

CANCELLING CONTINUING RESOLUTIONS

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ABSTRACT

Every year, by October 1st, Congress is supposed to pass an annual appropriations bill. The number of times Congress has done so timely could be counted on one hand. In lieu of full appropriation bills, Congress relies on a well-known stopgap measure: continuing resolutions. Although continuing resolutions have been instrumental in preventing most government shutdowns—and the devastating costs associated with them—nothing good comes free.

On the surface, the costs of continuing resolutions seem minimal and worthwhile. But on closer inspection, new problems emerge. In reality, continuing resolutions have far-reaching and dire consequences that affect constitutional rights for litigants and the security of the federal judiciary. Continuing resolutions may also encourage violations of the Competition in Contracting Act and may even raise separation of powers concerns, just to name a few.

What is the impact of these consequences? And what should we—or even can we—do to address them? This Article explains that the consequences of continuing resolutions have more than just monetary implications and that the downstream effects threaten national security and government programs that we rely upon. As to the later question, this Article suggests that we can—and should—make meaningful improvements as to how we use continuing resolutions by (1) incentivizing Congress to pass timely budgets and (2) increasing agency appropriation flexibilities.

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“I don’t know that they want from me. It’s like the more money we come across, the more problems we see.”¹

INTRODUCTION

Many of us live on a monthly budget.² Every month we categorize and set expenditure limits based on our monthly income,³ and—if we are lucky—we have enough left over to set aside for unexpected expenses or future goals.⁴ But imagine if things worked differently. What if any monetary surplus at the end of the month vanished—never to be seen again? What if the amount you spent this month became the upper limit of your income for the next month? And what if your failure to finalize next month’s budget capped next month’s spending at 80% of your current monthly budget? What would you do? Most would likely find a way to spend their entire budget, even if some of those purchases were frivolous, and, chances are, most would make sure their budgets were finalized timely so that they were not limited for the next month. If this sounds absurd, but also vaguely familiar, it should. This is essentially how the federal government appropriations process works.⁵

As a result of this chaotic appropriations process, the United States wastes a considerable sum of money during what is colloquially known as “end of year” spending.⁶ Each year Congress races against an imaginary

¹ THE NOTORIOUS B.I.G., *Mo Money, Mo Problems*, on LIFE AFTER DEATH (Bad Boy Records 1997).

² See *More Americans are Budgeting More than Ever*, DEBT.COM, <https://www.debt.com/research/best-way-to-budget/> (last visited Nov. 22, 2022) (finding that roughly 86% of respondents in a survey “track[ed] their monthly income and expenses” up from 80% in 2020–2021). But see Nicole Dow, *More Than Half of Us Don’t Keep a Budget or Know How Much We Spend*, THE PENNY HOARDER (June 15, 2021), <https://www.thepennyhoarder.com/budgeting/budgeting-statistics/> (“A little over 55% of Americans do not use a budget . . .”).

³ See Nicole Dow, *Expense Tracking: Stay on Top of Your Finances Without a Budget*, THE PENNY HOARDER (June 18, 2021), <https://www.thepennyhoarder.com/budgeting/expense-tracking/> (“After a few months of recording and reviewing . . . your new budget should mirror your actual spending, making it easier to stay within the limits you set.”).

⁴ See Nicole Dow, *How to Budget: Create A Household Budget in 4 Simple Steps*, THE PENNY HOARDER (Dec. 15, 2022), <https://www.thepennyhoarder.com/budgeting/how-to-budget/> (“[I]f you’re able to save more than 20% of your income, that’s wonderful. You’ll be able to reach your financial goals faster.”).

⁵ See Joseph Goldberg, *The Problem of Determining the Problem: The Problem with Year-End Spending*, OVERSIGHT PROJECT (May 31, 2022), <https://oversightproject.org/2022/05/31/the-problem-of-determining-the-problem-the-problem-with-year-end-spending/> (“Agencies are likely driven to spend funds to avoid the appearance of overfunding which may invite future budget cuts from Congress. Alternatively, year-end spending may be the result of agency planning.”); *What is a Continuing Resolution and How Does it Impact Government Operations?*, U.S. GOV’T ACCOUNTABILITY OFFICE (Nov. 3, 2022), <https://www.gao.gov/blog/what-continuing-resolution-and-how-does-it-impact-government-operations> [hereinafter *What is a Continuing Resolution*] (“CRs generally continue the level of funding from the prior year’s appropriations or the previously approved CR from the current year.”).

⁶ Jeffrey B. Liebman & Neale Mahoney, *Do Expiring Budgets Lead to Wasteful Year-End Spending? Evidence from Federal Procurement*, 107 AM. ECON. REV. 3510, 3511–12 (2017) (discussing the increase in year-end spending and “sharp drop-off in quality at the end of the year”).

clock to pass the next fiscal year budget; the clock has quite the success rate.⁷ In fact, since 1952, only five regular appropriation bills have been enacted.⁸ Since 2010, the United States has also been forced into three government shutdowns.⁹ Given the recent change in House leadership, we can expect this pattern to continue for the next two years.¹⁰

When a budget is not passed the government generally resorts to using continuing resolutions (CRs) that “provide temporary funding until the consideration of annual appropriations measure is completed.”¹¹ Although CRs keep the government operational and are preferable to shutdowns, they come with a hefty price tag.¹² Like buying concert tickets from Ticketmaster,¹³ CRs come with all sorts of added and hidden fees—like delayed justice and agency inefficiencies.¹⁴ Moreover, the appropriations process is commonly used as a sword to force legislation via appropriation riders or used as a shield to block legislation.¹⁵ This all culminates in a never-ending cycle of wasteful spending and politicization of what should be, at its core, a straightforward budgeting process. Unfortunately, everyone except for those involved get stuck footing the proverbial bill. It does not have to be this way.

⁷ See *What is a Continuing Resolution*, *supra* note 5 (“Congress debates this funding, and then votes to appropriate funding. However, Congress has only completed this process before the beginning of the fiscal year 3 times in the last 47 years, most recently for FY1997.”).

⁸ See CONG. RESEARCH SERV., RL32614, DURATION OF CONTINUING RESOLUTIONS IN RECENT YEARS (2012).

⁹ See JEFF ARKIN, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-22-104701, FEDERAL BUDGET: SELECTED AGENCIES AND PROGRAMS USED STRATEGIES TO MANAGE CONSTRAINTS OF CONTINUING RESOLUTIONS (2022), <https://www.gao.gov/products/gao-22-104701> (noting that the government experienced shutdowns in 2014, 2018, and 2019); Alexander Bolton, *McCarthy’s Concessions Spur Fears of Potential Default, Government Shutdown*, THE HILL (Jan. 10, 2023, 6:00 AM), <https://thehill.com/homenews/senate/3806110-mccarthys-concessions-spur-fears-of-potential-default-government-shutdown/> (“One Senate Democrat aid predicted a stalemate in spending negotiations this year and forecast that Congress will only agree to passing yearlong continuing resolutions that would keep federal spending frozen. . . . [T]he turmoil over spending is likely to result in a government shutdown later this year.”).

¹⁰ See Jennifer Shutt, *U.S. House GOP Plan Calls for Federal Spending Cuts, Conditions on Debt Limit Increases*, NEW HAMPSHIRE BULLETIN (Jan. 10, 2023, 2:35 PM), <https://newhampshirebulletin.com/2023/01/10/u-s-house-gop-plan-calls-for-federal-spending-cuts-conditions-on-debt-limit-increase/> (“Republican plans to pass a CR, or continuing resolution, before Sept. 30 indicate the party doesn’t expect to wrap up the fiscal 2024 government funding process by the start of the next fiscal year on Oct. 1”). This statement is not intended to provide any support or opposition to the change in leadership, it merely reflects that a change has occurred and that others have commented on the likely effect on the appropriations process.

¹¹ DREW C. AHERNE & SARAH B. SOLOMON, CONG. RESEARCH SERV., R47283, OVERVIEW OF CONTINUING APPROPRIATIONS FOR FY2023 (DIVISION A OF P.L. 117-180) 1 (2022).

¹² See *What is a Continuing Resolution*, *supra* note 5 (“Continuing resolutions are common. They keep our government running until the CR expires or when final appropriations are enacted, whichever comes first. But they do so at a cost.”).

¹³ See Moises Mendez II, *Why Everyone’s Mad at Ticketmaster Right Now*, TIME (Aug. 18, 2022, 3:16 PM), <https://time.com/6207167/ticketmaster-ticket-prices-expensive-backlash/> (noting the outrageous ticket prices and additional fees).

¹⁴ See ARKIN, *supra* note 9, at 15 (noting the “challenges and administrative inefficiencies”).

¹⁵ See Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L. Q. 457, 457–58 (1992).

This Article examines some of the demonstrative effects of the federal appropriation process and emphasizes the hidden damage from the reliance on CRs. Part I starts with a brief overview on the federal appropriations process and how CRs function within it.¹⁶ Part II discusses the problems associated with the CR framework and examines how CRs effect the judicial, executive, and legislative branches.¹⁷ Part III explores possible solutions—such as congressional incentives and increased agency budgetary flexibility—and critiques a common proposal of automatic CRs.¹⁸

I. “PAINT IT, BLACK”¹⁹: A PRIMER ON CONTINUING RESOLUTIONS

Congressional authority to establish appropriations stems from the Appropriations Clause, which provides: “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.”²⁰ As Professor Gillian E. Metzger notes, “the Constitution is silent on how the principle of congressional control of the purse should be implemented”²¹ with the exception of a two year appropriation for the Army.²² The evolution of the appropriations process is storied,²³ but the current appropriations process is driven primarily by the Congressional Budget Act (CBA) of 1974.²⁴

“Prior to 1974, the government’s fiscal year started on July 1 and ended on June 30. The Congressional Budget and Impoundment Control Act made the change to allow Congress more time to agree upon a budget each year”²⁵ Today, “[t]he federal government’s fiscal year runs from October 1 of one calendar year through September 30 of the next.”²⁶ And recent legislation seeks to push the start of the fiscal year even further to January 1.²⁷

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ THE ROLLING STONES, *Paint It Black*, on AFTERMATH (Decca Records 1966).

²⁰ U.S. CONST. art. I, § 9, cl. 7.

²¹ Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1087 (2021).

²² See U.S. CONST. art. I, § 8, cl. 12.

²³ See Metzger, *supra* note 21, at 1086–90 (detailing appropriations history from 1870 through the CBA).

²⁴ *Id.* at 1090; see E. Donald Elliot, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. REG. 317, 343 (1987) (noting other statutory measure like the War Powers Resolution and Impoundment Control Act of 1974); *Policy Basics: Introduction to the Federal Budget Process*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 24, 2022) [hereinafter *Policy Basics*] (“No single piece of legislation established the annual federal budget.”).

²⁵ *Happy New Year! Why the US Federal Fiscal Years Starts in October*, FED. TIMES (Sept. 20, 2022), <https://www.federaltimes.com/management/budget/2022/09/20/why-the-us-federal-fiscal-year-2023-starts-in-october/>.

²⁶ *The Federal Budget Process*, USA.GOV, <https://www.usa.gov/budget> (last updated Jul. 14, 2023).

²⁷ Thomas Gnau, *Secretary of Defense Warns Congress that Continuing Resolutions Cost Pentagon Millions*, DAYTON DAILY NEWS (Nov. 29, 2022), <https://www.daytondailynews.com/local/secdef-warns-congress-that-continuing-resolutions-cost-pentagon-millions/7HIK7JBWEBGGDFWKQJ2LSLAKVM/> (noting that in 2018 Rep. Mike Turner “introduced the ‘It’s About Time Act’ to change the government finding deadline from October to January 1”).

In a perfect world, the federal budget and appropriations process works like this: from July to February, the President—with assistance from the Office of Management and Budget (OMB) and agencies—develops a budget proposal.²⁸ The proposal recommends how much money should be spent on public purposes (both mandatory and discretionary programs),²⁹ the amount of tax the government should collect to pay for these programs, and the difference between those amounts.³⁰ Once the proposal is submitted, the House and Senate “develop their own budget resolutions to set spending levels”³¹ between March and June. The House and Senate Appropriation Committees and their twelve subcommittees then “hold hearings to examine the budget requests and needs of federal spending.”³² Appropriations allow agencies to incur obligations and make payments from the U.S. Treasury for specific purposes and can be definite or indefinite.³³ Appropriations are divided into distinct categories: (1) annual or single year, (2) multiyear, (3) revolving fund, (4) no year, (5) expired, and (6) closed/canceled.³⁴ These appropriation bills pass between the House and Senate, finally receiving a floor vote sometime between July and October.³⁵ Last, the President signs the final bills into law.³⁶

This timetable, however, is purely aspirational. So, as a stop gap measure, Congress can pass an Omnibus bill with funding for multiple areas.³⁷ If Congress still cannot agree, it can pass “a continuing resolution authorizing temporary funding at the previous year’s levels or face a government shutdown.”³⁸ Not only are CRs the now-default mode of the federal appropriations process, but their duration appears to be increasing.³⁹

²⁸ See *Policy Basics*, *supra* note 24.

²⁹ See *How Much has the U.S. Government Spent This Year?*, FISCAL DATA, <https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/> (last visited Nov. 22, 2022) (“Government spending is broken down into two primary categories: mandatory and discretionary.”). Note, there is also a process for “supplemental spending” that works similarly but is not driven by the annual appropriations cycle. See *id.*

³⁰ See *Policy Basics*, *supra* note 24.

³¹ *The Federal Budgeting and Appropriations Process (Accessible)*, NAT’L SCI. FOUND, https://www.nsf.gov/about/congress/federal_budgeting_accessible.jsp (last visited Nov. 22, 2022) [hereinafter *Federal Budgeting*].

³² *Id.*

³³ *Glossary of Terms*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/open-government/statement-of-disbursements/glossary-of-terms> (last visited Nov. 22, 2022).

³⁴ *Id.*

³⁵ *Federal Budgeting*, *supra* note 31.

³⁶ See *id.*

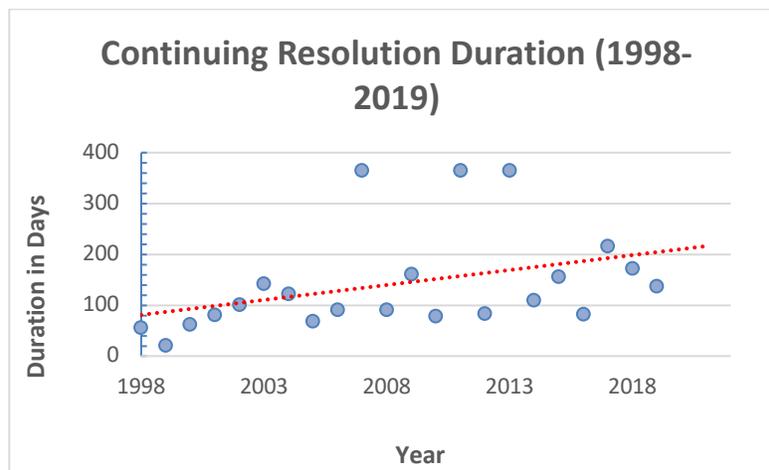
³⁷ CONG. RESEARCH SERV., RL32473, OMNIBUS APPROPRIATIONS ACTS: OVERVIEW OF RECENT PRACTICES 1 (2016) (“If action is not completed on all of the regular appropriations acts toward the end of a congressional session, Congress will sometimes combine the unfinished regular appropriations into an omnibus measure.”).

³⁸ *Id.*

³⁹ See *infra* Figure 1.

On average, CRs last 142.7 days for any given year.⁴⁰ To make matters worse, government shutdowns have become more common in recent years under Presidents Clinton, Obama, and Trump—ranging from sixteen to twenty-one days at a time.⁴¹

*Figure 1: Continuing Resolution Duration (1998–2019)*⁴²



Though CRs are preferable to a complete government shutdown,⁴³ they still present a number of problems. CRs themselves are limited by the types of activities they can fund, their duration, funding rates, and prohibition on new activities.⁴⁴ These limitations “impose significant costs on agencies—disrupting activities and creating uncertainty that makes it difficult for agencies to plan effectively.”⁴⁵ “Under a CR, individual program accounts are stuck at the previous year’s levels, resulting in billions of severely

⁴⁰ See KATE P. MCCLANAHAN ET AL., CONG. RESEARCH SERV., R42647, CONTINUING RESOLUTIONS: OVERVIEW OF COMPONENTS AND PRACTICES 13 (2019).

⁴¹ See *Policy Basics*, *supra* note 24.

⁴² Data taken from MCCLANAHAN ET AL., *supra* note 40, at 12–13. Trendline added via Microsoft Excel.

⁴³ See Joe Davidson, *Federal Government Shutdowns Don’t Save Money. They Cost Taxpayers Billions*, WASH. POST (Sept. 18, 2019, 6:00 AM), https://www.washingtonpost.com/politics/federal-government-shutdowns-dont-save-money-they-cost-taxpayers-billions/2019/09/17/8c620218-d987-11e9-adff-79254db7f766_story.html (explaining that the “three partial shutdowns in the past five years cost taxpayers \$3.7 billion in backpay, \$338 million in other costs, and almost 15 millions days or 57,000 years in lost productivity”); STAFF OF THE PERMANENT SUBCOMM. ON INVESTIGATIONS, THE TRUE COST OF GOVERNMENT SHUTDOWNS 2 (2019) (“Rather than saving taxpayer money, shutdowns produce significant costs to the American taxpayer.”), <https://www.hsgac.senate.gov/imo/media/doc/2019-09-17%20PSI%20Staff%20Report%20-%20Government%20Shutdowns.pdf> (“Rather than saving taxpayer money, shutdowns produce significant costs to the American taxpayer.”) (primarily the work of Rob Portman and Tom Carper).

⁴⁴ MCCLANAHAN ET AL., *supra* note 40, at 2.

⁴⁵ Metzger, *supra* note 21, at 1096.

misaligned dollars.”⁴⁶ CRs also pose threats to national security⁴⁷ and the judicial process.⁴⁸ Although “agencies by and large seem to have adjusted”⁴⁹ to the uncertainty that CRs create, the length and reliance on “a larger number of short-term CRs. . . [are] particularly problematic.”⁵⁰

II. “MO MONEY, MO PROBLEMS”⁵¹

Aside from pure financial costs to taxpayers, CRs create other problems that are not readily apparent. These monetary problems cascade into issues for the judiciary and administrative agencies and may create separation of powers problems.

