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THE RISE OF CONTINUING RESOLUTIONS

Greg Schmidt
&
Justin Dews

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Introduction

In the world envisioned by the drafters of the Congressional Budget and Impoundment Control Act of 1974, continuing resolutions would not exist. The Budget Committees would draft, and Congress would pass, a budget resolution; then the Appropriations Committees would draft, and Congress would pass, a dozen regular appropriations bills. But over the last four decades, as this process has been honored largely in the breach, the continuing resolution has grown to play a key, if partially episodic, role in the budget process. Simultaneously reflecting the breakdown of the budget process during times of deficits and divided government and serving as important tool for mitigating congressional dysfunction, in recent decades the unique features and various forms of the continuing resolution have played an continually minor and recurrently major role in the budget process and enabled other substantive legislation.

This paper seeks to shed light on the evolving role of continuing resolutions (CRs) and their implications for agency operations and the federal budget process. Part I provides a taxonomy of the modern CR, distinguishing between interim CRs and full-year CRs and breaking down the ingredients of the classic and modern CR. Part II provides a history of the CR over the last forty years, tracing the rise of substantive full-year CRs during the budget battles of the 1980s, their fall during the improving budget situation of the 1990s and the one-party control of government for much of the 2000s, and their recent rise as the Obama era has again presented a period of divided government and high deficits; throughout each period, interim CRs were a constant presence. Part III analyzes how the use of CRs has affected Congress, both in terms of process and outcome, and how the use of interim CRs has affected agencies. Part IV outlines potential changes to the budget process involving CRs, including

proposals to create “automatic” CRS to avoid government shutdowns and to shift towards biennial budgeting. Part V concludes.

I. The Role and Taxonomy of CRS

A. Role of CRS in the Budget Process

Article I, Section 9 of the Constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹ Under the process established by the Budget and Impoundment Control Act of 1974, such appropriations are made at the end of an annual process in which the House and Senate Budget Committees draft a resolution setting spending and revenue levels for the upcoming fiscal year, each house passes such a resolution, the House and Senate negotiate and pass a concurrent budget resolution, the House and Senate Appropriations Committees draft appropriations bills in line with that resolution, each house passes those bills, and the House and Senate negotiate and pass twelve regulation appropriations acts.

This process has several moving parts and deadlines, and in any given year delayed or missed steps are likely. In the event that Congress has not completed the regular budget and appropriations process by the end of the fiscal year on September 30, it can instead pass a CR by a floor vote in both houses in lieu of at least one of the twelve regular appropriations bills, appropriating funds based on the previous year’s levels for a defined period of time.

CRs serve several functions in the budget process. First, they avert a government shutdown by allowing federal agencies to continue to draw funds from the treasury even in the absence of a regular appropriations act. Second, they give Congress additional time to negotiate over the details of the budget en route to completion of the ordinary budget process and the

¹ U.S. CONST., Art. 1, § 9.

passage of twelve ordinary appropriations act. Third, they may take the place of regular appropriations act by setting spending levels for the remainder of the fiscal year.

B. Taxonomy of CRS

1. *Interim v. full-year*

As the preceding discussion suggests, CRS may take two very different forms. An “interim” CRS lasts for only part of a fiscal year, ranging from as short as a few days to as long as a few months.² Such legislation delays, but does not supplant, the regular appropriations process, giving Congress additional time to complete the regular budget process. A “full-year” CRS plays a very different role, appropriating funds for the entire fiscal year and obviating the need for regular appropriations legislation.³

2. *Standard components of a CRS*

Early CRS contained little more than a formula for continued appropriations levels, but the modern CRS has evolved to contain as many as six components. In contrast to the budget process laid out in the Congressional Budget and Impoundment Control Act of 1974, these six components are not laid out in statute; instead, they have evolved over time. These first four are the standard components of a CRS:

a. Coverage. First, a CRS specifies which activities are covered under its grant of continued appropriations.⁴ This is generally accomplished by reference to the legislation authorizing such activities.⁵

² CLINTON T. BRASS, CONG. RESEARCH SERV., RL34700, INTERIM CONTINUING RESOLUTIONS (CRS): POTENTIAL IMPACTS ON AGENCY OPERATIONS, CONGRESSIONAL RESEARCH SERVICE 1 (2010).

³ *Id.*

⁴ JESSICA TOLLESTRUP, CONG. RESEARCH SERV., F42647, CONTINUING RESOLUTIONS: OVERVIEW OF COMPONENTS AND RECENT PRACTICES 3 (2012).

⁵ *Id.*

b. Duration. Second, a CR specifies a date up to which budget authority is provided.⁶ For full-year resolutions, this date is September 30 of the fiscal year; interim resolutions set an earlier date by which Congress will either have to pass a regular appropriations act or another CR.

c. Funding rate. The third component specifies the funding level in two steps. First, the CR identifies a full-year funding level, most commonly by reference to the previous fiscal year's funding level⁷ (potentially with a percentage increase or decrease⁸). Second, the CR appropriates the percentage of that full-year funding level that corresponds to the duration of the CR.⁹ For example, for a program with a previous-year funding level of \$12 million, a two-month CR would generally appropriate \$2 million.

d. Purposes. Fourth, a CR will generally provide that funds can only be used for those purposes allowable under the previous year's appropriations act; this carries over any restrictions introduced in that act.¹⁰

3. *Special components of a CR*

The four components above represent the standard CR components, but Congress may also depart from these cross-cutting provisions to make exceptions to general funding formulas or to introduce legislative provisions.

a. Anomalies. Congress may choose to deviate from the cross-cutting provisions set out in one of the four components above for a particular account or activity.¹¹ For example, Congress might provide for full-year appropriations for a particular activity, appropriate greater

⁶ *Id.* at 5.

⁷ *Id.* at 6.

⁸ *See, e.g.*, P.L. 112-33 § 101(b) ("The rate for operations provided by subsection (a) [FY11 levels] is hereby reduced by 1.503 percent.").

