The Heritage Foundation Issue Bulletin

No. 73

The Heritage Foundation • 214 Massachusetts Avenue • N.E. • Washington, D.C. • (202) 546-4400

November 17, 1981

THE ULTIMATE VETO: DARE REAGAN BLOCK A CONTINUING RESOLUTION?

INTRODUCTION

In his latest news conference, President Reagan declared that his Administration would "stiffen its spine and not throw in the towel" in its fight to get federal spending under control. In keeping with that pledge, the President repeated his threat to veto appropriations bills that exceed his September 24 spending targets. If he carries out the threat, he is likely to be quite busy. According to the latest reports from the Office of Management and Budget (OMB), eight domestic appropriations bills currently pending could exceed Reagan's September budget targets by $8 to $11 billion. (See Appendix 1.) Before he can veto the bills, however, they have to pass Congress; no appropriations have done so despite the fact that the fiscal year began on October 1.

Within days, however, a bill is likely to pass that will give Reagan the opportunity to impose the ultimate veto. By so doing, he could paralyze the government and create bureaucratic chaos or send the clearest signal yet that he is determined to hold down spending, cut the deficit, trim inflation and make the U.S. economy once again the dynamo that long was the envy of the world. On November 20, the authority will lapse by which the federal government can spend money. To avoid this, Congress is expected to do what it often has done in past years: pass what is called a "continuing resolution." In effect, it automatically continues the authority of the government to spend at some specified level. Continuing resolutions routinely have been signed by Presidents, though not without some grumbling. Yet a President need not approve such a bill; he could veto it and force a confrontation with Congress over the critical issue of the level of government spending.

Will Reagan dare veto a continuing resolution? What is clear is that Congress has been ignoring many of his recent pleas for budget restraint, particularly his September budget proposals to cut $13 billion from 1982 spending by eliminating the Departments of Education and Energy and reducing spending in most non-defense, discretionary programs by 12 percent across-the-board. The President has requested these additional budget cuts because spending for social welfare programs has been sharply higher than forecasted. Partly owing to a declining economy and rejection by Congress of some of Reagan's initial budget recommendations, a broad range of social programs including Medicare, food stamps, unemployment compensation, and Aid to Families with Dependent Children (AFDC) have run billions over their estimated spending. Interest rates higher than forecasted have contributed $5.5 billion since July to the government's cost of servicing the nation's debt. Because of these over-runs, the President has urged Congress to stick with his budget-cutting program and not to be deterred "by temporary economic changes or short-term political problems."

The chart below shows spending totals for fiscal year 1982 increasing sharply between Reagan's initial March forecast and his most recent September predictions. In March, OMB predicted budget outlays for 1982 of $695 billion; by September 1982 the spending projections had risen to $722 billion.

Fiscal Year	Total Projected Outlays	Total Projected Receipts	Date of Estimate
1981	$615.8	$600.0	January 1980 (Carter estimate)
1981	611.5	628.0	March 1980 (Carter estimate)
1981	633.8	604.0	July 1980 (Carter estimate)
1981	655.2	600.3	March 1981 (Reagan estimate)
1981	661.3	605.6	October 1981 (actual)
1982	739.2	711.8	January 1981 (Carter estimate)
1982	695.3	650.3	March 1981 (Reagan estimate)
1982	704.9	662.4	July 1981 (Reagan estimate)
1982	722.0	663.2	September 1981 (Reagan estimate excluding $13 billion in budget cuts.)

Prepared by Mary Ippolito of the National Journalism Center.

Some other government budget agencies now predict even higher spending for 1982 if Congress enacts no further budget cuts. The Congressional Budget Office's (CBO) latest prediction, for example, forecasts spending at $725-$730 billion and the Senate Budget Committee's estimate is $731.7 billion. Even though Reagan has already won over $35 billion in budget cuts for fiscal year 1982, the new budget projections show those cuts eroded by a strong surge in government spending due to a downturn in the economy.

Reagan's is not the first administration to understate the growth of government. The Carter Administration understated government spending in 1981 by nearly $50 billion. His estimates for spending in FY 1981 went from $611.5 billion in March 1980 to $633.8 billion in July and, finally, to $661.2 billion in October when final figures were compiled. The point is not that recent budget estimates are unreliable -- forecasting has always been an inexact art rather than a science. Government budget predictions, almost without exception, underestimate government spending by wide margins. Given the past history of these predictions, the Congress and President will have to slash additional billions just to maintain the current targets. Even these cuts are not likely to meet the September totals Reagan has requested.

