

Bridging the Funding Gap: The Implementation of Fiscal Law and Policy to a Lapse in Appropriations

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I. Introduction

On 30 September 2013, the clock struck midnight with no appropriations or continuing resolutions to fund government operations, resulting in the first lapse in appropriations since 1996.¹ Without appropriations, the Department of Defense (DoD) and the U.S. Army had no alternative but to execute a partial shutdown of the majority of its day-to-day operations. The government shutdown began the morning of 1 October with the furlough of government civilian employees, who encompass a large portion of the Army's workforce. Over the next four hours, employees subject to furlough² set their e-mail out-of-office messages and handed off work to co-workers designated as "excepted employees."³ Commanders and supervisors made decisions about how to apply the Headquarters, Department of the Army (HQDA) planning guidance for a variety of different operations. Army personnel traveling for official duties were subject to a recall to their stations of origin, depending on the purpose of the travel. Courts-martial proceeded cautiously, with judges and lawyers unsure if the trials would continue. Every potential expenditure of government funds was subject to review.

During a lapse in appropriations, also known as a funding gap,⁴ unprecedented restraints on funding affected Army operations and generated a plethora of legal issues for all areas of practice within offices of the staff judge advocate (OSJAs). The staff judge advocate, for example, addressed the furloughs of his civilian support staff. The chief of justice addressed funding for courts-martial witnesses and the potential impact of the funding gap on the judge's docket. Many judge advocates (JAs) advised their respective commanders on what activities and expenditures were legally permissible during a funding gap. The OSJA administrative staff grappled with travel issues and attendant temporary duty (TDY) costs, the purchase of office supplies, and the use of government credit cards. In sum, the October 2013 funding lapse directly affected the planning and orderly shutdown of all OSJA areas of law.

Parts II and III of this article provide the current legal and policy framework for government expenditures and activities during a funding gap. Part IV of this article discusses the application of this framework to U.S. Army operations during the Fiscal Year (FY) 2014 funding gap that occurred from 1–16 October 2013. To assist practitioners with the planning and preparation for future funding gaps, Part V recommends strategies to mitigate their impact.

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¹ JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RS20348, FEDERAL FUNDING GAPS: A BRIEF OVERVIEW 1 (2013), available at <http://www.fas.org/sgp/crs/misc/RS20348.pdf>.

² Employees subject to furlough are those funded through annual appropriations but not designated as "excepted." These employees are barred from working during a shutdown, except to perform minimal activities as necessary to execute an orderly suspension of agency operations related to non-excepted activities. See *infra* note 3.

³ During a funding gap, personnel and related activities that are determined to be necessary for the "the safety of human life or the protection of property," or fall under other allowable exceptions to the Antideficiency Act, are referred to as "excepted." TOLLESTRUP, *supra* note 1, note 5. Some authorities also provide for a third category of employees and activities that are also exempt from a funding gap. U.S. OFFICE OF PERS. MGMT., GUIDANCE FOR SHUTDOWN FURLOUGHS 1 (Oct. 11, 2013), available at <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>. This category includes employees paid with other than annual appropriations that did not lapse. For purposes of this article, this exempt category will be included as part of the excepted activity and personnel category.

II. The Legal Framework of Funding Gaps

A funding gap occurs during the interval between the expiration of an appropriation and the enactment of a new one.⁵ During this lapse in appropriations,⁶ a group of statutes, collectively known as the Antideficiency Act⁷ (ADA), prohibits the government from obligating funds in the absence of appropriations.⁸ Exceptions to this law, including activities involving the safety of human life or the

⁴ CLINTON BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 2 n.5 (2013), available at <http://www.fas.org/sgp/crs/misc/RL34680.pdf>.

⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-146 (3d ed. 2006) [hereinafter GAO REDBOOK II].

⁶ Major Janet C. Eberle, Instant Replay: Proposing an Automatic Continuing Resolution (Mar. 15, 2013) (unpublished research paper, The Judge Advocate General's Legal Center and School) (on file with The Judge Advocate General's Legal Center and School) (discussing the historical background of the Antideficiency Act and U.S. Government's budgeting process, which is useful for understanding a lapse in appropriations).

⁷ 31 U.S.C. §§ 1341–1342, 1511–1519 (2013).

⁸ TOLLESTRUP, *supra* note 1, at 1.

protection of property,⁹ allow certain government “excepted activities” to continue, while requiring all other “non-excepted activities” to shut-down in an orderly manner.¹⁰ Section A discusses the legal framework¹¹ for determining the difference between excepted activities and non-excepted activities during a funding gap. While the government may obligate funds for excepted activities (i.e., enter into a legal obligation to pay),¹² those funds cannot be disbursed during the funding gap (i.e., paid).¹³ Section B discusses the difference between such obligations and disbursements. Finally, legislation enacted during a funding gap may partially appropriate funds for certain activities; with the proper appropriation of funds, these activities continue as normal. Section C discusses the effects of additional legislation on government activities during a funding gap.

A. The Law of Funding Gaps: Excepted Versus Non-Excepted Activities

An analysis of the legal framework for U.S. government operations during a lapse in appropriations begins with the Appropriations Clause of the U.S. Constitution, which states, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law”¹⁴ This “power of the purse”¹⁵ is further protected by Congress through the ADA, which generally prohibits government agencies from obligating funds in advance of appropriations, as described in 31 U.S.C §§ 1341, 1342, and 1517.¹⁶ These statutes create difficult legal problems¹⁷ concerning what a

government agency is permitted or required to do during a funding gap.¹⁸ To address these issues, the U.S. Attorney General, and later the Assistant U.S. Attorney General, articulated their interpretation of the law applicable to government operations during a lapse in appropriations in three important memoranda. These legal interpretations from 1980, 1981, and 1995, respectively, form the basis of the legal framework on government operations during a lapse in appropriations. This legal framework distinguished between excepted activities (where the obligation of funds does not violate the ADA) and non-excepted activities (where the government must cease operations because obligations would violate the ADA), and is still applicable today.

In 1980, U.S. Attorney General Benjamin R. Civiletti wrote the first of two legal opinions, known as the Civiletti opinions, for the President of the United States on the application of the ADA to government activities during a funding gap.¹⁹ This opinion articulated the general rule in applying the ADA when he stated, “[O]n a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.”²⁰ The second Civiletti opinion discussed the exceptions to this general rule, which permitted certain government activities to continue after a lapse in appropriations.²¹ These exceptions include activities authorized by law or other constitutional authorities.²² The two Civiletti opinions provide the basic legal framework for determining the permissibility of specific government operations during a funding gap.

In anticipation of a potential funding gap in 1995, Alice Rivlin, the director of the Office of Management and Budget (OMB), requested advice from the Attorney General on government operations during a lapse in appropriations. In response, Assistant Attorney General Dellinger wrote a memorandum (referred to as the Dellinger Memo)²³

⁹ 31 U.S.C. § 1342.

¹⁰ TOLLESTRUP, *supra* note 1, at 1.

¹¹ Three Department of Justice (DoJ) memoranda form the basic legal framework for funding gaps that is still applicable today. *See infra* notes 19, 21, 23.

¹² Obligation: Amount representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. U.S. DEP’T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION glossary, at 13 (Dec. 2008) [hereinafter DOD FMR].

¹³ Disbursements: Amounts paid by federal agencies, by cash or cash equivalent, during the fiscal year to liquidate government obligations. *Id.* glossary, at 21.

¹⁴ U.S. CONST. art. I, § 9, cl. 7.

¹⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-261SP, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-3 (3d. ed. 2004) [hereinafter GAO REDBOOK I].

¹⁶ *Id.* at 6-36 to -37.

¹⁷ Violations of 31 U.S.C. §§ 1341(a), 1342, and 1517(a) of the Antideficiency Act (ADA) are subject to both penal and administrative sanctions. Even though the DoJ may take actions to enforce the criminal provisions of the ADA, violations are typically handled administratively. Whether violations occur during or outside of a funding gap, it appears that the DoJ has never prosecuted an officer or employee for a violation of the ADA. In addition to these sanctions, violations of the ADA must be signed by the agency head and reported to the President and Congress through the Office of Management and Budget (OMB). The report includes all relevant

facts and a summary of the action taken to correct the error, including any disciplinary measures. GAO REDBOOK II, *supra* note 5, at 6-144.

¹⁸ *Id.* at 6-147.

¹⁹ The President, 43 U.S. Op. Att’y. Gen. 224 (1980) [hereinafter Civiletti I].

²⁰ *Id.* at 229.

²¹ The President, 43 U.S. Op. Att’y. Gen. 293 (1981) [hereinafter Civiletti II].

²² *Id.* at 300.

