the priorities would be, make it clear that things like the Social Security checks will go out in the mail, people will get those benefits, and that maybe we will get a little light shed here today that will allow the American people to understand a little bit better what is going on in Washington right now and what the probable outcomes are.

I would now like to recognize the Senator from Nebraska, Senator Exon, for any opening statement he may want to make. Senator, if I could just lay out the schedule, since we have a few more members here, and Mr. Sabo. We are probably going to have votes at about 11, and I think we are going to have about 45 minutes worth of votes which will throw us into turmoil. Senator Domenici is at markups and hearings and votes, and so we decided to move forward and hear from the witnesses.

Senator EXON.

OPENING STATEMENT OF SENATOR EXON

Senator EXON. Mr. Chairman, thank you very much.

I should also advise you that we are scheduled tentatively for a vote in about 15 or 20 minutes, so I would suggest that we move ahead as rapidly as we can. Senator Domenici has advised me that he will be here as soon as he can.

Let me continue and insert my opening statement, if I might, so we can get to the witnesses. I certainly want to welcome Director Rivlin and Assistant Attorney General Dellinger to today's hearing. This is a very important hearing. We hope that whatever we talk about here today does not have to be done, but certainly I think it is wise for the two Chairmen of the House and Senate Committees on the Budget to have called this hearing to at least do some planning, which I think is obviously necessary.

I wish we did not have to go through this exercise, but I appreciate the knowledge and the experience that it will bring to us and the help that it will be in case we have to put something into effect.

Last week, America sighed relief when the White House and the congressional leaders tentatively agreed to work towards a continuing resolution, thereby avoiding a government shutdown. And from the comments that were made by the distinguished Chairman of the Budget Committee on the House side this morning, I am further relieved that chances are something can be worked out.

I caution, however, that the relief may be short-lived and cosmetic. The continuing resolution, if we get one, could be a very brief stay of execution. In recent days, there has been a lot of softening of rhetoric on the Government shutdown, although the bomb blast by the Republican revolutionary guard continued, and the Republican leadership has holstered its guns at least for the moment.

Any Member of Congress with a scintilla of common sense and responsibility knows that another government shutdown would hurt both parties—especially the Republican Majority which has been charged with governing, but seems only capable of shutting down the Government. If we allow partisan, political calculations to take precedence over the safety of the American people, or to needlessly threaten the security of our Federal employees, then Congress will richly deserve the scorn of the American people.

So I applaud the President and the Republican leadership for taking these first tentative, yet wobbly steps. And I hope they find their stride. The continuing resolution, however, is a perfect example of the old joke: every silver lining has a cloud. The jubilation over the continuing resolution masks a much deeper problem.

As far as I can tell, there has been no movement on the part of the Republican Majority to accommodate any of the Democratic concerns over the budget—especially over the \$245 billion tax cut for the wealthy. That monstrosity looms larger with each passing day.

Because of the Republican arm twisting on the tax cut, I see no give and take on medicare or medicaid. I see no willingness to bargain over the harsh hits on rural America. At the White House, Speaker Gingrich restated his sound bite that he is willing to cooperate, but will not compromise.

I also trust that my Republican colleagues are honest with the American people. A government shutdown may be some Members'

idea of good political theater. Closing up shop, however, can mean more than turning away tourists at the Washington Monument. The real showdown is not on October 1st. High noon comes when Congress must raise the debt ceiling in late October. Even Senator Dole said, and I quote, "That's when it really gets dicey. That's the date to keep your eye on."

Some of the Republicans want to play budgetary "chicken" with the debt ceiling. At last count, 160 House Republicans had signed letters to the President and the Senate and House leaders vowing to oppose raising the debt limit unless the President caves in to their budget extortion.

Holding the debt limit hostage could force a default on U.S. Treasury securities for the first time in history. The Congressional Budget Office warns, and I quote, "even a temporary default—that is a few days' delay in the Government's ability to meet its obligations—could have serious repercussions in the financial markets. Those repercussions include a permanent increase in Federal borrowing cost relative to yields on other securities as investors realize that Treasury instruments are not immune to default." Such short-term foolishness will have serious long-term consequences.

And what about Social Security? Failure to raise the debt ceiling could prevent checks from being issued to millions of America's seniors, survivors and disabled.

In conclusion, I don't believe that we should be rolling bandages for a train wreck that doesn't have to, and shouldn't happen. I refuse to accept that verdict. Instead, we should be negotiating in earnest on this budget. Of course, that is much harder than shutting the Government down, but that is what the American people expect of their leaders.

Mr. Chairman, I am looking forward to the testimony of our witnesses today.

Chairman KASICH. Thank you, Senator.
Congressman SABO.

OPENING STATEMENT OF CONGRESSMAN SABO

Mr. SABO. Thank you, Mr. Chairman.

I welcome Budget Director Rivlin and Assistant Attorney General Dellinger. Welcome to the committee.

Mr. Chairman, I am not sure what we are going to accomplish. We have a problem that should be solved, not that difficult to solve. It is clear that not all appropriations bills will be passed by October 1st. Others may be passed, but run into a veto. That is nothing new. Congress has passed continuing resolutions to keep the Government functioning, many times and we should. It is nothing drastic or something that we have not done before. The process works and we should simply do it.

Mr. Chairman, I would suggest that those people who want to play a game of chicken with the debt limit are making a serious mistake. In my judgment, that is the ultimate irresponsibility. We have a responsibility and an obligation, as members, at a time when we clearly have major differences of opinion on major policy issues, to extend the debt ceiling so that we do not negate and fail to pay a government debt when it is due. If we fail to pass it, it

would be the ultimate irresponsibility on the part of the Congress. It is really the Congress' choice.

Clearly, the reconciliation bill will be one that has major controversy attached to it. Clearly, a resolution of that disagreement will not be simple or easy. To shut down the Government for some type of pretended leverage while those negotiations go on I think would just be totally wrong.

I look forward to our witnesses today. But the options are really with Congress, and the Congress should not be playing games with the people who work for the Federal Government or are dependent on the Federal Government or for those people who have financed our operations. I would only suggest to the majority that inherent in their budget resolution is an increase in the requirement for an increase in the debt ceiling. So we should get on with our business in a responsible fashion and then eventually do the negotiations that bring an end to this session.

I ask unanimous consent that my entire statement be made a part of the record. Thank you, Mr. Chairman.

Chairman KASICH. Without objection.

[The prepared statement of Mr. Sabo follows:

OPENING STATEMENT OF CONGRESSMAN MARTIN O. SABO

Mr. Chairman: I'd first like to welcome Budget Director Alice Rivlin and Assistant Attorney General Walter Dellinger to today's hearing. I am sure they will lend us their valuable insight and advice as we deal with important issues surrounding the budget process. Welcome to you both.

Throughout this budget process, I have profoundly disagreed with the extreme positions staked out by the new Republican majority. You have championed large tax breaks for the affluent, at the expense of the most vulnerable Americans.

But I am just as concerned that in order to enact your extreme agenda, the majority has expressed a willingness to engage in irresponsible tactics that could inflict severe and irreparable harm upon the credibility of the United States.

Although, "shutting down the Federal Government" and denying an extension of the Federal debt limit may make for good sound bites, they are, by almost all accounts, unsound policy. Ultimately, these tactics will do little to reduce budget deficits. They amount to playing budget politics with the credibility of the United States.

CONTINUING RESOLUTIONS

In the past, when work on spending bills has not been completed by October 1, Congress has enacted continuing resolutions to provide interim funding until any disagreements could be resolved. Even when funding gaps have occurred, government services have been interrupted for only short periods of time. Continuing resolutions are a common and responsible way to keep the Government operating until we can enact spending policies.

In fact, in 13 of the last 15 years, not all spending bills were completed and we have needed continuing resolutions to maintain Federal activities. In 11 of those years the continuing resolution was enacted on or before October 1. There is no reason that can't be done again this year while we work to resolve our internal political differences.

DEBT LIMIT EXTENSIONS

Far more problematic is the misguided attempt by some in the majority to deny an extension of the Federal debt limit. Action of this sort would be an unprecedented act of irresponsibility with far harsher consequences than many of us have yet contemplated. In the end, not extending the debt limit would do nothing to reduce deficits or increase revenues. Rather, it would make it impossible for the Government to pay its bills and it would increase future Federal borrowing costs.

The United States has never defaulted on any of its financial obligations. Any default, even if temporary, would shake world financial markets and have consequences for years to come.

We all are interested in reducing budget deficits and making the Federal Government more efficient. But these sorts of changes are achieved by legislative decisions, not by refusing to pay the Government's bills.

I would remind my Republican colleagues that when you voted to pass your budget this year, you also voted to increase the national debt. So, posing as fiscal conservatives by denying a debt limit extension is an empty political act. It will do nothing to reduce the deficit and could do irreparable harm to our Nation.

Chairman Kasich, I applaud your intentions to go along with a short-term debt limit extension. I urge all of my colleagues that as we work out our differences over the budget this year, we act responsibly and not hold the Government's honest creditors hostage to our political differences.

Chairman KASICH. Well, I think we will go immediately to Dr. Rivlin and then to you, Mr. Dellinger. If you folks could summarize as best you can, that would be very much appreciated.

Dr. Rivlin.

STATEMENT OF ALICE M. RIVLIN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Dr. RIVLIN. Thank you very much. I am pleased to be here, Mr. Chairman, and I am pleased both with the progress that has been made in discussing what would happen if we do not have a full set of appropriations bills signed by October 1, and by the fact that Congress is working very hard on those bills. I think many of the members who are not here this morning are, in fact, in conferences and meetings that will speed the passage of those bills, and it is encouraging that we are having meeting of the minds on the necessity for a continuing resolution and a possible short-term extension of the debt ceiling.

As you know, Washington is awash in rumors and speculation about the possibility of a government shutdown. With that backdrop, let me state as clearly as I can: The President believes strongly that we should avoid a shutdown or other extraordinary disruption of the people's business. We should arrive at budgetary decisions in an orderly fashion, not in a crisis atmosphere of our own making.

The President has urged Congress to send him, by October 1, all 13 appropriations bills, preferably in a form that he can sign. If Congress needs more time to complete its work, the President has said he wants to work with Congress on a short-term continuing resolution to avoid a lapse in funding—a continuing resolution that is free of controversial riders and does not prejudice the ongoing debate over budget priorities.

In addition, the President, the Secretary of the Treasury, and others have urged Congress to act responsibly and increase the debt limit in a timely manner. Failure to do so could disrupt Treasury borrowing, generate uncertainty in the financial markets about the Government's fiscal operations, and raise interest rates for all Americans. We must not play games with America's financial integrity.

Nevertheless, you asked that I discuss a potential funding hiatus and answer questions about a possible delay in increasing the public debt limit. and I will address both of those issues.

As you know, departments and agencies will experience a lapse in their legal authority to enter into certain obligations if, first, the

appropriations bills that fund their operations are not enacted by October 1, and, second, the President and Congress have not enacted a continuing resolution. Under these circumstances, departments and agencies would be unable to provide important public services or employ Federal workers.

By contrast, failure to increase the statutory limit on the public debt—often called the debt ceiling—presents a very different problem. If the Government reaches the debt ceiling, the Treasury Department will lack authority to borrow additional funds. Currently, the Treasury estimates the Government will reach its debt ceiling at the end of October. When monthly tax receipts are insufficient to cover outlays, the Government's inability to borrow would produce a cash shortfall, leaving the Treasury with insufficient cash to pay the Government's bills.

I strongly support the view, expressed by the Secretary of the Treasury, that Congress must move promptly to raise the debt ceiling. I would note, as Secretary Rubin has also noted, that the congressional budget resolution calls for an increase in the debt ceiling to \$5.5 trillion. As we continue to debate how best to balance the budget, we should separate that issue from the task of raising the debt ceiling. It would be irresponsible to bring the Nation to the edge of default, with the financial chaos that would ensue, in order to force a particular result in the budget debate.

The United States has never defaulted on its obligations, and such a default has always been considered unthinkable. The Administration trusts that Congress will protect the Nation's financial integrity by raising the debt ceiling, as Secretary Rubin has requested.

The issue of more immediate concern, of course, is the possible lapse in appropriations authority.

Appropriations laws provide departments and agencies with legal authority to enter into obligations to provide services, employ workers, and enter into contracts. In cases in which Congress passes appropriations for programs, projects, and activities each year, a failure to do so by October 1 would cause a lapse in legal authority to enter into obligations. No employee can obligate the Government in advance of appropriations, except as authorized by law—as, for example, in the case of emergencies involving the safety of human life or the protection of property. Mr. Dellinger will go into the law in greater detail.

A lapse in appropriations authority on October 1 could have far-reaching and deleterious consequences. To be sure, the particular implications would depend on which appropriations bills were not enacted. But a few examples will serve to illustrate the point.

Without an appropriation, the Government would not issue new Food Stamps beginning October 1. The Government would not send veterans compensation benefit checks on November 1st. The Government would lack new funding for food packages for women, infants, and children. Except in emergency situations, the Government would not issue passports. National parks and Smithsonian-operated museums would close. And, environmental regulation, enforcement, research, and grant programs would cease, as would rural development and farm credit programs.

During a lapse in appropriations authority, agencies would lack the authority to continue to employ Federal workers, except as authorized by law. Thus, the Federal Government would have to furlough large numbers of workers. In the absence of any appropriations or continuing resolution, it would have to furlough over 800,000 workers.

Meanwhile, other workers who are exempted from furlough in order to provide emergency services, such as air traffic controllers or personnel in veterans hospitals, would be working without pay, although they would be paid later.

The Administration, from the President on down, is concerned about the disruptive effects that a government shutdown would have on employees and their families, as well as on those who receive government services. These workers do the people's business every day, and they are in the forefront of our efforts to reinvent government. They should not be used as pawns as we try to work through the difficult budget decisions that lie before us.

In addition, a shutdown of any size or duration would generate costs, including those of closing and securing Federal buildings and facilities, and paying penalties and other charges associated with the unanticipated cessation of contractual liabilities or late payments. At the same time, the productivity of Federal employees surely would fall even after the shutdown ends; along with their normal responsibilities, they would have to perform the tasks left undone during the shutdown.

Despite our strong hopes of avoiding a shutdown, we obviously must prepare for all contingencies. On August 22nd, I asked the heads of all executive departments and agencies to send OMB updated contingency plans to deal with a funding hiatus.

We have received plans from virtually all agencies except the Department of Defense, on which we had an extensive and detailed briefing. Some of these plans have come in only recently, and we have not yet completed our reviews. Specifically, we want to make sure that all the plans are complete, and that they are consistent with the Attorney General's 1981 opinion, and with the August 16th opinion of Assistant Attorney General Dellinger that speaks specifically to the 1990 amendment to the Anti-Deficiency Act. Once we have completed our reviews, we will provide you with copies of all the plans.

The mechanics of a shutdown are straightforward. If neither an appropriations bill nor a continuing resolution is enacted by October 1, or if an enacted continuing resolution has expired, then on the first day in which funding has lapsed, OMB will instruct agencies to implement their shutdown plans and actually begin the process of shutting down agency operations. Of course, agencies will need some time to implement these plans, and complications will occur because, this year, October 1 falls on a Sunday.

At the end of the shutdown, the process works the same way in reverse. On the day the President actually signs an appropriations bill or continuing resolution, we will instruct the agencies that they are to resume normal operations. To the extent we can, we try to advise agencies in advance on both scores, if it seems reasonably certain that action is about to be taken.

If necessary, the Administration is prepared to handle a shutdown on October 1, or at a later date. But a shutdown will needlessly deprive our citizens of important services, hurt Federal employees, and cost money.

I urge Congress to send the President all 13 appropriations bills, in an acceptable form, before October 1. If not, I hope we can agree on a continuing resolution that does not contain controversial riders or prejudice the outcome of the debate.

Thank you, Mr. Chairman.

Chairman KASICH. Thank you, Director.

[The prepared statement of Dr. Rivlin follows:]

TESTIMONY OF
ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET
BEFORE A JOINT HEARING OF THE
SENATE BUDGET COMMITTEE
AND THE
HOUSE BUDGET COMMITTEE

September 19, 1995

Chairman Domenici, Chairman Kasich, Members of the two Committees, thank you for the opportunity to discuss with you today the implications of a hiatus in appropriations authority and of the federal government reaching the statutory limit on the public debt.

As you know, Washington is awash in rumors and speculation about a possible government shutdown, whether at the October 1 start of the fiscal year or later this fall in connection with the debt limit. With that backdrop, let me state as clearly as I can: The President believes strongly that we should avoid a shutdown or other extraordinary disruption of the people's business. We should arrive at our budgetary decisions in an orderly fashion, not in a crisis atmosphere of our own making.

The President has urged that Congress send him, by October 1, all 13 appropriations bills, preferably in a form that he can sign. If Congress needs more time to complete its work, the President has said he wants to work with Congress on a short-term continuing resolution (CR) to avoid a lapse in funding -- that is free of controversial riders and that does not prejudice the ongoing debate over budget priorities.

In addition, the President, Secretary of the Treasury, and others have urged Congress to act responsibly and increase the debt limit in a timely manner. Failure to do so could disrupt Treasury borrowing, generate uncertainty in the financial markets about the Government's fiscal operations, and raise interest rates for all Americans. We must not play games with America's financial integrity.

Nevertheless, you asked that I discuss a potential funding hiatus and to expect questions about a delay in increasing the public debt limit. I will quickly contrast the two issues, and then turn to the more immediate problem of a potential lapse in appropriations authority.

Appropriations Hiatus vs. Debt Ceiling

As you know, departments and agencies will experience a lapse in their legal authority to enter into certain obligations if (1) the appropriations bills that fund their operations are not enacted by October 1, and (2) the President and Congress have not enacted a continuing resolution. Under these circumstances, departments and agencies would be unable to provide important public services or employ federal workers.

By contrast, a failure to increase the statutory limit on the public debt -- often called the "debt ceiling" -- presents a very different problem. If the government reaches the debt ceiling, the Treasury Department will lack authority to borrow additional funds. Currently, the Treasury estimates that the government will reach its debt ceiling at the end of October. When monthly tax receipts are insufficient to cover outlays, the government's inability to borrow would produce a cash shortfall, leaving the Treasury with insufficient cash to pay the government's bills.

I strongly support the view, expressed by the Secretary of the Treasury, that Congress must now move promptly to raise the debt ceiling. I would note, as Secretary Rubin has also noted, that the Congressional Budget Resolution calls for an increase in the debt ceiling to \$5.5 trillion. As we continue to debate how best to balance the budget, we should separate that issue from the task of raising the debt ceiling. It makes no sense -- indeed, it would be irresponsible -- to bring the nation to the edge of default, with the financial chaos that could ensue, in order to force a particular result from the budget debate.

The United States has never defaulted on its obligations, and such a default has always been considered unthinkable. The Administration trusts that Congress will protect the nation's financial integrity by raising the debt ceiling as Secretary Rubin has requested.

Lapse in appropriations authority

The issue of more immediate concern is the possible lapse in appropriations authority.

Appropriations laws provide departments and agencies with legal authority to enter into obligations to provide services, employ workers, and enter into contracts. In cases in which Congress passes appropriations for programs, projects, and activities each year, a failure to do so by October 1 would cause a lapse in legal authority to enter into obligations.

No employee can obligate the government in advance of appropriations, except as authorized by law -- as, for example, in the case of "emergencies involving the safety of human life or the protection of property." (Other exceptions include the authority to enter into obligations which enable the President to perform constitutional duties; the authority to employ workers involved in implementing a shutdown; and the authority to employ workers to administer programs with permanent or multi-year appropriations authority.)

The Costs -- Human and Financial

A lapse in appropriations authority on October 1 could have far-reaching and deleterious consequences. To be sure, the particular implications would depend on which appropriations bills are not enacted. Here are a few examples of the possible consequences:

- The government would issue no new food stamps beginning October 1;
- The government would send no veterans compensation benefit checks on November 1;
- The government would lack new funding for food packages for women, infants, and children (WIC);
- Except in emergency situations, the government would issue no passports;
- National Parks and Smithsonian-operated museums would close; and
- Environmental regulation, enforcement, research, and grant programs would cease, as would rural development and farm credit programs.

During a lapse in appropriations authority, agencies would lack authority to continue to employ federal workers, except as authorized by law. Thus, the government might have to furlough large numbers of workers. In the absence of any appropriations bills or a CR, it would have to furlough over 800,000 workers. Meanwhile, other workers who are exempted from furlough in order to provide emergency services -- such as air traffic controllers and personnel in veterans' hospitals -- would be working without pay (though they would be paid later).

The Administration -- from the President on down -- is concerned about the disruptive effects that a government shutdown would have on employees and their families. These workers do the

peoples' business every day and are in the forefront of our efforts to reinvent government. They should not be used as pawns as we try to work through the difficult budget decisions that lie before us.

In addition, a shutdown of any size or duration would generate costs, including those of closing and securing federal buildings and facilities, and the payment of penalties and other charges associated with the unanticipated cessation of contractual liabilities. At the same time, the productivity of federal employees surely would fall even after a shutdown ends; along with their normal responsibilities, they would have to perform the tasks left undone during the shutdown.

Preparations

Despite our strong hopes of avoiding a shutdown, we obviously must prepare for all contingencies. On August 22, I asked the heads of all executive departments and agencies to send to OMB updated contingency plans to deal with a funding hiatus.

We have received plans from virtually all agencies except the Department of Defense, but some have come in recently and we have not completed our reviews. Specifically, we want to make sure that all the plans are complete, and that they are consistent with the Attorney General's 1981 opinion, and with the August 16, 1995 opinion of Assistant Attorney General Dellinger that speaks specifically to the 1990 amendment to the antideficiency act. Once we have completed our reviews, we will provide you with copies of all of the plans.

The mechanics of a shutdown are straightforward. If neither an appropriation bill nor a CR is enacted by October 1, or if an enacted CR has expired, then on the first day in which funding has lapsed, OMB will instruct agencies to implement their shutdown plans and actually begin the process of shutting down agency operations. Of course, agencies will need some time to actually implement their plans, and complications will occur because, this year, October 1 falls on a Sunday.

