

House FY21 Appropriations Process Begins, Using “Emergency” Spending Authority

By Jeff Davis



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House Democrats this week unveiled their outline for the twelve bills that would fund the discretionary side of the federal government for fiscal year 2021. The spending outline adheres to the Budget Control Act spending caps totaling \$1.298 trillion, set in the Bipartisan Budget Act of 2019, but only by funding many Democratic priorities as off-budget emergencies, which require a Senate supermajority and Presidential approval, sometimes line-item by line-item, in order to be successful.

\$1.298 trillion in base funding. The House Appropriations Committee is scheduled to adopt chairman Nita Lowey’s (D-NY) plan to subdivide nearly \$1.3 trillion in discretionary funding amongst the twelve subcommittees at a markup on July 9 according to the following plan:



FY 2021 Discretionary Appropriations Levels

Millions of dollars of net discretionary budget authority. CBO scoring.

<u>Subcommittee:</u>	<u>FY 2017 Enacted</u>	<u>FY 2018 Enacted</u>	<u>FY 2019 Enacted</u>	<u>FY 2020 Enacted</u>	<u>FY 2021 House</u>	<u>House vs. FY 2020</u>
Agriculture and Rural Develop.	20,877	23,259	23,042	23,493	23,980	+487
Commerce-Justice-Science	56,555	59,600	64,118	70,675	71,473	+798
Defense	516,115	589,452	606,469	622,665	626,190	+3,525
Energy and Water Development	37,771	43,200	44,640	48,343	49,607	+1,264
Financial Services/General Govt.	21,515	23,423	23,423	23,828	24,636	+808
Homeland Security	42,408	47,723	49,411	50,468	50,718	+250
Interior/Environment	32,280	35,252	35,552	35,989	36,760	+771
Labor-HHS-Education	161,025	177,100	178,076	183,042	182,914	-128
Legislative Branch	4,440	4,700	4,836	5,049	5,300	251
Military Construction/Veterans	82,376	91,991	97,136	103,486	102,648	-838
State/Foreign Operations	36,586	42,000	46,218	46,685	47,850	+1,165
Transportation-HUD	57,651	70,300	71,079	74,277	75,924	+1,647
Subtotal, Base Appropriations	1,069,599	1,208,000	1,244,000	1,288,000	1,298,000	+10,000
<i>Memo: Base Defense</i>	<i>551,068</i>	<i>629,000</i>	<i>647,000</i>	<i>666,500</i>	<i>671,500</i>	<i>+5,000</i>
<i>Memo: Base Non-Defense</i>	<i>518,531</i>	<i>579,000</i>	<i>597,000</i>	<i>621,500</i>	<i>626,500</i>	<i>+5,000</i>

While the Transportation-HUD Subcommittee was one of the winners and got a \$1.65 billion increase, only \$78 million of that net increase went to the Department of Transportation (HUD got \$1.5 billion of the increase).

But the regular budget, prepared under fairly tight spending constraints, is only a part of the whole.

Plus emergencies. The House plan would supplement the \$1.298 trillion in “base” appropriations with an additional \$247.6 billion in appropriations that would not be subject to the spending caps because they would be designated an “emergency,” making them effectively off-budget. The totals are shown below, in millions of dollars.

	<u>Regular (Subject to BCA Caps)</u>	<u>Emergency (Exempt from Caps)</u>
Agriculture and Rural Develop.	23,980	0
Commerce-Justice-Science	71,473	0
Defense	626,190	0
Energy and Water Development	49,607	43,475
Financial Services/General Govt.	24,636	67,183
Homeland Security	50,718	0
Interior/Environment	36,760	14,960



Labor-HHS-Education	182,914	24,425
Legislative Branch	5,300	0
Military Construction/Veterans	102,648	12,494
State/Foreign Operations	47,850	10,018
Transportation-HUD	75,924	75,000
TOTAL	1,298,000	247,555

Congress enacts billions of dollars of emergency appropriations each year. In fiscal 2017, Congress appropriated \$19.4 billion in emergency spending. This rose to \$125.6 billion in fiscal 2018 because of the damage done by the Harvey-Irma-Maria 2017 hurricane season (plus wildfires in the West), then it dropped back down to a more normal \$25.4 billion in fiscal 2019. Because of coronavirus, Congress is in the process of blowing out the emergency designation in fiscal 2020 - [\\$511.4 billion in emergency appropriations to date](#), with almost three months still to go in the fiscal year to enact even more funding. (By comparison, the emergency appropriations in the 2009 ARRA stimulus bill only [totaled \\$311 billion.](#))

But the “emergencies” funded by the House’s 2021 bills under that designation are different from rebuilding after hurricanes, floods and wildfires, or responding to once-in-a-century pandemics and the unique economic circumstances that come with that. The \$12.5 billion in emergency funding in the Military Construction-VA bill largely converts advance appropriations for veterans health care (provided last year but becoming available on October 1, 2021) from regular to emergency. This was widely criticized by Republicans in this week’s markup as a “gimmick” to make it look like the regular budget for that subcommittee was dropping, when in fact the regular program is increasing. The White House has so far refused to carve out an exemption from the caps for certain kinds of veterans health funding, as has been proposed by Senate appropriators on a bipartisan basis, and efforts to get such a cap exemption in the bipartisan budget agreement last year failed.

