TESTIMONY

Statement of

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Mr. Chairman and members of the committee, thank you for your invitation to appear today to offer testimony with regard to the historical development of some of the congressional rules and practices related to authorizations and appropriations. Specifically, this testimony addresses the relationship between authorizations and appropriations in the congressional budget process and how the purpose and frequency of authorizations has evolved over the past two centuries. It concludes with a discussion of how the House and Senate approach appropriations not authorized by law in their rules and associated practices.[1]

The Relationship Between Authorizations and Appropriations

Authorizations and Appropriations Distinguished

The U.S. Constitution grants Congress the "power of the purse" by prohibiting expenditures "but in Consequence of Appropriations made by Law."[2] As a result, legislation to provide for government expenditures must adhere to the same requirements and conditions imposed on the lawmaking process as any other measure. The Constitution does not, however, prescribe specific practices or procedures. Instead, the manner in which the House and Senate have chosen to exercise this authority is a construct of congressional rules and practices, which have evolved pursuant to the constitutional authority of each chamber to "determine the Rules of its Proceedings."[3] One way in which both chambers have chosen to exercise this authority is to adopt rules that limit appropriations to purposes authorized by law. This requirement allows Congress to distinguish between legislation that addresses questions of policy and legislation that addresses questions of funding—and to provide for their separate consideration. In common usage, the terms used to describe these types of measures are "authorizations" and "appropriations," respectively:

- An *authorization* may generally be described as a statutory provision that defines the authority of the government to act. It can establish or continue a federal agency, program, policy, project, or activity. Further, it may establish policies and restrictions and deal with organizational and administrative matters. It may also, explicitly or implicitly, authorize subsequent congressional action to provide appropriations. By itself, however, an authorization does not provide funding for government activities.
- An *appropriation* may generally be described as a statutory provision that permits a federal agency to incur obligations and make payments from the Treasury for specified purposes, usually during a specified period of time.

From the beginning, Congress has observed the practice of considering appropriations separately from other legislation. As this practice developed, the distinction between appropriations and other types of legislation was reflected in the designation of measures containing budget authority for more than one purpose as "supply bills," highlighting their purpose as supplying funds to carry out government operations already established in law. The House established formal rules in 1837 that stated, "No appropriation shall be reported in such general appropriation bills, or be in order as an amendment thereto, for any expenditure not previously authorized by law."[4] These rules were motivated, at least in

[1] This testimony is largely drawn from CRS Report R43862, *Changes in the Purposes and Frequency of Authorizations of Appropriations*, by Jessica Tollestrup; and CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, by Jessica Tollestrup and Brian T. Yeh.

[2] Article I, §9.

[3] Article I, §5.

[4] Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907-1908), vol. 4, §3578.

part, by concern over the increasing delays in enacting appropriations due to the inclusion of "debatable matters of another character."[5] The Senate did not formally adopt a parallel rule until 1850, when it prohibited certain amendments to general appropriations bills that would propose additional appropriations unless it was for the purpose of carrying out the provisions of existing law.[6]

While the form and specific applications of these rules have evolved over time, their basic principles still persist in the rules of both the House and Senate today.[7] One effect of these rules has been the formalization of funding decisions as a two-step process in which separate legislation to establish or continue federal agencies, programs, policies, projects, or activities is presumed to be enacted first and is subsequently followed by legislation that provides funding. Another effect of these rules has been a distinction between appropriations authorized by law and those not authorized by law.

"Authorized" and "Unauthorized" Appropriations

Under the rules of the House and Senate, whether an appropriation is "authorized" or "unauthorized" is determined based on the application of the precedents of the respective chamber; the existence of legislation defining the legal authority for particular federal agencies, programs, policies, projects, or activities; and the relationship of such authority to the applicable appropriation. In most cases, an appropriation is said to be authorized when it follows explicit language defining the legal authority for a federal agency, program, policy, project, or activity that will be applicable in the same fiscal year for which the appropriation is to be enacted. In contrast, an appropriation is said to be unauthorized when no such authority has been enacted or if authority that was previously enacted has terminated or expired.