A. JUSTICE “DON’T COST A THING”⁵²: THE EFFECT ON THE JUDICIARY

“The Judiciary, like the rest of the federal government”⁵³ is not immune to the effects of CRs.⁵⁴ This is cause for concern because “[o]ur constitutional system of government, with separation of powers and checks and balances, cannot function as intended if the judicial branch is not sufficiently resourced.”⁵⁵ To make matters worse, the judiciary is still reeling from the backlog of cases caused by the COVID-19 pandemic.⁵⁶ Although judges are

⁴⁶ Arnold Punaro, *The \$76 Billion Cost of Yearlong Continuing Resolution*, DEFENSE ONE (Feb. 8, 2022), <https://www.defenseone.com/ideas/2022/02/76-billion-cost-yearlong-continuing-resolution/361757/>.

⁴⁷ *See id.* (explaining that the 2022 CR could affect “[k]ey programs” like “hypersonic weapons, shipbuilding, space, AI, quantum, and cyber”).

⁴⁸ *See* ADMIN. OFF. OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2023 CONGRESSIONAL BUDGET SUMMARY i–ii (2022), <https://www.uscourts.gov/sites/default/files/FY%202023%20Congressional%20Budget%20Summary.pdf> (noting the need for increased funding to respond to the backlog of cases from COVID-19, including increased bankruptcy cases and need for public defender services, and to address security concerns).

⁴⁹ PHILIP G. JOYCE, IBM CTR. FOR THE BUS. OF GOV’T THE COSTS OF BUDGET UNCERTAINTY: ANALYZING THE IMPACT OF LATE APPROPRIATIONS 20 (2012), <https://www.businessofgovernment.org/sites/default/files/The%20Costs%20of%20Budget%20Uncertainty.pdf>.

⁵⁰ *Id.*

⁵¹ *See* THE NOTORIOUS B.I.G., *supra* note 1.

⁵² JENNIFER LOPEZ, *Love Don’t Cost a Thing*, on J. LO (Epic Records 2000).

⁵³ ADMIN. OFF. OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2023 CONGRESSIONAL BUDGET SUMMARY I (2022), <https://www.uscourts.gov/sites/default/files/FY%202023%20Congressional%20Budget%20Summary.pdf> [hereinafter 2023 CONGRESSIONAL BUDGET SUMMARY].

⁵⁴ Gordon Gray, *What’s a “CR”?*, AM ACTION FORUM (Oct. 12, 2021), <https://www.americanactionforum.org/insight/whats-a-cr/> (noting that all three branches of government’s budgets are affected by appropriations and CRs).

⁵⁵ *See Proposed FY 2024 Funding Levels Would Hurt Courts and Public, Letter to Congress Says*, U.S. COURTS (Aug. 1, 2023), <https://www.uscourts.gov/news/2023/08/01/proposed-fy-2024-funding-levels-would-hurt-courts-and-public-letter-congress-says>.

⁵⁶ *See* Todd Ruger, *Federal Courts Seek More Money and Judges in Next COVID-19 Bill*, ROLL CALL (May 5, 2020, 6:26 PM), <https://rollcall.com/2020/05/05/federal-courts-seek-more-money-and-judges-in-next-covid-19-bill/> (“When the courts reconstitute after the COVID-19 pandemic, the strain will be even greater since there will be a backlog of cases that could not be adjudicated during the pandemic . . .”).

mostly immune financially during CRs, others are not.⁵⁷ Money needed to fund projects and vital members of the judicial branch like court security officers, federal public defenders, staff attorneys, and contractors affect the administration of justice.⁵⁸

1. *Criminal Cases: The Speedy Trial Act, Right to Counsel, and the Sixth Amendment*

Unsurprisingly, criminal defendants often pay the biggest price as a result of CRs. Of the most serious effects that CRs have on criminal defendants are threats to their Sixth Amendment rights.⁵⁹ Under the Sixth Amendment, “the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense.”⁶⁰ But reduced budgets combined with the backlog caused by COVID-19 threaten both the right to speedy and public trials and the right to counsel.⁶¹

Although “[m]ore than ninety-seven percent of federal convictions are obtained through plea bargains,”⁶² the right to a speedy and public trial remains a constitutional guarantee.⁶³ To function, criminal trials require multiple participants: judges, law clerks, prosecutors, defense attorneys (usually from the federal public defender’s office), courtroom security officers, U.S. Marshals, court reporters, members of the clerk’s office, and jurors.⁶⁴ All of these positions require funding. In 2022, Congress appropriated \$7.6 billion to the judiciary.⁶⁵ Of this, roughly \$5.6 billion was allocated to salaries and expenses, \$1.3 billion to defender services, \$704

⁵⁷ See, e.g., *Judiciary Has Funds to Operate Through Jan. 31*, U.S. COURTS (Jan. 22, 2019), <https://www.uscourts.gov/news/2019/01/22/judiciary-has-funds-operate-through-jan-31> (noting that should funding run out before Congress enacts a new continuing resolution or full-year funding . . . “[e]ach court would determine the staff necessary to support its mission critical work” and that some courts “issued orders suspending or postponing civil cases in which the government is a party”).

⁵⁸ See 2023 CONGRESSIONAL BUDGET SUMMARY, *supra* note 53, at 34–36 (requesting funding for more magistrate judges and staff, “court staffing support,” “temporary bankruptcy law clerk program,” additional law clerks, new software and IT support).

⁵⁹ See Amanda Pampuro, *Federal Civil Cases Dropped 27% in 2021, but Criminal Cases Ticked Up*, COURTHOUSE NEWS SERV. (Mar. 15, 2022), <https://www.courthousenews.com/federal-civil-cases-dropped-27-in-2021-but-criminal-cases-ticked-up/> (noting how the reduced budget can affect a right to speedy trial).

⁶⁰ U.S. CONST. amend. VI.

⁶¹ Pampuro, *supra* note 59.

⁶² Clark Neily, *Prisons are Packed Because Prosecutors are Coercing Plea Deals. And, Yes, it’s Totally Legal*, NBC NEWS (Aug. 8, 2019, 7:33 PM), <https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201>.

⁶³ U.S. CONST. amend. VI.

⁶⁴ See *Courthouse Contacts – Journalist’s Guide*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/courthouse-contacts-journalists-guide>.

⁶⁵ BARRY J. McMILLION, CONG. RESEARCH SERV., R47155, JUDICIARY APPROPRIATIONS, FY2022 7 (2022). Note, the annual salaries figure also includes the federal appellate courts, not just federal district courts.

million to court security, and \$32.6 million to juror fees.⁶⁶ The same year, the United States Attorney's Office requested \$1.8 billion for criminal litigation activities, of which \$26.4 million was requested to prosecute COVID-related fraud alone.⁶⁷ Conservatively, the federal government spends \$7.1 million in personnel costs alone for criminal trials.⁶⁸

Table 1: Average Annual Personnel Costs for Criminal Trials

2021 Criminal Trial Statistics	
No. of Federal Criminal Cases ⁶⁹	57,287
Avg. % of Cases to Trial ⁷⁰	2%
Total No. of Trials	1,146

Position	Annual Salary
District Judge ⁷¹	\$ 223,400.00
Law Clerk ⁷²	\$ 66,214.00
U.S. Marshal ⁷³	\$ 43,609.50

⁶⁶ *Id.*

⁶⁷ U.S. ATT'Y'S OFF., FY 2022 BUDGET & PERFORMANCE SUMMARY 94 (2022), <https://www.justice.gov/d9/pages/attachments/2021/05/27/usa.pdf>.

⁶⁸ See McMILLION, *supra* note 65. The actual annual costs for criminal trials likely exceed this figure, especially when facility costs, IT support, and other miscellaneous expenses are included. The point here is that criminal trials are expensive.

⁶⁹ See *Overview of Federal Criminal Cases Fiscal Year 2021*, U.S. SENTENCING COMM'N, 1–2 <https://www.uscc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2021> (last visited Dec. 18, 2022) (“The United States Sentencing Commission received information on 57,377 federal criminal cases in which the offender was sentenced in fiscal year 2021.”).

⁷⁰ See Neily, *supra* note 62 (“According to a recent study from the Pew Research Center . . . just two percent [of criminal cases] went to trial”).

⁷¹ *Judicial Compensation*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-compensation> (last visited Dec. 18, 2022) (listing the 2022 district judge salary at “\$223,400”).

⁷² Most federal law clerks are hired directly out of law school and paid as the JSP-11 Step 1 salary level. See *Getting a Firm Job After a Judicial Clerkship*, LAW CROSSING (June 24, 2021), <https://www.lawcrossing.com/article/900051193/Getting-a-Law-Firm-Job-After-a-Judicial-Clerkship/> (“Many young law students will take clerkships right out of school . . .”); *Qualifications, Salary, and Benefits*, OSCAR, https://oscar.uscourts.gov/qualifications_salary_benefits (last visited Dec. 18, 2022) (“JSP-11, step 1 – Law school graduates with academic excellence and no legal work experience.”). Law clerk salary depends on locality. This table uses the JSP-11 Step 1 salary for the “Rest of the United States.” See *Judiciary Salary Plan Rest of the United States* – Table RUS, U.S. COURTS, https://www.uscourts.gov/sites/default/files/jsp_2022/jsp_2022/jsp_rest_of_the_us_2022.pdf (last visited Oct. 9, 2023).

⁷³ See *US Marshal Salaries*, FED. LAW ENF'T, <https://www.federallawenforcement.org/us-marshall/us-marshall-salary/> (last visited Dec. 18, 2022) (“All U.S. deputy marshals begin their career at the federal GL-07 level, which has a salary range of \$38,511 to \$48,708.”). Adding these figures and dividing by two equals \$43,609.50. The number of U.S. Marshals needed for a trial depends on the number of defendants and the courtroom layout. To be

Court Reporter ⁷⁴	\$	82,635.00
Federal Public Defender ⁷⁵	\$	110,787.50
USAO ⁷⁶	\$	123,486.78
Jurors ⁷⁷	\$	700.00
Total Salary	\$	650,832.78

2021 Avg. Annual Costs for Criminal Trials		
Avg. Daily Trial Cost	\$	1,783.10
Avg. Trial Days ⁷⁸		3.5
Total Avg. Trial Cost	\$	6,240.86
Total Avg. Annual Trial Cost	\$	7,150,405.54

Needless to say, conducting a federal criminal trial is an expensive endeavor—not just for defendants—but also for the government.

CRs threaten criminal defendants’ Sixth Amendment rights, in part because of their budgetary effects. “[E]nacting a full-year [CR] sets funding levels at last year’s level except for a small number of exceptions to the general rule.”⁷⁹ Federal public defenders and lawyers appointed under the

conservative, the figures above only include the cost of one marshal, but more would likely be present for each day of the trial.

⁷⁴ See *Court Reporters’ Rates of Pay Effective January 4, 2021*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/2021_court_reporters_rate_of_pay_hired_before_october_11_2009_0.pdf (last visited Dec. 18, 2022) (listing the “Level 1” rate of pay for the “Rest of the United States” at “\$82,635”).

⁷⁵ See *Job Details for Assistant Federal Public Defender*, U.S. COURTS, <https://www.uscourts.gov/careers/current-job-openings/121429> (last visited Dec. 18, 2022) (listing the salary range at “\$66,214 - \$155,361”). The sum of the top and low-end salary figures divided by two equals \$110,787.50. Of course, salary ranges differ based on locality. This is purely a rough estimate.

⁷⁶ See *Executive Office for U.S. Attorneys and the Offices of the U.S. Attorneys Salaries of 2021*, FEDERAL PAY, <https://www.federalpay.org/employees/exec-ofc-us-attorney-and-off-us-attorney> (last visited Dec. 18, 2022) (noting that the average salary was \$123,486.78). Some cases may require more than one attorney and will often include paralegal or administrative support with exhibits.

⁷⁷ *Juror Pay*, U.S. COURTS, <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited Dec. 18, 2022) (“Federal jurors are paid \$50 a day.”). Typically, juries are seated with two alternates for a total of fourteen jurors, at least based on my experience as a federal law clerk. See *How Courts Work*, AM. BAR ASS’N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/ (last visited Dec. 18, 2022) (“Alternate jurors are selected in some cases to take the place of jurors who may become ill during the trial.”). This figure does not include other reimbursements for transportation, parking, meals, and lodging.

⁷⁸ See, e.g., *Length/Terms of Jury Service*, U.S. DISTRICT COURT N.D. OKLA., <https://www.oknd.uscourts.gov/lengthterms-jury-service> (last visited Dec. 20, 2022) (“Most trials are 3 to 5 days in duration . . .”); see *Juror FAQ*, U.S. W.D. OF KY, <https://www.kywd.uscourts.gov/jury-info/jury-faq> (last visited Sept. 21, 2023) (“While the majority of jury trials last less than a week . . .”).

⁷⁹ David Reich, *Congress Should Finish 2023 Appropriations Now, Rather than Punting Until the Next Session*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 2, 2022, 11:00 AM), <https://www.cbpp.org/blog/congress-should->

Criminal Justice Act (CJA) are funded under 18 U.S.C. § 3006A.⁸⁰ U.S. Attorneys, as government employees, are also subject to budgetary constraints.⁸¹ CRs also introduce uncertainty and usually result in hiring freezes.⁸² The Department of Justice’s recently expressed its desire to “expand efforts to deter and prosecute hate crimes; safeguard fair elections; combat discrimination” and “to reduce the backlog of immigration cases,”⁸³ which means more criminal trials—not less. With rising cases and no corresponding increase in funding or employees, it’s a forgone conclusion that cases will take longer to litigate.⁸⁴

These litigation delays can result in violations of the Sixth Amendment and Speedy Trial Act.⁸⁵ Although delays due to funding and staffing shortages generally cannot be blamed on prosecutors, several courts—at least at the state level—have determined this does not matter.⁸⁶ They reason that

finish-2023-appropriations-now-rather-than-punting-until-the-next-session.

⁸⁰ See 18 U.S.C. § 3006A(f) (explaining that courts “authorize or direct that such funds be paid to the appointed attorney”); WHITE HOUSE, JUDICIAL BRANCH 53 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/03/jud_fy2023.pdf (requesting funds under 18 U.S.C. 3006A “[f]or the operation of Federal Defender organizations”).

⁸¹ See, e.g., U.S. DEP’T OF JUST., FY 2023 BUDGET SUMMARY 2-3 (2022), <https://www.justice.gov/jmd/page/file/1489621/download> (requesting an increase in funding for, among other things, U.S. Attorney’s Offices and litigating components).

⁸² See, e.g., Nicole Ogrysko, *OMB Warns of Hiring Freeze, Funding Gaps, if Congress Pursues Full-Year Continuing Resolution*, FED. NEWS NETWORK (Nov. 12, 2021, 7:50 PM), <https://federalnewsnetwork.com/budget/2021/11/omb-warns-of-hiring-freeze-funding-gaps-if-congress-pursues-full-year-continuing-resolution/> (noting, for example, that the SSA would have to implement a hiring freeze if current funding levels remained the same); *Employment and Internships*, U.S. ATT’Y OFF. DIST. OF N.J., <https://www.justice.gov/usao-nj/employment-and-internships> (last visited Dec. 22, 2022) (noting that “[n]o vacancy announcements are currently being posted as a result of the federal employee hiring freeze”). As of December 16, 2022, President Biden “signed the second continuing resolution for FY 2023.” *Appropriations Watch: FY 2023*, Comm. for a Responsible Fed. Budget (Dec. 22, 2022), <https://www.crfb.org/blogs/appropriations-watch-fy-2023>. In prior years, under sequestration, the Department of Justice has resorted to hiring uncompensated “special assistant U.S. Attorneys.” See Joe Davidson, “*Special Assistant U.S. Attorneys Work for Free*,” WASH. POST (July 18, 2013), https://www.washingtonpost.com/politics/federal-government/special-assistant-us-attorneys-work-for-free/2013/07/18/3dd33d3c-efba-11e2-a1f9-ea873b7e0424_story.html.

⁸³ See U.S. DEP’T OF JUST., *supra* note 81, at 4.

⁸⁴ This was especially true in 2013 when budget cuts resulted in furloughs at federal defender’s offices, forcing some judges to consider dismissing cases due to the delays and lack of federal defenders. See Michelle R. Smith & Jesse J. Holland, *Budget Cuts Cause Delays, Concern in Federal Court*, SAN DIEGO UNION-TRIBUNE (Apr. 25, 2013, 1:19 PM), <https://www.sandiegouniontribune.com/sdut-budget-cuts-cause-delays-concern-in-federal-court-2013apr25-story.html> (noting layoffs at federal defenders offices and a federal judge in Nebraska who contemplated “dismissing some criminal cases”).

⁸⁵ 18 U.S.C. § 3161.

