

HEARING OF THE CIVIL SERVICE SUBCOMMITTEE
OF THE HOUSE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE
SUBJECT: WHAT CONSTITUTES "ESSENTIAL" DURING GOVERNMENT
SHUTDOWNS

CHAired BY: REPRESENTATIVE JOHN MICA (R-FL)

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Body

REP. MICA: Good morning. I'd like to call this meeting of the House Subcommittee on Civil Service to order, and the subject of today's hearing is government **shut-down** and what is essential.

I'll start off this morning's hearing by welcoming our witnesses and guests and fellow colleagues this morning. And I have an opening statement and then we'll hear from some of the other members.

Today the subcommittee will be **reviewing** the government **shut-down**, both as it affected our federal work force recently and what might happen **in** the event of a future government lapse **in** appropriations. Any **review** of the federal government **shut-down** must center on what activities of the federal government are essential and which are non-essential. The Constitution of the United States is clear **in** Article I, Section IX, and I'll quote -- "No money shall be drawn from the Treasury, but **in** consequence of an appropriation made by law."

Despite this constitutional restriction, we recognize that certain functions of our government are **in** fact essential and its work force must continue to operate, even when appropriations do lapse. By tradition, it is the president, together with OMB and the individual agencies that have been allowed to decide which functions and agencies are essential, and which, **in** fact, are to be **shut down**.

Part of the reason that I and other members -- new members -- have sought election to Congress was really to come here with the intention of exploring these issues **in** a broader context. **In** our attempts to balance the federal budget, we deal with this issue directly as we decide what, **in** fact, are essential national functions and activities.

That, of course, is part of a larger question, as we consider the proper role of our federal government, including other alternatives, such as privatizing, downsizing or shifting responsibilities to state and local authorities.

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However, no one can deny the fact that taxpayers and the average citizen outside the Beltway must ask some very serious questions when large segments of our federal government close down and they see no appreciable differences in their lives.

Inside the Beltway, many people spoke of assessing blame for the government's shut-down of non-essential services. Outside the Beltway, many citizens and taxpayers applauded closing down non-essential government activities.

Others outside the Beltway who have grown dependent on federal government benefits and services were in fact appalled and dismayed and had their lives severely disrupted by the shut-down.

In this hearing today, I hope we can review first what took place in the recent shut-down, and secondly, what plans are under consideration for any future government closure.

It's important to note that the shut-down, itself, has not been a new idea to this administration. I believe it was part of a calculated strategy by the administration to close down the government, in fact, and do that closure this year.

Planning for this supposedly spontaneous shut-down began as early as July of this year. In September, agencies were required to submit shut-down plans to OMB. This was in marked contrast to the first shut-down, which occurred under President Reagan in 1981, when the first OMB guidance to agencies was issued less than a week before employees were sent home.

In spite of the current administration's advance planning, it's unfortunate the execution of the shut-down was in many instances a disorganized and illogical, at best, and often times chaotic experience.

For example -- let me cite a couple of examples here, and we've got people that will speak to this as witnesses. The Department of Housing and Urban Development -- HUD -- initially released all but 136 of nearly 12,000 employees. As a result, some housing programs were shut down, even though funds were available for many major housing programs.

Even with a 90 percent retention rate at the Department of Veterans' Affairs, the administration announced that the processing of new applications for some major veterans' benefits programs would be suspended. Within a week of the shut-down, the White House announced the recall of more than 1,700 DVA employees.

The Department of Education, as another example, furloughed 86 percent of its work force, while the Bureau of Alcohol, Tobacco and Fire Arms found it necessary to retain so-called essential 15 of 23 public affairs officers.

The Social Security Administration furloughed 90 percent of its work force. Retirement claims processing ceased. At the same time, retirement claims for civil service retirees at the Office of Personnel Management were being processed at a 100 percent capacity and activity rate.

Three days into the furlough, the president initiated a recall of more than 50,000 Social Security personnel, raising questions about whether they should have been furloughed in the first place.

Furthermore, in the middle of the shut-down, the president declared the activities non-essential -- some of them non-essential on Monday when on Friday these same functions were suddenly termed "essential."

It's important that we look at the discrepancies and review the agencies and see what is in fact a priority activity. We must also examine what activities are more costly to close down than to continue.

And finally, we must consider federal employees whose lives are severely disrupted by this disorderly process. This may have been a well-planned shut-down, but I find some of the results very confusing. You heard a lot of rhetoric. We saw a lot of posturing and grand standing from the administration. As cold reality set in, we even saw back peddling and employees recalled.

And what about the question, "What is essential?" The administration seems not to have defined this consistently among its various agencies.

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Was this poor management or premeditation? Should Congress have established better criteria or better defined guidelines? The priorities seem evident to me. First and foremost, we have a responsibility to ensure national security. We have a duty to provide for the effective enforcement of our laws. We must take adequate measures to guarantee the public safety, health and welfare.

Next, we must assure that those who cannot sustain themselves are provided for adequately. Most of these functions were deemed essential last month. Most were carried out with only minor interruptions. But it is important that we look at the discrepancies in the implementation of the administration's first shut-down, if only to make certain that we avoid these problems in the future.

We face the prospect of another shut-down affecting several agencies here today within just a matter of 10 days.

We remain committed to approving legislation that will continue operations. But if another veto does shut down these agencies, we hope this hearing will result in a more consistent criteria for closures and more effective operations of continuing activities.

To explore these issues we have assembled a panel of senior officials, who have had responsibility for the management of major agencies that have implemented the shut-down in a variety of ways. They include Dr. Walter Broadnax, the deputy secretary of the Department of Health and Human Services; Mr. Dwight Robinson, acting deputy secretary of the Department of Housing and Urban Development; Mr. Thomas Glynn, deputy secretary of the Department of Labor; Mr. George Munoz, assistant secretary for Management and chief financial officer of the Department of Treasury; Mr. Gene Brickhouse, assistant secretary for Human Resources and Administration of the Department of Veterans' Affairs; and Mrs. Shirley Chater, commissioner of the Social Security Administration.

Our second panel includes Mr. John Koskinen, deputy director of the Office of Management and Budget; Mr. Christopher Schroeder, deputy assistant attorney general in the Office of Legal Policy at the Department of Justice; and Mr. Alan Heuerman, associate director for Human Resource Systems Service in the Office of Personnel Management.

Those are my opening remarks and comments. I will yield now to the ranking member of our panel, the distinguished gentleman from Virginia, Mr. Moran.

REP. JAMES MORAN (D-VA): Thank you, Mr. Chairman. I'm glad you're having this hearing on the government shut-down that never should have happened. In my view, it was clearly the Congress' fault we did not get our appropriation bills passed in time. We had a year to do it and we didn't do it. There was only one in my recollection out of 13 bills that was enacted.

There was a lot of complaint over the fact that the president vetoed the legislative branch appropriations bill, but thank God he did. That would have been the worst thing to have had the Congress paid and none of the rest of the government paid, because we took care of our own salaries and operation expenses before the rest of the government.

So I'm glad he vetoed that, but the fact is that we didn't get the appropriation bills passed. That's why we had the government shut-down, and then we deliberately sent the continuing resolution to the president, calculated to draw a veto.

Now, I grant you that the speaker tried to lend some insight as to why that happened by going into the fact that he didn't get a window seat on the plane to the Middle East, or that he went out the wrong door, or something. But I don't think it was so much the personal snubbing that he perceived occurred as the fact that the legislative branch did not act in an efficient and effective way.

The reconciliation bill is far less important than getting these appropriation bills signed. And that, in the future, should be our highest priority. But 40 percent of the government did not operate as a result for four days and I think that's something we should be ashamed of. We also ought to be embarrassed at the fact that we spent \$700 million of taxpayers' money and got no work out of it -- no return from the federal employees who were furloughed,

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all of whom wanted to be at work performing their job. None of them wanted to get paid for doing nothing, but all of them -- 800,000 -- were sent home.

I think that we need to clarify what is essential and non-essential in the first place. The definition that suggests that -- and, in fact, I have the directive here. Essential employees are only those, where, if they were unable to perform their job, the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.

There's an inconsistent application of that criteria. But the functioning of the federal government goes far beyond that. Obviously, national park officials, for example, are not going to be involved in the safety of human life or the protection of property, for the most part, but they are important for the proper functioning of the federal government.

The people who issue visas -- we had any number of people in my jurisdiction -- I'm sure they're throughout the country -- who needed visas, who needed to be able to travel, who couldn't get them. One woman's family member was dying and she couldn't get there because the people who would have issued her a visa were not able to get to work.

The Social Security applications, the applications for veterans' benefits were not processed when they were supposed to, when people were eligible. The fact is that millions of dollars were wasted every day that should have been collected and wasn't.

I know we're going to find a number of discrepancies between the number of federal agencies and the way they interpreted the guidelines, and as a result, some were harder hit than others, not just because some of the functions relate to the safety of human life and protection of property more than others, but because of different interpretations. I think that's due to a sincere effort to do the right thing, and simply differences in honest judgment.

The hearing that we're having today is particularly important because it could happen again. The continuing resolution expires on December 15th. It's conceivable we could have another government shut-down at that time. We're making absolutely no process (sic) on the seven year balanced budget bill. We've agreed on how many people are going to sit at the table and what table it is, but we haven't gone beyond that.

So that being the case and the fact that we're running out of time, I don't see any possibility of all these bills being resolved. So a continuing resolution is clearly going to be necessary. I would hope that it would be simple extension of the continuing resolution.

If there is not, then the public is going to be absolutely right in identifying the source of the problem, and it is us, as far as I'm concerned. Back in 1990, almost two out of three taxpayers figured it was the Congress' fault and the figures were almost identical this year, as well. I think they're going to be higher if it happens again.

So I think it behooves us to take measures now to avert this. One of the things that we could do is to pass legislation, and it ought to originate in this subcommittee, that I've introduced and Congressman Gekas from Pennsylvania has introduced, that would have federal employees go to work in the event of any lapse of appropriations. They would be reimbursed after the fact, but at least the taxpayer would get effort for the money that is being paid for the federal employees in salaries.

It would not disrupt the ability of the federal work force to serve the public. Speaker Gingrich made it clear in a letter that he gave to Republican members of the Congress that he was committed to paying federal employees -- all federal employees -- including those who were furloughed. So this simply assures that they would be performing work during that period of time.

I can't imagine why people would be opposed to that other than for the political leverage that it gains people to be able to threaten the possibility of a government shut-down. That's wholly irresponsible. I think we also need to take into consideration that people employed in the private sector who were severely and adversely affected by this shut-down -- people in the services, the retail sector and government contracting and procurement -- the losses

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that they suffered are not made up. They don't get any retroactive pay and particularly in this Washington area, there's a lot of people who were hurt unjustifiably and unnecessarily.

It's H R 2184 that we've introduced and I would hope we would consider that in this subcommittee and pass it on in an expeditious fashion.

Beyond that, I'm anxious to get into this hearing, Mr. Chairman, and I'm glad we have the occasion to see how it worked, and I hope even more importantly, to get to work to make sure that this does not occur again. Thank you.

REP. MICA: I thank the gentleman and would now like to yield to the chairman of the full committee who's joined us this morning, Mr. Clinger from Pennsylvania.

REP. WILLIAM CLINGER (R-PA): Thank you very much, Mr. Chairman, and thank you also for holding this hearing on the effect of the partial shut-down of the federal government on civil service staff and the government functions.

A great deal of planning and work went into the shut-down plans of the agencies and we're hear to learn about the actions taken by the federal Cabinet departments and independent agencies to prepare for possible appropriations impasse, whether they took the appropriate steps to troubleshoot their own plans and ask for help when they need it from the Office of Management and Budget.

I think we also want to know what actions OMB and/or the Department of Justice and the Office of Personnel Management took to assist in the planning, to help guide the agencies and to troubleshoot the problem areas before a funding hiatus occurred.

Dr. Rivlin and numerous other administration officials were commenting publicly on the potential shut-down of the government really for months before it actually took place. As early as July 26th, I believe, Dr. Rivlin cautioned agencies to "take no actions such as reductions in force, office closings or similar measures until we have had time to assess the developing situation and put together a government-wide plan," was her quote.

By memo dated August 17th of this year, she directed the agencies to "develop and submit for review any plans that you believe are appropriate," she said, and she assured the agencies that OMB would quote, "review plans promptly and get back to the agencies with suggestions" -- closed quote.

And again, on November 9th, she instructed agencies to begin to implement the plan -- quote -- "as approved by OMB in September" -- closed quote. So clearly OMB had been planning for the funding hiatus since mid-summer and had also accepted full responsibility for reviewing and approving the plans and otherwise managing a succession in government operations.

However, we find that during the shut-down, inconsistencies became apparent in the treatment and status of employees who perform very similar if not identical functions. For example, the Department of Veterans' Affairs makes benefit payments for pensions and compensation.

In its shut-down procedure the VA strictly adhered to the Anti- Deficiency Act and veterans' compensation was determined to be unpayable because it is funded through annual appropriations.

The Social Security Administration also, however, makes payments for pensions and compensation. But here, even though the Social Security Administration is funded through indefinite appropriations, the SSA shut down to only seven percent of its workforce. On what basis, then, were these disparate decisions made? Is this a distinction based on funding stream only?

I'm also curious to know whether sufficient guidance was given by OPM for the agencies to adequately prepare their shut-down contingency plans. The contingency plan of the Department of Health and Human Services was a mere two pages long, one of which was a chart and the other a cover memo to Nancy-Ann Min of the Office of Management and Budget. And by contrast, the contingency plan for the U.S. Department of Labor was an impressive and extensive 184 pages long, with the Treasury Department a close second, with 174 pages long.

In its review of the plans, did OMB consider the HHS shut-down plan to be adequate at two pages? Also, why were certain safety functions, which are necessary to protect human life, treated differently as we understand it. The Mine Safety and Health Administration had more than 1,400 safety inspectors on duty during the furlough. By

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contrast, OSHA -- the Occupational Safety and Health Administration -- retained a staff of about 250. No child labor inspectors were retained.

Do child labor inspectors perform a safety function? I really continue to be somewhat puzzled by this apparently desperate treatment of safety functions and I look forward to hearing an explanation of this issue from the Department of Labor this morning.

Were any of these inconsistencies observed by OMB in their review of the plans? And of what did OMB's review and approval process consist? The bottom line is, how was this shut-down managed?

In 1994, the Office of Management and Budget merged its management and budget functions. And at that time, I sent a letter to then Director Panetta expressing my concern. I was joined in that by the then Chairman, expressing our concern about the impact of the OMB's reorganization and its management of the federal government. In examining this shut-down, I'm again concerned that the management functions of OMB have been over-shadowed by the ongoing budget work. And frankly, I am concerned that OMB may not have reviewed shut-down plans thoroughly enough, at least on the basis of the information we've seen so far.

If they had, it seems that they would have seen these serious inconsistencies in the plan and would have taken steps to re-address them. The partial shut-down of the federal government is an extremely complex process. If we've learned nothing else in this exercise we've learned exactly how complex and complicated it is.

It requires a tremendous amount of planning and sound judgment. It's my hope that OMB will assess the responsibility it has for properly managing future shut-downs so that expectations are fair and clear and confusion and inconsistency is minimized. Frankly, we hope we never have to go through this again, but if we do, it surely needs to be better thought out beforehand.

Finally, I wonder whether the subcommittee might consider recommending that there be a process within OMB by which shut-down plans will be reviewed, and through which agencies can formally resolve questions and appeal those decisions.

I want to thank you, Mr. Chairman. I would ask unanimous consent that the letter I referred to from myself and Mr. Conyers to Mr. McDana (ph) with regard to the management functions of OMB dated June 21, 1994 be included in the record at this point.

REP. MICA: Without objection, so ordered. I thank the gentleman for his opening statement. I'd like to yield now to Ms. Morella. Ms. Morella from Maryland is recognized for her opening statement.

REP. CONSTANCE MORELLA (R-MD): Thank you, Mr. Chairman. I want to commend you for convening this hearing. Last month we experienced the longest government shut-down in our history. So for me there's no more opportune time to examine the criteria used by the administration to determine what functions would remain operational during the shut-down, particularly with December 15th staring us in the face.

I didn't want to shut-down. No member of this subcommittee or full committee wanted it. The shut-down was a terrible experience. It was a demoralizing and divisive ordeal for our workforce. It was costly and disruptive to the taxpayers. It hurt a number of businesses, particularly in this local area.

Clearly, I wish the president could have signed a continuing resolution that would have kept the entire government running. But for me, this hearing is not about that. This hearing is about reviewing the policies and the implementation of those policies so we can devise solutions to better determine what needs improving and to fix what is broken. It's also about sitting here and talking through this matter so that just maybe we wouldn't have to be in this position again. There are issues that need to be reconciled. I have a hard time understanding, for instance, why cancer researchers were not considered essential. I think most of you know how cancer has affected my life.

I'm not certain, but I've heard also that AIDS research may have been affected during this period. The fact that the Department of Veterans' Affairs were recalling employees to process claims for disabled veterans indicates some confusion over how the policy was implemented. Our veterans need special treatment. If the current policies don't afford this treatment, let's fix them.

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Before I conclude my statement, there are two other issues that I think need to be addressed. I've been reading statements in the paper and hearing people say that federal workers who were furloughed came out ahead because they received their pay, and I was one who advocated that they not be victimized.

Now I realize there's a question of equity out there, and we need to examine that in the future. But I find that these statements are highly offensive and insensitive and an affront to the dedicated men and women who serve this nation and who, through no fault of their own, were furloughed.

I don't know how you come out ahead after having to wear the demoralizing title of "non-essential." I don't know you come out ahead while you're sitting at home wondering how long it will last and how you or your colleagues will pay your bills in the interim. There was not one federal worker screaming, "Please, please, furlough me!" So I hope that this will be an end of that kind of rhetoric. I also feel that the term "non-essential" must be eliminated from the federal vocabulary. I can't think of a term more misguided or misleading.

