

**RISE OF THE ZOMBIES:  
THE UNAUTHORIZED AND UNACCOUNTABLE  
GOVERNMENT YOU PAY FOR**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON FEDERAL SPENDING  
OVERSIGHT AND EMERGENCY MANAGEMENT

OF THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
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**WEDNESDAY, OCTOBER 30, 2019**

U.S. SENATE,  
SUBCOMMITTEE ON FEDERAL SPENDING,  
OVERSIGHT AND EMERGENCY MANAGEMENT,  
OF THE COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 1:55 p.m. in room 342, Dirksen Senate Office Building, Hon. Rand Paul, Chairman of the Subcommittee, presiding.

Present: Senators Paul, Scott, and Hassan.

Senator PAUL. I call this hearing to order.

The first witness is the Honorable Cathy McMorris Rodgers of the U.S. House of Representatives.

**OPENING STATEMENT OF THE HONORABLE CATHY MCMORRIS RODGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Ms. RODGERS. Thank you, Chairman Paul and Ranking Member Hassan, for this opportunity. I would like to talk about the Unauthorized Spending Accountability (USA) Act, that I have been a champion of in the House, along with many other co-sponsors. I appreciate you giving me some time to shine the light on these solutions that I believe would be helpful in helping to control our out-of-control government spending, and to bring accountability that is so desperately needed.

Right now there are hundreds of programs within the Federal Government that are unauthorized. They are on autopilot. They are runaway programs that have not been reviewed or reauthorized by the people's representatives in Congress, in some cases for decades.

A few years ago, Jake Tapper called these unauthorized programs "zombie programs," and it is a perfect description. Now I just learned that it is actually Kevin Kosar who originally called them zombie programs, and you are going to hear from him a little bit after me.

But these zombie programs account for roughly \$310 billion in government spending. That is hundreds of billions of dollars. Often it is part of the untold frustration that we often hear from the citizens, the hard-working taxpayers that we represent. Congress is

not using its power to exercise the power of the purse to hold these programs accountable on a regular basis, and it needs to change.

That is why I have introduced, and I am leading, the USA Act. The USA Act will sunset zombie spending. It will require the people's representatives to review, rethink, or possibly eliminate government programs that no longer serve their mission. It would really ensure that we are doing our job to rethink, review, bring these programs into the 21st Century at times, and make sure that every dollar is spent wisely.

First, it requires Congress to either end or reauthorize programs that do not have current reauthorization, enforcing this requirement through an annual spending cut for 3 years. On the third year, if the program has not been reauthorized, then it will sunset.

The USA Act lays out a fiscally sound but feasible schedule for the Federal bureaucracy to defend their need for taxpayer dollars. It provides flexibility for authorizers to get their work done while maintaining spending discipline. Because Congress is reviewing programs, it ensures that necessary programs are improved and updated.

We all hear the frustration. People are frustrated by out-of-control spending. They are frustrated by record debt, record deficit, and they are frustrated because their elected representatives seem powerless at times, against the unelected bureaucrats in the Executive Branch and judges who legislate from the bench. There is a breakdown of trust as people see so much government waste, no accountability, and agencies that have lost sight of their mission.

My goal with the USA Act is to rein in this runaway zombie spending and ensure that the American people can trust they are empowered through their elected representatives who are doing their job, the good government solution to restore the separation of powers.

Article 1 gives Congress the exclusive power to write laws and set the funding priorities. Our founders established this by design. They put decisionmaking power where it is closest and most accountable to we, the people. That is what makes America the greatest experiment in self-governance the world has ever known. To keep this experiment alive, Congress needs to rebuild trust, restore Article 1 power, and keep decisionmaking close to the people. A good way to start is by putting an end to these zombies that are feasting off of broken spending process in Congress.

I am grateful to my friends and colleagues in the Senate for this opportunity to highlight the USA Act with all of you. I hope we can continue to work together on more solutions to restore the power of the purse, bring accountability, and rein in government spending.

Thank you very much.

Senator PAUL. Thank you for coming. I think we promised not to ask questions, but what if we broke our promise and asked one or two?

Ms. RODGERS. That is great, yes.

Senator PAUL. They are friendly questions. At least mine are.

Ms. RODGERS. Yes.

Senator PAUL. But anyway, do you have a Democrat co-sponsor?

Ms. RODGERS. I am working on it.

Senator PAUL. OK. We have done the same. We have reintroduced a similar bill and we have not had one yet. Have you gotten feedback from the other side as far as whether or not you have a chance or what the obstacles are?

Ms. RODGERS. Right. I have worked on this legislation now for several years. We introduced it first, I believe two Congresses ago, and are continuing to build awareness, build support. There is some hesitancy putting Congress on this schedule, but I believe that we need that. We need something that is going to force Congress to make the tough decisions.

Senator PAUL. My point is we look back to William Proxmire, who was a Democrat, who pointed out these sort of wasteful projects from back in the 1970s, and we said, why are we still doing this? Part of the answer, at least, is maybe we look at these programs and see where we are spending the money. We have given away the authority.

Ms. RODGERS. Yes. It is an opportunity for us to update a program that was put in place in the 1990s. It was a very different time in the 1990s than where we are in 2019. It is absolutely important that we are updating these programs, looking through the lens of 2019. How often do we meet with someone that is working within the Federal Government that feels like their hands are tied? They are saying, "Well, this is the law, these are the rules. We do not have the flexibility to do what we really should be doing within the program or this agency."

That is where if Congress was actually doing this on a more regular basis, and making sure that it is not decades that go by before a program is reviewed, and we can rethink it, it would also empower those that are really working hard on the front lines and want to spend taxpayer dollars wisely.

Senator PAUL. Senator Hassan.

#### **OPENING STATEMENT OF SENATOR HASSAN<sup>1</sup>**

Senator HASSAN. Thank you for your testimony and for your work and interest in this area. I share a lot of the concerns that you outlined. I probably have a different approach, in terms of how you might go about holding programs accountable and making decisions about reauthorization. It may not be a different approach, but I wonder what you think about it. Senator Shaheen, my senior Senator, and I were both on a bill in the past that would do Federal budgeting much more like the way States do it.

We would suggest biennial budgeting, so in the first year you actually appropriate funds and authorize programs. The second year of the biennium you would actually have metrics so you would be measuring those programs against those metrics, looking at how they work, and then that would inform the budgeting process the next year.

Does that sound like something we could find bipartisan support for?

Ms. RODGERS. Yes. There has been similar legislation introduced in the House. It is part of a package that I think many members, bipartisan, believe would help bring accountability. I have sup-

<sup>1</sup>The prepared statement of Senator Hassan appears in the Appendix on page 24.

ported that proposal in the House. I would still come back to the fact that years go by, decades go by, and you are talking hundreds and hundreds of programs, agencies, and departments, that are on autopilot, that continue to get funded every year, whether it is 1 year or 2 years, without Congress really bringing them in and saying, “OK, we need to make sure that you are authorized, and reauthorized.” Do not let those deadlines go by. Often they have deadlines, but we have just allowed those deadlines to go by.

Senator PAUL. One other comment on that would be that we have groups of people we call appropriators, and then there is the rest of us. They tend to have all of this power, and it is supposed to be somewhat split with authorizers who are supposed to watch the appropriators, and then there would be more of a check and a balance.

I think we need to figure out a way, and all I would say from my point of view is if there was something that we could find agreement on to figure out how to force authorization, on the details of my bill, I am open to compromise on, if we could find a common ground.

Ms. RODGERS. Yes, and we really need to figure out that piece between the appropriators and the authorizers, because, yes, I thought that was—yes, we need to figure out. That is the piece that I believe is missing, and this is one attempt.

Senator PAUL. Thank you for coming over.

Ms. RODGERS. OK. Thank you. Good to be with you.

Senator PAUL. We will go ahead and have the second panel come forward, and we will start with our opening statements now.

#### **OPENING STATEMENT OF SENATOR PAUL<sup>1</sup>**

Senator PAUL. We are here the day before Halloween to talk about zombies. These are not the kind of zombies we see on the *Walking Dead* or what we might see on our doorstep tomorrow evening. In many ways, these zombies are far scarier. These are zombie government programs that have sometimes not been reauthorized for decades.

Since the mid 19th Century, and reaffirmed in the 1974 Budget Act, Congress separated spending bills from the authority, and we were supposed to have checks and balance between appropriators and authorizers. In recent decades, though, Congress has failed in its oversight by not reauthorizing the programs it creates.

What are these zombie programs? They are programs Congress created long ago that have since expired and yet somehow live on, continuing to receive appropriations. How big is the problem? Some might say, “Well, surely it cannot be more than a few dozen programs, or maybe just a few million dollars.” Actually, it is over 1,000 programs and \$300 billion. It is a huge problem.

What are these zombie programs? Some are ridiculous and well out of date. For example, the Inter-American Foundation spent taxpayer dollars on such things as a clown college in Argentina, welfare in Brazil, and jump-starting the Haitian film industry. When I point these things out people always ask me how such ridiculous things continue to get funded. Part of the answer is unauthorized

<sup>1</sup>The prepared statement of Senator Paul appears in the Appendix on page 21.

spending. The Inter-American Foundation was created in the 1960s and last authorized more than 30 years ago. It is no wonder a lot of people ask, "What is the Inter-American Foundation?"