⁸⁶ See, e.g., *State v. Lattimore*, 696 S.E.2d 613, 614 (Ga. 2010) (noting that delays caused by staffing shortages are weighed against the state); *State v. Young*, 582 S.W.3d 84, 94 (Mo. Ct. App. 2019) (holding that staffing shortages weighed “slightly against the State”). *But see, e.g., Cartwright v. State*, 346 So.3d 22, 25 (Ala. 2020) (holding that staffing shortages “should not be attributed to either side, as the staffing shortage was beyond the prosecution’s control”); *Yokley v. Commonwealth*, No. 2004-SC-000751-MR, 2006 WL 1045412, at *5, 15 (Ky. Apr. 20, 2006) (unpublished) (holding that delays due to budget constraints and staffing shortages did not violate the defendant’s Sixth Amendment rights because the delay was not due to “ulterior motives”); *State v. Mende*, 741 P.2d 496, 500–01 (Or. 1987) (en banc) (noting that a 16-month delay due to budget restrictions was unjustified,

the government, as a political entity, is the party bringing the case.⁸⁷ The government includes the legislature and executive officers who sought the indictment.⁸⁸ In the end, it is the government that chooses how to fund and expend its resources. Thus, delays associated with docket congestion due to funding or staffing issues are—according to these courts—attributable to prosecutors.⁸⁹

Relatedly, freezing budgets at prior year levels creates issues with empaneling juries—an essential component of criminal trials.⁹⁰ Without adequate funding, federal courts cannot empanel juries.⁹¹ This puts federal judges in a predicament. Judges could be faced with deciding either to dismiss cases to avoid Sixth Amendment issues or potentially violate the Anti-Deficiency Act,⁹² “which bars United States officers and employees from obligating the federal government to make payment for which no money has been appropriated,”⁹³ if they were to empanel juries without adequate funding. If history teaches us anything, the most likely result here would be to delay the case as much as statutorily allowed and then dismiss it if a budget was not passed.⁹⁴ In 1986, when the faced with insufficient appropriation for juror payments, the Administrative Office suspended civil jury trials to help focus on criminal trials to mitigate this issue.⁹⁵

One possible upshot to the forced dismissal of criminal cases is that it will cause prosecutors to focus their efforts on more serious crimes instead of low level non-violent drug offenses. But even when criminal cases are dismissed, those charged and held in prison still pay the stigmatic⁹⁶ and financial costs.

it “was not designed to impair the ability of the [defendant] to defend himself”); *Davis v. Puckett*, 857 F.2d 1035, 1041 (5th Cir. 1998) (holding that a five month delay due to staffing shortages did not violate the defendant’s Sixth Amendment rights because it was not oppressive and did not impair his ability to defend himself).

⁸⁷ See Hillary A. Taylor, *Appellate Delay as Reversible Error*, 44 WILLAMETTE L. REV. 761, 772 (2008).

⁸⁸ Taylor, *supra* note 87.

⁸⁹ See Taylor, *supra* note 87, at 772–73 (2008) (noting that the Oregon Supreme Court “took the state to task for attempting to rely on budgeting constraints to justify” a delay).

⁹⁰ See Jonathan Bunge, *Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee*, 55 U. CHI. L. REV. 237, 237 (1988) (discussing a similar problem as it relates to civil trials under the Seventh Amendment).

⁹¹ Bunge, *supra* note 90.

⁹² 31 U.S.C. § 1341.

⁹³ See Bunge, *supra* note 90 (discussing a similar problem as it relates to civil trials under the Seventh Amendment).

⁹⁴ See *id.*

⁹⁵ See, e.g., *Armster v. United States Dist. Ct. for Cent. Dist.*, 806 F.2d 1347, 1349–50 (9th Cir. 1986).

⁹⁶ See Bunge, *supra* note 90, at 268 (“The fear of stigmatization that motivates application of the speedy jury trial right in criminal cases . . .”).

2. Civil Cases: Procedural Due Process and the Seventh Amendment

Like criminal cases, CRs also affect civil cases.⁹⁷ Because the Speedy Trial Act and Sixth Amendment concerns addressed above, civil cases may be placed on the backburner so that courts can prioritize criminal trials.⁹⁸ This problem has been compounded by the pandemic because “[s]chedules for long-delayed jury trials will project out for years, with criminal cases having priority. [And c]ourts, facing an enormous backlog, will be challenged more than ever to clear their dockets.”⁹⁹ Although prioritizing criminal trials over civil trials is the correct move, civil case delays present their own host of issues, such as procedural due process and Seventh Amendment violations.¹⁰⁰

“Federal courts are frequently confronted with administrative delays which raise procedural due process issues.”¹⁰¹ These “temporal due process”¹⁰² claims—as coined by the Third Circuit—often arise in agency proceedings, appeals, civil commitments, and civil asset forfeitures. Generally, these cases occur when there are substantial delays in processing benefit decisions—like veteran and social security benefits—or civil service decisions and appeals. “The fundamental requirement of [procedural] due process is the opportunity to be heard ‘at a meaningful time in a meaningful manner.’”¹⁰³ “An opportunity to be heard in a meaningful manner includes a prompt disposition of the issues.”¹⁰⁴ “Once suspension has been imposed,” or a benefit has been taken away/denied, a claimant’s “interest in a speedy resolution of the controversy becomes paramount, and there is little or no state [or federal] interest in an appreciable delay in going forward with a full hearing.”¹⁰⁵ “The more important the private interest at stake, the more likely it is that the person will be harmed by the delay.”¹⁰⁶ These delays can be especially damaging in civil commitment and immigration cases where—like with criminal cases—personal liberties are at stake.

Procedural due process claims are rarely successful against federal agencies for two reasons. First, the multifactor balancing test to determine whether a procedural due process violation has occurred is “an ad hoc

⁹⁷ See generally *Homer v. Andrzejewski*, 811 F.2d 571 (Fed. Cir. 1987) (examining the validity of a federal emergency furlough provision that was invoked because of a Continuing Resolution).

⁹⁸ See *supra* text accompanying notes 85-95.

⁹⁹ Merrill Hirsh, *Necessity and Invention: Seven Steps for Using Special Masters to Help Courts with the Pandemic Caseload*, 60 JUDGE J. 18, 18 (2021).

¹⁰⁰ See *Armster v. United States Dist. Ct. for Cent. Dist.*, 806 F.2d 1347, 1361.

¹⁰¹ *Allen v. State, Human Rights Comm’n*, 324 S.E. 2d 99, 118, n.22 (W. Va. 1984) (collecting cases).

¹⁰² *Breyer v. Meissner*, 23 F. Supp. 2d 540, 547 (E.D. Pa. 1998); *Wilkinson v. Abrams*, 627 F.2d 650, 665 (3d Cir. 1980).

¹⁰³ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹⁰⁴ *Morehouse v. Jackson*, No. 06-775-C, 2008 WL 4664075, at *3 (M.D. La. Oct. 21, 2008).

¹⁰⁵ *Bary v. Barchi*, 443 U.S. 55, 66 (1979).

¹⁰⁶ *Morehouse*, 2008 WL 4664075, at *6.

process, and no factor is determinative.”¹⁰⁷ That test also changes depending on the type of case. For most cases, courts employ the *Mathews* test that balances (1) “the private interest that will be affected by the official action”; (2) “the risk of erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”¹⁰⁸ But for civil asset forfeiture cases, “the specific due process concern spurred by inaction . . . ‘mirrors the concern of undue delay encompassed on the claimant’s due process rights to a speedy trial.’”¹⁰⁹ “To determine whether delay in the litigation process violates the forfeiture claimants’ due process rights courts balance 1) the length of delay, 2) the government’s proffered justification for the delay, 3) the timeliness of the claimant’s assertion of his or her rights, and 4) prejudice to the claimant.”¹¹⁰ Under either test, flexibility gives the government substantial leeway to avoid procedural due process claims.

The second and more difficult hurdle is that procedural due process claims for damages against federal officials or the federal government have to be asserted as either a *Bivens* claim¹¹¹ or under the Federal Tort Claims Act (FTCA).¹¹² *Bivens* actions today might as well be fiction,¹¹³ “as the Supreme Court ‘has made clear that expanding *Bivens* remedy is now a “disfavored” judicial activity’ and has refused to extend *Bivens* to any new context ‘for the past 30 years.’”¹¹⁴ Arguably, delays due to the impacts of CRs qualify as a special factor counselling hesitation—which would also negate the possibility of a successful *Bivens* action.¹¹⁵

Claims under the FTCA do not fare much better. FTCA claimants must establish, among other factors, “that the United States is liable ‘in the same manner and to the same extent as a private individual in like circumstances.’”¹¹⁶ This standard is exceedingly hard to meet, especially in

¹⁰⁷ *United States v. \$307,970.00*, in *U.S. Currency*, 156 F. Supp. 3d 708, 717 (E.D.N.C. 2016).

¹⁰⁸ *Mathews*, 424 U.S. at 335.

¹⁰⁹ *\$307,970.00, in U.S. Currency*, 156 F. Supp. 3d at 716.

¹¹⁰ *Id.* at 717; *see also* *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972).

¹¹¹ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹¹² 79 P.L. 601, 60 Stat. 812, 79 Cong. Ch. 753; *see also* *Carlson v. Green*, 446 U.S. 14, 20 (1980).

¹¹³ *See* Howard M. Wasserman, *Court Again Rejects Extension of Bivens Suits Against Federal Officers*, SCOTUSBLOG (Jan. 8, 2022, 12:05 PM), <https://www.scotusblog.com/2022/06/court-again-rejects-extension-of-bivens-suits-against-federal-officials/> (explaining that the Supreme Court once again declined to extend *Bivens* and noting that Justice Gorsuch argued that “the court should not leave false hope for any future *Bivens* claims”).

¹¹⁴ *Hoyle v. Lee*, No. 21-CV-02512-, 2022 WL 4316171, at *4 (W.D. Tenn. Sept. 19, 2022) (quoting *Ziglar v. Abassi*, 137 S. Ct. 1843, 1857 (2017)).

¹¹⁵ *See Ziglar*, 137 S. Ct. at 1857–58.

¹¹⁶ *Clark v. United States*, No. C07-00805, 2007 WL 2358630, at *2 (N.D. Cal. Aug. 17, 2007) (quoting 28 U.S.C. § 2674), *aff’d* 321 F. App’x 672 (9th Cir. 2009).

the context of delays for benefits processing.¹¹⁷ The closest private employer analogue would be a private employer covered by ERISA, but the Supreme Court has stated that

the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409 Congress did not provide, and did not intend the judiciary to imply a cause of action for extra-contractual damages caused by improper or untimely processing of claims benefits.¹¹⁸

“Because the federal government would not be liable if it was a private person in like circumstances,”¹¹⁹ FTCA claims for due process violations for administrative delays due to CRs are likely not actionable.

Seventh Amendment violations, although improbable are not impossible. “Among the federal appellate courts, only the Ninth Circuit held that the suspension of jury trials for lack of funds violated the Seventh Amendment’s guarantee.”¹²⁰ In *Armster v. U.S. District Court for the Central District of California*, civil plaintiffs with pending civil cases in California and Alaska sought emergency writs of mandamus against district courts “prohibiting them from suspending civil jury trials because of an alleged insufficiency of funds appropriated for the payment of jury fees.”¹²¹ The Ninth Circuit acknowledged that there is no right to speedy trial under the Seventh Amendment but noted the Supreme Court’s emphasis on “the importance of the right to a civil jury trial and the need for courts to be vigilant in guarding against the erosion of that right.”¹²² The Ninth Circuit also reasoned that “[o]ur basic liberties cannot be offered and withdrawn as ‘budget crunches’ come and go.”¹²³ The Ninth Circuit then held that a three and a half month delay violated the Seventh Amendment but did not issue a writ as it thought one would not be needed to enforce its opinion.¹²⁴

Assuming the backlog and near-certain delays from CRs, it is not impossible for future writs to be sought due to civil jury trial delays—at least

¹¹⁷ See generally, *id.* at *4.

¹¹⁸ *Id.* at *3 (quoting *Abraham v. Norcal Waste Sys., Inc.*, 265 F.3d 811, 820–21 (9th Cir. 2001)).

¹¹⁹ *Id.* at *4.

¹²⁰ Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 138 (2022).

¹²¹ *Armster v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 792 F.2d 1423, 1424 (9th Cir. 1986).

¹²² *Id.* at 1428; see also *Jacob v. New York City*, 315 U.S. 752, 752–53 (1942) (“The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen . . . should be jealously guarded by the courts.”).

¹²³ *Id.* at 1429.

¹²⁴ *Id.* at 1431.

in the Ninth Circuit which comprises eleven states and U.S. territories.¹²⁵ One potential benefit for the judiciary is that delays may cause increase dispute resolution outside of the courts through mediation or arbitration.¹²⁶ But this too comes with a price, “creating a persistent cycle of lawyers opting not to go the jury route because they lack the skillset and familiarity needed for success” and discounting the benefits that civil juries provide, like “add[ing] to the quality of fact-finding,”¹²⁷ the “group nature of jury decision-making,”¹²⁸ and increased “civic engagement and systemic legitimacy.”¹²⁹

Due to the improbability of any cognizable *Bivens* or FTCA claim, monetary damages for litigants asserting procedural due process or Seventh Amendment challenges are out of the question. As Judge Yohn of the Eastern District of Pennsylvania put it, “[w]hile administrative agencies ‘are often guilty of unconscionable delay,’ the tools available to courts for remedying such delay are weak and limited, even ‘against egregious, prejudicial, unjustifiable administrative foot-dragging.’”¹³⁰ That said, some relief may be possible; otherwise, what good is procedural due process and what prevents agencies from foot-dragging?¹³¹ Claimants seeking relief for delays against agencies have two potential forms of relief: (1) an action under the Mandamus and Venue Act, 28 U.S.C. § 1361 or (2) a § 706 claim under the Administrative Procedure Act that allows courts to compel “agency action unlawfully withheld and unreasonably delayed.”¹³²

Injunctive relief under § 1361 is governed by the four-factor test articulated in *eBay Inc. v. MercExchange, L.L.C.*, which requires plaintiffs to demonstrate:

- (1) that [they] have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the

¹²⁵ See *U.S. District Court Caseloads and Statistics*, U.S. COURTS FOR THE NINTH CIRCUIT, <https://www.ca9.uscourts.gov/district/district-court-statistics/> (last visited Jan. 2, 2023) (listing Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marina Islands, Oregon, and Washington as states and territories under the Ninth Circuit).

¹²⁶ See Jolly et al., *supra* note 120, at 139 (“Even more people will be driven to private adjudication service, further diminishing the number of jury trials.” (footnote omitted)).

¹²⁷ See *id.* at 99, 139.

¹²⁸ See *id.* at 103.

¹²⁹ See *id.* at 107.

¹³⁰ *Breyer v. Meissner*, 23 F. Supp. 2d 540, 548 (E.D. Pa. 1998) (quoting *Maxon Marine Inc. v. Dir., Off. Worker’s Comp. Programs*, 39 F.3d 144, 147 (7th Cir. 1995)).

¹³¹ See Michael Serota & Michelle Singer, *Veterans’ Benefit and Due Process*, 90 NEB. L. REV. 388, 422 (2011) (“The existence of a remedy is important because it enables a right to characters as legal, rather than as moral or natural; as Paul Gewirtz puts it, “[t]he function of a remedy is to “realize” a legal norm [and] to make it a “living truth” so it can be ‘effective in the real world.’”).

¹³² 5 U.S.C. § 706(1) (1996).

plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.¹³³

As Professors Michael Serota and Michelle Singer argue, these factors could easily be met—at least in the context of delays to VA benefits.¹³⁴

Setting aside the legality of national injunctions,¹³⁵ it is also possible that “unconstitutional delays in the adjudication of . . . benefits” could result in a “system-wide injunctive relief.”¹³⁶ Professors Serota and Singer propose a thoughtful model of what this nationwide or national injunction would look like, and—under normal conditions—it would likely be a viable solution.¹³⁷ But this model injunction would not solve the woes with delays associated with CRs. As Professors Serota and Singer argue, some avenues agencies could take to speed up benefits processing is to “ask Congress for more funding, increase staff . . . or shift[] staff roles, . . . [and] better utiliz[e] available technology.”¹³⁸ All of these avenues cost money and require appropriations, which are the precise roadblocks created by CRs. So, assuming a court would issue such an injunction, it would cause agencies to face a Hobson’s choice: ignore the injunction and comply with appropriations law or ignore appropriations law and comply with the injunction.¹³⁹

Section 706 claims under the Administrative Procedure Act present plaintiffs backend relief.¹⁴⁰ Section 706(2) allows courts to “hold unlawful and set aside agency action, findings, and conclusions”¹⁴¹ when they are “contrary to a constitutional right, power, privilege, or immunity.”¹⁴² Unlike injunctive relief, § 706 would, in theory, permit courts to set aside agency decisions when a procedural due process violation was found.¹⁴³ That said, courts would likely determine such delays to be “harmless error”¹⁴⁴—

¹³³ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

¹³⁴ *See* Serota et al., *supra* note 131, at 427.

¹³⁵ *See* Amanda Frost & Samuel Bray, *One for all: Are Nationwide Injunctions Legal?*, 102 JUDICATURE 70, 70 (2018) (noting that the “debate over the . . . legality” of nationwide or national injunctions).

¹³⁶ *See* Serota et al., *supra* note 131, at 428.

¹³⁷ *See id.* at 433.

¹³⁸ *See id.* at 429.

¹³⁹ True, no such national injunction has been issued, but courts have issued injunctions for individual plaintiffs even when the agency involved was faced with problems outside of its control. *See White v. Matthews*, 559 F.2d 852, 859 (2d Cir. 1977).

¹⁴⁰ 5 U.S.C. § 706 (2023).

¹⁴¹ *Id.* § 706(2) (2023).

¹⁴² *Id.* § 706(2)(B).

¹⁴³ *See Ali v. United States*, 849 F.3d 510, 514 (1st Cir. 2017).

¹⁴⁴ *See id.* Conceivably, a delay could result in court remanding a decision to an agency under § 706 where the delay would have an effect on the underlying decision. For example, imagine that important witnesses died before their testimony could be taken and that their testimony may have swayed the agencies decision, or at least affected it.

especially when the delay would have “no effect on the underlying agency action being challenged.”¹⁴⁵ But the § 706 claims themselves would create extra work and litigation costs.

The point here is that delays caused by funding and personnel problems associated with CRs—mixed with a backlog from the pandemic—create a litigation storm. Aside from the constitutional harms, this storm may end up costing taxpayers more in litigation costs and will further strain judicial resources.

3. Court Security and Safety

Budgetary restrictions caused by CRs also present physical threats to the judiciary. “Over the past several years, threats and attacks against judges in the United States have increased in both number and intensity.”¹⁴⁶ According to the U.S. Marshals Service, the number of “threats and inappropriate communications against federal judges and other court personnel” has increased “from 926 incidents in 2015 to 4,261 in 2020.”¹⁴⁷ Security for the federal judiciary is handled primarily by the U.S. Marshals Service (USMS) and the Federal Protective Service,¹⁴⁸ and, although “Congress has approved additional funding for bolstering the security of federal judges[,]”¹⁴⁹ it may not prevent the damage that CR budgetary freezes could have.

