

Hearing on “Rise of the Zombies: The Unauthorized and Unaccountable
Government You Pay For”

Testimony on:

“Spending on Unauthorized Programs”

for a hearing before the

Federal Spending Oversight and Emergency Management Subcommittee

Committee on Homeland Security and Governmental Affairs

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Chairman Paul, Ranking Member Hassan, and Members of the U.S. Senate Federal Spending Oversight and Emergency Management Subcommittee of the Committee on Homeland Security and Governmental Affairs. I am honored to appear before you today on the topic of unauthorized appropriations or “Zombie” appropriations.

The Constitution gives “the power of the purse”, the power to tax and spend to Congress. The Spending Clause clearly specifies, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹ The Constitution bars the executive from withdrawing money from the Treasury without prior congressional approval. Specifically, the Appropriations Clause stipulates, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”² In addition the government is required to publish information about the federal budget so that the American people can evaluate the fiscal decisions that their elected representatives make while in office.³

Unauthorized spending is governed by House Rule XXI and Senate Rule XI contain restrictions on the consideration of appropriations that are unauthorized. House Rule XXI(2)(a)(1) states, “may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law, except to continue appropriations for public works and objects that are already in progress.”⁴ The Senate has defined the meaning of “authorized by law” in broader terms than the House, and excluded appropriations as unauthorized in a more narrow set of circumstances as stated in Paragraph 1 of Senate Rule XVI states:

On a point of order made by any Senator, no amendment shall be received to any general appropriation bill the effect of which will be to increase an

¹ U.S. Const. art. I, § 8, cl. 1.

² U.S. Const. art. I, § 8, cl. 1.

³ Congress must authorize by law both the collection of government revenues and their expenditure before executive branch agencies are allowed to spend money. While Congress can fund the government for any length of time, its members have chosen to do so on an annual basis since the first Congress in 1789. Through reports by legislative support agencies like the Government Accountability Office (GAO) and the Congressional Budget Office (CBO), as well as committee hearings, Congress tries to comply with the Constitution’s directive to publish information detailing the budgetary decisions its members make when they tax and spend.

⁴ Rules of the House of Representatives, in *House Manual, One Hundred Fourteenth Congress*, H.Doc. 113-181, 113th Cong., 2nd sess., [compiled by] Thomas J. Wickham, Parliamentarian (Washington: GPO, 2015) (hereinafter *House Manual*), §1045.

appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.⁵

Authorizations of appropriations are provisions of law that provide funds for a future appropriation to carry out a program or function. They are different from appropriations, which generally provide funding once those authorizations are in place. In practice whether an appropriations is unauthorized and whether it is a violation of a House or Senate Rule 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. While the decisions that the Congress must make with respect to funding government activities for which there is not authorization may be obvious to some, this Subcommittee will perform a hugely important service to the Congress and to the nation if it can highlight why there are no updated authorizations for so much of the federal government. Without regular rigorous oversight and reauthorization of programs, these programs are not modernized and may live beyond their usefulness or original purpose.

In 1985, Congress required the Congressional Budget Office (CBO) to write an annual 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.”⁶ Therefore each year, CBO reports to the Congress on the following:

- activities funded for the current fiscal year for which the authorizations of appropriations have expired, and
- all programs and activities for which the authorizations of appropriations will expire during the current fiscal year.

CBO identified unauthorized appropriations for 257 laws and 971 expired program authorizations for a total of and \$307 billion for fiscal year 2019.⁷ The annual CBO

⁵ Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 178.

⁶ H. Rept. 99-433, (December 10, 1985), the conference report accompanying the Balanced Budget and Emergency Deficit Control Act of 1985, p. 114.

⁷ Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations*, March 2019, see Tables 1 through 7.

reports (since 1985) have 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.

However, lack of reauthorizations does not mean there is zero oversight of programs; often, the authorizing committees carry out oversight hearings and reviews, require GAO audits and reports, and legislation reported that is ultimately not enacted or considered on the floor.

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. While the appropriations process can be used to continue existing programs, every program needs revisions and mid-course corrections from time to time. A further problem is that controversies that should be resolved in authorization process spills over into appropriations. The appropriators thus have usurped the role and power of the authorizers.

“Zombie appropriations” no longer seem controversial. They are commonly accepted practice. House and Senate leadership of both parties have allowed these “backdoor authorizations” 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’.⁸

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.”⁹

⁸ Congressional Research Service Report by Edward C. Liu and James V. Saturno and *Authorization of Appropriations: Procedural and Legal Issues*, November 30, 2016, p. 9.

⁹ 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.”

With today's partisan polarization and obstructionism, it is hard to pass legislation and the budget on time, let alone consider the sheer number of expired authorizations that would have to pass to ensure all appropriations were authorized.¹⁰ The top fifteen programs that do not have authorizations, but have appropriations are¹¹:

Veterans' Health Care Eligibility Reform Act of 1996 (\$73.339 b.)
Housing and Community Development Act of 1992 (\$7.033 b.)
Violence Against Women and Department of Justice Reauthorization Act of 2005 (\$28.639 b.)
Quality Housing and Work Responsibility Act of 1998 (\$30.026 b.)
Foreign Relations Authorization Act, Fiscal Year 2003 (\$26.613 b.)
Health Care and Education Reconciliation Act of 2010 (\$22.475 b.)
National Aeronautics and Space Administration Transition Authorization Act of 2017 (\$21.390 b.)

America COMPETES Reauthorization Act of 2010 (\$16.016 b.)
Head Start (\$11.063 b.)

