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Proposals to Address “Unauthorized Appropriations” Would Likely Do More Harm Than Good
Programs Already Receive Congressional Scrutiny and Direction

By David Reich

Republican members of the House of Representatives are offering various proposals targeting “unauthorized” appropriations, including a bill from House Republican Conference Chair Cathy McMorris Rodgers to impose automatic cuts in such programs and various plans to more strictly enforce House rules on the subject. In reality, however, descriptions of the problem are often greatly exaggerated and the proposals would likely do more harm than good.

In this context, “unauthorized” usually refers only to the lapsing of legal language that House rules say must exist before the House may consider annual appropriations for an agency or program — even though the underlying law creating and governing the agency or program remains in effect.

Contrary to some rhetoric surrounding this issue, the fact that a particular appropriation may be considered unauthorized does not confer any additional discretion on the executive branch or represent an abdication of congressional power. Every unauthorized appropriation is nevertheless an appropriation — that is, a legal directive from Congress to the executive branch to spend a specific amount of money for specified purposes during a particular year or years. If Congress has appropriated funds for a program for a given year, it has exercised its power of the purse to direct that program to operate that year.

Nor does the existence of “unauthorized” appropriations mean that programs are continuing past their intended termination date. Many of the affected items are major longstanding federal agencies and programs that Congress almost certainly does not intend to shut down. They include veterans’ medical care, the National Institutes of Health (NIH), the Federal Bureau of Investigation (FBI), U.S. embassies abroad, numerous international humanitarian assistance programs, major housing assistance programs, NASA, and the National Weather Service, according to the most recent Congressional Budget Office (CBO) report on programs with expired funding authorizations.

In recent years, Congress has fallen further behind in renewing language authorizing appropriations for these and other important activities. This may partly reflect the current political polarization regarding fiscal issues generally, perhaps combined with a perception that renewing this language is a low priority.
The various new proposals to control “unauthorized” spending would mostly create more hurdles to enacting appropriations — further encumbering a process already beset by long delays. By making up-to-date funding authorizations a prerequisite for maintaining appropriations for important agencies and programs, these proposals would create more “must pass” measures and “funding cliffs” that members could use as leverage to force action on other matters and that may generally lead to more brinkmanship and impasses.

Renewal of language authorizing funding levels is a spurious indicator of whether Congress is giving adequate scrutiny to a program. But if Congress nonetheless believes it is an important tool for oversight, the most straightforward approach would be for its leaders to simply place a higher priority on enacting those measures, without resorting to elaborate new devices to try to force such action.

The Meaning of “Unauthorized” Appropriations

The concept of unauthorized appropriations comes from congressional rules designed to separate authorizing legislation, which establishes or modifies federal agencies, programs, or activities and sets out their purposes, authorities, and operating rules, from appropriations legislation, which sets annual funding levels for particular agencies, programs, and activities. To enforce this separation, a House rule prohibits appropriations bills from funding agencies or programs not already authorized by law.¹ (The Senate also has a rule on this subject, but it applies only in limited circumstances.) This is the most basic, and oldest, meaning of the term “unauthorized appropriations.”

One rationale often cited for separating authorization from appropriation is to prevent disputes over authorization legislation from delaying action on necessary annual appropriations.² In addition, the rule helps distribute responsibilities between the committees handling appropriations and those handling authorizing matters and helps ensure that both functions receive attention. The rule can be waived or simply not enforced, however, which is why appropriations for unauthorized programs can be enacted.

In recent decades, a second — and now more common — type of “unauthorized” appropriations has emerged due to the growing practice of adding special “authorization of appropriations” language to authorizing law. This practice began around the 1930s and became quite common by the 1970s.³ Such language typically states, “there are hereby authorized to be appropriated” either a

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¹ House Rule XXI, clause 2(a)(1). The Senate version is Senate Rule XVI, paragraph 1. The Senate rule applies only to amendments offered to appropriations bills while they are being considered by the full Senate, not to action by the Senate Appropriations Committee, while the House rule applies to bills as approved by committee as well as amendments during consideration by the full House. The Senate also exempts items authorized by bills passed by the Senate (even if not yet enacted) or included in the President’s budget. Both the House and Senate rules apply only to programs where funding levels are set each year in appropriations legislation; they do not apply to “mandatory” funding, which is normally provided within authorizing law.


specified amount of funding or “such sums as may be necessary” for particular programs and purposes in specific years. Appropriations that exceed the stated amounts or where the authorization of appropriations language has expired are considered “unauthorized.”