The Judicial Security Division of the USMS “maintains more than 1,600 residential security systems in judges’ personal residences, and, as the physical security provider to over 700 federal facilities, the USMS develops, manages, and implements security systems and screening equipment that protect each courthouse.”¹⁵⁰ But “[a]larm systems installed in judges’ homes are badly out of date”¹⁵¹ and “the home security systems [previously] funded

¹⁴⁵ *Id.* (citing *PDK Lab’ys Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)).

¹⁴⁶ Susan J. Kohlmann, *The Disturbing Trend of Threats and Violence Against Judges and the Vital Importance of Judicial Security*, N.Y. CITY BAR (June 24, 2022), <https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security>.

¹⁴⁷ *Facilities and Security –Annual Report 2021*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/facilities-and-security-annual-report-2021> (last visited Dec. 22, 2022).

¹⁴⁸ BARRY J. McMILLION, CONG. RESEARCH SERV., IN11947, SECURITY OF THE FEDERAL JUDICIARY: BACKGROUND AND RECENT CONGRESSIONAL LEGISLATION I (2022).

¹⁴⁹ C. Ryan Barber, *Inside the Threats Federal judges are Facing Across the Country: Suspicious Packages, White Powdery Substances, and a ‘Swatting’*, INSIDER (Oct. 24, 2022, 5:33 PM), <https://www.businessinsider.com/threats-federal-judges-swatting-suspicious-packages-powder-marshals-court-security-2022-10>; see also John Fritze, *Federal Courts Look to Expand Security Following Capitol Riot, Other Threats to Judges*, USA TODAY (Mar. 16, 2021, 4:40 PM), <https://www.usatoday.com/story/news/politics/2021/03/16/federal-courts-expand-security-following-jan-6-capitol-riot-threats/4720960001/> (reporting that USMS received \$7 million to update judges’ home alarm systems).

¹⁵⁰ *Protecting the Judiciary*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/what-we-do/judicial-security/protecting-judiciary> (last visited Dec. 23, 2022).

¹⁵¹ David McKeague, *Modernizing Security Measures to Protect Federal Judges and Their Families*, 104 JUDICATURE 54, 54 (2020).

by Congress are limited to motion detectors and door and window sensors, and they do not include more modern technology such as external video surveillance cameras or doorbell cameras.”¹⁵²

In addition to their homes, judges and judiciary employees have also been targeted at courthouses.¹⁵³ Although courthouses are often thought of as secure, the Government Accountability Office (GAO) recently reported alarming security issues.¹⁵⁴ According to the GAO, sixty-nine percent of federal courthouses “lacked fully separate circulation paths for the public, prisoners and judges in all hallways, elevators and stairways.”¹⁵⁵ In May 2022, two judges testified to the House Appropriations Subcommittee on Financial Services and General Government that “\$8.6 billion is needed to keep pace with inflation and to pay for new investments in courthouse security, IT modernization, and cybersecurity,”¹⁵⁶ the latter of which has become increasingly problematic recently.¹⁵⁷

Spending for these security improvements—home, IT, and courthouses—are covered by discretionary spending.¹⁵⁸ Until a budget is passed, any new contracts to update these security measures likely will not be able to start because “[m]ost CRs include a provision intended to prohibit ‘new starts’ or the initiation of activities that weren’t funded in the past year.”¹⁵⁹ With a divided Congress, the budget often becomes a bargaining chip that results in several CRs¹⁶⁰ or, even worse, government shutdowns. In December 2022, Congress approved \$8.46 billion in funding for the federal judiciary, of which

¹⁵² *Id.*

¹⁵³ *See id.* (“Courthouses have also been targeted.”).

¹⁵⁴ *See generally* Nate Raymond, *Four in 10 Federal Courthouses Rank Poorly for Security: Congressional Watchdog*, REUTERS (Jan. 6, 2022, 4:08 PM), <https://www.reuters.com/legal/litigation/four-10-federal-courthouses-rank-poorly-security-congressional-watchdog-2022-01-06/>.

¹⁵⁵ *Id.*

¹⁵⁶ *Judges Request Funding to Address Cybersecurity, Courthouse Safety, Growing Workload*, U.S. COURTS (May 12, 2022), <https://www.uscourts.gov/news/2022/05/12/judges-request-funding-address-cybersecurity-courthouse-safety-growing-workload>.

¹⁵⁷ *See* Nate Raymond, *Federal Judiciary ‘Vulnerable’ to Cyberattacks, U.S. Lawmakers Told*, REUTERS (May 12, 2022, 4:21 PM), <https://www.reuters.com/legal/government/federal-judiciary-vulnerable-cyberattacks-us-lawmakers-told-2022-05-12/> (noting that Congress was warned “that the judiciary’s aging computer systems are ‘vulnerable’ to cyberattacks. Creating a risk that hackers could obtain confidential material or draft court decisions”).

¹⁵⁸ *See* James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 3 (2006) (noting that fixed costs, like judicial salaries, are mandatory costs but “[a]ll other expenses are discretionary” such as “the purchase of equipment”).

¹⁵⁹ *Legislative Process 101-Continuing Resolutions (Or “Doing the Bare Minimum”)*, INDIVISIBLE, <https://indivisible.org/resource/legislative-process-101-continuing-resolutions-or-doing-bare-minimum> (last visited Dec. 23, 2022).

¹⁶⁰ *See* Molly E. Reynolds, *How Does a Divided Government Impact the Congressional Budget Process?*, BROOKINGS (Feb. 28, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/28/how-does-a-divided-government-impact-the-congressional-budget-process/> (“Because of its ‘must pass nature, fiscal policy can become particularly high-stakes arena for . . . partisan goals to be pursued during divided government.”).

\$750 million will be used for court security.¹⁶¹ Even though security improvements are on the way, it may be some time before they are fully implemented.¹⁶² Given that the FY 2023 omnibus bill barely passed the House,¹⁶³ which is now under Republican control, it is tough to say whether additional funding for security measures will be granted should the \$750 million prove insufficient. Contracting efforts will need to progress quickly to implement these security measures or face delays from next fiscal year's inevitable CR and appropriation fights.

B. "MONEY FOR NOTHING"¹⁶⁴: THE EFFECT ON ADMINISTRATIVE AGENCIES

CRs also wreak havoc on administrative agencies because they burden agencies' hiring and planning processes, create inefficiencies in government contracting, and may inadvertently pressure agencies to violate the Competition in Contracting Act (CICA).¹⁶⁵

1. *Staffing and Program Burdens*

Like the federal courts, administrative agencies cannot function without employees. But CRs "can cause hiring activities to slow down or pause."¹⁶⁶ Other than the immediate effects that staffing issues have on "training, strategic hiring plans, and program services,"¹⁶⁷ administrative agencies face less obvious long-term consequences from these hiring pauses. Many young people interested in working for the federal government cannot afford to wait to start work while agencies deal with hiring freezes caused by CRs.¹⁶⁸ Faced

¹⁶¹ Nate Raymond, *U.S. Judiciary Receives Security Funding Boost in Massive Spending Bill*, REUTERS (Dec. 23, 2022, 2:38 PM), <https://www.reuters.com/legal/government/us-judiciary-receives-security-funding-boost-massive-spending-bill-2022-12-23/>.

¹⁶² See Reynolds, *supra* note 160.

¹⁶³ See Raymond, *supra* note 161 (noting that the House "approved Friday on a largely party-line vote of 225-201").

¹⁶⁴ DIRE STRAITS, *Money for Nothing, on BROTHERS IN ARMS* (Universal 1996).

¹⁶⁵ 41 U.S.C. § 3301 (2011). CRs also "result[] in administrative inefficiencies and limited management options in areas such as hiring and travel." See *What is a Continuing Resolution*, *supra* note 5.

¹⁶⁶ U.S. GOV'T ACCOUNTABILITY OFFICE., GA-22-104701, FEDERAL BUDGET: SELECTED AGENCIES AND PROGRAMS USED STRATEGIES TO MANAGE CONSTRAINTS OF CONTINUING RESOLUTIONS 16 (June 2022) [hereinafter FEDERAL BUDGET]. See also Ed O'Keefe, *How do Continuing Resolutions Impact Agencies?*, WASH. POST (Mar. 15, 2011), https://www.washingtonpost.com/blogs/federal-eye/post/how-do-continuing-resolutions-impact-agencies/2011/03/14/ABT7pbW_blog.html ("[A]gency officials said that, absent a CR, they would have hired additional staff sooner for activities such as grant processing and oversight, food and drug inspections, intelligence analysis, prison security, claims processing for veterans' benefits, or general administrative tasks, such as financial management and budget execution," GAO said.)

¹⁶⁷ FEDERAL BUDGET, *supra* note 166, at 16.

¹⁶⁸ See Jessie Bur, *Federal Hiring Times far Exceed Ideal Threshold*, FED. TIMES (Mar. 5, 2018), <https://www.federaltimes.com/management/hr/2018/03/05/federal-hiring-times-far-exceed-opm-standard/> ("[T]his extended time is preventing the government from hiring top-tier talent . . . [y]our best candidates can't

with student loan debt,¹⁶⁹ younger employees may instead opt to work for private employers to service their student debts or simply out of impatience.¹⁷⁰ This is especially troubling because the federal government has “struggled to attract young people”¹⁷¹ and its “workforce is aging rapidly.”¹⁷² As older federal employees retire, agencies—like the Department of Defense (DoD)—face “a significant talent drain,”¹⁷³ and because “[t]he new hires of today are the mentors of tomorrow, the lag in hiring will be felt by the defense industry for generations.”¹⁷⁴

CRs also cause program inefficiencies¹⁷⁵ and “management nightmare[s].”¹⁷⁶ Consider an example from the Department of Health and Human Services (HHS). The HHS operates the Low Income Home Energy Assistance Program (LIHEAP) to “help[] keep families safe and healthy through initiatives that assist families with energy costs.”¹⁷⁷ HHS officials have to determine LIHEAP allocations for grantees, but “as a result of CRs, [HHS has] to update the formula[tions] at least twice—once for the CR and

stand to wait when there’s a better job offers out there,’ said Sen. Steve Daines, R-Mont.”). True, agencies can utilize direct hiring authority to help combat this issue. But this direct hiring authority is reserved for “certain job positions,” so the positive effect here is minimal. See Ian Smith, *OPM Announces New Direct Hiring Authority for Certain Positions*, FEDSMITH (Oct. 11, 2018, 3:26 PM), <https://www.fedsmith.com/2018/10/11/opm-announces-new-direct-hiring-authority-certain-positions/> (noting that direct hiring authority applies to STEM and cybersecurity positions); Eric Katz, *Federal Agencies are Increasingly Avoiding Normal Hiring Procedures to Bring on New Staff Quickly*, GOV’T EXEC. (Feb. 8, 2021), <https://www.govexec.com/workforce/2021/02/federal-agencies-are-increasingly-avoiding-normal-hiring-procedures-bring-new-staff-quickly/171922/> (noting the same and other specialized approvals).

¹⁶⁹ See Emma Kerr & Sarah Wood, *See How Average Student Loan Debt has Changed*, U.S. NEWS (Sept. 13, 2022, 8:00 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/see-how-student-loan-borrowing-has-changed> (“[T]he average student debt continues to hover around \$30,000 . . .”).

¹⁷⁰ See Janice Gassam Asare, *Dear Businesses: Generation Z Does not Want to Hear “Please Hold”*, FORBES (Nov. 11, 2019), <https://www.forbes.com/sites/janicegassam/2019/11/11/dear-businesses-generation-z-does-not-want-to-hear-please-hold/?sh=71d35ff36b46> (“It should come as no surprise to anyone that Generation Z . . . is the most impatient generation.”).

¹⁷¹ Gerry Connolly, *The Government has a Talent Problem. This Bill Could Help Change That*, CNN BUS. (Jan. 27, 2022), <https://www.cnn.com/2022/01/27/perspectives/nextgen-feds-act-federal-government-jobs-talent/index.html>.

¹⁷² See Fiona Hill, *Public Service and the Federal Government*, BROOKINGS (May 27, 2020), <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/>.

¹⁷³ Maiya Clark & Caitlyn Wetzel, *How Congressional Continuing Resolutions Hurt Defense Industrial Base*, HERITAGE FOUND. (Nov. 9, 2022), <https://www.heritage.org/defense/commentary/how-congressional-continuing-resolutions-hurt-defense-industrial-base>.

¹⁷⁴ *Id.*

¹⁷⁵ Although beyond the scope of this Article, these program inefficiencies ultimately have negative effects on people and organizations that rely on agency services and programs. See, e.g., FEDERAL BUDGET, *supra* note 166, at 17–18 (noting how CRs create additional burdens for participants in the Department of Education’s Predominantly Black Institutions (PBI) grant initiative).

¹⁷⁶ Kimberly Adams, *The Cost of Continuing Resolutions to Keep the Government Open Adds Up*, MARKETPLACE (Jan. 8, 2018), <https://www.marketplace.org/2018/01/08/cost-continuing-resolutions-keep-government-open-adds/>.

¹⁷⁷ See generally *Low Income Home Energy Assistance Program (LIHEAP)*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (Nov. 2, 2022), <https://www.acf.hhs.gov/ocs/low-income-home-energy-assistance-program-liheap>.

a second time when the final appropriations are enacted.”¹⁷⁸ HHS officials report that “this formula is complicated, . . . time consuming, and creates additional work when calculated twice.”¹⁷⁹ Additionally, each CR requires grantees to process a new award, and “when grantees and sub-grantees receive influxes of funds later in the fiscal year, they sometimes have to rehire the seasonal staff they previously let go to assist in their efforts to spend the funds.”¹⁸⁰

2. Contracting Inefficiencies

“The federal government relies on contracting with . . . private [companies] for necessary goods and services.”¹⁸¹ “In Fiscal Year [FY] 2021, the federal government spent about \$637 billion on contracts”¹⁸² and, in FY 2023 has already obligated \$140.4 billion.¹⁸³ CRs “impose restrictions on agency operations”¹⁸⁴ by limiting “the issu[ance] of new contracts or renewal of old ones”¹⁸⁵ and “place operations in a holding pattern until the regular annual appropriations become available.”¹⁸⁶ To compound the problem, “[m]any organizations have budgets that expire at the end of the fiscal year,” and agencies that do not “obligate their funds by the end of the fiscal year [must] return the funds to the Treasury.”¹⁸⁷ The combination of delayed budget authority on the front end and pressure to spend at the end of the year truncates the procurement process.¹⁸⁸ Truncation of the procurement process leads to inefficiencies and potential CICA violations.¹⁸⁹

With regard to inefficiencies, CRs negatively affect cost and schedules.¹⁹⁰ First, CRs “can necessitate short-term contracts that must be

¹⁷⁸ FEDERAL BUDGET, *supra* note 166, at 18.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Stuart Roy Kasdin, *Continuing Costs: The Impact of Continuing Resolutions on Federal Contracting*, 51 AM. REV. PUB. ADMIN. 542, 544 (2021), <https://journals.sagepub.com/doi/epub/10.1177/02750740211010347>.

¹⁸² *A Snapshot of Government-wide Contracting for FY 2021*, GOV’T ACCOUNTABILITY OFFICE (Aug. 25, 2022), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard>.

¹⁸³ See *Contractual Services and Supplies*, USASPENDING (Nov. 30, 2022), https://www.usaspending.gov/explorer/object_class. Note the dollar obligated amount changes as new contracts are awarded.

¹⁸⁴ Kasdin, *supra* note 181, at 543.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Jeffrey B. Liebman & Neale Mahoney, *Do Expiring Budgets Lead to Wasteful Year-End Spending? Evidence from Federal Procurement*, 107 AM. ECON. REV. 3510, 3510 (2017), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20131296>.

¹⁸⁸ See Kasdin, *supra* note 181, at 544 (“CRs reduce the time available for proposing, evaluating and allocating research and development grants within the fiscal year.”).

¹⁸⁹ See Molly E. Reynolds, *Shutdown Politics—Understanding Fiscal Brinkmanship*, BROOKINGS (Sept. 28, 2022), <https://www.brookings.edu/blog/fixgov/2022/09/28/shutdown-politics-understanding-the-contemporary-appropriations-process/> (“[W]hen a continuing resolution is followed by the adoption of a regular appropriations bill mid-way through a fiscal year already in progress, agencies are left with less time to spend responsibly the funds allocated to them.”).

¹⁹⁰ See Stephanie Young & J. Michael Gilmore, *Operating Under a Continuing Resolution*, RAND CORP. 13

reissued once additional funding is provided,” which causes “additional paperwork, and additional overhead in contracting actions.”¹⁹¹ During a CR in 2011, the Veterans Health Administration (VHA) lost one million dollars in productivity and “more than \$140,000 in extra work for the agency’s contracting office.”¹⁹² The VHA was also forced to solicit bids on new maintenance projects to “redo environmental, architectural[,] and engineering analyses.”¹⁹³ That same year, the “Administration of Children and Families . . . had to issue block grant awards multiple times . . . leading to 10 extra days of work preparing and verifying the grants.”¹⁹⁴

Second, CRs affect the timing of contracts—delaying the start of a major acquisition and possibly creating national security concerns.¹⁹⁵ CRs can force agencies to “defer and cancel modernization efforts”¹⁹⁶ that would otherwise “address immediate capability gaps”¹⁹⁷ in national defense programs.¹⁹⁸ Delays also come with financial consequences. For example, a 2009 GAO report noted that “an agency delayed awarding a contract during a CR period in order to reserve money for more pressing needs.”¹⁹⁹ After the CR, when the contract was finally awarded, the cost for the work had increased by \$5.4 million—taxpayer dollars, down the drain.”²⁰⁰

Third, CRs may inefficiently allocate funding across different account types. Agency budgets are usually allocated based on categories—commonly called “colors of money.”²⁰¹ These categories include (1) operation and

(2019) https://www.rand.org/content/dam/rand/pubs/research_reports/RR2200/RR2263/RAND_RR2263.pdf. (Other literature indicates that a CR might negatively affect the efficiency with which the government procures goods and services.

