

# NOTES

## DEFENSE LAWMAKING

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*As James Madison famously wrote, the power of the purse is “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” But the Constitution does not outline specific procedures for how Congress should use that weapon. Over time, Congress has developed a set of norms—the two-step authorization-appropriations process—to effectively execute its power under the Appropriations Clause. The two-step process was born out of a need to limit appropriations “riders” and maximize congressional oversight over an increasingly complex federal budget.*

*The two-step process has broken down with Congress’s failure to reenact temporary authorization bills on schedule. However, one anomalous bill stands as a stark exception to this breakdown—the annual National Defense Authorization Act (NDAA), which authorizes programs for the Department of Defense. Indeed, despite Congress’s growing reputation for inaction and gridlock, the NDAA is routinely commended as “one of the last remaining relics of bipartisan consensus” and “perhaps the last bill, the last legislative process, that still actually works.”*

*This Note sheds light on the process that Congress has used to enact the NDAA on an annual basis for the last fifty-nine years. It argues that the breakdown of the authorization-appropriations process in nondefense policy areas weakens congressional oversight and proposes that Congress use the NDAA as a model to reignite the reauthorization process for other bills. Otherwise, the appropriations process may cease to provide as “complete and effectual” an oversight weapon as Congress can and should possess.*

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## INTRODUCTION

Since the Founding, lawmakers have recognized the importance of temporary spending legislation as a key element of congressional oversight over the executive branch.<sup>1</sup> Over time, Congress developed a set of norms—a two-step process known as the authorization-appropriations process—in order to distribute responsibility for crafting temporary spending bills, encourage specialization among congressional committees, and boost efficiency.<sup>2</sup> The authorization-appropriations process requires that Congress first authorize temporary spending levels for federal programs and then appropriate temporary funds for those programs.<sup>3</sup> This two-step process is commonly presented as the primary model that the legislative branch uses to divide oversight responsibilities between “authorizing” committees and “appropriations” committees.<sup>4</sup>

In practice, however, this two-step model has broken down. Increasing inertia has led Congress to allow many temporarily authorized programs to expire without any impact on appropriations.<sup>5</sup> Consequently, the appropriations committees, with their limited resources and enormous responsibility over the federal budget, hold considerable policymaking power at the expense of overall congressional oversight.<sup>6</sup>

One anomalous bill has withstood the overarching forces that have eroded the two-step process. The annual authorization bill for defense spending stands as a striking exception to the trend away from authorizing spending in advance of appropriations bills.<sup>7</sup> For each of the last fifty-nine years, Congress has passed an annual bill to authorize funding for defense programs.<sup>8</sup> In legal literature and most press accounts, the National Defense Authorization Act (NDAA) is considered “must pass,” despite

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1. See *infra* section I.A.1.

2. See Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 *Cath. U. L. Rev.* 51, 52–59 (1979) [hereinafter Fisher, *Authorization-Appropriation Process*] (outlining the history of the authorization-appropriations process).

3. Bill Heniff Jr., *Cong. Research Serv., RS20371, Overview of the Authorization-Appropriations Process 1* (2012).

4. *Id.*

5. See *infra* section II.A.

6. See *infra* section II.A.2 (explaining the decline of authorization bills).

7. See David Hawkings, *Which of These Bills Is Not Like the Others? The Defense Budget*, Roll Call (Sept. 18, 2017), <https://www.rollcall.com/news/hawkings/defense-budget-congress-authorization> [https://perma.cc/JZE4-K26K].

8. Joe Gould, *Armed Services Committee Chairmen Resolve to Narrow Defense Bill in 2020*, *Def. News* (Dec. 30, 2019), <https://www.defensenews.com/congress/2019/12/30/hold-armed-services-chairmen-resolve-narrower-defense-bill-in-2020> [https://perma.cc/VMJ9-EKYQ].

clear evidence that Congress neglects to consider other authorization bills as prerequisites for appropriations.<sup>9</sup>

This Note examines the legislative process surrounding the NDAA and proposes ways that it can serve as a model for Congress to restore the authorization-appropriations process in nondefense policy areas. Despite its relevance to today's political climate, the subject of intrabranched constitutional norms is "surprisingly understudied."<sup>10</sup> This Note adds to the discourse by drawing upon primary source interviews with individuals who have worked on the NDAA and other authorization bills, including a U.S. Senator, Republican and Democratic congressional staff, a former White House official, and a senior lobbyist.

Part I discusses the history of the authorization-appropriations process, how it should work in theory, and why it is important to the separation of powers. Part II describes the recent collapse of the process and introduces the NDAA, illuminating the political and procedural mechanisms that ensure its successful passage every year. Finally, Part III proposes several solutions to restore the fading authorization-appropriations process for bills other than the NDAA, arguing that authorizing committees should use the NDAA as a model to enact regular authorizing bills in their legislative jurisdictions. Doing so would strengthen congressional oversight, policymaking, and transparency.