International Security and Development Cooperation Act of 1985 (\$7.275 b.)
Energy Policy Act of 2005 (\$5.791 b.)
Higher Education Opportunity Act (\$5.553 b.)
Implementing Recommendations of the 9/11 Commission Act of 2007 (\$5.017 b.)
National Oceanic and Atmospheric Administration Authorization Act of 1992 (\$3,005 b.)

All of these programs have not been reauthorized for many years, at least partially because politics over mostly-unrelated issues. In this manner, partisan rancor, polarization and gridlock can (and frequently does) stop just about any reauthorization bill. Just as in the earlier era of permanent authorizations, congressional leadership picks and chooses which issues deserve committee work and floor time. The major difference now is that authorizations expire, but essential programs must be funded for essential services of government to function.

¹⁰ The [United States federal budget](#) for fiscal year 2019 ran from October 1, 2018 to September 30, 2019. Five appropriations bills were passed in September 2018, the first time five bills had been enacted on time in 22 years, with the rest of the government being funded through a series of three [continuing resolutions](#). A gap between the second and third of these led to the [2018–19 federal government shutdown](#). The remainder of government funding was enacted as an [omnibus spending bill](#) in February 2019.

¹¹ See Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations*, March 2019.

Even the most cursory review of the March, 2019 CBO's report on *Unauthorized Appropriations and Expiring Authorizations* demonstrates clearly why Congress has no choice but fund programs it fails to authorize. Should our nation's veterans be deprived of needed medical care because large portions of the Department of Veterans Affairs or stop programs dealing with Violence Against Women or stop Implementing Recommendations of the 9/11 Commission because there is 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.

The primary underlying cause of a pattern of growth in the number of unauthorized programs and the amount of appropriated dollars for those is the current polarization in the electorate and consequent dysfunctional gridlock of Congress.¹² Voter polarization is not new, but it is getting worse.¹³ The extreme partisanship that seems to impact virtually every aspect of the legislative process and party leadership in Congress 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.¹⁴

Authorizing committees deal with difficult policy issues and changes which is a their job. Absent the willingness of Members of Congress to cooperate and compromise, especially given their polarization on so many policy topics and now on the impeachment inquiry, it becomes difficult to pass stand-alone authorization measures let alone rigorous oversight of programs. It takes special leadership and lots of time often to build the consensus to pass authorization bills.¹⁵ such as the amendments to No Child Left Behind (The Every Student Succeeds Act of 2015) demonstrate.

The way Congress works or rather does not work, is aptly illustrated by the increasing number of "zombie appropriations" that are directly linked to polarization, and the unwillingness to compromise and work together. There may be an underlying desire

¹² See James A. Thurber, Keynote Speech, "Congressional Polarization and the Dilemma of Gridlock," Welcoming Reception for the Freshmen Class of the 115th Congress, National Statuary Hall, U.S. Capitol Building, United State Capitol Historical Society, March 7, 2017.

¹³ Ed Goetas and Brian Nienaber, "Battleground Poll 65: Civility in Politics: Frustration Driven by Perception," October 19, 2019, found that "voters broadly agree with the premise that our political culture has become too uncivil and lacks a focus on solutions though they still want leaders to "stand up to the other side" and stand up to "powerful special interests."

¹⁴ 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).

¹⁵ An example of this success is The Every Student Succeeds Act of 2015.

for bipartisan lawmaking among Members of Congress of both parties (especially after they retire), but party leaders are structuring debates that promote, rather than deter, partisanship in committees and on the floor. This is especially true during the current impeachment inquiry. 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 unless there is a crisis. It is harder than ever for a majority to foster the compromises that benefit the country.

I suggest several institutional reforms that 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.

Improve lawmaking through legislative procedural reforms. Return to the regular order allowing more freedom for committees to do their work would help. 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.

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. Committees are not free and independent of the party leadership and the party caucuses to pursue their work. The centralization of the legislative process has been tough on the authorizers. Increasing the capacity and freedom for authorizing committees to do better oversight would help solve the problem. Also requiring authorization committees to clearly list all unauthorized programs that have had appropriations (and how long they have been unauthorized) under their jurisdiction may help. A list of “failures” before and beyond the annual CBO report would bring more transparency about this problem which may bring more incentive for committees to make progress on reauthorizations. Linking the annual funding for committees to their oversight responsibilities would also help. If failure to authorize has budgetary consequences for the committee, there might be more productivity, more discipline and action by the committees. Try to make the “unholy alliance” between the authorizers and appropriators more transparent.¹⁶ Most importantly, give committees more independence from their party leadership to do their work. The leadership and party caucuses need to schedule regular floor time for consideration of reauthorization of existing programs. Given institutional hurdles, partisan obstruction, and leadership preferences, you need to consider whether it makes sense to have authorizations sunset or whether they should continue until repealed or replaced.

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

¹⁶ An “unholy alliance” is a non-transparent agreement between authorizers who cannot get something done in their committee and the appropriators who can fix the problem in the appropriations.

Washington, DC, and the work of Congress on campaign fund raising and the “permanent campaign” 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 old and new programs, Members need to 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. The congressional work schedule needs to include 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. Three weeks on and one week per month for district and state work is a good beginning to get Congress back to work.

Unauthorized spending is a symptom of broader dysfunction in the budget process and Congress generally. 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. The answer to a dysfunctional Congress is not to stop unauthorized appropriations, although that is a worthy goal. 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 likely even more dangerous – crises.