On the brighter side, government predictions have underestimated the tax revenues under the Reagan economic program. Forecasters had expected tax revenues to decline as a result of the massive tax cut and lower inflation rates. But projected tax revenues increased by nearly $13 billion since the March budget forecast, providing supply-siders with some evidence that the tax cut may, as they have been predicting, eventually increase tax revenues, not reduce them. In fact, if tax revenues increase by just 7.4 percent over the most recent forecast, supply-side economists will have strong evidence that the tax cut actually produced larger tax revenues than expected under the formerly higher tax rates -- and in the first year of enactment of the tax cut.

To assure that Congress, in fact, does incorporate his budget cuts in 1982 appropriation bills, Reagan has threatened repeatedly to veto any bills that exceed his requests. House Speaker Thomas P. O'Neil, Jr. (D-Mass.) has said that the President will have "tremendous problems" in getting the cuts, although he would not obstruct the votes. "The President will have his day in court," the Speaker said.

Before Reagan has this day in court, Congress is almost certain to enact another continuing resolution. The current continuing resolution allows the government to spend far above the Reagan Administration's request for non-defense programs and below the levels he wants for defense. The continuing resolution calls for spending levels at the lower of the House or Senate appropriation bills or the conference agreement, if one has been worked out.

The Reagan Administration finds these funding levels unsatisfactory because all House and Senate appropriations bills are billions above what Reagan suggested in his September budget. Since appropriation bills have not been passed for the defense budget, the continuing resolution holds military spending to 1981 levels even though Reagan wants the military to begin a build-up. In the programs where spending is allowed to run above his requests, the President has submitted at least 550 notices to Congress to defer spending authority. OMB estimates the saving from this at

$1.8 billion in budget authority through November 20. Either House of Congress, however, may force the immediate use of the funds that Reagan is deferring simply by passing a resolution disapproving of the President's action. Since the Democrats have a wide majority in the House, leaders there have predicted that Reagan's deferrals will be overturned. Yet, Reagan has been very successful so far in sustaining deferrals: Congress has overturned only $361 million of his $3.814 billion in deferrals. By the end of the fiscal year at the latest, however, the Administration will have to release the deferrals. The President is hoping that by then the Congress will have passed his budget cuts.

Since the continuing resolution will expire on November 20, the current political controversy in Congress centers on the levels of spending that act should authorize. Reagan would like spending levels to be set no higher than his September budget; the House Democratic leadership, on the other hand, will probably commit itself to the higher budget totals allowed in the first continuing resolution. Republicans appear poised to add a third "trigger" to the continuing resolution beginning November 20: under the GOP plan, budget totals would be the lowest of the House appropriation, Senate appropriation, or Reagan's September budget recommendations. On just eight of the appropriations bills, the extra trigger would save $8 to $11 billion dollars. Another proposal suggested by Republicans would cut the appropriations permitted by the continuing resolution by 5 to 6 percent.

If Congress rejects these suggestions and passes a continuing resolution permitting higher spending totals, this confronts the President with a tough dilemma and a major challenge to his leadership. Should he veto the continuing resolution? According to Professor Charles Rice of the Notre Dame Law School, this would be an unprecedented move and would nullify spending authority for the <u>entire</u> government since no government agency or branch can spend money without authorization and appropriation. Since no regular appropriation bills have yet been passed by Congress and signed by the President, a veto of the continuing resolution would nullify almost every spending appropriation for the government.

Constitutional experts, budget and appropriations committee officials, and Justice Department lawyers disagree over the possible consequences of a presidential veto of a continuing resolution. One thing is certain: the President would embark upon relatively uncharted waters; no set body of legal opinion or precedents precisely govern his powers and authority. According to the Republican Research Committee, the Congress has permitted appropriations to lapse at least eight times in recent history. On these occasions, government agencies had no statutory authority to spend but they continued to keep running. In the longest case on record, thirteen days lapsed in FY 1979 before a continuing resolution was approved to finance government operations. Lapses in funding also occurred in 1952, 1953, and 1956 and, on two of these occasions, Congress subsequently enacted appropriation bills ratifying the spending incurred during the lapses.[1]

The first year that the Justice Department challenged this practice was 1980. That action was prompted because Congress permitted the appropriations bill for the General Accounting Office (GAO) to lapse. The GAO contended at the time that the agency could stay open because it was not "the intent of Congress that GAO close down." At the time of the lapse in appropriations, the Director of General Services and Controller issued a memorandum which stated that the GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations."[2] The memorandum argued, however, that the agency's employees could continue to work if congressional intent was clearly "to keep the agency open." The OMB advised the GAO not to incur "controllable obligations" and "avoid hiring, grantmaking, nonemergency travel and other nonessential obligations" while lacking proper appropriations.[3]