#### I. HISTORY OF THE AUTHORIZATION-APPROPRIATIONS PROCESS

The history and rationale behind the authorization-appropriations process are essential to understanding the role the process plays in balancing power between the legislative and executive branches. Part I discusses the development of the authorization-appropriations process and its benefits for Congress. This discussion underscores the harm of the process's decline, as Part II explains, and the value of restoring it, as Part III proposes.

Section I.A outlines the history of the two-step process. Section I.A.1 discusses the constitutional origins of Congress's "power of the purse" and the norms that Congress has developed to exercise that power. Section

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9. See, e.g., Sheryl Gay Stolberg, Senate Passes \$700 Billion Pentagon Bill, More Money Than Trump Sought, *N.Y. Times* (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/us/politics/senate-pentagon-spending-bill.html> (on file with the *Columbia Law Review*) (describing the NDAA as "one of the few must-pass measures to go through Congress").

10. David E. Pozen, Self-Help and the Separation of Powers, 124 *Yale L.J.* 2, 34 n.136 (2014). Scholars have drawn attention to the general importance of the appropriations process as an oversight tool. See, e.g., Jack M. Beermann, Congressional Administration, 43 *San Diego L. Rev.* 61, 84–90 (2006) (describing how Congress uses the appropriations process to supervise federal agencies). Others have thoughtfully considered how courts should treat recent, high-profile disputes over appropriations law. See, e.g., Matthew B. Lawrence, Disappropriation, 120 *Colum. L. Rev.* 1, 74–86 (2020) (proposing a default rule for courts to limit "disappropriations," or instances of unfunded appropriated entitlements).

I.A.2 explains how Congress devised a particular set of norms—the authorization-appropriations process—to ensure the authorization of federal spending levels before the enactment of appropriations bills. Section I.A.3 explains the temporary nature of authorization bills and their perceived advantages. Section I.A.4 provides an overview of the process in its current form, using an example from 2017. Finally, section I.A.5 discusses Congress’s attempts to codify the authorization-appropriations process in rules and statutes.

With this overview as a backdrop, section I.B explains the value that the authorization-appropriations process adds to congressional oversight and policymaking. Specifically, the section discusses how the authorization-appropriations process maximizes the value of congressional committees (section I.B.1), increases oversight over the executive branch (section I.B.2), and promotes transparency (section I.B.3).

A. *Legal Provisions for the Authorization and Appropriation of Federal Funds*

There is no constitutional requirement that authorization bills precede appropriations bills.<sup>11</sup> The two-step process originated in the mid-nineteenth century when Congress sought to make the appropriations process more efficient and increase oversight over the growing federal budget.<sup>12</sup> Over time, Congress adopted rules and enacted statutes to codify the authorization-appropriations process.<sup>13</sup> However, these formal restrictions have no practical effect.<sup>14</sup>

1. *Constitutional Origins of the Spending Power.* — The Constitution grants Congress the exclusive authority to appropriate funding for federal government activities.<sup>15</sup> The Framers viewed this exclusive “power of the purse” as essential to the nation’s system of checks and balances.<sup>16</sup> In addition, the Framers sought to ensure that Congress exercised the spending

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11. See U.S. Const. art. I, § 9, cl. 7 (providing that “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law” but not specifying any requirement that authorization bills precede appropriations bills).

12. See *infra* notes 22–25 and accompanying text.

13. See *infra* section I.A.5.

14. See *infra* section I.A.5.

15. U.S. Const. art. I, § 9, cl. 7; see also *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (noting that the Appropriations Clause “means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” (internal quotation marks omitted) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937))).

16. James Madison famously wrote that the power of the purse was the “most complete and effectual weapon with which any constitution can arm” the people’s representatives against the executive. *The Federalist* No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

power in a way that promoted meaningful debate and robust oversight over the executive branch.<sup>17</sup>

Despite the Framers' clear interest in Congress's exclusive exercise of the spending power, the Constitution says very little with respect to Congress's obligations in this area.<sup>18</sup> As a result, the political branches have developed constitutional norms—or what Professor David Pozen calls “separation-of-powers conventions”—that govern the budget process.<sup>19</sup> For example, Congress ensures that executive branch agencies have sufficient funds to function, and the executive branch interprets congressional reports that accompany appropriations bills as law, despite their lack of force.<sup>20</sup> The two-step authorization-appropriations process, described in the following section, serves as an additional example of a separation-of-powers convention arising out of Congress's power of the purse.<sup>21</sup>