Authorization of appropriations language allows those who draft an authorizing law to state the desired amount of appropriations for a given year, probably in an attempt to influence the Appropriations Committees. It can also set a schedule for renewing the authorization of appropriations, which in turn can serve as a vehicle for enacting other changes to the authorizing law. However, expiration of an authorization of appropriations by itself has no effect on the validity of the authorizing law in which it appears, which sets the purposes and operating rules for the agency or program in question. Those rules almost always remain fully in effect, even if the appropriation has become “unauthorized.”

There is no general requirement in law or congressional rules for “authorization of appropriations” language. Where such language does not exist, the law establishing the agency or program is considered sufficient to authorize the annual appropriations. But once such language has been added to an authorizing law, any appropriations for the agency or program after that language expires are considered unauthorized. Since Congress has not regularly renewed much of this authorization of appropriations language, the volume of “unauthorized” appropriations has grown.

List Includes Key Agencies and Programs Surely Not Intended to Expire

Proponents of new restrictions often suggest that the existence of unauthorized appropriations means that agencies and programs are hanging on long after they were supposed to shut down. A video on Rep. McMorris Rodgers’ web page, for example, describes these programs as “zombies” that are “well past their expiration date yet Congress still lets them feast — on government cash.” In reality, the large majority of appropriations considered unauthorized are for longstanding, key parts of the government that Congress almost certainly does not intend to shut down.

The principal source of data on this subject is an annual CBO report listing programs that received appropriations in the current year even though their authorization of appropriations had expired. The 2016 report shows a total of $310 billion in such appropriations. Almost all of them

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7 Congressional Budget Office, “Unauthorized Appropriations and Expiring Authorizations,” January 15, 2016, https://www.cbo.gov/publication/51131. CBO is required by law to issue this report each January, primarily to assist Congress in identifying authorizing legislation up for renewal. The report, drawing on a CBO database of provisions of law that expressly authorize appropriations, lists those that expired before the current fiscal year. (A separate list identifies authorizations scheduled to expire during the current fiscal year.) The CBO report does not attempt to identify the much smaller group of appropriations that were enacted (in contravention of House rules) without a prior authorizing law.
fall on the non-defense side of the budget, since Congress had enacted the annual measure authorizing defense appropriations before the report was issued; they represent a little more than half of non-defense discretionary appropriations that year.

### Table 1

**Agencies or Programs With Largest Amounts of Expired Appropriations**

<table>
<thead>
<tr>
<th>Agency or Program</th>
<th>2016 appropriations with expired authorizations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Amount (in $ billions)</td>
</tr>
<tr>
<td>1 Dept. of Veterans Affairs, Veterans’ medical care</td>
<td>61.1</td>
</tr>
<tr>
<td>2 Dept. of Health and Human Services (HHS), National Institutes of Health</td>
<td>31.3</td>
</tr>
<tr>
<td>3 Dept. of Justice, Federal law enforcement &amp; legal activities</td>
<td>26.5</td>
</tr>
<tr>
<td>4 Dept. of Housing and Urban Development (HUD), Tenant-based Rental Assistance</td>
<td>19.6</td>
</tr>
<tr>
<td>5 National Aeronautics &amp; Space Administration (NASA)</td>
<td>18.6</td>
</tr>
<tr>
<td>6 International development, economic, &amp; disaster assistance*</td>
<td>18.3</td>
</tr>
<tr>
<td>7 State Dept., Administration of Foreign Affairs</td>
<td>11.3</td>
</tr>
<tr>
<td>8 HHS, Head Start</td>
<td>9.2</td>
</tr>
<tr>
<td>9 United States Coast Guard**</td>
<td>9.1</td>
</tr>
<tr>
<td>10 National Science Foundation</td>
<td>7.5</td>
</tr>
<tr>
<td>11 HUD, Public Housing Capital &amp; Operating Funds</td>
<td>6.4</td>
</tr>
<tr>
<td>12 International Assistance, Foreign Military Sales &amp; Financing</td>
<td>6.0</td>
</tr>
<tr>
<td>13 Dept. of Homeland Security, Transportation Security Administration</td>
<td>5.8</td>
</tr>
<tr>
<td>14 Dept. of Energy, Office of Science</td>
<td>5.4</td>
</tr>
<tr>
<td>15 National Oceanic &amp; Atmospheric Administration</td>
<td>4.7</td>
</tr>
<tr>
<td>16 Environmental Protection Agency</td>
<td>4.1</td>
</tr>
<tr>
<td>17 State Dept., International Organizations</td>
<td>3.9</td>
</tr>
<tr>
<td>18 HHS, Substance Abuse &amp; Mental Health Services</td>
<td>3.6</td>
</tr>
<tr>
<td>19 HHS, Low-Income Home Energy Assistance</td>
<td>3.4</td>
</tr>
<tr>
<td>20 State Dept., Migration &amp; Refugee Assistance</td>
<td>3.1</td>
</tr>
</tbody>
</table>

