

MEMORANDUM

TO: Professor Robert S. Kravchuk

FROM: William Nicholas

DATE: April 22, 2019

RE: An Analysis of Automatic Continuing Resolutions in the U.S. Congress

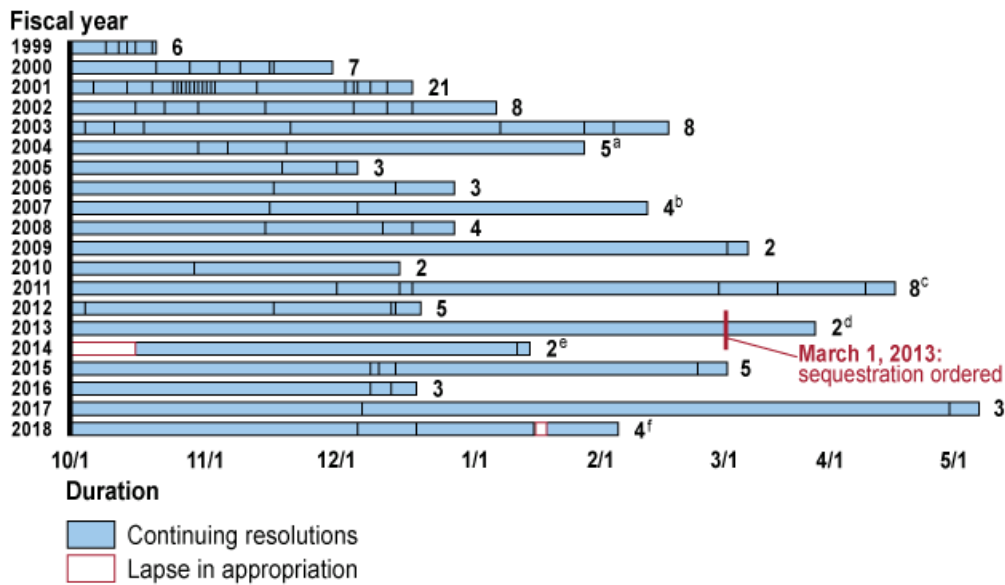
In opposition to the December 2018 – January 2019 shutdown of the U.S. federal government, lawmakers from the Senate Republican caucus proposed S.104, the “End Government Shutdowns Act.”ⁱ This bill intends to enact a mechanism for Automatic Continuing Resolutions (ACRs), maintaining Congressional appropriations from the prior fiscal year for any of the twelve appropriations bills not passed by October 1st of a given year subject to one percent reductions in appropriations for the first 120- and each 90-day period thereafter in which the relevant law is not passed. Congress has considered measures mandating ACRs for elements of legislative appropriations in most sessions since 1991ⁱⁱ, and the idea remains popular in the 116th Congress with 12 other related bills read before the House and Senate in 2019.ⁱⁱⁱ

I contend that to enact an automatic continuing resolution in any capacity would be more expensive to the government than the cost of federal shutdowns, as programs would be funded beyond their needs and would become more difficult to cut. Furthermore, I will argue that their political and administrative considerations make them an inadequate alternative to effective annual appropriations legislation. I will support this hypothesis by evaluating the financial and legislative elements of common ACRs and analyzing the sole instance of an enacted ACR in the United States, as well as how other shutdowns might have been affected by such a proposal.

Background

The Constitution of the United States requires that government spending must be made through legislative appropriations on the power of Congress.^{iv} While most mandated spending is automated, the majority of discretionary government spending is determined by annual appropriations bills passed by the House and Senate Appropriations Committee.^v In 2007 the House and Senate Appropriations Committee voted to align their subcommittees by subject matter jurisdiction to ensure stability in the appropriations process and ensure timely passage of each appropriations bill.^{vi} Despite this structure, it is uncommon for Congress to pass all twelve appropriations bills by the October 1 fiscal year deadline, at which point a continuing resolution is necessary to ensure continued funding for those government programs not covered under a passed appropriations act.^{vii} Without a continuing resolution, unfunded elements of the government face a full or partial shutdown.^{viii}

Extensive utilization of continuing resolutions represents a political reality in modern budgeting. In 2018, the Government Accountability Office (GAO) found that 36 of the previous 40 fiscal years required at least one continuing resolution.^{ix}



Source: GAO analysis of Congressional Research Service data. | GAO-18-368T

Notes: Modified from GAO-17-807T.