At the end of a shutdown, the process works the same way in reverse. On the day that the President will actually sign an appropriation bill or CR, we will instruct the agencies that they are to resume normal operations. To the extent we can, we try to advise agencies in advance on both scores -- i.e., if it appears reasonably certain that the Congress will be presenting the President a CR he can sign on the following day, we will instruct the agencies to prepare to continue (or resume) normal operations on that day.

Conclusion

If necessary, the Administration is prepared to handle a shutdown on October 1. But, a shutdown will needlessly deprive our citizens of important services, hurt federal employees, and cost money.

I urge Congress to send the President all 13 appropriations bills, in an acceptable form, before October 1. If not, I hope we can agree on a continuing resolution that does not contain controversial riders or prejudice the outcome of the debate.

Chairman KASICH. MR. DELLINGER?

STATEMENT OF WALTER DELLINGER, ASSISTANT ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Mr. DELLINGER. Mr. Chairman, thank you. I will summarize my testimony. Let me begin by saying how pleased the Department of Justice is that you are having this hearing, which gives us an opportunity to put forward what our interpretations are of laws in this area.

One of my colleagues noted to me that this is unusually an area in which you run out of law well before you run out of questions. It is an extremely difficult area, but it is one that we think is important to have a widespread discussion about what the law is in advance of facing one of these situations, because it is very important that the American people have confidence in the basic legitimacy of the Government of the United States and in the legality of its continued functioning and operation, so we hope to be quite clear about that.

Our basic approach has been to try to have every agency of the Government in good-faith try to apply the legal standards that have evolved in this area. We want to make it clear to you today that we would welcome any thoughts you have about the submissions we have made. I believe that members of the House and Senate have been provided copies of the memorandum that was prepared by my office for Dr. Rivlin on August 16th of this year. Our testimony is available and we would be very pleased to have the benefit of any of your thoughts about how you believe the legal standards apply in this area, and we will take those thoughts seriously into account.

Let me just begin by summarizing the law in this area and begin with the foundation point, which is the Constitution. It is one of the less known and less frequently quoted provisions in the Constitution, but I think this is a fundamentally important provision. It says no money shall be drawn from the Treasury but in consequence of appropriations made by law.

It is not a very heralding provision, but it is certainly one for which patriots fought and died, because it establishes a very important principle that the people's representatives in the legislature must approve before one dime can ever be taken out of the United States Treasury and spent, and that is a principle in the long struggles between parliaments and kings, between legislators and executives, a principle that was worth fighting for to make sure that the representatives elected by the people made that determination before anyone was authorized to take money out of the

treasury and spend that money. So it is really the Constitution that stands behind the basic concepts that we will be dealing with.

Therefore, if there is a lapse in appropriations on October 1st or at the end of the period stated in a continuing resolution, then government may not write checks where there are no appropriations by the bodies of Congress signed into law by the President, so that no employees can be paid, contract payments cannot be made, rent payments cannot be made by the Federal Government, in cases where necessary appropriations are lacking.

Now, that is not the end of the story, because the Government of the United States does not operate on a daily pay-as-you-go basis. It is still possible, in the absence of an appropriation under the Constitution, for officials to go ahead and make obligations for future payment. Were it not for the Anti-Deficiency Act, there would thus be no legal limit on the authority of the executive branch to make promises to pay in the future for services that are rendered now by employees or for goods and services that are provided by outsiders.

So long as suppliers, contractors and employees were willing to contract with the Federal Government on the basis of a promise to pay in the future, then the Government could continue but for the limitations embodied in the Anti-Deficiency Act, which really plays an important backup role in protecting Congress' power over the purse. The Anti-Deficiency Act provides that no Federal official is permitted to enter into a contract or to otherwise obligate funds before an appropriations measure has been enacted.

Now, if that were, without any exception, an across-the-board barrier to entering into obligations, then it would also bring all of the functions of the Federal Government to a halt. However, the Anti-Deficiency Act is not an absolute across-the-board bar, and what I will discuss briefly with you are the half dozen major exceptions to the application of the Anti-Deficiency Act that permit some operations of the Government to continue notwithstanding even a general lapse in appropriations.

I think it is very important to note that the exceptions that exist do not necessarily reflect any considered judgment about what functions are important or essential. These are exceptions that arise from a variety of different causes, and one of the consequences is that sometimes fairly insignificant functions can continue operating while other critically important activities must be curtailed.

The first of the six—and I will go through these quickly—is the one you are most familiar with, and that is if there are some multi-year, permanent or indefinite appropriations like the Social Security Fund, and where that is the case, those monies may continue to be spent.

Second, there are circumstances in which employees do not incur any obligation by continuing to work. Those few employees who are paid by virtue of holding an office like presidential appointees who are confirmed by the Senate do not bring about an obligation to be paid by coming to work, but merely by holding the office. So there is no obligation created by those individuals coming to work and they are therefore outside the Anti-Deficiency Act.

The most important exception, the one that we have grappled with the most and that prior Attorneys General and prior opinions of the Office of Legal Counsel have had to deal with is the emergency exception. It is the principal exception that will occupy our time and attention and I think your comments. That is, the Anti-Deficiency Act does allow government officials to go ahead and promise to pay, to enter into obligations, to contract for obligations without an appropriation having been made in what are really emergencies—what were defined originally in the 19th century versions of this bill as emergency exceptions—that is, those that involve the safety of human life or the protection of property.

The language is rather bracing, but it doesn't come without a history. It comes with a very long history. And while on its own it does not provide a lot of guidance, what we have done in consultation with the Office of Management and Budget and by consulting prior opinions is really look at what the prior practice has been.

Our best guide to try to come up with legal guidance in this area has been to look at first the prior opinions by Attorney General Civiletti and others, and then to look at the contingency planning that was made during the administrations of President Carter, President Reagan and President Bush and by this Administration, and to see how those plans have played out over time that have come to give us some sense and understanding of what the legal standards are.

It was necessary for us to take account of a 1990 amendment that stated that the emergency exception did not include permission to continue just ongoing regular functions of the Government, the suspension of which would not imminently threaten the safety of human life and protection of property. In taking that into account, we now believe that the standard must be that for a function to continue under this exception, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised in some significant degree by a delay in the performance of the function in question.

To give you a sense of how we looked at prior practice, let me give you one very good example. When you think of an emergency exception, the first thing that would come to your mind is air traffic controllers. The airways are full of commercial aviation carrying tens of thousands of passengers a day, and without the Federal employees who are air traffic controllers, there would obviously be a severe risk to public safety.

One could, however, say there is no threat to public safety if you simply shut down all the airports and ceased all air transportation and air traffic, then it would not be necessary for the protection of human life to continue to obligate payments to air traffic controllers. To resolve the question of whether you assume that continuation of air traffic or other aspects of the private economy, we really look at prior practice.

What we found I think is, over various Administrations over time, it has become a settled practice to assume that the major segments of the private economy need production, air traffic will continue, and therefore in order to protect safety, you need to have air traffic controllers, FDA, Department of Agriculture meat inspectors

at their stations doing their jobs, and that question, which the text of the act may have left open, is really answered for us by history.

There is one point that is very important to note, and that is that while this exception permits officials of the executive branch to continue to obligate for these services, it does not allow you to actually issue a paycheck to any of these employees when there is not yet an appropriation. So these employees may not receive an actual payment of money from the Treasury unless and until an appropriation is enacted.

Therefore, during an extended lapse of appropriations, the Nation would be depending upon the ability and the willingness of air traffic controllers, prison guards, law enforcement agents and others to continue working even though they would not be receiving any paychecks until appropriations finally were enacted.

In the interest of time, Mr. Chairman, I will just mention the final exceptions, which are those obligations that are expressly authorized by law like the Department of Defense's food and forage authority and those obligations that we believe are necessarily implied in law, that is, where Congress has appropriated on a continuing basis the funding of Social Security and requires by law those checks to be sent out. We assume that you necessarily incur the obligation of those employees who are necessary to process and send out those funds.

Finally and the last exception I will mention is the President's core constitutional duties. It is the case that the Constitution itself authorizes the President to take action as commander-in-chief, to make treaties, and to engage in those other essential functions of national defense and foreign relations.

In those areas, under the opinion of Attorney General Civiletti, we believe that there is authority on behalf of the President to continue those core constitutional functions, though caution should be exercised, and those who have written prior opinions are most comfortable with the President doing so, and where Congress has also authorized the function. In any event, those should be undertaken with the policies of the Anti-Deficiency Act in mind.

Mr. Chairman, I will conclude at this point, because I know that you will have questions for Director Rivlin and for me, and we would be happy to answer those questions as best we can and take any comments you have on this now or after you have had a chance to study these submissions.

Thank you.

Chairman KASICH. Thank you.

[The prepared statement of Mr. Dellinger follows:]



Washington, D. C. 20530

TESTIMONY OF
WALTER DELLINGER
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE A JOINT HEARING OF THE
SENATE BUDGET COMMITTEE
and the
HOUSE BUDGET COMMITTEE

September 19, 1995

Chairman Domenici and Chairman Kasich, Members of the Committees:

I appreciate the invitation to appear today before the Budget Committees from both Houses to discuss with you the executive branch's interpretation of the laws providing for government operations in the event of a lapse in appropriations. The Department of Justice welcomes this opportunity to have a full public discussion of the conclusions we have reached so far. In addition to answering your questions, we would very much like to have the benefit of your thinking, either this morning or after you have had an opportunity to consider further the submissions we have made. Any thoughts you have about the proper resolution of these often difficult legal questions will be most welcome by the Department of Justice and will be given careful attention as we continue the process of elaborating the applicable legal standards.

In recent weeks, the Office of Legal Counsel has been concentrating on the legal issues associated with a lapse of appropriations, and this is the focus of my remarks today. In the course of our analysis, we have reviewed and been guided by the 1981 opinion by Attorney General Civiletti interpreting the Antideficiency Act, which has formed the basis for contingency planning by the administrations of President Reagan and President Bush and by this administration. On August 16, 1995, I issued an Office of Legal Counsel memorandum reaffirming the conclusions of the 1981 Civiletti opinion and assessing the consequences of a 1990 amendment to the Antideficiency. Let me briefly sketch our interpretation of the law.

INTRODUCTION

Our starting point in addressing these questions is the Constitution itself. One of the Constitution's least heralded, but most fundamentally important, provisions is found in Article I, § 9. It reads:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

This provision expresses what is commonly known as Congress's "power of the purse." It is no exaggeration to say that it is a principle for which patriots fought and died, and it means what it says: without authorization by the vote of the people's representatives in Congress, not one dime can be spent from the United States Treasury.

Therefore, one consequence of a lapse in appropriations is mandated by the Constitution -- no one can be paid any money from the Treasury when the necessary appropriations bill has not been enacted. Should we reach October 1 without all appropriations bills having been signed into law, and no continuing resolution in place, employees cannot be paid, contract payments cannot be made, government rents cannot be paid, in all cases where the necessary appropriations bill is lacking.

If the government operated exclusively on a daily pay-as-you-go basis, a lapse in appropriations would necessarily mean that any and all activities of the government that required disbursements from the Treasury would just come to a halt. The government is not a daily pay-as-you-go operation, however. Consistent with Article I, § 9, it would be possible for the government to make contracts with individuals and firms for goods and services even when it currently lacked the funds to pay off those contracts. So long as suppliers, contractors and employees were willing to contract with the federal government on the basis of a promise to pay in the future, activities of government could continue on that basis -- but for the limitations embodied in the Antideficiency Act.

The Antideficiency Act provides that no federal official is permitted to contract or obligate funds before an appropriations measure has been enacted. By preventing the federal government from even obligating itself to pay for goods or services before Congress has made an appropriation, the Antideficiency Act reinforces the constitutional principle that the Congress must decide how much money to spend and how to spend it.

If the Antideficiency Act were an absolute bar on obligating funds in advance of appropriations, then the results would be just as I have described -- the entire portion of the federal government that requires annual appropriations would come to a halt. Congress, however, has not made the Antideficiency Act an absolute bar on obligating funds in advance of appropriations. It has instead provided for certain exceptions. For the functions covered by these exceptions the government may continue to obligate funds even though appropriations bills have not been enacted.

The exceptions to the Antideficiency Act do not necessarily reflect any considered judgment by the Congress as to which activities are crucial or essential and which are not. Instead, for reasons I will elaborate, there are a variety of different exceptions that permit some very discretionary and perhaps even insignificant functions of government to continue operating, while other, critically important activities must be curtailed.

A. EXCEPTIONS TO THE ANTIDEFICIENCY ACT

1. Multi-year, Permanent, and Indefinite Appropriations

One initial explanation for a great deal of continuing functions of the federal government is that the Antideficiency Act does not by its own terms apply to a substantial portion of those functions at all. The Act only prohibits incurring obligations in advance of appropriations, and a majority of current government expenditures occur under multi-year, permanent or indefinite appropriations that do not lapse on the expiration of the current fiscal year. Some examples include social security payments, medicare payments and interest payments on the national debt.

Some salaries are paid out of permanent appropriations, too. Sometimes this occurs because salaries are paid out of a fund that collects fees from users. An example would be the lawyers in the Justice Department's antitrust division whose salaries are allocated to the account that collects merger pre-clearance fees under the Hart-Scott-Rodino law. Sometimes it occurs because Congress has simply enacted an appropriations measure that continues for a period of years or even indefinitely. An example would be the salaries of members of Congress.

In all these cases, obligations may be made and money may be withdrawn from the treasury to pay the recipients of these obligations. The Constitution is not violated because the sums in question are drawn from the Treasury "in Consequence of Appropriations made by Law." Congress has in fact enacted an appropriation, and the Antideficiency Act is not implicated because the expenditures or obligations are not taking place or being incurred in advance of an appropriation.

2. Employees Whose Continuing Work Does Not Incur Any Obligation

Some employees of the federal government operate under terms that obligate the federal government to pay them so long as they occupy a certain post or position, whether or not they are performing services. Examples include certain foreign nationals who are employed by the State Department in various localities where local labor laws create such terms. Certain high-ranking members of the executive branch who have been confirmed by the Senate, such as cabinet secretaries, provide other examples. In addition, the Constitution forbids the salary of the President or of Article III judges to be reduced while they are in office. The obligation to pay the salaries of these officeholders is created by the Constitution without regard to whether they actually perform services.

In these cases, the authority to incur the obligation to pay such individuals is contained in the Constitution or in the legislation that creates or authorizes such arrangements to be entered into in the first place. Furthermore, having such individuals actually perform

services during a lapse in appropriations does not incur any additional obligation -- the obligation already exists as a result of the original hiring, appointing, or electing of the individual. As a result, the Antideficiency Act is not violated if those individuals continue to work. Bear in mind always that the fact that monies are not appropriated to pay them means, of course, that they do not actually receive pay until funds are appropriated.

3. The Emergency Exception

The exception that probably explains the greatest number of employees who will not be furloughed during a lapse in appropriations is expressly stated in the statute. The Antideficiency Act, in § 1342, authorizes federal officials to "employ personal services" in "emergencies involving the safety of human life or the protection of property." In 1990 this provision was amended to clarify its scope, so that the statute now expressly states that the emergencies it refers to "do[] not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."

This articulation is consistent with the advice that the Department of Justice had been giving since Attorney General Civiletti's 1981 opinion. The interpretations of the Department of Justice and the settled practice of the executive branch indicate that a function may be continued under the emergency exception if two conditions are met. First, there must bear some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question.

In applying the exception relating to property and life, it is necessary to make certain assumptions. For example, the continued functioning of FAA air traffic controllers is necessary only if the nation's airports remained open and air transportation were to continue. In this area, as in others, we have looked to past practice as an interpretive guide. With respect to any short lapse in appropriations, the consistent practice of past administrations has been to assume the continued operation of the private economy. Consequently, air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of § 1342. We have not determined whether this assumption would continue to be justified if a lapse in appropriations extended beyond a short period.

Because the Antideficiency Act authorizes federal officials to "employ personal services" to continue functions encompassed within the emergency exception, obligations to pay compensation may be given to those federal employees who perform emergency functions during an appropriations lapse. It is important to note, however, that these employees may not receive an actual payment of money from the Treasury unless and until

an appropriation is enacted. During an extended lapse in appropriations, the nation would be depending upon ability and willingness of prison guards, border officials, law enforcement agents, air traffic controllers and others to continue working even though they would not be receiving pay checks.

4. Obligations Expressly Authorized by Law

In some cases, Congress has passed other legislation that authorizes the government to enter into obligations in advance of appropriations. Attorney General Civiletti's opinion concluded that such authorization cannot be derived from the sort of general authorizing statute Congress necessarily enacts when creating a government program. Rather, to be considered "expressly authorized," a statute must clearly authorize the incursion of obligations regardless of a lapse in appropriations. An example of such authority is the statute that permits the military to incur obligations on behalf of the United States in the absence of appropriations "for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies." 41 U.S.C. § 11(a).

5. Obligations Necessarily Implied by Law

Attorney General Civiletti's opinion also recognized instances where the specific terms of a statute imposing duties upon or vesting authority in federal officers and employees lead necessarily to an inference that such officers or employees are authorized to incur obligations in advance of appropriations. It is on this basis, for example, that Attorney General Civiletti concluded that agencies may incur obligations in order to conduct an orderly termination of the unauthorized activities of the agency. The Attorney General interpreted the Antideficiency Act to require nonexcepted functions to terminate. He then reasoned that because it would in fact be impossible to terminate functions without incurring any obligations at all and because a statute that imposes a duty impliedly confers the authority to fulfill that duty, the Antideficiency Act itself requires, by necessary implication, federal officers to incur obligations associated with an orderly shutdown.

A second kind of necessarily implied authorization arises in situations where the government has a duty to continue an activity, but the administrative personnel necessary to carry forward that activity or function are funded through appropriations that have lapsed. The Civiletti opinion concluded that in such a case, Congress had impliedly authorized the staffing necessary to maintain the activity. The example he used was of the personnel in the Social Security Administration necessary to maintain the activity of disbursing social security benefits to eligible individuals.

6. The President's Core Constitutional Duties

The Constitution itself vests certain duties and powers in each of the three branches. As to the executive branch, the President's constitutional powers include the pardon power, the commander in chief power, the foreign affairs powers, the power to make recommendations to Congress, and the power to demand opinions in writing of the heads of departments. Attorney General Civiletti did not take an unduly broad view of this power. For example, he did not reason that, because the Constitution vests "the executive Power" in the President and charges him to "take Care that the Laws be faithfully executed," the President is "authorized by law" to carry out all statutorily vested executive power. Attorney General Civiletti did, however, read the Antideficiency Act as leaving with the President the authority to make "those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers." Obligations incurred in undertaking these functions are "authorized by law"; *viz.*, the Constitution.

For all three branches, but especially for the executive branch, the specific functions that they are constitutionally entitled to undertake will depend on the facts and circumstances surrounding the proposed activity. Whether a particular function is necessarily incident to the exercise of the President's foreign affairs power, for example, will depend upon the factual setting. Attorney General Civiletti recognized that where the President seeks to take action that is grounded in his constitutional authority, his assertion of authority is buttressed in those cases in which there are acts of Congress authorizing the activity asserted. He also observed that valid assertions of the President's constitutional authority are typically marked by both urgency and necessity.

B. NONEXCEPTED FUNCTIONS

It bears emphasizing that the Antideficiency Act mandates the termination of all functions other than the excepted functions set out above. As I have indicated, the functions that the Antideficiency Act allows to continue during an appropriations lapse are not determined by whether a particular activity is important or "essential" in some general sense. As a result, a number of functions that are, by any conception, important and essential must nevertheless terminate during a lapse in appropriations. In contrast, other functions that, if assessed in order of importance, would be unlikely to rank higher than many nonexcepted functions would nevertheless continue.

C. THE DEBT CEILING

Finally, as Director Rivlin outlined, the situation in which neither an appropriations bill nor a continuing resolution has been enacted is entirely different from the situation in which the failure to raise the debt ceiling deprives the Treasury of authority to issue more debt as defined in the statutory debt ceiling, 31 U.S.C. § 3101(b). Among those differences

is this: In the case of a lapse of appropriations, Art 1, § 9 of the Constitution prevents the Treasury from honoring any unauthorized claim for payment against the United States and the Antideficiency Act prohibits affected agencies from entering into many contracts or obligations to pay. By contrast, reaching the debt ceiling does not deprive the departments of the government of the authority to employ workers and otherwise enter into obligations. Nor does it deprive the Treasury of statutory authority to honor claims for payment. The problem would be, rather, that the Treasury may on any given day lack the funds to honor all the authorized claims that are submitted to it. In an extreme case, the government might face a calamity unknown in its two-hundred year history, namely a default by the United States on its debt obligations.

CONCLUSION

The Antideficiency Act protects that central constitutional provision committing the power of the purse to Congress. It was drawn, however, with a specific context in mind. Unfortunately for present purposes, that context is not a general appropriations lapse. In 1820, when the first version of the Antideficiency Act was enacted, and through its formative revisions, Congress had in mind the practice, apparently common at the time, of executive branch agencies obligating more funds than had been appropriated for authorized activities in an attempt to force Congress after the fact to appropriate more funds than Congress had wished or chosen to appropriate.

Although the Antideficiency Act was not written with a general lapse in appropriations in mind, the act applies to that situation. Because its drafters did not consider the contingency of a general appropriations lapse, it is often difficult to apply to the many specific and often very complicated questions that attend a general appropriations lapse. For that reason, we rely heavily on the precedents of administrative construction and practice in issuing guidance on the application of the Antideficiency Act to a general appropriations lapse. Since the scope and contours of the Antideficiency Act are very often difficult to define, we are grateful for these hearings and welcome the opportunity to receive any thoughts or suggestions that members of the Committees might have.

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Chairman Kasich. Mr. Dellinger, under the definition of health and safety, would the Administration be able to continue funding of WIC, continue funding of veterans health care benefits under the definition of health and safety?