It is not just bad programs, though. There is a lot of conversation these days about election security. But it would surprise people to learn that the Federal Election Commission (FEC) was last reauthorized in the 1980s, before there was the Internet or electronic voting machines. That means the FEC does not have the proper powers, authorities, or guidance to address current needs, or worse, they are making up their own rules as they go.

I put forward a solution, a zombie cure, called the Legislative Performances Review Act. This bill would require programs to be reauthorized every 4 years, creates a targeted point of order against funding such programs, it provides for an orderly wind-down of expired programs, and it asks committees to consider performance evaluations, which Congress has been mandating but ignoring for the past 25 years, when authorizing programs.

Some say that sufficient oversight happens in the spending committees, with the appropriators. I do not think that is true. If we are to look at this program and look at this problem, I think we really have to have some sort of parameters that force authorization to happen, or some kind of punishment to the program that does not allow it to continue on.

I, for one, think there is need for reform. I also am very open to compromising with anyone on the Democrat side who wants to have reform, this is something, eminently, we would compromise on if we can find common ground.

Thank you, and with that I recognize Senator Hassan.

Senator HASSAN. Thank you, Mr. Chairman. I appreciate your work and your staff's work on this hearing, and I also want to thank the witnesses for being here today to provide their expertise on these issues.

Today's hearing focuses on the issue of government spending on programs that have expired and that Congress has failed to reauthorize, but continue to operate through mandates in appropriations bills.

Earlier this year, the Congressional Budget Office (CBO) reported that in fiscal year (FY) 2019, 971 programs continue to operate despite an expired authorization of appropriations. These programs cost \$307 billion and accounted for roughly 25 percent of all discretionary funding in fiscal year 2019.

There are critically important programs among those identified by the CBO. These are large programs like medical services and hospital care for veterans, and those established under the Violence Against Women Act (VAWA), as well as smaller programs dedicated to civil rights, environmental protection, and the promotion of science and the arts. These programs are vital to the health and safety of our constituents, and that is all the more reason that they should be subject to congressional oversight through the reauthorization process, so we can be assured that they are working as Congress intended and so that we can identify opportunities for improvement.

I am proud to have introduced and supported a number of bipartisan bills to help Congress fulfill its oversight duties in an effi-

cient, data-driven way, including the Foundations of Evidence-Based Policymaking Act, Taxpayers Right to Know Act, and the Duplication Scoring Act of 2019, which Chairman Paul and I introduced earlier this year.

While I believe that authorizing committees should periodically review programs, I disagree with the premise that programs should automatically lapse or wind down if that does not happen, even when Congress agrees to fund them. It would do enormous harm to our constituents if programs that provide medical services to veterans, or to combat violence against women ended because Congress appropriated funding but failed to authorize the programs.

I look forward to hearing from our witnesses today, and most importantly, I hope our witnesses can help us to identify ways to continue to improve congressional processes in order to safeguard taxpayers' dollars, while ensuring that Congress continues to support essential programs that serve the American people, and that the American people support.

Thank you again, Mr. Chairman, for holding this hearing, and to the witnesses for your attendance.

Senator PAUL. Thank you, Senator Hassan. This is our second panel, and our first witness on the second panel is Kevin Kosar. Mr. Kosar is a Vice President of Policy at the R Street Institute, overseeing all of the think tank's research. He also co-directs the nonpartisan Legislative Branch Capacity Working Group, which aims to strengthen Congress.

Mr. Kosar is the co-editor of the book *Congress Overwhelmed: The Decline in Congressional Capacity and the Prospects for Reform*. His writing has appeared in academic journals as well as the *New York Times*, *Politico*, and the *Washington Post*.

Mr. Kosar holds a BA from Ohio State University and a doctorate in politics from New York University.

Mr. Kosar, you are recognized for your opening statement.

**TESTIMONY OF KEVIN KOSAR,<sup>1</sup> VICE PRESIDENT OF POLICY, R STREET INSTITUTE**

Mr. KOSAR. Thank you, Chairman Paul, and Ranking Member Hassan, and Members of the Subcommittee for holding this hearing and inviting me to testify. This is an important issue. I began writing about it a few years ago, and I was alarmed by what I was seeing, namely that it is a problem which continues to grow, but Congress has really struggled to prioritize it as a problem and to devise ways to deal with it.

Now, as mentioned already, this past March, CBO reported that there were 971 expired authorizations and appropriations, and those can be found in 257 laws. At the time they amounted to about \$158 billion in annual funding. But most recently, Congress appropriated some \$307 billion toward those same programs. It is almost as if those authorizations, in statute, are just irrelevant. They might as well not be written law. But they are law, and law is supposed to matter.

We have a lot of zombie programs, we have a lot of spending, and for sure the rise in unauthorized appropriations are a symptom of

<sup>1</sup>The prepared statement of Mr. Kosar appears in the Appendix on page 25.

a broken congressional budget process. They also reflect general struggles that our legislature is having in the 21st Century.

I would not want to weigh the way zombie programs is just a symptom. I think they are, in an of themselves, troubling and problematic, and I have four reasons for saying that, the first of which is Congress is just not following the plan it set out in the 1974 Budget Act. That law said authorize and appropriate. That is the law. Not following the law does not look good to anyone, as far as I can tell.

The second, the rise of the zombie programs gives the appearance that Congress is abdicating its oversight duties because it creates programs, says that it is only going to spend money at a certain level for a certain number of years, and then proceeds to disregard that. Government watchdogs and citizens will be forgiven for wondering whether Congress has checked out and just abdicated its power over the public's money.

Third, if Congress is not reforming these programs through reauthorizations, it raises the specter of anachronism. We may have Federal programs that we do not need. We probably do. These programs should be de-authorized and de-funded. Additionally, not re-authorizing statutes may mean we have Federal programs that are needed, that are important, but they are designed to solve the problems of yesteryear or they may be designed in a way to use the techniques of yesteryear. Both these scenarios, needless to say, are the antithesis of evidence-based policymaking, which is something that Congress has been moving toward over the recent years.

Fourth and finally, failing to reauthorize programs delegates legislative authority to the Executive Branch. In short, agencies themselves get to decide what the law means, what the programs should do, and where the money goes.

Now the growth in unauthorized appropriations has been fueled by a whole lot of factors that I allude to in my written testimony. Some are way beyond the control of Congress, like polarization. One factor that gets less consideration than I think it should is insufficient congressional capacity, vis-a-vis the Executive Branch. Consider, the Executive Branch has perhaps 180 agencies which administer untold thousands of statutes and programs. The sheer gigantism of the Executive Branch has utterly outstripped Congress' ability to oversee it.

CBO said that in fiscal year 2019 alone there were 130 expiring authorizations for appropriations. That is a lot of laws to review and update. That is a huge workload. But Congress' capacity has not kept up with it. It has lagged, in some cases, if you look at the House. Particularly, it has gone down. The number of congressional staff has certainly not kept up. We know they are workhorses in helping do oversight. The amount of time Congress is in session today and able to hold hearings is about the same as it was in 1969. Those are diversion trends, to put it mildly.

I would also say that when it comes to dealing with unauthorized appropriations, congressional capacity is a key piece. You have to have the resources, but it is not enough. You have to have will.

There is, in the 1974 law, kind of an eat-your-spinach aspect to the reauthorization process. You should do it; it is the right thing to do. It is proper budgeting technique. That is in there. But what

is the incentive to doing it? Clearly, Members of Congress, many of whom may feel personally that it is worth doing, but they do not bother to do it because it is hard work and it is often unrewarded.

In looking toward reform, my general advice is it would be great to tackle zombie appropriations and to reduce them, and that it should be a two-pronged strategy. You need capacity and you also need to make sure that Members of Congress have the incentive to get it done.

Thank you.

Senator PAUL. Thank you, Mr. Kosar. Our next witness is Jonathan Bydlak. Mr. Bydlak is Founder and President of the Institute for Spending Reform and the Coalition to Reduce Spending, which raises awareness about the need for responsible fiscal policy and balanced budgets. Mr. Bydlak's work on spending reform has been featured in columns ranging from Business Insider to Reason magazine to the Washington Examiner. He holds a bachelor's degree in economics from Princeton University. Mr. Bydlak, your opening statement.

**TESTIMONY OF JONATHAN BYDLAK,<sup>1</sup> PRESIDENT, INSTITUTE FOR SPENDING REFORM**

Mr. BYDLAK. Thank you, Mr. Chairman, and Ranking Member of the Subcommittee for the opportunity to speak with you today.

It is no secret that, over time, Congress has found it easier and easier to ignore the budgetary instructions that lawmakers have set for themselves. Most Americans, and certainly Members on this Subcommittee, are familiar with the devolution of the budgeting process and the temporary stopgaps, onerous omnibus legislation, and even shutdowns that have become a part of modern government.