^aThe fifth CR, P.L. 108-185, amended the original CR with substantive provisions but did not extend the CR period.

^bIn February 2007, Congress enacted a 227-day CR that provided funding for the remainder of the fiscal year; this CR is not included in the figure.

^cIn April 2011, Congress enacted a 168-day CR that provided funding for the remainder of the fiscal year. This CR is not included in the figure.

^dIn March 2013, Congress enacted a 189-day CR that provided funding for the remainder of the fiscal year; this CR is not included in the figure.

^eIn October 2013, the federal government partially shut down for 16 days because of a lapse in appropriations.

^fIn January 2018, the federal government partially shut down for 3 days because of a lapse in appropriations.

Figure 1: Government Accountability Office, 2018

Despite the availability of continuing resolutions, portions of the federal government have experienced a “funding lapse” twenty times since FY1977.^x While not every one of these lapses resulted in a shutdown, each resulted in administrative uncertainty. Several lapses, including the 34-day shutdown beginning December 2018 that represents the longest to date, produced significant turmoil and resulted in financial hardship for furloughed employees as well as dramatic cuts to government operations.^{xi} In spite of evidence provided by the GAO that the use of continuing resolutions results in economic damage to government operations^{xii} and the significant negative impact of federal shutdowns, it is unlikely that the use of continuing resolutions will wane in the near future.

Automatic Continuing Resolutions

Automatic Continuing Resolutions have been regularly proposed by a variety of policy experts and members of Congress as a solution to the financial, administrative, and political problems raised by these funding lapses.^{xiii} Though the exact specifications of each proposal differ, ACRs are generally defined as bills providing for the automatic appropriation of discretionary funding at a specific value if an appropriations bill or stopgap continuing resolution is not passed in time to avoid a funding lapse.^{xiv} That value is commonly gathered from the previous year's appropriations for the relevant programs, but may vary according to the proposal.

The Congressional Research Service describes four elements that distinguish common ACR proposals:

1. Sunset Provision
2. Funding Level
3. Activities Covered
4. Duration^{xv}

The sunset provision describes the extent to which the ACR is effective. Some, including the 2013 Pay Our Military Act^{xvi}, are intended to be eligible for use over a defined period, while others are meant to protect appropriations indefinitely. Others are distinguished by the percentage of funding provided or the duration of a funding lapse for which the bill provides. The 2019 End Government Shutdowns Act would provide for 100% of the previous year's appropriations, subject to a 1% decrease after 120 days without a new bill and another 1% each 90 days thereafter.^{xvii} Finally, some ACR proposals seek to prompt

government action by covering only certain programs deemed necessary, while others ensure no element of the government goes without appropriations until a final bill is passed.

While these factors vary between proposed ACRs, those in support of their use have argued their value through several common themes. First, implementing an ACR would reduce the significant costs incurred by the government in the event of a shutdown in the form of work stoppages, back pay to employees, and debt service costs.^{xviii} Secondly, an implementation would reduce the impact on federal workers and contractors, who are often forced to work without pay in the event of a shutdown.^{xix} By ensuring those individuals are paid on time, institutional knowledge of the federal workforce is preserved, attrition is reduced. Government labor hours would not be wasted preparing for a shutdown or returning operations to normal. Furthermore, businesses that contract with the federal government are not weakened, limiting delays in contracted projects and ensuring that smaller businesses without extensive cash reserves are not precluded from contracting with the government.