²³ Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, Dep’t of Justice, for the Director Office of Management and Budget, subject: Government Operations in the Event of a Lapse in Appropriations (Aug. 16, 1995) [hereinafter Dellinger Memo], available at <https://www.jagcnet.army.mil/DocLibs/TJAGLCSDocLib.nsf/topicThread.xsp?action=openDocument&documentId=D545FC5B411C379785257B24006D1F31> (providing Memorandum Opinion for the Dir., Office of Mgmt. & Budget, in CONTRACT AND FISCAL LAW DEP’T, THE JUDGE ADVOCATE

reviewing the limits of permissible activities during a lapse in appropriations and also addressing the legislative change to the ADA after the Civiletti opinions. The amendment to the ADA in 1990 added the following language to the statute: “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.”²⁴ Mr. Dellinger determined that the change to the language of the ADA was intended to limit the coverage of the emergency exception.²⁵ In addition, the Dellinger Memo reiterated the major exceptions to the ADA that were later detailed in the Civiletti opinions.²⁶ These five exceptions to the ADA during a lapse in appropriations outline the boundaries of excepted activities that may continue during a funding gap, as described below:

1. Government activities funded with multi-year and indefinite appropriations, may continue. These activities continue because there is no lapse in the relevant appropriation.²⁷ For example, activities which use previous-year research, development, test and evaluation (RDT&E) funds may continue, as the two-year RDT&E appropriation would not lapse during a funding gap on the second year of the appropriation.

2. If Congress provides an express authority for agencies to enter into contracts or borrow funds, the ADA does not bar the activities because they are authorized by law.²⁸ For example, the Feed and Forage Act²⁹ authorizes the DoD to contract for necessary clothing, subsistence, forage, supplies, etc., without an appropriation.³⁰

3. The second Civiletti opinion concluded that the ADA allows a limited number of government functions funded with lapsed appropriations to continue because they support other excepted activities. For example, the distribution of social security payments, which operate under indefinite appropriations, implies the check writing and distributing activities required to disburse the funds. The Dellinger Memo refers to this category of excepted activities as, “[n]ecessary implications: authority to obligate that is necessarily implied by statute.”³¹ Another important example under the necessary implications group is activities necessary to bring about an orderly termination of functions that may not continue during a lapse in appropriations.³²

4. Obligations that are necessary for the execution of the President’s constitutional duties and powers are excepted activities.³³ For example, the ADA does not prohibit the President from exercising his authority under the U.S. Constitution³⁴ to grant reprieves and pardons for offenses against the United States.³⁵

5. Personal or voluntary services for “emergencies involving the safety of human life or the protection of property”³⁶ are excepted activities.³⁷ This emergency exception probably includes the exception for “national security,”³⁸ and encompasses the majority of DoD operations during a funding gap.

GEN.’S LEGAL CTR. & SCH., 2013 CONTRACT AND FISCAL LAW DESKBOOK ch. 9, app. B, at 9-22 to 9-31 (2013)).

²⁴ *Id.* at 6.

²⁵ *Id.* at 8.

²⁶ *Id.* at 3–4.

²⁷ *Id.* at 3.

²⁸ *Id.* at 4.

²⁹ 41 U.S.C. § 11 (2013) (sometimes also referred to as the Feed and Forage Act). The text of the Feed and Forage Act requires the Secretary of Defense to immediately advise Congress of the exercise of this authority. As an example of the use of this authority unrelated to funding gaps, on 21 September 2001, Secretary of Defense Donald H. Rumsfeld invoked fiscal provisions available under this act. *News Release: Department of Defense Invokes Feed and Forage Act*, U.S. DEP’T OF DEF. (Sept. 21, 2001), <http://www.defense.gov/releases/release.aspx?releaseid=3054>. During the funding gap from 1–16 October 2013, however, the Secretary of Defense did not exercise this authority, and some speculate that the authority of DoD to continue national security-related activities appears to be broader than the authority provided by the Feed and Forage Act. AMY BELASCO & PAT TOWELL, CONG. RESEARCH SERV., R41745, GOVERNMENT SHUTDOWN: OPERATIONS OF THE DEPARTMENT OF DEFENSE DURING A LAPSE IN APPROPRIATIONS 3 (2013), available at <http://www.fas.org/sgp/crs/natsec/R41745.pdf>. This may explain why the Feed and Forage Act has never been invoked by the DoD during a funding gap.

³⁰ Dellinger Memo, *supra* note 23, at 4.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ U.S. CONST. art. II, § 2, cl. 1.

³⁵ Civiletti II, *supra* note 21, at 299.

³⁶ 31 U.S.C. § 1342 (2013).

³⁷ Dellinger Memo, *supra* note 23, at 4.

³⁸ In November, 1981, then OMB Director, Mr. Richard Darman issued guidance that first described the exception for “national security.” Memorandum from David A. Stockman, Dir., Office of Mgmt. and Budget, for Heads of Executive Departments and Agencies, subject: Agency Operations in the Absence of Appropriations (Nov. 17, 1981) (retyped (without change by Office of Personnel Management (OPM))), available at http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf. Although the Civiletti Opinions and the Dellinger Memo do not specifically address the exception for national security, it is likely that the national security activity exception is rooted in the ADA’s emergency exception. Since the emergency exception includes the safety of human life and the protection of property, it logically overlaps with some of the national security interests of the United States. Moreover, the DoD has generally not cited any authority beyond the emergency exception. Some analysts, however, believe the national security exception is independent of the emergency exception to the ADA. BELASCO & TOWELL, *supra* note 29, at 18. The distinction between the emergency exception and the DoD authority to continue operations for national security, if any exists, remains unclear.

B. Obligation Versus Disbursement

Although the exceptions to the ADA allow the government to obligate funds for certain excepted activities, these activities do not continue normally, as the ADA prohibits the disbursement of funds during a lapse in appropriations.³⁹ If the expenditure, however, supports a non-excepted activity, the government may not obligate nor disburse funds during a lapse in appropriations, without violating the ADA.⁴⁰

An obligation is any act that legally binds the government to make payment. Obligations can occur when placing an order, awarding a contract, receiving services, or similar transactions that bind the government to a legal liability for payment in the future.⁴¹ The disbursement takes place when the government actually makes a payment.⁴² Obligation and disbursement can take place in succession or at the same time.⁴³ For example, assume a contracting officer (KO) awards a contract for cleaning services on 15 August, which requires the daily cleaning of a building, and makes the first payment for these services on 1 September. The obligation took place on 15 August: at this point, the government was legally required to make payments in the future. The disbursement occurred on 1 September, when the government made a payment against the obligation.

During a funding gap, obligations for non-excepted activities and disbursements for both excepted and non-excepted activities are legally objectionable. Therefore, legal practitioners should pay close attention to any type of potential disbursement and obligations for non-excepted activities during a funding gap. When fiscal law questions arise during the funding gap, examine the point of obligation (usually contract award or point of sale for government purchase cards) and the point of disbursement (usually the payment to liquidate the obligation at a specified interval) to ensure that government employees do not disburse any payments.

³⁹ BELASCO & TOWELL, *supra* note 29, at 11.

⁴⁰ *Id.* at 13.

⁴¹ *See* DOD FMR, *supra* note 12.

⁴² *Id.*

⁴³ For example, field ordering officers (FOOs) typically purchase items with cash, whereas obligation and disbursement occur at the same time. MONEY AS A WEAPONS SYSTEM—AFGHANISTAN 179 (19 Oct. 2013). Field ordering officers provide their commands with the ability to quickly make local purchases for mission-essential requirements to support contingency operations. Although contingency operations are excepted, the Army is not allowed to disburse funds during a funding gap. As such, even though they support excepted activities, FOO operations using lapsed Operation and Maintenance (O&M) funds are effectively shut down during a funding gap because the payment is a disbursement.

C. The Effect of Other Legislation During the October 2013 Funding Gap: POMA and HFFSA

A funding gap begins when the government fails to enact legislation appropriating funds, and ends when the government enacts legislation to appropriate funds. If the government, however, enacts legislation that either partially appropriates funds or otherwise authorizes government activities during the funding gap, the legal analysis for operations during the funding gap may change significantly. As discussed above, the ADA prohibits the obligation of funds in advance of an appropriation.⁴⁴ By enacting legislation that appropriates funds for certain activities during a funding gap, however, these activities are legally permissible regardless of whether or not they support an excepted activity. As such, obligations and disbursements for these activities may continue normally during the funding gap. During the FY14 funding gap, two statutes partially appropriated funds during the funding gap: the Honoring the Families of Fallen Soldiers Act (HFFSA)⁴⁵ and the Pay Our Military Act (POMA).⁴⁶ While the DoD implemented HFFSA with relative ease, POMA required a more in depth analysis.

The POMA appropriated funds for the pay and allowances of military, civilian, and contractor personnel continuing to work during the FY14 funding gap.⁴⁷ Prior to POMA funds being obligated, however, the statute required the Secretary of Defense (SECDEF) to determine which DoD civilians and contractor personnel provided “support to members of the Armed Forces” before recalling those employees to work and to receive pay.⁴⁸ The SECDEF implemented this POMA authority via policy memorandum on 5 October 2013.⁴⁹ Under this “POMA recall,” however, the SECDEF only recalled DoD civilian employees whose responsibilities included either providing support to servicemembers or their families, or sustaining capabilities

⁴⁴ *See* discussion *infra* Part II.

⁴⁵ Department of Defense Survivor Benefits Continuing Appropriations Resolution, 2014, Pub. L. No. 113-44, 127 Stat. 555 (2013), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ44/pdf/PLAW-113publ44.pdf>.

