

Spending on Unauthorized Programs: Authorizations and Appropriations

Testimony on:

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Testimony by:

Dr. James A. Thurber

University Distinguished Professor of Government

Director of the Center for Congressional and Presidential Studies

School of Public Affairs

American University

Thurber@american.edu

Mr. Chairman and distinguished Members of the U.S. Senate Budget Committee,
it is an honor to appear before you today on the topic of authorizations and appropriations.

To my knowledge, there has never before been a special congressional committee

challenging unauthorized appropriations. Thank you for your invitation to this unique hearing. I plan to make a few observations at the outset about unauthorized appropriations, by my fundamental thesis is that Congress's partisan polarization is a main contributor to today's hike in unauthorized appropriations. After my remarks, I would be pleased to answer any questions you may have.

It is clear that House Rule XXI and Senate Rule XI contain restrictions on the consideration of appropriations that are unauthorized.¹ However, in practice whether an appropriation is unauthorized and whether it is a violation of a House or Senate Rules is determined by the Speaker of the House and the Presiding Officer of the Senate on the advice of the Office of the Parliamentarian in either chamber. Unauthorized appropriations exist and are common. There is a pattern of growth in the number of unauthorized programs and the amount of appropriated dollars for those programs. What the primary cause of this growth in the number of unauthorized programs and the increase in dollars appropriated for them against the rules of the House and Senate results from the current polarization and consequent dysfunctionality of Congress.

I have concluded that the volume of unauthorized appropriations (256 laws and \$310 billion for fiscal year 2016) is not Congress abdicating its responsibilities, but rather the fact that before the 1950s, most authorizations were permanent.² The move to shorter authorization periods was an attempt to force more oversight for federal programs. In 1985, Congress required the Congressional Budget Office (CBO) to write an annual

¹ See House Rule XXI of the House Rules and Manual, H. Doc. 110-162, pp.836 and Rule XVI of the Standing Rules of the Senate, S. Doc. 110-9, pp. 11-12.

² Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations*, January 15, 2016, Table 1, p. 4.

report about unauthorized appropriations, the purpose being “to help Congress use the early months of the year to adopt authorizing legislation that must be in place before the regular appropriations bills can be considered.”³ The CBO report has not caused Congress to authorize more programs in a timely manner; it simply counts its failures. It is not that Congress has stopped its oversight responsibilities of these programs that are unauthorized. Congress is operating as it did pre-1960s, but falling short of the non-binding goals it set for itself – and then mandating a report in 1985 that reveals how far it has fallen short of these goals.

Adding some kind of enforcement provision to force Congress to authorize before appropriating would likely not work. If Congress does not want to “do its job” of reauthorizing programs using the regular order, adding consequences to inaction would be counter-productive.

Lack of reauthorizations does not mean there is zero oversight of programs; often, the authorizing committee carries out oversight hearings and reviews, requires GAO audits, and legislation may be reported without ultimately being enacted as a result of these activities.

Moreover, whether or not the authorizing committee has thoroughly reviewed the program or project, oversight is provided annually through the appropriations process. Appropriators say they review all discretionary spending very thoroughly on an annual basis and make needed revisions and mid-course corrections from time to time..

It is not controversial that Congress appropriates dollars for expired programs. It is commonly accepted practice. House and Senate leadership of both parties have

³ H. Rept. 99-433, (December 10, 1985), the conference report accompanying the Balanced Budget and Emergency Deficit Control Act of 1985, p. 114.

allowed this for many years. The legal and acceptable procedures are clear:

If an authorization of appropriations expires, Congress may still appropriate money to fund the particular program, agency or activity, as long as there is legislative history that shows that Congress intended for the programs to continue (and not terminate), or ‘at least the absence of legislative history to the contrary’.⁴

The Government Accountability Office (GAO) has also been explicit that unauthorized programs may be funded, “. . . as a general proposition, the appropriation of funds for a program whose funding authorization has expires. . . provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent.”⁵

Many crucial agencies and departments (over 256) are currently operating without authorizations, including the National Institutes of Health (NIH) (\$31 billion) and National Aeronautics and Space Administration (NASA) (\$19 billion). It is not as if the activities of these agencies are un-scrutinized by relevant authorizing committees or by appropriators. Only the defense authorization bill and, more recently, the intelligence authorization bill, are considered “must pass” bills and are enacted on a timely basis.

With today’s partisan polarization and obstructionism, it is hard to pass legislation, let alone consider the sheer number of expired authorizations that would have to pass to ensure all appropriations were authorized.

For example, the Foreign Relations Authorization Act has not been reauthorized

⁴ Congressional Research Service Report by Jessica Tollestrup and Brian T. Yeh, *Authorization of Appropriations: Procedural and Legal Issues*, September 9, 2014, p. 9.

⁵ Government Accountability Office, Office of General Counsel, *Principles of Federal Appropriations Law*, Volume I, (3d ed. 2004) at 2-69. “It is fundamental ...that one Congress cannot bind a future Congress and that Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. The authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money.”

for many years, at least partially because the politics over the mostly-unrelated issue of abortion. In this manner, partisan rancor, polarization and gridlock can (and frequently does) stop just about any reauthorization bill. An exception to the polarized gridlock last year was the reauthorization of The Every Student Succeeds Act programs that had received about \$22 billion in unauthorized appropriations in 2015 because of bipartisan leadership and compromise.