Other arguments in support of the use of ACRs center on the impact that lapses in funding have on citizens or decision making in Congress. When elements of the government are forced to close during shutdowns, citizens are deprived of their ability to enjoy museums, visit parks, engage with licensing offices, and otherwise receive the services for which they pay taxes.^{xx} This results in intense dissatisfaction with Congress, and influences the final argument for ACRs: that they limit crisis decision-making and enable better fiscal administration.^{xxi} In 1990, Senator John McCain supported the enactment of ACRs in order

to limit “pressure to throw everything but the kitchen sink into a last-minute spending bill just to get a deal and prevent a shutdown.”^{xxii}

By contrast, those in opposition to the use of ACRs drive their argument along the following lines: that they are ineffective tools to distribute funding, that they distort or deny the Congressional authority to spend, and that it undermines procedural or legal safeguards.^{xxiii}

Utilizing ACRs has been argued as an inefficient method of distributing funding from Congress.^{xxiv} Without deadlines that prompt negotiation and concession, pork barrel spending could persist for years, while new programs would have a significantly higher hurdle to climb to secure funding under an ACR.^{xxv} Furthermore, entities would see a real reduction in funding if ACRs are not adjusted for inflation. This would result in limited agency capacity over time, coupled with potential to tend toward the status quo and a reduced likelihood to attempt new programs.

Procedurally, agencies are dependent on Congress for oversight and guidance on spending priorities. Under an ACR, the agencies do not have this direct guidance and thus cannot be held accountable in the same way.^{xxvi} As a result, most agency spending would become defined by the priorities of the executive branch, shifting the Congressional power to spend from their purview and subverting existing procedures.^{xxvii} Chairwoman of the House Appropriations Committee Nita Lowey (D-NY) summarized resistance to the End Government Shutdowns Act along those lines as follows:

“While well intentioned, automatic Continuing Resolutions would weaken Congress’ power of the purse, shift power to the President, and make it much harder to fund investments important to working families. Discretionary spending should be subject to annual review by Congress, not indefinite autopilot.”^{xxviii}

Legal questions abound as well. The Committee for Budget and Policy Priorities notes, for example, that “an automatic continuing resolution may not be able to apply to the Army, since Article I, Section 8, of the Constitution provides that ‘no appropriation of money [to raise and support Armies] shall be for a longer term than two years.’”^{xxix} The sole ACR that has been enacted, the FY2014 Pay Our Military Act, was enacted for a single year.^{xxx} Wider omnibus ACRs would require distinct considerations for military spending, and would likely face challenges along Constitutional lines.

While Automatic Continuing Resolutions have attracted the attention of prominent members of Congress for decades, both they and policy analysts remain starkly divided on the issue. Though proposed ACRs vary in scope and duration, proponents generally support them for reasons of economic stability and reduced disruption to government services. Those who oppose them tend to argue that they warp statutory and Constitutional authority, and that they limit the ability of Congress to effectively distribute funds to programs.

A Practical Analysis of Shutdowns and ACRs in the U.S. Congress

While funding lapses resulting from unpassed appropriations bills have occurred since the 1884 Antideficiency Act prohibited expenditures not appropriated by Congress^{xxxi}, only since the tenure of President Carter have shutdowns taken place.^{xxxii} President Carter’s

Attorney General Benjamin R. Civiletti issued opinions in 1980 and 1981 interpreting the Antideficiency Act to require unfunded government entities to immediately terminate operations in the event of a funding gap.^{xxxiii} Accordingly, federal shutdowns and ACRs have limited cases for study. This analysis will consider the costs of federal shutdowns to date and frame these against the sole enacted ACR as well as hypothetical proposals.

Government shutdowns at the federal level result in a variety of costs, both directly quantifiable and abstract. These costs include backpay to employees who did not provide work, lost revenue from all sources, and the lost productive work hours of employees who prepared for a shutdown and then returned from it, rather than performing normal duties. Furthermore, the 1990 Cash Management Improvement Act precludes the government from paying bills beyond thirty days without incurring late fees^{xxxiv}, resulting in potential additional costs.