The Attorney General of the United State, Benjamin Civilleti, on April 25, 1980, rendered a strong opinion on behalf of the Justice Department that found these approaches "legally insupportable." According to the Attorney General's opinion, no agency can legally continue operations without a proper and timely congressional authorization and appropriation. Applying the Antideficiency Act of 1906, Section 665(a) of Title 31, the Attorney General wrote:

> It is my opinion that, during periods of lapsed appropriations, no funds may be expended except as necessary to bring about the orderly termination of the agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.[4]

In the three-quarters of a century since the Antideficiency Act, the Attorney General continued, there have been "No exceptions, never an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations." According to Civilleti, even government employees cannot be paid under the Antideficiency Act unless Congress makes a specific appropriation for the agency. The Attorney General also rejected GAO's contention that Congress desired the agency to continue operations even though its appropriations had expired. Civilleti

---

1 Benjamin Civiletti, "Applicability of Antideficiency Act Upon A Lapse In Agency Appropriations" (hereafter referred to as Opinion), April 25, 1980, pp. 2-3.

2 The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Senator Magnuson].

3 Civilleti, Opinion, p. 4.

4 Civilleti, Opinion, p. 1.

argued that no one could anticipate Congress's future actions or intent and that "Faithful execution of the laws cannot rest on mere speculation" that Congress desires to continue funding an agency.

The Civilleti opinion was the strongest action on record signalling to Congress that it must undertake appropriations in a serious, timely and prudent fashion, not depending on the executive branch to continue lapsed appropriations. If Congress could not handle its fiscal operations prudently and in a timely fashion, Civilleti seemed to say, it must pay the political consequences of causing agencies to close operations. Without appropriations, the entire operations of the agency or department -- except those necessary to terminate the agency itself -- must come to an immediate halt.

The first test of the Attorney General's ruling occurred on April 30, 1980, when Congress failed to pass the continuing resolution funding operations of the Federal Trade Commission (FTC). The official closing lasted one day as Congress accepted a unanimous consent agreement to rush through emergency stopgap funding (H. Res. 541) for the agency. The resolution was immediately signed by Carter. When FTC funding lapsed a month earlier, the agency's employees came to work and operations continued normally. In April, however, the President ordered the FTC to close and begin dismantling operations -- the first time in history that a federal agency shut down due to a lapse in funding. On April 30, the FTC told its 1,700 employees that according to the Attorney General's opinion, they could only work "if they were closing the office." Most employees continued working, but spent their time organizing files for storage or referral to other federal agencies. Most normal activity was terminated: court appearances were cancelled, business travelers recalled, and meetings stopped. FTC lawyers even declined to talk with reporters on record for fear their discussions would be considered "normal work" forbidden by the Attorney General's opinion. Representative Elliott H. Levitas (D-Ga.) drew a lesson from the agency's closing, observing: "I hope this affair has sent shock waves out that shock the arrogant and the complacent. From now on, no bureaucracy can rely on the continuation of his agency unless Congress has reauthorized its programs and appropriated its funds."[5] In June 1980, Congress again allowed the FTC's funding to lapse and it closed down for two days before the Senate rushed to pass another appropriations measure.

---

5 Judy Sarasohn, "FTC Funded But Old Power Dispute Remains," Congressional Quarterly, May 3, 1980, pp. 1167-1168. See also Congressional Quarterly, March 15, 1980, p. 757; March 8, 1980, p. 635; and June 7, 1980, pp. 1573-1574 for history of FTC's lapsed funding. The agency's funding has been allowed to lapse on at least three occasions as a result of controversy in Congress over a legislative veto of FTC regulations.

If the Reagan Administration strictly follows the Attorney General's opinion of April 1980, a veto of the continuing resolution would force the suspension of pay to government employees and the immediate shut-down of the normal operations of all government departments. The Antideficiency Act explicitly allows exceptions for expenditures only for "cases of emergency involving the safety of human life or the protection of property." (U.S. Code 665(b)). These exceptions would undoubtedly be interpreted much more broadly by the Attorney General in the case of a veto of a continuing resolution than they were regarding the FTC in 1980 since all government operations would be affected.