This legislation was passed after the DoD determined that POMA did not appropriate funds for these survivor benefits, and families of fallen Soldiers were not receiving benefit payments.

⁴⁶ Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013) [hereinafter POMA], *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ39/pdf/PLAW-113publ39.pdf>. This legislation appropriated funds for pay and allowances for DoD military, civilian, and contractor personnel. In addition, this act required the Secretary of Defense to recall employees who would normally be subject to a furlough as non-excepted employees. *Id.*

⁴⁷ *Id.* § 2(a).

⁴⁸ *Id.* § 2(a)(2) and 2(a)(3).

⁴⁹ Memorandum from Chuck Hagel, Sec’y of Def., for Deputy Sec’y of Def. et al., subject: Guidance for Implementation of Pay Our Military Act (Oct. 5, 2013) [hereinafter Hagel Memo], *available at* <http://www.defense.gov/pubs/POMA-implementation-guidance.pdf>.

and Force Readiness.⁵⁰ This policy memorandum also provided examples of employees included in these two categories, as well as employees who were to remain furloughed.⁵¹ Moreover, since servicemembers were already excepted from furlough, POMA authorized DoD to disburse their pay and allowances as well. The SECDEF, however, did not certify any contractor employees for recall under POMA.⁵² Under the authority of this statute, which by its language is only applicable to the FY14 funding gap,⁵³ the SECDEF recalled the majority of DoD civilian employees back to work.⁵⁴

III. The Policy Framework

The Civiletti Opinions and the Dellinger Memo provide the executive branch's interpretation of the ADA with respect to funding gaps. In conjunction with these Department of Justice (DoJ) memoranda, OMB provides overarching policy guidance on funding gaps for the rest of the executive branch. To understand the policy framework and how it applies to the Army, the legal advisor's analysis should start with the aforementioned OMB policy, as implemented by DoD policy, and further refined by the Army policy guidance issued by HQDA. An analysis of

policies issued during the October 2014 funding gap, described below, is particularly useful to understand the likely implementing policies for future potential funding gaps.

On 17 September 2013, the OMB issued a policy memorandum that cited previous question and answer documentation from the OMB and the Office of Personnel Management (OPM), conveyed the basic legal framework from the Civiletti opinions and the Dellinger Memo, and required agencies to update their plans for a funding gap.⁵⁵ On 25 September 2013, the Deputy SECDEF issued a memorandum⁵⁶ stating all military personnel would continue in a normal duty status, regardless of whether or not they are supporting excepted activities;⁵⁷ delegating the responsibility for determining excepted activities to the appropriate Secretaries and Heads of DoD Components; and attaching a memorandum containing a list of excepted activities.⁵⁸ The HQDA issued Planning Order (PLANORD) 226-13, which provided detailed guidance on issues for both military and civilian personnel.⁵⁹ HQDA also issued two Fragmentary Orders (FRAGOs) to this PLANORD prior to the lapse in appropriations, which provided additional guidance on personnel, TDY, and logistics.⁶⁰ The U.S. Army Reserve Command (USARC) issued Operation Order (OPORD) 13-165 and a FRAGO, providing similar guidance.⁶¹ In sum,

⁵⁰ *Id.* at 2.

⁵¹ Some examples of support for servicemembers included health care, family support activities, repair and maintenance of weapons systems, training, supply chain management, human resource activities, installation support, commissary, payroll, and legal advice. Some examples of activities that contribute to capabilities and force readiness are acquisition program oversight and management, intelligence functions, information technology functions, and the necessary support of the aforementioned functions. Examples of activities that did not fall under POMA included certain legislative affairs, auditor and related functions, and civil works functions of the Department of the Army. *Id.*

⁵² The DoD did not recall any contract employees under POMA because implementation for contractor employees presented additional challenges, as the government does not pay contractor employee salaries directly. The government has privity of contract with the contractor, and not its contractor employees. Instead, the contractor (company) invoices the government in accordance with the terms of the contract, which includes costs for various contract expenses that may be unrelated to employee pay and allowances (e.g., materials, profit, administrative overhead, and other direct and indirect costs incurred by the contractor during contract performance). As such, paying only the salaries for contractor employees through POMA would have been challenging to implement. BELASCO & TOWELL, *supra* note 29, at 3. It is likely, however, that if the FY14 Funding Gap had continued for longer than two weeks, the SECDEF would have implemented POMA for contractor employee pay and salaries in conjunction with a new contract clause that would have directed contractors to submit invoices with the contractor employee salary and expense costs identified separately from other contract direct and indirect costs.

⁵³ POMA, *supra* note 46, § 3 ("Appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation (including a continuing appropriation) for any purpose for which amounts are made available in section 2; (2) the enactment into law of the applicable regular or continuing appropriations resolution or other Act without any appropriation for such purpose; or (3) January 1, 2015.").

⁵⁴ BELASCO & TOWELL, *supra* note 29, at 13.

⁵⁵ Memorandum from Sylvia M. Burwell, Dir., Office of Mgmt. and Budget, for Heads of Executive Departments and Agencies, subject: Planning for Agency Operations During a Potential Lapse in Appropriations (Sept. 17, 2013) [hereinafter Burwell Memo], available at http://www.whitehouse.gov/omb/memoranda_2013.

⁵⁶ Memorandum from Ashton B. Carter, Deputy Sec'y of Def., for Sec'y's of the Military Departments et al., subject: Guidance for Continuation of Operations in the Absence of Available Appropriations (Sept. 25, 2013) [hereinafter Carter Memo], available at http://www.defense.gov/home/features/2013/0913_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf.

⁵⁷ Prior to POMA, government personnel who were excepted from shutdown (including all military) would have reported to work during the funding gap without pay, since the government could not disburse funds absent appropriating legislation. *Id.*

⁵⁸ Carter Memo, *supra* note 56, attachment, available at http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf.

⁵⁹ HEADQUARTERS, U.S. DEP'T OF ARMY, PLANORD 226-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (26 Sept. 2013) [hereinafter HQDA PLANORD], available at <https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/PLANORD.aspx?PageView=Shared>.

⁶⁰ HEADQUARTERS, U.S. DEP'T OF ARMY, FRAGMENTARY ORDER 1, TO PLANORD 226-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (27 Sept. 2013) [hereinafter FRAGO 1 TO PLANORD]; HEADQUARTERS, U.S. DEP'T OF ARMY, FRAGMENTARY ORDER 2, TO PLANORD 226-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (29 Sept. 2013) [hereinafter FRAGO 2 TO PLANORD].

⁶¹ U.S. ARMY RESERVE COMMAND, OPORD 13-165, CONTINGENCY PLAN GUIDANCE OF ESSENTIAL OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS OR CONTINUING RESOLUTION EFFECTIVE 01 OCTOBER 2013 (26 Sept. 2013).

the policy guidance that was issued in anticipation of the FY14 funding gap verified the applicability of the previous legal framework, provided general guidance on excepted activities, and articulated how commanders were to execute an orderly shutdown of operations on 1 October 2013.

Just before the funding gap began, the OMB issued a memorandum to begin the government's orderly shutdown.⁶² The DoD also issued policy guidance through various offices during the funding gap.⁶³ On 1 October 2013, HQDA released policy guidance in the form of Executive Order (EXORD) 228-13.⁶⁴ During the first week of the funding gap, HQDA released FRAGOs to this EXORD almost daily. The eight FRAGOs⁶⁵ and numerous appendices issued during the funding gap implemented DoD guidance by detailing a list of excepted activities and approval requirements for certain expenditures.⁶⁶ The policy guidance released by these executive agencies proved critical during the funding gap.

IV. Application of Law and Policy to the FY14 Funding Gap

This Part analyzes the application of the law and policy to specific U.S. Army activities that took place during the

October 2013 funding gap. Practitioners should use this discussion as a framework to help determine excepted activities during a future lapse in appropriations. In making such a determination, the DoD warned, “[G]uidance should be applied prudently in the context of a Department at war, with decisions guaranteeing our continued robust support for those engaged in that war, and with assurance that the lives and property of our nation's citizens will be protected.”⁶⁷ The DoD policy also provided flexibility: “The guidance does not identify every excepted activity, but rather provides an overarching direction and general principles for making these determinations.”⁶⁸ After these determinations are made in accordance with policy guidance, commanders can obligate funds in support of excepted activities during a lapse in appropriations.

A. Military Operations and Activities

During the FY14 funding gap, most military operations continued in order to provide national security under the emergency exception to the ADA.⁶⁹ The Army provided a list of approximately 100 specific, named operations and exercises (for example, Operation Enduring Freedom (OEF)), organized by combatant command, which were activities excepted for national security.⁷⁰ In addition to these specific operations, the DoD policy also designated direct support of these operations as excepted activities, such as the administrative, logistical, medical, and any other support required for the excepted military operations.⁷¹ The policy also designated recruiting, military entrance processing (MEPS), and basic training activities for entry into the Armed Forces during contingency operations as excepted.⁷² Funding gap operations during FY14 included a broad range of excepted activities for national security in the context of war. The list of excepted activities may not contain as many activities during peace time. The DoD also authorized the typical activities that fall under the emergency exception, including fire protection, law enforcement, security, explosive ordinance disposal, air traffic control, emergency services, etc.⁷³ Some other atypical examples under the emergency exception included

⁶² Memorandum from Sylvia M. Burwell, Dir., Exec. Office of the President, Office of Mgmt. and Budget, for Heads of Executive Departments and Agencies, subject: Update on Status of Operations (Sept. 30, 2013), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-24.pdf>.