Following the shutdowns of 1995-1996, President Clinton's Office of Management and Budget (OMB) determined the approximate cost to the government to be \$1.4 billion.^{xxxv} Under President Obama, the OMB found the cost of the 2013 shutdown to be approximately \$2.5 billion.^{xxxvi}

What these figures do not consider is the additional cost to the nation in lost consumer spending, reduced investor confidence, and threats to the credit of the United States. The 2013 shutdown was estimated to reduce the quarter's real GDP growth between 0.2 and 0.6 percentage points^{xxxvii}, while the 2019 shutdown was forecasted to impact the coming quarter's real GDP growth by 0.2 percentage points.^{xxxviii} More drastic is the impact that

shutdowns can have on the government's credit rating and associated costs to borrow money. The Congressional Budget Office found in 2017 that even a single additional percentage point in interest rates could raise the deficit by \$1.6 trillion dollars over ten years.^{xxxix} In August 2011, Standard & Poor's lowered the government's long-term sovereign credit rating in response to "prolonged controversy over raising the stationary debt ceiling and related fiscal policy debate."^{xl} While this was later restored to AAA, it demonstrates the measurable impact that questions of domestic spending priority and brinksmanship can have on credit and the interest rates used for national borrowing. Similar changes could be reasonably expected if government shutdowns occurred more frequently. Should debt service capability become less certain due to reduced authority over spending and large, immovable programs established by ACRs, it is all but certain that a reduction in the nation's bond rating would follow.

The 2013 shutdown presents the singular ACR enacted by Congress for consideration in comparison to the shutdown of that period: the 2013 Pay Our Military Act. In the fall of 2013, disputes over the debt ceiling and the Affordable Care Act culminated in a 16-day shutdown beginning October 1st that would total approximately 6.6 million furloughed employee-days^{xli} and once again threaten the nation's credit rating.^{xlii} In the days prior to this shutdown, Congress passed H.R. 3210, the Pay Our Military Act, to provide funding for service members and selected civilian personnel.^{xliii}

The Pay Our Military Act was implemented to support the active duty military and those that the Secretary of Defense deemed necessary to support those individuals.^{xliv} While 400,000 civilian employees were initially furloughed, consultations between the

Department of Defense and the Department of Justice determined that the Pay Our Military Act allowed for the return of the majority of civilian employees after the first week on the grounds that they were necessary to support active duty military personnel.^{xliv} The Act did not provide for the costs of equipment or supplies, and would have been unable to provide for any non-personnel costs that would be necessary over the course of a longer shutdown.

While one can reasonably assume that the nearly 400,000 civilian employees that were able to return to work reduced the overall costs of the shutdown and protected the livelihoods of many families, it is important to recognize that this resolution was implemented on short notice and was not a complete solution.

First, the implementation of this program required that those few individuals supporting critical Department of Defense operations during the first week dedicate their time to the evaluation of employee responsibilities and preparation for their return in a limited capacity. In addition to this time, employees who returned would be unable to do their jobs in full without the capability to procure equipment or enter into contracts, as well as dedicating time to the work of restarting Departmental programs. Though having citizens back at work and being paid reduces the overall economic impact to consumer spending, it does little to continue the services the Department provides at their appropriate levels and does not significantly reduce the impact of wasted government personnel hours.

Secondly, the Act only specified that the Department be appropriated “such sums as necessary,” resulting in dramatic ambiguities surrounding “necessary” appropriations that would require more active resolution in the event the shutdown had lasted beyond 16

days.^{xlvi} Furthermore, the Act did not clarify the full extent to which it covered possible shutdowns in FY2014, presenting legal questions in the event that FY2014 or Q1 FY2015 experienced multiple shutdowns, as in 1995-1996.^{xlvi}