And with that said, I again want to thank Chairman Mica for calling the hearing, for his indulgence and also look forward to hearing from the witnesses. Thank you, Mr. Chairman.

REP. MICA: I thank the gentlelady and now would like to yield to the vice chair of the subcommittee, Mr. Bass from New Hampshire.

REP. CHARLES BASS (R-NH): Thank you very much, Mr. Chairman. I have an opening statement that I'd like to submit for the record, and to simply comment, thank you for holding the hearing this morning. I'm looking forward to hearing the testimony from our witnesses. I agree with my colleague, Mrs. Morella, that the term "non-essential" does not necessarily mean "unneeded" or "unnecessary."

And I think what we need to determine in the course of these hearings is what the nature, what the effect of the shut-down was on the operation of the government, the difference between what worked and what didn't work in government, what was reactive versus proactive in terms of government activities, and perhaps we can learn more about the internal workings of bureaucracy and perhaps what we can learn from this experience -- how to run a better, more efficient government, but certainly not stereotype anybody who was furloughed as being quote, "non-essentials."

So I want to thank the chairman for calling these hearings. I think they're important and I think they're timely, and I look forward to hearing this testimony today and I yield back.

REP. MICA: I thank the gentleman, and now I yield to Mr. Horn from California.

REP. STEVE HORN (R-CA): Thank you very much, Mr. Chairman. I appreciate the opportunity to sit with your committee during these hearings. As chairman of the Subcommittee on General Government, we have major concerns about the processes by which these decisions were made.

Let me just say that I agree with what I have heard from the gentleman from Virginia, the chairman, gentlewoman from both Maryland and the gentleman from New Hampshire. There's a lot of significant questions and I commend you for these hearings. I hope you will recommend to the full committee, and thus the House, the criteria by which these decisions have been made.

My particular concern comes on an incident that occurred in my own district, and that is the Department of Defense withdrew the C-17 inspectors from the line and if this shut-down had lasted a few more days, approximately five to ten thousand workers would have been furloughed because there's no way you can keep production going unless the appropriate inspection has been made along the way.

Now, if that policy was across the nation, which I suspect it was, having talked to various officials in the Pentagon, I think it is a wrong-headed policy that would damage this economy by the billions, but more particularly, it would damage the efficiency of defense production, which has taken a long time on the C-17 and other major projects to be developed. And now that it's efficient, this kind of nonsense of pulling C-17 inspectors and other defense productions inspectors, I think needs a very careful review by this committee.

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And Mr. Chairman, I'd like to enclose at this point in my remarks a statement I've made that raises some fuller questions, but I do hope, whether I'm in the room or not, that you and your colleagues will ask, did the White House directly or indirectly urge any particular closures.

Because another series of closures that irks me deeply is the fact that park rangers are pulled from various national monuments when people have saved money for five to 10 years to finally see those national monuments and they're unable to do it, not to mention, of course, the Social Security field offices and all the other things we all know about.

REP. MICA: I thank the gentleman, and without objection, the statement will be made part of the record. Also a statement from Mr. Bass, without objection, will be made part of the record. I also have a statement and a request from Cardiss Collins, the ranking member of the full committee and without objection, her statement will be made part of the record.

I've also had requests, I might say -- well a number of members now, it's growing -- to testify and comment on the question of the impact of the shut-down and how we proceed. And we are going to hold a members' panel next Tuesday at 1:30 and give all of the members who wish an opportunity to be heard at that time. If any members do have a statement they'd like to be made as part of the record today, we'd also be glad to include that in the text. In order to be fair to everyone I think we'll proceed in that fashion.

I'd like to now call our first panel and we have them before us. Dr. Walter Broadnax, Department of Health and Human Services; Dwight Robinson, Department of Housing and Urban Development; Thomas Glynn, Department of Labor; George Munoz, the Department of Treasury; Eugene Brickhouse, Department of Veterans' Affairs and Shirley Chater, the commissioner of the Social Security Administration.

Some of you have appeared before us before. Some of you are new members. This is an investigation and oversight subcommittee and a committee of Congress. So if you would please stand, I'd like to administer an oath.

If you'd raise your right hand. Do you swear that the testimony you're about to give before this subcommittee of Congress is the whole truth and nothing but the truth?

WITNESSES: I do.

REP. MICA: The witnesses have answered in the affirmative. Again, I'd like to welcome our panelists, and since we have several lengthy panels here, we are going to use the five minute rule. You are asked if you have a lengthy, detailed statement to submit it for the record and it will be made part of the record. And we'd appreciate your summarizing so that the members of the subcommittee will have an opportunity to discuss and ask questions.

We'll start first, if we may, by having a statement by Dr. Walter Broadnax, deputy secretary of the Department of Health and Human Services. Welcome, and you're recognized, sir.

DR. WALTER BROADNAX (Deputy Secretary, Department of Health and Human Services): Thank you, Chairman Mica, and members of the committee, for the opportunity to speak to you today concerning the Department of Health and Human Services' implementation of the recent government shut-down.

Mr. Chairman, this is my oral statement. I have submitted my full testimony for the record.

The first casualty of a shut-down is the morale of our employees who were incorrectly termed "non-essential." I want to make the point clearly that all HHS employees are essential. During a lapse in appropriations, some employees may continue to work as a matter of law. Others may not -- a distinction made by law, not by the value of their work.

The HHS shut-down plan was developed and implemented in accordance with existing laws and guidelines contained in the legal opinions developed by the Department of Justice and OMB guidelines. Consequently, HHS determined that 33,600, or 55 percent of our employees would continue to work during the shut-down because their work was accepted.

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HHS had to furlough approximately 27,500, or 45 percent, because their work was not classified in one of the accepted categories. The secretary and the deputy secretary kept HHS employees advised of key developments regarding a possible shut-down. The secretary met personally with the heads of HHS operating divisions prior to the shut-down and assured them that she considered each and every one of our employees and the services that they provide to be essential.

However, it was made clear to them that normal business would have to be suspended for the duration of the shut-down, consistent with legal requirements. I am proud of the efforts made by our shut-down team, who prepared a shut-down plan and managed that plan once OMB officially announced a shut-down.

Their efforts enabled HHS to proceed in an orderly manner to implement the shut-down. The team met frequently before and during the shut-down and provided a vital focal point for information and guidance about the shut-down. It was necessary for the team to consider adjustments to the shut-down plan after initial implementation, since circumstances changed as the shut-down continued.

For example, following the president's announcements that new Medicare beneficiaries should be enrolled during the shut-down, HHS identified employees of the Health Care Financing Administration -- HICVA -- who provided these services and prepared to call them back to work.

What about the cost of shut-down? They are extremely difficult to determine. Besides employee morale, we know that roughly \$5 million a day was lost due to HHS wages and rent. But there were significant non-personnel costs of the shut-down, as well.

Each day we had to turn away 10,000 new Medicare applicants. New patients could not be accepted into clinical research at the NIH clinical center. An average of 170 patients enter each week. The Centers for Disease Control ceased disease surveillance. Therefore, information about the spread of disease, such as the flu and AIDS was unavailable.

The shut-down gave a holiday to deadbeat dads, since we had to shut down the parent locator service to which is referred on average fifteen to twenty thousand cases per day. Hotline calls to the NIH concerning diseases could not be answered and calls to our inspector general concerning fraud and abuse could not be referred.

Fortunately, the effects of the shut-down did not have an impact on some of our customers. For example, the Medicaid and Aid to Families With Dependent Children programs were already funded for the first quarter prior to shut-down from advance appropriations, and Medicare claims were paid from trust funds, which were not affected by the shut-down. But these Medicare claims were paid by contractors who could not be paid during the shut-down, and who would have to cease Medicare payments if their cash ran out, due to a longer hiatus.

The impact of another shut-down on December 15th would be substantially worse. We would have all the same problems that we encountered in November but we would add to them the lack of available funding for Medicaid, AFDC and foster care, and all the other programs that are due to be funded for the second quarter on January 1, 1996.

These grants are prepared and then awarded on January 1st. This affects approximately 4,500 grant awards, totalling more than \$28 billion. Clearly, shut-down of the government is in no one's interest. The public is left without services that affect the most vulnerable among us. States are left to support a myriad of services that they cannot afford alone. Contractors providing accepted services such as Medicare claims payment are left in the position of either floating the government through the crisis or suspending payments.

And employees are told they cannot come to work and do their jobs providing services, tracking diseases and caring for the elderly in the people's departments, simply because their job does not meet the legal definition of an accepted function.

I am sure you will agree that these costs are simply too high for the country to bear, and therefore, we must do all within our power to avoid another shut-down.

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Thank you, Mr. Chairman, and I would be happy to answer any questions the committee may have.

REP. MICA: I thank you, Dr. Broadnax. We are going to withhold questions until we finish the panel. I'd like to recognize now Mr. Dwight Robinson, who's acting deputy secretary at the Department of Housing and Urban Development.

DEP. SEC. DWIGHT ROBINSON (Acting Deputy Secretary, Department of Housing and Urban Development): Thank you, Mr. Chairman, and good morning. I want to thank you for this opportunity to discuss the planning, implementation and oversight of the recent shut-down of the government, including the Department of Housing and Urban Development.

We believe that our actions followed the law, directions from OMB, the Department of Justice, and what was necessary under the regrettable circumstances. We are pleased to be able to answer your questions and to discuss with your committee how we thought through the process and how the plan unfolded.

Like most federal agencies, HUD had experienced short-term shut-downs before, although the most recent lasted just a half a day in 1990. In compliance with a series of OMB bulletins issued over the last 15 years, we had in place general guidance and procedures for implementing a shut-down. That possibility grew stronger late in the summer, and in August and early September, the Department undertook, legal review of opinions from the Department of Justice and we also examined OPM instructions and OMB guidance to update and add detail for our plan for operations during a funding lapse.

The plan was submitted and reviewed by OMB in September. The plan is conceptual, rather than administrative. It reviews each of the programs for which the Department is responsible, in terms of its legal authority to continue activities under the applicable statutes. What we found is that the length of the funding hiatus really determines the work that can be done.

In a one or two day lapse in funding, we require only minimal emergency staff to protect life and property and provide for an orderly shut-down of activities. But a longer shut-down would require more HUD staff perform activities necessary to protect life and property.

In October, we developed a contingency plan containing the administrative procedures and personnel guidance for implementing a shut-down. Employees were told of the possibility of a shut-down and advised of their personnel rights and told how a furlough would effect benefits and employment. Employees over the two week period were provided with materials.

As we neared the critical date, assistant secretaries and program managers were asked to provide specific plans for a short-term shut-down, keeping only those few employees who would be protecting life and property or conducting the shut-down, itself.

On Monday before the shut-down, November 13th, through a headquarters public address system and a national conference call, the secretary addressed all HUD staff, explaining the impending funding problems and the possibility of a furlough.

The shut-down began on the morning of Tuesday, November 14th. OMB provided the official notice that employees should be released, and those employees who were excepted per the plan were provided with a letter containing the emergency conditions under which they were retained, and all other employees were provided with a furlough letter and other personnel guidance.

Once again, the secretary informed employees by conference call, facsimile transmission and over the public address system in headquarters of the shut-down, and the shut-down was executed orderly.

About 400 HUD employees were excepted during this period and about 11,000 were furloughed. Consistent with our long-term plans, during the week we determined that we would need to bring more employees back and furlough -- bring back on board additional furloughed employees if the funding lapse continued beyond a week or so.

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For example, HUD provides operating subsidies and modernization funds to 3,400 local housing agencies, who in turn provide public housing and services to 1.4 million low income households. These funds are drawn down by public housing authorities on a daily basis, as needed. Additional HUD public housing employees would have been needed to provide these funds of about \$25 million per day. On Thursday, November 16th, discussions were held on providing additional with OMB and by the weekend, we had a plan to increase emergency staff to meet critical needs in public business. As it happens, the crisis was over before this next step took place.

We have found that planning for contingencies is not a static process when planning for an event that is unknown. Longer shut-downs require a continuous assessment of staffing in order to gauge when the absence of providing some government function would cause impending threat to life and property.

We believe that our planning process worked the way it should have worked within the law and the regulations and with enough flexibility to adjust to circumstances.

Thank you for this opportunity to discuss these matters. We'll provide materials to your staff in response to your specific requests for documentation and I would be happy to answer your questions.

REP. MICA: Thank you, and I yield now and recognize Thomas Glynn, the deputy secretary of the Department of Labor.

DEP. SEC. THOMAS GLYNN (Deputy secretary, Department of Labor): Thank you, Mr. Chairman. We appreciate this opportunity to appear before the committee this morning to discuss the planning and implementation of the shut-down plans at the Labor Department, and I, too, am going to summarize my statement, which will be submitted for the record.

I thought it might be useful to just spend a minute on the historical perspective of the Department on the question of shut-downs. The Department of Labor has developed shut-down plans regularly for more than a decade. Since 1985, only in two years, FY '89 and FY '95, did we have an appropriation on October 1st. Therefore, in 10 out of the 12 most recent years, we have had to prepare for the possibility of a shut-down. Some years we've had a continuing resolution on October 1st, and other years we haven't.

This is probably particularly related to the history of the Labor HHS Education Appropriation and sometimes the difficulties it has had getting through both Houses.

The basis for the Department of Labor plan, as it has been revised on an almost annual basis, goes back to the guidance from OMB in 1980, revised by Director Stockman in 1982, and the memo from Attorney General Civiletti in 1981. The Department of Labor's plan is actually published as a document, entitled "Continuing Resolution on Suspension of the Operating Procedures of the Department."

This document delineates the steps necessary to complete an orderly shut-down. It requires each unit to develop a plan, and it requires each plan to have a listing of excepted employees in several categories. One, those who are in the category of protecting an imminent threat to life and property; two, those in the category who manage mandatory benefit programs; three, those whose funding is not subject to annual appropriation; and fourth, the support staff necessary to perform the above three functions. In addition, each unit is responsible for developing a list of employees essential to shut down the Department on a temporary basis.

In an effort to just touch on the questions which we were asked to address this morning, I would say in terms of a process followed at the Department, we began with our published plan, as it has developed over the last 10 or 15 years, conducted an August review, received the memo from OMB in late August, and communicated to our agencies the need to develop plans by early September.

They were transmitted to OMB in late September. A number of questions were raised by OMB and changes were made so that we had a final plan by the middle of November, which proposed 3,000 excepted employees and 470 essential employees.

On the question of the control agency guidance, I think we received approximately 10 communications from OMB, OPM and the Justice Department between August 1st and mid-November, and I think that the -- speaking for the

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Department of Labor, we found the OMB to be cooperative and responsive to our questions without having to micro-manage every decision that needed to be made at the Department of Labor.

On the question of oversight, all the plans and modifications were reviewed by our Solicitor's Office, our Budget Office and by OMB for the policy questions that they would raise. The information that we disseminated to our employees was similar to what you have heard from the Department of HHS and HUD. The costs to the Department of Labor we calculate are at about \$7.3 million in payroll costs for employees who did not work during that period.

Mr. Chairman, that summarizes the Department of Labor shut-down plan and implementation. I thank you for the chance to appear and I'd be happy to answer any questions or submit any documentation that the committee might require.

REP. MICA: Thank you. And now I'll recognize George Munioz, assistant secretary for Management and chief financial officer for the Department of the Treasury.

ASSIST. SEC. MUNOZ (Assistant Secretary for Management and Chief Financial Officer, Department of the Treasury): Good morning, Mr. Chairman. I'm pleased to be here on behalf of Secretary Rubin to testify on the Treasury Department's plans for and implementations of the recent partial shut-down of the federal government between November 14th and November 19, 1995.

I, too, will submit my formal presentation for the record and will just want to highlight portions, thereof. From the beginning, Treasury has approached this issue in a very methodical manner. Our process was managed, taken into account, the interest of the American public and Treasury employees within the legal parameters. This is not a matter that any of us looked forward to, but given that it was necessary, we made it run as smoothly as possible.

To understand the impact of a shut-down, it's important to keep in mind that the Treasury Department has 11 bureaus, all of which serve an important role in the overall government's responsibilities, with functions that are broad and critical to the nation's wellbeing.

One of the concerns that we identified in planning for the shut-down was the unfortunate mis-use of the terms "essential" and "unessential." We very much agree with the statements earlier made by Representative Morella on this matter.

This terminology was not used in any of our shut-down plans. I know that I speak on behalf of the secretary when I say that these are inappropriate terms that mistakenly convey a sense of relative importance among federal employees. They perpetuate the false impression that some federal workers perform jobs that are trivial or unnecessary.

Every day federal workers provide valuable service for the American taxpayer. Instead, our determinations of the work that can and cannot continue in the absence of appropriations are based on the Anti-Deficiency Act's requirements and not on the basis of some abstract judgment of workers' value.

In August, we put together a review team that examined all the plans from our bureaus to ensure that those plans were consistent with the applicable legal principles that were well thought out and clearly communicated.

Treasury Department performed well only because in this review team we had representatives starting at the top, with Secretary Rubin, myself, members of the CFO Department, members of the general counsel under Ed Knight, our personnel office, and our general managers. It was due to this review team that we were able to review our bureau's plans and give guidance to them so that they would be complete and well-communicated to all employees.

Once the shutdown was ordered by OMB, we used the network of bureau shutdown coordinators, which we had established, and the bureau heads to instruct them to begin implementation of their shutdown plans. The bureaus and the department began issuing furlough notices and ordered non-excepted employees to begin to shut down their operations and go home once that process was completed.

We established a hot line, and we put it into effect on the day of the shutdown with the purpose of informing all treasury employees of the status of the shutdown. This hot line proved effective and permitted questions to be

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answered. During the shutdown, our departmental review team continued to meet to evaluate exception requests that became necessary as circumstances changed. Through conference calls initiated twice daily between the department review team and the shutdown coordinators in the bureaus, we provided continuous communications to the bureaus on the status of appropriations action as well as answering operational questions. We also used this team to ensure that departmental operations were back to normal as soon as possible after the Treasury Department shutdown was ended.