⁶³ The DoD may release policy guidance through a number of different offices, including but not limited to the SECDEF, the Deputy SECDEF, Under Secretaries of Defense, etc. Therefore, practitioners should pay attention to the different sources of policy guidance that may affect their operations. For example, Deputy SECDEF appointed the Under SECDEF (USD) Comptroller as the lead on funding gap operations. Carter Memo, *supra* note 56, at 2. In addition, the USD for Acquisition, Technology, and Logistics (AT&L) released contracting guidance on 9 October 2013, with clauses for contracts in support of excepted activities executed in advance of FY14 appropriations. Memorandum from Richard Ginman, Dir., Def. Procurement and Acquisition Pol’y, for Commander, United States Special Operations Command (Attn: Acquisition Executive), et al., subject: Class Deviation-Contract Obligations in Advance of Fiscal Year 2014 Funding (Oct. 9, 2013) [hereinafter Ginman Memo], available at http://www.acq.osd.mil/dpap/policy/policyvault/USA005738-13-DPAP.pdf.

⁶⁴ HEADQUARTERS, U.S. DEP’T OF ARMY, EXORD 228-13, CONTINUATION OF OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS (1 Oct. 2013) [hereinafter HQDA EXORD], available at <https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/EXORD228.aspx>.

⁶⁵ HEADQUARTERS, U.S. DEP’T OF ARMY, FRAGMENTARY ORDERS 1–8, TO EXORD 228-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (2–14 Oct. 2013) [hereinafter FRAGOS 1–8 TO EXORD].

⁶⁶ The HQDA guidance provided a detailed analysis on the resolution of specific funding gap issues and is very useful for practitioners. For a good summation of the Fiscal Law Policy, please see HQDA EXORD Annex T, available at https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC_Document_Library/ANNEX%20T%20-%20FISCAL%20AND%20RELATED%20POLICY%20GUIDANCE.pdf.

⁶⁷ Carter Memo, *supra* note 56, at 2.

⁶⁸ *Id.*

⁶⁹ See discussion *supra* note 38 (discussing the distinction between the emergency exception and the exception for national security).

⁷⁰ HEADQUARTERS, U.S. DEP’T OF ARMY, ANNEX A3 TO FRAGMENTARY ORDERS 1, TO EXORD 228-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (2–14 Oct. 2013) [hereinafter ANNEX A3 TO EXORD], available at https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC_Document_Library/Annex%20A3_228-13_FRAGO_1%20Activities%20Necessary%20for%20Nat%20Sec.doc.

⁷¹ Carter Memo, *supra* note 56, attachment, at 7.

⁷² *Id.*

⁷³ *Id.*

utilities and food services for military personnel, trash removal, and substance abuse counseling.⁷⁴ For the most part, contingency operations, such as OEF, were excepted activities and mostly unaffected by the funding gap.⁷⁵

B. Personnel

In preparation for the funding gap, the OMB required agency leaders to review which employees provided necessary support to excepted activities.⁷⁶ Shortly thereafter, the DoD released guidance stating that all military personnel and all civilian personnel supporting excepted activities would continue in a normal duty status without pay.⁷⁷ Next, HQDA delegated the authority to determine which employees continued in a normal duty status to commanders and supervisors,⁷⁸ and provided guidance on how to implement the potential furlough of non-excepted employees.⁷⁹ Commanders and supervisors executed this plan on 1 October 2013 by determining which employees supported the excepted activities and were thereby exempt from furlough.

The POMA also provided SECDEF⁸⁰ with an appropriation to fund the pay and allowances of the DoD workforce, including military members and government civilian and contractor employees, who “support the members of the Armed Forces.”⁸¹ The SECDEF implemented this POMA authority on 5 October 2013 and eliminated furloughs for DoD civilian employees whose responsibilities contributed to the morale, well-being, capabilities, and readiness of servicemembers.⁸² HQDA implemented this guidance and provided detailed instructions on how to implement the SECDEF’s policy.⁸³ On 7 October 2013, most DoD civilian employees returned to work.⁸⁴ The SECDEF, however, did not implement

POMA with respect to the pay and allowances of contractor employees because paying only the salaries for contractor employees through POMA would have been difficult.⁸⁵ The implementing guidance also stated, “The Act provides appropriations for personnel; it does not provide appropriations for equipment, supplies, material, and all the other things that the Department needs to keep operating efficiently.”⁸⁶ While an argument could be made that some of these other expenses are necessarily implied for the employees to return to work, the policy made it clear that this appropriation only provided payments for pay and allowances.⁸⁷

C. Courts-Martial

The only authority that directly stated that any and all criminal litigation is an excepted activity emanated from DoJ. The guidance stated, “The law enforcement capacity of the U.S. Government should not be impaired or perceived to be impaired. To do so could constitute an imminent threat to the safety of human life and the protection of property.”⁸⁸ Relying on the emergency exception to the ADA, the policy further stated, “Criminal litigation will continue without interruption as an activity essential to the safety of human life and the protection of property.”⁸⁹ This DoJ policy guidance in particular helped practitioners conclude that all courts-martial were excepted activities during the FY14 funding gap. If this policy persists during future funding gaps, then it is likely that courts-martial will remain excepted activities.⁹⁰

⁷⁴ *Id.*

⁷⁵ See discussion *supra* note 43 (discussing the impact of the funding gap on field ordering officer operations).

⁷⁶ Burwell Memo, *supra* note 55.

⁷⁷ Carter Memo, *supra* note 56.

⁷⁸ The executive branch issued this preliminary guidance on 25 September 2013, before POMA was enacted. In the absence of additional legislation similar to POMA during a funding gap, all personnel remain in a non-pay status, regardless of their duties. See *supra* note 57 and accompanying text. This legislation, however, appropriated funds during the funding gap. POMA, *supra* note 46. Therefore, all excepted employees received pay in accordance with this appropriation.

⁷⁹ HQDA PLANORD, *supra* note 59.

⁸⁰ See discussion *infra* Part II.C.

⁸¹ POMA, *supra* note 46.

⁸² Hagel Memo, *supra* note 49, at 2. For examples of these types of employees, see *supra* note 51.

⁸³ FRAGO 5 AND 6 TO EXORD, *supra* note 65.

⁸⁴ *Id.* FRAGO 6 TO EXORD.

⁸⁵ See discussion *supra* note 52 (discussing the difficulty of applying POMA to salaries for contractors).

⁸⁶ Hagel Memo, *supra* note 49, at 2.

⁸⁷ Under the necessary implications exception to the ADA, certain expenses may be necessary for the recalled employees to return to work and perform their jobs. The exception is described in the Dellinger Memo, which concluded, “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.” Dellinger Memo, *supra* note 23, at 4.

⁸⁸ Memorandum from Dep’t of Justice, subject: U.S. Department of Justice FY 2014 Contingency 2 (Oct. 11, 2013), available at <http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf>.

⁸⁹ *Id.* at 3.

⁹⁰ The guidance from the DoJ is compelling because this department authored the Civiletti Opinions and the Dellinger Memo, and is also responsible for the prosecution of ADA violations.

In the absence of this all-encompassing DoJ policy guidance, practitioners may have to rely upon the DoD policy guidance.⁹¹ This policy defines excepted legal activities as “litigation activities associated with imminent or ongoing legal action, in forums inside or outside of DoD, to the extent required by law or necessary to support excepted activities,”⁹² and appears to be less inclusive than the aforementioned DoJ policy. With reference to support of excepted activities, a court-martial during the FY14 funding gap for a Soldier deployed to Afghanistan in support of OEF, for example, could continue without violating the ADA. Notably, OEF is an excepted activity,⁹³ and therefore, courts-martial in support of this operation are also excepted activities. In addition, court-martial expenses funded with prior year funds may also continue.⁹⁴ For example, assume the Army properly obligated FY13 funds for expert witness services that began in FY13 and extended into the funding gap for a non-excepted activity. Even if this court-martial began during the FY14 funding gap, there is no lapse in appropriations for these services because this expense was properly obligated (i.e., the contract was awarded) with FY13 funds before the beginning of the funding gap.⁹⁵ The DoD policy guidance also noted that ongoing litigation is excepted when required by law.⁹⁶ It is also likely that courts-martial are also “required by law” because of constitutional protections for accused personnel.

The constitutional right to a speedy trial,⁹⁷ for example, supports the assertion that courts-martial are excepted activities because they are required by the Constitution.⁹⁸

⁹¹ Carter Memo, *supra* note 56, attachment, at 7.

⁹² *Id.*

⁹³ ANNEX A3 TO EXORD, *supra* note 70.

⁹⁴ This policy guidance is firmly rooted in the Dellinger Memo, which found, “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 cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.” Dellinger Memo, *supra* note 23, at 3.