2. *History of the Authorization-Appropriations Process.* — Congress developed intrabranched procedures in response to challenges that arose as the federal budget expanded over time. The authorization process initially developed out of concerns about efficiency. By 1834, both the House and Senate had developed systems for sending appropriations bills through

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17. The Constitution's two-year limitation on army appropriations presents an early example of how the Framers viewed temporary measures as a useful oversight tool. See U.S. Const. art. I, § 8, cl. 12 (“The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . .”). The two-year limitation represented a compromise between proponents and opponents of a standing army; it would enable Congress to fund a standing army while forcing biennial, vigorous debate on the issue. Lucas Issacharoff & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 U. Chi. L. Rev. 169, 186–88 (2016); see also *The Federalist* No. 26, at 171 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the two-year limitation would require Congress to regularly “deliberate upon the propriety of keeping a military force on foot . . . and to declare their sense of the matter by a formal vote in the face of their constituents”). Moreover, Congress would not be able to delegate army oversight to the executive branch. See *id.* (observing that the two-year limitation meant that Congress was “not at liberty to vest in the executive department permanent funds for the support of an army” (emphasis omitted)). The temporal limitation thus strengthened Congress's power over the President while requiring, in the interest of the public, that lawmakers remain engaged enough to vote on the record as often as elections to the House of Representatives occurred. See *id.*

18. See *supra* note 15 and accompanying text.

19. See Pozen, *supra* note 10, at 34–39 (describing “separation-of-powers conventions” as “constitutional conventions serv[ing] to organize relations and promote cooperation among the coordinate branches,” including “those non-judicially-enforceable norms, such as Senate filibuster norms, that regulate behavior within a certain institution of government . . . and substantially shape the way that institution interacts with another branch”).

20. *Id.* at 35.

21. See *id.* (noting that “the framework statutes that govern the various phases of the [federal] budget's preparation have been characterized as ‘codifying norms and practices that first developed informally’” (quoting Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Legal Issues 717, 732 (2005))).

standing committees for consideration.<sup>22</sup> But because appropriations bills were necessary to continue funding federal programs, members of Congress frequently attached controversial legislative items or “riders” to the bills to increase their chances of becoming law.<sup>23</sup> These riders delayed the passage of appropriations bills and risked jeopardizing the timely allocation of funds to government programs.<sup>24</sup> To prevent riders and other abuses of the must-pass nature of appropriations bills, the House and Senate adopted rules requiring prior legislative authorization for the enactment of appropriations.<sup>25</sup>

Oversight concerns led to the eventual adoption of the modern two-step authorization-appropriations process. Before 1921, Congress exercised its spending power on an ad hoc basis by receiving individual requests for appropriations from federal agencies.<sup>26</sup> Congress had no way of accounting for total revenues and spending, and the executive branch faced little scrutiny outside of challenges to individual agency requests.<sup>27</sup>

The burdens of the Civil War and World War I, combined with the growing complexity of the federal government, prompted Congress to establish additional mechanisms for reviewing federal spending in order to limit duplicative and wasteful programs.<sup>28</sup> Although House and Senate rules requiring authorizations before appropriations already existed, the authorizing committees began to craft legislative provisions that authorized specific appropriations levels beginning in the 1920s.<sup>29</sup> This practice enabled the committees to impose “procedural ceilings” on subsequent appropriations, thereby exerting greater influence over the funding process.<sup>30</sup>

3. *The Rise of Temporary Authorizations.* — After World War II, Congress took further steps to strengthen its oversight by authorizing federal programs on temporary bases.<sup>31</sup> Congress first subjected military and

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22. See Fisher, Authorization-Appropriation Process, *supra* note 2, at 54 (noting, for example, that the House recognized Ways and Means as a standing committee in 1802 and the Senate recognized the Committee on Finance as a standing committee in 1816).

23. See *id.*

24. See *id.*

25. U.S. Gov’t Accountability Office, GAO-16-464SP, Principles of Federal Appropriations Law ch. 2, at 12 (4th ed. 2016) [hereinafter GAO Red Book]; see also Fisher, Authorization-Appropriation Process, *supra* note 2, at 55.

26. Nat’l Fed’n of Fed. Emps. v. Cheney, 883 F.2d 1038, 1045 (D.C. Cir. 1989).

27. *Id.*

28. *Id.*; see also GAO Red Book, *supra* note 25, at 11–13.

29. Jessica Tollestrup, Cong. Research Serv., R43862, Changes in the Purposes and Frequency of Authorizations of Appropriations 3 (2015) [hereinafter Tollestrup, Changes].