⁹ TOLLESTRUP, OVERVIEW, *supra* note 4, at 6.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 8.

or lesser funding, or restrict funds from being used for a particular purpose.¹² Restrictions on purposes for which funds can be used are often referred to as “riders.”

b. Legislative provisions. While anomalies make modifications to the four basic components of a CR, legislative provisions depart entirely from the traditional CR structure to amend or introduce substantive provisions of law not directly germane to the appropriation of funds.¹³ Most prominently, the Comprehensive Crime Control Act of 1984, a significant revision of the U.S. criminal code, was attached to a Fiscal Year 1985 CR.¹⁴

The attachment of legislative provisions to CRs may result from two dynamics. First, because CRs are generally passed on the brink of a government shutdown, CRs represent “must-pass” legislation,¹⁵ and legislative provisions attached to them may receive comparatively little scrutiny. Second, House rules make it easier to attach legislative provisions to CRs than to regular appropriations bills. House Rule XXI, clause 2 bans legislative provisions from regular appropriations bills, but this rule does not apply to CRs.¹⁶ While the Senate rules do not feature this discrepancy, they do allow the Senate to amend legislative provisions attached to a CR in the House.¹⁷

¹² See, e.g., P.L. 108-309 § 114 (“Provided, That no funds shall be made available for the SNS to the Department of Homeland Security for under this joint resolution.”).

¹³ TOLLESTRUP, OVERVIEW, *supra* note 4, at 10.

¹⁴ *Id.*

¹⁵ W. Mark Crain & James C. Miller III, *Budget Process and Spending Growth*, 31 WM. & MARY L. REV. 1021, 1025-26 (1990); Neal Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993, 1020 n.10 (1990) (describing how Congress’s failure to follow procedures set out in Budget Act led to frequent need for President to sign last-minute continuing resolutions to avert a shutdown); SANDY STREETER, CONG. RESEARCH SERV., FL30343, CONTINUING RESOLUTIONS: LATEST ACTION AND BRIEF OVERVIEW OF RECENT PRACTICES 9 (2010).

¹⁶ TOLLESTRUP, OVERVIEW, *supra* note 4, at 10 n.24; see also JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R41634, LIMITATIONS IN APPROPRIATIONS MEASURES: AN OVERVIEW OF PROCEDURAL ISSUES (2011).

¹⁷ TOLLESTRUP, OVERVIEW, *supra* note 4, at 10.

II. History: Four Phases of the Modern Use of Continuing Resolutions.

The use of temporary appropriations measures of some form dates back to as far as the Fifth Congress in 1798,¹⁸ but in recent decades they have expanded dramatically in size and scope. Focusing on the period leading up to, and the decades since, the passage of the Congressional Budget and Impoundment Control Act of 1974, this Part will trace the rise, fall, and return of the full-year CR, and the ongoing use of interim CRs.

A. Before the Rise: Prior to FY1977

The CRs of the 1960s and 1970s were far closer to the half-page temporary appropriations bills of the Fifth Congress than the hundred-page legislation of today. CRs were modest bills, generally only a page or two, providing funding at a formulaic level.¹⁹ Perhaps for this reason, the Congressional Budget and Impoundment Control Act of 1974 made little mention of CRs, neither envisioning them as part of its process nor seeking to restrict their use.²⁰ Nevertheless, CRs were used during this period to provide full-year as well as interim appropriations. In Fiscal Years 1971, 1973, 1975, and 1976 (the Budget Act was not fully implemented until Fiscal Year 1977), Congress passed at least one full-year CR.²¹

During this period, lapses in funding were, in GAO's words, "the norm rather than the exception."²² Between FY 1962 and FY 1981, there were thirty-one such lapses, for a total of

¹⁸ GENERAL ACCOUNTING OFFICE, APPROPRIATIONS: CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES 14 (1986) (noting that the Fifth Congress "passed temporary or partial appropriations . . . , using half-page documents which were limited in scope"), *available at* <http://www.gao.gov/assets/150/144084.pdf>.

¹⁹ STREETER, LATEST ACTION, *supra* note 15, at 9; GAO, AUTOMATIC FUNDING, *supra* note 18, at 14.

²⁰ The Act referred to "continuing appropriations" twice, once to exempt continuing appropriation bills from the requirement that CBO prepare a report for all bills "providing new budget authority," § 308(a), and once to exempt continuing appropriations bills from the requirement that Congress "complete action on all bills and resolutions . . . providing new budget authority for the fiscal year" by the seventh day after Labor Day, § 309(1). 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601–688).

²¹ TOLLESTRUP, OVERVIEW, *supra* note 4, at 17.

²² GENERAL ACCOUNTING OFFICE, FUNDING GAPS JEOPARDIZE FEDERAL GOVERNMENT OPERATIONS 1 (1981).

291 days.²³ Executive branch officials during this period operated under the assumption that Congress did not intend for them to suspend all operations, and generally sought to “abide by the spirit of the Antideficiency Act” rather than literally avoid making any new funding commitments.²⁴ While practices regarding funding gaps varied from agency to agency, such lapses generally did impose additional costs and inefficiencies, but generally did not feature either the rhetorical stakes or substantive curtailing of government operations of the modern “shutdown.”²⁵

B. The First Rise: Fiscal Years 1977–88

1. *What happened: Growth in size and scope*

Over the next decade, CRS ballooned dramatically in size and scope. In size, CRS full-year CRS expanded from between one and four pages in Fiscal Years 1977–82 to between 19 and 391 pages in Fiscal Years 1983–87.²⁶ In scope, the number of regular appropriations acts for which these full-year CRS were substituting increased from one or two in Fiscal Years 1978–79 to between five and thirteen in Fiscal Years 1980–87.²⁷ Both these trends peaked with the full-year CRS for Fiscal Year 1988, which numbered 451 pages and substituted for all thirteen regular appropriations acts.²⁸ (See chart B.4.)

During this period, interim CRS generally remained in the single-digit-page range in length, with Congress passing a series of short-term CRS to avert shutdowns before passing a much longer full-year CRS.²⁹

²³ *Id.*

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RL32614, DURATION OF CONTINUING RESOLUTIONS IN RECENT YEARS 5 (2011).