¹⁹¹ *Id.*

¹⁹² O’Keefe, *supra* note 166.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Young and Gilmore., *supra* note 190, at 13–14 (noting that a CR hindered the Air Force’s ability to award “the Long Range Stand-off Weapon and Ground Based Strategic Deterrent technology-maturation and risk-reduction contracts on time”); *Budget Delay Causing ‘Significant’ Harm*, ASS’N OF THE U.S. ARMY (Nov. 29, 2022, 11:34 AM), <https://www.ansa.org/news/budget-delay-causing-significant-harm> (“Continuing resolutions ‘diminish national security and the capabilities of the Armed Forces . . . by hurting readiness, modernization, and quality of life programs.’ . . . (first omission in original)).

¹⁹⁶ Young & Gilmore, *supra* note 190, at 15.

¹⁹⁷ *Id.*

¹⁹⁸ See PAT TOWELL, KATE P. MCCLANAHAN & JENNIFER M. ROSCOE, CONG. RESEARCH SERV., R45870, DEFENSE SPENDING UNDER AN INTERIM CONTINUING RESOLUTION: IN BRIEF 7 (2019) (noting that the DoD has “posited that CRs put commanders in a ‘straitjacket’ that limits their ability to adapt, or keep pace with complex national security challenges around the world while responding to rapidly evolving threats”).

¹⁹⁹ *Legislative Process 101*, *supra* note 159.

²⁰⁰ *Id.*

²⁰¹ See Col. John Dillard, *Understanding Acquisition: The Colors of Money*, U.S. ARMY ACQ. SUPPORT CTR. (Mar. 25, 2021), <https://asc.army.mil/web/news-understanding-acquisition-the-colors-of-money/> (“Colors of money is shorthand for categories of budget appropriations.”). The term color of money is most often associated with the Department of Defense. Other agencies use different terms like “account categories” and have different categories altogether, like the Department of Homeland Security. See FISCAL YEAR 2023 CONGRESSIONAL JUSTIFICATION, DEP’T OF HOMELAND SECURITY DHS-5 (2022), <https://www.dhs.gov/sites/default/files/2022->

maintenance (O&M); (2) procurement; and (3) research, development, test, and evaluation (RDT&E).²⁰² Each “color” can only be obligated and expended on products or services within the specified category.²⁰³ But budget needs are not static, and, as a result, CRs can cause an agency to have an excess of one color of money but leave the agency underfunded in another category.²⁰⁴ True, there are some workarounds for this problem. For example, some funding categories can be reprogrammed, but this process is cumbersome and requires congressional approval.²⁰⁵ And agencies that use the General Services Administration to order services or supplies can use no-year funds to cover increased costs,²⁰⁶ but that covers only a small portion of government contracts.²⁰⁷

Fourth, because CRs “freeze[] spending at the previous year’s level,”²⁰⁸ they prevent agencies from “taking advantage of more cost-effective acquisition strategies”²⁰⁹ like multi-year contract awards. Multi-year

03/DEPARTMENT%20OF%20HOMELAND%20SECURITY.pdf (“The Department’s Components share four common account categories: Operations and Support (O&S); Procurement, Construction, and Improvements (PC&I), Research and Development (R&D); and Federal Assistance (FA).”). Although the names may be different, the concept is the same: different categories are earmarked for specific types of purchases and obligations can only occur in specific time periods. See Tom Temin, *Tom Temin: Understanding the Color of Federal Money*, DLT (Sept. 12, 2018), <https://www.dlt.com/blog/2018/09/12/understanding-color-federal-money> (explaining the differences between one-year, multiple-year, and no-year appropriations); 31 U.S.C. § 1301(a) (1982) (“Appropriations shall be applied only to the objects for which appropriations were made except as otherwise provided by law.”).

²⁰² See *Understanding DoD Contracting*, MITRE AIDA, <https://aida.mitre.org/demystifying-dod/understanding-dod-contracting/> (last visited Jan. 10, 2023); see also U.S. DEP’T OF DEF., DOD FINANCIAL MANAGEMENT REGULATION, Vol. 3, Ch. 6, ¶ 060401(D)(1)–(4) (2000), https://comptroller.defense.gov/Portals/45/documents/fmr/archive/03arch/03_06_Aug00.pdf.

²⁰³ See Dillard, *supra* note 203.

²⁰⁴ See TOWELL ET AL., *supra* note 200, at 7 (“Because CRs constrain funding by appropriations account rather than by program, DOD may encounter significant issues with programs that draw funds from several accounts. . . . In such cases, the program could have excess R&D funding . . . and a shortfall in procurement funds needed to ramp up production.”). The USDA faced a similar problem heading into FY 2023. See FY 2023 CONTINUING RESOLUTION (CR) APPROPRIATIONS ISSUES 6 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/09/CR_Package_9-2-22.pdf (noting the need for language to prevent unexpended FY 2022 dollars to not reduce USDA’s FY 2023 budget or it would be unable to award a building modernization contract).

²⁰⁵ See U.S. DEP’T OF DEF., *supra* note 202, at ¶ 060401 (“Reprogramming actions requiring prior approval of the congressional committees.”).

²⁰⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, B-326945, GENERAL SERVICES ADMINISTRATION—AVAILABILITY OF NO-YEAR APPROPRIATIONS FOR A MODIFICATION OF AN INTERAGENCY ORDER 1 (2015), <https://www.gao.gov/assets/b-326945.pdf> (“The General Services Administration may accept no-year appropriations from a customer agency to fund the increased cost resulting from a modification to an interagency order . . .”).

²⁰⁷ These contracts refer to contracts awarded by under GSA’s Assisted Acquisition Services, a program of the Federal Acquisition Services (FAS) [that] offers value-added, customized, acquisition . . . services for large or complex Information Technology and Professional Services solutions.” *Assisted Acquisition Services*, U.S. GEN. SERV. ADMIN., <https://www.gsa.gov/about-us/regions/welcome-to-the-southeast-sunbelt-region-4/products-and-services/assisted-acquisition-services> (last visited Jan. 11, 2023).

²⁰⁸ Jim Garamone, *DOD Officials Say Service Members, Families Pay Price of Continuing Resolutions*, U.S. DEP’T OF DEF. (Jan. 12, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/2897977/dod-officials-say-service-members-families-pay-price-of-continuing-resolutions/>.

²⁰⁹ Young & Gilmore, *supra* note 190, at 14.

contracts cover “the purchase of supplies or services for more than 1, but not more than 5, program years,”²¹⁰ unlike other funds which can only be expended for one year (i.e., single year funds). Although not without drawbacks, multi-year contracts “can be very effective incubators for contractor-led efficiency services that ultimately lower procurement costs.”²¹¹

Last, under CRs, agencies may resort to bundling various products and services together. Certainly, contract bundling has time and cost benefits, which is why the Federal Acquisition Regulation permits it in particular cases,²¹² but bundling decreases opportunities for small businesses to compete.²¹³ Smaller contracts also allow new contractors a chance to build a past performance record, which is useful for competition for larger contracts in the future.²¹⁴ “Federal law generally requires agencies to consider contractors’ past performance when making source selection decisions in negotiated procurements that exceed the simplified acquisition threshold”²¹⁵ of \$150,000. Without this performance history, small businesses have little to no chance of winning larger contracts.²¹⁶

Bundling also encourages the use of cost-reimbursement contracts.²¹⁷ When contract size and scope increases “to cover a wide range of

²¹⁰ FAR 17.103 (2022).

²¹¹ Scot A. Arnold & Bruce R. Harmon, *The Relative Costs and Benefits of Multi-year Procurement Strategies* INST. FOR DEF. ANALYSES, Document NS D-4893 30 (2013), <https://apps.dtic.mil/sti/pdfs/AD1123783.pdf>; RONALD O’ROURKE, CONG. RESEARCH SERV., R41909, MULTIYEAR PROCUREMENT (MYP) AND BLOCK BUY CONTRACTING IN DEFENSE ACQUISITION: BACKGROUND AND ISSUES FOR CONGRESS 4 (2022) (“Compared to annual contracting, using MYP can in principle reduce the cost of weapons being procured” by (1) allowing contractor “optimization of workforce and production facilities” and (2) take advantage of “economic order quantity”).

²¹² See generally FAR 7.107-3 (2022).

²¹³ See Courtney Bubl , ‘Contract Bundling’ is an Issue That’s Still Top of Mind for the Small Business Administration, GOV’T EXEC. (Aug. 26, 2022), <https://www.govexec.com/management/2022/08/contract-bundling-still-top-mind-small-business-administration/376344/> (noting that bundling disproportionately effected women-owned small businesses and explaining that due to bundling “those contracts are no longer available for smaller business because a small business wouldn’t really be able to compete necessarily for a \$7 billion contract”); Kasdin, *supra* note 183, at 552 (“[S]mall firms and vendors from the poorer neighborhoods lose out after the CR ends.”).

²¹⁴ See *Past Performance*, DEF. ACQ. UNIV., <https://www.dau.edu/acquipedia-article/past-performance> (last visited Jan 11, 2023) (“A significant factor in the Government’s selection of contractors is the contractor’s history of past performance.”); FAR 42.1501 (“Past performance information . . . is relevant information, for future source selection purposes . . .”).

²¹⁵ KATE M. MANUEL, CONG. RESEARCH SERV., R41562, EVALUATING THE “PAST PERFORMANCE” OF FEDERAL CONTRACTORS Summary (2015).

²¹⁶ Note, the contractors are prohibited from competing without past performance records as they would be rated neutral under FAR 15.305(a)(2)(iv), but it would be hard to compete against a similarly situated business with substantial positive past performance.

²¹⁷ Kasdin, *supra* note 181, at 552 (“The predicted probability of a cost-reimbursement contract increases by 95% when the length of a CR increases from 15 to 180 days . . . although the change is small in absolute terms.”).

activities,”²¹⁸ the resulting contract “pose[s] more uncertainty.”²¹⁹ “Uncertainties involved in contract performance [that] do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract”²²⁰ is one justification for using cost-reimbursement type contracts. Cost-reimbursement contracts do not, however, “provide[] any incentive to the contractor to minimize costs to the Government other than its moral commitment to perform within the initial estimate. [And] . . . the contractor can generally quit, even if the buyer has received no benefit.”²²¹

3. CICA Violations

CRs also increase the possibility of CICA violations.²²² CICA was designed to “encourage the competition for the award of all types of government contracts. The purpose was to increase the number of competitors and to increase savings through lower, more competitive pricing.”²²³ “Delays resulting from CRs reduce[] time available ‘to fully compete and award contracts in the limited time remaining in the fiscal year after the agency had received its regular appropriations.’”²²⁴ These delays coupled with end-of-year spending (i.e., use-it-or-lose-it funding) puts pressure on agencies to rapidly award contracts.²²⁵ “[T]he process of soliciting and evaluating bids and then negotiating contracts is time consuming Avoiding the competitive bidding process is quicker.”²²⁶ In fact, a 2021 study revealed that the longer a CRs lasts the higher the probability that agencies will award sole-source contracts.²²⁷

CICA does permit seven exceptions to full and open competition, one of which is when “the executive agency’s need for the property or services is of

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ FAR 16.301-2(a)(2) (2022).

²²¹ Ralph C. Nash & John Cibinic, *Labor-Hour and Time-and-Materials Contracting*, 13 NASH & CIBINIC REP. ¶ 24 (1999).

²²² See generally Aaron C. Beezley & Patrick R. Quigley, *CICA Violated Where Sole-Source Award Duration Was Too Long*, BRADLEY (July 15, 2021), <https://www.buildsmartbradley.com/2021/07/cica-violated-where-sole-source-award-duration-was-too-long/>.

²²³ *Competition in Contracting Act (CICA)*, ACQNOTES, <https://acqnotes.com/acqnote/careerfields/competition-contracting-act-cica> (last visited Jan. 10, 2023); see also FAR 6.000 (2022) (“This part prescribes policies and procedures to promote full and open competition in the acquisition process . . .”).

²²⁴ Kasdin, *supra* note 181, at 544.

²²⁵ See *id.* (“Agencies may still rush to obligate their discretionary funds if the agency leadership is concerned that appropriators might reduce new appropriations based on existing reserves from the prior year.”).

²²⁶ *Id.*

²²⁷ See Kasdin, *supra* note 181, at 550 (noting that the probability increases anywhere from 33% to 56% depending on the length of the CR). “Sole-source contracts are a kind of contract that can be issued without a competitive bidding process.” *Types of Contracts*, SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-guide/types-contracts> (last visited Jan. 11, 2023).

such an unusual and compelling urgency that the Federal Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.”²²⁸ This exception is commonly used to justify sole source awards in the wake of lengthy CRs, but such reliance is troubling and peculiar.²²⁹ Although CICA permits exceptions to competitive bidding procedures, it also “impose[s] several conditions on agencies’ ability to rely on the exceptions permitting full and open competition.”²³⁰ Two conditions are particularly important: (1) “agency contracting officials [must] justify and obtain approval for their use of other than competitive procedures”²³¹ and (2) “poor agency planning cannot give rise to unusual and compelling urgency.”²³² These conditions are “especially important because”—in theory—they “preclude[] agencies from waiting until near the end of the fiscal year to procure items and then claiming unusual and compelling urgency because their appropriations are about to expire.”²³³ Put differently, “an agency is not permitted to award a noncompetitive contract where the urgent need has been brought about due to a lack of advanced planning.”²³⁴ Whether this restriction is functionally effective is questionable considering the relationship between the award of sole source contracts and lengthy CRs discussed above.²³⁵ As shown in *Figure 2*, FY 2022 federal contract award data shows an increase in non-competitive contract awards as the year progressed. This makes sense considering the last FY 2022 CR was approved on March 11, 2022 and the final omnibus spending bill was signed four days later—leaving only six months for “regular” procurement activities.²³⁶

²²⁸ 41 U.S.C. § 3304(a)(2) (2020).

²²⁹ Agencies often award short term sole-source “bridge contracts” until a full competitive source selection can be accomplished using “unusual and compelling” need as the sole-source justification. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-15, SOLE SOURCE CONTRACTING: DEFINING AND TRACKING BRIDGE CONTRACTS WOULD HELP AGENCIES MANAGE THEIR USE 14 n.15 (2015) [hereinafter SOLE SOURCE CONTRACTING]. Not all bridge contracts can be attributed to CRs, as other delays can cause contract award dates to slip, especially when higher approvals are needed.

²³⁰ KATE M. MANUEL, CONG. RESEARCH SERV., R40516, COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS 12 (2011).

²³¹ *Id.*

²³² *Id.*

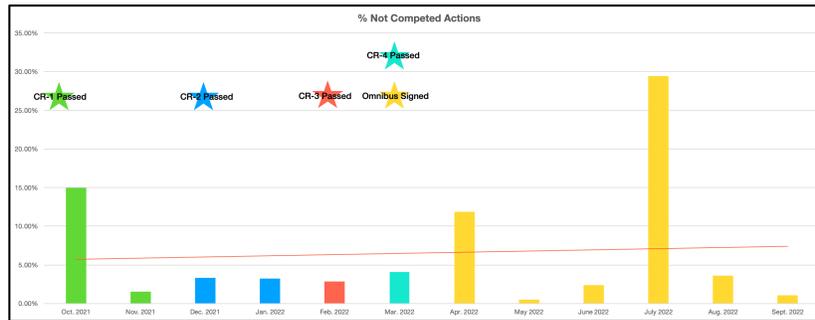
²³³ *Id.* at 13; *see also* William S. Cohen, *The Competition in Contracting Act*, 14 PUB. CONT. L.J. 1, 16–17 (1983) (noting issues with using the exception in year-end spending).

²³⁴ SOLE SOURCE CONTRACTING, *supra* note 229, at 8.

²³⁵ *See* Kasdin, *supra* note 181, at 552 (“CRs encourage more sole-source contracts, as a result of expediency . . .”). Although GAO and Congress have raised and dismissed concerns of the effectiveness of CICA in the past, watchdog groups still question whether CICA is effectively thwarting improper sole source contract awards. *See, e.g.,* Goldberg, *supra* note 5 (“The GAO’s 1998 conclusion began and ended with the assumption that measures like CICA, and subsequently the FAR, would ensure efficient year-end spending.”).

²³⁶ *See Appropriations Watch: FY 2022*, COMM. FOR RESPONSIBLE FED. BUDGET (Jun. 21, 2022), <https://www.crfb.org/blogs/appropriations-watch-fy-2022> (noting that the last CR ended on “3/15/2022” and the omnibus bill was “[s]igned into law on March 15”).

Figure 2: Percentage of Non-Competed Federal Contract Actions FY 2022²³⁷



The risk here is that savvy contractors that recognize the correlation between CRs and increased sole-source awards may file more bid protests.²³⁸ Protests, while an important check on federal contract awards, are costly for all parties involved.²³⁹ Aside from the litigation costs, protests may result in a stay of contractor performance while the protest is resolved.²⁴⁰ Stays negatively impact agencies because stays can force agencies to go without needed services, products, or programs.²⁴¹ Stays ultimately cost agencies financially because lifting a stay usually²⁴² requires a change in the periods of performance for a contract,²⁴³ which can effect contract pricing as the cost for materials and sometimes services fluctuates over time.²⁴⁴ Stays can also cause the winning contractor and its employees to suffer financial and

²³⁷Percentage data taken from SAM.gov. See *Competition*, SAM.gov, <https://sam.gov/reports/awards/standard/6602777D47E8D7A60F47429224E50CA5/view> (last visited Jan. 12, 2023) (Once users have registered for a SAM.gov account, search by each month and then click “execute” to produce the data table for that month. Each data table contains a column for “% Not Competed Actions.”). CR dates taken from *Appropriations Watch: FY 2022*, *supra* note 238.

²³⁸ “A bid protest is a challenge to the award or proposed award of a contract for the procurement of goods and services or a challenge to the terms of a solicitation for such a contract.” *FAQs*, GOV’T ACCOUNTABILITY OFFICE, <https://www.gao.gov/legal/bid-protests/faqs> (last visited Jan. 11, 2023) (scroll down to “What is a bid protest?”).

²³⁹ *Interstate Gen. Gov’t Contractors v. West*, 12 F.3d 1053, 1057 (Fed. Cir. 1993).