In general, the system that was put in place worked extremely well and facilitated rapid and coordinated communications with treasury's 154,000 employees, easing to the extent possible the negative effects on morale and minimizing the negative impacts of the shutdown on productivity.

Mr. Chairman, you have provided the secretary with a list of questions to be answered and the department's written answers to these questions address in more detail our management of the process. We will be providing these answers for the record. We hope that you will find them complete. Please have your staff get back to us if there are any further extensions on those answers. This concludes my follow-on remarks.

REP. MICA: I thank you and recognize Eugene A. Brickhouse, assistant secretary for human resources and administration of the Department of Veterans' Affairs.

MR. BRICKHOUSE: Good morning, Mr. Chairman and members of the subcommittee. I appreciate the subcommittee's interest in how executive branch agencies planned for and implemented the recent government shutdown. I would be pleased to share with you our experiences in the Department of Veterans' Affairs. With your permission, I will provide a brief summary of my written statement, and then, I will be glad to respond to any questions.

The VA started planning for a potential lapse of appropriations in early August. We have the benefit of previous guidance from OMB and the Justice Department. Also, OPM issued extensive questions and answers regarding furloughs which were very helpful. Current OMB and Justice Department guidelines were received well before the end of the month and provided further assistance to us in our planning efforts.

As you are aware, the VA is a large department with multiple missions, including health care for veterans, delivery of compensation, education and other benefits, and operation of the national cemetery system. Because of this diversity, we asked each of our operating components to develop shut down plans appropriate to their individual programs. These were independently reviewed by our general counsel to ensure that legal requirements were met and were then incorporated in our VA level plan.

The plan was ready for implementation when needed on November the 14th and was put into effect by operating VA managers and supervisors. The plan called for a continuation of direct medical care for veterans, as well as other activities which are in the excepted category. This included police and security services, benefit determinations for excepted functions, receipt and process of payments, management of government property, and interments in our national cemeteries. VA has some activities which were not depending on appropriated funds, and these were allowed to continue. This included operations of the veterans' canteen service, certain medical research activities, operation of the VA supply system, and medical care cost recovery system for the third- party insurance.

At the close of the shutdown, there were approximately 206,000 employees that had been designated and excepted and another 33,000 were in furlough status. Clearly, the impact of the shutdown was felt by the veterans and family members whose calls went unanswered, whose appointments were canceled, whose claims for benefits or grave markers were delayed. And although direct patient care continued, our medical facilities felt the strain of suppliers and contractors who were reluctant to proceed with orders when there was no funding to back them up.

I think all of us hope earnestly that another shutdown will not be necessary. With regard to VA's plan, we believe that it met the requirements of the law while making use of every possible opportunity to continue service to veterans. I would like to close with a word of praise for VA managers, supervisors, and employees. They implemented the shutdown, unwelcome as it was, in an orderly, responsible fashion, and we can be proud of them.

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Thank you, Mr. Chairman and members of the subcommittee. I will be glad to answer any questions.

REP. MICA: Thank you, Mr. Brickhouse.

And we'd like to recognize now Shirley Chater, commissioner of the Social Security Administration. Welcome.

MS. CHATER: Thank you, Mr. Chairman and members of the committee. My written testimony has been presented to you for the record. With my time this morning, I'd like to answer some of the questions about the number of Social Security Administration employees who were furloughed. I'd like to tell you about the services that were maintained during the shutdown and the services, of course, that were interrupted.

On November 14, the Social Security Administration furloughed about 61,000 non-excepted employees and retained about 4,800 excepted employees. Now, the vast majority of those employees who remained on the job were directly involved in the processes involved in paying benefits to currently enrolled social security, supplemental security income, and black lung beneficiaries. We also retained some employees who maintain records for those beneficiaries currently on the roles.

In addition, social security continued to perform functions related, of course, to the protection of life and property, and all the administrative activities necessary to support the excepted functions. I want you to know, however, that none of our district social security offices were closed.

Now, let me tell you about the suspensions. There were a number of agency functions that we suspended during the shutdown. I want to make it clear to you that social security never used the term "non-essential" to describe either the services that were disrupted during the shutdown period or the employees who provide those services. Although the functions that were suspended did not at that time meet the definition of excepted activities under the statute, they are critical to the mission of social security. And we feel very strongly about that.

Now, if I could tell you about the work that was not done. I need to paint a context for you so that you understand how far behind we are. The Social Security Administration receives on average about 28,000 retirement and disability benefit applications every single day. We receive an average of about 53,000 applications for social security numbers every day. And every day we answer about 200,000 telephone calls on our 800 number. Every day we conduct approximately 2,700 hearings for claimants who appeal the denial of benefits. While social security, during the shutdown, did not process new benefits or social security numbers, we provided only an automated message on the 800 number, so we were not available to answer questions. And, of course, there were no hearings conducted during this four day period.

These numbers make it very clear that an appropriation lapse has a severe impact on social security's ongoing ability to properly administer our social security program. If several days elapse in which no benefit applications are handled and no hearings are conducted, it could seriously impair the agency's capacity to process pending claims and appeals. Because of our deep concern about the potential impact on service to the public, we were prepared to make appropriate adjustments in our initial SSA's shutdown plan if we suspected a prolonged lapse in appropriations. The president asked SSA to review its shutdown plan in light of the potential length of the shutdown. We were ready to act. We were ready to accept and process new claims applications, but I decided at that point, should it come, I would expand the number of excepted employees effective November 20, and bring back 50,000 people, especially to our field offices and to the telephone centers. On the other hand, those not directly involved in paying benefits of accepting and processing claims would have remained on furlough. Because all federal employees returned to work on November 20, I did not have to take this action.

In closing, I can say with confidence that social security implemented the shutdown in an orderly manner and in full compliance with the applicable statutes and directives and guidance from the Office of Management and Budget and others with government-wide responsibility for ensuring the consistency of individual agency shutdown plans. I would be happy to answer your questions.

REP. MICA: I thank you and each of the panelists for your testimony this morning and for the comprehensive coverage each of you provided the subcommittee with how you approached this question of a shutdown.

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I'd like to begin some of the questioning by asking if, in fact -- let's see we have several different plans for shutdown. I have an HHS plan here which, I guess, is basically a two-page plan. Maybe there is more to this, and you have 60,000 employees. And I believe 27,000 were deemed essential. And then I have another plan here which is a little bit thicker, Department of Labor, and this one is 184 pages. You have a total of 16,000 employees of which somewhere in the neighborhood of several hundred were deemed essential and retained. It seems to be sort of a wide disparity. Maybe I could ask HHS, is this your full plan, or do you have something additional?

MR. BROADNAX: Mr. Chairman, the document that you're holding, the two-page document, really acts more as a summary. The detailed plan behind that summary is approximately 30 pages. It still does not come to the 184 pages that the Department of Labor has.

MR. GLYNN: I was going to say that, in this particular case, I think the difference is probably the details in terms of the difference in the two roles and functions, at least at some level, that the two departments play.

REP. MICA: Well, the other question I have for both of you -- now, you know, the shutdown doesn't appear to be any new idea. I think we had testimony from both Mr. Glynn and maybe Mr. Munoz also spoke to it that shutdowns are not new.

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I think in the 10 of 12 years we didn't have an appropriations measure. But I have a memo dated July 26. It doesn't say anything about whether the speaker gets to speak with the president on the plane, or not. But, in fact, it is by Alice Rivlin, and it says this planning in light of appropriations action is very clear directing you all on the 26th to come up with plans. It says, "We recognize that there may be delayed, or reflects sharp disagreement with the president's requests," and that there, in fact, I think may not be funding.

Did each of you see this, each of you receive this? It's my understanding, too, that you were to respond by September 5; is that correct? Did everyone here respond. I'm getting affirmative head shakes. So, it wasn't anything, first of all, new, and secondly, that there were some very direct actions by the administration to plan for the shutdown.

My question is: Do you feel this is adequate? I don't see a great deal of distinguishing between what is essential and non-essential, either functions or employees. And I see a great disparity between the plans that have been developed, and I'd like you to respond. Maybe, Mr. Broadnax, you could respond, and Mr. Glynn, and the others, feel free to comment.

MR. BROADNAX: Sort of back to where we stopped with the comparison between the two plans, Mr. Chairman, if you look at the Department of Health and Human Services, what we did was to apply the guidelines as outlined by the law and the OMB guidelines that were issued and applied that to the work of the department from the bottom to the top. And after applying the law and the guidelines with the guidance of OMB in that process, we then came out with a number of people that we felt that we could furlough in the first instance and the number that would be required, or excepted as it were, to carry on work of the department in the first instance, but understanding, as outlined in our plan, that this was an evolving process so the number we began with might change after a period of time depending on the length of the shutdown.

REP. MICA: Mr. Glynn, how do you see this?

MR. GLYNN: Well, as I indicated --

REP. MICA: Do you see these guidelines as adequate, and you prepared a more comprehensive response? MR. GLYNN: Well, as I indicated, as you mentioned, the Department of Labor along with several other agencies in our appropriations subcommittee has had numerous opportunities over the last 10 or 15 years to prepare shutdown plans because of the difficulty of getting our appropriation approved by October 1, so that we found the guidance issued by OMB adequate. I think perhaps it would be fair to say that over the years a certain amount of boilerplate has been developed in terms of how these shutdown plans have been developed by our department and

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reviewed by OMB. We chose to submit to OMB a full plan with all the boilerplate attached. It sounds like, at HHS, they recognized that perhaps OMB had a certain amount of this because it's been done over the years. So, I'm not sure that there's as much difference in terms of the two documents as it might appear at first blush.

REP. MICA: Well, the other question I had is some of the rationale for closing down certain functions and then some of the statistics that have been quoted. I think, Mr. Broadnax, did you say that there were 1,500 or 15,000 deadbeat dad requests a day.

MR. BROADNAX: Fifteen (thousand) to 20,000 per day.

REP. MICA: Per day? That would 3 million a year?

MR. BROADNAX: This is through the referral service.

REP. MICA: Three million a year.

MR. BROADNAX: Well, these are calls about -- calls coming in -- so you could have, you know, a call every day about the same person, presumably. But that's the number of calls coming in.

REP. MICA: And let me, if I may, go back to, or go to, the VA administration here. Mr. Brickhouse, there seem to be some changes in what was essential and non-essential as far as what the administration considered essential on one day versus another day. I believe the president decided to call back 1,700 VA field staff and change this, I think, after your initial determination. Did you have direction from the administration to make these changes, or did you help initiate this?

MR. BRICKHOUSE: Chairman, when we developed our plan that was submitted to OMB at the start of the shutdown, we outlined the numbers that we thought were appropriate. However, in that planning, we planned for a shutdown, perhaps, in the neighborhood of a three to four day at maximum. And what happened on the last Friday of the shutdown plan when we began to look at our activities, we recognized that, perhaps, this shutdown was going to go into the following Monday of the next week. And we felt it appropriate to identify and bring some additional people in.

REP. MICA: So, you initiated that request rather than vice versa. It was a request to the administration, the president. MR. BRICKHOUSE: We initiated the request. Yes, sir.

REP. MICA: And did any of you other request changes as far as essential -- as far as essential and non-essential? You did, Mr. Robinson?

MR. ROBINSON: Yes, sir, we did.

REP. MICA: And what was that?

MR. ROBINSON: Well, similar to the VA, we reviewed our shutdown plans which, as indicated, has been long-standing across the government in light of the guidance that we received from OMB. And we submitted a plan that indicated that a certain nature of flexibility because, based on the experience of the government, as short shutdown had been the experience that our agency had been through and the government had been through. So, our plan called for us to review based on the length of the shutdown, and we had initiated discussions during the week of the shutdown with OMB petitioning them to modify our plan.

REP. MICA: Since the last shutdown, now let's see, we have defense and treasury, postal has been passed. We have seven appropriations bills in place. Have there been any additional requests from either OMB or from the administration to redefine what is essential or non-essential? If we get into a second shutdown, has there been any request to redefine the terms? Are any of you aware of anything?

WITNESS : Mr. Chairman, I would say OMB has asked us to review the success and the lessons from the first shutdown and make any appropriate amendments to the plan -- which doesn't speak directly to the question, but we have --

REP. MICA: Did you have a deadline for submitting that? Is that --

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WITNESS : I think it's due a week from tomorrow.

REP. MICA: A little close -- (laughs) -- but I guess we're looking at December 15 as the next possible day. It's a week from tomorrow, next Thursday?

WITNESS : Yeah. Actually, I have the memo with me if you want to wait one second.

REP. MICA: I think it's important that we find out what steps are being taken to see what, again, what services should be continued, what functions should be continued, personnel, and how these matters should be handled.

WITNESS : I'm sorry. It is due to OMB on December 10. REP. MICA: The 10th, December 10.

WITNESS : Mmm-Hmm. (Affirmative.)

REP. MICA: Would that be next week, I guess, Sunday?

All right. Well, I've got some additional questions, but I don't want to occupy all the time. I want to yield now to the ranking member, Mr. Moran.

REP. MORAN: Thank you, Chairman Mica. The thing that I found most troubling and disappointing about the way in which the executive branch reacted to the shutdown was the bizarre situation you created on the first day of the shutdown with everyone coming in to work and then being told whether or not they were essential and being sent back home again. As far as I'm concerned, that was inexcusable. In fact, we knew by the end of the prior week whether or not people would be coming, should be coming, in to work.

It seems to me when there was clear indication and plans being put together in the late summer of this year, in July and August, that we may very well reach a situation that could cause a government shutdown and clearly that very short term continuing resolution that was cast as of October 1, indicated we had a potential problem coming at the expiration of the first continuing resolution, there should have been contingency plans made for the first day when you would have lapsed appropriations. And it appears that there were not. I just can't imagine why you would create a situation where employees came in and were told to go back home again. It's demeaning. It's amateurish. It's irresponsible, et cetera.

Now, if you disagree, tell me. But I would like to know how that situation developed in some of the larger agencies and why, why there were not contingency plans made by OMB and the White House and made available to the agencies. And if there were, why they were not carried out. So, let's start with Dr. Broadnax from the largest agency, I guess, represented here in terms of employees, a substantial number of whom came in that first day on Monday and were sent back home again. Why?

MR. BROADNAX: Congressman, there are roles for people to play during that three hour period that you're talking about when people came back in. And people secured their various areas, depending on the work that they were carrying out during that three hour period. So, people weren't just called back in and sort of standing around wringing their hands as it were, but were actually working to secure their areas, where machinery was involved, to secure machinery and make other arrangements to get us into the full shutdown.

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So the full shutdown began three hours subsequent to those employees having arrived, carried out their tasks and duties, and then were sent home.

REP. MORAN: So, what you're telling me is for the first three hours of the day, their services were considered essential, even though there was no reimbursement for that effort available at the time. You see the problem is, if we're going to operate within a strict legal construct here, the only way you can justify any members of the federal work force going to work is to consider them essential. And we've got a definition of essential, the safety of human life and protection of property. I guess the latter is probably what you used, but you would have to have some type of legal opinion to get around the Anti-Deficiency Act that these people were, at some point, essential. In other

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words, 100 percent of your employees you would have to legally justify were essential at the time for those three hours, and then, all of a sudden, they're not essential.

I don't know why that wasn't done the end of the work week, rather than waiting until, not the 11th hour or the 12th hour, but 12:05 -- (laughs) -- after the expiration period.

MR. MUNOZ: Could I --

REP. MORAN: Yeah. I'd like for you to, Mr. Munoz.

MR. MUNOZ: Sir, let me just say that I think OMB did an excellent job of having a contingency plan because we were on hold. We were informed by OMB, by Alice Rivlin in particular, that we were to not notify anyone of a shutdown until we received notice. And that could have been on Monday, we were told. So, be on hold for a possible Monday notification or not until Tuesday.

Now, I don't know what went into the thinking as to whether or not to not do it on Monday so that people don't have to come back on Tuesday, but as I understand it, OMB very much respected the prerogative of Congress to decide whether or not, after midnight Monday night, there was going to be -- before midnight there was going to be anything. And a perfect example of that was, in fact, when the shutdown was terminated, as we understand, in a period of a very few hours settlement was arrived at between the president and the Congress on terminating the shutdown. I believe that was what was the thinking. Second of all, we do need certain -- there are certain legal procedures that need to take place when you get into an orderly shutdown. Coming back Tuesday morning was very positive for the Treasury Department, and I may add that the legal authority that defines excepted or not excepted also says that you can maintain people for an orderly shutdown. So, we read that legally based on our general counsel's opinion that, for that whole morning on Tuesday, the hours that it took for people to close down the files and make sure that there's no risk or exposures from their retiring from work was left exposed.

And secondly, we have a legal obligation to give furlough noticed in writing and have some indication of receipt of notice. All that was taken on after we knew that the Congress and the president decided -- or I'm sorry -- decided not to agree that there was going to be some funding. So, we think that that was probably the best way to approach it, and we felt very comfortable. By Tuesday afternoon, everybody -- it was a quick, clear communication as to who was going to stay and who wasn't.

At the Treasury Department for example, sir, we have some functions that are funded because they have a revolving fund or have other means of appropriations that would not be subject to this furlough. Nonetheless, the media -- because of the media communications, sometimes that may confuse employees as to what is overwritten and what isn't. And we made it very clear on Tuesday morning. We made very effective use of Tuesday morning to hand out the furlough notices and to make further communications to the employees.

REP. MORAN: You just did an excellent job of defending OMB and clarifying the situation, but there are some problems. For one, we have a different situation on the Sunday when we terminated the termination, the shutdown, and that was not comparable to what happened on Monday. Presumably, the White House knew whether or not it was going to veto the continuing resolution it received, and it certainly knew what the continuing resolution was going to look like.