²⁷ *Id.*

²⁸ *Id.* at 6.

²⁹ *Id.* at 10–11.

2. *How it happened: Changes to content of CRS*

The increased length of full-year CRS was the result of several new approaches to the drafting of full-year CRS. First, during this period Congress shifted from using a simple formula, which adopted the previous year's funding levels with a slight adjustment, towards either using more complicated formulas³⁰ or setting specific appropriations levels on an account-by-account basis.³¹ Second, Congress began making increasing use of "riders," restricting the use of funds for particular purposes which would have otherwise been authorized under the authorizing language.³² Third, Congress began inserting substantive legislative provisions into CRS, most notably by including the Comprehensive Control Act of 1985 in a Fiscal Year 1985 CRS.³³

The Fiscal Year 1988 CRS, which represented the apotheosis of these trends, came in for special criticism in President Reagan's 1988 State of the Union Address:

And then, along came these behemoths. . . . And the long-term continuing resolution — this one was 2 months late, and it's 1,057 pages long, weighing 14 pounds Congress shouldn't send another one of these. No, and if you do, I will not sign it.³⁴

That CRS contained a striking number of legislative provisions, many negotiated and drafted without review by the relevant authorizing committees. This CRS banned smoking on domestic flights shorter than two hours, let states raise the speed limit on rural highways, and extended the Clean Air Act, among other provisions.³⁵

3. *Why it happened: Reasons for growth of CRS*

Several dynamics fueled these trends. First, in 1980 and 1981 two Department of Justice opinions dramatically raised the stakes for the passage of CRS by requiring that agencies cease

³⁰ GAO, AUTOMATIC FUNDING, *supra* note 18, at 18.

³¹ TOLLESTRUP, DURATION, *supra* note 26, at 5.

³² GAO, AUTOMATIC FUNDING, *supra* note 18, at 17.

³³ *Id.* at 3.

³⁴ President Ronald Reagan, Address Before a Joint Session of Congress on the State of the Union (Jan. 25, 1988).

³⁵ Neal Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 399.

non-essential operations during a lapse in appropriations.³⁶ This was a significant departure from the patchwork of policies previously in place at federal agencies:

Never before had heads of agencies been required to seriously plan the tasks and identify the staff that would be needed to begin closing down an agency's activities. Faced with a drastic change in the status quo, Federal officials felt compelled to take action to indicate compliance with the Act, or at least to avoid giving the appearance that they were in violation of it.³⁷

Where once a failure to pass CRs to fill lapses in regular appropriations had been routine, this development cemented the status of CRs as must-pass legislation.³⁸ CRs thus became a tempting target for legislators looking to insert riders limiting the use of funds or to pass unrelated legislation provisions which would not otherwise survive the legislative process.

Second, the Congressional Budget and Impoundment Control Act of 1974 expanded the number of participants in, and public visibility of, the budget process, ending the Appropriations Committee's tight grip over the budget process.³⁹ The complexity of this process may have resulted in the greater use of CRs, allowing a greater share of members of Congress to insert their own provisions into budget legislation.⁴⁰

Third, the 1980s were a period of large deficits and divided government, simultaneously raising the salience of budget issues and making it more difficult to reach agreements on the budget. This dynamic made the prior two dynamics more severe: CRs were the rare piece of legislation guaranteed to achieve passage in some form in a period of divided government, and

³⁶ CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS, 3 (2011).

³⁷ GAO, FUNDING GAPS, *supra* note 22, at 19.

³⁸ STREETER, LATEST ACTION, *supra* note 15, at 9, 14.

³⁹ See David W. Casazza & Greg Schmidt, *The History of the Congressional Appropriations Process: 1789–2014* 20–26 (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. ____, 2014).

⁴⁰ GAO, AUTOMATIC FUNDING, *supra* note 18, at 20; Crain & Miller, *supra* note 15, at 1025–26 (1990) (describing increasing use of full-year CRs in 1980s and how this was inconsistent with Congress's goals in passing Budget Act).

partisan disagreements made passage of a budget resolution and ordinary appropriations acts more difficult.

C. The Temporary Fall: Fiscal Years 1989–2006

1. *What happened: CRs fade in length and usage*

After a decade of growth to consume the entire federal budget process and portions of the substantive legislative process, this sort of large-scale use of CRs rapidly faded. From Fiscal Year 1989 to Fiscal Year 2006, Congress passed only one full-year CR, an eight-page bill funding Foreign Operations for Fiscal Year 1992.⁴¹ Short-term CRs continued to be used frequently,⁴² but these were generally short bills extending appropriations levels and not including extensive conditions or legislative provisions.

Instead, CRs were used primarily to defer passage of the regular appropriations acts by a few months. During the Clinton Administration (Fiscal Years 1994 through 2001), the use of interim CRs extended to an average date of November 28, two months into the regular budget cycle.⁴³ During the Bush Administration (Fiscal Years 2002 through 2009, with the exception of Fiscal Year 2007), the use of interim CRs extended to an average date of January 19, three and a half months into the fiscal year.⁴⁴ (See chart B.6.)

2. *Why it happened: Reasons for decreased role of CRs*

The Clinton years, of course, are hardly remembered as times of blemish-free budget tranquility.⁴⁵ But several dynamics led to the avoidance of the CR excesses of the 1980s.

⁴¹ STREETER, LATEST ACTION, *supra* note 15, at 10.

⁴² The exceptions are Fiscal Years 1989, 1995, and 1997, when Congress did not pass a single CR. TOLLESTRUP, DURATION, *supra* note 26, at 12.

⁴³ *Id.* at 12–13 (calculations presented here are based on this data).

⁴⁴ *Id.*

⁴⁵ See, e.g., Robert D. Hershey Jr., *Federal Government Starts Another Shutdown*, N.Y. TIMES, Dec. 16, 1995.

First, from Fiscal Years 1989 through 1995, a series of multi-year deficit agreements set overall spending targets and provided for a diverse set of enforcement mechanisms, narrowing the scope of conflict over appropriations measures and moving such discussions back into the regular budget process.⁴⁶ While the extensive requirements of the formal budget process could not always be completed in time, CRs were used to allow time to complete negotiations rather than to bypass the process itself.