But often lost in the noise over appropriation standoffs is the fact that the other side of that proverbial coin, budgetary authorizations, which is meant to be the first step, has been increasingly ignored. What is supposed to be a two-step process in which programs are first authorized before funding is appropriated, now works, more often than not, by ignoring that first step entirely.

As we have already talked about, in 2019, Congress spent about \$307 billion on nearly 1,000 agencies and programs that were no longer authorized. This is about 23 percent of the discretionary budget, but those numbers look even worse when you consider that every year we reauthorize the entire Pentagon budget in one bill, which is half of discretionary spending. That means that for all other discretionary spending, more than half is going unauthorized on an annual basis.

As the chart<sup>2</sup> I put in my written testimony illustrates, despite some blips up and down, the trend has been unmistakably moving in the wrong direction. For comparison, unauthorized spending in the early 1990s hovered under 10 percent of the discretionary budget. Today we are at typically more than a quarter.

Many specific programs have not been authorized, as we have touched on. My personal favorite is the Federal Election Commis-

<sup>1</sup>The prepared statement of Mr. Bydlak appears in the Appendix on page 29.

<sup>2</sup>The chart referenced by Mr. Bydlak appears in the Appendix on page 30.

sion, just because it has not been reauthorized since 2 years before I was born, since 1981.

Why does this matter? At a basic level, separating authorizations and appropriations is meant to reflect what I think we would all agree is a generally good practice, which is you should have a plan for spending money before you actually allocate the funds. This is an idea that dates back to the founding of our republic. Unfortunately, Congress in recent years, has not really seemed to agree.

Contemporary lawmakers will say that they avoid these authorization procedures perhaps out of a desire to avoid what could be messy debate and could halt critical programs. I think equally likely is an assumption that it is not worth the burden of the reauthorization process when we have agencies that are operating without authorization, and there seems not to be any adverse consequences.

But just because we do not see those consequences openly does not mean they do not exist. Skipping authorization can mean that programs intended to sunset continue past their expiration dates, while no one is the wiser. Whether government programs operate well is harder to know when Congress does not take the time to re-evaluate the worthiness of their existence. Even if only one program were being allowed to exist beyond its usefulness, no proponent of good government would say it is acceptable to let that situation continue without oversight.

Abdicating responsibility in one area of the budgeting process makes it easier to abdicate responsibility elsewhere. The issue of unauthorized appropriations cannot be easily separated from the other budgetary problems the Nation currently faces.

Unauthorized appropriations may not represent the entirety of the Federal budget, or even of the discretionary budget, but that does not mean we should forego the opportunity to re-evaluate and reform this \$300 billion, and counting. Consider that resources are limited, and in the era of tight budgets and worsening debt, a billion, or even a million, dollars misspent can represent dollars stripped away from critical national priorities or the taxpayers' wallets.

Now critics may argue that regardless of whether appropriations are authorized there is already plenty of accountability over where Congress, and subsequently agencies and departments, spend taxpayer funds. I think this view is overly optimistic at best, but consider an analogy that may be appropriate.

In 2001, Congress passed the Authorization for the Use of Military Force (AUMF) in Afghanistan, and in the years since, many, including some on this Subcommittee, have called for a new vote, arguing that the 18-year-old AUMF should hardly provide a blank check for today's overseas engagements. In such discussions, few accept the argument that because there are other ways of ensuring wartime accountability that we should not bother following the rules or reassessing the original authorization.

It is my contention that the same should hold true in the case of fiscal rules as well. If Congress, at the time of originally authorizing a program or agency, does so for a specified period of time, we should respect those wishes in the name of ensuring the most efficient use of the societal resources that we have at our disposal. If the rules are arcane or no longer useful—certainly one can argue

there are plenty to which that description applies—the correct solution is to change them, to update them, not to ignore them indefinitely.

Tackling the current problem requires both addressing the existing programs with expired authorizations and reforming the process to ensure that kind of spending stops going forward.

A couple of principles that we may want to consider. There should be meaningful enforcement mechanisms so that unauthorized spending does not continue unchecked as it has for decades. Recent legislation, such as that by Representative McMorris Rodgers, proposed a combination of sunset provisions and a rolling sequester to gradually reduce the amount of unauthorized spending. I think that is a good suggestion.

There also must be broader and more holistic effort to return this body to being a deliberative budgeting entity. Legislators ultimately have responsibility for making budgeting decisions, rather than having them arise as a de facto product of political chaos.

Every Federal agency is supposed to operate under congressional authorization. These are the rules that define the priorities and activities of the government. When they expire, there comes a time to reconsider an agency's mission, modernize, or end them, if applicable, and impose some accountability onto the process instead of abdicating responsibility to open-ended spending.

Reforming unauthorized appropriations is a great place to start evaluating government spending more broadly. Even so, it should not be viewed as a cure-all for our budget woes but as an untapped area of potential reform.

I applaud the Subcommittee's willingness to hold this hearing and explore solutions before the issue becomes even more unmanageable, and I look forward to answering your questions.

Senator PAUL. Thank you. Our last witness today is Dr. James Thurber. Dr. Thurber is the Distinguished Professor of Government at American University. He is also the Founder of the Center for Congressional and Presidential Studies and the Affiliate Distinguished Professor of Public Administration and Policy at American University.

Since 1976, he has worked for several Members of Congress on issues including budget process reform and congressional committee reorganization.

Professor Thurber holds a bachelor's degree in political science from the University of Oregon and a PhD in political science from Indiana University. Professor Thurber.

**TESTIMONY OF JAMES A. THURBER,<sup>1</sup> DISTINGUISHED  
PROFESSOR OF GOVERNMENT, AMERICAN UNIVERSITY**

Mr. THURBER. Thank you very much Chairman Paul and Ranking Member Hassan, and other Members of the Subcommittee. I have a statement here that I was going to read. I am not going to do that. I just want to say a few things.

I first started working in the Senate in 1973. I was here for the 1974 Congressional Budget and Impoundment Control Act (CBICA) and worked on it. I have written about it. I have written a lot

<sup>1</sup>The prepared statement of Dr. Thurber appears in the Appendix on page 34.

about the failures of it. It has only passed four times on time since 1976, when we fully implemented it. That is part of this problem.

Second, I worked as a professional staff member on the Bipartisan Temporary Select Committee to Study the Senate Committee System. That was the last time we reduced the number of committees, realigned jurisdictions, and reduced committee assignments. It worked pretty well for a while.

The discussion brought back discussions that we had on that committee. The chairs were Senators Adlai E. Stevenson and Bill Brock. We talked about merging the Appropriations Committee with Authorizations—a very controversial thing. But in my opinion, the appropriators have taken over the power of authorizing, totally.

To summarize some of my thoughts here rather than reading it, I think that this is a consequence of extreme partisanship and gridlock, and the leadership is controversial. But the leadership does not give the committees the incentive and the freedom to do the kind of oversight that they should be doing.

Second, the budget for the committees are not there. They are a part of the reform. In 1976, what we had was we asked committees to have an oversight agenda, and the committees would get money related to the oversight that they were doing or what they did.

I suggest that changing the rules may not work immediately but there are a bunch of things that you can do in the interim. One is to return to the regular order. Easy to say. Take a little bit of power away from the leadership. Give more power to the chairs of the committees. Let them work their will. Because some committees are quite bipartisan, by the way. Energy and Natural Resources Committee is well-known for being quite bipartisan. I think your committee is also. They can work their will. They can get some things done.

Third, I think it should be required that every committee should have a list of all the unauthorized programs within their jurisdiction. That should be part of their website and it should maybe create a way to motivate the committee to do a little bit more on that.

Last, authorizers sometimes do not want to pass a bill because they cannot get exactly what they want, and so there are these unholy alliances with appropriators. You know about it. Maybe you are involved with it. I don't know, where you can't get something—

Senator PAUL. We are not in any unholy alliances. [Laughter.]

Mr. THURBER [continuing]. When you can't get something through authorizations so you do a non-transparent agreement. A quid pro quo? No. A transparent agreement with the appropriators, and they take care of that little problem that you have. Make those things more visible to the American public.

I think that the basic work of the Congress is not getting done, and we cannot blame it all on polarization or all on the leadership. Some of it is you, the Tuesday to Thursday Club. Now I know you do not belong to the Tuesday to Thursday Club, but people in the permanent campaign that is going on, and all the people running for the presidency now is something else, but the permanent campaign, they are out bringing in money, helping others bring in money, and they are not here doing their work. If they were here doing their work, and the leadership tries to do this 3 weeks on,

1 week in the district, I think you would get much more done. That reform has been around since the late 1960s, and Congress cannot seem to deal with it.

The funding of these committees should be directly linked to their productivity, and maybe, again, as I said before, it would get more done.

I believe in biennial budgeting. I have published about that. We really have it anyway. Only about 10 percent of the budget of the Federal Government is controllable from year to year. That means you have multi-year budgeting going on anyway. I would push for that.

In conclusion, unauthorized spending is a symptom of a broader dysfunction, in the budget process and in Congress, generally. The ability of Congress in the absence of a hard-working partisan center—I am from Oregon. We believe in sort of radical, centrist positions. If you do not have a bipartisan center you cannot effectively deal with problems like oversight of these authorizations.