And the rest of the emergency funding is for infrastructure, across the Energy and Water (water infrastructure, power grid, clean energy research), Financial Services (FCC broadband), Interior/Environment (water supply), Labor-HHS-Education (health and hospital research), and Transportation-HUD bills. This funding is largely consistent with the authorization targets made by the Democratic infrastructure bill passed by the House last week (H.R. 2).

Where is the dividing line between regular funding and emergency funding?

Fortunately, these terms are precisely defined in section 250 of the [Balanced Budget and Emergency Deficit Control Act of 1985](#), as amended (the Gramm-Rudman-Hollings Act). In order to qualify as an “emergency,” the following conditions need to exist:

§250(c)(20) The term “emergency” means a situation that—

(A) requires new budget authority and outlays (or new budget authority and the outlays flowing therefrom) for the prevention or mitigation of, or response to, loss of life or



property, or a threat to national security; and

(B) is unanticipated.

Obviously, the “unanticipated” part is key, so the law then goes on to define, in detail, what that word means in this context:

§250(c)(21) The term “unanticipated” means that the underlying situation is—

- (A) sudden, which means quickly coming into being or not building up over time;
- (B) urgent, which means a pressing and compelling need requiring immediate action;
- (C) unforeseen, which means not predicted or anticipated as an emerging need; and
- (D) temporary, which means not of a permanent duration.

The need for additional federal investment in infrastructure may be urgent, but it is hardly “sudden” - this problem has been building up for decades. And to call the infrastructure problem “unforeseen” is ludicrous - at the very least, we all saw the problem coming at Infrastructure Week every year going back almost a decade. Likewise with the Military Construction-VA bill’s designation of \$12.5 billion of veterans health funding as an emergency - the problem was [clearly foreseen](#) when Congress enacted, and the President signed, a law in 2018 creating a new unfunded health program and stuck the Appropriations Committees with a rapidly growing bill. (It is a big and real problem, but not in the least “unforeseen.”)

Budget law makes it hard for the emergency designation to be used unless there is broad political support. In the Senate, any Senator can make a point of order under section 314(e) of the [Budget Act](#) and knock an emergency designation out of a paragraph unless at least 60 Senators vote to approve the designation. And even if Congress passes a law with a bunch of emergency designations, the President has effective line-item veto power over these - budget law says that each individual account must have a separate emergency designation, and once the bill is signed into law, if the President does not then sign an approval of the emergency designation for each account and transmit it to Congress, those appropriations count towards the spending caps. (See [here](#) for POTUS’s emergency designation of each emergency account in the CARES Act.)

Of the seven House bills that provide emergency funding, six have a catchall proviso in the back of the bill (sec. 607 of Energy & Water, sec.901 of Financial Services, sec. 501 of Interior, sec. 603 of Labor-HHS, sec. 514 of MilCon and sec. 8008 of State/Foreign) that ties all of the sundry emergency designations in the bill together so the President has to take or leave all of the designations in that bill - and so that the funding only becomes “available” (a.k.a. spendable) if the President signs a designation:

Each amount designated in this Act by the Congress as being for an emergency requirement



pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded or transferred, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

But the Transportation-HUD bill, as approved by subcommittee, does not have such a proviso tying all the emergency designations together, which would give the President the authority to pick and chose which would be exempt from sequestration and which would not (if he chose not to exempt some of them).

In any event, for the emergency appropriations not to trigger another round of sequestration, 60 votes in the Senate and Presidential approval of the emergency designation, even if he accepts the non-emergency parts of the bill, are required. At least for fiscal 2021.

Wait until next year for infrastructure? The Budget Control Act's caps on discretionary spending are set to expire after fiscal 2021. After that, unless the caps are extended, in fiscal 2022, Congress and the President will be able to appropriate as much money as they want, whether or not it is designated as an emergency or an Overseas Contingency Operation or something else, without having to worry about triggering another round of across-the-board sequestration.

Would Congress extend the caps? Maybe. Spending caps were originally imposed by the fall 1990 bipartisan budget deal, then allowed to lapse in 2002. They were reinstated in August 2011 as part of the deal to get the federal debt limit increased.

As fate would have it, the federal government is currently operating without a debt limit (or, rather, the debt limit of \$21.988 trillion has been suspended since the enactment of the Bipartisan Budget Act of 2019 - but a new debt limit will come into being at midnight on July 31, 2021, at whatever the amount of the debt is at that point). As of close of business yesterday, the debt subject to limit was [\\$26.434 trillion](#), meaning that the federal government has borrowed \$4.4 trillion in 11 months.