Fiscal Year 1996, of course, featured extensive conflict over appropriations levels and two government shutdowns, largely a result of conflict between the Democratic President and a now-Republican Congress seeking to make its mark on the federal budget. But rather than return to Reagan-era style full-year CRs, negotiations featured a series of short-term CRs, two lapses in funding, and an eventual omnibus appropriations measure.⁴⁷

In the late 1990s, multi-year deficit agreements combined with the improving deficit outlook prompted Congress and the President to return to budgeting via regular appropriations acts, although Congress began making greater use of omnibus regular appropriations bills, combining bills together to speed passage and reduce opportunities for floor amendments or vetoes.⁴⁸

There is relatively little commentary on the reasons why CRs followed this pattern in the Bush years, but it is plausible that the uniform Republican control of Congress from 2003 through 2007 eased the passage of regular appropriations acts. Additionally, the Bush Administration's use of supplemental appropriations to fund the Iraq and Afghanistan wars may have moved such conflicts out of the regular appropriations process and avoided a return to protracted budget conflict and CR budgeting.

⁴⁶ STREETER, LATEST ACTION, *supra* note 15, at 10.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 11.

Fiscal Year 2007, the first budget year of the Bush years with unified Democratic control of Congress, presented a dynamic of divided government during a time of high deficits, and the result was the first full-year CR since Fiscal Year 1992 and, at 53 pages, the longest CR since Fiscal Year 1988.⁴⁹

D. The Return: Fiscal Years 2007–14.

1. *What happened: resurgence of CRs*

Fiscal Year 2007, which featured the first full-year budget measure passed after the 2006 Democratic takeover of Congress, represented an anomaly for the Clinton and Bush years, as Congress passed the longest CR since the 1980s and the first full-year CR since Fiscal Year 1992. The appropriations process would follow its more regular form for Fiscal Years 2008 through 2010, but Fiscal Year 2007 would prove to be a sign of things to come.

Starting in Fiscal Year 2011, with the federal government facing large deficits and a newly elected Republican Congress vowing to rein those deficits in, CRs began to again play a greater role in the federal budget process. In Fiscal Years 2011 and 2013, Congress did not pass a single regular appropriations act, instead passing interim CRs lasting, respectively, until mid-April of 2011⁵⁰ and late March of 2013,⁵¹ followed by full-year CRs. In 2012 and 2014, Congress returned to the Clinton-Bush-era practice of passing omnibus regular appropriations acts after interim CRs, although the Fiscal Year 2014 budget featured a sixteen-day lapse in appropriations.⁵²

⁴⁹ TOLLESTRUP, DURATION, *supra* note 26, at 11, 15.

⁵⁰ Library of Congress, Status of Appropriations Legislation for Fiscal Year 2011 (last visited Apr. 22, 2014), <http://thomas.loc.gov/home/approp/app11.html>.

⁵¹ Library of Congress, Status of Appropriations Legislation for Fiscal Year 2013 (last visited Apr. 22, 2014), <http://thomas.loc.gov/home/approp/app13.html>

⁵² Library of Congress, Status of Appropriations Legislation for Fiscal Year 2012 (last visited Apr. 22, 2014), <http://thomas.loc.gov/home/approp/app12.html>; Library of Congress, Status of Appropriations Legislation for Fiscal Year 2014 (last visited Apr. 22, 2014), <http://thomas.loc.gov/home/approp/app14.html>.

The Fiscal Year 2011 full-year CR closely resembled the “behemoth” CRs of the 1980s, covering all twelve appropriations acts and numbering ninety-eight pages.⁵³ This CR contained the full text of the Defense Appropriations Act, and addressed the other eleven appropriations bills with formulas and anomalies.⁵⁴ The Fiscal Year 2013 full-year CR, similarly, grew to 240 pages, containing extensive anomalies and appropriating specific amounts across accounts and agencies.

2. *Why it happened: Divided government and high deficits*

The return of lengthy full-year CRs after their twenty-year absence can be explained by the confluence of two dynamics. First, as in the 1980s, the President and at least one house of Congress were of opposite parties, and as in Fiscal Year 1996 a newly elected congressional majority was eager to make its mark on the federal budget. Fiscal Years 2007 and 2011 both featured a newly opposition Congress facing off against a President used to working with a Congress of his own party. Second, as in the 1980s, large budget deficits raised the level of budgetary conflict and made it harder for all parties to be satisfied with a budget produced by the regular process. Instead, conflict over which spending to prioritize and which to cut created gridlock within the ordinary budget process, forcing a return to budgeting by CR.

III. Consequences & Implications of Use of CRs

A. Inefficiencies of uncertain budgeting

The use of interim CRs to delay finalization of yearly appropriations levels creates a great deal of uncertainty and inefficiency in agency management. Notably, this concern applies only to the use of *interim* CRs; for the purposes discussed in this section, either a regular appropriations bill or a full-year CR serves to set a year-long budget.

⁵³ TOLLESTRUP, DURATION, *supra* note 26, at 5.

⁵⁴ *Id.*

1. *The data: consistent delays in finalization of budget*

Between Fiscal Years 1977 and 2014, Congress approved final appropriations for a fiscal year on an average date of December 28 — when nearly one quarter of the fiscal year had already passed.⁵⁵ Such delays in finalizing an annual budget, either via regular appropriations acts or a full-year CR, have been a constant feature of the post-1974 Budget Act federal budget process, with an average date of January 1 for the Reagan years, December 7 for the H.W. Bush years, November 18 for the Clinton years, January 13 for the W. Bush years, and February 12 for the Obama years.⁵⁶ (See chart B.6.)