Mr. DELLINGER. It is not clear that that is the case, Mr. Chairman.

Chairman KASICH. It essentially would be the Administration's call as to whether they wanted to define WIC or Food Stamps or veterans health care benefits as a health and safety requirement, correct?

Mr. DELLINGER. That is not entirely correct, because the emergency exception to the Anti-Deficiency Act provides that the Government may employ personal services exceeding that authorized by law in emergencies involving the safety of human life or the protection of property, and the actual WIC payments may not involve the employment of personal services. These are really employees that—

Chairman KASICH. No, no, no. You are saying there is confusion, isn't that correct? You are saying you do not really know, it is a gray area, correct?

Mr. DELLINGER. I am not—

Chairman KASICH. I don't think you need to consult counsel.

Mr. DELLINGER. My colleague Chris Schroeder wants me to make precisely clear to you what is not allowed. We cannot pay the WIC funds for women, infants and children in the absence of an appropriation. The emergency exceptions in health and safety is an exception that pertains to employees and personal services, not for the payment of funds which have not been appropriated. So the answer to the question is no, we cannot send out funds for women, infants and children nutrition programs in the absence of an appropriation.

Chairman KASICH. Then how do you say that you can operate the air traffic control system?

Mr. DELLINGER. Because those employees may come to work because we may obligate to pay for their services because they are—

Chairman KASICH. But under the definition of health and safety, correct?

Mr. DELLINGER. Under the definition that allows you to employ personal services in cases involving health and safety. There is not a provision of the anti-deficiency law—and I think this is where we are missing each other—there is not a provision of the anti-deficiency law that allows you generally to expend funds where there is a health and safety emergency. In fact, we cannot spend any funds. We cannot actually pay the air traffic controllers.

What you can do is to promise to pay the air traffic controllers if and when there is eventually an appropriation. You can obligate to pay them. So there are no funds to pay air traffic controllers, there would be no funds to pay prison guards, there would be no funds to pay the money for the Women, Infants and Children Program under this, but there would be the ability to enter into an obligation to pay the employees in the future.

Chairman KASICH. Let me ask the Director, you are in the process now of trying to put together the plans for how the Government would operate without a continuing resolution, and you are now asking the various departments, agencies and bureaus to send you a plan. How are you having that plan constructed, under what definition, and where are we at this point in time?

Dr. RIVLIN. We circulated to the agencies Assistant Attorney General Dellinger's opinion, and previous legal opinions, so that they would have all the guidance they needed. We asked the agencies, in light of those legal opinions, to provide us with details on what they would do in the event of a shutdown. We have almost all of those plans, as I indicated earlier.

Our only function is to review the plans for consistency. There are some kinds of functions that occur in several different agencies, and we're looking at the plans to see if those functions are being treated in a consistent manner across the Government—for example, legal services or the inspectors general or other kinds of operations that occur in multiple agencies. In cases where they seem to be treated inconsistently, we were trying to arrive at a consist-

ent definition of what would happen. That process is ongoing, but is nearly complete.

Chairman KASICH. What can you tell us essentially is the outline of what we would see?

Dr. RIVLIN. We would see a government that would maintain essential services—such as veterans medical care, the actual military services of those in uniform, air traffic controllers, and other types of essential services that we have referred to—but not very much else. Much of the rest of the Government would be closed down.

Chairman KASICH. Mr. Dellinger, under your definition, could we continue to deliver veterans health benefits under the narrow definition that you have?

Mr. DELLINGER. No, not in the absence of an appropriation.

Chairman KASICH. Well, why is the Director saying that they would do that?

Mr. DELLINGER. Well, those benefits that are part of a continuing appropriation—

Dr. RIVLIN. No, no. I am talking about the actual Veterans Administration employees who run acute care hospitals. We believe we could continue to incur the obligations for those kinds of services, but those doctors and orderlies would not be paid.

Chairman KASICH. But you would continue to deliver the services, which is expending money, correct?

Dr. RIVLIN. We would not be spending money. We would be delivering the services. The employees would be volunteers, so to speak, who would be working for the Government.

Chairman KASICH. I understand that.

Dr. RIVLIN. We would not be spending money for those services, but we wouldn't leave people to die in the hospital.

Chairman KASICH. Exactly right, and that is why I want to pursue this a little further, because I am confused about what you are saying. On the one hand, Mr. Dellinger says you cannot pay WIC, you cannot give people WIC benefits, but we can deliver—I would maintain that this issue of what is covered under the definition of health and safety would permit a significant portion of the Government to operate. I think you have to be consistent on this.

In other words, if you are in a veterans hospital and you are delivering services, that means you have to expend money for medicine.

Dr. RIVLIN. No, we would use up the existing stocks, but we would not buy more medicine. I think the very clear distinction here—and Mr. Dellinger can check if I am right, I am not a lawyer—is between continuing to incur obligations for services that are essential to health and safety which is OK, and actually writing checks, which is the case in operating WIC or Food Stamps, and that is not OK.

Chairman KASICH. You wanted to comment?

Mr. DELLINGER. Yes; I think that the critical distinction is that you simply may not pay out money that has not been appropriated. So that if something requires the actual payment of money like the sending of funds for infant care, you cannot send that out. What you have to do is you have to rely upon, in providing services, that people will come forward and be willing to provide those services under an assumption that they will be paid later, and that will give

us some ability in an orderly fashion to run parts of the Government, but not to actually spend the money. So the exception doesn't help, if there are no funds on which you can write a check.

Chairman KASICH. One other area and that is the area of medicare and Social Security. Under a failure to reach an agreement on a CR, what would the status be of entitlement programs like Social Security and medicare? Would those checks be continued to be sent?

Dr. RIVLIN. In cases where there is a permanent appropriation, checks would continue to be sent. Social Security and Medicare Part A fall into that category, but Part B does not.

Chairman KASICH. Thank you very much.

Mr. Sabo?

Mr. SABO. I will yield to Mr. Orton. I think he is the most senior member on our side, sir.

Mr. ORTON. I was not prepared quite yet to ask a question. Let me look very quickly here. Have you done a detailed analysis as to the cost that would be incurred if we did not pass a continuing resolution? Would it cost us any more to continue to operate and then pass the appropriations later and pay those services that we had continued? Is there an excess cost to the Government in failing to act?

Dr. RIVLIN. There is certainly some excess cost. The cost of actually shutting down facilities can be estimated. We have not done a new estimate of that, but there was as GAO estimate in 1990. But the real question is: What do you count as cost?

If furloughed employees are eventually paid, then they are being paid for work they did not do. We would urge that they be paid, however, because they are counting on that income. But if they were paid for days they did not work, the Government incurs the cost of paying people for not working, and the work they did not do, of course, would have to be done later by them and other people and would cause an excess burden.

Mr. ORTON. I think you have covered fairly adequately from my point of view the difference between paying out checks in benefits to individuals such as welfare or WIC or whatever, and hiring employees or paying for services. You can incur a continuing obligation for services performed by individuals. You cannot issue a payment either to acquire additional product or to make payments to beneficiaries. I think that is clear.

One issue that I think we have not yet touched on is the next step. Assuming that we get beyond the continuing resolution or the appropriations bills, the next step is the debt limit, this issue of playing chicken that Mr. Sabo mentioned in his opening statement.

If in fact the debt limit is attached to a series of statutory changes which the President cannot and would not accept and vetoes and we are forced to go beyond the amount of the debt which we are authorized to incur and we fail to pay those obligations, you indicated, Dr. Rivlin, in your testimony the impact on domestic and foreign capital markets and financial markets. Have you done a cost analysis as to what it would cost the Government in that event as far as increased costs of borrowing, any additional costs that we would incur if we failed to increase the debt limit in a timely manner?

Dr. RIVLIN. We have not done a cost analysis, because the United States Government has never defaulted on its obligations and we hope it never will.

But the most obvious costs would be disruption of financial markets and loss of confidence in United States Government obligations. I do not think we can gauge the extent to which that would happen, because we hope it never happens. But certainly, if there were a default, people around the world who buy U.S. Government bonds would be much more cautious about doing so. They would demand higher interest rates on their money, and taxpayers would be paying higher interest rates for a very long time to come.

Mr. ORTON. My final question would be if either of you could—in fact, I think this is an area, since it has not happened, there have been people speculating as to what specifically would occur. Could either of you describe in detail the technical impact of a non-renewable of the debt ceiling, what we would expect to see, what would occur specifically, and what would be required of the Government at that point? Would it actually put us into technical bankruptcy and default on our obligations? What technically would occur if we failed to increase the debt limit?

Dr. RIVLIN. Well, the Secretary of the Treasury would be faced with the problem of not having enough cash to pay major obligations that were coming due, such as Social Security payments, veterans compensation, and interest on the debt. There are some very big payments of that nature that are due in November.

If we failed to pay the interest on the debt, or even seriously contemplating the possibility, we could expect to see a major disruption in financial markets, not just the markets for U.S. Government bonds, but for financial markets around the world, because they are interrelated.

Obviously, this is just speculation, but that is the nature of—

Mr. ORTON. But the Treasury Department would actually be in default?

Dr. RIVLIN. Yes, it would actually be in default. You need cash to meet those obligations, and if we were not able to borrow more, we would run out of cash.

Mr. ORTON. Thank you, Mr. Chairman.

Chairman KASICH. Let me just ask a question. Director, would the President sign a short-term debt extension separate from anything else?

Dr. RIVLIN. The President would very much like to have a debt extension that was not attached to anything else. We believe the sensible thing to do is to raise the debt ceiling now, and to detach that decision from the budget decisions.

Chairman KASICH. At the end of the day, would the President sign a short-term increase in the debt ceiling while we worked our way through these disagreements in order to avoid a default?

Dr. RIVLIN. The President would certainly do that. We would have to talk about the length of the term, but if it were separate from everything else, that would be a sensible thing to do.

Chairman KASICH. Thank you.

Let me ask Mr. Dellinger, just to put this in perspective. If you do this whole funding program as a pie, assuming that the debt represents about a third of the pie, entitlements are another third

of the pie, and defense discretionary and non-defense discretionary is another third of the pie, the debt would continue to be serviced if we failed to get a CR, is that correct? The debt would continue to be paid?

Dr. RIVLIN. Yes, interest on the debt would be paid.

Chairman KASICH. Second, nonappropriated entitlements would continue to be paid, correct?

Dr. RIVLIN. Yes, if there is a permanent appropriation—as is the case for Social Security.

Chairman KASICH. So about two-thirds of our budget would be operating, if you take the debt and the nonappropriated entitlement programs, and then half of the discretionary programs would be funded because they are defense.

Dr. RIVLIN. Defense is not automatically funded, but a substantial portion of defense activities would continue, although they would continue without payment.

Chairman KASICH. So when we talk about this close-down, it is about a sixth of the Government that we are really talking about, is that correct?

Dr. RIVLIN. No, I would have to work through the numbers, but it is larger than that, certainly in terms of numbers of employees and—

Chairman KASICH. But in terms of non-defense discretionary makes up about a sixth, when you put it into the context of—I have not run the math, but you are going to pay your debt, you are going to cover your entitlement programs and they are still going to be funded—

Dr. RIVLIN. Only some of the entitlement programs would still be funded, Mr. Chairman.

Chairman KASICH. But the bulk of them are not appropriated entitlement programs. Social Security and medicare and medicaid, they are the biggest.

Dr. RIVLIN. Wait a minute.

Chairman KASICH. No, medicare and Social Security.

Dr. RIVLIN. Medicare Part A and Social Security would not be affected.

Chairman KASICH. I am just trying to get it in perspective so people can see what we are dealing with.

Dr. RIVLIN. Part B and medicaid would be affected, depending on the length of the crisis. There is some forward-funding for medicaid.

Chairman KASICH. Part B would be up to whether physicians wanted to continue to treat their patients.

Dr. RIVLIN. Yes, that is right. Funding for some of the others would depend on whether the States wanted to advance money to pay for their portion of the programs.

Chairman KASICH. Thank you, doctor. I appreciate your comments, by the way, on the short-term debt.

Senator Domenici is recognized.

Chairman DOMENICI. I am going to be very brief, because many of you have been here for a while and I could not get here because I have been attending a conference on the Interior Appropriations bill which affects my State very, very much.

But let me make a couple of observations. First, Dr. Rivlin, I got in here just in time for you to discuss the effect of a so-called train wreck whereby we did not increase the debt limit and you were talking about its impact on the markets, including Treasury bills.

I want to give you another scenario which I am growing more and more convinced is just as apt to be the case as yours. I believe that, as a matter of fact, the market and interest rates on United States Treasury bills is anxiously anticipating the passage of a balanced budget or at least that we dramatically reduce entitlement growth. I believe if we give in to the Administration in the balanced budget debate and do not accomplish significant reductions in the mandatory entitlement programs such as those that are in the current Reconciliation instructions to the various committees, I believe the impact on Treasury bills will be worse than if we have a 30- or 40-day hiatus at which time about \$30 billion worth of bonds would be in jeopardy, and that is about all, \$31 or \$32 billion in the first 30 to 35 days.

Let me put it more simply. I believe the market may sit by and not react badly for 30 to 40 days in anticipation that we will do what is right towards the balanced budget. Then if we do not, I believe the impact on America's cost of T bills will be greater in the future than the risk we take of something happening for 30 to 40 days.

Now, I did not dream this up. I went out and talked to a bunch of people that work in this area. I had 10 of them last night in a room and they actually said we are not at all sure that there will be a black mark on T bills, if in fact we do not do anything for a while and we are certain it will not be as black and as bleak on the costs of T bills in the future as it will be if we do not solve the ever-growing problem of mandatory expenditures.

Now, I do not want you to comment on that yet, but you might in a minute. My assessment which I would have given in my opening remarks in terms of what part of government will be closed down is as follows: Defense is 16 percent of the budget, and I understand that most of it would remain operative. Mandatory programs, that is entitlements that are not subject to appropriations, Mr. Chairman, are 67 percent of the budget. That means that there is really only 17 percent that would be subject to closure and some of that would not even be closed because of the emergency provisions in the various current laws.

Now, I am not saying this because I want to close government down. What I want is to get a balanced budget and I want to get that in a way that is real, that is not based on optimistic economic assumptions, but, rather, upon the Congressional Budget Office's assessments.

I would close by saying to you, Dr. Rivlin, there is much talk on the part of the President of let us not have this train wreck, let us get a balanced budget. But I want to say to the members of the House and Senate, that is not easy because of the way the President's so-called balanced budget is structured, and let me just give you three points.

The President's plan increases non-defense discretionary programs over 7 years by close to \$300 billion more than our balanced budget resolution, not \$100 billion, not \$50 billion, not \$200 billion,

but \$300 billion. Now, that is a lot of money. If you negotiate a budget, you start with a \$300 billion increase in discretionary non-defense spending in the President's budget.

Second, \$475 billion of the President's deficit reduction is made up of economic and technical assumptions that are better than those in our budget resolution. Of that amount, technical assumptions on medicare and medicaid spending are more optimistic by a rather substantial amount, about \$120 billion. All that allegedly gets the President a balanced budget and thus reduces interest expenses on the debt.

Now, that is very interesting, because the Congressional Budget Office says the President's plan does not balance budget. So I do not want to leave this hearing with any notion that it is the Congress' fault that we are going to end up in perhaps a train wreck, perhaps a meltdown posture. I mean it is as much the President's fault, if not more, than ours. He has to come our way substantially to get anything done.

Having said that, I thank both of you for coming and for enlightening us, and I thank all the members of the joint committee for being here. I thank you, Representative Kasich, for presiding. You almost became a Senator today.

Chairman KASICH. I wanted to keep my good job.

Doctor, if you want to comment, please proceed.

Dr. RIVLIN. Yes, I do.

First, the President wants a balanced budget. He also wants to avoid closing down the Government, and we want very much to work with the Members of Congress on that.

As to speculation on what might happen if we do default on the obligations of the United States Government, I hope we never have to find out, Senator, and I know you hope so, too. I cannot imagine who these people are who think there would be no effect on the financial markets, especially the financial markets for government securities. I think they are wrong, and I hope we do not have to test the hypothesis.

I would agree with you that the markets and the Nation are counting on us to get to a balanced budget, and if we fail to do that, it will have deleterious consequences. I do not think we can say whether T bills will go up more than they would have under other speculation, but both scenarios are undesirable. We should get to a balanced budget, but we should do it in a way that allows for a free, frank and open debate and decisionmaking by the constitutional processes, without an artificial crisis like the United States Government defaulting on its obligations.

Chairman KASICH. Since we are over here in this building, I am going to turn the gavel over to Senator Domenici until he has got to leave, and he is now the Chairman.

Chairman DOMENICI. Thank you very much.

I think now we should go to a Democratic Senator. Who was here first under our rule? Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Let me just say a word of observation on a question. I hope we can get these things resolved. I have heard now in the last couple of weeks on the floor of the Senate Senator Byrd say we have had excessive partisanship. I have heard Senator Stevens of Alaska say

we have had excessive partisanship. I think we have to get together and work this thing out.

I do not know what the cost of shutting government down is, whether it is 17 percent or 15 percent or 19 percent. But I know it is unnecessary and that we ought to be getting things worked out. I hope we can pass at least a temporary debt extension or a small debt extension.

But the reality is the confidence in our government in part comes from what we do. The day after the Senate defeated the balanced budget amendment by one vote, the dollar plummeted in the international markets to below 80. Now, since both Republicans and Democrats are on line for a balanced budget, we have seen the dollar move up to 104 yen. But things can fall apart very, very quickly and I hope we do the right thing by our government, and frankly for both parties.

Part of the reason for cynicism towards government is the public sees excessive partisanship, and do not see us working together when we should be working together, and I hope we can. Those are just some observations.

I thank you, Mr. Chairman.

Chairman DOMENICI. Thank you, Senator Simon.

Who is next on the House side? Mr. Shays.

Mr. SHAYS. Thank you, Senator.

I thank both of you for testifying, and I was trying to think as I was going through what you were saying how I formulate a question, and I realize I first need to say to you how strongly I feel about how important it is and how important I think it is for confidence in the markets that this Congress, Republicans and Democrats, vote to balance the budget in 7 years.

Since 1980, under a Republican President and now a Democratic President, the National debt has gone from \$800 billion to nearly \$5,000 billion or \$5 trillion. That happened because Members of Congress voted for more spending and voted to increase the National debt ceiling.

I feel so strongly about this bill. If Newt Gingrich got down on bended knee and asked me to vote for the debt ceiling, I would tell him no way. I will not vote to increase the debt ceiling until this President weighs in on a balanced budget amendment in 7 years. Now then how we spend in that 7 years to me needs to be worked out between the White House and Congress.

I will vote for a continuing resolution, but under no circumstance, even at risk of recall, would I vote to increase the debt ceiling. One of the points that I think needs to be made is that our leadership cannot necessarily deliver votes to increase the debt ceiling, because we are not going to be with them if that is what they intend to do.

Now, my question to you is do you not believe that people want us to balance the budget and get our financial house in order? Do you not think that is something that matters a lot to them?

Dr. RIVLIN. Yes, I do. I believe that very strongly. I do not think it is the only thing that matters to people, however. I think they want to see it done in a moderate way, without financing a large tax cut at the same time. We want to balance the budget. We want to do it over a slightly longer time period than Congress, and we

want to do it with more moderate cuts in spending programs, and without a huge tax cut. Those are the differences between the President and Congress. There will have to be a compromise, but I believe people want the budget balanced. The President wants to balance the budget, as does Congress. We just have to figure out how to do it.

Mr. SHAYS. I agree that theoretically the President does, but in reality he does not. He came in with a 10-year budget that the Congressional Budget Office says is never in balance, that in the 10th year it is over \$200 billion. Now you all presented that 10-year budget, but you all scored your own budget. So scored by CBO, his budget is not balanced. How can I believe that he wants to balance the budget, when he comes in with a plan that CBO says never is balanced?

Dr. RIVLIN. I have great respect for CBO. I have a historic connection with the institution. But, at the moment, I do not think their economic assumptions are necessarily better than ours. There is some difference of opinion about the baseline. The only things we are arguing about are the rate of growth in the economy and the rate of medical care inflation. In both areas, CBO is marginally more pessimistic than we are. Over time——

Mr. SHAYS. Dr. Rivlin, I was here in 1990 when OMB scored the budget and it was as rosy scenario. I was here on the floor of the House——

Dr. RIVLIN. I was not at OMB in 1990.

Mr. SHAYS. I was here when the President came before Congress and said let us use honest numbers, let us use CBO's numbers, and now I am seeing him say that there is a 10-year plan presented by you and scored by you, and to me it is a rosy scenario all over again. It is 1990 all over again and that is why he has no credibility with us when you say he wants to balance the budget.

Dr. RIVLIN. We are not offering a rosy scenario. We are talking about 2.5 percent growth in the gross domestic product, adjusted for inflation. Senator Dole recently made a speech in which he castigated the Administration for being so conservative on growth, saying that he believed the economy would grow much faster than 2.5 percent. Well, we hope it will grow faster than that, but we think 2.5 percent is an average estimate. It is what commercial forecasters think, and it is certainly not a rosy scenario.

Mr. SHAYS. I am only one Member of Congress. I will vote for continuing resolutions that spend something like 60 to 70 percent of the full cost. If the President vetoes budgets that cut 10 percent, we are going to give him I hope continuing resolutions that give him only 80 percent. I believe we are going to put the debt ceiling on a continuing resolution, as we should. If a vote comes to increase the debt ceiling, I am not going to be there as one member.

Dr. RIVLIN. There are strong feelings on this issue, which is why we very much hope that the substantive issues can be settled before we get to the debt ceiling problem.

Mr. SHAYS. I yield back.

Chairman DOMENICI. I am told that Representative Pomeroy would be next.

Mr. POMEROY. Thank you, Mr. Chairman.

Chairman DOMENICI. Mr. Pomeroy, I wonder if you would yield me 30 seconds.