When applying these House and Senate Rules in a particular context, additional distinctions related to the structure and specificity of the particular authorization in question is often relevant. House and Senate rules do not prescribe the form in which programs or activities are authorized, and, as a consequence, this structure and specificity varies widely in practice. The issue of structure includes whether the statute authorizing the program also explicitly authorizes appropriations for the program or does so implicitly. It is generally understood that statutory authority to administer a program or engage in an activity—sometimes referred to as organic or enabling legislation—also provides implicit authorization to appropriate for such program or activity even in the absence of an explicit authorization of appropriations. If an explicit authorization of appropriations is present, however, it may expire even though the underlying authority to administer such a program or engage in such an activity does not. If that authorization of appropriations is not renewed, subsequent appropriations are often regarded as unauthorized.

The interaction between authorizations and appropriations can also be affected by how specific or general an authorization is. For example, some statutes that provide an explicit authorization of appropriations place a limit on the amount that is authorized, either generally for a class of programs or activities or for a more specifically designated program or activity. In these instances, appropriations in excess of such limits are generally considered to be unauthorized. However, appropriations that address only some of the activities framed more generally in the authorization of appropriations, or do so in more specific terms,

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[5] Ibid.; *Congressional Globe*, 24th Cong. 1st sess., p. 20.

[6] As the House has historically claimed the exclusive right to originate appropriations bills, the Senate expects to consider appropriations in the form of amendments to House bills. See W[illia]m Holmes Brown, Charles W. Johnson, and John V. Sullivan, *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, 112th Cong., 1st sess., (Washington: GPO, 2011), ch. 4, §2.

[7] These prohibitions are currently located in House Rule XXI(2)(a) and Senate Rule XVI(1). For further information on the operation of these rules, see CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, by Jessica Tollestrup and Brian T. Yeh, pp. 4-8.

are said to be authorized so long as the appropriation falls within any limits prescribed by the authorization.

The Evolution of Purposes and Frequency of Authorizations

The choice to separate money and policy decisions and vest control over them with different congressional committees has meant longstanding tensions between the authorization and appropriations processes. These tensions have significantly influenced how the processes have evolved as Congress has exercised its lawmaking and oversight prerogatives to affect decisions related to federal government activities and the level at which those activities should be funded.[8]

Development in the 19th and Early 20th Centuries

From the very earliest Congresses, authorizations were generally used to provide permanent, broad grants of authority, while control over the details and amounts for particular activities was achieved through the annual appropriations process. During this period, authorization for subsequent congressional action to provide appropriations was implicit and did not include specific amounts to be appropriated. Temporary authorizations were rare and were generally reserved for programs that were intended to be of a limited duration. In contrast, appropriations laws contained the details of what agencies were able to do and how much they would have to spend.[9] These appropriations laws were enacted annually.

Developments in the House and Senate committee systems that occurred during this same period also served to strengthen this authorization-appropriations distinction. At first, the "legislative committees" had jurisdiction over authorization measures, while the House Ways and Means Committee and Senate Finance Committee were responsible for most appropriations bills. During the Civil War, however, when the workload of these committees and size of federal expenditures increased considerably, both chambers chose to create separate Appropriations Committees that would be responsible for the annual appropriations measures.[10] Although jurisdiction over some appropriations was dispersed during the late 19th century, Congress continued to keep appropriations measures separate and distinct from authorizations.[11] The reconsolidation of appropriations jurisdiction and the reorganization of regular annual appropriations bills in the House in 1920 (and in the Senate in 1922) further reinforced this distinction.[12]

As the size and scope of federal government activities increased, the congressional practices related to authorizations and appropriations began to change. Authorization laws began to specify the details of broad classes of federal government programs and activities in consolidated legislation instead of in multiple pieces of stand-alone legislation that addressed only some aspects of such programs and

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[8] The summary that follows of the general development of these congressional rules and practices is largely based on Alan Schick, *Legislation, Appropriations, and Budgets: The Development of Spending Decision-making in Congress*, Congressional Research Service, May 1984; and Louis Fisher, "Annual Authorizations: Durable Roadblocks to Biennial Budgeting," *Public Budgeting and Finance*, Spring 1983.

[9] Schick, *Legislation, Appropriations, and Budgets*, p. 8.