How binding is the Civilleti ruling? The Reagan Administration could ignore it if the Justice Department chose to interpret the Antideficiency Act differently. The Attorney General's opinion simply is the advice of the nation's chief law enforcement officer to the President and the heads of government departments concerning the Antideficiency Act. According to Professor Aaron A. Wildavsky of the Berkeley Law School, the Attorney General's opinion sets a precedent for the Reagan Administration only "provided that the Comptroller General hasn't contradicted it, and the new administration doesn't disagree with it." Professor Kenneth Dam of the University of Chicago Law School commented that there is no evidence which indicates that an Attorney General's opinion is of "any value" in a court of law. In short, the Civilleti opinion is only a precedent if Reagan cares to view it a precedent.

While the Reagan Administration could interpret the Antideficiency Act differently than the Carter Administration's Justice Department, the Office of Legal Counsel of the Justice Department recently reaffirmed the April 1980 Attorney General's opinion. According to a Justice Department official, Attorney General William French Smith, in a letter to Senator Howard Baker, indicated his concurrence with the Carter Administration's interpretation of the Antideficiency Act. According to the official, "The Attorney General's opinion (April 1980) is fully operative."

The Attorney General's opinion, however, has only been applied to the narrow circumstances of lapsed funding of one agency. If the entire government were shut down, broad exceptions could be made to continue emergency functions of the government, to save human life and protect property. It would all depend on how the Justice Department interprets the critical provisions of the Antideficiency Act. For example, a former staff member of the Senate Budget Committee contends that all entitlement programs would continue, even if continuing appropriations bills were vetoed by the President or allowed to lapse. More than one-half of all government expenditures are included in this category including Social Security, Supplemental Security Income (SSI), AFDC, civil service and military retirement, Medicare, and unemployment compensation. Among those programs not included is food stamps. Professor Rice concurs that entitlement programs would continue "since there is a legal contractual arrangement to deliver these services." He notes that "if there is a contractual commitment by the U.S. government it must be honored." Rice is not sure, however, that Social Security checks would be delivered since Social Security has been ruled a welfare program by the U.S. Supreme Court, not an entitlement program. Rice added, though, that the President has broad powers over "contingency funds" and could shift them between programs and agencies in the event of an expiration of appropriations.

A Republican Research Committee aide who studied the consequences of lapsed appropriations contended that entitlement programs would not be affected since they are not included in appropriation bills. What would be affected, he states, are the salaries of government workers because they are included in appropriations. Therefore, employees working in the Social Security Administration are not "obligated to show up to get the checks out," if they do not receive their own paychecks. The staffer commented: "Under law, the government should come to a screeching halt, but it would not, in actuality, because it is politically suicidal to stop important government functions." He predicted that in such circumstances "the President can direct certain parts of government to ignore the Antideficiency Act."

A lawyer for the Senate Appropriations Committee agrees: "Legally, federal agencies would have to shut down, or go through the shutting down process." But, he added, "in fact, government would not shut down, because of political considerations."

An official in the Congressional Budget Office (CBO) contends that "essential services" would continue if the President vetoed a continuing resolution: FDA (Food and Drug Administration) experiments would continue, for instance, but "most normal business" would be ended. The official said that all agencies and departments have contingency plans for "minimal bare-bones" level of activity if no appropriations are made. The CBO official said that HHS (Health and Human Services Department) had already gone through "the fire drill" over an abortion rider, and the checks for HHS services did get delayed. Asked whether those checks would go out if the President vetoed a continuing resolution or allowed it to expire, he said that it depends on "where the checks are in the pipeline." By the 20th of November, he said, "the Social Security computer tapes are already distributed to local offices, so monthly checks would probably go out." Another government official however commented that government employees might not show up to run the computers since they would be under no obligation to continue working.

Most officials were confident that military activity for the national defense could continue to be funded under emergency powers, but one former budget staffer wondered whether checks could be written for non-essential military personnel. "Some military paychecks might be held up," the former staffer commented, "but the veto would probably be too late to hold up beginning of the month checks," since military personnel are paid every two weeks. An aide in the minority leader's office remarked that the "President has special responsibilities for national security, so fundamental military operations would continue," if the continuing resolution expired. But, he said, some military personnel would have to be cut from the payroll."

There thus is wide disagreement among government officials and agencies concerning the consequences of lapsed appropriations and the responsibilities of agency directors under such circumstances. Guidance comes from only two Attorney General's opinions; other precedents are few and contradictory. A high official ln the Department of Justice's Office of Legal Counsel summed up the likely consequences of a lapsed continuing appropriations bill for the entire government: "All hell would break loose," he said. "It would be a very confusing situation indeed." One immediate effect: it would undoubtedly force Congressmen to reconsider appropriations measures. House and Senate leaders almost certainly would delay the Thanksgiving adjournment currently set to begin November 19 or 20 and marathon weekend sessions would be scheduled to resolve the appropriations measures expeditiously.