Mr. POMEROY. Of course, Mr. Chairman.

Chairman DOMENICI. Let me make sure that in my exchange with reference to the value of a balanced budget for America's future debt and T bill interest rates, the Senator from New Mexico was not recommending a default on our T bills.

Dr. RIVLIN. I am glad to hear that.

Chairman DOMENICI. And I heard you say that I was and maybe I did. I do not think I did, but I—

Dr. RIVLIN. No, you did not hear me say that. We will correct the record on both scores. I know that you would very much like to avoid a default.

Chairman DOMENICI. On the other hand, I wanted to make it very, very clear that the attention required to get our balanced budget in 7 years is going to scare a lot of people, including the street, but they have to understand if we get it done, it is very, very good for America and for interest we are going to be paying on those T bills.

Thank you very much, Representative Pomeroy.

Mr. POMEROY. You are very welcome.

I would find it a profound embarrassment for the institution of Congress to allow a situation to occur that would involve the United States of America defaulting on its debt. I am very surprised to hear any member of this committee, particularly one I respect as much as Congressman Shays, indicate that we want to play around with continuing resolutions on appropriations, but drawing a line in the sand, take my marbles and go home, it is our plan, or no-vote on debt ceiling.

To me, this is exactly the wrong place to do it. I think we ought to have a unanimous agreement that the United States of America pays its bills and never defaults on an obligation as a matter of principle, but also as a matter of cost to taxpayers. Because when our debt becomes as risky as Third World debt and the interest rates charged because the United States of America can no longer be trusted implicitly to pay its bills, it becomes an extra cost to taxpayers, something that they feel right in their pocketbooks.

So it seems to me, Director Rivlin, that if we are going to want to pressure one side versus another to negotiate, that is done on the appropriations side, not on the debt limit side. I am a relatively new member of Congress, but I am aware that we often find ourselves as a country where Congress is controlled by one party, the White House by another. What has been the history on debt limit votes, even when there are very fundamental differences in the economic policy under debate? How have past Congresses worked with the Republican White House, for example?

Dr. RIVLIN. My briefing book is full of letters and exchanges between past Secretaries of the Treasury, Republican and Democrat, and chairmen of the Finance Committee or Ways and Means Committee on this subject. They have always worked out their differences.

The United States Government has never defaulted on its obligations, and neither Congress nor the Administration has ever con-

templated this as a realistic possibility. I hope it will stay that way.

Mr. POMEROY. I yield back. That concludes my questions, Mr. Chairman.

Senator FRIST [presiding]. Thank you.

Dr. Rivlin, we have already mentioned that medicaid is an appropriated entitlement and there is an advance appropriation for medicaid funds through calendar year 1995. Does that mean that a funding gap in this calendar year would not affect the medicaid payments to States?

Dr. RIVLIN. That is correct.

Senator FRIST. And if it were to extend beyond the end of this year, what would the effect be?

Dr. RIVLIN. If it extended into 1996, the Federal Government would not be paying its matching contribution to the States and the States would be left to carry the program on their own. If that happened, States would get interest on the funds retrospectively.

Mr. SABO. Would the Senator yield just on a technical questions on medicaid?

Senator FRIST. Yes, please.

Mr. SABO. I am just curious about medicaid, because it is a reimbursement formula. My understanding is the bulk of the Federal reimbursements in October, November and December are for expenditures that occurred in the previous fiscal year. So under medicaid, we would not be making those reimbursements, even though they were for expenditures that occurred in the previous fiscal year?

Dr. RIVLIN. That is right, but the reason that we would be paying in calendar year 1995 is that there is a one-quarter advance appropriation already in place for medicaid.

Mr. SABO. There is in place—

Dr. RIVLIN. Yes, through December 31.

Mr. SABO. OK.

Senator FRIST. Dr. Rivlin, again I want to go back to the CBO numbers one more time because, as you mentioned, as first Director of the CBO, you said that there are honest differences in those projections. But are you not concerned that the CBO does predict that in that period of 2002 and 2003 that the President's budget, using those CBO numbers, is still \$200 billion?

Dr. RIVLIN. I would be concerned if I thought they were right. But I see no reason to think their estimates are better than ours. Both estimates are within the same range on the important economic variables.

Senator FRIST. So the implication is that it is not important to start with a common set of numbers, but the growth figure, as long as we agree on the growth figure, is that what you are saying?

Dr. RIVLIN. No, I am saying that when we get to a negotiation on the final budget, and we will, we will have to agree on a common baseline that should be the starting point.

But when we sit down for that negotiation I think there will have to be some kind of compromise on the baseline, and I do not think the CBO numbers are more plausible than ours. I think ours are more plausible.

Senator FRIST. Last, Dr. Rivlin, for what period of time and what amount would the Administration feel it appropriate to have the debt extended?

Dr. RIVLIN. We have stated that we would prefer that Congress raise the debt ceiling to \$5.5 trillion, the number estimated in Congress' own budget resolution. We think that is an appropriate level, and it would extend the debt ceiling into 1997.

Senator FRIST. And do you think it is important to have a balanced budget plan in place before we raise that debt limit once again?

Dr. RIVLIN. No, I think the debt limit should simply be raised, and then we should resolve our differences over the budget. I believe we both want to balance the budget and that we can reach a compromise on that, but the budget debate should not be carried out in a crisis atmosphere with the debt limit issue hanging over us.

Senator FRIST. Thank you.

We will turn now to Senator Conrad, and then the Chair back to Congressman Kasich.

Senator CONRAD. I thank the Chair.

I want to greet Mr. Dellinger and Alice Rivlin, as well, to this unusual hearing. In your estimation, would it be an overstatement to say that if the United States defaulted on its debt, that that would be a disaster in the financial markets?

Dr. RIVLIN. I think it would be a disaster if we defaulted on our debt. What exactly would happen to the market, we do not know, because it has never happened and I just hope we do not find out. But I think it would have very serious consequences in the financial markets.

Senator CONRAD. If we were in a circumstance in which we were approaching default, would the Treasury dis-invest in the trust funds? As I understand it, that has been done in the past. Would that be an option open to Treasury?

Dr. RIVLIN. It is an option, it is a very unattractive one and I cannot say what the Treasury would do.

Senator CONRAD. Would you explain precisely how dis-investing in the trust funds would work? What has happened in the past when they dis-invested?

Dr. RIVLIN. Well, disinvestment in the trust funds can take the form of the Treasury not investing in government bonds with the money coming into the Social Security Trust Fund. In a more extreme case, the Treasury would sell government bonds. This is something that nobody wants to do, because it would undermine confidence in Social Security. While such a move would not necessarily have any long-run consequences once we got back on track, it is something that we certainly do not want to do.

Senator CONRAD. Am I correct that that was done in 1985?

Dr. RIVLIN. Yes.

Mr. DELLINGER. In September and November of 1985, the Treasury was confronted with a failure of Congress to enact an increase in the debt ceiling and anticipated not having enough in its cash account to pay the benefits in a timely manner. The Treasury suspended the investment of contributions to the trust fund until

there was room under the debt ceiling to invest those contributions in U.S. debt securities.

The Office of Legal Counsel did not issue a public opinion at the time on the Treasury's action, but the Comptroller General opined that the Treasury did not act unreasonably under the circumstances in doing that. That is, as far as we know, our only prior experience with that.

Senator CONRAD. How long did that last?

Mr. DELLINGER. I am not certain. But it was a fairly short period of time in the September–November period of 1985.

Senator CONRAD. What other options are open to Treasury if there is a failure to pass the debt limit, in order to avoid a default? Other than disinvestment in the trust funds, is there any other option open to the Treasury in order to avoid a default?

Dr. RIVLIN. Well, cash management (i.e., not paying bills) is certainly one option. But that is a difficult and undesirable thing to do, and costly in the long run.

Senator CONRAD. In terms of cash management, have you done an analysis of how long that would allow you to avoid default in the absence of Congress taking the steps necessary to extend the debt limit?

Dr. RIVLIN. No, we have not. I would suggest that these questions are more appropriately addressed to the Treasury.

Senator CONRAD. I thank the Chair.

Chairman KASICH. Thank you, Senator. I turn the chairmanship back to the Senator.

Senator FRIST [presiding]. The gentleman from New Jersey, Mr. Franks, is recognized.

Mr. FRANKS. Thank you, Mr. Chairman.

Dr. Rivlin, this has been a very interesting exchange. I want to follow up on a few points raised by some prior members' opportunities.

Mr. Pomeroy spoke with great passion about the need to honor our obligations, to pay our debts. And I think most of us certainly concur that we need to live up to our obligations, both for our standing in the world economy and to make certain that we are practicing the values we try to teach our children, that we are going to be good to our word.

But I think there is another overriding consideration. And it was spoken to by Mr. Shays, which is that we have to recognize that what we have before us is both a crisis and an opportunity. And the opportunity that we confront is to jointly make decisions, the Administration and the Congress, to end this debt financing.

Certainly we have to recognize we have accumulated this debt. People are relying on us to meet our obligations to pay it out. But the historic opportunity, I think, from people watching this kind of hearing, is the answer is simple: Stop the deficit and debt financing upon which this Government has come to rely for so very long.

Moreover, Dr. Rivlin, if the two parties are going to get together, the White House and the Congress—we spoke about this briefly at a House budget hearing—we have to come with goodwill on both sides and a willingness to understand each other's competing priorities, although I believe, after hearing your testimony today, that we share a good number of priorities in common. But how we will

express that to each other, I suspect, becomes particularly important.

And it is on that basis, I think, that we have to look again at the President, who said to us in 1993: You know, people have, for various partisan purposes, Republicans and Democrats alike, have used different sets of numbers to spin the tail in such a way as to avoid blame or take credit, whatever the circumstances may have been. And the Congress looked to the President during that budget address. And the President pointed at my party, and he said: That's why I think we need to rely on one arbiter of all these competing scenarios, and that needs to be the CBO. And he spoke to the CBO's historic record of being somewhat more conservative and reliable than other folks who have been in the business of making these projections.

So I think it is very troubling to many of us that the President who just 2 years ago said that was the entity, so no one can be able to hide behind favorable scenarios and nobody can try to escape blame for decisions that rightfully are ours, let us all sing from the same song sheet, at least as it relates to the calculation of the potential impact of these various scenarios.

You later said at that House hearing a month or so ago that these are tiny, tiny differences in percentile. But as we all know, spread over an economy as vast as this one, spread over a government that spends \$1.5 trillion a year, it amounts to hundreds of billions of dollars in differences in terms of what the ultimate results of some of these policies are.

You said to us: Well, all we need to do is sit down, and we can work those differing assumptions out. Can you share with us this morning some further insight as to how we can work these various differences concerning assumptions out in such a way that we can reach a breakthrough in this process?

Dr. RIVLIN. I do not think I have anything to add to what I said that day or what I said earlier this morning, Congressman. The differences are small. And when we get to the negotiating table, I believe we will be able to agree on a common baseline, and it will be very useful to do so. But I do not think that arguing about what the baseline might be in advance of a negotiation is very fruitful.

We do have major differences in priorities. When we get all of the Congressional input, the 13 appropriations bills and the reconciliation bill, we will have to sit down and see where a compromise lies. And part of that discussion will be: Can we first agree on a common baseline?

Mr. FRANKS. Mr. Chairman, just one follow-up, if I may. Dr. Rivlin, I am a relatively junior member of this institution. I would not profess to be mindful of all of the various negotiations that are even in tentative states going on at this point in time. Is anyone talking about this issue today? Is anyone from the Administration talking to anybody in the leadership of the Congress about establishing that common set of assumptions, that common baseline, as you call it in Washington jargon?

Dr. RIVLIN. There have been some staff-level discussions. But until we have the Congressional priorities spelled out in actual bills, we believe it is premature to start negotiating on where we would come out.

Mr. KASICH. Mr. Chairman, we are down to the 10-minute bell. And there are two Senators. I do not know how long we are going to be over there, I say to the gentleman from Arizona. If you want to take your time now and ask maybe a question or two, we could probably get over there in 8 minutes. But we do not have much time left.

Mr. SHADEGG. I am ready to go.

Senator FRIST. Mr. Shadegg, and then we will come back to Senator Snowe.

Mr. SHADEGG. Dr. Rivlin, thank you very much for being with us. I have got to tell you that you just a moment ago sent a chill down my back. Mr. Franks said that he is a relative junior member. I am a junior member. I am a member of the freshman class.

What I am going to tell you, I think, expresses, however, the sentiment of many freshman. You said just a moment ago, boldly, directly and flatly, no, you do not think it is important to have an agreement on a balanced budget plan before we raise the debt limit. A part of these hearings is for exchange of information in both directions.

I will tell you that I feel as Mr. Shays does. I believe it is absolutely critical that we have a plan to balance the budget in 7 years before we raise the debt limit. And that is not just John Shadegg saying it or posturing it. I speak for the people in my district. I went home over my August recess. And the singlemost pressing point I got was why is it taking you 7 years to balance the budget? It is irresponsible. And point-blank statements from constituents who got in my face and said, "We did not send you there to continue the debt finance. We did not send you there to continue to obligate our children and our grandchildren's money because of your irresponsibility, because you insist on continuing to spend money to buy votes. That is dead wrong. We sent you there to balance the budget, John Shadegg, and if you do not balance it, then do not raise the debt and force this point."

I am not acting irresponsibly, and I understand Mr. Pomeroy's passion. But I am more embarrassed by the notion that we cannot accomplish anything. And if the President does not believe that it is important that we balance the budget before we raise the debt limit again, he is gravely mistaken.

Now, I do not want your opinions on this issue. What I would like is a list of specific studies I can go to. Number one, has the Administration studied what we could continue to fund with current cash flow and no extension of the debt? If so, where can I get a copy of that study. And what other institutions besides the Administration have created such studies and where can I get them, because I need to be able to provide them to my constituents in the eventuality we reach that point and I have to say to them, "Here are what the experts say about how we can continue to fund government if we do not raise the debt limit?"

Dr. RIVLIN. I know of no such study. I think the question would be most appropriately addressed to the Secretary of the Treasury.

Mr. SHADEGG. Well, it seems to me that the entire Administration needs to perform such a study. I think we need to know exactly what we can fund without further debt, because that's what my constituents want. They have said to me—and actually, quite

frankly—at the very first meeting of this committee—no, I am sorry, about the second—the first joint meeting of this committee, Mr. Largent said to the assembled people there, “Why is it that we cannot balance the budget in 1 year; isn’t it because of politics?” And no one answered his question. I think the answer is, it is because of politics.

And at least in my district—and I am not acting irresponsibly and I am very concerned about financial markets—but in my district, the American people want me to balance the budget in 7 years or less. And quite frankly, they think it should be done less. And they are not going to want me to vote to raise the debt limit if I cannot give them a plan to do that.

So we need another consequence in case there are other members of my class and others who simply say we will not raise the debt limit until we have such a plan. It seems to me, having a cash flow plan, knowing how we could operate with only our current cash flow, would be a fundamental obligation.

Dr. RIVLIN. We could not operate very long without defaulting on United States Government obligations. That is something we do not want to do. But permit me to answer the question that you say Congressman Largent asked about why we cannot get to balance in 1 year, and what would happen if we did. We cannot get to balance in 1 year because we are too far out of balance.

Part of the reason for that is the very large deficits we ran up in the 1980’s, and we have very a large debt service to pay on those deficits.

Mr. SHADEGG. That is precisely why we should not—

Dr. RIVLIN. If we did not have the debt run up between 1980 and 1992, we would be in balance now.

Mr. SHADEGG. That is precisely why we should not go on creating debt. I hope you will join me in trying to come up with a study for how long we could operate. I will offer my constituents your statements.

Dr. RIVLIN. That is simply not my responsibility. Please address that question to the Secretary of the Treasury. He manages the cash.

Senator FRIST. Thank you. The Senator from Maine, Senator Snowe?

Senator SNOWE. Thank you, Mr. Chairman. And I certainly want to welcome you—Dr. Rivlin and Mr. Dellinger—here today. I do not think there is any question about what the cost would be or the implications of a shutdown. And I am not just talking monetary cost. I think there would be a tremendous loss in public confidence toward both of our branches of Government. And it is something that we clearly should avoid.

And what is frustrating about this discussion, not only today but in past weeks, is the fact that we are spending so much time, energy, attention and money on what the impact would be of a shutdown—what will happen, what services will be provided, which ones will not, who will be working, who will not be working—rather than trying to negotiate the vast differences that exist between the legislative and executive branches.

Now, we talked about the debt that was incurred in the 1980’s. But the fact is, the President understood that and had, in fact, rec-

commended a five-year balanced budget plan, even as late as January of 1995, in one of his speeches. And in May, he said we could do it in less than 10 years. So what accounts for the President now feeling that a 7-year balanced budget plan is going too fast and too far? It seems to me seven is somewhere between five and 10.

Dr. RIVLIN. Nobody in the Administration has a particular reason for wanting to go slower in terms of wanting to stretch it out. There are two reasons why we believe it is difficult to do what Congress wants to do. One is that Congress wants to fund a large tax cut, which means much more drastic cuts in spending than would otherwise be necessary. We think that is undesirable. The other is that getting there quickly means that very important programs—medicare, medicaid, education spending—will have to be cut drastically. We think that reaching balance more slowly, without the large tax cut, is a more moderate approach, and it's what the public wants.

Senator SNOWE. So would you do a plan in 7 years?

Dr. RIVLIN. Well, I cannot negotiate.

Senator SNOWE. Would you offer a plan for 7 years that is different than what we have offered?

Dr. RIVLIN. Our plan gets to balance in 9 years. We originally thought we needed 10, but we figured we could do it in nine. Our plan funds a smaller tax cut. There are many differences between Congress and the Administration, and we certainly need to resolve them. One possibility would be to go, say, to 8 years, something in-between. I cannot negotiate here, however, and obviously, you do not want me to. But there will have to be a negotiation. My hope, and I think it is everybody's hope, is that we agree on a budget that does what the American public wants, including getting to balance in a reasonable period.

Senator SNOWE. But the President said in January of this year that he was going to present a 5-year balanced budget plan, and then in May said he could do it in less than 10 years and that he would present us that plan. And so, that is what is confusing about all of this. Now we have a dramatic change on the part of the President.

We should not be doing this at the end of the process, because we all know what that gamesmanship and that brinkmanship is all about. We should be doing it now. There are vast gaps. Just look at the numbers. The President, when he made his first speech to Congress, he said we should have one referee between CBO and OMB, and it should be CBO. Now he is back to OMB.

Well, we know that presents a whole set of problems That must be resolved first because there are disparities so great in terms of what set of numbers are we going to be using. And that is a major problem. And we should be doing that now. I just have not heard the alternatives. If the President disagrees with the resolution that we have enacted here in Congress and disagrees with the amount of time in which we are doing it—which obviously he does—then he has to present a plan to this Congress as an alternative. This is not enough. This is not enough.

And there are no specifics in the President's plan. That is why CBO scored it the way it did, as adding a trillion dollars more in debt. It talks about the more optimistic economic assumptions that

Senator Domenici talked about, for the growth rate of medicare and medicaid. But the point is, there are vast disparities. And this is mid-September. And we should not be talking about shutdowns. We ought to be avoiding that.

And if it comes to appropriations, the President ought to tell us what numbers can he accept in appropriations, what is his alternative, because we have not heard anything. And to wait to the end of the process, we know what that means. And I think that here and now, we should be working out these differences.

Dr. RIVLIN. I respectfully beg to differ, Senator. We have sent to Congress not only a plan for balancing the budget over 9 years, but also, with respect to appropriations, a very specific budget which says what we would do. And, each day, I write and sign several letters and statements of Administration policy on exactly what we would like changed in the appropriations bills as they move through Congress.

Many of the bills are now in conference, as you know, and differences are being worked out. I think many members of these two committees are absent because they are sitting in conferences, working out the differences between the two houses, and between the Administration and Congress. Some of those differences are being worked out. There will be bills that the President can sign. While we have not received any bills yet. I think there will be several that he can sign.

But there will be some that he cannot sign, because the differences in priorities are too great. And then we will need to have a negotiation about how to change those bills so that they can be made acceptable to both sides.

Senator FRIST. Thank you. In the interest of time, the Senator from New Jersey, Mr. Lautenberg.

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I am sorry that the room is empty of participants. But I often find myself in that situation. [Laughter.]

But I would like to say, in response to comments that were made, I am not junior anything. I am not junior here. I am not junior in life. But with the white hair and 30 years of experience in business, I hope comes not only experience, but wisdom, as well.

And when I hear the debate about why cannot we solve our debt problems in a shorter time than 7 years, maybe even a year, well, the reason is fairly obvious. And I think Dr. Rivlin has said it. You just cause an economic collapse. That is the problem, perhaps only the most important reason. And to me, I think it is critical to get our financial house in order. But I do not think that a target date of 7 years is critical. I do not even think that a target date of 9 years is critical.

I think what is critical is responsible behavior by this Government. And when people demand or ask why it is that we cannot pay our debts, I think that we, the representatives of the people, have a responsibility to push back and say because we are so deeply in debt and short of programs that we have to balance our books in a slightly different way.

Corporations across this country take delight in announcing their credit worthiness. Families after families depend on credit. Does the average parent sit down and say to the child, "I am going to

balance the budget. We are not using our American Express card, our Visa card, our Master Card anymore. We are going to live within our means. We are not going to borrow to buy a house. We are going to save up our money until we have enough to buy a house."

It would be the end of our economy as we know it. And so it would be with automobile sales and refrigerator sales and everything else. And I am not advocating loose borrowing. I think families ought to contain their borrowing. I think businesses ought to contain their borrowing and I think the Government ought to contain its borrowing.

But our debt is created by two things. One is expenditures and the other is revenues. And I ask you, Dr. Rivlin, if we shut down, does it mean a suspension of our accounts payables process?

Dr. RIVLIN. If we do not have appropriations, we do not pay out money. We can incur obligations and we pay out money eventually. But we may have to pay more because there are penalties in some contracts. But unless there were a permanent or advance appropriation, we would not pay out money.