No wonder the public is dissatisfied with what Congress is doing. No wonder you are at the 14 percent level. But the public also wants you to confront the opposition. The Pew Charitable Trust poll of October 19th shows that while they really want you to do more, and get along, and compromise, but they want Congress to stand up against the opposition. They want to go to heaven without dying, really, and you have to deal with that.

In conclusion, my recommendations are not radical. I think they are practical. You need to bring the leadership in on this and get them to agree with this. Now that does not mean, Senator, that I am against your bill. I am just trying to be realistic about some procedural things that can be done here to help out.

Senator PAUL. Thank you. Thank you for your testimony.

I think probably there is some agreement on both sides of the aisle and among the panel and probably the public that we probably should authorize what we spend, and maybe that having authorization bills and appropriation bills is a good idea. I worry about making them the same people and putting them all in the same hands, because they are different types of personalities. At least on the Republican side, we see the appropriators as people who are more inclined to spend money we do not have, and those of us who are not on the Appropriations Committee are purposely not put on the Appropriations Committee because we will not vote for spending.

Really, when you come to Washington, the selection process on our side is made. Spenders, people who are willing to vote for spending, are put on the spending committees. The people who are less inclined, think we spend too much, or that our budgets should be balanced, are not put on there. Our only chance to get balance, from the Republican perspective, would be to have authorization separate from appropriation.

You mentioned the Budget Act of 1974. Not only did we have the Budget Act of 1974, we had Gramm-Rudman, Hollings, and Pay-As-You-Go (PAYGO). We have had all of these things to try to reform at least the accumulation of debt, and they have all failed. I guess it is because lawmakers make laws and they can also ignore

their own laws. We simply have I think at one count, Pay-As-You-Go had been ignored thousands of times.

That gets to the next question, and that is a real pertinent question here. How do you force Congress to do what they should be doing, even encourage them to do it? But I think that is why I am for a bill that has a hammer. Now there may be some disagreement on what the hammer is, but I am willing to compromise on what the hammer is. If there is concern about a program completely expiring, let's take that off the table.

We have significant cuts. We have a 20 percent cut after the first year if it is not authorized, and then a 52 percent cut. Maybe that is way too dramatic, but if you were willing, or if the other side was willing to agree to some kind of hammer, maybe it is a 1 percent cut, or maybe it is a freeze. Even a freeze would be—don't you think we would go crazy with a freeze around here? Even if we froze spending at the last year's level people would go, "Oh, my goodness. The world is coming to an end. We cannot have a freeze."

I would think that number would be negotiable, what the hammer is. If the hammer is not acceptable, though, I guess my question for the panel would be, how do we get Congress to obey this? Do we need a hammer, and what should the hammer be? If the hammer is not reducing spending, are there other possible hammers? Both my bill and the McMorris Rodgers' bill have the hammer as reducing spending if you do not authorize.

Why do we not start with Mr. Kosar and we will work our way down.

Mr. KOSAR. Thank you. Yes, I think there is some value in having a statutory source of pressure, and what you just alluded to, OK, let's not reauthorize. Well, you are frozen. Nothing dramatic but it does start to create pressure, that over time would hopefully induce some sort of action.

I think, also, the idea of, in some way, linking committee budgets to reauthorizations and reauthorization performance, I think that would be very interesting. I can say that in the early 1970s, when Congress really seized back a bunch of power, it started to reach Congress. It was like, hey, we are creating plans for doing oversight. They worked the process. I mean, that was the era of joint committee reports being issued. They took it seriously. But over time that sort of attitude has fallen away, and you cannot just wave our fingers at them and chastise them and say, "Do this more." The personal incentives just do not seem to be there. So, OK, let's use something simpler—more funding. That may be another way to go.

Senator PAUL. Mr. Bydlak.

Mr. BYDLAK. Yes, I think as I said in my remarks, I think you need to have some sort of enforcement mechanism. You can pass whatever rule you want but if there is no way of actually enforcing it then it is not really going to make much of a difference.

I would say, broadly speaking on budgetary issues, if you look at what is done in the States, or even in some other countries, it is those places that have some sort of firm enforcement mechanism that tend to have more responsible finances. If you look at fiscal rules in Sweden or Switzerland, for example, we forget about this.

Sweden had an entitlement crisis and they put in place a statutory regime that—obviously they were not dealing with the problem of unauthorized appropriations—but they put in place very stringent rules that dictated what their government was able to spend, and, as a result, they had more responsible fiscal outcomes, both in terms of economic well-being and economic distress.

I think with any problem like this that is budgetarily related, at the core there has to be some way of ensuring that future Congresses will actually follow that rule.

I should say, one other point: political scientists often say that there is no way of binding future Congresses. But, in a sense, that is kind of what we are doing here by not following through on tackling unauthorized appropriations. We basically have past Congresses that are authorizing programs, and then today we are just deciding that we are going to follow those same rules. We are essentially assuming that Congress itself is being bound by these past rules. We do not really accept that in other areas. I think here we probably would be best not to as well.

Senator PAUL. Dr. Thurber, you get a double. We are going to double down on you because you get to answer the question on how do we get Congress to authorize and how do we get them to obey the 1974 Budget Act. Since you helped write it, how do we get Congress to obey it?

Mr. THURBER. I have to take pharmaceuticals when I look at how badly it has been implemented. I have written a whole history of the dysfunction—

Senator PAUL. That is not the answer. We want the answer. How do you force Congress to pay attention to it?

Mr. THURBER. First of all, I like the idea of a hammer and freezing a program. You cannot zero out veterans programs or violence against women program—I mean, maybe you could but I think it is unreasonable—or NASA or all these others. You have to send a message that if you do not get your act together, we are going to have a leveling out, a freezing of the program. I like that.

By the way, it was mentioned that things were better in the 1970s, and I have a whole book on this, about polarization, where it came from, and its impact. In the 1970s, we had about third of the House and the Senate that voted together, and we had Senators Bellmon and Muskie, Chairs of the Budget Committee, that were two former Governors. Governors know how budgets are put together and they did a great job. They had a bipartisan approach and they did a great job, better than the House, for the first 4 years.

Personality makes a difference, but also the nature of who is in the body makes a difference. Right now we have 4 percent of the members that regularly vote together. Congress has a bimodal distribution of ideology. Nobody in the middle. That is one of the reasons why Congress cannot get the work done. But that is why I gave you these incremental, not-very-sexy ideas about changing the process, getting members to work, getting people together in committees to talk with each other and work problems out. That is not really going on.

The Budget Impoundment Control Act. Whenever it failed, Congress changed the rules—you mentioned three of them—and that

continually goes on. It is going on this year. When you have omnibus continuing resolution (CR) going on, it is really sort of changing the rules.

Senator PAUL. Just to interrupt you for a second—every time—a lot of people do not realize this—whenever we pass CRs, we have to pass an exemption to a lot of the rules you are talking about. I think the Pay-As-You-Go is a rule. We are supposed to absolutely do that. We exempt ourselves from it. Every time we vote for CR, it's in the language.

Mr. THURBER. A former student of mine helped write the PAYGO rule as a staff member. I am very proud of that.

One thing I do is teach my students about how bad the debt and the deficit are, and how this is failing, and that they should get engaged up here with staff members. I have over 180 former students working as Congressional staff members, and four Members of Congress. Some of the Members of Congress have forgotten what they learned in my class maybe.

But I hope I have answered your question. I do not think I did. [Laughter.]

Senator PAUL. Senator Hassan.

Senator HASSAN. I want to thank you again, Senator Paul, for convening this hearing, and I want to thank our witnesses for your very insightful and thoughtful testimony.

Dr. Thurber, I want to drill down a little bit with you, and I am going to ask these questions and then I am going to apologize because I am supposed to check in at one more hearing before we have a meeting.

But, Dr. Thurber, I have real concerns that we have all talked about with our lack of authorizations, to be sure, but real concerns for the Senate's failure to take up attempts to reauthorization appropriations for some of the government's most important programs, and you just talked about a couple of them.

For example, the Violence Against Women Reauthorization Act passed the House in April. The House actually has reauthorized it. It contains a number of provisions that reauthorization expired programs that provide vital services for all Americans. But it is now stalled on the Senate floor. Can you elaborate? You talked about the attractiveness of some sort of hammer or consequence, but I think it is really important when we talk in the abstract about that to also talk about the harm that results from not reauthorizing these programs. Can you elaborate on what not reauthorizing the Violence Against Women Act, what kind of impact that would have?

Mr. THURBER. First of all, it is disruptive in terms of running a program.

Senator HASSAN. Right.

Mr. THURBER. You, as a Governor, understand that. I worked with Sandia and Los Alamos Labs, and when the government shuts down or it looks like they are not going to be funded, the Energy Department was last authorized in 1984, it really disrupts things. It is the same with the VAWA, and those programs are very important not only to women but to the elderly, to a variety of local groups that are helping people that are in danger. The Stalker Reduction Database gets shut down and you have to get it started

again, and the Sexual Assault Services Programs throughout the United States. Right now that really serves an important topic, and it is really sending the wrong message. But there is an elder abuse grant program that would get cutoff.