²⁴⁰ See 31 U.S.C. § 3553(d)(3)(C) (2021). Note, stays can be overridden but only if performance “will be in the best interest of the United States; or” there are “[u]rgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the decision of the GAO” on the protest. FAR 33.104(c)(2)(i)–(ii).

²⁴¹ *Interstate Gen. Gov’t Contractors*, 12 F.3d at 1057.

²⁴² Although FAR 33.104(c)(4) directs agencies to “attempt to negotiate a mutual agreement on a no-cost basis,” nothing requires the winning contractor to do so.

²⁴³ See, e.g., *XPO Logistics Worldwide Gov’t Servs., LLC v. United States*, 134 Fed. Cl. 783, 795 (2017) (noting that a contract modification “which lifted the previous stay of performance” also “revised the periods of performance”).

²⁴⁴ *Interstate Gen. Contractors, Inc.*, ASBCA No. 43369, 92-2 BCA. ¶ 24,956 (Mar. 17, 1992) (holding that the contractor who filed a claim while a contractor was stayed for a protest was “entitled to an equitable adjustment for unabsorbed overhead during the protest period”).

staffing consequences.²⁴⁵ With no work being performed, the contractor is not paid.²⁴⁶ And employees hired by the contractor to perform the contract may have to seek work elsewhere while the stay is in place.²⁴⁷ And, where performance or construction bonds are required,²⁴⁸ the original winning contractor may not be able to bid on other contracts during the stay.²⁴⁹

C. “CASH RULES EVERYTHING AROUND ME”²⁵⁰: CR FRICTION
BETWEEN THE BRANCHES OF GOVERNMENT

CRs also present friction between the executive and legislative branches.²⁵¹ Outside the usual political posturing around raising the debt limit and threats of government shutdowns, CRs may also create separation of powers concerns.²⁵² Because CRs prevent “new starts,” “[u]nder the right set of circumstances, [CRs] can . . . have the effect of blocking existing programs”²⁵³ and prevent the executive branch from fulfilling its obligations or from conducting investigations.

1. *Blocking Agency Programs*

The Ninth Circuit faced the program blockage issue in *Environmental Defense Center v. Babbitt*.²⁵⁴ In *Babbitt*, an environmental group sued the Secretary of the Interior for failing to decide whether to list the California red-legged frog under the Endanger Species Act (ESA).²⁵⁵ Under the ESA, the Secretary has twelve months to take action when an interested person submits a petition that presents substantial information that a species should be added or removed from the endangered species list.²⁵⁶ After the environmental group submitted such a petition, the Secretary started his review but failed to make a determination within the statutorily appointed

²⁴⁵ Interstate Gen. Gov’t Contractors, 12 F.3d at 1057-58.

²⁴⁶ See FAR 52.216-7 (2022) (“The Government will make payments to the Contractor when requested as work progresses”); FAR 52.232-16 (stating the same for progress payments).

²⁴⁷ Interstate Gen. Gov’t Contractors, 12 F.3d at 1057 n.4.

²⁴⁸ See FAR 28.102 to .103 (2022).

²⁴⁹ See *Interstate Gen. Contractors, Inc.*, ASBCA No. 43369 92-2 BCA. ¶ 24,956.

²⁵⁰ WU-TANG CLAN, *C.R.E.A.M. (Cash Rules Everything Around Me)*, on ENTER THE WU-TANG (36 CHAMBERS) (Loud Records 1993).

²⁵¹ Jacob E. Meyer, “Drive-By Jurisdictional Rulings”: *The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 Colum. J.L. & Soc. Probs. 415, 456-57 (2009).

²⁵² *Id.*

²⁵³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP APPROPRIATIONS LAW VOL. II, PRINCIPLES OF FEDERAL APPROPRIATION LAW 8-26 (2006), <https://www.gao.gov/assets/2019-11/202819.pdf>.

²⁵⁴ *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

²⁵⁵ See *id.* at 869; see also 16 U.S.C. 1533(a)(1) (2003) (“The Secretary shall by regulation . . . determine whether any species is an endangered species or threatened species . . .”).

²⁵⁶ 16 U.S.C. 1533(b)(3)(B) (2003).

time.²⁵⁷ The Secretary argued that he failed to complete his review because, in 1995, Congress enacted an appropriations rider that “rescind[ed] funding for the making a final determination that a species is endangered.”²⁵⁸ When Congress passed a CR, the rider carried forward.²⁵⁹ The Ninth Circuit held that the Secretary was still required to make the determination under the ESA, but, because “completion of the process [would] require only a slight expenditure of funds,”²⁶⁰ the Secretary was precluded from expending funds to complete the process.²⁶¹

The Ninth Circuit ultimately vacated and remanded the district court’s order “to provide that compliance with the requirement that the Secretary make a final determination . . . is delayed until a reasonable time after appropriated funds are made available.”²⁶² Although the Ninth Circuit’s holding was reasonable, it does appear to overstep Congress’s authority to establish statutory deadlines by permitting the district court to establish its own.²⁶³ Although “[i]t is emphatically the province and duty of the judicial department to say what the law is,”²⁶⁴ courts generally should not be in the business of saying what the law “ought to be.”²⁶⁵ If the Supreme Court has told us anything, rewriting deadlines—even in issues of grave importance, like elections—is now frowned upon.²⁶⁶

The legislature can also hamstring the executive branch without appropriation riders. Because CRs generally limit funding to the prior year’s level, agencies may not have the necessary budget to comply with statutory deadlines.²⁶⁷ Unlike the Secretary’s argument in *Babbitt*, courts have found that “the United States may not evade the law simply by failing to appropriate enough money to comply with it.”²⁶⁸ Thus, Congress *could* take advantage of CR funding restrictions and citizen suits under 5 U.S.C. § 706 to force agencies between a rock and hard place.²⁶⁹ An agency that ignores or declines

²⁵⁷ *Babbitt*, 73 F.3d at 869.

²⁵⁸ *Id.*

²⁵⁹ *See id.* at 870 (“Section 104 of the resolution continues the moratorium on funding contained in Public Law No. 104–06.”).

²⁶⁰ *Id.* at 871.

²⁶¹ *See id.* at 872 (“[W]e find that lack of available appropriated funds prevents the Secretary from complying with the Act.”).

²⁶² *Id.* at 872.

²⁶³ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1188 (10th Cir. 1998).

²⁶⁴ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁶⁵ *See Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 397 (1893) (Fields, J., dissenting) (explaining that federal judges “never possessed” jurisdiction to determine what “the general law out to be”).

²⁶⁶ *See Moore v. Circosta*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., Alito, J., dissenting) (“Just days ago, this Court rejected a similar effort to rewrite a state legislature’s election deadlines.”).

²⁶⁷ Wendy E. Wagner, *Article: Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181, 39 n.175 (1999).

²⁶⁸ *Loudner v. United States*, 108 F.3d 896, 903 n.7 (8th Cir. 1997).

²⁶⁹ *See, e.g., Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1182–83 (D. Ariz. 2003) (ordering the Secretary of the Interior to comply with the ESA despite the lack of necessary funds).

to comply with a court's injunctive order commanding their compliance may face contempt.²⁷⁰ And though possible to defend against contempt by arguing impossibility, it is unclear whether such argument would always be successful.²⁷¹

2. *Blocking Investigations*

Congress could also use the CR new start prohibition to temporarily halt investigations. In 1980, the Federal Trade Commission began investigating allegations that Boise—a federal contractor—received unjustified price discounts from its suppliers in violation of the Clayton Act.²⁷² “Boise argued that the initiation of the investigation and subsequent fine constituted new activity, which was prohibited by the continuing resolution.”²⁷³ Although the court found that the FTC's investigation was authorized under an existing program, it did so based on House and Senate committee reports that explicitly noted the FTC's investigations into such activities were considered an existing program.²⁷⁴

Under a different set of circumstances, it might be possible to temporarily halt an agency's investigative powers if the investigation was not part of an existing program. This sets up a potential separation of powers problem because it would “undermin[e] the President's ability to exercise his [or her] constitutional responsibilities and take care that the laws be faithfully executed.”²⁷⁵ An agency could always proceed with the investigation and seek to ratify it later,²⁷⁶ but this too is risky given that anti-deficiency act penalties range from adverse personnel actions (suspension and termination)²⁷⁷ to criminal penalties (monetary fines and prison time).²⁷⁸

²⁷⁰ *Schnier v. District Court of Denver*, 696 P.2d 264, 268 (Colo. 1985).

²⁷¹ *Cf., e.g., Forest Guardians*, 174 F.3d at 1192 (10th Cir. 1999) (noting that impossibility may be raised “at any subsequent contempt proceeding”); *United States v. Rylander*, 460 U.S. 752, 757 (1983) (“In a civil contempt proceeding . . . a defendant may assert a *present* inability to comply with the order in question.”).

²⁷² *See Boise Cascade Corp. v. F.T.C.*, 498 F. Supp. 772, 776 (D. Del. 1980); 15 U.S.C. § 13(f) (1936).

²⁷³ Maj. Ronald M. Herrmann, *The Pitfalls of New Starts During a Continuing Resolution*, 2017 THE ARMY LAWYER 5, 10 (2017); *Boise Cascade Corp.*, 498 F. Supp. at 780.

²⁷⁴ *Boise Cascade Corp.*, 498 F. Supp. at 780 & n.5.

²⁷⁵ Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 377 (2018) (quoting President Barack Obama, Presidential Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act 2011, 1 PUB. PAPERS 386 (Apr. 15, 2011)).

²⁷⁶ *See id.* at 422 (recounting when “President George Washington expended funds in arguable violation of appropriations limits to suppress the so-called Whiskey Rebellion” and later “sought congressional ratification of his action”).

²⁷⁷ 31 U.S.C. § 1349(a) (1982).

²⁷⁸ *Id.* § 1350 (1982).

3. *Blocking Prior Administrations*

As with most things, appropriations law is a dual-edged sword, and the executive branch can also use the new start prohibition to refrain from undertaking certain activities it might not otherwise want to. Consider, for example, the border wall.²⁷⁹ Generally, “new starts pertain to specific appropriation line-items and include new programs, projects, subprojects, or modifications . . . [and a] new start occurs even when such activities may be funded in another appropriation belonging to the same or different . . . department or . . . agency.”²⁸⁰ Though the Biden administration *may*²⁸¹ be required to expend funds on the on-going portions of the wall,²⁸² it could argue that new sections of the wall—not currently covered under federal contract—qualify as new starts if money was not previously appropriated for those sections of the wall.²⁸³ Thus, under a CR, the Biden administration could refrain from constructing parts of the wall unless or until a new

²⁷⁹ See Priscilla Alvarez, *Biden Administration Terminates Two Border Wall Contracts in Texas*, CNN Politics (July 23, 2021, 2:40 PM), <https://www.cnn.com/2021/07/23/politics/border-wall-contracts/index.html>.

²⁸⁰ H.R. REP. NO. 105591, at 14–15 (1998).

²⁸¹ I emphasize “may” here because \$2.5 billion in border wall funding was originally reprogrammed from the DoD budget to DHS under 10 U.S.C. § 284 and the remaining \$3.6 billion was made available by the Secretary of Defense by “indefinitely deferring ongoing military construction projects” so that the funds could be used for the border wall. WILLIAM L. PAINTER & CHRISTOPHER T. MANN, CONG. RESEARCH SERV., IN11193, FUNDING U.S.-MEXICO BORDER BARRIER CONSTRUCTION: CURRENT ISSUES 2 (2021). Those actions could, and in some ways have been, easily reversed. *Building a Border Barrier: the U.S. Army Corps of Engineers’ Contracting Efforts*, U.S. GOV’T ACCOUNTABILITY OFFICE. (July 7, 2021), <https://www.gao.gov/blog/building-border-barrier-u.s.-army-corps-engineers-contracting-efforts/> (“In April 2021, DOD announced it will no longer use its funds for border wall construction.”) Funny enough, the DOD’s reversal forced the U.S. Army Corps. to award \$4.3 billion in noncompetitive contracts” so that it could expend the DOD funds it had before the reversal—which sets up possible CICA violation discussed above. *Id.* Without necessary funding the government could terminate existing border wall contracts for convenience. See FAR 52.249 2 (2012); Priscilla Alvarez, *Trump Administration Locks Down Border Wall Contracts, Complicating Biden’s Pledge to Stop Construction*, CNN (Jan. 5, 2021, 6:55 PM), <https://www.cnn.com/2021/01/05/politics/border-wall-trump/index.html>; *Contract Terminations*, FED. TRANSIT AUTH., <https://www.transit.dot.gov/funding/procurement/third-party-procurement/contract-terminations> (last visited Jan. 17, 2023) (explaining the “Termination for Convenience clause” can be used when there is a lack of funding). Not to mention the government may opt to terminate contracts that may have been improperly awarded in the first place for areas of land the government does not own. *Cf. e.g.*, Courtney Bublé, *Homeland Security Cancels Two Border Wall Contracts*, GOV’T EXEC. (July 23, 2021), <https://www.govexec.com/management/2021/07/dhs-cancels-two-border-wall-contracts/183999/> (noting that DHS cancelled two contracts for sections of the wall in Laredo, Texas, due in part to environmental concerns).

²⁸² See Audio recording of oral arguments in *General Land Off. of the State of Texas v. Biden*, at 24:04–26:31 (Dec. 6, 2022), https://www.ca5.uscourts.gov/OralArgRecordings/22/22-40526_12-6-2022.mp3; Uriel J. García, *Biden’s Latest Border Moves Spur Criticism that he’s Continuing Wall Construction*, TEXAS TRIBUNE (Feb. 25, 2022, 5:00 AM), <https://www.texastribune.org/2022/02/25/texas-border-wall-biden/> (noting President Biden’s campaign promise not continue the border wall under his administration). Funding currently provided for the border wall was “provided with conditions that the barriers are built in certain border patrol sectors and meet certain design requirements.” PAINTER & MANN., *supra* note 281, at 2.

²⁸³ The border wall project includes repairs to existing parts of the wall and construction of new segments. Arguably, each of these are separate projects, or at the very least subprojects of the entire border wall project. See Alvarez, *supra* note 279 (noting the repairs and construction of new segments).

appropriations bill is signed into law that contained line items for those areas.²⁸⁴

III. “OPPORTUNITIES (LET’S MAKE A LOT OF MONEY)”²⁸⁵

It is safe to say that Congress “prefer[s] not to have . . . continuing resolution[s]”²⁸⁶ despite its overwhelming reliance on them. As Congressman Rob Wittman once said, “continuing resolutions are a short-sighted and irresponsible way to fund important programs.”²⁸⁷ So what—if anything—can be done to mitigate against the problems caused by CRs? There are three possible approaches: (1) embrace CRs, (2) increase the use of multi-year funding and relax reprogramming for agencies, and (3) incentivize Congress to pass a budget timely.

A. “IF YOU CAN’T BEAT ‘EM,”²⁸⁸ JOIN ‘EM: AUTOMATIC CRS

The first approach to handling CRs is counterintuitive; rather than disband CRs, this approach leans into CRs and makes them automatic if Congress does not pass a budget by the start of the new fiscal year.²⁸⁹ Automatic CRs (ACR) were first floated in the 1980s and Congress has proposed this method several times since 1991.²⁹⁰ “Under an [ACR] approach, funding for agency operations would become available automatically when appropriations bills are not passed on time.”²⁹¹ This “method of funding, once established, would not be subject to House and Senate votes, presidential signature or veto, or any amendment. It would completely bypass the legislative process and be automatically effective without delaying amendments or threat of veto.”²⁹² To date, “the only ACR

²⁸⁴ See Niv Elis, *Trump Signs Stopgap Measure, Funding Government Through November*, THE HILL (Sept. 27, 2019, 6:23 PM), <https://thehill.com/homenews/administration/463464-trump-signs-stopgap-measure-funding-government-through-november/> (noting that CRs “would prevent agencies from embarking on new projects”). Assuming a Republican candidate wins the next election, Democrats could use CRs to further halt the border wall progress under a similar argument. All of this works both ways, and Republicans could utilize the same tactics to halt Democrat projects.

²⁸⁵ PET SHOP BOYS, *Opportunities (Let’s Make Lots of Money)*, on PLEASE (EMI America Records 1986).

²⁸⁶ Niv Elis, *Lawmakers Skeptical of Progress on Spending Deal as Wall Battle Looms*, THE HILL (Nov. 17, 2019, 8:00 AM), <https://thehill.com/homenews/house/470735-lawmakers-skeptical-of-progress-on-spending-deal-as-wall-battle-looms/> (quoting former Rep. Nancy Pelosi).

²⁸⁷ *Continuing Resolutions are a Bad Way to Do Business. Here’s Why.*, ROB WITTMAN (Sept. 21, 2016), <https://wittman.house.gov/news/documentsingle.aspx?DocumentID=1064>.

²⁸⁸ QUEEN, *If You Can’t Beat ‘Em*, on JAZZ (Elektra Records 1978).

²⁸⁹ See JESSICA TOLLESTRUP, CONG. RESEARCH. SERV., R41948, AUTOMATIC CONTINUING RESOLUTIONS: BACKGROUND AND OVERVIEW OF RECENT PROPOSALS Summary (2015).

²⁹⁰ *Id.*

²⁹¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/AFMD-86-16, CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES 2 (1986).

²⁹² *Id.* at 33.

mechanism to have been enacted into law was the Pay our Military Act (P.L. 113-39),”²⁹³ but this mechanism was eventually terminated one month after it was passed.²⁹⁴ That said, ACR proposals continue to be championed and debated today.²⁹⁵ But why lean into ACRs when CRs are problematic? Supporters of automatic CRs tout several policy and governance benefits.

First, ACRs “avoid the resource waste involved in planning for shutdowns and furloughs, maintain government services, and reduce backlogs.”²⁹⁶ The theory here is that by avoiding time spent debating CRs, Congress can instead focus on the task at hand: passing a regular appropriations bill. And by avoiding any possibility of a shutdown, we avoid “disruptions in government services.”²⁹⁷

Second, ACRs “could improve spending efficiency”²⁹⁸ and, with some tweaks, “could facilitate ‘new starts’ as well.”²⁹⁹ With ACRs, agencies would no longer have to worry about or spend efforts dealing with contracting ramifications with short-term CRs, nor would they have to deal with the effects of government shutdowns.³⁰⁰ That means agencies would not have to expend resources “restart[ing] and complet[ing] government activities that should have occurred during [a] shutdown.”³⁰¹ And “if appropriations language made such an allowance,”³⁰² ACRs could be modified to permit new starts, bypassing the current prohibition against them.

