

CBO TESTIMONY

**Statement of
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Director**

Unauthorized Appropriations and Senate Resolution 173

**before the
Committee on Rules and Administration
United States Senate**

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Mr. Chairman and Members of the Committee, thank you for the opportunity to testify on Senate Resolution 173, which would amend the standing rules of the Senate to strengthen restrictions against certain appropriations that are deemed “unauthorized.”

S. Res. 173 would significantly broaden the definition of unauthorized appropriations to include certain earmarks in appropriation bills. The Senate would be barred from considering unauthorized appropriations in such bills, amendments to those bills, or conference reports on those bills. Further, any points of order raised under the new restrictions could be waived only by a three-fifths vote of the Senate. For any appropriation stricken under those procedures, the total amounts appropriated and the applicable spending allocations made under the budget resolution would be reduced accordingly.

My testimony provides background on authorizations and appropriations in the legislative process, discusses the Congressional Budget Office’s (CBO’s) annual report on unauthorized appropriations, and comments on the definition of an “unauthorized appropriation” assumed in the resolution.

Background

Authorizations define the purposes for which appropriated money may be obligated and spent. Some authorization laws merge policy and funding decisions, combining an authorization and indefinite appropriation in the same legislation—direct, or mandatory, spending laws. Roughly half of all federal spending now goes to programs whose authorization also provides funding for the program, including most major entitlement programs.

The remaining federal programs (including those for national defense) continue to require annual funding through the appropriation process. For discretionary spending and some appropriated entitlements, authorizations are the first component of the long-standing two-part legislative practice of distinguishing between the laws that establish substantive federal entities or programs and the laws that fund them. Once the authorizations are in place, funding for the agencies, programs, or activities authorized is then provided separately in annual appropriation laws.

There are two kinds of authorization laws. The first type is the “organic,” or “enabling,” statute. Those laws include authorizations that create governmental entities—setting forth their organizational structure, duties, and functions—as well as authorizations that establish federal programs. Those enabling statutes may contain language that terminates the authorities after some number of years, but more typically they are permanent law.

Authorizations may also refer to authorizations of appropriations, which are intended as a guide to the appropriate level of funding necessary to carry out the

authorized program or activity. Such authorizations of appropriations may include a specific dollar amount (definite authorizations) or an indefinite amount (“such sums as are necessary”). This second type of authorization law may be permanent or temporary, covering only a specified number of fiscal years.

Senate and House rules dating from the 19th century institutionalize the distinction between—and the proper sequencing of—authorization and appropriation bills. Currently, House Rule 21 prohibits appropriations in a general appropriation bill (or in an amendment to it) for an entity or program that is not previously authorized. Senate Rule 16 is more narrowly drawn, prohibiting only an amendment to a general appropriation bill that increases or adds an appropriation unless it carries out the provisions of an existing law or treaty. Both rules subject the legislation containing the unauthorized appropriation to a point of order. In the Senate, a point of order under Rule 16 cannot be waived as it can in the House, but in either case, if no point of order is raised, an unauthorized appropriation may proceed through the legislative process.

CBO’s Annual Report on Unauthorized Appropriations

Until the mid-1950s, most authorization laws were permanent and rarely included provisions that authorized appropriations for a specific amount or period of time. In an effort to improve oversight by forcing periodic review of government programs, the Congress began to include temporary authorizations of appropriations in authorizations of new programs—and to insert such provisions in the authorizations for many existing programs.

The trend toward periodic authorizations accelerated over the ensuing decades. However, the reauthorization of expired or expiring authorizations of appropriations sometimes was delayed—in some cases for extended periods—which resulted in a number of appropriations being unauthorized. By 1985, mounting concern over the perceived failure of the reauthorization process led the Congress to amend the Congressional Budget Act of 1974 to require CBO to report by January 15 of each year on the programs and activities that are funded without an authorization of appropriations or for which an existing authorization of appropriations is due to expire. The law requires CBO to list all programs and activities funded during a fiscal year for which an authorization of appropriations has not been enacted for that fiscal year. CBO has interpreted the law to require including a program if the program’s authorization of appropriations expired in a year prior to the year of the most recent appropriation for that program. CBO focuses on the specific authorization of appropriations; CBO does not consider the broader authority that may exist in an enabling statute.

Table 1.

Appropriations for Which the Specific Authorization Has Expired

(In billions of dollars)

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Unauthorized Appropriations	93.9	n.a.	89.4	115.8	102.1	120.9	91.5	112.3	n.a.

Source: Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations* (January 1995-2003).

Notes: n.a. = not available.

For 1996 and 2003, unauthorized amounts could not be determined because temporary continuing appropriations covering most or all of the unauthorized programs were in effect when CBO issued its report.