* Amount authorized by Public Law 99-83 in 1985; can’t be precisely matched to current appropriations structure
** Now reauthorized.  
Source: CBPP analysis of data from the Congressional Budget Office

Table 1 shows the 20 agencies or programs with the largest amounts of unauthorized appropriations, which together account for roughly four-fifths of the $310 billion total. The largest such program is veterans’ medical care, for which CBO lists the entire $61 billion discretionary appropriation as unauthorized. As the box at the end of this paper explains, though, there’s some question whether this appropriation should actually be considered unauthorized — which illustrates the sometimes uncertain and subjective nature of the authorization of appropriations concept.
Other large agencies or programs with most or all of their 2016 appropriations listed as unauthorized include NIH, virtually all Justice Department law enforcement agencies (including the FBI and the federal prison system), tenant-based housing assistance, NASA, the State Department “administration of foreign affairs” accounts (which fund U.S. embassies and consulates abroad and embassy security, among other things), Head Start, the Transportation Security Administration, and the National Oceanic and Atmospheric Administration (which includes the National Weather Service).

Few, if any, of the agencies and programs accounting for the vast majority of unauthorized appropriations fit the description of “zombies well past their expiration date.” It’s hard to believe that Congress intended the FBI, NIH, NASA, embassies abroad, and the Weather Service to expire and shut down — even if it failed to meet the schedule it set for itself for renewing their authorizations of appropriations. If Congress did intend for them to terminate, it presumably would have used clear language saying so.

**Claims That Unauthorized Appropriations Circumvent Congress Are Inaccurate**

While some describe “unauthorized” appropriations as allowing agencies and programs to operate without authority from Congress and circumvent the congressional power of the purse, that description is not accurate.

First, every “unauthorized” appropriation is nevertheless an appropriation — that is, a legal directive from Congress to the executive branch to spend a specific amount of money for specified purposes during a particular year or years. The appropriations process is the primary means by which Congress regularly reviews the wide range of programs and activities requiring annual funding. Through that process, Congress decides each year which programs should continue and sets the funding levels for each. In short, if a program has an appropriation, Congress has exercised its power of the purse to direct that program to operate that year.

Further, even where the authorization of appropriations has expired, extensive authorizing law almost always remains fully in place. As previously discussed, that language typically spells out an agency’s functions, powers, and limitations and sets rules for how specific programs must operate, and agencies are not permitted to contravene that language. Expiration of the authorization of appropriations language in no way negates or suspends the statutory program requirements. In the minority of situations where there is no separate authorizing law, the annual appropriations bill often provides similar rules and guidance.10

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9. For example, in introducing her legislation Rep. McMorris Rodgers characterized unauthorized appropriations as “spending on government programs that have not been authorized by the people’s representatives,” with the result that “the American people are prevented from exercising their power of the purse.” See [http://mcmorris.house.gov/usa-act-introduced/](http://mcmorris.house.gov/usa-act-introduced/).

10. Our review of the lists of unauthorized appropriations included in the House Appropriations Committee reports accompanying 2016 appropriations bills suggests that relatively few programs fall into this category and that a number of appropriations bills contain none at all. (House rules require committee reports on appropriations bills to contain such lists.)
Fundamentally, the requirement for authorization of appropriations is an internal congressional matter, aimed primarily at the division of legislative responsibilities between authorizing committees and appropriations committees. The fact that an agency or program’s authorization of appropriations has expired neither grants the executive branch additional discretion nor frees it from any restrictions. The agency’s operations are still governed by annual appropriations legislation and any ongoing authorizing law.