The question is, if you are running a program and you have these goals and objectives, and it looks like the program is not going to get the money, it just does not work. You go up and down like this. Governors know this. The city managers know this. The National Association of Counties (NACO) knows this.

Senator HASSAN. Yes, and it gets very hard to recruit and retain critical staff to do things like help people who are in danger.

Another example—

Mr. THURBER. Excuse me, Senator, if I could just mention one thing.

Senator HASSAN. Yes.

Mr. THURBER. Sometimes these programs have one or two provisions that hold up the authorization. It does not mean that, Senator Paul, maybe you are not for this. I will just assume that you are for many of these programs. There are very narrow provisions that are extremely controversial and it holds it up. That is where Senators have to get together and you have to compromise.

Senator HASSAN. Right.

Mr. THURBER. And that is not going on.

Senator HASSAN. Right. But in some cases—we have the Violence Against Women Reauthorization Act, which passed the House is stalled over here. Another example is the Nelson and Pollard Intelligence Authorization Act, which would reauthorize funding for the intelligence activities of 16 different agencies. This authorization expired in 2017. The bill passed the House 396–31, a huge bipartisan vote, but is yet to be acted upon in the Senate. A failure to reauthorize intelligence activities would certainly have an effect on our national security.

Dr. Thurber, what would you do to encourage Congress to pursue proactive reauthorizations?

Mr. THURBER. I would suggest that the caucuses, both caucuses, really push their leadership to do something about this. These things are not going forward frequently because the leadership does not want them to go forward, because they think they have consensus of the caucus. Sometimes they do not. Many times both parties would like to have things go forward but the leadership is in the way. I know that is easy to say, and in an election year it is very hard—every 2 years it is very hard to get them to move.

But remember, the House is Democratic and it is pretty progressive and liberal, and so passing this act maybe is something that the Republican leadership does not want to touch in an election year.

Senator HASSAN. Which I understand, but it passed 396–31.

Mr. THURBER. I know.

Senator HASSAN. I have one more question that I do want to get to, but I also just want to point out, when we talk about winding down programs that have not been reauthorized, perhaps the most startling one to me, as a relatively new member of the Senate, is the spending authorizations for medical services and hospital care for our veterans expired in 1998. To my knowledge, no bill has

been introduced in this Congress to reauthorize spending for the health care of 18.2 million veterans.

I do not think that any of us want to neglect to fund medical services for veterans, simply because we do not pass the spending authority for the services. Would you agree with that?

Mr. THURBER. I would agree, and CBO estimates that \$73.3 billion has not been reauthorized for the Veterans Health Care Eligibility Reform Act, and that is the largest of all of them.

Senator HASSAN. I thank you for that. I do have one other question, and I wanted to get all the witnesses to answer on it. We have been discussing the broken reauthorization process but we have yet to hit on the broken appropriations process. It has been 22 years since Congress last passed all 12 regular appropriation bills on time. When the appropriations process breaks down, the government shuts down.

I have been working hard with my colleague, Senator James Lankford from Oklahoma, to pass the Prevent Government Shutdowns Act, which implements an automatic continuing resolution when Congress fails to pass the regular appropriations bills, and ensures that members stay in Washington to get an appropriations package passed by restricting their travels, which simply says we cannot go home, and neither can our staff, by the way. Nobody can travel.

As we consider how to conduct better oversight of Federal programs, it is imperative that we work to consider, debate, and vote on every single appropriations bill. To that end—and I realize I am just about out of time—for each of our panelists, how can we ensure that Congress carefully considers each appropriation bill, as it used to? If you could briefly give an idea or two and then we can follow up with you in writing.

Mr. KOSAR. Sure. I think your proposal actually speaks to the personal incentives. That is a hammer, that would change behavior. The second thing is I think the current appropriations calendar, as laid out in the 1974 Budget Act, is undoable. The government is too big, it is too complicated to ram everything through in that short amount of time.

Senator PAUL. Do you think that is fixed by a 2-year program, a biennial?

Mr. KOSAR. It could be fixed by a 2-year biennial program, but you have to make sure they actually do the work and they do not save everything until the last minute.

Senator PAUL. Right.

Mr. BYDLAK. Yes, I think a 2-year biennial can be useful, depending on the agency or the type of spending that we are talking about. It may not be appropriate for some. There may be some departments that you may want to a longer period.

But my concern is that when we have had instances where we, if you have gotten spending under control or addressed our debt, or had sort of deals that have addressed the debt, they have often times come out of some of these conflicts that we have had. There is this strange situation where, on the one hand, none of us necessarily want the government to shut down or want to face these sorts of controversial moments, but the reality has also been that it has been those moments that have actually given us some of the

mechanisms by which we have actually addressed our spending and debt.

My personal view is that I think all these solutions should be on the table, but I would be a little hesitant about having fewer discussions about spending restraint and our growth in debt than we currently have.

Mr. THURBER. I will get back to the point. If you look at the budget, about 10 percent of the budget is relatively controllable from year to year. If you take into account mandatory programs, of course, you can get rid of Medicare and Medicaid and some other programs, but it is unlikely. Net interest and long-term contracts, the long-term contract with the Air Force tanker with Boeing of \$41 billion, if you cut it off you will get sued for more than the \$41 billion probably.

All of those add up to 90 percent of the budget. So if, every 2 years, you were really focusing on that 10 percent, I think you could make some progress in terms of dealing with unauthorized programs.

I think it is ridiculous that we have not authorized programs for the veterans, for the 9/11 Commission, or for NASA. Americans would be shocked if they knew about this.

Senator HASSAN. Thank you very much. Thank you, Mr. Chair, for letting me go over.

Senator PAUL. Thank you, and I hope we can maybe get together. This is just a comparison of the two bills, and if there is some kind of hammer we could agree to. The only thing I would say about a hammer is even if the hammer were a freeze for something that you wanted, I think it would be enough incentive by those who want it not to be frozen that we would actually bring it up.

Senator HASSAN. Yes, and part of the shutdown bill that Senator Lankford and I have provides for level spending while we are being required to stay here in D.C. and hammer out actual appropriations. It does not allow for a cut, which is what some people on your side of the aisle want, but some people on my side of the aisle would want an automatic increase. It does not do either of those things. It just keeps it level.

Senator PAUL. Right.

Senator HASSAN. I look forward to continuing to work with you on this.

Senator PAUL. Thank you.

I want to thank our panel for looking at this, and I think the problem is bigger than just authorization. As we mentioned the Budget Act and we mentioned so many rules that we have that we just ignore, and how do you force people who ignore rules to follow rules? Do you get better people? That is part of it. Part of it is the electoral process.

But it seems to go on and on, decade after decade, and the budget is probably the most noticeable, how many times we have reached that and how now it is stuck in the bills. It is a privileged vote that you can bring up, but I have brought up the privileged vote on the PAYGO. I think the last time I brought it up we had exceeded it and we did not adhere to the PAYGO rule. It got 8 votes in favor of enforcing the PAYGO. But we exceeded it so much that there would have probably been hundreds of billions of dollars

they would have had to cut, because they are completely exceeding and ignoring all of the rules.

I want to thank the panel for coming today. Keep working on this project. Keep in touch with us. If you have specific suggestions on either my legislation or Representative McMorris Rodgers' legislation, let us know. We will continue to work with the other side to see if there has to be an enforcement mechanism. If there is no enforcement mechanism, I agree we should encourage leadership, but they do not listen a lot of times.

Mr. THURBER. Even though they are from the same State?

Senator PAUL. Even so. The problem is that there is also a built-in incentive. You mentioned it briefly. When we do not do appropriation bills, all the power focuses on one or two people up there, so it ends up being a deal with the majority leader, the minority leader, and the President. Three people get involved, and at that point in time there are special things that go into bills, but they only happen between those three people. Not only are the appropriators cut out, all the non-appropriators—everybody is cut out, and it becomes a Congress of three people at that point.

Mr. THURBER. You do not know what is in it until it is too late.

Senator PAUL. Yes. It is two or three thousand pages and we get it that morning. There are all kinds of problems here. I think we should continue to explore and explore the solutions. I do not think they necessarily have to be partisan, and I will work together with Senator Hassan and see if we can come up with some solutions. But we appreciate your input. Thanks.

[Whereupon, at 2:50 p.m., the Subcommittee was adjourned.]



# A P P E N D I X

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## **FSO Subcommittee Hearing:**

### **Rise of the Zombies- the unauthorized & unaccountable government you pay for.**

*October 30, 2019*

#### **Opening Statement of Chairman Paul**

I call this hearing of the Federal Spending Oversight Subcommittee to order.

We are here the day before Halloween to talk about zombies. These are not the kind of zombies we see on the Walking Dead, or what we might see on our doorsteps tomorrow evening. In many ways, these zombies are scarier. These are zombie government programs; programs that have sometimes not been reauthorized for decades. Since the mid-19<sup>th</sup> Century, and reaffirmed in the '74 Budget Act, Congress separated spending bills from authority in mission parameters which are in what are called authorizing bills. In recent decades Congress has failed in its oversight by not reauthorizing the programs it creates.