[10] The House Appropriations Committee was established in 1865; the Senate Appropriations Committee was established in 1867. The events leading to the establishment of these committees are discussed in Charles H. Stewart III, *Budget Reform Politics: The Design of the Appropriations Process in the House of Representatives, 1885-1921* (New York: Cambridge University Press, 1989), pp. 53-83; and U.S. Senate, Committee on Appropriations, *Committee on Appropriations: 1867-2008*, 110th Cong., 2nd Sess., Doc. No 14 (Washington, DC: GPO, 2008), pp. 4-6.

[11] Stewart, *Budget Reform Politics*, pp. 89-132.

[12] Background on these changes is provided in U.S. House of Representatives, Committee on Appropriations, *A Concise History of the House of Representatives Committee on Appropriations*, 111th Cong., 2nd Sess. (Washington, DC: GPO, 2010), pp. 7-11; U.S. Senate, Committee on Appropriations, *Committee on Appropriations: 1867-2008*, pp. 9-16.

activities. At about the same time, appropriations, which used to be comprised almost entirely of specific line items, shifted to more general lump sums for purposes that were usually identified simply by referencing the statutory authorization. In other words, appropriations began to rely on the authorization statutes to specify and limit how the funds would be used.

Coincident with the enactment of the Budget and Accounting Act of 1921, the reconsolidation of Appropriations Committee jurisdiction over general appropriations increased the committee's role in congressional decisions about spending. In response, the legislative committees began to explore new legislative language that would influence budgetary outcomes both with respect to the action of the appropriators and also in their oversight of the agencies under their jurisdiction. This resulted in significant changes in the content and timing of authorization laws over the next several decades.

Emergence of Explicit Authorizations of Appropriations

The first significant change in the form of authorization laws occurred after the 1920s, when authorizations began to include provisions that explicitly authorized future appropriations tied to certain purposes. At a minimum, such provisions were a recommendation of the legislative committees as to the level of future appropriations. This practice, however, had broader implications for the role of the legislative committees in budgetary decisionmaking, because the existing House and Senate rules that prohibited appropriations not authorized by law had to be applied in new ways. Although these prohibitions were longstanding, having been first adopted during the previous century, authorization provisions that established an entity, project, or activity had been considered sufficient to implicitly authorize subsequent appropriations under the terms of those rules. However, when the legislative committees started to include explicit provisions authorizing appropriations, this effectively enabled them to create procedural ceilings on subsequent appropriations and thus exert greater influence over subsequent funding decisions.[13]

As language specifically authorizing appropriations was increasingly used, various practices started to emerge. First, the legislative committees began to authorize definite amounts to be appropriated for specific fiscal years. In their early use, such provisions were usually tied to minor or temporary programs. Because provisions that limited the amount or duration of future appropriations were considered to be inappropriate for permanent or large-scale government programs, language authorizing appropriations for "such sums as are necessary" were typically used for such programs. Over the postwar period, however, as these committees continued to increase their use of such language, they began to apply it to programs of a more large-scale or permanent nature. Second, the legislative committees began to conduct reviews (associated with the expiration of these provisions) and enact revisions to authorization laws for certain agencies and departments on periodic schedules instead of on an as-needed basis. While the timing of these revisions was to coincide with the need to reauthorize appropriations, these revisions also provided an occasion to make needed programmatic changes.

The types of provisions periodically authorizing appropriations that were developed during this period have continued to be used through the present day. These provisions generally indicate two schedules of legislative review: "annual" and "multiyear." *Annual* authorizations of appropriations explicitly authorize appropriations for a single fiscal year. *Multiyear* authorizations of appropriations explicitly authorize appropriations for more than one fiscal year at a time (typically between two and five).

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[13] The legislative committees also employed other mechanisms during this period to influence fiscal decisionmaking, such as so-called "backdoor spending," which included borrowing authority, contract authority, mandatory entitlements, and permanent appropriations. For a further discussion of these and other such mechanisms, see Louis Fisher, "The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices," *Catholic University Law Review*, vol. 29 (1979-1980), pp. 51-105.