While the Pay Our Military Act provided valuable relief to the cash flow of Department of Defense employees, the limitations on their work, the need to restart programs, and the ambiguities surrounding the Act's longer-term elements demonstrate its limited value as a model for other shutdowns. The Office of Management and Budget noted that major financial institutions still anticipated measurable harm to GDP. In an OMB report, Goldman Sachs analysis was cited as saying that "the shutdown would reduce GDP growth by 0.14 percentage points per week, even after most furloughed Department of Defense employees returned to work."^{xlvi} A more thoroughly researched law would have provided for these critical considerations prior to submission before the House of Representatives. I conclude that the Act more likely served as a political tool to limit the perception that Congress was failing servicemembers amidst budget negotiations rather than a tool to limit the economic impact of a government shutdown. In the event of a larger shutdown, as in December 2018 and January 2019, these ambiguities would have resulted in major legal questions left to be resolved while large numbers of the individuals necessary to interpret them were furloughed.

Given the limited sample size of enacted ACRs in the history of Congressional budgeting, it is difficult to quantify the potential impact an ACR might have on other shutdowns. In the case of the 2018-2019 government shutdown that lasted 34 days, two approaches could be considered: first, a hastily written resolution as in the case of the Pay Our Military Act;

second, a more thoroughly constructed ACR that addressed some of the ambiguities present in the 2013 Act. The first case presents us with significant legal questions and demonstrated limited financial value. Though the second case would provide for a reduction in costs without raising legal questions, it is important to consider that the overall scale of government shutdowns is limited compared to the size of the economy. While the 2018-2019 shutdown resulted in more than \$3 billion dollars in back pay for work not performed during the shutdown, that pales in comparison to the \$4.4 trillion the government is expected to spend in 2019.^{xlix}

Table 3-5.

CBO's Baseline Projections of Discretionary Spending

Billions of Dollars

													Total	
	Actual, 2018 ^a	2019 ^a	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2020– 2024	2020– 2029
Budget Authority														
Defense	701	716	647	662	678	695	712	729	747	766	784	803	3,394	7,224
Nondefense	721	629	566	579	593	608	623	639	655	671	688	705	2,970	6,328
Total	1,422	1,345	1,213	1,241	1,272	1,303	1,335	1,368	1,402	1,437	1,472	1,509	6,363	13,552
Outlays ^b														
Defense	622	664	648	652	667	675	685	706	723	740	764	771	3,328	7,032
Nondefense	642	670	647	647	652	663	677	693	708	724	741	759	3,286	6,911
Total	1,263	1,334	1,295	1,299	1,319	1,338	1,362	1,399	1,431	1,465	1,505	1,530	6,614	13,943
Memorandum:														
Caps in the Budget Control Act (As Amended), Including Automatic Reductions to the Caps														
Defense	629	647	576	590	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Nondefense	579	597	542	555	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Total	1,208	1,244	1,118	1,145	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Adjustments to the Caps ^c														
Defense	72	69	70	72	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Nondefense	125	24	24	24	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Total	197	93	94	96	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

Figure 2: Congressional Budget Office, 2019

The miniscule fraction of government spending that is wasted by government shutdowns demonstrates that ACRs are in fact a more expensive solution to the problem of funding lapses. I conclude that while short-term shutdown costs could conceivably be reduced by well-written ACRs, they would in fact reduce the ability of Congress to allocate money to

programs as necessary and result in unpopular or inefficient programs persisting. By removing any mechanism to force negotiations on tense issues like immigration or healthcare, spending that is enacted by one party during its majority would be nearly impossible to remove by another, and the goals of a minority party would be nearly impossible to enact. Even a one percent rise in non-discretionary non-defense spending in 2019 alone would total approximately \$6.7 billion, outweighing the total costs of most recent shutdowns combined.¹ Even before considering the persistent impact on future spending, this clearly demonstrates ACRs to be an inappropriate and expensive solution to a problem of limited scope.