2. *The problem: managing an unpredictable budget*

As discussed above, in an interim CR Congress both sets a yearly level and appropriates the portion of that amount that corresponds to the period covered by the CR. For example, a two-month CR would appropriate \$2 million for an account with an annual level of \$12 million. But because this rate is neither certain for the rest of the year nor sufficient to cover accounts that generally pay out a larger share of their funds earlier in the fiscal year, agencies often are faced with difficult choices.⁵⁷ In recent years, for example, the FBI and FDA have delayed hiring and training staff in order to ensure that funds were available for their continued employment.⁵⁸ Other agencies have delayed contracting, postponing such decisions to later in the fiscal year.⁵⁹ Discretionary grant programs, which are generally awarded later in the fiscal year, are comparatively less affected, but interim CR periods that extend beyond mid-February have

⁵⁵ Author's analysis of data presented in TOLLESTRUP, *DURATION*, *supra* note 26, at 10–16; and Library of Congress, *supra* notes 50–52.

⁵⁶ *Id.*

⁵⁷ BRASS, *POTENTIAL IMPACTS*, *supra* note 2; GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-879, *CONTINUING RESOLUTIONS: UNCERTAINTY LIMITED MANAGEMENT OPTIONS AND INCREASED WORKLOAD IN SELECTED AGENCIES* (2009).

⁵⁸ GAO, *UNCERTAINTY*, *supra* note 57, at 12–13.

⁵⁹ *Id.* at 14.

caused HHS and the Veterans Health Administration to delay announcement and award dates and to compress application timelines.⁶⁰

Other agencies have turned to using a series of short-term contracts during periods of interim CR budgeting, creating unpredictability for government contractors and increasing the work of agency staff negotiating and overseeing contracts.⁶¹ In general, agencies reported that the unpredictability of interim-CR budgeting impeded effectively planning, especially when Congress ultimately appropriated more or fewer funds than expected.⁶² Additionally, interim CR budgeting frequently forces agencies to prepare for the possibility of a government shutdown, incurring additional costs and delays.

3. *Congressional and OMB efforts to mitigate*

Congress will often write anomalies into CRs for programs that will be particularly negatively affected by operating under a series of interim CRs. Such anomalies may appropriate a higher amount than would be appropriated by proportional formula, may provide full-year appropriations for specific programs, or may authorize new activities not authorized in the previous year.⁶³ Between Fiscal Years 1999 and 2009, Congress tended to insert a larger number of anomalies into interim CRs as they extended further into the fiscal year.⁶⁴

OMB may also manage the apportionment process to allow an agency to spend a greater share of funds available to a program earlier in the CR period, but this apportionment is still limited to the amount of funding authorized by Congress for the interim CR period.⁶⁵

B. Additional vehicles for legislation

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 16–17.

⁶² *Id.* at 22.

⁶³ *Id.* at 10–11.

⁶⁴ *Id.* at 10 fig.3.

⁶⁵ *Id.* at 24.

While CRs are generally seen as a reflection of congressional gridlock, they also offer a shortcut *through* gridlock, with more CRs emerging as vehicles for must-pass legislation precisely during times when Congress, or Congress and the President, are at unusual levels of conflict. This is especially the case when multiple CRs are being passed extending deep into a fiscal year, offering continuing opportunities for legislative vehicles. Unlike regular appropriations bills, which are subject to extensive procedural hurdles and rules, congressional leadership and the White House may be able to use CRs to insert legislative language they would otherwise not be able to see through the legislative process. This has taken a variety of forms.

1. *Extending program authorizations*

Least controversially, Congress often will use CRs to extend the authorization of a program into an additional fiscal year, even though the program's authorizing language may have authorized appropriations for a shorter period.⁶⁶ This is barely seen as controversial, although it deserves note that this two-step may make it easier for members of Congress to create ongoing pet programs. They need only survive the scrutiny of the authorizing and appropriations process once, for a program that is nominally time-limited, and then can work through the relatively underscrutinized CR process to ensure continued appropriations.

2. *Use of CRs to change program conditions or insert substantive legislation*

More controversially, Congress may use CRs to attach riders to programs changing the substantive purposes of the program or restricting funds from being used in certain ways. Again, this is a way of bypassing the traditional authorizing process, through which the substantive purposes of a program are meant to be laid out. This tool can add teeth to Congress's oversight powers, enabling it to respond to agency actions that are consistent with the letter but not spirit of

⁶⁶ STREETER, LATEST ACTION, *supra* note 15, at 4 (describing use of a recent CR to extend the authorization of a program into an additional fiscal year).

an authorization, but it can also unproductively disrupt the balance of powers by inhibiting agencies from exercising executive discretion in designing and implementing programs.⁶⁷

CRs tend to make such substantive legislating possible for several reasons. First, House Rules prohibit legislative provisions or unauthorized appropriations in regular appropriations bills,⁶⁸ but as CRs are not regular appropriations bills these rules do not apply to them.⁶⁹ While Senate rules do not contain this same discrepancy,⁷⁰ the Senate has leeway to amend substantive legislative provisions introduced in the House. Additionally, the must-pass nature of CRs allows the insertion of language that might face public opposition were it vetted through the normal committee process rather than through the comparatively small group controlling the drafting of a CR.

For example, a Fiscal Year 2011 interim CR passed on December 22, 2010 included a short but controversial provision that was inserted and passed with little public scrutiny.⁷¹ In September of that year, the Ninth Circuit had struck down a Department of Education regulation allowing alternatively certified teachers (such as though placed through the Teach For America program) to count as “highly qualified” for purposes of compliance with Title I funding requirements.⁷² The December interim CR included language incorporating the Department’s regulation and rendering moot the Ninth Circuit decision.⁷³ The decision sparked some after-the-fact controversy, as civil rights and disability groups opposed to the Department’s regulatory

⁶⁷ Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 88-89 (2006) (arguing that Congress attaching appropriations riders disrupts separation of powers).

⁶⁸ House Rules XXI, cl. 2 & XXII, cl. 5

⁶⁹ House Rules § 1044, Points of order on general appropriation bills generally.

⁷⁰ Senate Rules XVI.

⁷¹ Alexander Russo, *Left Out of No Child Left Behind: Teach for America’s Outsized Influence on Alternative Certification*, AMERICAN ENTERPRISE INSTITUTE: FUTURE OF AMERICAN EDUCATION PROJECT (2012).