Last, ACRs might “improve overall governance and strengthen Congress as an institution.”³⁰³ Proponents contend that by “removing the possibility of a funding gap . . . Congress will be able to avoid any public backlash that may occur when the government shuts down.”³⁰⁴ ACRs “reduce[] the stakes” usually involved with appropriations and “alter[] the choice to one of status quo spending or”³⁰⁵ an actual budget. Put differently, ACRs give Congress and the President breathing room to negotiate a budget by “encourage[ing] more bipartisan discussions on appropriations bills and discourage[ing] the

²⁹³ TOLLESTRUP, *supra* note 289.

²⁹⁴ *See id.* (“Because the enactment of continuing appropriations on October 17, 2013(P.L. 113-46), terminated the funding under this ACR mechanism . . .”).

²⁹⁵ *Better Budget Process Initiative: Automatic CRs Can Improve the Appropriations Process*, COMM. FOR RESPONSIBLE FED. BUDGET (Sept. 17, 2020) [hereinafter *Better Budget Process*], <https://www.crfb.org/papers/better-budget-process-initiative-automatic-crs-can-improve-appropriations-process>.

²⁹⁶ *Id.* at 4.

²⁹⁷ TOLLESTRUP, *supra* note 289, at 6.

²⁹⁸ *Better Budget Process*, *supra* note 295, at 4.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 1.

³⁰¹ TOLLESTRUP, *supra* note 289, at 7.

³⁰² *Better Budget Process*, *supra* note 295, at 7.

³⁰³ *Id.* at 4.

³⁰⁴ TOLLESTRUP, *supra* note 289, at 7.

³⁰⁵ *Better Budget Process*, *supra* note 297, at 5.

past practices of holding appropriations bills hostage to last-minute negotiations.”³⁰⁶

Opponents of ACRs counter that such a mechanism would do more harm than good for three reasons. First, they assert that ACRs “could prolong disruptive, inefficient CRs.”³⁰⁷ These opponents suggest that because Congress always has major disagreements “over funding levels and legislative ‘riders,’”³⁰⁸ ACRs would eventually become the default approach.³⁰⁹ And without a looming deadline, ACRs do not provide the needed pressure for Congress to pass a regular budget.³¹⁰ So, although ACRs avoid shutdowns, they magnify the costs outlined above—such as uncertainties and contracting efficiencies.

Second, opponents argue that if ACRs become the default they stand to replace regular appropriations entirely. This is problematic because unlike ACRs, regular appropriations permit flexibility with upward or downward adjustments for agencies and long-term programs.³¹¹ Moreover, unlike regular appropriations, ACRs would not account for inflation—making them “inadequate for almost all mandatory appropriations.”³¹² As Jacob Lew, then-Director of the Office of Management and Budget, once stated:

[a]n automatic CR is not a workable policy. It would effectively set the default position for discretionary spending at a freeze level, resulting in: (1) the underfunding of programs which require increases to cover growing costs and populations; and (2) the overfunding of projects which are already near or at completion.³¹³

³⁰⁶ TOLLESTRUP, *supra* note 289, at 8 (quoting U.S. Congress, SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, GOVERNMENT SHUTDOWN PREVENTION ACT, Committee Report to Accompany S. 558, 106th Cong., 1st sess., S. Rept. 106-15 (Washington, DC: GPO 1999), p. 3).

³⁰⁷ Richard Kogan & Paul N. Van De Water, *Automatic Continuing Resolutions Not a Good Solution for Government Shutdowns*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (Jan. 30, 2019), <https://www.cbpp.org/research/federal-budget/automatic-continuing-resolutions-not-a-good-solution-for-government>.

³⁰⁸ *Id.* at 2.

³⁰⁹ See TOLLESTRUP, *supra* note 289, at 11.

³¹⁰ See *id.* at 10 (“This is because, under an ACR, the cost of failing to come to an agreement would no longer be a government shutdown; this situation might prompt participants in negotiations who prefer the ACR-provided level to hold out . . .”).

³¹¹ Kogan & Van De Water, *supra* note 307, at 2–3.

³¹² *Id.* at 3.

³¹³ TOLLESTRUP, *supra* note 289, at 11 (quoting U.S. CONGRESS, HOUSE COMMITTEE ON THE BUDGET, GOVERNMENT SHUTDOWN PREVENTION ACT, report to accompany S. 558, 106th Cong., 1st sess., S. Rept. 106-15 (Washington, DC: GPO 1999), pp. 14–15).

Fourth, ACRs may shift power to the Executive and make it easier to shrink the government.³¹⁴ Congress usually “appropriates money for broad budget accounts . . . and provides more explicit instructions in the accompanying committee and conference reports.”³¹⁵ Under an ACR, however, “congressional report language would no longer constrain the way appropriations are spent, effectively giving extensive new authority to the Administration over how to use the funds.”³¹⁶ An assured level of funding may also empower agencies to be less cooperative with Congress because the agencies would have less incentive to work with Congress to “regularly comply with congressional directives.”³¹⁷ Under a normal appropriations and authorization process, congressional committees have “an opportunity to exercise informal, nonstatutory controls over . . . agenc[ies]”³¹⁸ through hearings, committee reports, floor debate, and correspondence with agencies.³¹⁹ Because agency and presidential budget request approvals are conditioned—at least in part—on an agency’s past performance, Congress’ “‘power of the purse’ allows the House and Senate Committees on Appropriations to play a prominent role in oversight.”³²⁰ ACRs, however, remove Congress’ “‘carrot and stick’ of appropriations recommendations”³²¹ because agencies would no longer feel the pressure of a “‘loss of funds and flexibility”³²² by choosing not to abide by congressional nonstatutory controls.

Last, because CRs usually freeze funding at the previous year’s level, ACRs provide “a powerful new tool to those who want to cut funding for programs and services.”³²³ If ACRs became the default, “lawmakers opposed to funding increases for particular agencies or programs could prevail simply

³¹⁴ *Id.* at 11. To some, shrinking the government may not be a bad thing. *See, e.g., To Grow the Economy, We Need to Shrink the Government*, DAN NEWSOME (Oct. 4, 2022), <https://newhouse.house.gov/media/weekly-columns-and-op-eds/grow-economy-we-need-shrink-government> (arguing that shrinking the government is better for the economy). Whether this is true is debatable, and I provide no comment on which approach is more beneficial to the American public. *See* Anna Persson & Bo Rothstein, *It’s My Money: Why Big Government May Be Good Government*, 47 *COMPAR. POL.* 231, 235 (2015) (“[I]f we consider existing empirical data, there seems to be very limited support in favor of the argument that ‘big government’ is generally ‘bad government’ . . .”).

³¹⁵ Kogan & Van De Water, *supra* note 307, at 3; BEN WILHELM, TODD GARVEY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 23 (2022) (noting that appropriations contain five statutory controls, including: (1) specifying the purpose of the funds, specifying the funding level, (2) specifying the funding level for agencies and programs, (3) setting time limits on the availability of funds, (4) limitation provisions, and (5) reprogramming or transfer provisions).

³¹⁶ Kogan & Van De Water, *supra* note 307 at 3.

³¹⁷ TOLLESTRUP, *supra* note 289, at 12.

³¹⁸ WILHELM ET AL., *supra* note 315.

³¹⁹ *Id.*

³²⁰ *Id.*; *see also* U.S. CONST. art I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .”).

³²¹ WILHELM ET AL., *supra* note 315.

³²² *Id.* at 24.

³²³ Kogan & Van De Water *supra* note 307.

by blocking any appropriations bill.”³²⁴ Rather than duking it out through legislative debate, Congress could instead “take a ‘hands off’ approach to shrinking government, with little incentive to reach agreement on appropriations.”³²⁵ “This is particularly possible in the Senate, where a minority of Members may be able to effectively freeze spending for certain programs by refusing to end debate on appropriations measures.”³²⁶ Likewise, a President in favor of spending cuts could continue an ACR so long as there were enough votes in Congress to sustain his or her veto.³²⁷ In either scenario, those who favor spending cuts would “hold a negotiating advantage.”³²⁸

The efficacy of ACRs largely boils down to the features one would incorporate, like a sunset provision, funding levels, activities, and duration.³²⁹ ACRs, without any funding adjustment mechanisms start to look like annual CRs. Even ACRs provided for increases in inflation, this does not solve the inefficiencies then-OMB Director Lew addressed above.³³⁰ The shift in power dynamics accompanying ACRs is also troubling. True, under ACRs agencies gain a new ability to ignore Congressional nonstatutory controls and Congress gains improved negotiating power to shrink agencies.³³¹ Whether these new “abilities” are an improvement over the regular process is debatable.³³² Agencies are a necessary component of the federal government and we rely on them to provide necessary services and expertise, so increased power to shrink them—without the usual political accountability—is not prudent.³³³ But agencies should not be able to evade Congressional oversight, since agencies are not susceptible to voters like politicians, some form of accountability is needed.³³⁴ And ACRs that would provide limited durations

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ TOLLESTRUP, *supra* note 289, at 10.

³²⁷ Kogan & Van De Water, *supra* note 307.

³²⁸ TOLLESTRUP, *supra* note 289, at 10.

³²⁹ *See id.* at 4–6 (listing these as features of a possible ACR); *see also* Jessie Bur, *Congress Isn't Punished Enough for Budgetary Failures*, FED. TIMES (Feb. 6, 2018), <https://www.federaltimes.com/federal-oversight/congress/2018/02/06/congress-isnt-punished-enough-for-budgetary-failures/> (“[Sen. Rand] Paul recently introduced legislation called the Shutdown Prevention Act that would create automatic, 90 day [CRs],” which “would fund agencies at 99 percent of the previous year’s levels.”); Jessie Bur, *Congress Isn't Punished Enough for Budgetary Failures*, FED. TIMES (Feb. 6, 2018), <https://www.federaltimes.com/federal-oversight/congress/2018/02/06/congress-isnt-punished-enough-for-budgetary-failures/> (noting Sen. Rand Paul’s proposed “Shutdown Prevention Act that would create automatic, 90-day [CRs],” which “would fund agencies at 99 percent of the previous year’s levels”).

³³⁰ *See supra* text accompanying note 315.

³³¹ WILHELM ET AL., *supra* note 315; Kogan & Van De Water, *supra* note 309.

³³² Kogan & Van De Water, *supra* note 307.

³³³ *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1983–84 (2021) (discussing political accountability for agency heads).

³³⁴ *Cf.* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 56 & n.247 (2017) (discussing how *Chevron* deference may be a method to make agencies accountable through the Chief

are essentially an automatic extension of the fiscal year—which has already been extended before. Sadly, without the pressure of a government shutdown and the negative backlash, ACRs pave the way for decreased Congressional action—the opposite of what the appropriations process needs.³³⁵

This is not to say that ACRs could not prove useful in *limited circumstances* to avoid government shutdowns.³³⁶ For example, an ACR with a sunset provision restricting ACRs to lame duck sessions following elections could help avoid government shutdowns when CRs have traditionally been needed the most.³³⁷ After all, the last government shutdown reportedly “tacked on \$31 billion to the nation’s debt.”³³⁸ In the main, however, using ACRs to curb the problems associated with CRs would be like pouring gasoline on a fire and hoping to extinguish it.

B. “PUT YOUR MONEY WHERE YOUR MOUTH IS”³³⁹: CONGRESSIONAL INCENTIVES TO PASS A BUDGET TIMELY

Another proposal to the CR and appropriations crisis is to establish incentives for timely passage of a regular budget. “The consequences for failing to come to an on-time budget agreement aren’t enough to incentivize Congress to avoid the cost of [CRs] and shutdowns”³⁴⁰ As one commentator noted, “there’s little impetus to make sure that the appropriations process works as intended in the Congressional Budget Act, because there are no consequences for legislators who stymie that process.”³⁴¹ The question then is how to incentivize Congress to—quite frankly—do its job in timely passing a federal budget.

The most common proposed incentives are monetary bonuses, salary pauses, and fines.³⁴² Some have suggested that Congress might be incentivized by “a hefty bonus if [it] does its job and completes all 12 appropriations bills before October 1.”³⁴³ The upshot with bonuses is that if

Executive).

³³⁵ TOLLESTRUP, *supra* note 289, at 11.

³³⁶ *Id.* at 4, 6.

³³⁷ See DREW C. AHERNE, CONG. RESEARCH SERV., R46574, THE ENACTMENT OF APPROPRIATIONS MEASURES DURING LAME DUCK SESSIONS Summary (2022) (“Continuing appropriations measures were also an important element in most, but not all, of the lame duck sessions that occurred between calendar years 1994 and 2020.”).

³³⁸ Bur, *supra* note 329.

³³⁹ JET, *Put Your Money Where Your Mouth Is*, on SHINE ON (Atlantic Records 2006).

³⁴⁰ Bur, *supra* note 329.

³⁴¹ Ellen Ioanes, *How Congress’s Dependence on Short-term Funding Keeps us Stuck in the Past*, VOX (Feb. 19, 2022, 5:43 PM), <https://www.vox.com/2022/2/19/22941984/congress-government-funding-continuing-resolution-appropriations>.

³⁴² Leonard E. Burman, *It’s Not News That Congress’s Budget Process Is A Wreck, But It Should Be*, TAX POL’Y CTR. (Oct. 9, 2020), <https://www.taxpolicycenter.org/taxvox/its-not-news-congresss-budget-process-wreck-it-should-be>.

³⁴³ *Id.*

Congress failed to act, it would cost taxpayers nothing, and “if the bonus nudged Congress to do its job, it would be a bargain.”³⁴⁴

Alternatively, or concurrently, others have proposed monetary penalties in the form of withholding of salary and fines.³⁴⁵ In 2021, New Hampshire Senator Maggie Hassan and Indiana Senator Mike Braun introduced a bipartisan “*No Budget, No Pay Act*, which would require members of Congress to pass the annual budget resolutions and all appropriations bills by the start of the fiscal year . . . otherwise members will not be paid, with retroactive pay prohibited.”³⁴⁶ Likewise, the House also introduced a version of the same bill.³⁴⁷ Unlike the Senate’s version, the House bill merely holds salaries in escrow to be paid out once the budget is passed or on the last day of the Congressional session.³⁴⁸

Notably, a variation of this measure was successful in 2013. “After the Senate failed to pass budget resolutions for three consecutive fiscal years . . . Congress adopted a law that threatened to withhold members’ pay if they failed to adopt a budget resolution by the statutory deadline.”³⁴⁹ That measure was likely unconstitutional under the 27th Amendment, which prohibits “varying the compensation for the services of the Senators and Representatives . . . until an election of Representative shall have intervened.”³⁵⁰ It appears Congress learned from this, as both versions here would likely pass constitutional muster. The Senate’s version applies to the next congressional session,³⁵¹ and unquestionably would be permissible under the 27th Amendment.³⁵² The House’s version may not be constitutional if it were imposed against the same congressional session that passed it.³⁵³ Although the House version does not vary the amount of congressional compensation in the traditional sense, postponing payment is a variance of

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Senator Hassan Jones Senator Braun, Colleagues in Reintroducing No Budget, No Pay Act*, HASSAN SENATE (Mar. 27, 2021), <https://www.hassan.senate.gov/news/in-the-news/senator-hassan-joins-senator-braun-colleagues-in-reintroducing-no-budget-no-pay-act>.

³⁴⁷ *See* No Budget, No Pay Act, H.R. 178, 117th Cong. (2021).

³⁴⁸ *Id.* at § 2.

³⁴⁹ Romina Boccia, *Congressional Pay for Performance: No Budget, No Pay*, CATO INST. (Jan. 17, 2023, 9:57 AM), <https://www.cato.org/blog/congressional-pay-performance-no-budget-no-pay>.

³⁵⁰ U.S. CONST. amend. XXVII.

³⁵¹ *See* No Budget, No Pay Act, S. 2765, 117th Cong. § 6 (2021) (“This Act shall take effect on September 29, 2023.”).

³⁵² *Compare* U.S. CONST. amend. XXVII. (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”), *with* No Budget, No Pay Act, S. 2765, 117th Cong. § 6 (2021) (declaring that the act will not take place until September 29, 2023, which is two years after the bill was first introduced.).

³⁵³ *See* U.S. CONST. amend. XXVII.

some sort.³⁵⁴ Constitutionality aside, the No Budget, No Pay Act has some bipartisan support in both chambers of Congress.³⁵⁵

Some would take matters further by imposing a monetary fine.³⁵⁶ Former Representative Gary Franks, for example, proposes levying a fine against “all the Members of Congress and the president if they are unable”³⁵⁷ to pass a timely budget. As for the amount, Franks recognizes that the net worth of congressional members varies, so a flat fine would do nothing to incentive the wealthiest of members while be devastating to members “living paycheck to paycheck.”³⁵⁸ Rather, he proposes to make the fine “a percentage of their adjusted gross income (AGI) from their most recent federal tax return” and to make the payments “payable to a nonprofit.”³⁵⁹

The effectiveness of any of these proposals depends, in part, upon how much Congress is motivated by its salary. As for the bonuses, it is doubtful such a measure would pass—as many believe Congress is overpaid as it is.³⁶⁰ Moreover, the net worth of most Congressional members comes not from their salary but from business, real estate, and stocks.³⁶¹ Salary is taxable, whereas taxable earnings from business, real estate, and stocks are subject to more loopholes in the tax code.³⁶² The source of congressional member wealth may also defeat the effectiveness of any fines or withholding of salary.

³⁵⁴ See *Vary*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining vary as (1) “[t]o change in some usu[al] small way; to make somewhat different,” (2) “[t]o cause to alter; to transmute,” and (3) “to differ in details; to be subtly dissimilar”).

³⁵⁵ Chris Weigant, *The No Budget, No Pay Act*, THE HUFFINGTON POST (Mar. 14, 2012), https://www.huffpost.com/entry/the-no-budget-no-pay-act_b_1346206.