Now, I'm not going to ask you that. That's OMB's job to explain why they didn't act, or why the president didn't give some earlier indication. But I think it's a different situation that occurred on the Sunday when the government shutdown ended, but I have the sense that some employees, even on Monday, knowing that anybody that had been watching it closely would have known that there was not going to be work on Tuesday for at least 40 percent of the workforce, some of them did not know whether they were essential or non-essential. Did everyone in your respective agencies know whether they were classified essential or non-essential on Monday? Is there anyone who did not?

(Pause)

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Every agency represented here informed their employees as to whether they made the cut or not. That's true. Is there any exception? If not, forever hold your peace, I suppose. You wanted to say something further here?

MR. MUNOZ: The clearest indication to an employee is when, in fact, they receive the furlough notice. That's the ultimate and clearest. You don't want to wait until that instant happens. And we did have communications beforehand so that there would be some clear communications on that. But according to the law and for all practical purposes, especially when you have a very large agency spread around the country, the clearest indication was that Tuesday morning. It was an effective use of that Tuesday morning to give the written notice and further instructions of how to shut down their offices.

REP. MORAN: Well, it's just that since it was so likely by the end of the prior week, it seemed to me that planning should have taken place, certainly by that Friday through the weekend and, no question about it, on Monday. And the other thing I want to get into, although I don't want to take time from my colleagues so, but I think an important area of consideration is whether those employees who have to stay and work, getting reimbursed the same as their colleagues who were not at work, whether there was ample communication so that those who were on the job knew how to carry out, not just their own function, but the necessary functions of their colleagues.

That's the kind of forward planning that seemed to be necessary. I have a lot of federal employees, as you know, on my desk, and I don't that the sense that much of that took place, that it was almost a shock to the vast majority of federal employees that this happened. They were really unprepared, and a lot of the people who were left on the job didn't know how to handle the responsibilities of their colleagues who were not on the job. So, I think the best way to deal with this is to simply make sure everybody stays on the job next time. We don't have one of these inane furloughs. And the people are going to get reimbursed, which they certainly should, then they could be reimbursed for work that they performed in the interim, and we are going to try to get that legislation through.

But I do think there are some problems in the forward planning of this situation which, at some point, in advance of when it occurred was inevitable.

Thank you, Mr. Chairman.

REP. MICA: Thank the gentleman, and yield now to Mr. Bass.

REP. BASS: Thank you very much, Mr. Chairman, and to follow on the very last comment that Mr. Moran made, I think it can be observed that the issue of giving an employee compensation for time not served on the job further exacerbated the humility of the term "deemed non-essential" and not going to work, than getting paid for not going to work. But my question is a general question that any of you all can address if you wish and that is: Do any of you have any specific suggestions for congressional action that might clarify for you the definition of essential versus non-essential, or even redefine the term, to establish better procedures for implementing a shutdown which may, in some instances, be unavoidable in order to address Mr. Moran's question about what happened to the employees during this specific period of time to establish consistency from one agency to the next so that there aren't different standards adopted in different agencies, and lastly, and perhaps for some of us most importantly, to attempt to mitigate the impact or the political impact of a shutdown so that a shutdown cannot, to the extent possible, be used for political, to make a political statement? With that, I'll just turn it over to anyone who wishes to address those.

MS. CHATER: I'd like to address the question if I might, sir, from the sense that it's probably going to be difficult to be thoroughly consistent across agencies because the nature of our work differs so much. For social security, for example, where we are an extremely customer focused agency, we had appointments to take care of, appointments to cancel, and now, appointments to make up in a very one-on-one kind of activity. Our work is, therefore, different from another agency that, perhaps, doesn't deal with the public in a face-to-face way. So, while I think consistency across government is a good idea, I just suggest that it might be difficult based on the work we do and how we do that work.

MR. MUNOZ: One suggestion I might have is -- the thing that was constantly in our mind at Treasury when we were planning this was the criminal penalties that accompany any running afoul of the Justice Department guidelines on this issue. Even if there are criminal penalties, you really have -- you run the risk, on the one hand

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that if you read the opinions too broadly so that you try to put everything under protection of property, you run the risk of running afoul of those criminal penalties. If you read it too narrowly, then you run into some of the examples that were cited this morning in terms of the public being harmed in some fashion because they didn't fall within the guidelines, the criminal guidelines.

REP. BASS: How many prosecutions have occurred under that, since its inception?

MR. MUNOZ: Well, I'm sure that if there have been any, they're not here today, but -- (laughter) -- I'm not aware of it. Although, as a lawyer I know that these are very serious things, and our good general counsel, Ed Knight, at the Treasury Department kept us aware that that's the ultimate that we have to live by.

REP. BASS: If nobody else has any comments, I'll yield back.

REP. MICA: I thank the gentleman, yield now to Miss Morella for questions.

REP. MORELLA: Thank you, Mr. Chairman. I'm curious, and again I would ask all or any one of you or multiples of whatever who might want to respond, I'm curious about whether or not your shutdown plan would be altered if the shutdown occurred because of the debt ceiling versus the lapse in appropriations? Would it be different, or would it be the same? Have you had any instructions from OMB or Justice on that?

MR. MUNOZ: We've had no instructions, but those would be two very different situations.

REP. MORELLA: So, you anticipate that it would be a different procedure.

MR. MUNOZ: The shutdown that we went through had a constitutional basis based on Congress's prerogative to appropriate or not appropriate. And if appropriations were not granted, then we can really not run afoul of that lest we face criminal penalties. If the government shuts down for another reason, a liquidity point, it doesn't have cash, my sense is, and I don't know that we would ever reach that point, but my sense is that you don't have the same guidelines, the constitutional basis of appropriations. We may have appropriations appropriated to us, but if there's no cash, my senses of thinking would go differently. But to answer your first question, we have not received any guidance on it, but instantly, I see a very different standard by which you would develop your plans.

REP. MORELLA: Would you all agree, first of all, that you have not received any guidance on it --

MR. MUNOZ: And ma'am, can I just underscore, then, the point that you made and that we, some members here, have made, also. And that's because the guidelines is not essential versus non-essential. If it were, maybe there would be some great similarity, but the guidance is really whether you accept it under the law or not.

REP. MORELLA: I don't know whether it would be a greater impact or not. I mean, that would be an interesting point, also, for anyone of you to comment on. I'd also like to -- maybe I'll address this one to Mr. Robinson, it deals with the recall question. You indicated that there was a plan in place but acknowledged the need to recall additional staff if the shutdown continued beyond a week, and yet, you had to go to OMB to discuss recalling people. Were these recalls in your initial plan? Were they reviewed by OMB prior to the week of November 13, when OMB came out with its guidelines, because what I sense you're saying is that OMB approved our plan and then, if we need to implement it, a part of it, or need a recall, we have to go back to OMB to get another part of it approved? Is this sort of like overkill?

MR. ROBINSON: What I meant to indicate, Congresswoman, is that our plan originally called for flexibility dependent upon circumstances. It's part of our plan that, as the circumstance unfolds, we would reassess what needs we would have related to property and safety and modify our plan accordingly. As the week proceeded, as I indicated, we determined that, in fact, that was the case and that we needed to modify our plan. In doing so, we had to submit it to OMB. And that was the process that we had undertaken.

REP. MORELLA: Do you think that's the most expeditious process?

MR. ROBINSON: Well, I've been in government two years now. It's the only process I'm aware of. (Laughter.) I don't mean to be flippant in my answer, but there certainly is a tremendous amount of oversight in terms of what we do, not only in terms of our necessity to work with the office of management and budget, but our necessity to work across the board. And so, it's, I think, important that we not only address the law, but we address the requirements

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of the personnel issues that are involved. And certainly the office of management and budget has the expertise and responsibility in that area.

REP. MORELLA: I guess --

MR. MUNOZ: Could I just add to my --

REP. MORELLA: Yes, certainly.

MR. MUNOZ: In the last hypothetical, you posed a question of would the plans differ any if there were a shutdown because of a debt ceiling issue, and as I said, we have received no guidance on that. But I want to reemphasize for those agencies that have appropriations already, the debt ceiling really is not an issue as to whether you would face a shutdown or not a shutdown. It's a question of we still would have authority to obligate the government to pay for the activities that take place. So, we don't anticipate the hypothetical that you pose to be an issue.

REP. MORELLA: It might be wise to have some kind of a tentative plan that is thought about when you get the OMB regulations with regard to reporting for three hours on that morning, et cetera. That's all spelled out in the OMB statement that was made or was sent to all of you. I guess, Mr. Brickhouse, in regards to the 1,700 employees who were being recalled to receive and come up with date benefit claims, you stated that veterans' affairs determined that the potentials for adverse effects of delays in receipt of applications qualified for an exception under the Anti-Deficiency Act. I wondered if you might elaborate on why the Anti-Deficiency Act allowed for this recall and why the determination was not made earlier. You began planning in August. Plans were set by September 30. The shutdown happened in November, and you had to recall 1,700 people. And I'm just kind of mystified by it.

MR. BRICKHOUSE: Yes --

REP. MORELLA: Apparently your percentage of furlough was, I think, the lowest, wasn't it?

MR. BRICKHOUSE: Yes. That's primarily because our primary mission in the VA is to deliver health care, and in those areas, we elected not to defer or delay any treatment in our hospitals that we have now, in 72 hospitals that we have across the nation.

REP. MORELLA: But you couldn't anticipate that?

MR. BRICKHOUSE: In regards to your question, if I understand it correctly, we did not anticipate, initially, the need for those 1,700 people. As I mentioned earlier, as we moved through the week and saw this shutdown going longer than we had previously anticipated, we decided that it was necessary to bring in people to make sure that they received and logged in claims. There is a legal requirement that we must date-stamp claims that veterans submit to us. So, we felt that it was necessary to bring in those people back and, also, answer questions and, also, deal with telephonic inquiries about these matters.

We also felt so strongly about this that we asked OMB for permission to, in essence, change our amendments. And you are exactly right. They did come back and tell us that they felt that this was an excepted function under the Anti-Deficiency Act. But to answer your question, no, we did not anticipate it. However, as we moved through the shutdown, we identified certain areas of concern in that area and we --

REP. MORELLA: And then you went to OMB. Did you have to go to Justice, too.

MR. BRICKHOUSE: I think the Justice Department was collaborated on this particular issue, yes.

REP. MORELLA: With OMB, mmm-hmm. (Affirmative.)

So, you determined that as a result of discussions with them. Did you discuss it with them, or you just tell them, or -
- MR. BRICKHOUSE: That was primarily through telephonic discussions with OMB, and we submitted a written matter on it, too.

REP. MORELLA: That's fine.

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MR. BRICKHOUSE: But I might add that we did not find that it was any problem for us to have dialogue with OMB. I think, as I recall, that decision was made in a matter of hours, if you will, from the time we submitted the request.

REP. MORELLA: I see. I'm just trying to understand the process and the anticipation of what concerns would arise in whether or not you've got an extra layer to go through and how well it's planned.

Thank you. In the interest of time I'll yield back, Mr. Chairman, thank you.

REP. MICA: I thank the gentle lady.

Mr. Horn from California?

REP. HORN: Thank you very much, Mr. Chairman. I have basically two questions, and I want to follow up on Mrs. Morella's question, which was an excellent question in terms of a liquidity crisis, cash flow crisis in, with regard to the debt ceiling. It seems -- one, Mr. Chairman, I'd like to put a letter in the record that a number of us wrote the president a month ago that said, if we're serious about controlling the debt ceiling, we ought to freeze non-essential travel, non-essential purchases, and deal with the not absolutely essential workers. And obviously healthcare and the VA and others would be absolutely essential workers. So you wouldn't have to worry about that.

Perhaps that situation has passed, perhaps it hasn't. But I think it's very clear, Mr. Munoz, that a debt ceiling shutdown would be a lot more serious, I think, than what we've gone through. You would not be making up for lost pay. You couldn't afford to do it. Am I wrong on that? Is that your hunch or inclination?

MR. MUNOZ: Sir, yeah, on the hypothetical that was posed, would there be, there's an assumption that the debt ceiling would also create a shutdown possibility. The possibility of that is very small, because that would be a discretionary call. And I'm going to look to my legal counsel here if he wants to correct me. But once we have appropriations in place we have a responsibility to continue working. If there is a liquidity question, and a question as whether or not, when you're going to get paid, but we still have an obligation to continue working, and there is an obligation of the government to pay.

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So there wouldn't necessarily have to be a shutdown of government operations.

REP. HORN: Well there's something, Mr. Chairman, you might want to consider. It seems to me it is an important question. You ought to give some guidance on that.

Let me get to my two basic questions. And I'd like to ask this of all of you, since you are under oath. Either directly or indirectly, prior, during or since the shutdown, did any member of the White House staff influence what categories of workers you stated were non-essential or essential? And that includes OMB staff who said, we're getting the word from the White House. Anybody? Let's just get a yes- no answer.

MR. : No.

REP. HORN: No.

MR. : No.

REP. HORN: No.

MR. : No.

REP. HORN: No.

MS. CHATER: No.

REP. HORN: How about you, Mr. Munoz?

MR. MUNOZ: No.

MR. : No.

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REP. HORN: No. And Commissioner Chater.

You're probably the wrong people. We ought to be asking the cabinet officers that.

Now for the hearing record, I'd just like to have filed, of those on the staffs reporting to those at and above the bureau chief administration, administrator level, institute head level, comparable levels, for the categories such as public affairs, management, human resource personnel, general counsel, etcetera, the traditional staff agencies, I'd like to know one, how many people are qualified at that level? What percent were determined non-essential and/or essential. And of those in direct contact with the customer-taxpayer, such as the Social Security Administration and the Immigration and Naturalization Service, how many were actually furloughed. And I need an absolute number of how many are there and then what percent was essential, non-essential, in terms of direct customer contact. Based on 30 hearings I've held this year on the Government Management Subcommittee, there's no doubt in my mind that since President Eisenhower, regardless of party, we have had a thickening of government, as Professor Light (sp) calls it. And we have a bloated staff level at the commissioner, the bureau chief level, on up, that you would not have recognized 30 years ago. And it does not relate to increased appropriations, it does not relate to a growth in population. It just relates, regardless of party and power, to the bloated nature of staff that frankly are crippling you more than helping you. So I'd like to get that in the record, Mr. Chairman.

REP. MICA: Mr. Horn, did you want --

REP. HORN: I just want them to respond in writing.

REP. MICA: Okay, in writing.

REP. HORN: In writing, and we'll put it in the record.

REP. MICA: Because I think we could spend the rest of the day doing the calculations here. I appreciate your understand.

As we wrap up this panel I have a couple of questions. First of all, Mr. Glynn, under DOL, you estimated the cost at \$7.3 million. Now was that for personnel alone? I ask that question because each of you incurred cost and you paid people after the fact. I notice that OPM, Office of Personnel Management, has released a guideline as far as the subject pay and leave treatment of employees effected by a lapse in appropriation. And this guideline allows for payment of overtime, not work. Now it's bad enough that they didn't work in the first place, but got paid, or weren't allowed to work. But I wonder about, Mr. Glynn, was any of this \$7.3 million paid in overtime?

MR. GLYNN: I'm not aware of any, Mr. Chairman, but we'd be happy to double-check and communicate that.

REP. MICA: Did anyone pay overtime? Has anyone paid overtime since according to these guidelines, that we pay overtime for not working in the time that we didn't work in the first place.

MR. : No.

REP. MICA: I'd like each of you to check that. I think it would be interesting. Also, as far as VA is concerned, Mr. Brickhouse. It's my understanding that you kept on all field people in the hospitals, and there was no differentiation between different types of personnel activities in that. For example, while you had some claims processors for disabled veterans who were not kept on, the gardeners at the VA hospitals were in fact deemed essential.

MR. BRICKHOUSE: Congressman Mica, if I may, we did furlough in excess of approximately 20,000 people in our healthcare delivery system.

REP. MICA: But I have reports that gardeners and lawncare personnel were kept on, and claims processors for disabled vets were let off. Of course I guess they were called back. Can you check that for us?

MR. BRICKHOUSE: Sure, I'd be glad to.

REP. MICA: And then, as far as PR shops, did all of you keep your PR shops open? Or was there a decrease in the staffing of the public affairs offices? Mr. Broadnax?

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MR. BROADNAX: There was a very, very sharp decrease. There were several people kept to help the secretary stay in touch with the employees throughout the department on a daily basis.

REP. MICA: So you had some down. How about you, Mr. Robinson.

MR. ROBINSON: There was a very sharp decrease, I think we --

REP. MICA: Mr. Glynn?

MR. GLYNN: Very significant reduction.

REP. MICA: Mr. Munoz?

MR. MUNOZ: Significant reduction.

MR. BRICKHOUSE: Very significant reduction.

MS. CHATER: And the same, reduction.

REP. MICA: Okay. The other general question. I notice that there were a variety of plans. For example, in social security, you prepared a plan for a two week shutdown. Were any of you, and it seemed like some you had a shutdown for a shorter period of time. Was there any continuity. You did two weeks, is that correct?

MS. CHATER: Well, we started in our contingency planning, sir, with the notion that we could have a smaller number of people excepted at the beginning of the shutdown. And not knowing, of course, how long it would take, we made another plan consistent with our objectives for what we might do at a later time. So while the two-week was a sort of talking period, it was never meant to be specifically after 14 days. It was to be what happened based on our experience. REP. MICA: So you have a short term and then a longer term. What about you, Mr. Brickhouse?

MR. BRICKHOUSE: In the VA our initial plan was that this shutdown would not go longer than one week. And, as we've talked about, that's why we started making changes.

REP. MICA: So we had some problems there.

Mr. Munoz?

MR. MUNOZ: We looked at short and longer term.

REP. MICA: Okay.

MR. MUNOZ: And longer meant beyond 10 days.