**Congress Employs Other Oversight Tools**

The large number of expired authorizations of appropriations are not necessarily a sign that Congress is failing in its oversight responsibilities. Developing and passing legislation modifying and extending an agency’s authorization is only one of a range of oversight tools available to Congress. Others include oversight hearings, studies and reports by agencies like the Government Accountability Office, and investigations by committee staff.

In addition, Congress often enacts legislation dealing with program rules and agency operations without including authorizations of appropriations. Veterans’ health care is one example. Congress has conducted extensive oversight and enacted important changes to that program over the past several years, even though it has not renewed the authorization of appropriations that expired 18 years ago. Another example is the State Department authorization bill (S. 1635), which the Senate passed in April and a House committee approved (in modified form) in May; both versions make extensive changes to authorizing law, but neither extends any of the long-expired authorization of appropriations language. Similarly, the House and Senate recently unanimously passed H.R. 3700, a comprehensive update of the authorizing law governing public housing and housing assistance vouchers — clearly indicating that Congress intends these programs to continue. However this measure, too, does not specifically renew the authorization of appropriations language.

**Further Restrictions Would Likely Do More Harm than Good**

Rep. Cathy McMorris Rodgers has introduced a bill (H.R. 4730) to impose automatic spending cuts on “unauthorized” programs, which it defines as anything listed in the annual CBO report on programs with expired authorizations of appropriations. As discussed earlier, for most — if not all — of these listed programs, all that has expired is the authorization of funding levels, not the underlying law that creates and governs the programs.

Because of its reliance on the CBO report, the McMorris Rodgers bill would potentially apply automatic cuts to all of the items in Table 1 — including veterans’ medical care, NIH, most of the Justice Department, and major housing assistance programs — as well as many other items. In the first year after expiration, funding for all such programs would be automatically cut 10 percent below the year before; in each of the next two years their funding would be cut by an additional 5 percent; and in the fourth year the program would be terminated. (Programs with authorizations of appropriations listed by CBO as expired prior to 2016 would be treated as expiring in 2016.)

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11 The bill’s reliance on CBO reports would raise constitutional issues, based on the Supreme Court’s 1986 decision in *Bowsher v. Synar*, which held it improper to vest that type of decisionmaking authority in a legislative branch officer such as the director of CBO. While use of the *existing* CBO report would be permissible on the theory that it had been incorporated by reference into, or ratified by, the McMorris Rogers legislation, use of reports issued after the legislation was enacted would be problematic.
reductions would be restored if Congress reauthorized funding for the program. In addition, all programs funded through annual appropriations would be put on a three-year authorization cycle and would terminate if not reauthorized.

A second group of proposals aim at stricter enforcement of the existing House rule against unauthorized appropriations — a rule now routinely waived to allow unauthorized appropriations to proceed.12 A set of wide-ranging recommendations from the Republican Study Committee, for example, would prohibit waiving that rule.13 Rep. Tom McClintock has made a similar proposal, along with an alternative that would have the House Republican Caucus decide whether to waive the rule in particular cases by voting to instruct Republican members of the Rules Committee how to respond to particular waiver requests.14 As an intermediate step, Rep. McClintock has also suggested prohibiting funding increases for programs with unauthorized appropriations.15

A concern about all these proposals is that Congress is already having serious trouble enacting appropriations in a timely manner; creating more hurdles would likely worsen the delays and difficulties. Also, making up-to-date authorizations of funding levels a prerequisite to maintaining appropriations for important agencies and programs would create more “must pass” measures that members could use as leverage to force action on other matters and that could lead to more brinkmanship and impasses.

Proposals to limit waiving the House rule against unauthorized appropriations seem impractical as well as undesirable. A blanket prohibition on waiving the rule would leave large pieces of almost all the annual appropriations bills vulnerable to being struck from the bill if even one member of the House objects to them as unauthorized, even in cases where Congress almost surely intends to continue funding for the items. In addition to the mostly non-defense programs listed in the CBO report, almost all defense appropriations would likely be unauthorized at the time the House is considering the defense bill, since the annual defense authorization measure is rarely enacted before the appropriations bill is taken up. Therefore, without a waiver, most defense provisions would also be subject to elimination by any member.