Conclusion

So long as the American government faces the specter of a shutdown due to a lapse in funding, Automatic Continuing Resolutions will persist as a popular way for politicians and interested parties to demand stability from Congress. In my analysis, I considered the various distinctions of popular ACR proposals, the legal and financial impact of proposed ACRs and the enacted 2013 Pay Our Military Act, the costs associated with government shutdowns, and the legal questions raised by the use of ACRs. I concluded that ACRs are an ineffective policy tool because they are more expensive than the shutdowns they seek to prevent and that they are a legally questionable solution to a problem of political alignment. While ACRs provide for continued government operation, they would likely result in unpopular or inefficient programs continuing for longer periods of time, resulting in a rise in costs that outweigh those of a shutdown. Short-term ACRs, such as the Pay Our Military Act, are likely to generate legal questions. Longer-term ACRs cannot be applied

to the military, would drive bloated spending, and would limit Congressional oversight and spending authority. Despite their popularity, ACRs are a tool for political argument rather than financial stability.

ⁱ End Government Shutdowns Act, S. 104, 116th Congress. (2019)

ⁱⁱ Congressional Research Service. “Automatic Continuing Resolutions: Background and Overview of Recent Proposals.” 2015. <https://fas.org/sgp/crs/misc/R41948.pdf>

ⁱⁱⁱ The 116th United States Congress. “S.104 – End Government Shutdowns Act. Related Bills.” 2019. <https://www.congress.gov/bill/116th-congress/senate-bill/104/related-bills>

^{iv} U.S. Constitution, Article 1, Section 9

^v The 116th United States Congress House Committee on Appropriations. “Subcommittees.” 2019.

<https://appropriations.house.gov/subcommittees>, The 116th United States Congress Senate Committee on Appropriations. “Subcommittees.” 2019. <https://www.appropriations.senate.gov/subcommittees>

^{vi} The 110th United States Congress House Committee on Appropriations. “Senate, House Appropriations Set Subcommittee Plans for New Congress.” Jan. 4, 2007.

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^{vii} Congressional Research Service. “The Congressional Budget Process Timetable.” 2008.

<https://www.senate.gov/reference/resources/pdf/98-472.pdf>

^{viii} The Committee for a Responsible Federal Budget. “Appropriations 101.” 2018.

<https://www.crfb.org/sites/default/files/May%202018%20Appropriations%20101.pdf>

^{ix} Government Accountability Office. “Continuing Resolutions and Other Budget Uncertainties Present Management Challenges.” 2018. <https://www.gao.gov/products/GAO-18-368T>

^x Congressional Research Service. “Federal Funding Gaps: A Brief Overview.” 2019.

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^{xi} *Id.*

^{xii} Government Accountability Office. “Continuing Resolutions and Other Budget Uncertainties Present Management Challenges.” 2018. <https://www.gao.gov/products/GAO-18-368T>

^{xiii} Congressional Research Service. “Federal Funding Gaps: A Brief Overview.” 2019.

<https://fas.org/sgp/crs/misc/RS20348.pdf>

^{xiv} *Id.*

^{xv} Congressional Research Service. “Automatic Continuing Resolutions: Background and Overview of Recent Proposals.” 2015. <https://fas.org/sgp/crs/misc/R41948.pdf>

^{xvi} *Id.*

^{xvii} End Government Shutdowns Act, S. 104, 116th Congress. (2019)

^{xviii} <https://archives-democrats-rules.house.gov/archives/RL30339.pdf>

^{xix} Congressional Research Service. “Automatic Continuing Resolutions: Background and Overview of Recent Proposals.” 2015. <https://fas.org/sgp/crs/misc/R41948.pdf>

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} U.S. Congress, Senate Committee on the Budget and Committee on Governmental Affairs, To Consider Budget Process Reform, joint hearing, 106th Cong., 1st sess., S.Hrg. 106-24 (Washington, DC: GPO 1999)

^{xxiii} Congressional Research Service. “Automatic Continuing Resolutions: Background and Overview of Recent Proposals.” 2015. <https://fas.org/sgp/crs/misc/R41948.pdf>, Paul N. Van de Water and Richard Kogan.

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^{xxiv} Paul N. Van de Water and Richard Kogan. “Automatic Continuing Resolutions Not a Good Solution for Government Shutdowns.” Center for Budget and Policy Priorities. Jan. 30, 2019.

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^{xxv} *Id.*

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