REP. MICA: Okay. In your volume here, Mr. Glynn, what did you plan for? I haven't read the whole thing. I'm going to take it home tonight and go through it. (Laughter.) Go ahead.

MR. GLYNN: As long as you don't ask me if I've read the whole thin, Mr. Chairman.

We anticipated a shorter term shutdown when we put the plan together. Although we had started thinking about the implications of a longer shutdown as the shutdown unfolded.

REP. MICA: So this really is just for short-term.

REP. MICA: Mr. Robinson?

MR. ROBINSON: As I testified, short-term and longer term, sir.

REP. MICA: Okay. And Mr. Broadnax?

MR. BROADNAX: Short-term and long-term.

REP. MICA: In your two page summary, and with a 30 page addendum.

Well those are, I think, some of the questions that I had. Oh, there's one other area, too. In multi-year funding, for example in HUD, there are some programs, I think that have multi-year funding, and some of these, I understand,

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were closed down. What was the rationale for that? And where the funds were there, and they closed down anyway. Because you had the biggest closedown, didn't you, Mr. Robinson.

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MR. ROBINSON: I understand that's the case, sir. Our thinking was that we would apply the law in terms of property and safety and we attempted to do that. Funding in many of these multi-year programs is done on what we call a lockbox basis, so the recipients have a line of credit against which they down funds. And so funds would have flowed over a period of time out of these lockbox situations. So in the short circumstance we would have been able to cover funding, or funding would have been covered through that lockbox process.

REP. MICA: But you still closed them down anyway?

MR. ROBINSON: The lockbox process requires us to maintain a number of systems in order to do that. And in our longer term process we were bringing back people to maintain those systems.

REP. MICA: I think Mr. Lazio wants to talk you later on.

The other panelists, did you have any areas where there was a continuation of funding in a multi-year fashion.

MR. BROADNAX: In our case of Medicare it's a trust fund. So, you know, the trust funds were there.

REP. MICA: So you kept everything going in Medicare?

MR. BROADNAX: Well no we did not. There were, in terms of the applications, taking applications, initially we did not.

REP. MICA: And then you changed?

MR. BROADNAX: And we thought if we go longer term we would begin to take them.

MS. CHATER: And for social security I would answer the same way. We have a trust fund of course, which we interpret as an indefinite appropriation. And for our second program, the supplemental security program, we are forward funded for the first quarter of the year. So we could continue functioning until December 31.

REP. MICA: So some of the activities that in fact have multi-year funding, or are self-funding, we should possibility look at those categories for future reference in functions to be continued. Mr. Moran.

REP. MORAN: Following up on that. I appreciate the fact that I'm the only Democrat here, so I make an urgent plea that we at least extend the current continuing resolution that is currently in effect, for at least another month. The reason for making it at least 30 days deals with several reasons, but I think foremost is something that the chairman was getting at. And that is the grant funding. It extends far beyond the lives of federal employees. If, for example, we don't have adequate funding at the beginning of the year we would not be able to issue the grants for Medicaid, aid for dependent children, social services foster care, adoption and so on. That's a matter of billion of dollars and, more importantly, millions of people who are wholly dependent in many cases upon those Medicaid and cash assistance grants. The very poorest, the very needy, the neediest in our country. It wasn't a problem this time because, since it occurred in November the original continuing resolution enabled you to pay those grants out to the states on October 1st, the beginning of the fiscal year. The second quarter would be January, would occur as of January 1st. And if there is not an adequate continuing resolution the lives of tens of millions of people are going to be adversely effected.

So I'm both sending a message to my colleagues, but also raising an issue that I think, perhaps, you should address, particularly Dr. Broadnax on behalf of the Department of Health and Human Services, because those are probably the largest grants that go out to states. I don't know what happens if the ADC payments are not made and Medicaid and Title 20 and foster care and the like, that could be a disaster shutdown to the people who can afford it the least.

Dr. Broadnax, could you respond to that?

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MR. BROADNAX: Well, I agree with the Congressman's description. It would be very, very painful for the recipients, but also place the states in great difficulties, because they are our partners in terms of administering many of the programs that you're described. And as I said in my formal testimony, this is something we hope to avert at all costs.

REP. MORAN: Thank you. The legislation that I referred to that I would hope we could get passed that would keep federal employees on the job in the event of lapsed appropriations does not cover this eventuality. Because clearly that would not provide adequate funds for your grants. And while they may be on the job, in the absence of a continuing resolution, we clearly would have to suspend those payments. And I don't see any way we could possibility pass legislation that would get around that. So I, any continuing -- and I have heard various versions of continuing resolutions -- they don't share their entire strategy with us all the time. In fact, we don't know, oftentimes until the very last minute what the plan is. But I would urge the leadership of this body to propose an extended continuing resolution that gets us through early January so that those grants can be made. And with that point maybe we should move on to the next panel, Mr. Chairman,.

REP. MICA: I thank the gentleman. I think Ms. Morella requested one additional question.

REP. MORELLA: Thanks. Right. I just wondered, Mr. Broadnax, since I talked about medical research in my opening statement, if you might tell us about what research activities did continue during the shutdown, and how the determination was made in terms of what research activities should be continued or not?

MR. BROADNAX: First of all, Congresswoman, let me say, that our approach to, particularly the NIH and the National Institutes, was to discuss of course the broad guidelines with the scientific and medical leadership there. But to have those best qualified to guide our hand, or to guide the process, if you will, in terms of implementing those guidelines as related to the various institutes and the research taking place therein.

Where research was in progress and to cease or to shut that research down and it would have been destructive to it, arrangements were made to keep it going. It was on a case by case basis that those decisions were made. But the attempt was not to be destructive to any research or trials or so forth that were in progress during the shutdown, so that those would have been kept going.

REP. MORELLA: So it was done on a case by case basis, which means that it tends to be arbitrary, somewhat capricious, because I know of a lot of researchers who are so frustrated because they really felt they had to get back to the laboratory to continue with the research which, again, was going to pay off in terms of health as well as financially too. So I guess that's a problem that you face in the medical field.

MR. BROADNAX: It is a big problem. We do not like to be in the position of looking at a researcher across his or her bench and saying that we do not think that his or her research is as important; as we don't want to be looking across that bench saying that any of our employees are non-essential. But it is on a case by case basis. And as I said, we do it in collaboration with the scientific and medical leadership within the various institutes.

REP. MORELLA: And mention had been made of trust funds, whether it be social security. But the Medicare trust fund, how would you feel about using that for the new Medicare recipients or clients. Because you held off signing them up under the shutdown, right? So you not have used trust fund money for that?

MR. BROADNAX: Yes, we could. And as I said before, we were about to -- remember I said we had a short-term and a long-term plan? In the short-term we were not receiving applications. We knew in the longer term because of the backlogs and the destruction that now start as a result of developing those backlogs that we would have to bring people back and start to take the applications.

REP. MORELLA: I think Mr. Horn probably wants to continue with that question. And just one final point. I just wondered, did you all come up with some plans for those employees that were considered non-essential, even though we hate that term? Because they would call my office, panic-stricken about, what do I do if I need money for cash flow, even though I have an assurance I'll be paid later? Do I file for unemployment? What is the status? I know some of you mentioned hot lines were available. Did you have anything that was kind of consistent, uniform, that came, whether it would be from OMB or whether you put it together and met together in terms of discussing

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how to ease the panic that people had who had to pay mortgages and tuition and whatever. Anybody want to comment on it?

MS. CHATER: Yes, I'd like to respond to that. Because I think there were a number of initiatives that took place during this time. First of all, for our employees you've heard us testify that many of the agencies set up a hotline for their own employees. And ours was used to the maximum. We also prepared, on our own, questions and answers about unemployment, when to file, whether to file, the pros and cons of doing so. We made the applications available to all of our field office employees throughout the United States. The hotline was for all 66,000 employees scattered all over the country.

And I think it's important that we remember that not every one of our federal employees reads the Washington Post or watches C-SPAN or CNN. And so there really was a need for much communication, particularly outside of the Beltway. We did that. And I know many of the agencies represented here and elsewhere put together a very detailed communication plan with our employees. Most of us have employee assistance programs that are ongoing. I know that we had many psychological problems brought to our attention because of the worries about payments and so on. And I think we provided the best we could for that particular purpose.

But I'd also like you to know that there is a group of us called the President's Management Council that meets on a monthly basis. It's chaired by Mr. Koskinen. And at that President's Management Council, those of us who are responsible for managing agencies have an opportunity to talk with each other. So in addition to the formal kinds of things that you've been talking about today, there was a great deal of informal communication between and among us. What did you do since you were here longer than I? Or how would you handle this? Or, how do you deal with patient care, because we're worried about our SSI beneficiaries, that sort of thing. So there was a great deal of concern, I think, expressed by the agencies, and a wonderful informal system for sharing information as well.

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REP. MORELLA: That sounds like a great idea in terms of continuing the kind of networking and sharing ideas. It just seems as though maybe, from what you said, there also needs to be put into effect, some consistent policy for how to respond to the needs, realizing that some of them will be different from agency to agency. But in general, so that you all have combined the information and have it available.

Thank you, Mr. Chairman.

REP. MICA: I thank the gentlelady and yield for one final question from Mr. Horn.

REP. HORN: Thank you, Mr. Chairman. A number of my colleagues, including the chairman, have mentioned the subject of Medicare. I'd just like to pursue a few things on that.

As I understand it, new applications for Medicare had to be turned away initially, is that correct?

MR. BROADNAX: That is correct.

REP. HORN: Now Medicare does operate from a trust fund that we all contribute into. Was the processing of applications paid for from that trust fund?

MR. BROADNAX: That is my understanding.

REP. HORN: Would the Department of Health and Human Services support legislation to make the costs of processing new applications payable to that trust fund when there has been a lapse of appropriations, or do you need that authority?

MR. BROADNAX: As I understand it, by there being a trust fund, that's why we were able to continue to operate, because under the trust fund's authority, even though there was a lapse, we could continue to use trust fund dollars.

REP. HORN: What was the reason why we turned away Medicare applications from the beginning.

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MR. BROADNAX: When we applied the law and the guidelines as we interpreted them, and that's why I said earlier on there was a short-term and a long-term plan. But in the initial application, if it was going to be a short-term shutdown, under the guidelines, as we looked at issues related to health, safety and the protection of property, it was appropriate to have the first instance shutdown. And by that turning away the applicants.

As time went on, then, applying those same guidelines, that logic then shifted, where under the same set of guidelines it was then appropriate to entertain bringing people back to process those same applications.

REP. HORN: Was that shift in logic helped by a call from the White House?

MS. CHATER: No. Since we process applications for Medicare, I'd like to say no.

REP. HORN: You process them or, okay. And you're saying no, you got no further guidance. It seems to me that's a fairly political hot potato. And if I were sitting in the White House I'd say, what nincompoop said we shouldn't take applications in this area?

MS. CHATER: Well, it's a little bit like -- what you have to say about applications for Medicare applies of course to the fact that we didn't take applications for disability benefits or for new Social Security benefits. I like to think of it a little bit like a leaky roof. If your roof leaks you can put a pot under the leak and collect the water, and you can do that for a few days. But as the leaks magnify and pretty soon your whole roof is leaky, then you have a very, very damaged house. So I see all of this as what -- the assumptions that we made in the beginning was that the furlough would be very short-lived and we could do that in a short period of time.

But based on our experience -- we know that backlogs accumulate -- and over time there is no way we could implement the intent of the Trust Funds -- if we keep delaying -- and therefore the Phase Two -- or the plans came into play -- for recalling more employees than we had in the first place.

Now in the case of Medicare -- because we send out a notice to beneficiaries -- a month or so before they turn 65 -- we ask the people to come in ahead of time -- to give us ample time to process the applications -- so there wasn't an emergency -- it's not as though somebody needed Medicare tomorrow -- because we hopefully would have them come into the office a week or two weeks or a month ahead of time -- to do all of that.

So that was the nature of the taking of Medicare applications in our offices.

REP. HORN: Okay. So you're saying, Commissioner, that you made the decision to re-open the application line for Medicare is that correct?

MS. CHATER: OMB is -- as far as I'm concerned -- reviewed our plan -- but I was responsible for making the decision about how to and when to recall additional employees to implement the Trust Fund's charge.

REP. HORN: What did your initial memorandum, or planning document, say as to the extent of a short-term shutdown -- are we talking three days, four days, two days; what?

MS. CHATER: We were working on a theoretical short-term/long-term -- never expecting that we would have to think about a long-term.

In the beginning -- for planning purposes -- I think some of our staff to operate on a What would happen if this went on for two weeks -- but after the first day -- when we realized that we had 28,000 applications that we couldn't take -- and 200,000 telephone calls that we couldn't answer -- we knew that it could never ever go on that long -- if we were to indeed carry out the intent of the law.

REP. HORN: Okay -- so the original plan -- that there is such a thing as a short-term -- was simply an error -- is that correct?

MS. CHATER: It was a short-term best guess -- based on some assumptions.

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REP. HORN: in other words -- as far as you're concerned -- if we went through this again -- hopefully we won't -- but if we did -- you're saying we should not be furloughing anybody that has anything to do with these thousands of applications that pour into your administration -- that you handle -- as you say -- for Medicare -- that we shouldn't even have a 24-hour --

MS. CHATER: If we were to do this again -- I would want to furlough a very minimum number of our employees -- because we are now already behind -- so it's not just the new cases that we wouldn't be able to process -- it's the ones that we are now working on -- with increased productivity -- to make up for what we lost.

REP. HORN: Yeah -- so the short-term/long-term distinction really makes no sense, when it comes to this type of government operation, is that correct?

MS. CHATER: Well it made sense in the beginning, because it assumes --

REP. HORN: Well, I don't see that it made any sense -- you knew the volume coming in every day -- it hasn't changed, presumably, over the years.

MS. CHATER: Well one always suspects that a furlough would be short-lived -- and therefore we can make do -- because we only need one bucket to catch the water in the leaky roof.

REP. HORN: Well it's an interesting analogy -- but it doesn't have any relationship to reality, is my conclusion, after hearing the leaky roof approach. It seems to me if you go through this again -- we shouldn't assume it will be short, unless the President signs on the Appropriations Bill -- the Continuing Resolution -- it could be very long; how do we know?

So it seems to me I would hope -- the next time -- we do not -- on essential health services -- shutdown the operation -- since there is a choice to be made.

Now I take it neither the President nor the Secretary of HHS called and said -- What are you people doing over there?

MS. CHATER: Well the Secretary of HHS wouldn't have called in any event -- because we're now an independent agency --

REP. HORN: I know you've independent --

MS. CHATER: -- however, I would say this to you --

REP. HORN: But she does have HCVA still?

MS. CHATER: Yes, she does -- and my point is that one of the issues that we've not really discussed in this whole problem -- has to do with the interaction of agencies -- the cooperativeness that we experience on a weekly basis --

SSA make some assumptions -- but we have to work cooperatively with the Department of Health and Human Services -- as we do all the time,

We've also had to be in contact with the Department of -- Immigration Services -- because we do a lot with INS -- so there is a whole cooperative element within government that we need to pay attention to as well.

REP. HORN: Just to get the Record complete -- when I asked you the question initially, Mr. Secretary, you really didn't answer it -- I take it you -- there was no influence -- since Health -- the Medicare administration is still in your agency -- there was no influence from the President, the White House, anyone else, to get you to help unravel the mistake of not taking applications?

MR. BROADNAX: As I said before Congressman -- and in terms of -- I received no phone calls -- we had a short-term/long-term approach -- I understand your concern and disagreement with that -- I think we were operating off of history -- that's all we had to guide us.

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History has demonstrated shutdowns have been very short in duration in the past -- some had been averted altogether -- and that's why I said in my opening statement -- I think the only way we can be on solid ground here -- is to make sure we do everything possible -- both branches of government working together to avoid, at all costs, any shutdowns in the future.

REP. HORN: We hope you're right.

REP. MICA: I thank our panelists for their testimony today -- and we have additional questions which we would like to submit -- time does not permit us to offer all the questions from both sides of the aisle at this point -- and I hope Mr. Munoz -- you'll also tell the Secretary of the Treasury, Mr. Rubin, that we're carefully watching his raid on the Employee Retirement Funds -- and also extend our regards to him for the holidays -- we'll be watching that issue -- you'll hear more about that later on.

But I would like to thank each of the panelists for their cooperation -- and close with a comment that President Clinton and Vice President Gore made to all the Federal employees after the close- down -- and I'll just quote one line, "You remain good people caught in what Churchill called, quote, 'the worst system of government devised by the wit of man, except for all others.'"

So thank you so much -- and we'll excuse this panel.

I'd like to welcome our second panel today. We have in our second panel the Honorable John Koskinen -- deputy director for management of the Office of Management and Budget. We also have Christopher Schroeder, deputy assistant attorney general, the Office of Legal Policy, the Department of Justice. And we have Allan Heuerman, associate director for human resource services in the Office of Personnel Management.

Most of the panelists have been before us before -- if we could have everyone go ahead and exit --

(Pause)

-- and get order here in the hearing room -- Most of you have been before us before -- and know it's the custom to swear in our witnesses.

If you'll rise -- raise your right hand --

Do you swear that the testimony you're about to give before this sub-committee of Congress is the whole truth and nothing but the truth?

WITNESSES: I do.

REP. MICA: Thank you.

Well welcome back Mr. Koskinen -- the Office of Management and Budget -- as you know -- we try to have your abbreviated your statement -- and we will make your entire comments part of the Record.

So we welcome you -- and you're recognized.

MR. KOSKINEN; Thank you, Mr. Chairman.

I ask your indulgence that a few seconds to my response -- because I would like to build into my formal testimony - responses to some of the questions that the panel has raised --

REP. MICA: Fine -- go right ahead.

MR. KOSKINEN: I appreciate the invitation to appear today to appear before the House Civil Service Subcommittee -- to discuss the shutdown of government service that occurred in the middle of November -- because of the lack of appropriations.