⁷² *Renee v. Duncan*, 623 F.3d 787 (9th Cir. 2010).

⁷³ Russo, *supra* note 71, at 12–13.

definition spoke out against it.⁷⁴ But as a recent report by the American Enterprise Institute reports, with the backing of the Obama White House and key members of Congress and staff in the congressional leadership and relevant authorizing committees, the provision was added to the anomalies list, and passed, with little public scrutiny.⁷⁵

C. Effects on the deficit

Under the regular budget process, decisions around spending levels are meant to be worked out far in advance via the budget resolution; the Appropriations Committees are then to undertake a deliberate exercise of assessing which programs should receive greater or lesser funding up to that level; and the whole House or Senate votes on regular appropriations bills under rules that limit amendment. Under CR budgeting, this carefully prescribed process is backloaded and concentrated, with last-minute decisions around spending levels made as a result of high-stakes negotiations, and with individual program levels adjusted up or down often based solely on their previous-year level.

It is difficult to assess the effect of the use of CRs on the budget deficit, as they may be as much a symptom of deficits and congressional dysfunction as a cause of them. Across all years Fiscal Year 1977 through Fiscal Year 2014, the use of CRs in a fiscal year does not appear to have a statistically significant relationship to the size of deficit as a percentage of GDP (“deficit”). There is not a statistically significant relationship between deficit and (i) the use of full-year CRs (P=0.195; n=38) or (ii) the number of days of the fiscal year under an interim or full-year CR (P=0.105; n=38). There may, however, be a statistically significant relationship between the deficit in the *previous* fiscal year and the use of CRs in the subsequent fiscal year. This relationship is significant for both (i) the use of full-year CRs in a fiscal year (P=0.007*;

⁷⁴ *Id.* at 13.

⁷⁵ *Id.* at 11–13.

n=37) and (ii) the number of days of the fiscal year under an interim or full-year CR (P=0.006*; n=37).⁷⁶ (See table B.8.)

Considering whether the federal government was under unified partisan control (same party controlling the White House and both Houses of Congress) or divided partisan control (lack of unified partisan control for at least part of the period when CRs or regular appropriations bills were passed for a fiscal year) may shed additional light. Looking solely at years of unified government, there was not a statistically significant relationship between the deficit in the previous fiscal year and either (i) the use of full-year CRs in the subsequent fiscal year (P=0.352; n=10) or (ii) the number of days of the subsequent fiscal year under an interim or full-year CR (P=.0331; n=10). On the other hand, looking solely at years of divided government, there is a statistically significant relationship between the deficit in the previous fiscal year and both (i) the use of full-year CRs in the subsequent fiscal year (P=0.006*; n=27) and (ii) the number of days of the subsequent fiscal year under an interim or full-year CR (P=0.006*; n=27).

These data suggest a potential connection between divided government, deficits, and the use of CRs, but given the low R-squared values (see table B.8) and the limitations of this analysis, which looks only at the variables identified and does not control for other potential independent variables, further statistical analysis would be necessary to draw final statistically valid conclusions.

D. Effects on the budget process

One effect of the use of CRs is a greater role for House and Senate leadership in the budget process, as spending levels are being set in high-level negotiations at the last minute, and CRs are being drafted quickly and with little deliberation or scrutiny compared to the regular Appropriations Committee processes. Throughout American history, the budget process has

⁷⁶ * indicates statistical significance at a 95% confidence level.

featured struggle between House and Senate leadership and Appropriations Committee chairs or control of the budget process,⁷⁷ so House and Senate leadership may welcome a dynamic in which they exercise greater control of the budget process. Similarly to the shift from the Appropriations Committee to leadership, in the executive branch the shift to budgeting by CR may result in Presidential negotiations with House and Senate leadership taking precedence over budget requests developed by agencies often over a year earlier.

The rhythm of frequent interim CRs may provide regular vehicles for moving must-pass provisions that congressional leadership or others close to the process (including the White House) would prefer not to have face significant scrutiny. An analysis of a recent CR, the fourth Fiscal Year 2011 CR, suggests that these bills have been used to pass measures that might otherwise prompt significant debate (see full walkthrough at Appendix A). In addition to the provisions related to Highly Qualified Teachers discussed above, the CR established a two-year pay-freeze for all federal civilian employees — a significant change beyond the ambit of the traditional CR.⁷⁸ President Obama had proposed such a freeze⁷⁹ and Congress was under unified Democratic control, but given that federal employee unions would likely fiercely oppose such a change it may have been advantageous to both the White House and congressional leadership to use a quieter fast-moving CR rather than pass this pay freeze through separate legislation.

Of course, the fact that congressional leadership derive some benefits from CR budgeting does not mean they desire such a system or consciously brought it about; they may simply derive some incidental benefits from a breakdown in congressional budget process brought about by other factors. And the majority of provisions added to CRs appear to be genuine anomalies directed at ameliorating the challenges of CR budgeting: a 2009 GAO analysis found that over

⁷⁷ Casazza, *supra* note 39.

⁷⁸ Continuing Appropriations and Surface Transportation Act of 2010, § 147, 124 Stat. 3518 (2010).

⁷⁹ *Fact Sheet: Cutting the Deficit by Freezing Federal Employee Pay*, THE WHITE HOUSE (Nov. 29, 2010).

two-thirds of the anomalies enacted since 1999 altered funding for a program or extended expiring program authority, noting that other anomalies included adding restrictions to the use of funds or funding activities not previously authorized (GAO's example of this was the relatively uncontroversial funding of a presidential transition).⁸⁰

Even the relatively chaotic practices of CR budgeting requires some process for disciplining what provisions are added to a CR, but compared to the regular appropriations process there is little public scrutiny around the process of how members of Congress or the White House ensure that their priority legislative changes are included in a CR. Keith Hennessey, the former Director of the National Economic Council under President George W. Bush, has written that the anomalies included on a CR are a result of negotiations between OMB and the Appropriations Committee:

While a CR is supposed to be a simple extension of last year's funding allocations and policies, there are always a few handfuls of *anomalies* justified by particular conditions. For instance, it doesn't make sense to continue the Census funding at the 2010 levels into 2011, because we're not redoing the Census next year. The appropriators and OMB will usually negotiate this list of anomalies, in which everyone agrees that only technical corrections like this one are allowed. Policy changes that one or another party wants are excluded.⁸¹

Although policy changes do seem to be included in CRs, OMB and the Appropriations Committee may face strong pressure to not take on excessive or significant policy changes for fear of attracting greater scrutiny to their role or of introducing provisions that attract controversy and endanger passage of the CR.