Senator LAUTENBERG. Would lots of little businesses, big businesses across this country, feel the shock of withholding our funds for them to continue the operations of their business?

Dr. RIVLIN. Yes; they would.

Senator LAUTENBERG. Well, I do not think that people here are quite looking at what the picture really is. The folks out in the country do not know what pain is going to be inflicted as we eliminate a lot of these programs. Forty-two million now in this country uncovered by any medical or health plan; forty-some million people now in the poverty class; our highways and our bridges groaning and straining under the flow of traffic that cannot be managed.

We are among the worst in the Nations across the world in investments in our transportation infrastructure. That is no way for America to be competitive. Company after company—and I come from a State that is considered a high-tech State. We have Bell Labs. We have pharmaceutical companies. We have Bell Corp. We are the third highest patent producer among States in the country, though we are only ninth in size.

And we have to rely on foreign-born, in company after company, to do the science and engineering work that we need done. At what point do we say investments in America are critical and not stand on the political soap box and say, "What I want to do is cut out spending. But I want you to know, citizen, you are going to pay the price in spades"? And we ought to get on with solving our financial problem. But we ought to do it in a sensible way.

I close with a question, Dr. Rivlin. If we did not plan to finance the tax cut, would getting to balance be an easier and more timely job?

Dr. RIVLIN. Absolutely. Financing a very large tax cut makes it much more difficult to get to balance. And if I may add just one more word, I think you have illustrated part of the problem of getting to balance very quickly. It would necessitate cutting back even more than we already have on investments we need to make the country grow. We think that is self-defeating.

Senator LAUTENBERG. Thank you. Thanks, Mr. Chairman.

Senator FRIST. Senator Exon?

Senator EXON. Mr. Chairman, thank you very much. And let me briefly ask two questions, because I understand some of the questions I had planned to ask earlier have been posed.

Mr. DELLINGER, in 1983, I think you will remember Attorney General Smith wrote Majority Leader Baker at that time, to warn that the executive branch had no authority to pick and choose among government programs if the Government ran up against a debt limit and ran out of cash. Is that still the opinion of the Justice Department?

Mr. DELLINGER. Senator, I am aware of that. We have not revisited that question. It was, at that time, the position of Treasury and Justice that when the Treasury runs out of cash, the Secretary has no authority to prioritize payments; that the view was the Treasury merely performs the ministerial function in preparing government checks and has no discretion when it is presented with valid vouchers from agencies to pick and choose among the expenditures. And therefore, they thought that checks must be paid in the order presented, to the extent there is cash available. That is not a question we have been asked to revisit at this time.

Senator EXON. Well, Director Rivlin, you have had a great deal of experience in this whole area. I would ask you: You probably remember that opinion that the Justice Department rendered; what is your opinion on that as an experienced budgeteer?

Dr. RIVLIN. I would not second-guess the Justice Department on a legal matter.

Senator EXON. You have always had a way of answering questions very directly. [Laughter.]

Mr. DELLINGER. It is important to note that running into the debt ceiling is not a money-saving device. There was some suggestion made in some questions that it is a good way to save money. But, in fact, obligations continue to be incurred. We simply are unable to write the check. It is nothing that saves any money for the Government to run into the debt ceiling and, as Director Rivlin has noted, may in some circumstances actually cost you money as you pay penalties, et cetera.

Senator EXON. Well, I would simply say that we are holding this hearing in anticipation of what could, should or would be done in the event of a crisis situation. I think none of us here expect that to happen. But we would not have had this hearing, I suspect, unless the chairmen of the House and Senate Budget Committees felt it should be reviewed.

I would respectfully suggest that it might not be a bad idea for the Justice Department to give some consideration to that proposition, because if the train wreck occurs, I suspect that that is the first question that the Justice Department is going to be asked, because that would be a crisis.

Turning to another matter, Dr. Rivlin, can you tell me what the White House has been doing to avoid a government shutdown, and has Congress been receptive to any of these advances from the executive department?

Dr. RIVLIN. The White House, and all of us in the Government, have been working very hard with the appropriations committees, urging them to get their work done. We also are making clear our views are on appropriations bills, hoping that we can get many of

them into shape so that the President can sign them as soon as possible. That work is proceeding very rapidly.

The President, as you know, called the leadership from both houses to the White House about 10 days ago to talk about the budget. He said he wanted to avoid a shutdown and suggested that a continuing resolution was in order. The leadership reacted favorably to that. I think we are on the track, as Chairman Kasich suggested earlier, to having at least a short-term continuing resolution.

With respect to the debt ceiling, Secretary Rubin and I have written several letters—and there is a new letter from Secretary Rubin today—asking Congress to raise the debt ceiling and decouple this problem from the budget debate. We have not received a response to those letters.

Senator EXON. I thank both of you. I thank you, Mr. Chairman.

Senator FRIST. Thank you. The Senator from Maine?

Senator SNOWE. Yes. I would like to ask a follow-up question. I still do not understand why the Administration has decided that they cannot balance the budget in 5 years, as the President said in January. Then he said it could be accomplished in less than 10 years in May. And I think we need to have an answer to that question.

Obviously, the Administration has made a dramatic turnabout in terms of when that budget can be balanced. And we all have disagreements on whether or not we should have a tax cut this year. And that is a fair issue. But the President also includes a tax cut in his package. But supposedly, the President's 10-year balanced budget plan is not a balanced budget plan—according to CBO—even with a lesser tax cut. So I would like to know why the Administration has changed its mind about the 5 years versus 10 years required for balancing the budget.

Dr. RIVLIN. I was not aware of the President's statement about balancing the budget in 5 years. The President says a lot of things, and that one was not run by me. So I do not know what you are referring to.

Senator SNOWE. Do you think he was wrong?

Dr. RIVLIN. Our February budget did not get to balance. While it offered deep cuts in discretionary spending, it did not address the entitlement programs. We said at the time that, in order to get to balance, it would be necessary to address the entitlement programs, especially the health care programs.

In June, we did that. We produced a new budget plan that reached balance in 9 years. The reason we think it should take longer to reach balance, as I said earlier, is that although getting to balance is very important for the future of the economy, there are other things that are important as well, including investment in education, science and technology, and other programs. We do not believe that savaging those programs in the name of getting to balance quickly is a good deal for the American public.

Senator SNOWE. Well, you are saying "quickly". But the President said even less than 10 years. And the fact of the matter is, CBO has said the President's budget, as presented to Congress, without the specific details on how to balance the budget, will still incur \$200 billion as far as the eye can see. And I think that is a

problem. The American people want a balanced budget. We ought to be able to resolve those differences, because they are vast differences and we do not have that much time.

Dr. RIVLIN. I agree that we ought to be able to resolve our differences, and I hope very much that we can. The Congressional Budget Office has not dealt with the question of how much would be saved by the cuts contained in the President's June budget. The difference that we are talking about today is a difference in baselines—their estimates and our estimates of what the budget would be, absent any changes in policy. I just wanted to make that clear.

Senator SNOWE. Thank you.

Senator FRIST. Thank you. If there are no further comments, I wish, on behalf of both houses, to thank both of you for being with us today. And with that, we stand adjourned.

[Whereupon, at 11:28 a.m., the joint hearing was adjourned.]

OPENING STATEMENT OF CHAIRMAN DOMENICI

First, let me welcome you Chairman Kasich and Ranking Member Sabo, and the other members of the House Budget Committee to the U.S. Senate this morning for this joint hearing.

Good morning, Director Rivlin. Mr. Dellinger, while you may not have appeared before the Senate Budget Committee as often as Director Rivlin, I recall you did appear before the committee once in 1992 on the proposed balanced budget amendment to the Constitution. We are pleased you both can join us today.

Director Rivlin, I want to assure you, the audience, and the American public watching this hearing today that we have no intention of "shutting down the government". We do intend, however, to put the government on a path to a balanced budget in 7 years!

Indeed, a week ago this evening our two respective leaders met with the President and I understand agreed that there would be a continuing resolution on October 1, that would avoid any funding lapse this year.

This week and next the Senate will work hard to try to get the final six appropriations bills passed and to conference. Every effort is being made to get all 13 appropriation bills to the President before the start of the new fiscal year—but I think we all must be honest and admit that we will still need a continuing resolution simply because we will not get all the paper work done on the conferences in time to meet the October 1 deadline.

If of course the President chooses to veto a continuing resolution, for whatever reasons, then the first set of questions before the committee still are relevant this morning.

What does it mean to have a funding lapse? Who would be affected by a funding shortfall and how? Who is essential and whose definition applies? What does it mean "programs for the safety of human life or protection of property"? And what broad authorities does the Executive possess to continue operating programs that have lost their funding?

I hope we can shed some light on these questions today, even if we all still believe we can avoid such an occurrence in a couple of weeks because clearly this is not a new issue. Unfortunately it is becoming more of an annual event, and maybe we can at least clear up some of the confusion that surrounds this issue for government employees and the American public at large.

But there are two funding issues, the first being the annual appropriations bills, and the second—and the one I consider more serious—the periodic debt limit issue. This fall we will be faced with both funding issues.

The debt limit provides the government with the authority to finance the entire government. I believe, that failure to pass a debt limit will affect the government's credit and would have severe financial and economic ramifications that could trigger a financial crisis.

Failure to enact appropriations is like not paying your phone bill. Failure to enact the debt limit is like not paying your mortgage. For a short time neither are disastrous. For an extended time, one results in losing your phone; the other results in losing your house. Along with losing your house, you would ruin your credit rating and endanger your ability to borrow funds in the future.

While most news stories are focused on the October 1st date associated with the need for appropriations, a much more serious date looms in mid November.

The current limit on the debt amounts to \$4.9 trillion. CBO tells us that Treasury will run up against the debt limit in mid November. While Treasury can run the government for a short period of time through some financing techniques, the Treasury needs a debt limit extension to meet the government's obligation.

If we fail to extend the debt limit for a period of time, it would eventually lead to a government default. That means the government could not honor its obligations and a financial crisis would ensue. Such a crisis would not be just a threat to the government, it would threaten the entire economy and have international ramifications.

Forcing a default would be the height of irresponsibility. And we should make every effort to avoid it.

But equally irresponsible, I say to the distinguished Director, is a legacy of \$200 billion deficits that CBO says the President's budget plan will give this country.

The next 2 weeks in the Senate is budget reconciliation time. I am convinced that the Senate Finance Committee will increase the debt limit in their title of the reconciliation bill.

The President said over the weekend that he would veto the reconciliation bill that will embody our changes in entitlement programs because he thinks we are restraining spending too much. Even under our budget which gets to balance in 7 years, and which he objects to because of the spending restraint, we will have to increase the debt by \$600 billion.

To the extent the President prevails with a veto, his action will lead to a Federal Government default and even higher debt. He cannot have it both ways. He cannot be for higher spending and a lower debt, because the numbers simply don't add up.

We cannot afford it and I hope the President will agree to the spending restraint outlined in our plan, using CBO's numbers, to get this country's budget balanced in 7 years.

This is serious business, and I hope both the Administration witnesses will comment this morning if the President is willing to put the government in actual default this fall by opposing a plan that truly and honestly gets us to balance in 7 years.

Dr. Rivlin you should know and communicate back to the President, that some in the Congress argue—and I do not necessarily agree but I understand their thinking—that a default on our debt this fall for a few days is a small price to pay, if it means achieving a real deficit reduction agreement that would avoid the bigger government shut down and fiscal nightmare that awaits us in the next century from failing to find a way to a balanced Federal budget.

I look forward to your testimony.

OPENING STATEMENT OF SENATOR CHRISTOPHER DODD

Thank you Mr. Chairman. I want to commend you for holding today's hearing. It is critically important that every American understand what may happen if Congress and the President engage in an elaborate game of budgetary chicken this fall. It is clear that Federal employees, the American public, our national economy, and the world's financial markets will not be held harmless. A long delay could cause enormous and irreparable damage.

While a somewhat more conciliatory tone has been struck in recent days, Senate majority leader Dole and speaker Gingrich have repeatedly stated their unwillingness to compromise this fall. These comments increase the likelihood of a fiscal train wreck and are, therefore, cause for great alarm.

I understand well the political stakes on these issues. But, I also understand the stakes of playing high-risk games with vital Federal functions. In my view, any short-term political advantage to be gained by either party could be dwarfed by the long-term damage of elevating this confrontation.

In our 200+ years of existence as a republic, the United States has never defaulted on its obligations. Any decision to hold the debt limit extension hostage to the passage of a reconciliation bill threatens to mar this record, undermine our Nation's creditworthiness, send warning signals throughout the world's financial markets, and raise interest payments on the debt.

Mr. Chairman, this year's debate over budget priorities is one of the most significant in a generation. The magnitude of the changes—to Federal health care programs, education, welfare, and the environment—are extraordinary and unprecedented. In my view, they will smack ordinary people in this country like a two-by-four right between their eyes.

Whatever one's view, one thing is clear: a fundamental reordering of Federal priorities demands a full, thorough, and open debate. The American people deserve no less. They deserve to see their representatives discussing these issues with the seriousness they deserve—not playing political games with vital Federal functions.

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A Primer on Continuing Resolutions and the Ceiling on the Public Debt

September 8, 1995

INTRODUCTION

Two distinct and separate budgetary events that could affect government activities and operations face Congress and the White House this fall. This primer is intended to explain the basic principles surrounding these events, and to answer basic questions Members have raised. The two events discussed are the following:

- **The Potential Need for a Continuing Resolution.** A continuing resolution would be needed to cover any appropriations bills that have not been signed by the President by October 1, the beginning of fiscal year 1996. If, in that situation, the President also refused to sign a continuing resolution, the result would be a "shutdown" of non-essential government activities in those agencies whose appropriations bills have not been signed. If the President were to veto all 13 appropriations bills, then the "shutdown" would affect all government agencies. Although such a shutdown would not halt "essential" activities — those concerning public health and safety and the protection of property — the suspension of other functions could affect substantial numbers of employees in various agencies.
- **Whether to Raise the Public Debt Ceiling.** As the name implies, this ceiling limits how much the government can borrow to maintain cash flow and finance the deficit. The current ceiling is expected to be reached in mid-October, although various actions by the Treasury could delay any effects until mid-November. Without an increase in the debt limit at that point, the Federal Government will be unable to borrow the money it needs to meet obligations for which there is no cash on hand on any given day. Although the need to raise the debt ceiling has been

driven by the past pattern of deficit spending, the effect of restricting government borrowing authority when the current debt limit is reached would fall largely on government cash flow: It could complicate the government's ability to meet its financial obligations in a timely manner. Prolonging the situation could intensify the problem.

It is important to bear in mind that a continuing resolution and the public debt ceiling are *two distinct budgetary issues*. The fact that they could occur within weeks of each other is purely coincidence. Furthermore, the possible consequences of an impasse are different in each case.

- **Continuing resolutions** concern potential lapses of authority to spend money for *discretionary* programs. (Discretionary programs are those funded annually through appropriations bills, as distinct from entitlement programs, which are not affected by the passage of or delay in appropriations bills or continuing resolutions.) As noted above, a deadlock over a continuing resolution could lead to a temporary "shutdown" of non-essential government activities.
- The **debt ceiling** concerns cash flow and the authority to borrow and disperse funds in a timely manner. A stalemate over the debt limit would not necessarily suspend government activities — at least not in the short term — but it would complicate the government's ability to meet its obligations in a timely manner. Taken to its extreme the situation could lead the government to defaulting on its obligations, although this has never happened.

Differences between Congress and the President over slowing the growth of spending, cutting taxes, and balancing the budget is creating what some call a budgetary "train wreck" over one or both of these events — especially the first. Such rhetoric exaggerates the possible consequences. Still, the issues are likely to demand challenging policy choices.

[Please note: The paper focuses on continuing resolutions and the debt ceiling because these are the two areas in which government operations could be affected. Government activities would not be affected if the President refused to sign this fall's other key legislative measure, *reconciliation*. Reconciliation is required to conform tax law and entitlement spending (such as Medicare, Medicaid, welfare, and so on) with the directives of the Congressional budget resolution. A failure to enact reconciliation legislation would create its own problems but funding for these programs would continue as provided under existing law because their appropriation is permanent. Nevertheless, a reconciliation bill could be used as a vehicle for debt ceiling legislation or even — though less likely — for appropriations legislation.]

I. POTENTIAL NEED FOR A CONTINUING RESOLUTION

Since 1977, there have been 56 continuing resolutions, most of them covering relatively short periods, such as several days or weeks. Some covered an entire year for certain programs (such as those usually funded through the Foreign Operations appropriations). Such temporary, stopgap legislation is required to cover any appropriations that the President refuses to sign by the time the fiscal year begins.

A. Timing and Procedural Issues

If one or more continuing resolutions are required this year, the first occasion for one will be Sunday, October 1, the start of the 1996 fiscal year. This also will be the first critical juncture of this fall's budget events.

Under normal circumstances, the government's discretionary (non-entitlement) spending is subject to the passage, each year, of 13 separate appropriations bills. These are the spending bills that the House has been considering this summer. A continuing resolution is needed to fund any discretionary programs whose appropriations the President has refused to sign by the time the new fiscal year starts on October 1.

Q: Why is it possible a continuing resolution will be needed this year?

A: Because it is unlikely that the President will have signed all the appropriations bills needed to fund discretionary spending for fiscal year 1996 by the time the new fiscal year starts on October 1. The continuing resolution procedure is intended precisely for such situations — to provide stopgap funding so that government functions can continue.

House and Senate leaders are striving to complete all the 1996 appropriations bills by October 1, the beginning of the fiscal year. But the Administration has stated its disagreement with all of the bills — concerns that could lead to presidential vetoes. Should the President veto any or all of the appropriations, the House and Senate likely would send him a continuing resolution.

Q: Would the need for a continuing resolution be unusual?

A: No. As noted above, there have been 56 continuing resolutions since 1977, or about three a year on average. Some occurred because Congress did not complete appropriations actions by October 1. Others came about because of policy differences between Congress and the White House. Continuing resolutions exist

precisely so that government activities can continue in these situations. The table below shows the history of continuing resolutions.

Recent History of Continuing Resolutions

Fiscal Year	Number of CRs	Number of Days Covered by CRs	Number of Days Shutdown	Appropriations Enacted by Start of the Year	Acts Covered by Full Year CR
1977 ¹	2	202	10	13	0
1978	3	337	28	9	1
1979	1	348	17	5	1
1980	2	355	11	3	3
1981	3	365	0	1	5
1982	4	363	2	0	4
1983	2	361	4	1	7
1984	2	363	3	4	3
1985	5	362	3	4	8
1986	5	365	0	0	7
1987	6 ²	364	1	0	13
1988	5	365	1	0	13
1989	0	0	0	13	0
1990	3	51	0	1	0
1991	5	33	3	0	0
1992	4	366	0	3	1
1993	1	5	0	1	0
1994	3	41	0	2	0
1995	0	0	0	13	0

¹1977 CRs mainly provided funding for HHS accounts not covered in the HHS Appropriations Bill.

²The sixth CR corrected enrollment errors in the fifth CR.

Q: Where do the President and Congress disagree on appropriations bills?

A: The Administration has expressed its disagreement with every appropriations bill under consideration by Congress. For example, the President has promised to veto the House-passed Labor-HHS appropriations bill because of cuts in the Head Start program, the termination of funding for Goals 2000, the elimination of the Summer Youth Employment program, language allowing states to restrict abortion funding, and language preventing organizations from using Federal funds for political advocacy. The Secretary of Commerce has recommended that the President veto the Commerce-State-Justice appropriations bill because of terminations of duplicative programs in his department. The VA-HUD bill is threatened with a veto because of legislative limitations on enforcement activities at the Environmental Protection Agency and major program funding reductions at EPA and the Department of Housing and Urban Development, and cuts in the Corporation for National and Community Service programs.

Q: What funding levels would be contained in a continuing resolution?

A: There are several alternatives. Traditionally, a continuing resolution assumes the lowest of the current year's level, the new House-approved level, or the new Senate-approved level. But Congress can specify any level and any mix.

Q: How long does a continuing resolution last?

A: The resolution's duration is specified in the legislation. Typically, continuing resolutions are drafted to cover a number of weeks, or even days, depending on how much time is expected to elapse before the President signs the regular appropriations bills. The resolution can be written to cover an entire fiscal year.

Q: If a continuing resolution is written to cover less than a full year, how are funding levels determined?

A: The resolution provides authority to spend at an annual rate. The President, through the Director of the Office of Management and Budget, "apportions" the funds to assure that agencies do not spend too rapidly.

Q: What level of spending is allowed by apportionments?

A: Normally, the apportionments are made on a pro-rata basis. In other words, if the continuing resolution is effective for 12 percent of the year, then the

apportionment is 12 percent of a program's annual appropriation. Different patterns of apportionments may be used where necessary. For example, if an agency needs to obligate more than a pro-rata amount, a larger apportionment can be provided by the Office of Management and Budget.

Q: Can new programs be started under a continuing resolution?

A: No, unless funds are expressly provided in the resolution. For example, if an activity is included in the Senate appropriations bill, but the House-passed appropriation is used as the basis for the continuing resolution, then the activity cannot be initiated under the continuing resolution. If, however, the continuing resolution expressly provides for the new activity, then the activity can be initiated. In the past, some continuing resolutions have contained language expressly prohibiting new projects or activities.

Q: Can existing discretionary programs be expanded?

A: No. Existing programs may be continued only at rates allowed under the continuing resolution.

Q: If an existing program or activity is proposed for termination, can it be funded under a continuing resolution?

A: If the program or activity is not terminated through specific language or implication in the continuing resolution, then it can be continued at a minimal level.

B. Effects of an Impasse: a Possible Government "Shutdown"

In the absence of regular appropriations or a continuing resolution, the government faces what is known as a "funding gap," in which the government lacks appropriations for discretionary programs that are funded annually. This condition is known as a government "shutdown," although the term exaggerates the extent to which government activities are suspended.

Q: When could a government shutdown occur this year?