The Federal government shutdown -- because neither a complete set of Appropriations bills -- nor a Continuing Resolution -- was enacted in a timely way.

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The Constitution -- in the Anti-Deficiency Act -- require that an agency only incur obligations to make payments -- when the Congress has passed -- and the President has signed -- either an Appropriation bill for the agency -- for a temporary appropriation known as a Continuing Resolution.

I think at this point I would like to make a couple of points clear -- I am sure the committee understands.

First -- as Mr. Munoz noted -- the law is very clear that it is a violation of the criminal law to -- in fact -- misapply the Anti-Deficiency Act.

Secondly -- the Congress has made it clear -- after the last shutdown -- by adding the word imminent before a threat to life or property -- that the Act was to be applied narrowly. Thirdly -- I would like to note -- that it is not a matter of choice among the agencies -- as to whether they might do something they would like to do -- and nor can it be a response to the interest of anyone -- the question is What are the legal guidelines -- What are the applicable guidelines -- and how is the law to be interpreted and applied.

The failure to enact appropriation bills resulted in substantial costs to taxpayers -- and degradation of government services.

The clearest lesson to be drawn from the recent government shutdown -- is that it should not be allowed to happen again.

Disputes over budget priorities should not be resolved in a crisis atmosphere -- in which federal workers and recipients of government services are needlessly harmed.

With regard to the government-wide impact of the shutdown -- we ask the agencies to submit preliminary estimates of the effects of the shutdown -- on their operations and the resulting costs.

The monetary costs are currently estimated at more than \$700,000,000 -- with approximately 400 to \$400,500,000 of that being payroll costs for furloughed employees.

Significant additional costs -- which cannot be determined at this time -- include interest payments to third parties under the Prompt Payment Act -- and the Crash Management Improvement Act -- where the Federal government does not pay its bills on time.

There will also be additional personnel costs necessary to deal with the backlog of work resulting from the shutdown.

As significant as the monetary costs are the denial of basic and important services to the American public.

Millions of Americans were inconvenienced -- or will be delayed in the receipt of payments and benefits to which they are entitled.

Some agencies and activities were already funded -- and therefore were allowed to function during the shutdown -- for example the Department of Agriculture did not shutdown -- because its Appropriation bill had been enacted into law.

And the U.S. Postal Service did not shut down because it is funded through fees.

The major exception to the prohibition against incurring an obligation -- without appropriations -- is for emergency actions to protect against imminent threats to property.

For the Record -- I would like to clear up a very unfortunate use of the terms -- essential and non-essential -- which unfortunately we continue to talk about this morning.

These terms do not appear anywhere in the statute -- I would emphasize that -- these terms do not appear anywhere in the statute.

When there are no appropriations, all employees are furloughed, except for those performing activities that provide for national security, relate to the conduct of foreign relations, provide for continuing mandatory benefit payments,

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and most importantly -- which covers most of the workers we're talking about -- for emergency activities to protect life and property, for example, medical care of inpatients, and emergency outpatient care.

If the distinction were between essential and non-essential -- no employees would have been furloughed.

In light of this subcommittee's long interest in -- and backing of a properly supported workforce -- I know that you will join me to ensure that henceforth the shutdown distinctions are between emergency and non-emergency employees.

As under past administrations -- the Office of Management and Budget was responsible for preparing for the possibility of a shutdown.

During the summer -- in light of the delays in Congressional actions on virtually all appropriation bills -- speculation increased about a possible government shutdown due to a funding hiatus.

As a result, Director Rivlin asked me to lead a working group to prepare for an orderly shutdown.

This group was composed primarily of OMB staff -- but included outside representatives from agencies -- such as the Department of Justice.

Director Rivlin asked the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations -- because as I noted earlier -- after the last shutdown in October of 1990 -- Congress had amended the Anti- Deficiency Act to insert the word imminent before the words threat to life or property.

On August 16, 1995, the Office of Legal Counsel in the Department of Justice updated the 1981 opinion of the Attorney General -- interpreting the law pertaining to government operations during a lapse in appropriations.

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On August 22nd -- Director Rivlin asked that the heads of all executive departments and agencies send to OMB updated contingency plans to deal with the funding hiatus -- based on the 1981 Attorney General's opinion -- as updated by the Department of Justice.

There's been a tone of irony in this hearing -- on the one hand we've been accused of planning too far ahead -- in providing too much planning -- and on the other hand we have been accused of not providing enough planning.

Let me make a few things clear -- when Congressman Clinger -- Chairman Clinger referred to the July 26th advice to the agencies from Director Rivlin -- that advice clearly states -- as does the subsequent advice on August 17th -- that the advice there to the agencies was with regard to the ultimate impact of declines of appropriation bills that might be passed.

Neither of those guidances asked for updated shutdown plans. The actual request -- as noted in my testimony -- came on August 22nd.

We have asked -- and questions have been raised about inconsistencies across the board. As noted by Secretary -- Administrator Chater -- inconsistencies are built into the operation of the government.

Social Security is forward-funded, has a continuing obligation, and therefore, historically, limited administrative functions have been implied from that situation.

VA benefits are appropriated; in the absence of an appropriation there is no ability to imply an exception for employees, unless there is an emergency.

(You) talked about the Civil Service Retirement Fund -- the Civil Service Retirement Fund continued to operate because, in fact, those operations were paid for by the Retirement Fund.

So as we go across the board -- the inconsistencies arise not because of a difference in views of the agencies -- but because of a difference of legal and financial situations of the programs being considered. When agencies

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were asked to review their plans -- they were told to assume a short shutdown -- with the understanding that plans would need revision in the light of a more protracted shutdown -- and might need to be adjusted for unforeseeable circumstances.

OMB assumed that this was appropriate -- because shutdowns since 1981 have averaged two days.

With the participation of the Department of Justice we reviewed the plans for general conformity with the Attorney General's opinion and government-wide consistency.

The working group also developed a common set of questions -- with appropriate answers for distribution to the agencies.

These materials were integrated with those developed by the Office of Personnel Management for employment issues -- such as the impact of furloughs on employees pay -- leave -- and benefits.

Fortunately a Continuing Resolution was enacted before the beginning of the Fiscal Year -- providing funding through November 13th.

Again -- we asked for plans on August 22nd -- planning for a potential shutdown on September 30th -- six weeks in advance.

I might note -- in passing -- that one of the reasons we were planning in advance was that the Speaker of the House had made it clear in April and June -- that his plan was -- in fact -- to shut the government down.

However by November 9th -- only two Appropriation bills had been enacted for Fiscal Year 1996.

Therefore Director Rivlin informed the heads of executive departments and agencies that it was possible that Congress would not pass a second acceptable Continuing Resolution by November -- Monday -- November 13.

With regard to Congressman Moran's very good question about What happened on the 13th -- on August -- November 9th -- there is guidance the committee has a copy of -- from Director Rivlin -- advising the employees that the agency -- that you should review your shutdown plans and ensure quote -- "that your employees are properly informed."

On November 13th we advised the agencies that there was great risk -- that there would not be a Continuing Resolution -- but I would remind the committee -- in response to Congressman Moran's question -- that the Continuing Resolution of the appropriations -- and the Continuing Resolution did not expire until midnight -- Monday.

We therefore were obligated -- through the night on Monday -- to see what the Congress would do. Historically -- in the past -- on many occasions the Congress has actually acted the day after the appropriation -- so the judgement was made -- that rather than furloughing employees and having no one here on Tuesday -- in the face of a potential Continuing Resolution -- we should behave as we have historically always done -- which was to bring everyone in -- with notification beforehand -- as to who were going to be emergency employees and who were not going to be designated emergency -- and if there were no Continuing Resolution on Tuesday morning -- by the middle of the day in an orderly shutdown -- activities would be shut down and those would in fact be in obligations incurred by the government for the employees through the time that they spent working on that day.

On the morning of November 14th -- Director Rivlin advised the agencies to proceed with a shutdown -- in the face of the absence of a Continuing Resolution.

As the shutdown continued for an unprecedented period of time -- and I think that's one of the things this committee should bear in mind -- the Congress had never -- in history -- caused the government to shutdown for more than two working days.

By the time we got to Thursday and Friday we were in uncharted, unprecedented history -- Congress for the first time had shut the government down for a period of four working days -- heading into the weekend.

As the shutdown continued -- agencies were asked -- by OMB -- to review the implementation of their plans -- for developing emergency situations.

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As a result -- on November -- Friday November 17th -- the Social Security Administration and the Veterans Administration received approval to call back a number of personnel to work on Monday, November 20th.

On Sunday -- November 19th -- HUD and the Department of Defense announced plans to recall a number of other workers -- to address developing emergencies.

I am sorry that Congressman Horn is not here -- the question has been raised -- isn't it inconsistent to say that someone is not an emergency employee on the first day -- and then on the fifth day determine that they are?

And I think Administrator Chater's response is exactly right -- the law imposes a criminal fine -- and a criminal penalty -- on anyone who over-interprets the Act.

It is logical to assume that what is an emergency on the first day may not be an emergency on the fourth day -- and conversely -- what you can tolerate for a day or two -- becomes intolerable with the passage of time. There is no way -- and I think again -- in response to Congressman Horn's question -- that if we do it again -- we will plan on a day-by-day basis -- if there is a shutdown -- and for the first two or three days we will -- in fact -- have a shutdown -- depending upon who are emergency employees and functions for the first two or three days.

If we go for a longer period of time I would expect that the agencies would continue to monitor and review their plans -- and after five or seven days we would have additional determinations made -- as to who was now an emergency and who was not an emergency employee.

In some areas -- like parks -- you may have an emergency activity for the first three days -- shutting the parks down -- at which point you then can have those furloughs -- employees furloughed -- because they are no longer engaged in emergency activities.

And so therefore I think -- it's important to bear in mind -- that it is not a sign of inconsistency on the part of the agencies -- that determinations continue to be made -- especially as we move into unprecedented territory.

If we start it again -- I think that we would find -- in the cases of HUD and other places -- that for the first day or two -- we could tolerate the situation that we could not tolerate at the end of five or seven days.

You asked how our determination would differ if the lapse of appropriation were to last another ten days -- thirty days -- or even ninety days.

I would like to stress -- and I cannot stress it too hard -- that a shutdown of more than two weeks would be so disruptive that it should not even be considered.

In such extreme circumstances -- the hardship to all Federal employees -- emergency and non-emergency -- as well as military personnel -- all Federal contractors -- grantees -- and anyone else dealing with the Federal government -- with the exception of recipients of certain mandatory benefits -- none of whom would receive payments -- would be without precedent.

And again I would remind the committee that there is an assumption -- that if we bring back a furloughed employee to perform a function -- that that solves the problem.

As we noted on that weekend -- we were about to move beyond a situation of who were emergency employees and who were not -- and deal with the situation that the government had no money to pay either the emergency employees or the non-emergency employees -- was about to have no money to pay the military employees -- was about to not have money to pay any bills that were not subject to the appropriation.

The Anti-Deficiency Act does not allow us to make payments -- the Anti-Deficiency Act -- in emergency circumstances -- only allows us to incur the obligation to have workers and contractors performing emergency activities -- to perform the work. We have no authority to pay them -- we have no funds to pay them -- because of the lack of an appropriation.

REP. MORELLA: Thank you -- Mr. Koskinen -- your testimony is very valuable to us -- but we only have about six minutes to vote -- so if I could --

MR. KOSKINEN: I just closed then -- with my last --

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REP. MORELLA: I'll let you close with the --

MR. KOSKINEN: Thank you --

REP. MORELLA: -- last sentence.

MR. KOSKINEN: Shutting the Federal government down is a serious matter with substantial costs and significant dislocations for the American public.

For more than two hundred years -- major budgetary issues between the Congress and the Executive Branch were settled without major disruptions in government operations.

Our goal should be to emulate that minimum standard of success.

If that goal is unattainable -- we should at least not subject the country to another shutdown this year.

Thank you, Madam Chairman.

REP. MORELLA: The subcommittee will now recess for 15 minutes for the vote.

(gavel)

(Recess)

(gavel)

REP. MICA: I'll call the meeting of the subcommittee back to order -- and we will resume.

I thank Mr. Koskinen for his testimony -- and we will get back to you with questions -- but at this time I want to call on Christopher Schroeder -- deputy assistant attorney general -- Office of Legal Policy at the Department of Justice.

Excuse me if I've slaughtered your name a couple times here -- I've said Shader --

MR. SCHROEDER: That's very close, Mr. Chairman.

REP. MICA: Okay, good -- and Schroeder -- I called you earlier -- she's leaving -- but --

LAUGHTER

REP. MICA: We've glad to have you with us -- thank you -- you're recognized -- and again -- if you want to submit a lengthy statement for the Record -- prepared -- we will do that without objection -- and if you could summarize -- thank you.

The other members will be returning -- and are interested -- thank you.

MR. SCHROEDER: Thank you, Mr. Chairman -- and members of the committee.

This is the first time I'm appearing before your committee -- and I hate to start it with an apology -- but I must.

My testimony arrived late this morning -- and contrary to your request for it being here in advance -- and when it arrived it was without fairly extensive appendices.

I understand that those are now available -- but again my apologies for the late arrival -- it's inexcusable -- and I won't attempt to excuse it.

I will offer to be available for questions at the staff level -- or in any other way you would think appropriate in order to accommodate the committee's interests -- REP. MICA: Just proceed -- thank you.

MR. SCHROEDER: Mr. Koskinen has covered a number of the points I make in my testimony -- so let me just briefly summarize the role of the Justice Department -- with respect to implementing government-wide application of the Anti-Deficiency Act.

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The Justice Department's function is to provide general legal advice -- working with the Office of Management and Budget -- and in recent years that responsibility within the department has fallen primarily on my office -- the Office of Legal Counsel.

The advice we have given over the years -- however -- originated with an Attorney General opinion in 1981 -- from then-Attorney General Civiletti.

That basic interpretation of the legal regime governing a situation of lapsed appropriations has been in place since 1981 -- and has been consistently followed by the Administrations of Presidents Carter -- Reagan -- Bush -- and now President Clinton.

Assistant Attorney General Dellinger of the Office of Legal Counsel issued a memorandum on August 16th of this year -- in response to a request from Director Rivlin -- to assess the implications of an amendment to the Anti-Deficiency Act -- that was enacted in 1990 -- that was the occasion of the August 16th memorandum.

That memorandum largely reiterates the Civiletti opinion and the views of the proper legal standards to be applied in this situation -- that have been in place at least since 1981 -- and does amend the Civiletti advice with respect to the interpretation of the emergency exception -- which was the subject matter that was addressed in the '90 amendments.

It is our function to provide legal advice -- and that the most laws we must interpret -- are Article I, Section 9, of the Constitution -- as you noted, Mr. Chairman -- the Appropriations clause -- and Sections 1341 and 42 of Title 31 of the United States Code -- the Anti-Deficiency Act.

The only point on which I will be somewhat repetitious is to simply reiterate the point that's been made a number of times already this morning -- the structure of the Anti-Deficiency Act is such that -- in the situation of a lapse of appropriations --

-- first -- funds cannot be withdrawn from the Treasury --

-- and second -- there are limited exceptions provided in the Act for the incurring of obligations -- such as to commitments to pay employees who are not furloughed -- and who remain at their posts.

But in no situation -- in the recent shutdown -- were furloughed employees -- who were coming in on that basis -- in a position to actually receive a paycheck -- if we went to a payday that was the covered period of the shutdown period.

We can obligate the government to honor those compensation promises -- but unless and until there's an appropriation -- it would not have been possible to meet the normal pay periods. Fortunately we've never confronted a payless or a partially-payless payday because the matter has been resolved prior to them. But it is fundamental to note that when the government is functioning in this period -- its functioning essentially on the basis of its ability to make contractual obligations. And that ability is limited to those categories that are defined under the Anti-Deficiency Act as what we refer to as excepted activities.

Nowhere is the concept of an essential worker or an essential function found in any of those definitions of accepted activity. What we do analyze are activities and functions to see whether under the facts and circumstances that exist -- on a fairly case by case basis -- there is a justification for an employee performing that function.

And those circumstances can and do change over time -- which as Mr. Koskinen explained, is one of the reasons why employees might be asked to perform a function at a certain day during a shut down period and not on others. You can -- We used an example in one of our memorandum of a truck or vehicle maintenance not being an accepted function -- assuming a short term shut down.

But obviously if you were maintaining a motor vehicle fleet to perform some otherwise authorized government activity -- As time went on you would have to perform some maintenance on those vehicles or they would become unsafe to a degree that the protection of property or the safety of human life would be involved.

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So that the longer a shut down went on the more likely it would be that some agencies motor pool would have to call maintenance staff in to perform rudimentary services.

A contrary example would be the kind of situation some of the large national parks may have faced in which -- although there was no funding available to continue the operation of those parks -- When the lapse in appropriations occurred there were still people in the interiors of large parks like Yosemite or Yellowstone or the Grand Canyon.

And there was a rational for park service personnel staying at their stations to insure the safety of those individuals while they hiked out of the park. Which often could take a couple of days. So that at the beginning of a shut down there would be a health and safety rational for maintaining some personnel that would then cease.

So the circumstances -- The fact of the circumstances are definitely a factor that agencies take into account. And that one significant reason that plans and staffing levels have to be updated and reassessed -- in light of the circumstances that are the best estimates and understandings of the circumstances that obtain at the time those decisions are made. And with that I'll conclude remarks and be more than happy to respond to any questions you may have.

REP. MICA: We thank you and we'll get back to questions. At this time I'll recognize Allan Heuerman, Associate Director for Human Resources Systems Service of the Office of Personnel Management.

MR. HEUERMAN: Mr. Chairman and members of the subcommittee I appreciate the opportunity to be here today to discuss the Office of Personnel Management's role in the partial shut down of the federal government that began on November 14, 1995.