³⁵⁶ See Gary Franks, *We Should Fine Congress Members for Failing to do Their Jobs*, BALTIMORE SUN (Sept. 23, 2021, 10:25 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0924-franks-entitlements-20210923-cdeqpm3uenbxrktmsneq2dqm4-story.html>.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ See, e.g., Nora Kelly Lee, *Are Members of Congress Overpaid?*, THE ATLANTIC (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/congress-overpaid-house-senate/485030/> (“Washington is ‘broken.’ Members of Congress are ‘overpaid and underworked.’ . . . Congress probably won’t get a raise next year. Many voters agree with that assessment.”).

³⁶¹ See Angela Wang & Madison Hall, *These are the 50 Top Stocks that Members of Congress Own*, BUS. INSIDER (Dec. 14, 2021, 7:01 AM), <https://www.businessinsider.com/congress-most-popular-stocks-members-investing-2021-12> (“More than 40% of members in Congress . . . own individual stocks, collectively holding at least \$225 million in stock assets.”); Madison Hall & Angela Wang, *Meet the 25 Wealthiest Members of Congress*, BUS. INSIDER (Dec. 14, 2021, 7:02 AM), <https://www.businessinsider.com/wealthiest-members-congress-house-senate-finances-2021-12> (reporting that the wealthiest members amassed their wealth through real estate, businesses, and stocks).

³⁶² For example, the tax code permits write offs for several business and property expenses and depreciation of assets that can be used to lower a tax bill. See 26 U.S.C. § 162 (permitting a deduction for “ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . .”); *id.* § 167 (permitting “a depreciation deduction . . . for the exhaustion, wear and tear” of “property used in the trade or business, or of property held for the production of income. . .”). Likewise, gains on investments are not taxable until they are realized, even so those gains can be offset by realizing losses. See *id.* § 1001(a)–(b) (noting that a gain is realized when it is sold and that “the loss shall be the excess of the adjusted basis”).

At the very least, these measures would punish non-wealthy congressional members more than wealthy members. This is because, as previously mentioned, wealthy members of Congress can better take advantage of the tax code to manipulate their AGI.³⁶³ Their AGI might be slightly higher than non-wealthy members, so any AGI-based fine would still hurt non-wealthy members more.³⁶⁴ The same is true of salary withholding or delay.³⁶⁵ Wealthy members whose salary is more or less negligible to them may not be as concerned as a “paycheck-to-paycheck” member. Perhaps a fairer and more incentivizing system would fine members based on a percentage of their net worth instead of their salary. We do know that withholding pay works—to some extent—in motivating Congress to pass a budget.³⁶⁶ So some adjustment to Congressional pay may be worth exploring further. Whatever the result, such a proposal will need to have an equal and fair effect across the wealth spectrum of congressional members.

Additionally, others had proposed the return of earmarks, or “pork barrel spending.”³⁶⁷ “Earmarks are congressional spending toward a specific project in a specific cite, state, or district, set aside for a particular project.”³⁶⁸ We may soon see whether this proposal will be effective this time around. Originally banned in 2011, they have made their return in 2021.³⁶⁹ The theory is that earmarks “give legislators ‘a little skin in the game’ . . . [and] a reason to pass the appropriations bill.”³⁷⁰ Time will tell if earmarks will speed up the appropriations process, but so far the answer to that question is that they have not.³⁷¹

³⁶³ See Franks, *supra* note 356.

³⁶⁴ See Hall & Wang, *Meet the 25 Wealthiest*, *supra* note 361; Mark Strand & Tim Lang, *How Much do Members of Congress Get Paid?*, CONG. INST. (Feb. 21, 2019), <https://www.congressionalinstitute.org/2019/02/21/how-much-do-members-of-congress-get-paid-2/#:~:text=Congressional%20leaders%20earn%20more%20since,salaries%20are%20set%20by%20law>.

³⁶⁵ See Hall & Wang, *supra* note 361; Strand & Lang, *supra* note 364.

³⁶⁶ See David Wessel, *What is a government shutdown? And why are we likely to have another one?*, BROOKINGS (Sept. 17, 2023), <https://www.brookings.edu/articles/what-is-a-government-shutdown-and-why-are-we-likely-to-have-another-one/#:~:text=When%20Congress%20fails%20to%20enact,known%20as%20a%20government%20shutdown>.

³⁶⁷ Lydia Stowe, *The Difference Between Earmark and Pork Barrel Spending & Why You Should Care*, FISCALNOTE (Nov. 11, 2021), <https://fiscalnote.com/blog/earmark-vs-pork-barrel-spending>.

³⁶⁸ *Id.* (arguing that the difference between earmarks and pork barrel spending comes down to whether funds are used to “move [a person’s] agenda forward”).

³⁶⁹ See Chris Cassella, E.J. Fagan & Sean Theriault, *Earmarks are back: How Democrats and Republicans Differ*, BROOKINGS (Jan. 12, 2023), <https://www.brookings.edu/blog/fixgov/2023/01/12/earmarks-are-back-how-democrats-and-republicans-differ/> (“In 2021, Democrats ended the 10-year earmark moratorium.”).

³⁷⁰ Ioanes, *supra* note 341.

³⁷¹ See Gordon Gray, *Earmarks Are Back, Legislating is Not*, AM. ACTION FORUM (Mar. 10, 2022), <https://www.americanactionforum.org/insight/earmarks-are-back-legislating-is-not/> (“Congress clearly rediscovered earmarking but has failed to recommit to the budget process.”).

C. “IT’S ALL ABOUT THE MONEY”³⁷² MITIGATION: INCREASE
MULTI-YEAR FUNDING & SIMPLIFY REPROGRAMMING ACTIONS

Regardless of what measures Congress takes to prevent CRs and move toward a timely appropriations cycle, we can bet on one thing: CRs will be here for the foreseeable future. Thus, the most useful proposal may be one that mitigates the negative effects of CRs while accepting their permanent existence. As discussed above, CRs are harmful because they restrict how agencies can obligate funds, and, by extension how efficient agency programs are.³⁷³ Shifting discretionary funding toward multi-year appropriations or making reprogramming of funds more streamlined can mitigate the harmful effects of CRs.³⁷⁴

Agencies have already adapted within current parameters to “look for funding flexibilities beyond the annual appropriations process, which has helped them manage the effects of CRs.”³⁷⁵ HHS, for instance, utilizes multi-year appropriations for its “unaccompanied children and refugee programs”³⁷⁶ to weather CR storms. Multi-year funding allows agencies increased budgeting flexibility because it extends the obligation period for such funds.³⁷⁷ Stated differently, multi-year funds operate more similarly to how money in a personal bank account works—that is the money does not “disappear” or become unusable with the passage of time.³⁷⁸ Agencies could then plan their programs and services further out without relying on annual appropriations from Congress.³⁷⁹ The caveat here is that to effectuate multi-year funding there first has to be an appropriations bill defining the availability of funding.³⁸⁰ But should Congress authorize the use of more multi-year funding it would decrease the negative impacts of future CRs by giving agencies increased flexibility.³⁸¹

³⁷² See SEAN COMBS, *It’s All About the Benjamins, on NO WAY OUT* (Bad Boy Records 1997).

³⁷³ See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-11, SECTION 123—APPORTIONMENTS UNDER CONTINUING RESOLUTIONS (2016).

³⁷⁴ Kogan & Van De Water, *supra* note 307.

³⁷⁵ *What is a Continuing Resolution*, *supra* note 5.

³⁷⁶ *Id.*

³⁷⁷ See Hannah Smith, *Using Multiyear Funding to Supercharge Your Grantmaking*, EXPONENT PHILANTHROPY (Mar. 16, 2023), <https://www.exponentphilanthropy.org/blog/using-multiyear-funding-to-supercharge-your-grantmaking/#:~:text=Multiyear%20funding%E2%80%94support%20that,better%20carry%20out%20their%20missions> (discussing guaranteed income streams).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ See 31 U.S.C. § 1502(a) (“The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.”).

³⁸¹ See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *supra* note 373.

Another viable contingency would be to streamline transfer and reprogramming of funds. While some agencies refer to both processes as “reprogramming actions”³⁸² they are actually two distinct processes. “A transfer involves shifting funds from one appropriation account to another, while programming involves shifting funds from within the same account.”³⁸³ For example, shifting funds between colors of money would be a transfer (e.g., from procurement to RDT&E funding) whereas “shifting funds . . . within the Shipbuilding and Conversion, Navy account—for instance, from . . . a missile destroyer . . . program to [an] . . . aircraft carrier program—would be reprogramming.”³⁸⁴ That difference is critical because “[a]s a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited.”³⁸⁵

One way to lessen negative CR effects may be to modify transfer limits. Transfer limits appear both in the United States Code³⁸⁶ and often in specific appropriations acts.³⁸⁷ By increasing these transfer limits, agencies would have more flexibility to plan for and deal with CRs. This would effectively authorize agencies to conduct more “below threshold reprogramming (BTR).”³⁸⁸ This could prove especially useful because BTR reprogramming generally does not require prior congressional approval and instead only requires agencies to report such transfers “in aggregate on a quarterly or annual basis, depending on the appropriations title”³⁸⁹

³⁸² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAOB223474, BUDGET REPROGRAMMING: DEPARTMENT OF DEFENSE PROCESS FOR REPROGRAMMING FUNDS 6 (1986) [hereinafter BUDGET REPROGRAMMING] (“Although they are related and often discussed as the same concept, reprogramming funds is distinguishable from transfer of funds.”).

³⁸³ BRENDAN W. MCGARRY, CONG. RESEARCH SERV., R46421, DOD TRANSFER AND REPROGRAMMING AUTHORITIES: BACKGROUND, STATUS, AND ISSUES FOR CONGRESS Summary (2020).

³⁸⁴ *Id.* at 6.

³⁸⁵ BUDGET REPROGRAMMING, *supra* note 384, at 1; see, e.g., 10 U.S.C. § 2214 (1990) (outlining the “procedure and limitations” for DOD transfer of funds).

³⁸⁶ See, e.g., 10 U.S.C. § 2214 (1990) (limiting DOD transfers to “(1) higher priority item[s], based on unforeseen military requirements, than the items for which the funds were originally appropriated; and” (2) prohibiting transfers to “item[s] for which Congress has denied funds”); see *id.* § 2853 (permitting a 25% variation for military construction and family housing); 50 U.S.C. § 3024 (setting limitations on the Director of National Intelligence for transfer of funds “less than \$150,000,000, and that is less than 5 percent of amounts available to a department of agency under the National Intelligence Program”).

³⁸⁷ See, e.g., Department of Defense, *Office of the Under Secretary of Defense-Comptroller, Financial Management Regulation* Vol. 3, ch. 3, at 3-3, https://comptroller.defense.gov/Portals/45/documents/fmr/current/03/03_03.pdf (explaining the types of transfer authorities); Consolidated Appropriations Act, Pub. L. No. 11376, § 103, 128 Stat. 5, 50 (2014) (limiting appropriations transfers for the Department of Commerce to five percent).

³⁸⁸ MCGARRY, *supra* note 383, at 14.

³⁸⁹ *Id.*

Alternatively or concurrently, Congress could increase agency flexibility to “park” or “bank” transferred funds.³⁹⁰ Parking or banking funds occurs when an agency transfers funds from a fixed-year or one-year account into a multi-year or no-year account “in an attempt to keep those funds available beyond the fiscal year for which they were provided.”³⁹¹ Normally, parking is prohibited under 31 U.S.C. § 1532,³⁹² but Congress can—and has—authorize parking by including language like “[b]alances so transferred shall be merged with and available for the same purposes and *the same time period* as to the appropriations to which transferred.”³⁹³

As for reprogramming, agencies can take matters into their own hands. Although Congress may direct agencies, like the DOD, to seek congressional approval prior to reprogramming funds via explanatory statements, this language by itself is not law and therefore not legally binding.³⁹⁴ As the Supreme Court has explained,

Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress.” Put another way, a lump-sum appropriation reflects congressional recognition that an agency must be allowed “flexibility to shift . . . funds within a particular . . . appropriation account so that’ the agency ‘can make the necessary adjustments for ‘unforeseen developments’ and ‘changing requirements.’”³⁹⁵

Moreover, the power of prior congressional committee approval may be further limited by the Supreme Court’s decision in *INS v. Chadha*, where the court found that a one-House legislative veto was unconstitutional.³⁹⁶ Prior approval from a single committee likewise violates the Presentment³⁹⁷ and Bicameralism Clauses.³⁹⁸

³⁹⁰ CONG. RESEARCH SERV., R43098, TRANSFER AND REPROGRAMMING OF APPROPRIATIONS: AN OVERVIEW OF AUTHORITIES, LIMITATIONS, AND PROCEDURES 11 (2013), <https://crsreports.congress.gov/product/pdf/R/R43098>.

³⁹¹ *Id.*

³⁹² 31 U.S.C. § 1532.

³⁹³ Commerce, Justice, Science, and Related Agencies Appropriations Act, 2013, Division B of P.L. 113-6, at 127 Stat. 264 (emphasis added).

³⁹⁴ *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975)).

³⁹⁵ *See id.* at 192–93 (1993) (omissions in original) (first quoting *TVA v. Hill*, 437 U.S. 153, 191 (1978) and then quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318 (1975)).

³⁹⁶ *INS v. Chadha*, 462 U.S. 919, 952–54, 959 (1983).

³⁹⁷ U.S. CONST., art. I, § 7, cl. 2–3.

³⁹⁸ *Id.* § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

True, agency regulations often instruct agencies to notify and seek approval from congressional committees to reprogram or transfer funds.³⁹⁹ Legally, however, there is not much to stop agencies from rewriting these regulations after a notice and comment period.⁴⁰⁰ Should agencies decide to bypass prior congressional committee approval for reprogramming, they do so “at the peril of strained relations with Congress,”⁴⁰¹ but perhaps that is just the pressure Congress needs to timely pass appropriations and set explicit limitations on transfers. For context, the Trump administration did not notify Congress when it transferred billions of dollars⁴⁰² to fund construction of the U.S.-Mexico border wall.⁴⁰³ And as a result, Congress has and likely will continue to seek to restrict reprogramming and transfer limits by explicitly prohibiting the use of funds to construct the border wall.⁴⁰⁴

CONCLUSION

CRs are an unfortunate crutch in the annual appropriations process. On the one hand, they are a useful tool in avoiding government shutdowns and keeping government operationally afloat while Congress “negotiates” an actual budget. But, to borrow a lyric from the Notorious B.I.G., the more we rely on CRs “the more problems we see.”⁴⁰⁵ These problems are not always apparent. Pulling back the curtains reveals issues that most would not easily associate with CRs. Delayed justice, potential constitutional and statutory violations, and contracting inefficiencies are just some of the hidden costs we pay to keep using CRs.

Are these costs worth it? And, if not, is there a better way? These are not easy questions, and there may not be a sure-fire solution. Cancelling CRs

³⁹⁹ See, e.g., DOD Financial Management Reg. 700.14-R.

⁴⁰⁰ See 5 U.S.C. § 553. Note, to the extent agencies rely on policy statements or internal agency as authority to request prior congressional approval, changes to those documents would not require notice and comment. See *id.* § 553(b)(3)(A).

⁴⁰¹ The Honorable Lowell Weicker, Jr., Chairman, Chairman, Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, United States Senate, B-217722, 64 Comp. Gen. 359, 361–62 (1985).

⁴⁰² CHRISTOPHER T. MANN, CONG. RESEARCH SERV., IN11274, FY2020 DEFENSE REPROGRAMMINGS FOR WALL FUNDING: BACKGROUNDER 2 (2020) (noting that the Trump administration “has redirected approximately \$9.9 billion” to construct the wall).

⁴⁰³ See JENNIFER K. ELSEA & EDWARD C. LIU, CONG. RESEARCH SERV., R45908, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION Summary, 2 (2019).

⁴⁰⁴ See Joe Gould, *House Dems Offer New Limit for DoD’s Border Wall ‘Slush Fund’*, DEFENSE NEWS (May 15, 2019), <https://www.defensenews.com/congress/2019/05/15/house-dems-offer-new-limit-for-dods-border-wall-slush-fund/> (“A group of House Armed Services Committee Democrats . . . offered a bill . . . to cap national emergency military construction authority at \$250 million per emergency. The legislation would tighten the ability to waive other provisions of law in carrying out the projects and mandate congressional notification and waiting period for construction projects.”).

⁴⁰⁵ THE NOTORIOUS B.I.G., *supra* note 1.

outright will inevitably lead to more government shutdowns. Embracing CRs by utilizing recurring ACRs only perpetuates the problem and excuses the costs associated with CRs. Instead, the answer lies somewhere in the hinterland, recognizing that CRs are with us for the foreseeable future but mitigating their downsides by (1) incentivizing Congress to timely pass annual appropriations through fines or salary withholding measures or (2) giving agencies increased flexibility through multi-year appropriations and higher transfer and reprogramming limits. These are just some of the potential improvements to mitigate the broken CR process.⁴⁰⁶

True, these measures will not solve the CR crisis. After all, this is the federal government we are talking about and “American governance never, ever has been tidy. . . . There’s always been polarization. There’s always been partisanship. There’s always been intense fighting and occasional irrationality.”⁴⁰⁷ But we should neither continue to pay the costs associated with CRs, nor should we accept the premise that the appropriations process can never be improved. To have any hope of cancelling CRs and to avoid their negative consequences some measures must be taken. One thing is certain, the price of inaction is not worth it.

⁴⁰⁶ See, e.g., CLINTON T. BRASS, CONG. RESEARCH SERV., RL34700, INTERIM CONTINUING RESOLUTIONS (CRS): POTENTIAL IMPACTS ON AGENCY OPERATIONS 4–5 (2012) (discussing how agencies can request “anomalies” to “accommodate what they perceive as exceptional circumstances for an agency, program, or policy” during a CR).

⁴⁰⁷ Michael Waldman, *Government Dysfunction: Introductory Remarks by Michael Waldman*, BRENNAN CTR. FOR JUST. (Feb. 12, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/government-dysfunction-introductory-remarks-michael-waldman>.