⁹⁵ In this example, assume that an additional expense for witness TDY requires the obligation of lapsed FY14 funds. Generally, the Army cannot obligate funds for this TDY expense in the absence of appropriations for non-excepted activities. If most other court-martial expenses required FY13 funds, however, an argument could be made that these expenses are a necessary implication of the prior allocation of FY13 funds. As such, these expenses might also be an excepted activity. *See id.* at 4.

⁹⁶ Carter Memo, *supra* note 56, attachment, at 7.

⁹⁷ This discussion does not include Rule for Courts-Martial 707 (Speedy Trial), only the right articulated in the Sixth Amendment. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (2012).

⁹⁸ Even though Congress passed the ADA to enforce the constitutional power of the purse, it is still only a statute. If there is a way to interpret the ADA without conflicting with the constitutional right to a speedy trial (or

Just as certain obligations necessary for the execution of the President’s constitutional duties are excepted,⁹⁹ obligations necessary to provide an accused with a speedy trial in accordance with this constitutional right are also excepted.¹⁰⁰ When charges are preferred,¹⁰¹ the government bears responsibility for a defendant’s right to speedy trial.¹⁰² The balancing test for whether or not the government violated a defendant’s right to speedy trial includes the factor of prejudice to the defendant, of which the most serious violation of this prong is the potential prejudice caused by the unavailability of defense witnesses.¹⁰³ A trial delay for lapse in funding could impact the constitutional right of a defendant to a speedy trial, potentially resulting in dismissal of the charges with prejudice, meaning that the government could not later attempt to try the accused for alleged crimes.¹⁰⁴ Since the government cannot predict the prejudicial effect attributable to the delays during a funding gap, it is impossible to determine whether or not a violation of this right during a funding gap will occur. That being said, a three-week trial delay on its own under these circumstances is very unlikely to result in a violation of the constitutional right to a speedy trial.¹⁰⁵ The argument, however, does not rest upon the probability of success of the defense motion, but rather the mere possibility of prejudice to the defendant at this time. If the possibility exists for a violation of the right to a speedy trial during a funding gap, then one could argue that the Army is legally required by the

other constitutional rights or powers), then this is the preferred interpretation. To also support this general assertion, the following two cases address the impact of the ADA on the constitutional right to a civil jury trial: *Hobson v. Brennan*, 637 F. Supp. 173 (D.D.C. 1986); *Armster v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 792 F.2d 1423 (9th Cir. 1986) (addressing the application of the limits of the ADA with respect to potential delays in civil trials due to lack of funding). Both of these cases held that the ADA must yield to the 7th Amendment right to a civil jury trial. Balancing the actual limits of the congressional power of the purse against other constitutional rights and powers poses an interesting question.

⁹⁹ Dellinger Memo, *supra* note 23, at 4.

¹⁰⁰ Another possible argument involves the presidential power as Commander in Chief.

¹⁰¹ The preferral of charges by military personnel does not obligate funds, and therefore does not appear to violate the ADA.

¹⁰² Captain Joseph D. Wilkinson II, *Speedy Trial Demands*, ARMY LAW. Dec. 2011, at 25; *Dickey v. Florida*, 398 U.S. 30 (1970) (“Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental, and the duty of the charging authority is to provide a prompt trial.”).

¹⁰³ *Barker v. Wingo*, 407 U.S. 514 (1972) (“A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: . . . (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious.”).

¹⁰⁴ Wilkinson, *supra* note 102, at 25 n.8.

¹⁰⁵ *Id.* at 25 n.14.

Constitution to proceed with courts-martial during a funding gap.

D. Contracting

Generally, contract obligations¹⁰⁶ were only permissible for excepted activities¹⁰⁷ during the FY14 funding gap.¹⁰⁸ Excepted activities included, for example, obligations necessary to support activities that fell under the emergency exception to the ADA. Contract obligations for non-excepted activities were not lawful during the funding gap. In addition, the government was required to stop incrementally-funded contracts for non-excepted activities that required additional FY14 funds.¹⁰⁹ Finally, disbursement (payment) of FY14 funds to contractors for all contracts was also not authorized, even when those payments were required in accordance with the contract,¹¹⁰ and regardless of whether or not the payment supported excepted or non-excepted activities.¹¹¹ To execute these aforementioned contract actions during the funding gap, the following authorities were necessary, and are described below: the Subject to Availability of Funds (SAF) clause, the Subject to Availability of End of Year Funds (SAEF) authority, the Obligations in Advance of Fiscal Year 2014 Funding (OAF) deviation clause, and modification of the contract to allow option exercise at a later date.¹¹²

1. Subject to Availability of Funds (SAF) Clause— Federal Acquisition Regulation (FAR) 52.232-18¹¹³

This clause is normally used for the release of a solicitation (and award of the contract) prior to the availability of funds for the next fiscal year. For example, this clause would be used if the Army issued a solicitation before FY14 funds are available at the end of FY13. Contracting officers should use this clause (or FAR 52.232-19¹¹⁴ for indefinite quantity contracts) in solicitations and contracts if the contract will be chargeable to funds of the next fiscal year and the contract action will be initiated before the funds are available.¹¹⁵ If this clause is properly incorporated in the contract, the government has no legal liability under the contract until funds are available and may release the solicitation and award the contract prior to the funds being available.¹¹⁶

2. Subject to Availability of End of Year Funds (SAEF)— Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2¹¹⁷

If a funding gap occurs at any time other than at the start of the next fiscal year,¹¹⁸ the SAF clause is not applicable. As such, practitioners may find the SAEF authority useful.

¹⁰⁶ Contract obligation includes contract award, modification, task order, delivery order, and option exercise. See *supra* note 11.

¹⁰⁷ The DoD delegated this authority to the relevant Secretary. Therefore, the determination of whether or not a contract supported an excepted activity depended on the branch of service. As an example, the Secretary of the Air Force delegated this authority. Memorandum for ALMAJCOM-FOA-DRU/CC, to Distribution C, subject: Planning Guidance for Continuation of Operations in the Absence of Available Appropriation (24 Sept. 2013) (on file with author).

¹⁰⁸ E-mail from George M. Cabaniss, Jr., Senior Exec. Serv., Policy Guidance from the Mission & Installation Contracting Command (MICC) PARC (Principal Assistant Responsible for Contracting) (Oct. 10, 2013, 00:00 EST) [hereinafter MICC GUIDANCE] (on file with author).

¹⁰⁹ *Id.*

¹¹⁰ See discussion *supra* Part II.B (Obligation Versus Disbursement).

¹¹¹ Ginman Memo, *supra* note 63. This clause specifically addressed the prompt payment act penalties for late payments to the contractor because of the government's inability to disburse funds.

¹¹² Appendix A (Authority for Contract Actions in Advance of Appropriations) (describing the three clauses and the contract actions that are permitted by them respectively).

¹¹³ FAR 52.232-18 (2014). "Funds are not presently available for this contract. The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer." *Id.*

¹¹⁴ *Id.* 52.232-19. "Funds are not presently available for performance under this contract beyond _____. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer." *Id.* (appropriate dates are inserted in the blanks above).

¹¹⁵ *Id.* 32.706-1.

¹¹⁶ *Id.* 52.232-18 (2014); *id.* 52.232-19.

¹¹⁷ AFARS 5101.602-2 (2014) "Solicitations may be issued for high priority requirements and Research, Development, Test and Evaluation (RDT&E) incrementally funded contracts before ensuring availability of funds when there is a high probability that the requirement will not be canceled." *Id.* "Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available." *Id.*

¹¹⁸ For example, the funding gap from 1–17 October 2013 occurred at the beginning of FY14. In addition, the continuing resolution that ended this funding gap for FY14 expired on 15 January 2014. If another continuing resolution or additional legislation was not passed to appropriate funds before 15 January 2014, another funding gap could have occurred in the middle of the fiscal year.

This authority allows the Army to release solicitations prior to the availability of funds for high priority requirements¹¹⁹ when there is a high probability that the requirement will not be cancelled.¹²⁰ The SAEF authority also differs from the SAF clause because the former only permits the release of the solicitation and not the award of the contract.

3. *Obligations in Advance of Fiscal Year (OAF) 2014 (Deviation 2014-O0001—Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7998*¹²¹

With this clause incorporated in the contract, any contract obligation¹²² that required FY14 funding during the funding gap was legally permissible for excepted activities. Although this clause was rescinded on 17 October 2013,¹²³ practitioners can expect a similar clause to be released. The Office of the Under SECDEF for AT&L released this guidance on 9 October 2013 for the FY14 funding gap, which permitted contract obligation prior to the availability of FY14 funds.¹²⁴ This clause also addressed the inability of the government to make payments using this authority and the applicability of the prompt payment act for any late payments.

4. *Modification to Option Exercise Using the Authority in FAR17.204(d)*

Because option exercise was not legally permissible for non-excepted activities during the funding gap, the Mission Installation Contracting Command (MICC) recommended

modification of the contract to preserve the right of the government to exercise the option at a later date.¹²⁵

V. Recommendations to Prepare for Future Funding Gaps

The law and policy for funding gaps has remained fairly consistent since the early 1980s and the first Civiletti Opinion. The situation for future funding gaps, however, will most likely differ slightly from the FY14 funding gap circumstances discussed above. The key variables for legal practitioners in future funding gaps include determining whether there is any legislation appropriating funds for certain activities (for example, HFFSA and POMA),¹²⁶ and determining what policy restrictions—or flexibilities—are provided by higher HQs. To prepare for future funding gaps, this section recommends four strategies.