A: As noted above, this would occur on October 1 if a discretionary "funding gap" occurred. This gap would come about if the President refused to sign any of the

appropriations bills for fiscal year 1996 and also refused to sign a continuing resolution sent to him by the Congress. Technically, the government at that point would have no authority to obligate or spend funds on programs subject to annual appropriations. The government would have to suspend certain activities funded through annual appropriations, or delay payments for those that continue.

Q: What if some appropriations bills are signed but others are not?

A: The general practice has been that the continuing resolution covers the appropriations bills that have not been signed.

Q: Don't the activities of some Executive Branch agencies continue even during a "shutdown?"

A: Yes. Entitlement programs operating under permanent appropriations would continue, as would activities deemed by the President to be essential for health, safety, and the protection of property. Also, programs needed for the President to discharge his Constitutionally enumerated powers would continue.

Q: Which programs could continue even if they fail to receive appropriations?

A: Ultimately, it's the Administration's decision but based on criteria set out in the following:

- **The Anti-Deficiency Act.** This 1870 law is the principal legislation governing this area. The act 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." It also prohibits the government from accepting voluntary services exceeding those authorized by law. (In other words, non-essential government employees cannot "volunteer" to work without pay.)

It should be noted that the Anti-Deficiency Act was designed to prevent government officials from incurring unauthorized obligations beyond what Congress intended to spend. Only in recent years have interpretations of the Act been used to address the consequences of lapses in spending authority.

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- **The so-called “Civiletti Memos.”** In 1980 and 1981, then Attorney General Benjamin R. Civiletti wrote two opinions in the form of memoranda. In the first, Civiletti set forth his interpretation of the Anti-Deficiency Act. Before the 1980 memo, GAO had interpreted the Anti-Deficiency Act to allow GAO’s operations to continue because it was not “the intent of Congress that GAO close down.” The 1980 Civiletti memo made clear that the Anti-Deficiency Act prohibited Federal agencies from incurring obligations prior to an appropriation.

Civiletti’s 1981 memo expanded on the first, elaborating on exceptions to the Anti-Deficiency Act. It said the exceptions would occur under the following circumstances: 1) for obligations that are “authorized by law,” including mandatory programs such as Social Security; 2) for the discharge of the President’s Constitutionally enumerated powers, such as his role as commander-in-chief of the armed forces, as well as his legislative role (signing bills sent to him by the Congress); 3) in cases of emergencies involving the safety of human life and the protection of property; and 4) when funds are necessary to bring about the orderly termination of an agency.

- **The 1990 Budget Agreement.** This legislation contained the following language: “The term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” This language makes clear that exceptions to the Anti-Deficiency Act are to be narrowly construed.
- **The “Rivlin Memo.”** On August 16, 1995, Assistant Attorney General Walter E. Dellinger prepared a memorandum for OMB Director Alice M. Rivlin regarding the permissible scope of government operations during a lapse in appropriations. The Rivlin memo is basically a restatement of the earlier Civiletti opinions. Dellinger also notes that the 1990 Budget Agreement was designed to provide a narrow construction of the “property and safety” exception to the Anti-Deficiency Act. This memo is being used by agencies to develop their current plans in the event of a shutdown.

Based on the above, the consensus is that the personnel who would continue to work would include the following:

- Those involved with the safety of human life and the protection of property, such as air traffic controllers, FBI, DEA, ATF, and Customs

agents, the border patrol, personnel involved with the oversight of stock, commodities, and futures exchanges, and meat inspectors.

- ▶ Those necessary to assure the continuation of mandatory programs (such as personnel involved with the check writing and distribution functions of Social Security).
- ▶ Personnel involved with the discharge of the President's constitutional duties and powers. This definition has been purposely kept vague because, according to the 1981 Civiletti memo, its extent and limitations are dependent upon circumstances.

Q: Do "essential" personnel get paid?

A: Yes. Employees who are considered "essential" would continue to earn their pay during a government shutdown. Their actual paychecks might be delayed, however, subject to the passage of an appropriations bill or continuing resolution.

Q: Would a government shutdown affect activities of the armed forces?

A: For the most part, no. The armed forces probably would fall into the exception for health and safety and the protection of property. In addition, the 1861 Food and Forage Act might also be employed. The Act provides the Department of Defense with the authority to obtain "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

Q: Would a shutdown threaten Social Security or Medicare benefits?

A: No. Social Security and Medicare Part A have permanent appropriations, so benefits would continue to be paid. Medicare Part B benefits also would continue to flow, although payments to providers would be subject to the availability of funds in the Medicare Part B Trust Fund.

Q: Is this also true of other entitlement programs?

A: No. Most other entitlements, such as Medicaid, Family Support Payments (AFDC), Supplemental Security Income, and Social Services Block Grants, are appropriated annually even though they are mandatory spending. The effect is

that clients continue to earn the benefits to which they are entitled, but the actual checks could not be processed without an actual appropriation for the program.

Q: Would a shutdown cause the furlough of personnel who write checks for benefit programs such as Social Security and Medicare?

A: No. The second Civiletti opinion argued that the government would require employees who administer these checks to continue working.

Recent U.S. Government "Shutdowns"

Fiscal Year	Date gap commenced	Full days of shutdown	Date shutdown terminated
1982	Friday 11-20-81	Saturday, Sunday	Monday 11-23-81
1983	Thursday 9-30-82 Friday 12-17-82	Friday Saturday, Sunday, Monday	Saturday 10-2-82 Tuesday 12-21-82
1984	Thursday 11-10-83	Friday, Saturday, Sunday	Monday 11-14-83
1985	Sunday 9-30-84 Wednesday 10-3-84	Monday, Tuesday Thursday	Wednesday 10-3-84 Friday 10-5-84
1987	Thursday 10-16-86	Friday	Saturday 10-18-86
1988	Friday 12-18-87	Saturday	Sunday 12-20-87
1991	Friday 10-5-90	Saturday, Sunday, Monday	Tuesday 10-9-90

Q: Would a government "shutdown" be unusual?

A: Obviously, a government shutdown is not common. Since 1980, however, the Federal Government has survived nine temporary "shutdowns" because of funding gaps. Most have lasted only a few days, and in several cases the effect was ameliorated

because the shutdown occurred during a weekend (see table below). This year, October 1 falls on a Sunday, so if a shutdown started then it would likely run into one or more weekdays.

Q: How long would a shutdown last?

A: In theory, a shutdown could last indefinitely if the President continued refusing to sign appropriations bills or continuing resolutions sent to him by Congress.

II. THE PUBLIC DEBT CEILING

The current public debt ceiling is \$4.9 trillion. This figure represents the total amount of debt that the government can incur to meet its obligations and to maintain orderly day-to-day cash flow.

The amount of money currently owed by the Federal Government that is subject to limit is about \$4.881 trillion and growing. If the Federal Government reaches its current \$4.9-trillion debt ceiling and the ceiling is not raised, the government will be unable to borrow money to meet any obligations for which there is no cash on hand on any given day. This will not bring government activities to an immediate halt; but it could lead to delays in meeting government obligations.

There are two kinds of extensions of the debt ceiling. A "permanent" extension establishes a dollar limit on the government's ability to borrow; it lasts until the government's actual borrowing reaches the ceiling (potentially forever). A temporary extension establishes either a small addition of borrowing authority or a fixed date for the expiration of authority to borrow; this is usually a short-term measure.

A. Timing and Procedural Issues

The need to raise the ceiling has been driven principally by two conditions: the deficit spending that has been chronic since 1970 and the practice of borrowing from government trust funds. Deficit spending has driven up the debt held by the public to \$3.6 trillion in 1995, compared with \$710 billion in 1980. Borrowing from government trust funds adds \$1.3 trillion to the debt, compared with \$200 billion in 1980.

But the need for borrowing would exist even if the budget were in balance because government revenues do not flow into the Treasury at the same rate as the demand for spending. In other words, the government uses a portion of its borrowing authority simply to maintain orderly day-to-day cash flow for approved programs and activities.

Q: When is the current debt ceiling expected to be reached?

A: The government is expected to reach its current debt ceiling in mid-October. But technical actions by the Department of the Treasury, as discussed below, will probably allow for sufficient cash flow up until November 15, when interest payments on Federal debt instruments will be due. On that day, the government will need to pay out between \$22 billion and \$25 billion.

Q: Can Congress temporarily extend the ceiling?

A: Yes, through two possible methods. In one, Congress could provide a small amount of additional borrowing authority — say \$25 billion. Another temporary method would be to extend borrowing authority for a fixed amount of time, expiring on a designated date.

Q: What options does the Treasury have when facing an interruption of borrowing authority?

A: The Treasury has typically resorted to several tactics, in sequence, in dealing with bumping up against the debt ceiling including the following:

- **Suspend the sale of non-marketable debt.** This includes sales of savings bonds and securities to state and local governments. If a temporary debt ceiling extension were enacted, these sales would be suspended on the date the extension expired.
- **Disinvest trust funds balances.** Trust fund surpluses are invested in IOUs the Federal Government writes to itself. At the expiration of the debt limit, the Treasury would stop writing new IOUs, and then, in effect, would begin tearing up old IOUs. The Treasury actually did this in November of 1985 to create room under the debt ceiling to auction marketable securities to establish a larger cash reserve.
- **Trim or delay auction of marketable securities.** At the expiration of the debt limit, the Treasury would suspend (or alter the normal size) of public debt offerings (bills, notes and bonds).

One other option that the Treasury has used previously — under a temporary debt ceiling extension — is beefing up sales of marketable securities to build cash balances prior to bumping up against the debt ceiling and before obligations become due.

Q: Doesn't the government retire some of its debt each month even as it is incurring more?

A: Yes. As government debt instruments (bills, notes and bonds) become due they are redeemed or retired. But retiring debt is usually funded through the issuance of new and additional debt because of deficit financing including interest payments on the Federal debt.

B. Impact of Reaching the Debt Ceiling

The questions and answers below reflect methods that have been used or can be used to address a restriction on the government's ability to borrow.

Q: Can't the government simply run on a cash-flow basis but at lower levels?

A: Yes, but it would be complicated, because cash receipts and outlays rarely coincide in timing. There are distinct peaks and valleys in the Treasury's need for cash associated with the seasonal and daily patterns of payments and receipts (see chart below).

The Federal Government's cash flow needs can be compared to those of a business. Even if the business is not operating on a deficit basis, it still borrows to cover cash shortfalls brought about by making sales on credit while having to operate on cash. In other words, it may perform a service and be compensated 30 days later while at the same time having to cover expenses for that service before receipt of payment from its customer.

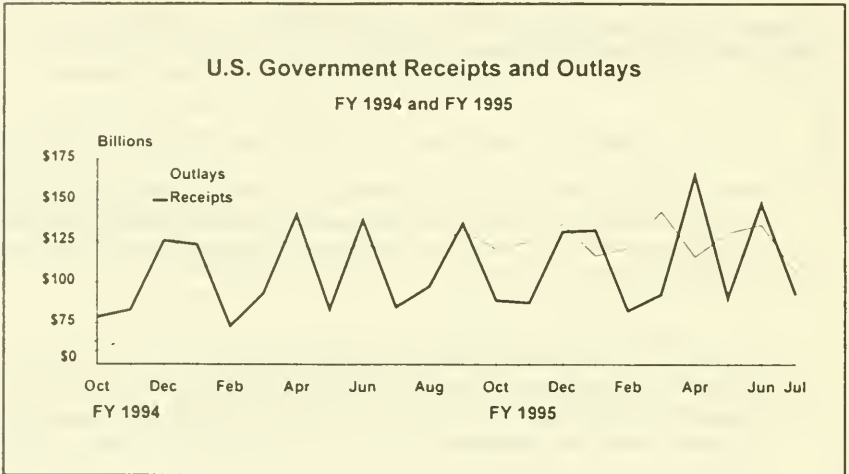
The government operates in a similar manner — cash income and expenses are out of synch with regard to timing. Two significant drains on the Treasury — benefit payments and interest payments — are especially large.

Q: What are the major cash flow drains on the Treasury?

A: Benefit payments go out between the first and third of the month. Interest payments to owners of Treasury notes and bonds take place on fixed dates. Other cash withdrawals for purposes as varied as Federal employees' pay, defense contracts, grants to states and localities, loans to foreign governments and Medicare are smaller, but nonetheless, they are not on an even keel with receipts. Also, unpredictable heavy outlays, such as natural disasters or national security emergencies.

Q: How does the flow of receipts compare with this pattern?

A: Receipts are a little more consistent, but they have some noticeable peaks and valleys as well. Income taxes withheld from paychecks and employment taxes are the backbone of the Treasury's deposits. Withheld taxes flow in fairly smoothly at about \$3 billion a day with a little clustering. In contrast, corporate income taxes and nonwithheld individual income taxes concentrate around just a few deadline dates, most notably April 15. Interest payments due from loans are inconsistent as are other cash receipts from various activities of the government.



Q: What happens if the debt ceiling is reached and the Treasury's cash flow is insufficient to meet all obligations?

A: First, this would be unprecedented. There is no established guidance for the Congress, the President, or the Treasury to determine how to use Federal funds to meet its obligations should borrowing authority be limited or inadequate. Legislation has not been enacted nor has the Executive Branch established guidelines as to the priority of which obligations would be met first.

Currently, the Treasury must prioritize payments by timing — which came due first, second, and so on.

Q: If the government attempted to run solely on a cash flow basis, how would it determine what obligations would be paid?

A: Congress and the Administration could attempt to assign priorities to programs and activities to indicate who should get payments in what order. No comprehensive plan for such a situation ever has been drafted. Any plan that Congress and the Administration would adopt would have to be feasible for operations — in other words, it would have to be possible for the agencies, the Treasury, and the Federal Reserve (the Treasury's banker) to apply the priorities to the day-to-day decisions of which claims should be paid and when.

THE ANTI-DEFICIENCY ACT

Sec. 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government 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 for the expenditure or obligation;

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

* * *

Sec. 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. . . . As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not involve ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

The Civiletti Opinion

43 Op. Att'y Gen. 29, 5 Op. Off. Legal Counsel 1 (1981)

**Authority for the Continuance of Government Functions
During a Temporary Lapse in Appropriations**

Statutory authority for an agency to incur obligations in advance of appropriations need not be express, but may be implied from the specific duties that have been imposed upon, or of authorities that have been invested in, the agency.

The "authorized by law" exception in the Antideficiency Act exempts from that Act's general prohibition not only those obligations for which there is statutory authority, but also those obligations necessarily incident to initiatives undertaken within the President's constitutional powers.

A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some degree by delay in the performance of the function in question.

January 16, 1981

THE PRESIDENT

THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have asked my opinion concerning the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations, such as the government sustained on October 1, 1980. As you know, some initial determination concerning the extent of these authorities had to be made in the waning hours of the last fiscal year in order to avoid extreme administrative confusion that might have arisen from Congress' failure timely to enact 11 of the 13 anticipated regular appropriations bills,¹ or a continuing resolution to cover the hiatus between regular appropriations. The resulting guidance, which I approved, appeared in a memorandum that the Director of the Office of Management and Budget circulated to the heads of all departments and agencies on September 30, 1980. Your request, in effect, is for a close and more precise analysis of the issues raised by the September 30 memorandum.

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980, opinion to you concerning the applicability of the Antideficiency Act, 31 U.S.C. § 665, upon lapses

¹ Prior to October 1, 1980, Congress had passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. No. 96-367, 94 Stat. 1331 (Oct. 1, 1980).

in appropriations, 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980). That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized by law to employ the services of their employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

The events prompting your request for my earlier opinion included the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission (FTC) would expire in April, 1980, without extension, and that the FTC might consequently be left without appropriations for a significant period.² The FTC did not then suggest that it possesses obligational authorities that are free from a one-year time limitation. Neither did it suggest, based on its interpretation of the law at that time, that the FTC performs emergency functions involving the safety of human life or the protection of property other than protecting government property within the administrative control of the FTC itself. Consequently, the legal questions that the April 25, 1980, opinion addressed were limited. Upon determining that the blanket prohibition expressed in § 665(a) against unauthorized obligations in advance of appropriations is to be applied as written, the opinion added only that the Antideficiency Act does permit agencies that are ceasing their functions to fulfill certain legal obligations connected with the orderly termination of agency operations.³ The opinion did not consider the more complex legal questions posed by a general congressional failure to enact timely appropriations, or the proper course of action to be followed when no prolonged lapse in appropriations in such a situation is anticipated.

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of § 665(a) excepts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that § 665(b) expressly permits the

² FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. No. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. No. 96-240, 94 Stat. 342. Prior to April 30, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. No. 96-252, 94 Stat. 374 (May 28, 1980), would precipitate a lapse in appropriations for a significantly longer period.

³ See note 11, *infra*.

government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

I.

Section 665(a) of Title 31, United States Code provides:

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; *nor shall any officer or employee involve the Government in any contract or obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.* (Emphasis added.)

Under the language of § 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. Att'y Gen. 288, 291 (1870).

A more complex problem of interpretation, however, may be presented with respect to obligational authorities that are not manifested in appropriations acts. In a few cases, Congress has expressly authorized agencies to incur obligations without regard to available appropriations.⁴ More often, it is necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations. This, of course, would be the relevant legal inquiry even if Congress had not enacted the Antideficiency Act; the second phrase of § 665(a) clearly does no more than codify what, in any event and not merely during lapses in appropriations, is a requirement of legal authority for the obligation of public funds.⁵

⁴ See, e.g., 25 U.S.C. § 99; 31 U.S.C. § 668; 41 U.S.C. § 11.

⁵ This rule has, in fact, been expressly enacted in some form for 160 of the 191 years since Congress first convened. The Act of May 1, 1820, provided:

[N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or

Previous Attorneys General and the Comptrollers General have had frequent occasion to address, directly or indirectly, the question of implied authority. Whether the broader language of all of their opinions is reconcilable may be doubted, but the conclusions of the relevant opinions fully establish the premise upon which my April 25, 1980, memorandum to you was based: statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies. The authority must be necessarily inferrable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested in, the officers or employees purporting to obligate funds on behalf of the United States. 15 Op. Att'y Gen. 235, 240 (1877).

Thus, for example, when Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment. *E.g.*, 30 Op. Att'y Gen. 332, 333 (1915); 30 Op. Att'y Gen. 186, 193 (1913); 28 Op. Att'y Gen. 466, 469-70 (1910); 25 Op. Att'y Gen. 557, 563 (1906). On the other hand, when authority for the performance of a specific function rests on a particular appropriation that proves inadequate to the fulfillment of its purpose, the responsible officer is not authorized to obligate further funds for that purpose in the absence of additional appropriations. 21 Op. Att'y Gen. 244, 248-50 (1895); 15 Op. Att'y Gen. 235, 240 (1877); 9 Op. Att'y Gen. 18, 19 (1857); 4 Op. Att'y Gen. 600, 601-02 (1847); *accord*, 28 Comp. Gen. 163, 165-66 (1948).

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsi-

of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

3 Stat. 567, 568. The Act of March 2, 1861, extended the rule as follows:

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 War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

12 Stat. 214, 220. Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

[I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, nor to involve the government in any contract for the future payment of money in excess of appropriations.

Act of July 12, 1870, ch. 251, § 7. 16 Stat. 230, 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 595, 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

bilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations. For example, Attorney General McReynolds concluded, in 1913, that the Postmaster General could not obligate funds in excess of appropriations for the employment of temporary and auxiliary mail carriers to maintain regular service, notwithstanding his broad authorities for the carrying of the mails. 30 Op. Att'y Gen. 157, 161 (1913). Similarly, in 1877, Attorney General Devens concluded that the Secretary of War could not, in the absence of appropriations, accept "contributions" of materiel for the army, e.g., ammunition and medical supplies, beyond the Secretary's specific authorities to contract in advance of appropriations. 15 Op. Att'y Gen. 209, 211 (1877).⁶

Ordinarily, then, should an agency's regular one-year appropriation lapse, the "authorized by law" exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, e.g., multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.⁷ A nearly government-wide lapse, however, such as occurred on October 1, 1980, implicates one further question of executive authority.

Unlike his subordinates, the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well. To take one obvious example, the President alone, under Article II, § 2, clause 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum

⁶ *Accord*, 37 Comp. Gen. 155, 156 (1957) (Atomic Energy Commission's broad responsibilities under the Atomic Energy Act do not authorize it to enter into a contract for supplies or services to be furnished in a fiscal year subsequent to the year the contract is made); 28 Comp. Gen. 300, 302 (1948) (Treasury Department's discretion to establish reasonable compensation for Bureau of the Mint employees does not confer authority to grant wage increases that would lead to a deficiency).

⁷ It was on this basis that I determined, in approving the September 30, 1980, memorandum, that the responsible departments 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. Certain so-called "entitlement programs," e.g., Old-Age and Survivors Insurance, 42 U.S.C. § 401(a), are funded through trust funds into which a certain portion of the public revenues are automatically appropriated. Notwithstanding this method of funding the entitlement payments themselves, the costs connected with the administration of the trust funds are subject to annual appropriations. 42 U.S.C. § 401(g). It might be argued that a lapse in administrative authority alone should be regarded as expressing Congress' intent that benefit payments also not continue. The continuing appropriation of funds for the benefit payments themselves, however, substantially belies this argument, especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula. In the absence of a contrary legislative history to the benefit program or affirmative congressional measures to terminate the program, I think it proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.

obligational authority sufficient to carry this power into effect. Not all of the President's powers are so specifically enumerated, however, and the question must consequently arise, upon a government-wide lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

In my judgment, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, *Crowell v. Benson*, 285 U.S. 22, 62 (1932), and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. § 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952):

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Following⁸ this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and

⁸ A majority of the Supreme Court has repeatedly given express endorsement to Mr. Justice Jackson's view of the separation of powers. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); *United States v. Nixon*, 418 U.S. 683, 707 (1974); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974).

competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes—and thus with the exercise of legislative power in an area of concurrent authority—that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates. In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations.⁹ Clearly, such an exercise of power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President.¹⁰ Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

In sum, I construe the “authorized by law” exception contained within 31 U.S.C. § 665(a) as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.