Although the proportion of agencies and programs that were subject to annual or multiyear reauthorizations expanded significantly during the mid-20th century, variation has continued in approach and congressional practice. Many agencies and programs are still authorized on a permanent basis, and others have been subject to different reauthorizations schedules at different times.[14] In addition, because an agency is often subject to a patchwork of authorization laws that have been enacted over the course of its existence, that agency may experience a variety of authorization schedules and approaches simultaneously. Finally, in an increasing number of instances, annual or multiyear authorizations of appropriations have lapsed or have not been renewed in a timely manner for a variety of potential reasons.[15] For example, a lapsed authorization of appropriations could be due to the authorizing committee's assessment that no programmatic changes are currently needed. Alternatively, it could indicate a lack of congressional support for the program's continuing existence or obstacles to achieving congressional consensus regarding the programmatic changes that would be part of the debate on reauthorization. This multiplicity of reasons presents a challenge when Congress attempts to assess what expired authorizations of appropriations mean in a given context, especially when the primary procedural avenue to address them is part of the appropriations process.

House and Senate Approaches to Appropriations Not Authorized by Law

As the congressional rules and practices related to authorizations and appropriations have evolved over the years, so has the meaning of the phrase "authorized by law" as it is interpreted and applied in each of the chambers to the general appropriations measures that it considers.[16] In a number of respects, the House and Senate have developed divergent rules related to this issue, although their approaches diverge to a lesser extent in practice.

One area of difference between House and Senate rules is under what circumstances appropriations not authorized by law are prohibited. The House restriction in Rule XXI(2)(a)(1) broadly applies to provisions in any general appropriations bill or amendment thereto. However, in current practice, the House almost always waives points of order against provisions in the bill for failure to comply with Rule XXI(2) through the special rule[17] that provides for the measure's consideration.[18] As a consequence, when

[14] For a discussion of this variety of approaches and illustrative case studies, see CRS Report R43862, *Changes in the Purposes and Frequency of Authorizations of Appropriations*, by Jessica Tollestrup.

[15] The Congressional Budget Office (CBO) is required to compile this information each year under Section 202(e)(3) of the Congressional Budget Act. For FY1988, CBO identified a total of 45 laws with expired authorizations of appropriations (CBO, *Report on Unauthorized Appropriations and Expiring Authorizations*, January 15, 1988). That total grew to 256 such laws for FY2016 (CBO, *Unauthorized Appropriations and Expiring Authorizations*, January 15, 2016).

[16] Both the House and Senate restrictions apply to general appropriations bills, but the chambers define such bills differently. In the House, "general appropriations bills" are the annual appropriations acts (or any combination thereof) and any supplemental appropriations acts that cover more than one agency. Continuing resolutions are not considered to be general appropriations bills (*House Practice*, ch. 4, §3). In the Senate, "general appropriations bills" are the annual appropriations acts (or any combination thereof) and any supplemental or continuing appropriations acts that cover more than one agency or purpose (Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S. Doc. 101-28 [Washington, DC: GPO, 1992], p. 159).

[17] Special rules are simple resolutions reported by House Rules Committee that set the terms for considering a measure and are effective once adopted by the House. The Rules Committee has exclusive jurisdiction over special rules. For further information, see CRS Report 98-433, *Special Rules and Waivers of House Rules*, by Megan S. Lynch.

[18] This practice dates back to about the 80th Congress (1947-1948). For further background, see U.S. Congress, House Committee on Rules, *A History of the Committee on Rules: 1st to 97th Congresses*, committee print, 97th Cong., 2nd Sess., (Washington, DC: GPO, 1983), pp. 156-159; Stanley Bach, "From Special Orders to Special Rules: Pictures of House Procedures in Transition," paper presented at the American Political Science Association annual meeting, San Francisco, CA, 1990, pp. 28-29; Stanley Bach, "Representatives and Committees on the Floor: Amendments to Appropriations Bills in the House of Representatives, 1963-1982," *Congress and the Presidency*, vol. 13, no. 1 (Spring 1986), pp. 43-44.

the House is considering an appropriations measure, Rule XXI(2) in practice primarily limits the content of floor amendments.[19]

The Senate prohibition in Rule XVI(1) is comparatively more narrow than the House, even in light of the House practices discussed above. Because it is framed in terms of amendments that would increase the amount for an item in the bill or add a new item, it does not apply to House-passed language, measures originated by the Senate Appropriations Committee, amendments to a House-passed bill reported by that committee, or amendments offered by direction of the authorizing committee with relevant jurisdiction, which have been reported and referred to the Appropriations Committee at least one day before consideration.[20] In other words, the Senate prohibition applies primarily to amendments offered by individual Senators during floor consideration of general appropriations bills. There is no opportunity to raise a point of order under Rule XVI(1) against an unauthorized appropriation in the bill itself or an Appropriations Committee amendment to that bill.