Whether the President would benefit politically from vetoing the continuing resolution is uncertain. A Republican committee staffer thought the President would lose in such a confrontation with Congress. "Reagan would come on as a black knight," he said. The budget is viewed as primarily a presidential responsibility. The public would think, "You vetoed it, you must act to resolve it." An appropriations committee staffer concluded that if the President decides to veto the bill, he would have to make "his pitch" in advance. If the government operations actually started shutting down, the staff lawyer predicted, the public would lose sight of the veto's purpose and demand resumption of government services.

Yet there are just as many arguments calling for a presidential veto of a continuing resolution with spending levels unsatisfactory to the President. These are echoed on Capitol Hill. A business leader feels that the President is justified in vetoing a continuing resolution that forces his administration to spend far more than he wants. She noted that the President has warned the Congress repeatedly: "I told you the appropriation bills were over-budget, I told you I would veto them." A veto also could spur great pressure on Congress from back home. In a confrontation with Congress over cutting the budget, she said, "The President would look strong, Congress would look weak."

An aide in the minority leader's office thought that while the continuing resolution would be tough to veto, "It may be in the public's interest to veto it; his whole economic strategy is at stake." The staffer detected a "terrible dilemma for the President. "If he signs a bill for too much spending he signals he has thrown in the towel in his fight to control the budget." But "if he vetoes the bill, the government could eventually be thrown into halt." The Republican staffer suggested that the President should "go to the people to explain the over-runs in appropriations bills due to congressional spending."

A legislative consultant to the Conservative Caucus, a strong advocate of conservative causes, also supports a veto of a continuing resolution not close to Reagan's requests. "It would be a tremendous game of national chicken," he said, "but Reagan will never get those September budget totals in appropriations bills with a veto of each bill." A "Reagan majority," he added, is one-third of the Congress plus one. He suggested that Reagan should immediately advise the Congress he will veto the continuing resolution if it does not contain language committing government to appropriations no greater than his September budget requests. Unless the President receives additional budget cuts, the Conservative Caucus consultant concluded, "pressure will be overwhelming to cave-in on Kemp-Roth or to enact revenue-enhancing measures."

The President's dilemma is clear: never in memory has a continuing resolution been vetoed by a President -- but then, the nation never before, or at least not for a half-century, has been in such difficult economic straits. If further budget cuts are not enacted, the very keystone of Reagan's plan for economic recovery -- the across-the-board tax cut -- may be reversed, just at the time when signs appear that the tax reduction is stimulating the savings rate and causing personal income to rise sharply.

Thomas M. Humbert
Walker Fellow in Economics

Assisted by:
Geoffrey Gimber
Robert Valero
Research Assistants

APPENDIX 1

STATUS OF APPROPRIATIONS BILLS (in thousands)

Bill No.	Title	March Adm. Request	Sept./Oct. Adm. Request	House-passed Bill / Date	Senate-passed Bill / Date
HR 4119	Agriculture	$ 22,022,548	$ 20,554,647	$21,035,647 (7-27)	$21,083,016 (10-30)
HR 4169	Commerce-Justice-State	8,761,102	8,180,801	8,683,999 (9-9)	---
---	Defense	208,635,953	200,878,234	---	---
HR 4522	District of Columbia	570,170	570,170	520,570 (9-22)	557,170 (10-30)
HR 4144	Energy and Water Development	13,410,287	11,788,547	13,189,674 (7-24)	12,763,636 (11-5)
HR 4559	Foreign Assistance	8,881,065	7,751,699	---	---
HR 4034	HUD-Independent Agencies	63,248,452	58,685,564	62,599,958* (7-21)	60,506,342 (7-30)
HR 4035	Interior	7,532,620	6,597,381	7,955,727 (7-22)	7,353,456 (10-27)
HR 4560	Labor, HHS, and Education	86,385,670	84,355,701	87,181,250 (10-6)	---
HR 4120	Legislative	1,433,917	1,434,092	---	---
HR 4241	Military Construction	8,016,208	7,300,608	6,887,452 (9-16)	---
HR 4209	Transportation	11,103,037	9,776,967	11,090,306 (9-10)	10,414,000 (11-3)
HR 4121	Treasury-Postal Service	9,864,638	9,142,274	9,745,292 (7-30)	---
		$449,865,668	$427,016,685		

*Conference Agreement passed by House: $60,689,970.

Prepared by Robert Lauterberg, Republican Study Committee