II.

In addition to regulating generally obligations in advance of appropriations, the Antideficiency Act further provides, in 31 U.S.C. § 665(b):

No officer or employee of the United States shall accept voluntary service for the United States or employ per-

⁹ As stated by Attorney General (later Justice) Murphy:

[T]he Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

39 Op. Att’y Gen. 343, 347–48 (1939).

¹⁰ One likely category into which certain of these functions would fall would be “the conduct of foreign relations essential to the national security,” referred to in the September 30, 1980, memorandum.

sonal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Despite the use of the term "voluntary service," the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § 665(b) was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claim for additional compensation asserted by government employees performing extra services after hours. That is, under § 665(b), government officers and employees may not involve the government in contract for *employment*, i.e., for compensated labor, except in emergency situations. 30 Op. Att'y Gen. 129, 131 (1913).

Under § 665(b), it is thus crucial, in construing the government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history—of which Congress is fully aware—of the interpretation of an identical phrase in a related budgeting context suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than § 665(b) itself. First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

As originally enacted in 1884, the provision forbade unauthorized employment "except in cases of *sudden* emergency involving the loss of human life or the *destruction* of property." 23 Stat. 17. (Emphasis added.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the government's "life-saving stations." One Senator cautioned:

In other words, at the life-saving stations of the United States, for instance, the officers in charge, no matter what the urgency and what the emergency might be, would be prevented [under the House-passed bill] from using the absolutely necessary aid which is extended to them in such cases because it had not been provided for by law in a statute.

15 Cong. Rec. 2,143 (1884) (remarks of Sen. Beck); *see also id.* at 3,410–11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now § 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. § 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the Bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that “cases of sudden emergency” be amended to “cases of emergency,” “loss of human life” to “safety of human life,” and “destruction of property” to “protection of property.” These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b). Act of September 6, 1950, Pub. L. No. 81–759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

This interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. § 665(e), which prohibits the apportionment or reappropriation of appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in, among other circumstances, “emergencies involving the safety of human life, [or] the protection of property.” § 665(e)(1)(B).¹¹ Directors

¹¹As provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of §§ 665(b) and 665(e)(1)(B) should not be deemed *in pari materia* and given a like construction, *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973), although at first blush, it may appear that the consequences of identifying a function as an “emergency” function may differ under the two provisions. Under § 665(b), if a function is an emergency function, then a federal officer or employee may employ what otherwise would constitute unauthorized personal service for its performance; in this sense, the emergency nature of the function triggers additional obligational authority for the government. In contrast, under § 665(e)(1)(B), if a function is an emergency function, OMB may allow a deficiency apportionment or reappropriation—this permitting the expenditure of funds at a rate that could not be sustained for the entire fiscal year without a deficiency—but the effect of such administrative action would not be to trigger new obligational authority automatically. That is, Congress could always decline to enact a subsequent deficiency appropriation, thus keeping the level of spending at the previously appropriated level.)

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reappropriation, Congress did not appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reappropriations do not create new obligational authority, they frequently impose a necessity for further appropriations as

of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include Federal Bureau of Investigation criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e).¹² Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).¹³

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980, memorandum, as illustrative of the areas of government activity in which emergencies involving the safety of human life and the protec-

compelling as the government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

¹²In my April 25, 1980, memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. 43 Op. Att'y Gen. No. 24, at 1 [4 Op. O.L.C.—(1980)]. The functions that, in my judgment, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under § 665(b), of the agency's property by its own employees until such protection can be arranged by another agency with appropriations; compliance, within the "authorized by law" exception to § 665(a), with statutes providing for the rights of employees and the protection of government information; and the transfer, also under the "authorized by law" exception to § 665(a), of any matters within the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions in advance of appropriations only to the minimum extent necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgment, expects.

¹³The Supreme Court has referred repeatedly to the:

venerable rule that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes omitted). Since enacting the modern Antideficiency Act, including § 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of § 665(e). At no time has Congress altered this interpretation of § 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. Compare 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980).

tion of property might arise. To erect the most solid foundation for the Executive Branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency's emergency functions.

In suggesting the foregoing principles to guide the interpretation of § 665(b), I must add my view that, in emergency circumstances in which a government agency may employ personal service in excess of legal authority other than § 665(b), it may also, under the authority of § 665(b), it may also, under the authority of § 665(b), 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 effectively the purposes of the law." *United States v. Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (three-judge court), *aff'd*, 386 U.S. 270 (1967). Accordingly, when a statute confers authorities generally, those powers and duties necessary to effectuate the statute are implied. See 2A J. Sutherland, *Statutes and Statutory Construction* § 55.04 (Sands ed. 1973). Congress has contemplated expressly, in enacting § 655(b), that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the government to hire firefighters must surely have intended that water and firetrucks would be available to them.¹⁴

III.

The foregoing discussion articulates the principles according to which, in my judgment, the Executive can properly identify those functions that the government may continue upon lapses in appropriations. Should a situation again present itself as extreme as the emergency that arose on October 1, 1980, this analysis should assist in guiding planning by all departments and agencies of the government.

As the law is now written, the Nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the

¹⁴ *Accord*, 53 Comp. Gen. 71 (1973), holding that, in light of a determination by the Administrator of General Services that such expenses were "necessarily incidental to the protection of property of the United States during an extreme emergency," *id.* at 74, the Comptroller General would not question General Services Administration (GSA) payments for food for GSA special police who were providing round-the-clock protection for a Bureau of Indian Affairs building that had been occupied without authority.

Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,

BENJAMIN R. CIVILETTI



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

August 16, 1995

MEMORANDUM FOR ALICE RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

From: Walter Dellinger *WED/uc*
Assistant Attorney General

Re: Government Operations in the Event of a Lapse in Appropriations

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.¹

The Constitution provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. art. I, § 9, cl. 7. The treasury is further protected through the Antideficiency Act, which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, unless otherwise authorized by law. See 31 U.S.C. § 1341 et seq.²

In the early 1980s, Attorney General Civiletti issued two opinions with respect to the implications of the Antideficiency Act. See "Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations," 4A Op. O.L.C. 16 (1980); "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations," 5 Op. O.L.C. 1 (1981) (1981 Opinion). The 1981 Opinion has frequently been cited in the ensuing years. Since that opinion was written, the Antideficiency Act has been amended in one

¹ We do not in this memorandum address the different set of issues that arise when the limit on the public debt has been reached and Congress has failed to raise the debt ceiling.

² For the purposes of this inquiry, there are two relevant provisions of the Antideficiency Act. The first provides that "[a]n officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). The second provides that "[a]n 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." 31 U.S.C. § 1342.

respect, and we analyze the effect of that amendment below. The amendment amplified on the emergencies exception for employing federal personnel by providing that "[a]s 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 government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

With respect to the effects of this amendment, we continue to adhere to the view expressed to General Counsel Robert Damus of the Office of Management and Budget that "the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General's earlier analyses; if anything, the amendment clarified that the Antideficiency Act's exception for emergencies is narrow and must be applied only when a threat to life or property is imminent." Letter from Walter Dellinger to Robert G. Damus, October 19, 1993. In order to ensure that the clarification of the 1990 amendment is not overlooked, we believe that one aspect of the 1981 Opinion's description of emergency governmental functions should be modified. Otherwise, the 1981 Opinion continues to be a sound analysis of the legal authorities respecting government operations when Congress has failed to enact regular appropriations bills or a continuing resolution to cover a hiatus between regular appropriations.

I.

Since the issuance of the extensive 1981 Opinion, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987 and 1990, lapses of funding ranging from several hours to three days actually did occur. While several of these occurred entirely over weekends, others required the implementation of plans to bring government operations into compliance with the requirements of the Antideficiency Act. These prior responses to the threat of or actual lapsed appropriations have been so commonly referred to as cases of "shutting down the government" that this has become a nearly universal shorthand to describe the effect of a lapse in appropriations. It will assist in understanding the true extent of the Act's requirements to realize that this is an entirely inaccurate description. Were the federal government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation's airports would be closed and commercial air travel and transport would be brought to a standstill. Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping. The country's borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result. In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate. Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. Were the federal government to shut down, medicare payments for vital operations and medical services would cease. VA hospitals would abandon patients and close

their doors. These are simply a few of the significant impacts of a federal government shut down. Cumulatively, these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss. -

The Antideficiency Act imposes substantial restrictions on obligating funds or contracting for services in advance of appropriations or beyond appropriated levels, restrictions that will cause significant hardship should any lapse in appropriations extend much beyond those we have historically experienced. To be sure, even the short lapses that have occurred have caused serious dislocations in the provision of services, generated wasteful expenditures as agencies have closed down certain operations and then restarted them, and disrupted federal activities. Nevertheless, for any short-term lapse in appropriations, at least, the federal government will not be truly "shut down" to the degree just described, simply because Congress has itself provided that some activities of government should continue even when annual appropriations have not yet been enacted to fund current activities.

The most significant provisions of the Antideficiency Act codify three basic restrictions on the operation of government activities. First, the Act implements the constitutional requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Second, when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations (except as to situations authorized by other law). Third, it restricts employing the services of employees to perform government functions beyond authorized levels to emergency situations, where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.³ The 1981 Opinion elaborated on the various exceptions in the Antideficiency Act that permit some continuing government functions, and we will only summarize the major categories here:

- Multi-year appropriations and indefinite appropriations.

Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such

³ These restrictions are enforced by criminal penalties. An officer or employee of the United States who knowingly and willfully violates the restrictions shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both. 31 U.S.C. §1350.

cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- Express authorizations: contracting authority and borrowing authority.

Congress provides express authority for agencies to enter into contracts or to borrow funds to accomplish some of their functions. An example is the "food and forage" authority given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the 1981 Opinion emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies' enabling or organic legislation is insufficient to support a finding of express authorization or necessary implication (the exception addressed next in the text), standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.

- Necessary implications: authority to obligate that is necessarily implied by statute.

The 1981 Opinion concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well. Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception. In addition, in a 1980 opinion, Attorney General Civiletti opined that agencies are by necessary implication authorized "to incur those minimal obligations necessary to closing [the] agency." The 1981 opinion reiterated this conclusion and consistent practice since that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.

- Obligations necessary to the discharge of the President's constitutional duties and powers.

Efforts should be made to interpret a general statute such as the Antideficiency Act to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the executive. In this regard, the 1981 Opinion noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the "President's obligational authority . . . will be further buttressed in connection with any initiative that is consistent with statutes -- and thus with the exercise of legislative power in an area of concurrent authority -- that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry

out his constitutionally assigned tasks in the manner he contemplates." 1981 Opinion, at 6-7.⁴

- Personal or voluntary services "for emergencies involving the safety of human life or the protection of property."

The Antideficiency Act prohibits contracting or obligating in advance of appropriations generally, except for circumstances just summarized above. The Act also contains a separate exception applicable to personal or voluntary services that deal with emergencies. 31 U.S.C. § 1342. This section was amended in 1990. We will analyze the effects of that amendment in Part II of this memorandum.

Finally, one issue not explicitly addressed by the 1981 Opinion seems to us to have been settled by consistent administrative practice. That issue concerns whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make, consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded. The correct assumption in the context of an anticipated long period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear. However, with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of § 1342.

⁴ The Attorneys General and this office have declined to catalog what actions might be undertaken this heading. In 1981, for example, Attorney General Civiletti quoted Attorney General (later Justice) Frank Murphy. "These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action." 5 Op. O.L.C. at 7 n.9 (quoting 39 Op. Att'y Gen. 343, 347-48 (1939)). This power should be called upon cautiously, as the courts have received such executive branch assertions skeptically. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); George v. Ishimaru, 849 F. Supp. 68 (D.D.C.), vacated as moot, No. 94-5111, 1994 WL 517746 (D.C. Cir., Aug. 25, 1994). But see Haig v. Agee, 453 U.S. 280 (1981); In re Neagle, 135 U.S. 1 (1890).

II.

The text of 31 U.S.C. §1342, as amended in 1990, now reads:

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 government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342. Because of the § 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.⁵ This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

The central interpretive task under § 1342 is and has always been to construe the scope of the emergencies exception of that section. When the 1981 Opinion undertook this task, the predecessor to § 1342 did not contain the final sentence of the current statute, which was added in 1990. Examining that earlier version, the Attorney General concluded that the general language of the provision and the sparse legislative history of it did not reveal its precise meaning. However, the opinion was able to glean some additional understanding of the statute from that legislative history.

The Attorney General noted that as originally enacted in 1884, the provision forbade unauthorized employment "except in cases of sudden emergency involving the loss of human life or the destruction of property." 23 Stat. 17. He then observed that in 1950, Congress

⁵ The 1981 Opinion concluded that:

[d]espite the use of the term 'voluntary service,' the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37, 23 Stat. 15, 17. In order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. This is, under [§ 1342], government officers and employees may not involve government in contract for employment, i.e., for compensated labor, except in emergency situations. 30 Op. Att'y Gen. 129, 131 (1913).

enacted the modern version of the Antideficiency Act and accepted revised language for § 1342 that originally had been suggested by the Director of the Bureau of the Budget and the Comptroller General in 1947. In analyzing these different formulations, the Attorney General stated that

[w]ithout elaboration, these officials proposed that 'cases of sudden emergency' be amended to 'cases of emergency,' 'loss of human life' to 'safety of human life,' and 'destruction of property' to 'protection of property. These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern §(1341). Act of September 6, 1950, Pub. L. No. 81-759, §1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment.

5 Op. O.L.C. at 9.

The 1981 Opinion also sought guidance from the consistent administrative practice of the Office of Management and Budget in applying identical "emergencies" language found in another provision. That other provision prohibits OMB from apportioning appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in cases of "emergencies involving the safety of human life, [or] the protection of property" -- phraseology identical to the pre-1990 version of § 1342.⁶ Combining these two sources with the statutory text, the Attorney General articulated two

⁶ 31 U.S.C. § 1515 (recodified from § 665(e) at the time of the Civiletti opinion). Analyzing past administrative practice under this statute, Attorney General Civiletti found that:

Directors of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include [FBI] criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e). Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(h).

rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than § 1342 itself:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, see Letter from Walter Dellinger to Robert G. Damus, October 19, 1993, we are aware of the possibility the second of these two rules might be read more expansively than was intended, and thus might be applied to functions that are not emergencies within the meaning of the statute. To forestall possible misinterpretations, the second criteria's use of the phrase "in some degree" should be replaced with the phrase, "in some significant degree."

The reasons for this change rest on our understanding of the function of the 1990 amendment, which comes from considering the content of the amendment, its structure and its sparse legislative history. That history consists of a solitary reference in the conference report to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:

The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Rep. No. 964, 101st Cong., 2d Sess., 1170 (1990). While hardly articulating the intended scope of the exception, the conference report does tend to support what would otherwise be the most natural reading of the amendment standing alone: because it is phrased as identifying the functions that should be excluded from the scope of the term "emergency," it seems intended to limit the coverage of that term, narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute.

Beyond this, however, we do not believe that the amendment adds any significant new substantive meaning to the pre-existing portion of § 1342, simply because the most prominent feature of the addition -- its emphasis on there being a threat that is imminent, or "ready to take place, near at hand," see Webster's Third New International Dictionary 1130 (1986) -- is an idea that is already present in the term "emergency" itself, which means "an unforeseen

combination of circumstances or the resulting state that calls for immediate action" to respond to the occurrence or situation. *Id.* at 741.⁷ The addition of the concept of "imminent" to the pre-existing concept of "emergency" is thus largely redundant. This redundancy does, however, serve to emphasize and reinforce the requirement that there be a threat to human life or property of such a nature that immediate action is a necessary response to the situation. The structure of the amendment offers further support for this approach. Congress did not alter the operative language of the statute; instead, Congress chose to enact an interpretive provision that simply prohibits overly expansive interpretations of the "emergency" exception.

Under the formulation of the 1981 Opinion, government functions satisfy § 1342 if, *inter alia*, the safety of human life or the protection of property would be "compromised, in some degree." It is conceivable that some would interpret this phrase to be satisfied even if the threat were *de minimis*, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision. The brief delay of routine maintenance on government vehicles ought not to constitute an "emergency," for example, and yet it is quite possible to conclude that the failure to maintain vehicles properly may "compromise, to some degree" the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation clarifies that the emergency exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response.

⁷ See also Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987) ("emergency" means "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action"); Webster's II New Riverside University Dictionary 427 (1988) ("an unexpected, serious occurrence or situation urgently requiring prompt action").

Debt Subject to Limit

The Congress has long placed a cap on the Treasury's issuance of debt, covering both securities sold to the public for cash and the special securities issued to federal trust funds. Lawmakers have had to hike that limit 19 times over the past decade, and with the current ceiling likely to be reached within the next couple of months, they will soon have to take action again. *

Before World War I, the Congress generally had to approve each separate issuance of federal debt. Since the Second Liberty Bond Act was passed in 1917, however, the Congress, by statute, has simply set an overall dollar ceiling on the amount of debt that the Treasury can issue. The debt ceiling typically gives the Treasury unfettered authority to issue debt for a year or two before seeking an increase, but very short term ceilings (which grant the Treasury permission to issue debt only for a few months or even days) are hardly rare.

The Treasury is now operating under a debt ceiling of \$4,900 billion, enacted in August 1993. With debt subject to limit standing at \$4,870 billion at the end of July and the government continuing to run deficits, the Treasury is likely to bump against the ceiling in October or November.

What the Debt Limit Covers

The debt limit applies to nearly all debt of the federal government. Thus, it covers the special securities (government account series) issued to trust funds

and other government accounts as well as to debt held by the public (securities such as bills, notes, and bonds that are sold in the market to raise cash and purchased by a variety of investors, including private domestic investors, state and local governments, foreign investors, and the Federal Reserve system). Because of large deficits, debt held by the public has climbed steeply--reaching \$3.6 trillion in 1995 compared with \$710 billion in 1980. Internally held debt, has also grown quite rapidly in recent years as Social Security and other trust funds have run large surpluses. At the end of fiscal year 1995, CBO estimates, government-held debt will amount to \$1.3 trillion compared with only \$200 billion in 1980.

With rare exceptions, the limit on debt does not apply to debt issued by other federal agencies, such as the Tennessee Valley Authority, which the Treasury does not control. However, few federal agencies have authority to conduct their own borrowing. The statutory limit also does not apply to debt issued by the Federal Financing Bank, which used its full authority during an interruption in the debt ceiling in 1985.

Debt subject to limit generally counts the face value of federal debt. Special rules, however, apply to securities that are sold at a discount. Savings bonds, Treasury bills, and zero-coupon bonds are all discount securities, meaning that holders of those securities collect no income at all from them until maturity, when they receive the face amount that reflects the initial purchase price plus accrued interest. If maturity is far in the future, the face amount of those securities greatly exaggerates their current

worth. Hence, such securities are included in the debt subject to limit at their purchase price when they are first sold and then at gradually greater amounts until they mature.

Together, the deficit and the trust fund surplus easily explain most of the growth in debt subject to limit (see Table 19). The deficit largely determines what the Treasury must borrow in credit markets. The trust fund surplus drives the issuance of debt to federal government accounts. Because the income—mostly earmarked revenues (such as Social Security taxes) and interest—of trust funds is likely to continue to exceed their outlays, debt subject to limit will continue growing even if the budget is brought into balance. Under the budget resolution adopted by the Congress this past June, the debt subject to limit would rise from its current ceiling of \$4.9 trillion to nearly \$6.7 trillion at the end of 2002.

At one time, the debt ceiling may have been an effective control on the budget when most spending was subject to annual appropriations. But discretionary spending is now a much lower proportion of total spending, amounting to only 36 percent in 1995. Under the recently adopted budget resolution, discretionary outlays will continue to fall further to 27.5 percent by 2002. The rise in mandatory spending and growth of the trust fund surplus has turned the statutory limit on federal debt into an anachronism. Through its regular budget process, the Congress already has ample opportunity to vote on overall revenues, outlays, and deficits. Voting separately on the debt is ineffective as a means of controlling deficits because the decisions that necessitate borrowing are made elsewhere. By the time the debt ceiling comes up for a vote, it is too late to balk at paying the government's bills without incurring drastic consequences.

Table 19.
Projections of Debt Subject to Limit Under the Budget Resolution
(By fiscal year, in billions of dollars)

	1995	1996	1997	1998	1999	2000	2001	2002
Debt Subject to Limit, Start of Year	4,605	4,887	5,195	5,494	5,764	6,023	6,273	6,487
Changes								
Deficit	161	170	152	116	100	81	33	-6
Trust fund surplus	103	121	127	134	139	151	162	173
Other changes ^a	17	17	20	20	20	18	19	19
Total	282	308	299	270	259	250	215	185
Debt Subject to Limit, End of Year	4,887	5,195	5,494	5,764	6,023	6,273	6,487	6,672

SOURCE: Congressional Budget Office.

NOTES: The current statutory ceiling is \$4,900 billion.

The figures shown here are based on the outlay and revenue levels reported in the budget resolution. Those reported levels do not include the effects of a contingent tax cut that the resolution provides for or the effect of the so-called fiscal dividend that CBO estimates would result from balancing the budget. Also, the figures reflect changes to CBO's estimates for 1995 that were completed after the resolution was passed.

a. Mostly investments by government accounts that are not trust funds and net outlays of credit financing accounts.

As a result, because raising the debt ceiling is considered to be "must pass" legislation, the debt limit is frequently used as a device to force action to obtain some other legislative goal. For example, in 1990, the Congress voted seven times on the debt limit between August 9 and November 5 as the budget summit meetings progressed and the Congress considered the resulting budget resolution and reconciliation bill.

What Are the Consequences of Not Raising the Debt Limit?