The role of OPM under a government shut down is to provide agencies with guidance and technical assistance related to the personnel management aspects of furloughing federal employees. Now last July based on media reports about the possibility of a lapse in appropriations my on my own initiative instructed my staff to begin updating OPM furlough guidance -- which was last issued on August 15, 1990.

On August 1, 1995, we distributed our updated guidance to agencies. This guidance was in the form of questions and answers which covered a broad range of information on personnel management aspects of a furlough, such as information on procedures the effect of a furlough on pay and leave and retirement and health insurance coverage and other benefits. The guidance did not -- because its not within the OPM's authority -- did not include guidance on the kinds of activities which would be accepted under the Anti-Deficiency Act during the last of appropriations.

After issuing this guidance we engaged in continuing discussions with federal agencies to help plan for a possible lapse in appropriations to ensure that they were kept informed and up to date. Our activities included OPM staff briefings for personnel at a number of agencies, weekly meetings of agency personnel directors where we continued to address the personnel implications of furlough, as new issues arose, arranged for representatives from OMB to speak on budgetary matters relating to shutdown, or representatives from the Department of Labor to discuss unemployment compensation issues, and for representatives from the Thrift Investment board to discuss Thrift Savings plan issues regarding loans.

We also distributed to agencies additional questions and answers pertaining to new issues on the personnel aspects of furlough, a Justice Department opinion on the 1990 changes to the Anti-deficiency Act, relative to determining excepted and non-excepted activities, and information on unemployment compensation and thrift savings plans.

Prior to and during the shutdown OPM responded to individual inquires from agencies, employees, unions, and the media on personnel aspects of furlough. On November 17 we issued to the directors of personnel questions and answers addressing leave answers affecting excepted and non-excepted employees. On November 21, the day after the law authorizing retroactive pay was enacted and employees returned to work we issued guidance on personnel documentation and on how to handle the pay and leave and employees for that period.

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Mr. Chairman you asked about the assumptions made by OPM with respect to length of the shut down. We made no assumptions and none were needed with respect to our guidance. Our August guidance provided information on furloughs of 30 days or less. And on furloughs of more than 30 days.

The reason for this distinction is that there are different provisions in law governing furloughs depending on the length of the furlough. Furloughs of less than 30 days require adverse action procedures. Furloughs of more than 30 days require reduction enforced procedures. It was OPM's guidance was a design to cover both scenarios.

If as a shut down continued it appeared that it would last for an extended period, we would encourage agencies to provide employees with additional information such as unemployed assistance programs and financial counseling.

However our basic guidance on the personnel management furlough remained the same. You asked about the effect of depth ceiling crisis on our guidance -- the depth ceiling limits the government's ability to borrow cash. And therefore our guidance dealing with furlough procedures would not be effected.

You also asked for a description of those OPM functions that were continued during the lapse in appropriations. OPM continued to carry out its responsibilities with regard to administration of federal employee benefits programs, such as: retirement, health and life insurance, background suitability investigations, and managerial and executive training. These activities are funded either out of the retirement or insurance trust fund, or OPM's revolving fund. And so we are not effected by the lapse in appropriated funds. OPM also conducted activities related to the orderly shut down of both OPM itself and other federal agencies. With regard to the cost associated with the furlough we estimate that the salary and benefits paid to OPM employees who were furloughed totals approximately \$1,238,700. We also incurred some incidental costs such as printing mailing and travel in connection with the orderly shut down.

We are providing you with all of the information you requested, including copies of all materials we issued with regard to the government shut down and all pertinent documents associated with the shut down at OPM.

I want to thank you for the opportunity to discuss this with you today and I'll be glad to respond to questions.

REP. MICA: I thank you Mr. Heuerman and also other panelists, witnesses today for their testimony. I have a few questions to start out with.

First for Mr. Koskinen. Do you think that the Anti-Deficiency Act is deficient?

MR. KOSKINEN: Is which?

REP. MICA: Deficient.

MR. KOSKINEN: No I think it -- whatever modifications you make in it I think ultimately your dealing with a provision of the Constitution that provides that the executive branch cannot incur obligations without appropriations.

The Anti-Deficiency Act basically as I noted in my testimony provides some very narrow exceptions for having employees perform emergency activities and other activities. But does not provide any exceptions and can not to the constitutional requirement that we can't pay -- make any payments -- and can only incur very limited obligations in the absence of an appropriation.

So if there is any deficiency its in fact in our inability to produce either appropriation bills or continuing resolutions to avoid this problem. As I said, we avoided it for 200 years; it's not quite clear to me why suddenly it's become a term of art.

REP. MICA: Well I think everyone that has testified today that said -- has said the shut downs have been sort of a way of life of governing the past 10-12 years given the fact that I guess its occurred on at least 10 occasions. And the difference I think in this particular shut down was the duration.

One of the things that we heard from the panelists -- previous panelists -- was variety in their plans for such an eventuality -- some prepared -- it seems short term and long term. Do you feel that the guidelines that you issued or request were sufficient -- And how they responded was adequate. And then we saw a great disparity between the plans.

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I did the presentation of this 184 pages of the Department of Labor versus the two pages and 30 pages addendum for HHS I believe it was. What's your reflection on this now?

MR. KOSKINEN: My reflection is the agencies were advised that they should plan for a short shut down in light of the history that we'd never had a shut down for more than one or two days.

When an agency asked for more detailed guidance we said as you heard that it would be in the range of five to seven days. All of the plans and all of our discussions with them contemplated that if the shut down lasted longer it would begin to cause people to have to reexamine developing emergencies in their activities.

So it did not surprise us and in fact we encouraged the agencies as the first week grew to a close to review their plans in light of the unprecedented nature of the shut down. And I would note the question was raised about the -- and actually another point about the difference in the size of the plans -- are agencies have been required to maintain shut down plans since 1980.

The guidance from Director Rivlin on August 22, specifically notes that the purpose of the review was for the agencies to review those existing plans in light of the new legislation and the updated Attorney General's opinion provided by the Office of Legal Counsel -- And make whatever changes seemed appropriate.

In the case of some agencies they went back as Labor did and in fact redid their plans entirely. The Defense Department perhaps for the first time in history actually developed a shut down plan. Other agencies like HHS that had relatively straight forward questions and preexisting plans had an easier time of it.

But it was left to the discretion of the agency as to determine what and how much work was necessary to update their preexisting plans.

REP. MICA: One of the other points that you raised that one of the reasons for different shut down -- degrees of shut down was in fact the legal parameters that have been established. And one of the areas that was mentioned today that stirred some controversy has been Social Security. I have this Department of Justice Office of Legal Counsel memorandum that was prepared August 16, 1995.

And it -- the subject is government operations in the event of a lapse of appropriation, and then it goes on at length -- it's pretty lengthy. It defines some terms I think you might be familiar with it.

But since multi-year appropriations and indefinite appropriations -- And let me quote from it --

It says 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.

I'm not an attorney but I'd interpret that they could go on. Social Security is such -- wait. Let me say this again. Social Security is a prominent example of a program that operates under an indefinite appropriation. Given this guideline prepared from the administration --

And then we have the Social Security Commissioner over here who furloughed about 60,000 employees. Is this a difference in understanding of the legal parameters. Or how do you interpret these actions.

MR. KOSKINEN: The original opinion by Attorney General Civiletti, which drew the distinction and discussed Social Security talked about situations where you have ongoing continuing obligation authority. As Social Security does.

And in those cases its said by implication one could assume that limited administrative functions, even though not funded, could continue. And that's the basis on to which historically Social Security benefit checks have been issued.

The question is beyond the limited administrative functions of paying existing beneficiaries -- Can you at the start have an exception because of an emergency activity or otherwise for the processing of and the volume of work that's done in new applications.

Social Security's judgment in their plan and it was very clear in their plan was that they did not think that for as Administrator Schroeder said -- For the first day or two there wasn't an emergency.

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Or that that would be the kind of work that would be accepted under the Attorney General's opinion. On the other hand it was clear as Administrator Schroeder said -- Once we got into the unprecedented shut down because of the inability to provide a continuing resolution -- After several days what had been tolerable for a day or two became intolerable over time. It began to create an emergency. That was their legal judgment under the basic original attorney generals opinion. And it has functioned. The original opinion talks about ongoing obligation authority and limited functions derived by implication from that.

REP. MICA: Do we need changes in the law to insure that some essential activities continue or can -- it seems that there was adequate authority because in fact some of these things were restored by fiat.

MR. KOSKINEN: (They) were not restored by fiat; they were restored because of a determination that an emergency had developed with the passage of time. That is not fiat.

REP. MICA: Yeah. Well but someone has the authority. The president or the administrator has to have that legal authority.

MR. KOSKINEN: Correct. It can't --

REP. MICA: That can't just suddenly appear.

MR. KOSKINEN: No. But that why it's not fiat. There's a set of legal guidelines that give you a determination and say -- If you determine that a function at any point and time is necessary because it's an emergency.

REP. MICA: So you're saying we have basically a moving target.

MR. KOSKINEN: Of course. There is no way --

REP. MICA: You don't need additional clarification. What's in law is adequate.

MR. KOSKINEN: The law has been changed in the past. It's certainly going -- can be changed going forward. As I say the last change in the law was an attempt to restrict and make it clear that the Congress intended that only eminent threats -- the only emergency actions were eminent threats to life or property. And that was what we updated. And the Congress has spoken. And said that this to be narrowly defined. A criminal penalty applies otherwise.

If the Congress decided to take another tack that could be done. And there's nothing that would prevent them from doing that. If the Congress decided -- Several proposals are before the Congress.

Across the board you could provide permanent continuing resolutions or permanent payments afterwards. Or even to redefine in the Congress' judgment as to what an appropriate exception is. The Congress can do that.

REP. HORN: Would the gentleman yield --

REP. MICA: Yes I will. I know you have some interest in the theory and you were referred to -- while you were out of the room -- by the witness so I will yield.

REP. HORN: The Chairman has raised a fascinating question and as the opinion of Assistant Attorney General Walter Dellinger, distinguished scholar of the Constitution goes on -- He says in such cases benefit checks continue to be honored by the Treasury because there's no lapse in the relative appropriation. My query is are employees of Social Security paid out of the same trust fund that the checks are paid out of?

MR. KOSKINEN: And my understanding is no. That they are in fact free standing, they are paid out of an S&E (?) account that's an appropriated account.

REP. HORN: So when Mr. Dellinger wrote this multi-year appropriation your saying that his definition lets some operate under multi-year appropriation and others operate under indefinite appropriation provisions that do not require annual passage of annual appropriations legislation. Your saying that its one thing to pay benefit checks. It's another to pay people. Is that correct.

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MR. KOSKINEN: Yes, sir. If you look on page four of his opinion he says -- And referring back to the 1981 opinion -- It says it contemplates that a limited number -- I would quote -- A limited number of government functions could continue.

And the next sentence -- It says examples include the check writing and distributing functions necessary to disburse the benefits that operate under indefinite appropriations. And that's what Social Security continued to do. There was never a threat to existing benefits. But the exception is to a limited number of functions and the example has always been check writing.

The issue facing Social Security was -- Could they deal for the first few days -- Would it be a legitimate interpretation to say we'll have a the thousands of workers necessary to process new applications.

Their interpretation of that unjudgment was that that was not an exception created by emergencies until it passed with the passage of time into an unprecedented area. Where in fact now we had a back log that was an emergency.

But going back to day one -- If we started and you told me we were going to shut the government down for one day. Would Social Security have people there? I'd say our position would be to ask Social Security is that going to create an emergency. Their answer the first time was no.

They would again, in light of the experience be able to answer it. But it would not be inconsistent for them to say -- We can tolerate the situation for two days. We can not tolerate the situation for five. REP. HORN: Is it not true that the Financial Management Service of the Treasury writes the Social Security checks?

MR. KOSKINEN: That's my understanding. But they actually -- FMS writes those checks in response to information forwarded by Social Security.

REP. HORN: Absolutely. But there is also a payment to Treasury by Social Security for that service, is there?

MR. KOSKINEN: A payment for the check writing function?

REP. HORN: Yeah.

MR. KOSKINEN: At some point surely.

REP. HORN: And that includes the employees in the Financial Management Service that have to get those checks processed.

MR. KOSKINEN: That's right. Both the FMS employees and the Social Security employees necessary to process the benefits for check writing are accepted under the attorney generals opinion.

REP. HORN: Right. Under the Dellinger opinion.

MR. KOSKINEN: It's actually under the Civiletti opinion. Its been the rule for 14 years.

REP. HORN: Yeah. Okay. Well I notice in your testimony, bottom of page two. You say the Social Security Administration was forced to turn away 112,000 claim applications.

Every where else you say -- in the case of Medicare, 40,000 individuals were delayed in enrolling Medicare. Then you go on to talk about the Park Service -- another beef I have -- more than 2 million visitors were denied access to the National Park Services.

More than 80,000 passport applications were delayed. More than 80,000 visas to visitors who spend an average of \$3,000 on their trips were delayed -- et cetera, et cetera.

Then you get down to customer service Internal Revenue -- were halted. Social Security you say was forced -- The only person that forced them was the commissioner of Social Security that made the decision. And OMB that backed her up.

MR.

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MR. KOSKINEN: Because they made a determination that under the law -- And the law passed by Congress -- That was the action they had to take. Now it goes back to the Chairman saying that if would like to change the law - - That's open to you.

But that was an interpretation -- their judgment -- in response to, as I say the threat, as Secretary Munoz noted, that if you make a violation you are in fact subject to criminal penalty.

The fact that nobody's been prosecuted that I know of -- Because we've never had --

REP. HORN: In 75 years.

MR. KOSKINEN: -- more than five or six days does not seem to me particularly of great comfort -- to anyone you are asking to make these judgments.

REP. HORN: Yeah. Well Mr. Chairman we obviously have a clear case where your committee can render a service to help straighten out the law on this subject one way or the other.

REP. MICA: Again a number of questions have been raised. I'm wondering whether we should file criminal charges against those gardeners at VA that were non-essential.

MR. KOSKINEN: Its my understanding that as noted that 10 percent of the 200,000 or 220,000 people who work in the hospitals were furloughed. And in fact my understanding is non-emergency activities like gardeners were furloughed. But you will hear from VA. But my understanding is they actually looked at that question in terms of what were support services necessary to support the emergency activities.

REP. MICA: Well the same thing relates to PR shops. We have thousands of PR people in the various agencies --

MR. KOSKINEN: But you heard someone --

REP. MICA: Someone could make a case for going after some of these folks that did keep their shop open that were nonessential and should be charged with a criminal violation. MR. KOSKINEN: First of all they'd be nonemergency, not nonessential. Secondly you heard from six different agencies here. All of them said they made substantial cuts in their public affairs departments. They all provide you those numbers. And I think in fact they're prepared to stand behind those. I do not think its fair to assume that there were violations of that law.

REP. MICA: Well the folks that we did hear from -- There are other agencies and activities. I was stunned at the number of PR folks and public information officers that we have throughout the vast number of agencies and activities.

The other point and I don't want to continue that one at this point. But one other final point is -- We have gone through one shut down and its been the longest one in history. Next Friday we may be facing another one. And it may be a very long shut down. I also heard testimony and I'm not sure maybe you could define that -- That you agency OMB has requested an update, and additional update based on the experience of this bad experience. And was that the tenth? Someone said the tenth and someone said the twelfth.

MR. KOSKINEN: This Sunday evening. We want them so that we will have the full week to review them.

REP. MICA: Okay. Well five working days I believe. And is that -- Do you feel that's enough time? Because we had one of the agencies -- HUD said that they had asked for an opinion from you all relating to some grant programs. I guess it was in the time frame prior to the shut down and did not get a response. So do you think that you can adequately respond -- review their plans and get back to them by the fifteenth?

MR. KOSKINEN: Yes. Again as I said -- The irony of this is on the one hand we have been attacked for having spent too much time in planning. I think the appropriate response is -- The agencies have we think good plans. We've asked them to review them because we think its appropriate to be prepared for the following Friday.

We do also think that -- Even before this we had asked the chief financial officers, the presidents management council and other inner agencies groups to give us their response over the last month of experience that they had and the lessons learned, as we're calling them.

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And we think that we will be able to respond. And we will be able to run if there is a necessary -- Which we hope it is not. Again an efficient and effective shut down. Its not exactly one of the things we liked to be involved in.

REP. MICA: If you think your having problems being charged with doing too much or too little you ought to join the new majority in Congress. We get criticized for either doing too much or too little too so -- REP. MORAN: I think you ought to think twice about that.

(Laughter.)

REP. MICA: With those comments I do want to defer to the ranking member for question.

REP. MORAN: Thank you Mr. Chairman. John, will OMB support the legislation that I've introduced that will keep federal employees at work, and get reimbursed after the fact in the same way that 60 percent of federal employees did this last time.

MR. KOSKINEN: Yes. We're in favor -- Whatever we can do to in fact provide continuity in management of the government. And to the extent that we could avoid unnecessary shut downs and termination of important workers. That we think would be an important step forward.

REP. MORAN: So you'd support H R 2184 that does that, similar to --

MR. KOSKINEN: We have not cleared that bill through our normal processes. But in my personal opinion, we should support that.

REP. MORAN: Okay. I'm glad to hear that. Although we have very little time. So I think that if the White House was to support that it would help. By my calculations, as of December 15, we would only be worrying about 10 percent of the federal work force not going to work.

MR. KOSKINEN: Our estimate is that if the situation holds that exists today -- And there were a shut down the end of next week -- Without further appropriations bills passing -- Assuming the plans -- The agency plans were consistent with their plans -- We would be looking at furloughs in the range of 330,000 - 350,000 employees.

REP. MORAN: Why? That doesn't make sense to my -- it certainly doesn't comport with my thinking.

MR. KOSKINEN: You have several large agencies. You have State, Justice, Commerce. There's an appropriation bill that's not passed yet. The VA, HUD appropriation bill has not passed.