Finally, the use of CRs, especially those setting appropriations levels by formula, may be to introduce a status quo bias in the relative allocation of funds amount programs. Rather than

⁸⁰ GAO, UNCERTAINTY, *supra* note 57, at 10–12.

⁸¹ Keith Hennessey, *What is a continuing resolution?*, KEITH HENNESSEY, Sep. 29, 2010, <http://keithhennessey.com/2010/09/28/cr/>.

carefully weighing which programs should grow or be cut, across-the-board formulas (whether they increase or decrease funds) may not reflect agency or public needs, and the last-minute nature of CRs makes more nuanced adjustments difficult.

IV. Potential Reforms

A. Restricting legislative provisions in House CRs

House rules provide that a “provision changing existing law may not be reported in a general appropriation bill,” and that “an amendment proposing a limitation not specifically contained or authorized in existing law for the period of the limitation shall not be in order during consideration of a general appropriation bill.”⁸² This rule has been interpreted not to cover CRs, because they are not general appropriations bills.⁸³ The House could promote passage of “clean” CRs, or those without riders changing the underlying authorization of a program, by extending the applicability of this rule to CRs, either to all CRs or only to full-year CRs, which effectively take the place of general appropriations bills.

Such a change would marginally reduce the desirability to congressional leadership of budgeting by CR, moving substantive lawmaking away from secret and whole-House legislation that they control and returning power to the authorizing committees to determine substantive program conditions. This change would also promote transparency and public accountability in the rules governing how federal funds are spent. But such a change would be unlikely to lead to a decline in the use of CR budgeting, as there is little evidence that congressional leadership manipulates the budget process towards CRs; it appears more likely that the use of CR budgeting is a result of difficulties of following the normal budget process during times of divided government and deficits.

⁸² House Rule XXI, clause 2.

⁸³ House Rules § 1044, Points of order on general appropriation bills generally.

B. Giving agencies greater authority to transfer funds under CRs

During negotiations over the Fiscal Year 2011 budget, the Obama Administration sought greater authority to move funding between accounts as a mechanism for dealing with the uncertainties of operating under long-term interim CRs.⁸⁴ This proposal received a cold reception even from the President's congressional allies,⁸⁵ but it bears consideration as a way of dealing with two problems of CR budgeting.

1. *Response to difficulties of short-term budgeting*

First, Congress could authorize some degree of transfer authority amongst accounts as a way of mitigating the inefficiencies of agencies operating under short-term interim CRs. (Congress provided such authority to the Transportation Security Administration in the Continuing Appropriations and Surface Transportation Act of 2010.⁸⁶) An agency would be able to transfer funds from a program (for instance, a discretionary grant program) that tended to expend funds only later in the fiscal year, and into a program (for instance, an annual contract) that tended to expend funds earlier in the fiscal year. Were Congress to not continue funding both programs at the level funded in the CR, however, it might not be possible to transfer funds back, meaning cuts affected programs other than those Congress intended.

2. *Response to CRs not reflecting changing public needs*

More ambitiously, in the event of a full-year CR, Congress might allow agencies greater authority than they would have under a regular appropriations act to transfer funds between accounts. This would recognize the reality that under a CR, Congress has not completed its task of carefully assessing spending levels across all accounts in light of anticipated needs for the

⁸⁴ David Rogers, *Barack Obama's deals may leave liberals behind*, POLITICO, Dec. 3, 2010, <http://www.politico.com/news/stories/1210/45944.html>.

⁸⁵ *Id.*

⁸⁶ Continuing Appropriations and Surface Transportation Act of 2010, § 156, 124 Stat. 3518 (2010).

coming year, and that the budgetary autopilot of formulaic full-year CRs, even with the use of anomalies, will not reflect shifting public needs or agency assessments of which programs are effective and which are not.

Adopting this as a general rule for agencies operating under full-year CRs might create an incentive for Congress to complete the regular budget process, lest it see its control over agency spending priorities decline in a full-year CR year. Of course, the very undesirability of that outcome for Congress would likely make passage of such a reform difficult. And such a reform would create a corresponding incentive amongst agencies and the President to encourage CR budgeting so as to gain additional flexibility over federal spending. For these reasons, such a proposal would most likely to be passed, and to have minimal perverse incentives, if it granted only limited transfer authority.

C. Creating automatic CRs in event of lapse in appropriations

1. *Proposals*

Recent budget battles have prompted renewed attention to proposals for an “automatic CR” mechanism, under which agencies would receive an automatic level of continuing funding in the event of a lapse in appropriations. Such proposals have been discussed as early as the 1980s, when GAO prepared an analysis of potential automatic CR approaches, and have recently taken the form of Republican Senator (and former OMB Director) Robert Portman’s End Government Shutdowns Act of 2013.⁸⁷

An automatic CR would take the form of a one-time passage of legislation that would establish the general background rule that during a lapse in appropriations, some level of funding would automatically kick in for some period of time.⁸⁸ The funding level could be based on the

⁸⁷ S. 29, 113th Cong. (2013).