A second area of difference is the timing of when a program or activity may be considered authorized by law. In the House, Rule XXI(2)(a)(1) requires that an authorization be *enacted* prior to consideration of the relevant general appropriations bill in order for its appropriation to be considered authorized.[21] In the Senate, Rule XVI(1) requires an authorization only to have been *passed* by the Senate during the current session of Congress prior to consideration of the relevant general appropriations bill in order to be considered authorized.[22] This broad Senate criterion under which an appropriation may be considered to be authorized also more narrowly defines the circumstances under which a point of order could be raised compared to the House.

A third area of difference is the types of projects and activities for which the rules provide an exception and thereby allow funds to be appropriated in the absence of being authorized by law. For example, House Rule XXI(2)(a)(1) contains a provision that excepts appropriations that would continue “public works and objects already in progress” from the prohibition on unauthorized appropriations. The Senate has no such exception. Senate Rule XVI(1), however, allows appropriations for projects and activities “proposed in pursuance of an estimate submitted in accordance with law.”[23] Such estimates can be provided in the President’s annual budget request, as required by 31 U.S.C. 1105(a) and 1107, or through deficiency and supplemental appropriations requests made after the President’s budget request has been submitted to Congress.[24] The House has no such exception.

Setting aside these areas of difference, however, both chambers’ rules in modern practice seek to encourage the timely enactment of authorizations through consequences that would be felt in the appropriations process. One challenge of approaching the issue of expired authorizations from this

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[19] On some occasions, the waiver for the bill provided by the special rule leaves specified provisions unprotected. In many such instances, the Rules Committee chooses to do so because the authorizing committee of jurisdiction objects to the inclusion of a particular unauthorized appropriation (or legislative provision). This practice has generally been recognized as the “Armey Protocol” since the 104th Congress. During subsequent floor consideration of that appropriations measure, if a point of order under Rule XXI(2) were raised against an unprotect provision and sustained, that provision would be stricken and consideration of the bill would continue. For further information, see House Rules Committee, “Open Rules and Appropriations Bills,” May 1, 2009, http://rules-republicans.house.gov/Media/PDF/BT-OpenRules.pdf; Walter Oleszek, *Congressional Procedures and the Policy Process* (Washington, DC: CQ Press, 2007), 7th ed., pp. 134-135; and *House Manual, One Hundred Fourteenth Congress*, H.Doc. 113-181, 113th Cong., 2nd sess., [compiled by] Thomas J. Wickham, Parliamentarian (Washington: GPO, 2015), §1044, p. 850.

[20] *Riddick's Senate Procedure*, pp. 171, 189.

[21] See *House Practice*, ch. 4, §10, for a further discussion of this requirement.

[22] *Riddick’s Senate Procedure*, p. 187.

[23] Ibid., p. 180.

[24] Ibid., p. 155.

perspective, however, is that these required authorization actions are not within the control of the Appropriations Committees. In addition, this framework can effectively set up a choice between, on the one hand, delayed appropriations for programs or activities that agencies may still be required to undertake or, on the other hand, funding unauthorized programs. As a result, this mechanism's effectiveness is limited when appropriations are unauthorized for reasons that are not directly related to whether that purpose should continue to receive funding.

Attempting to address the issue of expired authorizations through the authorization process, however, has its own challenges. Neither the Senate nor the House has rules that govern the form of authorizations. In addition, the responsibility for authorizations is decentralized and divided by subject matter jurisdiction among a number of committees. The different approaches to authorization that these committees take may be the result of a number of factors, including conscious choices driven by the current needs of the program, historical practices adopted at the time the authorization was first enacted, and current legislative challenges and opportunities. The flexibility in approach that chamber rules allows can enable the authorization process in a particular instance to be adapted to the committee's requirements related to agency oversight and the committee's desired role in congressional budgetary decisionmaking. The challenge posted by this flexibility is that the resultant lack of standardization can make addressing expired authorizations on a widespread basis more difficult.