Financial markets find the debt limit a periodic source of anxiety. The government has never defaulted on its principal and interest payments, nor has it failed to honor its other checks. However, even a temporary default--that is, a few days' delay in the government's ability to meet its obligations--could have serious repercussions in the financial markets. Those repercussions include a permanent increase in federal borrowing costs relative to yields on other securities as investors realize that Treasury instruments are not immune to default.

Failing to raise the debt ceiling would not bring the government to a screeching halt the way that not passing appropriation bills would. Employees would not be sent home, and checks would continue to be issued. If the Treasury was low on cash, however, there could be delays in honoring checks and disruptions in the normal flow of government services. Carried to its ultimate conclusion, defaulting on payments would have much graver economic consequences--such as loss of confidence in government and a higher risk premium on Treasury borrowing--than failing to enact discretionary appropriations by the start of a fiscal year.

Important Upcoming Dates

The date on which the debt ceiling is reached depends on the Treasury's borrowing schedule, which in turn is based on the government's cash outflows

and cash inflows. The Treasury tries to maintain a predictable borrowing calendar to minimize uncertainty in the market and help reduce costs. Many receipts and outlays also follow a predictable pattern, which helps in projecting the Treasury's cash needs.

Borrowing

Treasury securities are generally issued according to a regular schedule, except cash management bills, which are issued when needed to temporarily cover shortfalls in cash balances (see Table 20 for expected issue dates from September through November). Three-month and six-month bills are auctioned on a weekly basis, with 52-week bills offered every four weeks. As for longer-term securities, two-year and five-year notes are sold at the end of each month, with three-year and 10-year notes auctioned quarterly and 30-year bonds sold twice a year.

The sizes of note and bond auctions are generally stable from one issuance to the next, usually varying by no more than \$0.5 billion, if they change at all. Fluctuations in financing requirements are therefore made up through bill auctions. The predictability of Treasury issues, as well as the market's liquidity, may help the Treasury keep down the cost of borrowing.

Debt issued to trust funds plays an important role in calculating the debt limit. As shown in Table 21, debt held by government accounts represents over one-quarter of all outstanding debt subject to limit. Social Security, Medicare, and federal retirement trust funds account for the bulk of those holdings.

Purchases and sales of debt by trust funds are handled within the Treasury and do not flow through credit markets. Similarly, interest on those securities is simply an intragovernmental transfer: it is paid by one part of the government to another part and adds nothing to the deficit. Thus, participants in the financial markets view those investments accurately enough as a bookkeeping entry, an intragovernmental I.O.U. Nevertheless, transactions in government account series debt accrue against the debt ceiling. Moreover, continued investment of trust fund surpluses may cause the Treasury to bump against the debt limit even without a major payment to the pub-

Table 20.
Calendar of Treasury Borrowing, September to November 1995

Auction Date	Type of Issue	Settlement Date ^a
September 5	3-month bills	September 7
September 5	6-month bills	September 7
September 11	3-month bills	September 14
September 11	6-month bills	September 14
September 14	52-week bills	September 21
September 18	3-month bills	September 21
September 18	6-month bills	September 21
September 25	3-month bills	September 28
September 25	6-month bills	September 28
September 26	2-year notes	October 2
September 27	5-year notes	October 2
October 2	3-month bills	October 5
October 2	6-month bills	October 5
October 10	3-month bills	October 12
October 10	6-month bills	October 12
October 12	52-week bills	October 19
October 16	3-month bills	October 19
October 16	6-month bills	October 19
October 23	3-month bills	October 26
October 23	6-month bills	October 26
October 24	2-year notes	October 31
October 25	5-year notes	October 31
October 30	3-month bills	November 2
October 30	6-month bills	November 2
November 6	3-month bills	November 9
November 6	6-month bills	November 9
November 7	3-year notes	November 15
November 8	10-year notes	November 15
November 9	52-week bills	November 16
November 13	3-month bills	November 16
November 13	6-month bills	November 16
November 20	3-month bills	November 23
November 20	6-month bills	November 23
November 21	2-year notes	November 30
November 22	5-year notes	November 30
November 27	3-month bills	November 30
November 27	6-month bills	November 30

SOURCE: Congressional Budget Office based on the regularly announced schedule of the Department of the Treasury.

NOTE: Does not include cash management bills.

a. Date when debt is actually issued and the Treasury collects money.

Table 21.
Relationship Between Debt Held by the Public and Debt Subject to Limit
(End of fiscal year, in billions of dollars)

	Actual			Projected
	1980	1985	1990	1995
Debt Held by the Public	710	1,500	2,411	3,605
Debt Held by Government Accounts				
Trust funds				
Social Security ^a	31	37	215	481
Medicare ^b	19	32	110	147
Civil Service Retirement	74	127	236	375
Military Retirement	0	12	65	110
Unemployment Insurance	13	17	51	48
Highway	11	12	17	17
Airport and Airways	5	7	14	12
Railroad Retirement	3	4	9	13
Federal Deposit Insurance Corporation ^c	10	16	c	c
Other	14	23	39	51
Subtotal	180	287	755	1,255
Other government accounts ^d				
Deposit insurance agencies ^e	5	7	11	29
Other ^f	14	24	29	38
Subtotal	19	31	41	67
Total	199	318	796	1,322
Gross Federal Debt	909	1,818	3,207	4,927
Exclusions from Debt Limit ^a	f	6	-45	-40
Debt Subject to Limit	909	1,824	3,161	4,887

SOURCE: Congressional Budget Office based on information from the Department of the Treasury and the Office of Management and Budget.

- Old-Age and Survivors Insurance and Disability Insurance.
- Hospital Insurance (Medicare Part A) and Supplementary Medical Insurance (Part B).
- Until August 1989, the Federal Deposit Insurance Corporation Fund was classified as a trust fund. Its successor, the Bank Insurance Fund, is not a trust fund and is thus included in "other government accounts." Other deposit insurance funds include the Federal Savings and Loan Insurance Corporation (FSLIC) Fund and its successor, the FSLIC Resolution Fund; the Savings Association Insurance Fund; and the Credit Union Share Insurance Fund.
- Beginning in 1989, includes Treasury securities purchased in the open market by the Tennessee Valley Authority.
- Mostly debt issued by the Federal Financing Bank and debt issued by federal agencies other than the Treasury.
- Less than \$500 million.

lic or auction scheduled on that day. Indeed, a lump sum credit to the Civil Service Retirement trust fund of around \$20 billion on September 30 and a similar payment of around \$11 billion to the Military Retirement trust fund on October 1 will involve large issuances of government account series debt.

Cash Inflows

If the Treasury is barred from borrowing, it can count only on taxes and other current receipts to replenish its cash balances. Withheld income and employment taxes are the backbone of the Treasury's deposits, accounting for the majority of all non-debt-related deposits. Withheld taxes flow in fairly smoothly at about \$3 billion to \$4 billion per day. By contrast, corporate income taxes are concentrated around four major payments dates: April 15, June 15, September 15, and December 15. Given today's large budget deficits, though, the Treasury cannot count on such inflows to cover its cash drains for very long.

Cash Outflows

Two large drains on the Treasury—cash benefit payments and cash interest payments—are particularly noteworthy. Nearly all cash benefit payments for Social Security and other retirement and disability programs go out between the first and third of the month. Currently, those programs drain the Treasury's cash by about \$37 billion in the first week of the month.

Cash interest payments to owners of Treasury notes and bonds take place on fixed dates. The biggest spikes occur on midquarter refunding settlement dates: February 15, May 15, August 15, and November 15. Interest payments on those dates total around \$25 billion. Smaller spikes (of \$4 billion to \$5 billion or so) occur on other semiannual cycles, mostly at the end of each month.

Other cash withdrawals for purposes as varied as federal employees' pay, defense contracts, grants to states and localities, and Medicare are less lumpy and average about \$4 billion to \$6 billion per day.

So when will the Treasury hit the ceiling? It is still too early to determine the particular week that the debt ceiling will be reached, much less a specific day. With the 1995 deficit expected to total \$161 billion, the federal government should be able to squeak through September with a small amount of borrowing authority remaining.

After that point, when exactly the Treasury uses up its available authority will depend on the size and timing of upcoming cash drains and on the Treasury's cash balance at the beginning of the fiscal year. Normally, the Treasury enters a new fiscal year with a cash balance of \$30 billion to \$40 billion. Drawing on those cash reserves and using any remaining borrowing authority, the Treasury should be able to hold out until mid-October. Note, however, that those projections do not presuppose any unusual action by the Treasury. By departing from some of its normal practices, the Treasury might even be able to hold out into early November.

The November 15 interest payment date will present a very high hurdle for the Treasury to jump and may turn out to be the actual day of reckoning. October and November are both low-revenue—and therefore high-deficit—months. The Treasury borrowed more than \$27 billion in the market last October and almost \$37 billion in November to meet cash needs. Even if the Treasury manages to avoid cash flow problems into early November, it is unlikely to be able to raise enough money to pay note and bond holders their interest without an increase in the debt limit before November 15.

Treasury Options to Cope with Interruptions in Borrowing Authority

During an interruption in borrowing authority, the Treasury's main objectives are to avoid default, honor government obligations, and keep operations running. To do so, in the past the Treasury has adopted various tactics to cope with interruptions in the debt ceiling (see Table 22). The Treasury's options are

Table 22.
Recent Increases in the Debt Limit

Enactment Date ^a	Amount of Limit (Billions of dollars)	Expiration Date	Treasury Actions at Close ^b
Sept. 30, 1982	1,290.2	Sept. 30, 1983	Deteriorated budget outlook necessitated action well before expiration. Increase enacted in May 1983 as a consequence of Social Security rescue package.
May 26, 1983	1,389.0	Permanent	Beginning late October 1983, delayed auctions; undennvested trust funds.
Nov. 21, 1983	1,490.0	Permanent	Beginning late April 1984, trimmed auctions; undennvested Social Security.
May 25, 1984	1,520.0	Permanent	Beginning late June 1984, trimmed auctions; undennvested Social Security.
July 6, 1984	1,573.0	Permanent	Delayed auctions (beginning late September 1984); undennvested trust funds (beginning early September); cash situation not critical.
Oct. 13, 1984	1,823.8	Permanent	Prolonged interruption associated with debate over Balanced Budget and Emergency Deficit Control Act of 1985 (commonly known as Gramm-Rudman). Undennvested trust funds beginning early September 1985; cut late-September auctions, worsening cash situation; issued debt through FFB in October; actively disinvested trust funds in order to pay benefits in early November.
Nov. 14, 1985	1,903.8	Dec. 6, 1985	More or less timely increase.
Dec. 12, 1985	2,078.7	Permanent	Used FFB temporarily to credit Social Security and preserve regular auctions August 1-15, 1986, otherwise timely.
Aug. 21, 1986	2,111.0	Permanent	Used FFB authority; undennvested trust funds beginning September 30, 1986, delayed or cut auctions beginning late September; cash situation not critical.
Oct. 21, 1986	2,300.0	May 15, 1987	Timely increase at expiration.
May 15, 1987	2,320.0	July 17, 1987	Postponed some auctions beginning July 20, 1987, cash situation not critical.
July 30, 1987	2,320.0	Aug. 6, 1987	Postponed auctions normally held in early August but settling on August 15, 1987 (midquarter refunding).
Aug. 10, 1987	2,352.0	Sept. 23, 1987	Part of Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (commonly known as Gramm-Rudman II) package. Rescheduled auctions normally held September 21-24, 1987, otherwise timely.
Sept. 29, 1987	2,800.0	Permanent	More or less timely increase associated with savings and loan bill.
Aug. 7, 1989	2,870.0	Oct. 31, 1989	Boosted auction sizes and accelerated settlements to build up cash balances in late October.
Nov. 8, 1989	3,122.7	Permanent	More or less timely increase before Congressional recess.
Aug. 9, 1990	3,195.0	Oct. 2, 1990	Very short term increase associated with 1990 budget summit's conclusion.
Sept. 30, 1990	3,195.0	Oct. 6, 1990	Very short term increase as 1990 budget summit agreement underwent modifications.
Oct. 9, 1990	3,195.0	Oct. 19, 1990	Borrowed up to limit on October 19 while awaiting next increase.
Oct. 19, 1990	3,195.0	Oct. 24, 1990	Delayed several auctions normally held October 18-22, 1990, but settling after scheduled expiration of ceiling.
Oct. 25, 1990	3,195.0	Oct. 27, 1990	Compressed auctions and settlements into the period between October 25 and 27, 1990.
Oct. 28, 1990	3,230.0	Nov. 5, 1990	Temporary limit until reconciliation bill (including the Budget Enforcement Act of 1990) was signed.
Nov. 5, 1990	4,145.0	Permanent	Postponed several auctions pending last-minute increase before Congressional recess.
April 6, 1993	4,370.0	Sept. 30, 1993	Next increase enacted August 1993, comfortably before expiration, as part of OBRA-93.
Aug. 10, 1993	4,900.0	Permanent	Not yet expired.

SOURCE: Congressional Budget Office based on information from the Department of the Treasury and various news items.

NOTE: FFB = Federal Financing Bank; OBRA-93 = Omnibus Budget Reconciliation Act of 1993.

- Date signed into law, typically one to seven days after passage by the Congress.
- Actions listed do not include suspension of sales of savings bonds and state and local government series, which are more or less routine responses to an interruption in the debt ceiling (especially after expiration of a temporary ceiling). From 1983 through 1990, the Social Security trust funds enjoyed a special arrangement under which they were credited on the first of the month with all revenues expected during that month. If fully invested, that credit caused the debt subject to limit to spike between \$15 billion and \$20 billion. On occasion, when constrained by the debt limit, the Treasury credited the trust funds as required but was unable to invest the resulting balances fully.

influenced by whether it is operating under a permanent or temporary debt ceiling. Permanent ceilings (such as the current one) do not expire, but the dollar amount eventually becomes inadequate. Under a permanent ceiling, the Treasury can issue debt so long as it does not violate the dollar limit; even if it is right at the ceiling, it can refinance maturing securities or take other actions that do not, on balance, raise the debt.

In stark contrast, a temporary ceiling expires on a given date. The Treasury's authority to issue debt abruptly ceases, unless it can somehow get the debt down beneath its permanent ceiling. Debt that was issued before the expiration date need not be paid off immediately because it was perfectly legal when it was issued. But the Treasury can issue no new debt, not even to refinance maturing securities; instead, it must pay them off with cash. That requirement—combined with other drains on the Treasury's funds—brings matters to a head quickly.

Among the most common responses by the Treasury to interruptions in the debt limit in the past have been:

- o *Suspending Sales of Nonmarketable Debt.* Suspending the sales of savings bonds, state and local government series, and other nonmarketable debt for the duration of the interruption is a more or less routine response.
- o *Trimming or Delaying Auctions of Marketable Securities.* If the Treasury is unsure whether it can legally issue bills, notes, and bonds on the settlement date, it will not auction them.
- o *Underinvestment of Government Trust Funds.* This practice has frequently proved unavoidable.

In many cases, the Treasury could not invest trust fund receipts fully when it was up against the debt limit. The trust funds were properly credited, but they simply held large amounts of so-called uninvested balances. Upon the passage of a new debt ceiling, the Congress has routinely voted to invest those balances and replenish any trust funds that lost interest income as a result of the interruption.

Only once did the underinvestment of trust funds go a step further: in November 1985, the Treasury redeemed trust fund securities a few days early to create room under the debt ceiling to auction regular, marketable securities. The money raised in those auctions permitted the payment of benefits to Social Security recipients, otherwise imperiled by the Treasury's razor-thin cash balances. During a period when issuing debt has been suspended, the Treasury retains the option to disinvest particular trust funds.

The Debt Limit and Deficit Reduction

Limiting the Treasury's borrowing authority is not a productive method of achieving deficit reduction. Significant deficit reduction can best be accomplished by legislative decisions that reduce outlays or increase revenues. Failing to raise the debt limit in a timely manner, though perhaps bringing a difficult vote on legislation to a head, only serves to make the Treasury's job of paying the government's bills more difficult. An extended delay could have a significant effect on the government's credibility and the interest rates that it must pay on future borrowing.



BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, DC 20551

PAUL A. VOLCKER
CHAIRMAN

November 9, 1983

The Honorable Donald T. Regan
Secretary of the Treasury
Department of the Treasury
Washington, DC 20220

Dear Don:

The proposal by the Administration to increase the debt ceiling by \$225.6 billion from its present level of \$1.389 trillion has not yet been enacted by Congress. From projections provided by your staff I understand that if the debt ceiling is not increased, Treasury cash balances will be precariously low during the second half of November and by early December will be depleted entirely. I also understand that despite the absence of a sufficient cash balance in the Treasury's account at the Federal Reserve Banks, the Federal Reserve might nonetheless be faced with orders to pay from Treasury's account in the form of Treasury checks, letters of credit, wire transfers, or otherwise. Quite aside from the other major consequences of the government's inability to meet its obligations as they come due, of which I know you are keenly aware, I want you to know of the difficulty and chaotic situation that would be created for the Federal Reserve and for the Nation's payment system in such an event.

Under the Federal Reserve Act, banks may disburse funds upon order of the Treasury *only* against deposits in the Treasury account. Consequently, faced with the prospect or actuality of orders for payment in excess of available deposits, we would have no alternative other than to refuse or delay payment in part or in whole. As you are aware, a great variety of payments are made from the Treasury's account with the Federal Reserve, including interest on the Federal debt, Social Security and other government benefits, payments to Federal contractors of all kinds, salaries, and payment of principal on maturing Federal debt. We in the Federal Reserve have no basis for selecting among these items for payment, and, indeed, operational capabilities will not in many instances permit selectivity among recipients. Left with no further instructions, our only practical recourse may be to delay all payments until sufficient balances are available to honor all payment orders reaching us on a particular day.

In these potential circumstances, I would urge that in the absence of timely action on the debt limit you take all feasible steps to delay enough payment orders, with whatever priority you determine, to assure that orders reaching us will not exceed available deposit balances. Alternatively, it would be absolutely necessary for the Treasury to provide the Reserve Banks with instructions on priorities of payment in a manner in which we could, operationally, enforce such distinctions. The Federal Reserve Banks are prepared to assist you by monitoring and limiting wire transfers, redemptions and interest credits, ACE government payrolls and Social Security payments, and food coupons and check deposits. Few distinctions within such categories are operationally feasible. Such procedures could not, however, avoid the result that some checks or other orders for immediate payment would have to be dishonored or delayed.

In this light I would appreciate your guidance on whether payment orders to the Federal Reserve can be confined within estimated cash availabilities, and, if not, what priorities you wish us to apply in paying such orders.

As you can well imagine, the failure of the Congress to act on the debt ceiling would in either case create great uncertainty and confusion in banking and money markets that count on timely payment, and in individual cases, could result in hardship, in addition to the broader implications for confidence and the government's

credit. To minimize these adverse consequences, I believe that due notice of potential delays or other actions ought to be provided to recipients of Treasury payments in advance of the event.

The procedures I have outlined would assure our ability to act consistent with law. I hope we can avoid the serious consequences of failing to honor claims on the Treasury presented for payment; at the minimum, we need to be able to announce a procedure for denying certain payments. Nevertheless I must stress that even in these circumstances a failure to increase the debt limit would not only create havoc in the payments system because of the necessary delays that I have outlined, but it would also undermine confidence at home and abroad in the government's ability to manage its affairs.

Sincerely,



Office of the Attorney General

Washington, DC 20530

November 11, 1983

The Honorable Howard Baker
United States Senate
Washington, DC 20510

Dear Senator Baker:

You have asked for my analysis of the crisis that this country would face in the absence of legislation in the very near future to raise the Nation's debt ceiling. While we have not had an opportunity to research the matter thoroughly, we know of no comparable instance in which the President has been required to determine his responsibilities under the laws and Constitution of the United States in the event the United States were to run short of cash to respond to the imperatives necessary to continued functioning of the national government. I can say that the practical and legal problems that this country might face without a prompt legislative solution to this situation are both severe and immeasurable.

As you know, in the midst of a major constitutional dispute between the Congress and the President 10 years ago, involving scores of cases in the Federal courts and the impoundment by the President of billions of dollars of appropriated funds, the Congress enacted the Congressional Budget and Impoundment Act of 1974. That legislation, which avoided a test in the Supreme Court of the President's authority under the Constitution to impound appropriated funds, expressly reserved the grave unresolved constitutional issues concerning responsibilities of the President and the Congress with respect to the expenditure of appropriated funds.

The Impoundment Control Act addresses the impoundment of obligational authority. The Congress intended to control the President's actions to reduce or abolish programs and activities. This is not to say that no power exists under the Act to defer outlays; however, serious questions can be raised as to the existence of that power under the Act, and any assertion of that power will almost certainly result in extensive and complex litigation whose outcome could remain in doubt for extended periods of time.

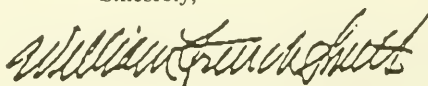
With regard to any inherent powers of the President to defer outlays, it can be assumed that the courts would closely scrutinize any action of the President lacking

express statutory authorization that would bar payments due and owing by the United States in satisfaction of obligations previously incurred. While the President has broad powers to take extraordinary actions in the presence of a fiscal-banking crisis that could not otherwise be resolved through resort to the normal constitutional processes, a serious question would be presented where, as here, the Congress had merely chosen not to enact a statute that could avert the crisis.

Finally, it is extremely doubtful that any action to stop issuing checks or to terminate payment of benefits conferred by law would, in these circumstances, be effective to ameliorate, much less "solve," the extraordinary crisis that would be presented should the Congress not raise the debt ceiling. Given this, and the unresolved nature of the legal authority to withhold payment of obligations under these circumstances, I am authorized to advise you that the Administration has determined that it will continue to issue checks and will not seek to defer outlays should the Congress fail to act to avert this crisis.

No responsible government should place itself in a situation in which it would default on its obligations. I therefore urge, in the strongest possible way, that the Congress act to spare our citizens from the hardship, the flood of litigation, and the unprecedented constitutional crisis that would be threatened by the inability of the United States to meet its financial obligations.

Sincerely,



William French Smith
Attorney General

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