By August 2021, the amount of debt incurred may finally be enough to scare some members of Congress. Raising the debt ceiling is always a tough proposition in which the minority party in Congress usually sits on its hands and makes the majority do all the work. Once a new debt limit pops into being 13 months from now, the Treasury can avoid crisis for two or three months via "extraordinary measures" like taking money from off-budget retirement funds and moving money around with the Federal Reserve, but at some point in fall 2021, a change in law will be necessary to increase the debt limit or the government will start shutting down.

Raising the debt limit is a big lift for Congress - over the last decade it has almost had to be tied into some kind of larger fiscal package as some kind of "cover vote" or sweetener. The closer we get to fall 2021, the more likely it is that any major fiscal action by Congress - whether that is to extend constraints on spending, or passing a large amount of new, not-a-true-emergency spending without constraint (like a big infrastructure bill) will get wrapped up in the talks about the debt limit.



Permanent Increases in the Statutory Limit on the Public Debt Since 1985

Date	P.L.	Legislative Vehicle/Political Cover	Increase Amount	New Ceiling	House Vote	Minority Yeas	Senate Vote	Minority Yeas	% of Yeas from PP	
									House	Senate
Dec 12 1985	99-177	Gramm-Rudman-Hollings I	+255	2,079	271-154	not online	61-31	22		64%
Aug 21 1986	99-384	Freestanding debt ceiling bill	+32	2,111	216-199	not online	36-35	26		72%
Sep 29 1987	100-119	Gramm-Rudman-Hollings II	+689	2,800	230-176	not online	64-34	33		52%
Nov 8 1989	101-140	Repeal tax on high-cost health plans	+323	3,123	269-99	not online	voice	n/a		n/a
Nov 5 1990	101-508	Omnibus Budget Reconciliation Act	+915	4,145	228-200	47	54-45	19	21%	35%
Aug 10 1993	103-66	Omnibus Budget Reconciliation Act	+530	4,900	218-216	0	51-50	0	100%	100%
Mar 29 1996	104-121	"Contract With America Act"	+600	5,500	328-91	127	u.c.	n/a	39%	n/a
Aug 5 1997	105-33	Omnibus Budget Reconciliation Act	+450	5,950	346-85	153	85-15	44	44%	52%
Jun 28 2002	107-199	Freestanding debt ceiling bill	+450	6,400	215-214-1	3	68-29	31	99%	46%
May 27 2003	108-24	Freestanding debt ceiling bill	+984	7,384	None*	n/a	53-44	2	n/a	96%
Nov 19 2004	108-415	Freestanding debt ceiling bill	+800	8,184	208-204	0	52-44-1	2	100%	96%
Mar 20 2006	109-182	Freestanding debt ceiling bill	+781	8,965	None*	n/a	52-48	0	n/a	100%
Sep 29 2007	110-91	Freestanding debt ceiling bill	+850	9,815	None*	n/a	53-42	25	n/a	53%
Jul 30 2008	110-289	Fannie Mae/Freddie Mac takeover	+800	10,615	272-152	45	72-13	28	17%	39%
Oct 3 2008	110-343	Troubled Asset Relief Program	+700	11,315	263-171	91	74-25	33	35%	46%
Feb 17 2009	111-5	Stimulus Act (ARRA)	+789	12,104	246-183-1	0	60-38	3	100%	95%
Dec 28 2009	111-123	Freestanding debt ceiling bill	+290	12,394	218-214	0	60-39	1	100%	98%
Feb 12 2010	111-139	Pay-As-You-Go Budgeting	+1,900	14,294	233-187	0	60-39	0	100%	100%
Aug 2 2011	112-25	Budget Control Act of 2011	+2,100	16,394	269-161	95	74-26	28	35%	62%
Feb 4 2013	113-3	No Budget, No Pay Act	+605	16,999	285-144	86	64-34	12	30%	81%
Oct 17 2013	113-46	Continuing Appropriations Act	+212	17,212	285-144	198	81-18	27	69%	67%
Feb 15 2014	113-83	Freestanding debt ceiling bill	+901	18,113	221-201	193	55-43	0	87%	100%
Nov 2 2015	114-74	Bipartisan Budget Act of 2015	+1,696	19,809	266-167	187	64-35	18	70%	72%
Sept 8 2017	115-56	Hurricane Harvey Relief/FY18 C.R.	+647	20,456	316-90	183	80-17	47	42%	41%
Feb 9 2018	115-123	Bipartisan Budget Act of 2018	+1,532	21,988	240-186	73	71-28	37	70%	48%
Aug 2 2019	116-37	Bipartisan Budget Act of 2019	????	????	284-149	65	67-28	37	23%	45%

*In the House, under the "Gephardt Rule," in effect from 1979-2000 and 2003-2010, if the House and Senate pass an annual budget resolution, and then the House votes to agree to a conference report thereon, a joint resolution increasing the debt ceiling automatically passes the House without a separate vote. So freestanding debt ceiling bills only got a House vote if there was no final budget resolution or if the Senate amended the House-passed debt ceiling bill.