⁸⁸ GAO, AUTOMATIC FUNDING, *supra* note 18, at 33.

current appropriations level, on the lower or higher of the President's budget or appropriations bills passed by either House or Appropriations Committee, or a reduction in funding level from the current appropriations level, possibly with further reductions over time.⁸⁹ The End Government Shutdowns Act of 2013 would take this last approach, providing for a 1% reduction in funding levels after 120 days, followed by a further 1% reduction in funding levels every 90 days.⁹⁰

2. *Addressing perverse incentives*

Changing default rules, of course, changes incentives. In recent years, Congress has only passed budget measures against the backdrop of an imminent government shutdown or a breach of the debt ceiling; the soft landing of a permanent automatic CR might make it difficult to assemble congressional majorities for any kind of appropriations measures. This inertia might turn to obstruction were one party's budgetary preferences addressed by the automatic measure. The automatic cuts envisioned by the End Government Shutdowns Act of 2013 might lead Republicans, who generally favor reductions in discretionary spending, to decline to pass a substitute CR or regular appropriations bill until some of their policy preferences had been achieved, and their bargaining position strengthened, by the ongoing cuts.⁹¹ The right balance — one that keeps government agencies open but doesn't establish budget levels that one side will want, through inaction, to lock in — would be difficult to achieve given the imprecise nature of a permanent background rule.

Weighing many of these considerations, the GAO report reflected that “[t]he ideal solution to the problem of continuing resolutions and funding gaps would be the timely

⁸⁹ *Id.* at 35–36.

⁹⁰ S. 29, 113th Cong. (2013).

⁹¹ Richard Kogan, *Portman Proposal for Automatic Continuing Resolutions Would Impede Appropriations Process and Could Produce Very Deep Funding Cuts*, CENTER ON BUDGET AND POLICY PRIORITIES (2013) (criticizing Senator Portman's proposed legislation as placing government on irreversible autopilot toward steep cuts).

enactment of the 13 regular appropriations levels,” and declined to make a formal recommendation.⁹² But if forced to choose amongst automatic-CR options, GAO recommended an automatic CR that carried over the previous years appropriations level, concluding that this was the proposal that introduced the fewest perverse incentives.⁹³

3. *Benefits to nature of CRs*

While these proposals are generally discussed in the context of addressing the problem of government shutdowns, they might also remedy some of the problems of CRs. First, under an automatic-CR background rule, each interim or full-year CR would no longer be must-pass legislation, as the worst case scenario would shift from a government shutdown to an automatic CR that carried over prior appropriations levels. Second, an automatic-CR background rule would reduce somewhat the unpredictability of a period of multiple interim CRs, as agencies would operate under a consistent level until the point when a full-year CR or regular appropriations bill was passed. On the other hand, the autopilot nature of automatic CRs might push back the date on which full-year appropriations measures were passed.

4. *Less ambitious approach*

A more modest automatic-CR proposal might provide for an automatic CR that lasted for only a short period (ten days, for instance) after a lapse in appropriations; if a CR or regular appropriations bill was not passed by the end of that ten-day period, a government shutdown would result. This would provide some insulation against the risk of government shutdown while preventing Congress from relying on an automatic CR on a prolonged basis.

D. Role of CRs in multi-year budgeting

⁹² GAO, AUTOMATIC FUNDING, *supra* note 18, at 44.

⁹³ *Id.*

Congress's difficulty in following the formal budget process each fiscal year has spurred recommendations for a shift to biennial budgeting,⁹⁴ furthered by Congress's recent passage of a two-year budget deal.⁹⁵ In some ways, the Obama years have already featured a sort of biennial budgeting, with the full-year CRs of Fiscal years 2011 and 2013 keying in part off the regular appropriations bills of Fiscal Years 2010 and 2012. With Congress having passed an omnibus regular appropriations bill for Fiscal Year 2014, it is plausible that at least some of the Fiscal Year 2015 appropriation bills will take the form of a full-year CR making modifications to FY 2014 appropriations levels, rather than Congress passing all twelve regular appropriations bills through the regular process.

It is difficult to characterize Fiscal Years 2011 and 2013 as any sort of exemplars of a new budget process. Agencies operated without a final budget for 197 and 177 days — over or nearly half the fiscal year, respectively — and the federal government came within minutes of a shutdown in Fiscal Year 2011. But these years may suggest an alternative. If Congress decided earlier in the process to pass a full-year CR — rather than doing so as a last resort after months of repeatedly failing to pass regular appropriations measures — it could avoid both the difficulties of seeking to go about the full budget process each year and the delays and inefficiencies imposed on agencies of keeping them uncertain of their funding levels for much of the fiscal year. The result of the Congressional Budget and Impoundment Control Act's establishment of an ideal process has more often been gridlock and delays than flawless execution,⁹⁶ so Congress committing to less ambitious, but more achievable, budget processes through a full-year CR passed at the start of a fiscal year, keyed off regular appropriations

⁹⁴ Stuart Young & Drew McLelland, *Implementing Biennial Budgeting for the U.S. Congress* (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 20, 2006).

⁹⁵ Bipartisan Budget Act of 2013, Pub. L. No. 113-67.

⁹⁶ Devins, *supra* note 15, at 1020 n.10.

measures passed in the previous fiscal year, might cure some of the problems of the recent budget process: using fewer interim CRS would impose fewer costs and delays, and would reduce opportunities for nontransparent passage of substantive legislation (although the latter may have its benefits).

Such an alternate-year approach would prevent the sort of thorough, nuanced adjustments to federal appropriations that ideally results from careful vetting of regular appropriations bills by the Appropriations Committees. This could be remedied in part by establishing a background rule under which agencies have greater authority to transfer funds between accounts during years governed by full-year CRS, such that agencies can make the sort of fine-tuning adjustments not being made by the Appropriations Committees.

V. Conclusion

Over the last forty years, CRS have played a significant role in federal budgeting, with interim CRS covering one-fourth of the typical budget cycle and full-year CRS frequently substituting for the regular budget process during the Reagan and Obama years of high deficits and divided control of government. Recent years have featured a decline in annual deficits, but given the long-term pressure that rising entitlement spending is likely to place on discretionary spending, CRS are likely to play a major continued role in the mid- and long-, if not short-, term.

While CRS often reflect a breakdown in the formal budget process, and their role in pushing final spending levels for a year months into a fiscal year often impedes good governance, they provide a safety valve to avoid the consequences of government shutdown and provide an alternative to a complex budget process that Congress often has been unable to follow during times of divided government and high deficits. If used properly, CRS might have a role to play in a more manageable budget process.