Just as in the earlier era of permanent authorizations, Congress picks and chooses which issues deserve floor time. The major difference now is that authorizations expire, but essential programs must be funded for essential services of government to function. However, controversies that should be resolved in authorization process spill over into appropriations and make it more difficult for the Congress to see that the government is funded for the coming year.

Even the most cursory review of the January 15, 2016 CBO's report on *Unauthorized Appropriations and Expiring Authorizations* demonstrates clearly why Congress has no choice but to fund programs it fails to authorize.

Should we shut down our air traffic control system and all commercial air travel in this country because the Senate Commerce Committee and the House Transportation and Infrastructure Committee cannot reach agreement on extending the FAA authorization?

Should investors be deprived of the regulatory protections provided them by Security and Exchange Commission because House and Senate Banking Committees do not send the President a new authorization?

Should citizens who live in the proximity of pipelines transporting hazardous

gases and fluids be deprived of federal monitoring of those lines until Congress reauthorizes that program?

Should our nation's veterans be deprived of needed medical care because large portions of the Department of Veterans Affairs have no current legislative authority other than that provided by appropriation law?

Obviously, government programs and activities are not unimportant because they have no authorization. The fact that the authorization process is broken is no reason to block the delivery of needed services and essential government activities.

While the decisions that the Congress must make with respect to funding government activities for which there is not authorization may be obvious, this Committee will perform a hugely important service to the Congress and to the nation if it can highlight as to why there are no updated authorizations for so much of the federal government. Unauthorized appropriations themselves are not themselves the problem. There are other basic problems with the current Congress that have caused the gridlock in passing authorizations.

I suggest political polarization and gridlock are the primary reasons so many programs are unauthorized.⁶ Several solutions to polarization and the inability of Congress to pass authorizations in a timely fashion follow.

The extreme partisanship that seems to impact virtually every aspect of the

⁶ This problem is discussed more fully in James A. Thurber and Antoine Yoshinaka (Eds.), *American Gridlock: The Sources, Character, and Impact of Political Polarization* (Cambridge: Cambridge University Press, 2015).

legislative process and makes it more difficult to report legislation from committee, get the timely agreements needed in the Senate to bring legislation to the floor or reach compromise with the other body, and the White House to secure enactment. Authorizing committees deal with difficult policy issues and changes, which is their job. Absent the willingness of Members of Congress to cooperate and compromise, especially given their polarization on so many policy topics, it becomes difficult to pass stand-alone authorization measures. It takes special leadership, lots of time, and special circumstances to build the consensus to pass authorization bills such as the amendments to No Child Left Behind (The Every Student Succeeds Act of 2015) demonstrates.

The way Congress works or rather does not work, is aptly illustrated by the increasing number of unauthorized appropriations that are linked to polarization, and the unwillingness to compromise and work together. There may be an underlying desire for bipartisan lawmaking among Members of Congress of both parties (especially after they retire), but party leaders are structuring debates in recent years that promote, rather than deter, partisanship in some committees and on the floor. As a result, the chambers are more partisan and deadlocked than at any time since the 1860s (just prior to the Civil War). There is little consensus about major policy problems and authorizations of existing programs to solve some of those problems. It is harder than ever for a majority to foster the compromises that benefit the country, especially in the U.S. Senate. However, certain reforms would improve lawmaking and lead to more consistent and timely authorizations and careful oversight, encourage deliberation, and fulfill Congress's constitutional mandate to represent the people. Here are some suggestions:

Improve lawmaking through legislative procedural reforms. Return to the regular

order, limit restrictive rules, and improve protection of the minority. Congress also needs to return to real post-enactment conference committees that are transparent to the public and fair to both parties.

Of critical importance is requiring members of both chambers to spend more time on their jobs in Washington. The extraordinary amount of time now spent away from Washington, DC, and the work of Congress on fund raising by members in both bodies, undermines the capacity of Congress to make laws and do rigorous oversight. Former U.S. Senator Tom Daschle recently said that he thinks members of the Senate spend more time on fundraising than working in Congress. The Tuesday to Thursday Club needs to be stopped with an enforceable required schedule of work in Washington. Whether cutting the size of government or authorizing new programs, Members should be in Washington doing the work of committees, (oversight, deliberation, and lawmaking) as well as educating themselves in order to develop expertise to understand the substance of their assignment and how they can best set policy. It is time for the party leadership in both chambers to set rules of attendance that have consequences. The lack of time the Congress spends in session is directly related to the problem of unauthorized programs. There are roughly 280 days left before the November 8th election of which more than 200 are weekdays. But according to the schedule published recently by the House Majority Leader, the House of Representatives will be in session only 85 of those days and many of those are days in which members will need to appear in the House chamber for only a brief period at the end of the day for roll call votes or will vote well before noon before leaving for the airport and heading back to their districts. Even if those days are included in the count, the House will be completely out of session 60 percent of the weekdays

between now and the November election. The permanent campaign and the drive to solicit campaign money dominate the work of many members. There needs to be a new schedule for Congress in session, which includes not only the show time on the floor, but the work time in committees and their offices in Washington, DC, not their states and districts.

The inability of Congress – in the absence of a vigorous, hardworking, bipartisan center – to address effectively known problems and pass crucial authorizations in a timely way is a legitimate cause of public dissatisfaction. Trust in Congress is at historic lows for a reason.

The answer to a dysfunctional Congress is not to stop unauthorized appropriations. The answer is to get Congress to function. A Congress that cannot confront public policy challenges through timely authorizations will surely lack the reserves of comity and trust to face any unknown and sudden – and perhaps even more dangerous – crises.