A. Identify a Timely Source for the Policy Guidance

During the FY14 funding gap, different agencies and other offices released policy guidance at varying intervals. As discussed previously, the OMB, OPM, SECDEF, Deputy SECDEF, and DPAP all released policy guidance that impacted operations during the funding gap. In addition, HQDA released new policy guidance almost daily for the first week of the funding gap. This HQDA policy guidance changed frequently, restricted various activities, and required differing levels of approvals and reporting for different types of excepted activities. For this reason, legal practitioners should find a reliable source for current policy information and an avenue to discuss the requisite policy implications. During the FY14 funding gap, the JAG Corps' online resource center (MilBook JAGConnect) compiled all

¹¹⁹ This clause is an Army-only authority and there is no definition of "high priority requirements."

¹²⁰ AFARS 5101.602-2.

¹²¹ Ginman Memo, *supra* note 63 ("The Department of Defense has the authority to enter into this contractual action and to obligate the Government in advance of appropriations; however, appropriated funds are not currently available to make payments under this contract to liquidate this obligation. When appropriated funds become available, the Government will make payment in accordance with the terms of this contract, including the payment of interest where applicable under the Prompt Payment Act. This clause supersedes conflicting terms of any other provision in this contract dealing with contract payment or financing until funds are made available to the Contracting Officer for this contractual action.").

¹²² See *supra* note 106.

¹²³ Memorandum from Richard Ginman, Dir., Def. Procurement and Acquisition Pol'y, for Commander, United States Special Operations Command (Attn: Acquisition Executive), et al., subject: Rescission of Class Deviation-Contract Obligations in Advance of Fiscal Year 2014 Funding (Oct. 17, 2013), available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA005884-13-DPAP.pdf>.

¹²⁴ Ginman Memo, *supra* note 63.

¹²⁵ Normally, the government cannot exercise an option period after the previous period of performance ends. The MICC guidance recommended that contracting officers (KOs) execute a bilateral modification pursuant to FAR 17.204(d) to extend the period of time for the exercise of the option with following language: "In the event funds are not available for obligation in the fiscal year in which the contract would otherwise be completed, the period within which an option may be exercised by the Government extends to 30 days after the date Congress has made funds for obligation available." MICC Guidance, *supra* note 108 (providing sample draft language by Mr. Gary Shaw, Legal Counsel, MICC (Oct. 2013)). The contractor may not always agree to this bilateral modification if, for example, continuing to perform at the option price would result in minimal or lost profit.

¹²⁶ The POMA (and HFFSA) expired upon the enactment of the continuing resolution on 17 October 2013. POMA, *supra* note 46, § 3 ("Appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation (including a continuing appropriation) for any purpose for which amounts are made available in section 2.")). Without similar legislation, the following disbursements will likely be prohibited during a future funding gap: the disbursement of pay and allowances for civilian and military personnel, temporary duty pay, and payments of death gratuities. In addition, the SECDEF cannot recall additional civilian employees; therefore, a furlough will affect a larger percentage of employees for the duration of the funding gap.

the legal and policy guidance for Army lawyers.¹²⁷ In addition, a variety of useful funding gap links are listed in Appendix B of this article.¹²⁸

B. Analyze the General Excepted Activities Guidance and Personnel Impact Before the Funding Gap

The first major issue for most commanders is the potential furlough of civilian personnel. In the early stages of a funding gap, local leaders make determinations on whether or not a civilian employee is supporting excepted activities and therefore, may continue to work. By using the resources in this article, legal practitioners can accurately predict the impact of a funding gap before the release of policy guidance.¹²⁹ In addition, lawyers can also skillfully advise their clients about the risks to operations, from both a legal and policy perspective. For example, even though obligations and disbursements for TDY during the FY14 funding gap were probably legal in accordance with POMA, HQDA policy restricted TDY.¹³⁰

C. Review the Schedule for Courts-Martial, TDYs, Conferences, and Other Events

Funding gaps significantly impact TDY travel, training, conferences, courts-martial, and other events scheduled during the lapse in appropriations. Generally, if these events do not support an excepted activity, they must be terminated in an orderly fashion or delayed until funds are appropriated. In particular, TDY was significantly impacted by POMA and changing policy guidance during the course of the FY14 funding gap. Ultimately, HQDA required all TDY requests during the FY14 funding gap, even those in support of excepted activities, be submitted and approved at the HQDA level.¹³¹ Although most TDYs required approval by G3/5/7,¹³² the Secretary of the Army delegated the authority to approve TDYs for courts-martial to the TJAG and

¹²⁷ The contract and fiscal law section of milBook was an excellent resource for current information during the October 2013 funding gap. The Army's Contract and Fiscal Action Branch (KFAB) administers this website, which is available to all federal government attorneys, both civilian and military, at <https://www.milsuite.mil/book/groups/army-contract-and-fiscal-law-attorneys> (login required).

¹²⁸ See Appendix B (Funding Gap On-Line Resources).

¹²⁹ The basic policy guidance from the FY14 funding gap, however, may change if there is a decrease or cessation in contingency operations, which will decrease the number of excepted activities. For example, recruiting activities were considered excepted activities during the FY14 funding gap in accordance with DoD policy guidance. Carter Memo, *supra* note 56, attachment, at 4. If the DoD is no longer engaged in contingency operations, recruiting activities may not be considered excepted activities.

¹³⁰ FRAGO 1 to EXORD, *supra* note 65.

¹³¹ *Id.* 3.C.1.D.2.

¹³² *Id.*

DJAG.¹³³ To prepare for a future funding gap, practitioners should recommend that their unit review TDY travel that begins slightly before or during the potential funding gap, and consider postponing or cancelling TDY that is not absolutely necessary. In addition, conferences, training, and other events funded with lapsed appropriations may also be affected. Commanders must weigh the risk of a lapse in funding and potentially restrictive policy guidance against canceling or rescheduling the event beforehand.

D. Review Contracting Actions that Require Administration Close to a Funding Gap

To properly advise contracting officers on the permissibility of contract actions during a funding gap, legal practitioners must first identify if the contract is in support of an excepted or a non-excepted activity. But this determination will ultimately be made by the requiring activity¹³⁴ during a funding gap, and not by the legal practitioner or contracting officer.¹³⁵ If the outcome of this determination is not clear before the funding gap, the safe course of action in most cases is to assume that this contract is in support of a non-excepted activity and take precautionary measures. The following section proposes precautionary measures and actions to take, both before and during a funding gap.

1. Preventive Measures in Anticipation of a Funding Gap

Funding gaps can occur at any time and more than once during the fiscal year,¹³⁶ depending on the circumstances.¹³⁷ If the potential lapse in appropriations is likely to occur at the start of the new fiscal year, a solicitation should normally include the SAF clause at FAR 52.232-18.¹³⁸ If a funding gap occurs in the middle of the fiscal year, practitioners should recommend that KOs issue solicitations subject to the availability of funds using the SAEF authority at AFARS 5101.602-2 for "high priority requirements."¹³⁹

¹³³ HQDA EXORD, *supra* note 64, annex T, para. 6.d.(2).

¹³⁴ The requiring activity is the Army organization that actually receives the benefit of the goods or services provided by the service contract. In most cases the requiring activity will be the organization that both pays for and receives the benefit of the contract service being purchased. U.S. DEP'T OF ARMY, REG. 70-13, MANAGEMENT AND OVERSIGHT OF SERVICE ACQUISITIONS glossary, sec. II (30 July 2010), available at http://www.apd.army.mil/pdffiles/r70_13.pdf.

¹³⁵ This is either the requiring activity or another level in the requiring activity's chain of command, depending on the relevant delegation of this authority during a funding gap. See discussion *supra* note 107.

¹³⁶ TOLLESTRUP, *supra* note 1, at Summary.

¹³⁷ See discussion *supra* note 118.

¹³⁸ See discussion *supra* Part IV.D.

Contract award may be restricted during a funding gap for non-excepted activities. If possible, KOs should try to award contracts before the lapse in appropriations with funds available at the end of the fiscal year, as long as the award satisfies all fiscal law requirements, including the “bona fide needs” rule. If the award cannot occur before the lapse in appropriations, or if the potentially lapsed funds will be necessary for the requirement, potential consequences of a funding gap include delay in award or performance of the requirement, particularly if the contract supports a non-excepted activity.

Option exercises and the obligation of funds for incrementally-funded contracts may also be restricted during a funding gap for non-excepted activities. For severable services contracts, KOs can use the authority under 10 United States Code 2410(a) to maximize the flexibility of the obligation of funds to work around a funding gap. For example, KOs can modify the period of performance (PoP) for the relevant base or options periods, and then exercise the new option period before the funding gap begins. In this example, the Army obligates funds prior to the funding gap.¹⁴⁰ For non-severable services contracts in support of non-excepted activities, practitioners should advise their commands that option exercises will likely be prohibited during a funding gap, and therefore, contract performance may be delayed until completion of the funding gap.