So what are zombie programs? They are programs Congress created long ago that have since expired, yet somehow live on; continuing to receive appropriations. How big is this problem? Some might say, "Well, it's probably a few dozen programs, and probably just a few million dollars." If you said that you would be wrong. Annually, Congress provides more than \$300 billion to nearly 1,000 programs that have expired. This is a huge problem.

And what are these zombie programs? Some are ridiculous, and well out of date. For example, the Inter-American Foundation spent taxpayer dollars on such things as: a clown college in Argentina, Brazilian welfare programs, and jumpstarting the Haitian film industry. When I point these things out, people always ask me how such ridiculous things get funded. Part of the answer is unauthorized spending. The Inter-American Foundation was created in the 1960s and last

authorized more than 30 years ago, in the 1980s. It is no wonder a lot of people ask, what is the Inter-American Foundation?

It is not just bad programs though. There is a lot of conversation these days about election security. But it would probably surprise people to learn the Federal Election Commission was last reauthorized in the '80s, before there was the internet or electronic voting machines. That means the FEC does not have the proper powers or authorities to address current needs, or worse, they are making up their own rules as they go, without any real Congressional input or oversight.

I've put forward a solution, a zombie cure called the Legislative Performance Review Act. This bill would require programs be reauthorized every 4 years, and creates a targeted point of order against funding such programs. It provides for an orderly wind down of expired programs and it asks committees to consider performance evaluations, which Congress has been mandating but ignoring for the past 25 years, when reauthorizing programs.

Some insist robust oversight occurs even without authorizations and that appropriators keep track of every dollar spent. I find that hard to believe, when we hear of clown colleges, but even if they do track every dollar the authorization process was split from the appropriating specifically because often the desire to spend, obstructs the desire to correct. Congress acts through passing laws, so oversight is anemic at best if there is no threat of legislative action.

Some say this would just be a tool to cut government. Well, some government should be cut, but even things that we might need should be reviewed and kept up to date. Some say politics will get in the way, or it is just too hard. We have shown it's not. Congress rightly prioritizes national defense and finds a way to do a NDAA every year. Certainly we can review other spending every 4 years. My proposal isn't so egregious, it simply provides for a point of order that could be waived. Is it too much burden for the Senate to debate and vote on programs once

every 4 years? Do we really believe that programs are so good they never get out of date or lose effectiveness? I don't think so.

With that, I'll recognize Ranking Member Hassan for her opening statement.

Homeland Security and Governmental Affairs Committee  
Federal Spending Oversight and Emergency Management Subcommittee

Ranking Member Margaret Wood Hassan  
Opening Statement

Wednesday, October 30, 2019

Thank you Mr. Chairman, I appreciate your work and your staff's work on this hearing. And I also want to thank the witnesses for being here today to provide their expertise on these issues.

Today's hearing focuses on the issue of government spending on programs that have expired and that Congress has failed to reauthorize, but continue to operate through mandates in appropriations bills.

Earlier this year, the Congressional Budget Office reported that in fiscal year 2019, 971 programs continued to operate despite an expired authorization of appropriations. These programs cost \$307 billion, and accounted for roughly 25 percent of all discretionary funding in fiscal year 2019.

There are critically important programs among those identified by the Congressional Budget Office. These are large programs like medical services and hospital care for veterans and those established under the Violence Against Women Act, as well as smaller programs dedicated to civil rights, environmental protection, and the promotion of science and the arts. These programs are vital to the health and safety of our constituents – and that is all the more reason they should be subject to congressional oversight through the reauthorization process, so that we can be assured that they are working as Congress intended and so that we can identify opportunities for improvement.

I am proud to have introduced and supported a number of bipartisan bills to help Congress fulfill its oversight duties in an efficient, data-driven way, including the Foundations of Evidence-Based Policy Making Act, Taxpayers Right to Know Act, and the Duplication Scoring Act of 2019, which Chairman Paul and I introduced earlier this year.

While I believe that authorizing committees should periodically review programs, I disagree with the premise that programs should automatically lapse or wind down if that does not happen, even when Congress agrees to fund them. It would do enormous harm to our constituents if programs to provide medical services to veterans or to combat violence against women ended because Congress appropriated funding, but failed to reauthorize the programs.

I look forward to hearing from our witnesses today, and most importantly, I hope our witnesses can help us to identify ways to continue to improve congressional processes in order to safeguard taxpayers' dollars, while ensuring that Congress continues to support essential programs that serve the American people. Thank you again, Mr. Chairman, for holding this hearing, and to the witnesses for your attendance.

**Written testimony of Kevin R. Kosar  
Vice President of Policy, R Street Institute  
Before the U.S. Senate, Committee on Homeland Security and Government Affairs,  
Subcommittee on Federal Spending Oversight  
October 30, 2019**

Thank you, Chairman Paul, Ranking Member Hassan and members of the subcommittee for holding this hearing, and thank you for receiving my testimony.

I am vice president of policy at the R Street Institute, and I previously spent 11 rewarding years as an analyst and acting research manager at the Congressional Research Service (CRS), where I provided nonpartisan research and advice to legislators, their staffs and committees.

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It is the beginning of fiscal year 2020 (FY2020), and Congress and the president are off to an inauspicious budgetary start. Contrary to the directives of the Congressional Budget and Impoundment Control Act of 1974 (CBICA), President Donald J. Trump did not submit a budget in a timely manner; a budget resolution was not adopted by both chambers in April; and none of the 12 FY2020 appropriations bills were passed before September 30.<sup>1</sup> The government is operating under a continuing resolution, and there is talk in the air of a possible government shutdown this autumn. Which is to say nothing of the possibility of the government beginning to run a \$1 trillion deficit.<sup>2</sup>

There also is the subject of today's hearing, unauthorized appropriations (UAs). This past March, the Congressional Budget Office reported that it had:

identified 971 authorizations of appropriations that expired before the beginning of fiscal year 2019 that had not been overtaken by subsequent legislation as of February 15, 2019. Those authorizations appeared in 257 laws and authorized a combined annual total of at least \$158 billion for the last year they were in effect for various agencies, programs, or functions.<sup>3</sup>

Congress appropriated \$307 billion towards these expired authorizations' purposes.

For certain, the rise in unauthorized appropriations is a symptom of the broken congressional budget process. But the rise of these "zombie appropriations" and "zombie programs," as I termed them, is troubling in and of itself.<sup>4</sup>

<sup>1</sup> Congressional Research Service, *Appropriations Status Table: FY2020*. <https://crsreports.congress.gov/AppropriationsStatusTable>; and Committee for a Responsible Federal Budget, *Upcoming Congressional Fiscal Policy Deadlines*, Oct. 2, 2019. <http://www.crfb.org/blogs/upcoming-congressional-fiscal-policy-deadlines>.

<sup>2</sup> Donna Borak, "US deficit estimated to hit \$1 trillion for 2020, CBO says," CNN, Aug. 21, 2019. <https://www.cnn.com/2019/08/21/politics/cbo-us-deficit-one-trillion/index.html>.

<sup>3</sup> Congressional Budget Office, *Expired and Expiring Authorizations of Appropriations: Fiscal Year 2019*, March 2019, pp. 2-3. <https://www.cbo.gov/system/files/2019-03/55015-EFAA.pdf>.

For one, Congress is simply not following the plan it set out in the CBICA: authorize, then appropriate. For another, the rise of zombie programs gives the appearance that Congress is abdicating some degree of its oversight duties. It creates programs, authorizes some level of spending for them for a time, and proceeds to disregard the authorizing statutes. Government watchdogs and the public would be forgiven for wondering whether Congress is really overseeing these programs or has abdicated its power of the purse.<sup>5</sup>

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The growth in the number of UAs has been fueled by a variety of factors.

Prof. James Thurber, who previously testified before the Senate, notes that partisan polarization contributes to the budget process by making the enactment of any legislation difficult.<sup>6</sup> Additionally, he reminds us, “before the 1950s, most authorizations were permanent. The move to shorter authorization periods was an attempt to force more oversight for federal programs.”<sup>7</sup>

A report of a task force of the American Political Science Association also points out that governing by continuing resolutions and omnibuses has become commonplace.<sup>8</sup> These spending statutes keep the money flowing to programs at last year’s levels—regardless of the expiration of authorizations.

Less appreciated, but not less critical, is that insufficient congressional capacity contributes to burgeoning unauthorized appropriations. Consider that the executive branch has perhaps 180 agencies, which administer untold thousands of statutes and programs. The *Code of Federal Regulations*, the corpus of existing regulatory law, runs more than 180,000 pages.<sup>9</sup> The sheer gigantism of the executive branch—which, to be clear, was erected and funded by Congress—has utterly outstripped Congress’ ability to oversee it. The CBO reported that 130 authorizations for appropriations found in 35 statutes were due to expire in FY2019 alone. Reauthorizing all those statutes would be an enormous amount of work.