You have EPA -- that has not passed. As part of that you have NASA. You've got a number of very large agencies that do not have appropriations. Labor/HHS I guess is the third. When you take the Labor Department, HHS, State, Commerce, and Justice, EPA and NASA you've got a fairly significant --

The Education Department -- A significant number of agencies that will not have appropriations.

REP. MORAN: What I did was to assume that VA HUD will not pass. Labor/HHS will not pass. Interior will not pass. MR. KOSKINEN: That's right. State, Justice and Commerce --

REP. MORAN: State, Justice and Commerce will not pass is my assumption that it's going to get vetoed. It will come to us this afternoon and when it gets to the president I think he'll veto it. But I made those assumptions. And then took the number of employees who were furloughed in each of those agencies. And that adds up to something less than 200,000 federal employees.

MR. KOSKINEN: I'd be delighted to share with you our calculations.

REP. MORAN: Okay. I would very much be interested in that because it certainly impacts -- not necessarily on what is the right policy. But it certainly impacts on the consequence of that policy. If we're only talking about less than 200,000 verses 300,000 -400,000 --

Either way I think this is the time to set in motion a policy that would prevent the type of situation that occurred last month from recurring. But I also think its important to know the scope the depth of the impact of a lapsed appropriation. And I think its terribly important for the White House to give some expedited review of HR2184 that would keep federal employees at work. But I'd like to ask you -- would you anticipate a change in the proportion of

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employees who were furloughed the last time the government shut down, versus those that you would furlough as of December 15th, if there was a recurrence of a lapsed appropriations situation.

MR. KOSKINEN: Well, we can't answer that question until we hear back from the agencies. Again, our process from the start, starting in the middle of August, has been to rely on the agencies and their counsel and their managers to make the judgements, and similarly we'll rely on them to make their adjustments according to what they now know. But nothing has occurred that, thusfar, would lead me to conclude there will be significant changes.

REP. MORAN: Well, I understand that, that you need to hear from the agencies, but we just heard from the agencies, and Shirley Chater, the Commissioner of Social Security, used the analogy of a leaking roof, and that if it goes very long, you have to put far more people back to work to ensure that you don't have a chaotic situation.

In the testimony from the deputy secretary of HHS, he indicated that a second shutdown would necessitate more people being employed. That seemed to be consistent with the opinion of all of the agency representatives we heard from this morning.

One reason might be that this could occur at a time when you have to prepare for the issuance of major grants like the AFDC and Medicaid and social services, Head Start, and the like. So you would need to have those people on board, which you didn't in early November, because they had just been issued for the first quarter of the fiscal year.

I'm assuming that there would be a change in terms of the proportion of people furloughed, and that in fact that change would reflect the need to have a higher proportion of the work force on board, in the event of a second lapsed appropriation period. So, I think we need to look at that, and I would like to see your figures, because they don't jibe with mine. It would appear that at the very most you wouldn't have more than 200,000 people furloughed, out of a total of something over 2 million.

Do you want to comment on that?

MR. KOSKINEN: Well, I will share those with you. We do, as I say, subject to change -- and that's why we've asked the agencies formally to give us their updates, for all those reasons -- our number is over 300,000, and I'll share that with you.

REP. MORAN: Yeah. Okay. We need to look at that.

What measures is the White House, or OMB, in the sense of recommending to the White House, taking to avoid the kind of chaos that occurred during the first government shutdown? In other words, to create a different situation. How have you learned from the last experience to improve --

MR. KOSKINEN: Well, I guess, first of all, I would challenge the question of whether it was chaos; actually, as the one who fielded all the calls for the ten days, and responded to the agency inquiries, it appeared to us that, in fact, and the agencies' response was that it ran smoothly. Some of your constituents, I understand -- I gather, have given you anecdotal information otherwise; our judgement is that the agencies made the right judgements, they informed their employees in a proper time.

Clearly, this time around everyone who is a non-emergency employee the last time will have fair notice of that. I think the thing we see the shutdown as having run -- as I say, it's not my goal in life to say the trains ran on time -- but the shutdown, we think, ran efficiently and effectively; we're prepared to do it again if necessary. We think it would be a major unfortunate and hopefully avoidable event, and we would hope that the Congress, if it cannot pass -- complete the work on the appropriation bills by the middle of December, would pass a continuing resolution to allow the government to continue to function.

REP. MORAN: I understand that, and I would agree that chaos is too strong a term. I think that OMB did a commendable job in many areas in preparing for this. It could have been a far more chaotic situation, had OMB not been as well managed and communicating as well with the agencies, almost all of whom reacted in a responsible, professional fashion.

A more appropriate term would be "imperfections" in the process. I think, and I would hope that you would agree, that there were some areas that could be improved upon, were this to occur. The first would be, how do we prevent

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it from occurring, whether through legislation that would keep employees at work, which I've mentioned, or more advance notice -- those types of things. I don't want to put words in your mouth, but I'd like to get a sense of how things are going to occur on December 12th, 13th, 14th and 15th, versus how things occurred on -- what was the date -- November 12th --

MR. KOSKINEN: November 13th -- 13th and 14th.

REP. MORAN: Yeah. So --

MR. KOSKINEN: Well, I was going to say, I think, to the extent your constituents have talked to you, in any particular agency, it's up to the agency to make sure employees receive appropriate notification. As I say, that problem is mooted to some substantial extent because as I say the people who were non-emergency employees in November, obviously are on notice that they are likely to be non-emergency employees in mid-December, subject to changes by the agencies.

We think that the guidance was clear, we need to make clear, and the area in which we are working with the agencies to make clear is this issue about funding activities that, if you have an ongoing obligation authority, such as Social Security, or programs that have been adopted this year by the government, then you can, in fact, make payments. The question is, if there's been no obligation this year, it's an obligation in prior years, then some agencies, a couple agencies decided they could spend S&E, or incur S&E obligations in this fiscal year, even though there was no congressional action in this year.

Most agencies took the other tack, which was consistent with the advice we gave, and we will make sure that there is consistent response to that, and we will review the agencies' plans, because, again, to the extent that they think, on the basis of what their experience was the first time around, they want to make changes in those plans, that's what we're encouraging them to do. Our instructions from the start, and it goes back to the question Congressman Horn asked, from the start, in August, with all the meetings we had and all the guidance we gave, our instructions to the agencies was to take the legal guidance, take their earlier plans, and play it right down the middle.

We did not reach to go in one direction or another. We think that, and I continue to believe, this is too serious a matter to run the risk of being legitimately accused of having shut down more of the government than is legally necessary, and that decision has to be made, initially, by the agencies.

On the other hand, I understand, several of the members here today have said, there are a number of activities that people are unhappy about having shut down -- Congressman Horn talked about, he was unhappy that people could not go to the parks. Again, those aren't judgements we make, those are legal decisions that are required by the statute. And our role here is to simply apply the law as best we can.

REP. MORAN: I understand what you're saying. I do think, though, that they are judgements; they may be legally-oriented judgements, but it's still a judgement call. Another judgement call is with regard to when grants go out, because there is a certain amount of discretion, in terms of when grants are awarded. I would hope that the grants folk would be busy, right now, making sure that there is a minimal disruption. I don't think that they should be granting the whole year's funding level, if that is not the custom.

But, I would hope that those grants that could go out within a period between, say, December 10th and December 30th would go out on December 10th. I'm just suggesting that, and -- to cause minimal disruption out in the field with grantees, who don't need to -- I would think our objective would be to cause the least suffering possible, the least disruption, the least chaos.

Another area where I would think there might be value in some feedback, is those employees, who had to remain on the job, might have got a better sense of how many other employees and which employees were also necessary, given the work that had to be handled during that interim four-day period. I would think that that would result in some adjustment of the numbers of people furloughed, and who would get furloughed. Has there been any of that type of adjustment that has gotten back to you from any of the agencies?

MR. KOSKINEN: My understanding is the agencies have done, in some cases, very detailed reviews of the experience of the shutdown; we've encouraged them all to do that, not necessarily to plan for the 15th, but one of

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the things we hope to leave behind is more guidance and more easily-accessible materials, so that people don't have to reinvent the wheel, next time around. The last time OMB looked at shutdown plans, for instance, was 1985, and we think that we will leave behind, both at the overall level at OMB and the Justice Department, clear records of what happened, but we're encouraging the agencies to do the same thing. So I think we will get more efficient at this, although, again, as I say, in the long run, the bottom line is, you have to understand that in these situations, the Congress has made a decision not to fund the agencies. We do not have the funding, we do not have authority.

So, we are looking at narrowly-defined exceptions to keeping emergency activities going. It's not that anybody -- and that's why, as I say, the distinction non-essential/essential evaporates, as you listen to the comments made, across the board, about things that people think are very important that cannot be done because legally we have been not authorized to do them, and so the question really is, the only window in the statute is, what are the emergency exceptions for imminent threats to life or property. There's a significant amount of important work that gets done by the government, and if there's any positive to this shutdown, I think more and more Americans discovered that, contrary to some of the assertions made around about well, and nobody noticed, that there were significant amounts of activities that were not done, because in fact, the government had shut down.

REP. MORAN: I appreciate what you're saying, and I also support what you have been doing, but 60 percent of the federal government doesn't fall under the category of imminent threat to the safety and protection of property. I don't argue with the legal basis of what you're saying, but the interpretation is much broader than what is in the law. I prefer that interpretation; I support -- and I think the majority of the Congress would. But I think it's a valid point to make, that there is a certain amount of judgement and discretion involved here, and I would hope that we would continue to exercise that judgement and discretion and, as I suggest, minimize the disruption to peoples' lives.

So we're not just talking about federal employees; we're talking about the lives of American citizens, who pay their taxes and have a right to have that money spent in the way that they've come to expect, and should be able to.

MR. KOSKINEN: That's right. But again, with the chairman's comment -- will reverberate through the system, and as Mr. Munoz noted, every counsel in every department reminds all of the people making these judgements that it is in fact a statutory requirement with criminal penalties.

I know the chairman was not necessarily totally serious, but when you say shouldn't we provide prosecution for people who kept too many of people in X, Y or Z positions -- perfectly legitimate approach, but the answer is you can't -- there are judgements, but you have to understand, this is, as I told the agencies, this is not beanbag. This is actually serious matters that affect, as you say, life and property, that affect the interests of the public; that is one of those things we should bear in mind when we ask questions like -- and as others have suggested, that we could have a shutdown for 30, 60 or 90 days, and what difference would it make? And what it would difference make, it would bring home even more significantly, as I noted in my testimony, even after 10 to 14 days, the really catastrophic effects of talking about shutting down the government.

What we ought to do, we ought to not gratuitously reach out to create any more problems than we have to, but you have to understand, we're operating against a backdrop of the Congress not have providing authorization at all for any activities, except emergencies.

REP. MORAN: I understand the backdrop; I've read the legal analyses. I'm just suggesting we exercise as much good judgement as we're capable of, which is a lot of it, and we don't necessarily maximize our capacity for good judgement in every situation all the time.

I just have one quick question for OPM. You've got all the healthcare plans, FEHBP, that the open season is just closing, there's a lot of switching that's been going on this year because of the increase in premiums. Is there going to be any problem in getting those effected on time by OPM, if there is a shutdown on December 15th?

MR. HEUERMAN: No, there will be no impact, because, in terms of December 15th, OPM does have an appropriation, and so all of our employees will be working.

REP. MORAN: Okay. While the --

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MR. HEUERMAN: in addition, those employees --

REP. MORAN: I thought they come from the agencies first, but I guess they go directly to OPM, and you can make the changes necessary for those -- the agencies by whom the people are employed. MR. HEUERMAN: Yes, I believe that's the case.

REP. MORAN: I think you can. Okay.

Thank you.

REP. MICA: I thank the gentleman. I think we're getting a clearer definition here, Mr. Moran. I think that we can't jail the gardener, but we can jail the VA administrator who told the gardener, go to work.

We're narrowing the --

REP. MORAN: For those gardeners who may be watching this, I don't think you're likely to be incarcerated anytime soon. (Laughter)

REP. MORELLA: Three strikes and you're out.

REP. MICA: I yield to the gentlelady from Maryland for her patience.

REP. MORELLA: I just wanted to ask, perhaps Mr. Schroeder, I wondered if you might elaborate on the issue of the interruption of the private economy, what the implications are in a shutdown.

MR. SCHROEDER: Well, in trying to assess what government functions can legitimately stay in operation under the law when there's a lapse in appropriation, one of the cases you confront which raises this issue most starkly is the FAA air traffic controllers. So long as planes are flying, those individuals are obviously performing functions that are necessary to avoid imminent threats to the safety of human life. And as long as you make the assumption that they will stay operating, we believe there's a valid justification under the law for keeping people in that kind of situation at their posts, even when there's a lapse in appropriations.

It has been, from time to time, raised or speculated during prior shutdown experiences that the only justification under the law, with respect to the FAA, was to have them operate for whatever period of time it took them to safely land all the planes that were then aloft, so that after three or four hours, all the FAA employees in the various air traffic posts around the country, who didn't have appropriated funds, should walk off their jobs because they didn't any longer satisfy the emergency exception. We thought, and Attorney General Civiletti thought, and it's been the consistent interpretation of past administrations that in the situation of a short shutdown, it is legitimate to assume that private activity, over which the government doesn't have any direct legal control, will continue operation.

So, instead of sending out a warning to passengers all around the country, "Don't fly after the first three hours of shutdown because the FAA controllers aren't there," we've made the other assumption, that we should assume that that activity will keep going, and it was beyond the legal requirements of the statute to literally close all of the commercial and non-commercial air traffic in the country.

REP. MORELLA: How did you determine what federal contracts should be continued or held in abeyance during the shutdown -- obviously there's a tremendous impact on the private economy when we have a shutdown. I'm wondering how those determinations were made.

MR. SCHROEDER: Well, there again, the fundamental legal guidance that we provide relates to whether -- to drawing a distinction between contracts for which there is funding and contracts for which there are not.

REP. MORELLA: Right.

MR. SCHROEDER: Under normal appropriations practice and under the terms of the Anti-deficiency Act, where the funding is absent for the contract, there's no authorization for the agency to continue incurring obligations during a period of lapse of appropriation. If a contract is funded with multi-year or no-year or indefinite appropriations, then those contracts can continue.

REP. MORELLA: So, other than the FAA, purely on the basis of whether there is funding.

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MR. KOSKINEN: Excuse me?

REP. MORELLA: Except for the FAA, purely on the basis of whether or not there is an appropriation, whether there is any funding for it.

MR. KOSKINEN: That's right, with one small exception, and that is, it is possible that contractors could be performing excepted activities for emergencies: you may have building guard contracts or others where there may not be legal authority otherwise, as Mr. Schroeder said, to continue the contract, but the function that they're performing is an emergency function, and therefore you can continue -- you can incur that obligation going forward. But otherwise, in the absence of funding, obviously, those contracts terminate.

REP. MORELLA: Fine.

Thank you, Mr. Chairman.

REP. MICA: I thank the gentlelady, and also the ranking member and other colleagues for their participation today, and I want to also thank our witnesses.

First of all, we do have additional questions, Mr. Schroeder, Schroeder, we -- cover my base there with both pronunciations, but -- we have -- MR. SCHROEDER: I actually respond to either.

REP. MICA: Either one. You should hear what I have to respond to, sometime. (Laughter)

But, in any event, since we got your testimony late, we will have some additional questions, probably from both sides of the aisle.

Mr. Koskinen, OMB, if you could also send the subcommittee, as soon as you get that, any revised plans from the agencies, we'd appreciate that, so we have opportunity to review what you're reviewing.

And Mr. Heuerman, if you have any instances of overtime being paid, according to the memorandum which you issued, the subcommittee would also like that. We'll have some questions on that, and also if you intend to keep this guideline for paying overtime for work that's --

MR. HEUERMAN: I might just mention, in that regard, Mr. Chairman, that that guidance is the same guidance that had been issued back in 1986 and 1990, based upon the same statutory language authorizing retroactive pay, which talks about paying people on their standard rate of compensation.

REP. MICA: I think that might be something that we want to look at, but we will have additional questions. I appreciate your participation in the hearing as witnesses; this is a very serious business, government shutdown. This subcommittee doesn't have the authority or the charge to determine whether or not there will be a shutdown, but we certainly have the responsibility to see if there are instances where there are a shutdown, one, how we're prepared for it, two, what we've done in the past and what we're preparing for in the future, and also that we act in a responsible manner, both for the public who depend on these services and benefits and activities, and also fulfill our responsibility as members of Congress.

So, we thank you for your participation, and --

REP. MORAN: Mr. Chairman.

REP. MICA: Yes.

REP. MORAN: If I could just say one last word, I think that the impression has been given that we have been, of course, looking for, finding fault, because this was a hearing to determine how the shutdown was implemented. It would be appropriate for the last word to be one of congratulations to the gentlemen here, particularly in the agencies they represent. In particular, to Mr. Koskinen, who was responsible for the operation of the government shutdown from OMB -- he has the management section of OMB -- and really did do an outstanding job. I think by any reasonable measure, you performed with brilliance in a very challenging situation. So I would like to make that point.

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And, last thing, Mr. Chairman, I want to ask you publicly, do you think we could markup a bill that would enable federal employees to stay on the job, rather than stay off the job and get paid nevertheless?

REP. MICA: I think that that's one thing that we should consider, and also I think we'll have that opportunity to hear from you and other individual members who have suggestions. And there are some lengthy suggestions and detailed suggestions for some improvements in the process, so I hope that we can reconvene this subcommittee on that subject next week, and hopefully make the changes that are necessary in the law and, you don't have to be a political scientist to realize that there are in fact some tremendous differences of opinion, you know, with this Congress, this administration, with the new freshman class, to see that we could have more instances of what we experienced just a few weeks ago. So, we should be prepared for it, and we'll consider that legislation.

There being no further business to come before the subcommittee, this meeting's adjourned. (Bangs gavel.)
Thank you.

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