In the same manner, if incrementally funded contracts will expire during a funding gap for non-excepted activities, the KO will probably have to issue a stop work order once the previously-obligated funds are exhausted.¹⁴¹ Commands can avoid a stop work order on an incrementally-funded contract whose PoP extends past the likely duration of a funding gap, however, by obligating sufficient incremental funds to take them past the funding gap.¹⁴²

2. Contract Actions During a Funding Gap

If a contract is funded with prior year or other than annual appropriations, performance may continue during a funding gap because these funds have not lapsed. Obligation of funds, disbursement of prior year funds, and contract administration is permissible for these contracts during a funding gap. If a contract is determined to be in support of an excepted activity, the solicitation, award, option exercise, or obligation of incremental funds is legally

permissible using the appropriate contract clause (OAF deviation clause).¹⁴³ Even if the obligation of funds is legally permissible in support of excepted activities, the disbursement of lapsed funds is not.¹⁴⁴ Any payments due in accordance with the terms of the contract must remain unpaid. The requisite interest penalties under the Prompt Payment Act apply to any late payments during a funding gap.

If a contract is deemed to be in support of a non-excepted activity, the following rules generally apply. The government may not award contracts in support of non-excepted activities during a funding gap because the obligation of these funds would violate the ADA. The contracting officer may issue the solicitation for the non-excepted activity contract (but not award) using the SAEF authority, as long as the KO satisfies the conditions of AFARS 5101.602-2. Along these same lines of logic, KOs may not exercise options for contracts in support of non-excepted activities. In accordance with the authority of FAR 17.204(d) the KO can modify the contract in order to allow the government to exercise the option after the funding gap, even if the end of the funding gap occurs after the contract's PoP ends.¹⁴⁵

VI. Conclusion

During a funding gap, the prohibitions by the ADA affect all aspects of Army operations and create numerous legal issues for all areas of practice within OSJAs. With such a broad impact, OSJAs must understand the law and policy that structures funding gaps so that they may successfully prepare for and manage potential future funding gaps. This article outlined the application of current law and policy to the difficult problems posed by a lapse in appropriations.

The U.S. political climate is constantly changing, and therefore, the risk of another funding gap is almost unpredictable. As a result, understanding the laws and HQDA policies of “government shutdowns” remains extremely important for judge advocates at all levels.

¹⁴³ See discussion *infra* Part IV.D.

¹⁴⁴ See discussion *supra* Part II.B (Obligation Versus Disbursement).

¹⁴⁵ See *supra* note 125 (discussing the contract modification to extend the time to exercise the option for non-excepted activities). This course of action suggests that the government modify a contract that supports non-excepted activities to allow exercise of an option after the prior period of performance ends. There will be a break in service during the funding gap when the government cannot allow the contractor to continue to perform. When the contractor stops performance during the funding gap and subsequently restarts performance when the funding gap ends (assuming the option is exercised), costs may be incurred. Depending on the language of the contract and modification, the government may be responsible for some of these costs.

¹³⁹ *Id.*

¹⁴⁰ See Appendix C (Examples of Potential Option Period Modifications Prior to a Funding Gap) (providing examples of potential modifications by KOs).

¹⁴¹ MICC Guidance, *supra* note 108.

¹⁴² Because of the significant implications of personnel law concerning government employees who are furloughed beyond thirty days, it is likely that the maximum duration of any funding gap would be thirty days.

Appendix A

Authority for Contract Actions in Advance of Appropriations

	CONTRACT CLAUSE/AUTHORITY		
CONTRACT PHASE	SAF¹⁴⁶	SAEF¹⁴⁷	OAF Deviation¹⁴⁸
Solicitation	X	X	X
Award	X		X
Obligation			X
Disbursement			

¹⁴⁶ This authority is used at the end of a fiscal year for contracts in advance of appropriations in accordance with FAR 32.706-1. The Subject to Availability of Funds (SAF) clause is at Federal Acquisition Regulation (FAR) 52.232-18; “Funds are not presently available for this contract. The Government’s obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.”; and also at FAR 52.232-19 (2014) for indefinite quantity contracts (“Funds are not presently available for performance under this contract beyond _____. The Government’s obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.” *Id.* (appropriate dates are inserted in the blanks above).

¹⁴⁷ This authority might be used in the middle of a fiscal year in anticipation of a funding gap for contracts in advance of appropriations. The Subject to Availability of End of Year Funds (SAEF) authority is located at Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2. “Solicitations may be issued for high priority requirements and Research, Development, Test and Evaluation (RDT&E) incrementally funded contracts before ensuring availability of funds when there is a high probability that the requirement will not be canceled.” *Id.* “Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available.” *Id.*

¹⁴⁸ This clause was used during the FY14 finding gap from 1-16 October 2013. The Obligations in Advance of Fiscal Year (OAF) 2014 (Deviation 2014-O0001) at Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7998 emanated from Memorandum from Director, DPAP, 9 October 2013. “The Department of Defense has the authority to enter into this contractual action and to obligate the Government in advance of appropriations; however, appropriated funds are not currently available to make payments under this contract to liquidate this obligation. When appropriated funds become available, the Government will make payment in accordance with the terms of this contract, including the payment of interest where applicable under the Prompt Payment Act. This clause supersedes conflicting terms of any other provision in this contract dealing with contract payment or financing until funds are made available to the Contracting Officer for this contractual action.”

Appendix B

Funding Gap On-line Resources*

1. JAGCNET LIBRARY–CONTRACT AND FISCAL LAW

- Over sixty FY14 Funding Gap Documents located at this site
<https://www.jagcnet2.army.mil/Sites/contractandfiscallaw.nsf/homeLibrary.xsp>
(CAC login required)

2. MILBOOK–CONTRACT AND FISCAL LAW

- Contains the most current fiscal information in the form of blogs, news, etc.
<https://www.milsuite.mil/book/groups/army-contract-and-fiscal-law-attorneys>
(CAC login and JAGConnect membership required)

3. TJAGLCS FISCAL LAW DESKBOOK 2013: CHAPTER 9 (CRA & FUNDING GAPS)

<https://www.jagcnet.army.mil/DocLibs/TJAGLCSDocLib.nsf/topicThread.xsp?action=openDocument&documentId=D545FC5B411C379785257B24006D1F31>

- Appendix A: Civiletti Opinion
- Appendix B: The Dellinger Memo
- Appendix C: OMB Bulletin 12-02
- Appendix D: DoD Funding Gap Guidance 2011

4. DEPARTMENT OF JUSTICE

- **Publications and Resources**
<http://www.justice.gov/jmd/publications/publications.htm>
- **FY14 Contingency Plan**
<http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf>

5. DPAP (DEFENSE PROCUREMENT AND ACQUISITION POLICY)

Policy Vault: http://www.acq.osd.mil/dpap/ops/policy_vault.html

- **Class Deviation – Contract Obligations in Advance of Fiscal Year 2014 Funding**
<http://www.acq.osd.mil/dpap/policy/policyvault/USA005738-13-DPAP.pdf> (9 Oct 13)

6. OFFICE OF MANAGEMENT AND BUDGET (OMB)

<http://www.whitehouse.gov/omb>

- **FY1995 Memoranda**
 - **Contingency Planning for Agency Operations in Fiscal Year 1996**
<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-17.pdf>
(17 Aug 95)
 - **Agency Plans for Operations During Funding Hiatus**
<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-18.pdf>
(22 Aug 95)

- **Agency Plans for Operations During Funding Hiatus**
<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-21.pdf>
 (25 Sep 95)
- **FY2011 Memoranda**
 - **Planning for Agency Operations During a Lapse in Government Funding**
<http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-13.pdf> (7 Apr 11)
- **FY2013 Memoranda**
http://www.whitehouse.gov/omb/memoranda_2013
 - M-13-24, Update on Status of Operations (30 Sep 13)
 - M-13-22, Planning for Agency Operations during a Potential Lapse in Appropriations (17 Sep 13)
- **FY2014 Memoranda**
http://www.whitehouse.gov/omb/memoranda_default/
 - M-14-01, Reopening Departments and Agencies (17 Oct 13)
- **Impacts and Costs of the Government Shutdown**
<http://www.whitehouse.gov/blog/2013/11/07/impacts-and-costs-government-shutdown>

7. OFFICE OF PERSONNEL MANAGEMENT (OPM)
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<http://www.opm.gov/>

- **Pay and Leave Furlough Guidance**
<http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Shutdown-Furlough>
 - **Guidance for Shutdown Furloughs**
 - <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf?nocache=6>
 - **OMB Bulletin M-95-18 transmitting 8/16/95 Department of Justice opinion** (22 Aug 95)
 - http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-1.pdf
 - **OMB Memorandum M-91-02, Agency Operations in the Absence of Appropriations** (5 Oct 90)
 - http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-2.pdf
 - **OMB Bulletin No. 80-14, Supplement No. 1, Agency Operations in the Absence of Appropriations** (20 Aug 82)
 - http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-3.pdf