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<sup>4</sup> Kevin Kosar, “Inappropriate Appropriations,” *Weekly Standard*, Feb. 26, 2016. <https://www.washingtonexaminer.com/weekly-standard/inappropriate-appropriations>; and Kevin Kosar, “Interview by Jake Tapper: The Lead with Jake Tapper,” CNN, Feb. 19, 2016. <http://edition.cnn.com/TRANSCRIPTS/1602/19/cg.02.html>.

<sup>5</sup> There is substantial evidence indicating that congressional oversight generally has waned since the 1980s. E.g., the number of days that committees and subcommittees meet has dropped. Jason Robert et al., “APSA Task Force Memorandum: The House of Representatives’ work schedule: Issues, and options for reform,” Sept. 12, 2019. <https://www.legbranch.org/the-house-of-representatives-work-schedule-issues-and-options-for-reform/>.

<sup>6</sup> Testimony of James Thurber, Senate Committee on the Budget, 114th Congress, Feb. 3, 2016, p. 2. <https://www.budget.senate.gov/download/dr-james-thurber>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Nolan McCarty et al., “APSA Committee on Congressional Reform: Report from the Subcommittee on the Appropriations Process,” Sept. 17, 2019, p. 5. <https://www.legbranch.org/app/uploads/2019/09/APSA-task-force-appropriations-memorandum.pdf>.

<sup>9</sup> Kevin Kosar, “How to Strengthen Congress,” *National Affairs*, Fall 2015. <https://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>.

To make matters worse, Congress has weakened its capacity while the size of the executive government has ballooned. The number of congressional staff who can assist with this workload has not kept up with the rising workload.<sup>10</sup> And the quantity of time Congress is in session today—and able to hold hearings and consider reauthorizations—is about the same as it was in 1969, when government was smaller.<sup>11</sup>

To be clear, however, building sufficient congressional capacity is not enough. In order to decrease zombie appropriations and programs, legislators need to feel incentivized.

Unfortunately, there is an “eat-your-spinach” aspect to the reauthorization of appropriations. Those who crafted the 1974 CBICA and its imperatives clearly believed that going through a two-step budget process—authorize then appropriate—was good budget practice. As I wrote elsewhere:

Having to complete two steps, rather than one, makes spending harder—always a good idea. With two bills that must complete the arduous path to the president's desk, the process should encourage fiscal restraint and, in theory, help keep budget deficits down. Congress might authorize trillions in federal spending any one year, but can always appropriate fewer dollars if revenues (e.g., taxes) are expected to be less than that. Government growth also might be curbed, legislators imagined, if programs' ability to receive funds timed out. If Congress and the president could not agree to reauthorize a program, it would die. Requiring that programs and agencies be reauthorized offers regular opportunities to rethink and revise policies. It's a cornerstone of congressional oversight.<sup>12</sup>

But clearly, Congress has not chosen to make reauthorizing appropriations a priority.<sup>13</sup> The Senate, for example, could have expended a great deal of floor time during the past two years reauthorizing programs. Instead, it has allocated much time approving nominees to the federal judiciary. (The Senate, notably, has not enacted any of the 12 appropriation bills for FY2020.)

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<sup>10</sup> Lee Drutman et al., “Modernizing Congressional Capacity: A Report of the APSA Presidential Task Force Subcommittee on Congressional Capacity,” Sept. 26, 2019. <https://www.legbranch.org/app/uploads/2019/09/APSA-memo-capacity-subcommittee-report-09-2019.pdf>.

<sup>11</sup> Jason Robert et al., “APSA Task Force Memorandum: The House of Representatives’ work schedule: Issues, and options for reform,” Sept. 12, 2019. <https://www.legbranch.org/the-house-of-representatives-work-schedule-issues-and-options-for-reform/>.

<sup>12</sup> Kevin Kosar, “Inappropriate Appropriations,” *Weekly Standard*, Feb. 26, 2016. <https://www.washingtonexaminer.com/weekly-standard/inappropriate-appropriations>.

<sup>13</sup> In 1985, Congress mandated that the CBO report on unauthorized and expiring appropriations—in hopes these reports would goad Congress to undertake reauthorizations. Congressional Budget Office, *Expired and Expiring Authorizations of Appropriations: Fiscal Year 2019*, March 2019, p. 1, note 1. <https://www.cbo.gov/system/files/2019-03/55015-EEAA.pdf>.

Thus, in closing, I suggest that slaying zombie appropriations and programs will necessitate reforms to ensure Congress has the capacity and the motives to devote time and energy to reauthorizing appropriations.<sup>14</sup>

Thank you for your time and consideration. I would be happy to answer any questions the subcommittee or its staff may have.

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<sup>14</sup> As James Madison theorized in Federalist 51, "The interest of the man must be connected with the constitutional rights of the place." [https://avalon.law.yale.edu/18th\\_century/fed51.asp](https://avalon.law.yale.edu/18th_century/fed51.asp).

Rise of the Zombies: The Unauthorized and Unaccountable Government You Pay For

Testimony on:  
“The Problem of Unauthorized Appropriations”

for a hearing before the

Subcommittee on the Federal Spending Oversight and Emergency Management  
of the  
United States Senate  
Committee of Homeland Security and Government Affairs

Wednesday, October 30, 2019 at 2:30 P.M.  
Room SD-342

Testimony by:  
Jonathan M. Bydlak  
Founder and President  
Institute for Spending Reform  
jonathan@spendingreform.org

*Mr. Chairman and distinguished Members of the U.S. Senate Subcommittee on Federal Spending Oversight and Emergency Management, thank you for the opportunity to speak with you today.*

**Background**

I'd like to begin my remarks by discussing the year 1974 – the year of Watergate, gas shortages, and the winding down of Vietnam – but also the year in which an oft-forgotten law was passed, one that – though remembered today primarily by the wonkiest of budget wonks – continues to impact the discourse and actions of the federal government in 2019.

That legislation is the Congressional Budget and Impoundment Control Act of 1974, more commonly known as the 1974 Budget Act. Despite subsequent changes in 1985, the early 1990s, and more recently, 2011's Budget Control Act, the government still funds its myriad priorities according to the framework that this law laid out.

At least, it does in theory. Over time, Congress has found it easier and easier to ignore the instructions that lawmakers set for themselves. And the result has been increased dysfunction every year that this ad hoc process is carried out.

Recent research from the Institute for Spending Reform, for example, has found that while growth in federal spending and debt were lower in the wake of the Act's passage<sup>1</sup>, the budgetary process also became politicized, particularly with respect to the allocation of federal grants.<sup>2</sup>

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<sup>1</sup> Ferraresi, Massimiliano, Gucciardi, Gianluca, & Rizzo, Leonzio. *Social Science Research Network*, “[The 1974 Budget Act's Impact on U.S. Spending and Debt: A Synthetic Control Study](#),” 19 May 2018.

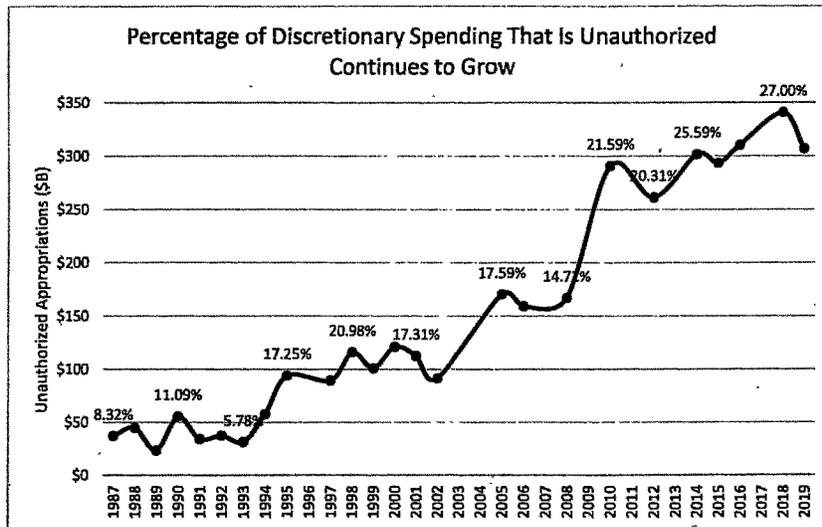
<sup>2</sup> Ferraresi, Massimiliano, Gucciardi, Gianluca, & Rizzo, Leonzio. *Social Science Research Network*, “[The 1974 Budget Act and Federal Grants: Exploring Unintended Consequences of the Status Quo](#),” 19 May 2018.

Of course, most Americans – and certainly this Subcommittee – are familiar with the devolution of the budgeting process into temporary stopgaps, onerous omnibus legislation, and even shutdowns that have become a fact of modern government.

But often lost in this noise over appropriations standoffs is the fact that the other side of the proverbial coin – budgetary authorization, the first step – has been increasingly ignored. What is supposed to be a two-step process in which programs are first authorized before funding is appropriated, now works – more often than not – by ignoring that first step entirely.

**The Numbers**

In 2019, Congress spent about \$307 billion on nearly 1,000 agencies and programs that were no longer authorized<sup>3</sup>. This represents about 23% of the entire discretionary budget. And these numbers look even worse when you consider that the entire Pentagon budget, which represents about half of discretionary spending, is typically reauthorized in one bill each year. This means that of all other discretionary spending, more than *half* goes completely unauthorized.