Unauthorized appropriations are sometimes difficult to pinpoint because the structure of authorization and appropriation laws often differs. The total amounts are rough approximations and may be understated because funding for some unauthorized programs could not be determined from the appropriation law or accompanying reports. In such cases, CBO has not included those unauthorized amounts in arriving at totals.

Under that definition of “unauthorized,” the total amount of unauthorized appropriations reported by CBO since 1995 has ranged from about \$90 billion to roughly \$120 billion annually (*see Table 1*).¹ Those amounts principally cover nondefense discretionary programs and, on average, have accounted for roughly one-third of total nondefense discretionary appropriations over that period. For 2003, some of the major entities, programs, or activities funded even though their authorizations of appropriations expired include the National Institutes of Health, the National Aeronautics and Space Administration, foreign aid, certain housing programs, violent offender and crime prevention programs, and several environmental research and water pollution control programs.

In the other direction, during the last session of Congress, lawmakers succeeded in renewing several major authorizations of appropriations that had lapsed in earlier years. Those reauthorizations include ones for the Department of Justice (whose authorization had expired in 1980),² the State Department (2001), the Coast Guard

1. See CBO’s reports titled *Unauthorized Appropriations and Expiring Authorizations*, released each year in January.

2. The 21st Century Department of Justice Appropriations Authorization Act (Public Law 107-273) was the first freestanding authorization law enacted for certain of the Justice Department’s activities since 1980. In most previous years, authorities under the 1980 Justice Department authorization law (P.L. 96-132) were extended one year at a time in annual appropriation laws.

(1999), the Customs Service (1992), the Securities and Exchange Commission (1999), and the National Science Foundation (2000). In addition, the Congress enacted laws extending major authorizations that were scheduled to expire at the end of 2002, such as those for the Department of Defense and intelligence agencies (which are reauthorized annually), various agriculture programs, the Food Stamp program (an entitlement program), and funding for international security and military assistance.

Concern over unauthorized appropriations arises for several reasons. In general, appropriating funds for unauthorized programs is at odds with the long-standing Congressional practice that federal activities should be established in law before appropriations to pay for those activities are made. Further, some Members of Congress and others believe that Congressional oversight of programs for which the underlying authorizations have expired is less effective or inadequate.

Although appropriations that are made available for entities or programs after their authorizations have expired are generally considered to be “unauthorized,” for most such entities or programs, there is an underlying law—the organic, or enabling, statute—that governs them and typically is permanent. That permanent law continues to set the policies and guidelines under which appropriations are to be obligated, even if provisions that authorize appropriations have expired. In addition, Congressional committees with jurisdiction over expired authorizations often conduct extensive oversight hearings and report legislation extending authorizations, even if the legislation falls short of enactment.

Earmarks and Senate Resolution 173

One aspect of S. Res. 173 that deserves highlighting is the inclusion of certain earmarks within the definition of “unauthorized appropriation.” Most often, earmarking is the allocation of a portion of a lump-sum appropriation to a specific purpose, usually a purpose within the general authority of the entity or program being funded. Earmarks may be set forth in an appropriation bill or in the conference or committee reports accompanying the bill. Some observers are concerned that the number and dollar amount of those earmarks have become excessive in recent years and that the purposes for which they are specified are increasingly narrow special interests.

The resolution defines any earmark as an unauthorized appropriation if the earmark is “restricted or directed to, or for the benefit of, an identifiable person, program, project, entity or jurisdiction” unless it is “described or clearly identified in a law that specifically provides” for it. In addition, any such earmark contained in a committee report or the joint explanatory statement in a conference report would make a motion to proceed with the legislation subject to a point of order.

That definition could raise certain practical issues. For instance, for agencies whose appropriations are reauthorized infrequently, such as farm or transportation agencies, lawmakers would have fewer opportunities to authorize an identifiable project in order to comply with the new rule. For agencies with a permanent, indefinite authorization of appropriations, earmarks under a lump-sum appropriation may provide the only opportunity to specify the purposes for which funds may be spent, but such earmarks might meet the criteria that would subject them to a point of order.

The resolution also raises a broader issue. The Congress uses earmarks to set funding priorities and direct executive branch activities. New procedures to constrain that practice could weaken lawmakers' ability to set priorities through annual appropriations, thereby strengthening the power of the executive branch over the use of appropriated funds.

Conclusion

Senate Resolution 173 addresses an important concern. Relatively large amounts of unauthorized appropriations and the use of earmarking for activities not specifically authorized by law are at odds with long-standing Congressional practices reflected in the rules of the House and Senate. However, flexibility in setting funding priorities through annual appropriations is an important means by which the Congress exercises its constitutional budgetary responsibilities. In fashioning procedures, such as S. Res. 173, that would tighten the control of unauthorized appropriations or earmarks, lawmakers may wish to be careful to protect their ability to clearly set forth Congressional spending directives.