- **OMB Memorandum, Agency Operations in the Absence of Appropriations** (17 Nov 81)
 - http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf
- **OMB Bulletin 80-14, Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations** (28 Aug 80)
 - http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-5.pdf

8. LIBRARY OF CONGRESS – CONGRESSIONAL RESEARCH SERVICE
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<http://www.loc.gov/crsinfo/> (the first three links below provide access to various CRS articles, specific articles also listed below)

- <https://openocrs.com/>
- <https://www.fas.org/sgp/crs/index.html>
- <http://www.phibetaiota.net/2013/07/congression-research-service-catalog/>
 - Look under the following Headings: BUDGET, CONGRESS and DEFENSE; also use a keyword search (funding, gap, lapse, appropriation, shutdown, etc.)
 - Some of these documents are updated from time to time, so the dates may change
- **Federal Funding Gaps: A Brief Overview** (11 Oct 13)
 - <http://www.fas.org/sgp/crs/misc/RS20348.pdf>
- **FY2014 Appropriations Lapse and the Department of Homeland Security: Impact and Legislation** (24 Oct 13)
 - <http://www.fas.org/sgp/crs/homesecc/R43252.pdf>
- **Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations** (15 Oct 13)
 - <http://www.fas.org/sgp/crs/natsec/R41745.pdf>
- **Reaching the Debt Limit: Background and Potential Effects on Government Operations** (21 Nov 13)
 - <http://www.fas.org/sgp/crs/misc/R41633.pdf>
- **Shutdown of the Federal Government: Causes, Processes, and Effects** (25 Sep 13)
 - <http://www.fas.org/sgp/crs/misc/RL34680.pdf>
- **Continuing Resolutions: Overview of Components and Recent Practices** (6 Aug 12)
 - <http://www.fas.org/sgp/crs/misc/R42647.pdf>
- **Past Government Shutdowns: Key Resources** (25 Nov 13)
 - <https://openocrs.com/document/R41759/>

- **In Brief: CRS Resources on the FY2014 Funding Gap, Shutdown, and Status of Appropriations** (23 Oct 13)
 - <https://opencrs.com/document/R43250/>
- **The FY2014 Government Shutdown: Economic Effects** (1 Nov 2013)
 - <https://www.fas.org/sgp/crs/misc/R43292.pdf>

9. U.S. DEPARTMENT OF DEFENSE

<http://www.defense.gov/>

- **Government Shutdown: What You need to Know (Oct 13)**
http://www.defense.gov/home/features/2013/0913_govtshutdown/
 - **Guidance for Continuation of Operations in the Absence of Available Appropriations** (25 Sep 13)
 - http://www.defense.gov/home/features/2013/0913_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf
 - **Contingency Plan Guidance for Continuation of Essential Operations in the Absence of Available Appropriations** (Sep 13)
 - http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf
 - **Potential Government Shutdown** (26 Sep 13)
 - http://www.defense.gov/home/features/2013/0913_govtshutdown/Potential-Government-Shutdown-DSD-Memo-9-26-2013.pdf
- **SECDEF Publications**
<http://www.defense.gov/pubs/>
 - **Guidance for Implementation of Pay Our Military Act (POMA)**
 - <http://www.defense.gov/pubs/POMA-implementation-guidance.pdf> (5 Oct 13)
 - **POMA Cover Letter**
 - http://www.defense.gov/pubs/Hagel_Cover_Memo_POMA-FINAL.pdf (5 Oct 13)
- **SECDEF Speeches**
<http://www.defense.gov/speeches/>
 - **Message to the Force on the Potential Government Shutdown**
<http://www.defense.gov/speeches/speech.aspx?speechid=1809> (30 Sep 13)
 - **Message to Department of Defense Personnel on Reopening the Government**
<http://www.defense.gov/speeches/speech.aspx?speechid=1812> (17 Sep 13)

- **SECDEF News Releases (Oct 13)**
<http://www.defense.gov/releases/default.aspx?mo=10&yr=2013>

- **Statement by Secretary Hagel on the Pay Our Military Act (5 Oct 13)**
<http://www.defense.gov/releases/release.aspx?releaseid=16293>

10. HEADQUARTERS, DEPARTMENT OF THE ARMY

<https://g357.army.pentagon.mil/default.aspx>

- **PLANORD 226-13: Continuation of Operations (PLANORD, FRAGO 1-2, Annex)**
<https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/PLANORD.aspx?PageView=Shared>
- **EXORD 228-13: Continuation of Operations (EXORD, FRAGO 1-10, Annex)**
<https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/EXORD228.aspx>
- **EXORD 049-12: Cont. OPNS in absence of Avail Appropriations (EXORD, FRAGO 1-2, Annex)**
<https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/EXORD%2004912%20Cont%20OPNS%20in%20absence%20of%20Avail%20Appropri/Forms/AllItems.aspx>
- **Fiscal and Related Policy Guidance, HQDA EXORD Annex T**
https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC_Document_Library/ANNEX%20T%20-%20FISCAL%20AND%20RELATED%20POLICY%20GUIDANCE.pdf

11. GOVERNMENT ACCOUNTABILITY OFFICE (GAO)

<http://www.gao.gov/>

- **GAO Redbook, Vol II., Chapter 6-146, Funding Gaps** <http://gao.gov/assets/210/202819.pdf>
- **Funding Gaps Jeopardize Federal Government Operations, PAD-81-31 (3 Mar 81)**
<http://www.gao.gov/products/PAD-81-31>
 - Appendix III: Comptroller Opinion for Honorable Gladys Spellman (3 Mar 80)
 - Appendix IV: Attorney General Civiletti Opinion (25 Apr 80)
 - Appendix V: OMB Director McIntyre Memorandum (28 Aug 80)
 - Appendix VI: OMB Director McIntyre Memorandum (30 Sep 80)
 - Appendix VII: OMB Director McIntyre Memorandum (15 Dec 80)
 - Appendix VIII: Attorney General Civiletti Opinion (16 Jan 81)

12. RELEVANT LEGISLATION

- **41 USC 11 (Feed and Forage Act)**
<http://www.gpo.gov/fdsys/pkg/USCODE-2009-title41/pdf/USCODE-2009-title41-chap1-sec11.pdf>
- **31 USCA 1341-1342, 1511–1519 (Anti-Deficiency Act)**
 - <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleII-chap13-subchapIII-sec1341.pdf>
 - <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1511.pdf>

- <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1512.pdf>
- <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1512.pdf>
- <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleII-chap15-subchapII-sec1515.pdf>
- <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1517.pdf>
- <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1518.pdf>

- **Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013)**
<http://www.gpo.gov/fdsys/pkg/PLAW-113publ39/pdf/PLAW-113publ39.pdf>

- **Department of Defense Survivor Benefits Continuing Appropriations Resolution, 2014, Pub. L. No. 113-44 (2013)**
<http://www.gpo.gov/fdsys/pkg/PLAW-113publ44/pdf/PLAW-113publ44.pdf>

* This list is current as of January 2014. Certain documents appear more than once on the list in the event the first link is no longer valid.

Appendix C

Examples of Potential Option Period Modifications Prior to a Funding Gap

EXAMPLE I:

Assume the continuing resolution (CR) expired on 15 January 2014. There had been no extension of the CR nor appropriation enacted and, therefore, a second funding gap occurred in FY14 on 15 January 2014. Also assume a contract for severable services had the following period of performance (PoP) and funding source:

Base period: 17 January 2013 to 16 January 2014 (using FY13 OMA)
Option period I: 17 January 2014 to 16 January 2015 (requiring FY14 OMA)
Option period II: 17 January 2015 to 16 January 2016 (requiring FY15 OMA)

Practitioners may recommend that KOs modify (must be bilateral) the PoP of the option periods as follows:

Base period: 17 January 2013 to 13 January 2014 (using FY13 OMA)
Option I: 14 January 2014 to 13 January 2015 (requiring FY14 OMA from the CR authority)
Option II: 14 January 2015 to 13 January 2016 (requiring FY15 OMA)

In this scenario, the Government loses a few days of performance at the end of the contract. However, with the modification, the new option period would have been exercised prior to the beginning of the funding gap. This action could allow potentially non-expected services to continue during a funding gap.

EXAMPLE II:

Assume a funding gap may occur at the start of FY15 on 1 October 2014. Also assume a contract for severable services has the following PoP and funding source:

Base period: 1 October 2013 to 30 September 2014 (using FY14 OMA)
Option period I: 1 October 2014 to 30 September 2015 (requiring FY15 OMA)
Option period II: 1 October 2015 to 30 September 2016 (requiring FY16 OMA)
Option period III: 1 October 2016 to 30 September 2017 (requiring FY17 OMA)

Practitioners may recommend that KOs modify (must be bilateral) the PoP of the option periods as follows:

Base period: 1 October 2013 to 28 September 2014 (using FY14 OMA)
Option I: 29 September 2014 to 28 September 2015 (requiring FY14 OMA)
Option II: 29 September 2015 to 28 September 2016 (requiring FY15 OMA)
Option III: 29 September 2016 to 28 September 2017 (requiring FY16 OMA)

In this scenario, FY14 OMA was used for both the base period and option period I. This total period of performance was just under 24 months, funded with FY14 OMA.