As the above chart illustrates, despite some blips up and down, the trend has unmistakably been moving in the wrong direction. For comparison, unauthorized spending in the early 1990s hovered under 10% of the discretionary budget, while today, a quarter of all discretionary spending typically lacks authorization in any given year.

Many specific programs have not been authorized for years. It was known to many in this town, for example, that the Department of State operated completely unauthorized for close to a decade

<sup>3</sup> Congressional Budget Office. "Expired and Expiring: Authorizations of Appropriations: Fiscal Year 2019," Mar 2019.

and a half. Likewise, the Federal Election Commission still operates without authorization – since two years before I was born.

And as the Congressional Budget Office notes in its most recent report from March, even the slight dip downward in the last year is a sign of budget dysfunction. As CBO says, “That drop stems primarily from a reduction in funding for the Community Development Block Grant program, which received \$28 billion in emergency supplemental funding in fiscal year 2018 to respond to natural disasters, compared with \$2 billion in fiscal year 2019. Excluding supplemental appropriations, funding for that program was comparable (about \$3 billion) in 2018 and 2019.”

In other words, the drop this year has nothing to do with reform, but rather reflects another form of budget dysfunction – one perhaps better suited for discussion at another hearing. However, viewed over time, it is clear that Congress is abdicating major parts of its duty when it comes to the budget.

#### **Clarifying the Problem**

Why does this matter? This idea behind separating authorizations and appropriations dates essentially to the founding of the Republic itself.<sup>4</sup> In 1837, in fact, “the House began the practice of authorizing expenditures and enacting appropriations in two separate processes. By resolving the issues likely to cause partisan gridlock first, the idea was, Congress could avoid a situation where funding for important programs is held hostage to the debate. Soon after, both the House and the Senate established committees for authorizing and appropriating funds.”<sup>5</sup>

At a basic level, separating authorizing and appropriating is meant to reflect that it is good practice to have a plan for spending money before funds are actually allocated. Unfortunately, in recent years, Congress appears not to agree.

Perhaps contemporary lawmakers have chosen to avoid authorization procedures out of a sincere desire to avoid messy debate that would halt critical priorities. But equally likely is an assumption that it is not worth lawmakers’ time to burden themselves with the reauthorization process when many agencies and departments are operating without authorization and there seem to be no adverse consequences. Why not just waive the rules that prevent appropriation of money to unauthorized programs?

Of course, that the consequences may not be easily seen does not mean that they don’t exist. As I noted in an editorial some years ago, “Skipping authorization can mean that programs intended to sunset continue past their expiration dates while no one is the wiser.”<sup>6</sup>

Whether government programs operate well is harder to know when Congress doesn’t take time to reevaluate the worthiness of their existence. Even if only one program were being allowed to exist beyond its usefulness, no proponent of good government would say it was acceptable to let the situation continue without oversight.

<sup>4</sup> From Vinik, Danny. *Politico*, “[Meet Your Unauthorized Federal Government](#),” 3 Feb 2016: “[I]n 1789, [Congress] passed a law establishing the War Department and a separate law funding it. The goal was to separate the money and policy decisions, out of worries that disagreements over policy would delay the flow of money, and that pressure to appropriate would lead lawmakers to pass legislation without proper scrutiny—what we called “riders” today.”

<sup>5</sup> Institute for Spending Reform, “[Unauthorized Spending: When Zombies Infect Congress’ Purse](#),”

<sup>6</sup> Bydlak, Jonathan. *The Hill*. “[The sun never sets on temporary government programs. Until now](#),” 27 Apr 2017.

Unauthorized appropriations may not represent the entirety of the federal budget – or even of the discretionary budget – but that does not mean we should forgo the opportunity to reevaluate and reform this \$300 billion and counting. Theoretically, we can always turn our attention elsewhere to some seemingly more critical matter, but those who would do so miss the point.

Abdicating responsibility in one area of the budgeting process makes it easier to abdicate responsibility elsewhere. The issue of unauthorized appropriations cannot be easily separated from the other budgetary problems the nation is currently facing, as our experience since 1974 illustrates.

Consider also that resources are limited, and in an era of tight budgets and worsening debt, a billion – even a *million* – dollars misspent can represent dollars stripped away from critical national priorities or the taxpayers' wallets. Without a clear and codified reform procedure, funding for critical agencies is lumped in with that for outdated and wasteful programs.

#### **Some Misconceptions**

It is worth noting that enforcing the authorization process does not mean a blank check to slash spending. I suspect that currently unauthorized agencies enjoying bipartisan support – such as the DEA, FBI, or ATF, for example – would ultimately continue to exist. Perhaps after a closer examination, lawmakers would choose to authorize *more* funding to such programs.

Certainly, many currently unauthorized programs may be ones we want to keep, and that deserve full funding regardless of whether they have been properly authorized. But the reason for forgoing oversight of even these programs should never be because lawmakers face few consequences for doing otherwise.

Critics may argue that regardless of whether appropriations are authorized, there is already plenty of accountability over where Congress, and subsequently agencies and departments, spend taxpayer funds. I believe this view is overly optimistic at best, but let us consider an analogy that may be appropriate:

In 2001, Congress passed the Authorization for the Use of Military Force in Afghanistan. In the years since, many including some on this subcommittee, have called for a new vote, arguing the 18-year-old AUMF should hardly provide a blank check for today's overseas engagements.

In such discussions, few accept the argument that because there may be other ways of ensuring wartime accountability – that we shouldn't bother following the rules or reassessing the original authorization.

It is my contention that the same should hold true in the case of fiscal rules as well. If Congress, at the time of originally authorizing a program or agency, does so for a specified period of time, we should respect those wishes in the name of ensuring the most efficient use of the societal resources we have at our disposal.

If the rules are arcane or no longer useful – and certainly one can argue there are plenty to which that description applies – the correct solution is to change them, to update them – not to ignore them indefinitely.

**Finding a Solution**

Any solution that seriously tackles these problems must address the mountain of programs with expired authorizations that currently receive funding, and reform the process to ensure that kind of spending stops going forward.

Some general principles can guide this subcommittee and others in moving ahead.

First, there must be a meaningful enforcement mechanism so that unauthorized spending does not continue unchecked as it has for decades. Recent legislation, such as that introduced by Representative McMorris Rodgers, has proposed a combination of sunset provisions and a rolling sequester to gradually reduce the amount of unauthorized spending that would occur without changes to current law. These are good suggestions.

Second, there must be a broader and more holistic effort to return this body to being a deliberative budgeting entity. Great power is vested here in these halls, and reform must ensure that responsibility is seized back for legislators instead of abdicated to the de facto decisions arising from political chaos.

Every federal agency is supposed to operate under congressional authorization. It is the set of rules that define the priorities and activities of the government. When they expire, there comes a chance to reconsider an agency's mission, modernize, or end it if applicable, and impose some accountability onto the process instead of abdicating responsibility to open-ended spending.

Reforming unauthorized appropriations is a great place to start evaluating government spending more broadly. The problem should not be viewed as a cure-all to our budget woes, but rather as an untapped area of potential reform.

For these reasons and more, this subcommittee should work to take action to address this budgetary problem, and I applaud your willingness to explore solutions before the issue becomes even more unmanageable.

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

Testimony on:

“Spending on Unauthorized Programs”

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Federal Spending Oversight and Emergency Management Subcommittee

Committee on Homeland Security and Governmental Affairs

United States Senate

Wednesday, October 30, 2019 at 2:30 pm

Room 342, Dirksen Senate Office Building

Washington, DC

Dr. James A. Thurber

University Distinguished Professor of Government

Founder of the Center for Congressional and Presidential Studies

School of Public Affairs

American University

[Thurber@american.edu](mailto:Thurber@american.edu)

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.”<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>2</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>3</sup> 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

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.”<sup>4</sup> 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 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.<sup>5</sup>

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

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comply with the Constitution’s directive to publish information detailing the budgetary decisions its members make when they tax and spend.

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

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

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.”<sup>6</sup> 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.

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

CBO identified unauthorized appropriations for 257 laws and 971 expired program authorizations for a total of and \$307 billion for fiscal year 2019.<sup>7</sup> The annual CBO 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.

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

“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’.<sup>8</sup>

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.”<sup>9</sup>

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

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<sup>8</sup> 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.

<sup>9</sup> 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.”

would have to pass to ensure all appropriations were authorized.<sup>10</sup> The top fifteen programs that do not have authorizations, but have appropriations are<sup>11</sup>:

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

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<sup>10</sup> 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.

<sup>11</sup> See Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations*, March 2019.

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.

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.<sup>12</sup> Voter polarization is not new, but it is getting worse.<sup>13</sup> The extreme partisanship that seems to

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

<sup>13</sup> Ed Goeas 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

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.<sup>14</sup>

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,<sup>15</sup> 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 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

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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.”

<sup>14</sup> 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).

<sup>15</sup> An example of this success is The Every Student Succeeds Act of 2015.

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.<sup>16</sup> 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 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

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<sup>16</sup> 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.

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.