If the objective is simply to make sure the House has an opportunity to vote on whether to appropriate funds for a program that lacks an up-to-date authorization for its funding level, that opportunity already exists under the normal House procedure for considering appropriations bills. A member concerned that a particular appropriation lacks a current funding authorization can simply

12 Such waivers are normally provided in the House Rules Committee resolution that sets terms for debate on each bill. Unless the rule has been waived through this procedure, any member of the House can make an objection (raise a “point of order”) to an unauthorized appropriation while a bill or amendment is being considered by the House. If the Chair agrees that the provision is unauthorized, it is automatically removed from the legislation.


offer an amendment to eliminate the funding from the appropriations bill, citing the lack of authorization as an argument for doing so. No new rules or procedures are needed.

If Congress wishes to place more emphasis on legislation authorizing funding levels, the most straightforward solution would be for its leaders to make that type of legislation a high priority, instead of Congress enacting new mechanisms threatening cuts to important agencies and programs to try to force itself to do so.
The Ambiguous Meaning of “Unauthorized” Appropriations: Some Examples

**Veterans’ medical care** is the largest single item on CBO’s list of “unauthorized” appropriations. Its entire $61.1 billion 2016 appropriation is listed as unauthorized because an authorization of appropriations enacted in 1996 expired in 1999. However, a large body of authorizing law remains in effect governing operation of the Department of Veterans Affairs (VA) health system and veterans’ eligibility for care. Congress has regularly revised that authorizing law, making major revisions in 2014 in response to reports of long waits for care at some VA health facilities and at least four further sets of amendments.

Moreover, the House and Senate Veterans’ Affairs Committees apparently consider the expired 1996 authorization of appropriations a one-time measure (as CBO notes in its report) and have no plans to extend it. That legislation overhauled the eligibility rules for veterans’ medical care, and Congress added a specific authorization level for the next two years — reportedly to temporarily cap appropriations out of concern that the new rules would raise costs. Previously, the general law establishing the VA health system would have been considered sufficient authorization of appropriations, and the committees apparently intended to rely on this general authorizing law after the two-year authorization of appropriations expired.

Thus, the House and Senate committees in charge of veterans’ affairs authorizing legislation evidently don’t consider appropriations for veterans’ health care programs to be unauthorized. Nevertheless, veterans’ health care appears on the CBO list — and accounts for roughly one fifth of the 2016 unauthorized total — because CBO’s statutory mandate is simply to identify specific authorizations of expirations that have expired. This situation highlights the ambiguous nature of the authorization of appropriations concept.

Another major item on the CBO list is the **National Institutes of Health (NIH)**, where CBO shows the entire $31.3 billion appropriation for 2016 as unauthorized due to the 2010 expiration of authorization of appropriations language enacted in 2006. However, NIH is still governed by extensive authorizing law that does not expire and that details the agency’s missions, organization, priority-setting mechanisms, and procedures for review of grant proposals, along with numerous specific programs and activities.

Before 2006, only parts of NIH had specific authorizations of appropriations, with appropriations for the rest authorized by the ongoing law that establishes and governs NIH. The 2006 reauthorization replaced these individual authorizations with one NIH-wide authorization of appropriations covering 2007-2009. Thus, all NIH appropriations became “unauthorized” when that language expired in 2010. The House passed an NIH reauthorization measure last year (H.R. 6) which is now awaiting Senate action, although it authorizes appropriations for only three years. Congress may be reluctant to authorize specific amounts for NIH further into the future, given uncertainties about what levels might be considered realistic several years later, so even if the pending legislation is enacted NIH may be back on the “unauthorized” list before too long.

NIH receives a good deal of attention from Congress through the annual appropriations process. In addition, Congress has enacted several amendments to NIH authorizing law since 2006, including legislation (actually enacted as part of the 2012 appropriations measure) creating a new NIH center to help translate research advances into new drugs and other therapies. In short, the extensive ongoing authorizing law that governs NIH continues to be updated.

A third large item on CBO’s list is the **State Department’s Administration of Foreign Affairs** budget category, which includes diplomatic and consular programs, embassy security, and education and cultural exchange programs. Its last specific authorization of appropriations covered only 2003. Since then, Congress has enacted numerous measures dealing with foreign affairs but has not extended that authorization.

Earlier this year, the Senate passed legislation (S. 1635) extensively revising State Department authorities and operating rules, which the Senate committee chairman referred to as the first State Department authorization bill in 14 years. A House committee has approved a companion measure. However, neither version includes any specific authorizations of appropriations, so the State Department would remain on the “unauthorized appropriations” list. This suggests that Congress may not currently consider renewing funding authorizations a high priority.