30. *Id.*

31. *Id.* at 4. In addition, Congress would later make changes to the budget process that would allow it to “systematically consider the total federal budget and determine priorities for allocating budget resources.” GAO Red Book, *supra* note 25, at 14.

foreign assistance programs to annual authorizations.<sup>32</sup> During debate over a foreign aid authorization bill, one Congressman articulated the importance of limiting authorizations to one year for oversight purposes:

This legislation annually is the only vehicle that presents itself for expression of the views of the House on various foreign policy matters that otherwise would not come before us. The only other vehicle that is available is the offering of restrictions on the appropriations bill and that is a somewhat imperfect device as we all know. If we are going to [extend the authorization beyond one year], we have no chance to express our views on the affairs that are occurring in Africa [or] what may occur in the Middle East.<sup>33</sup>

Temporary authorizations also forced Congress to devote attention to expiring federal programs. Thus, congressional committees effectively set up schedules for revisiting important issues.<sup>34</sup> At the same time, looming authorizations incentivized agencies to carefully consider the concerns of the authorizing committees.<sup>35</sup> From 1950 to 1980, the number of provisions authorizing appropriations on an annual or multiyear basis grew substantially.<sup>36</sup>

As the federal government grew even more complex, Congress shifted many annual authorizations to multiyear schedules. Having to pass numerous annual authorizations could delay the appropriations process,<sup>37</sup> while multiyear authorizations presented the benefits of longer-term planning and allowing for widespread policy changes to federal programs.<sup>38</sup> Recent years have demonstrated a continued trend away from annual authorization bills in favor of multiyear authorization bills.<sup>39</sup> But overall, the vast majority of authorization acts that specify spending levels are still temporary.<sup>40</sup>

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32. Louis Fisher, *Annual Authorizations: Durable Roadblocks to Biennial Budgeting*, *Pub. Budgeting & Fin.*, Mar. 1983, at 23, 27 [hereinafter Fisher, *Durable Roadblocks*].

33. 125 Cong. Rec. 7341 (1979) (statement of Rep. Bauman) (supporting an amendment that would maintain the foreign economic assistance authorization on an annual schedule instead of a two-year schedule). Other reasons have been cited for annual authorizations, including the need to closely oversee new agencies or rapidly changing conditions, and the political benefits of constituency–district interests. See generally Fisher, *Durable Roadblocks*, *supra* note 32 (presenting various arguments for and against annual authorizations).

34. E. Scott Adler & John D. Wilkerson, *Congress and the Politics of Problem Solving* 84 (2012).

35. *Id.*

36. Fisher, *Durable Roadblocks*, *supra* note 32, at 27; see also Tollestrup, *Changes*, *supra* note 29, at 5 (describing the growth of annual reauthorizations in the two decades after 1950).

37. Fisher, *Durable Roadblocks*, *supra* note 32, at 24.

38. Tollestrup, *Changes*, *supra* note 29, at 5.

39. *Id.* at 19.

40. Bill Heniff Jr. & Robert Keith, *Legislating in Congress: Federal Budget Process*, *in* *Congressional Authorizations and Appropriations: How Congress Exercises the Power of*

4. *The Current Authorization-Appropriations Process.* — In theory, the modern process for enacting spending bills involves two steps.<sup>41</sup> First, Congress must pass “authorizing legislation” that “authorizes the enactment of appropriations of specific amounts for specific programs and activities.”<sup>42</sup> These authorization bills originate in the relevant House and Senate “authorizing committees” that have legislative jurisdiction over the subject matter of the bill.<sup>43</sup> For example, the House and Senate Armed Services Committees have legislative jurisdiction over bills that authorize appropriations for the Department of Defense.<sup>44</sup>

The second step for enacting spending bills requires that Congress pass an “appropriation act” or appropriations bill, which “generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.”<sup>45</sup> In other words, appropriations bills contain the necessary language to actually transfer funds from the Treasury to federal agencies. Appropriations bills originate in the House and Senate Appropriations Committees.<sup>46</sup>

An example of the process is instructive. In 2017, Congress authorized a Department of Defense cybersecurity scholarship program to receive ten million dollars for fiscal year 2018.<sup>47</sup> The language that authorized that funding originated in the Senate Armed Services Committee and became

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the Purse through Authorizing Legislation, Appropriations Measures, Supplemental Appropriations, Earmarks, and Enforcing the Authorization-Appropriations Process 95, 122 (2010).

41. There are important and oft-used mechanisms for funding federal programs that fall outside of this process, such as the mechanisms for enacting mandatory spending (like entitlements). This Note’s discussion is tailored to the relevant processes for enacting discretionary spending through the NDAA, which is discussed in section II.B. For a comprehensive overview of legislative spending procedures, see generally Jessica Tollestrup, Cong. Research Serv., R44582, *Overview of Funding Mechanisms in the Federal Budget Process, and Selected Examples* (2016).

42. U.S. Gov’t Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process 15* (2005) [hereinafter *GAO Glossary of Terms*]. There are technically two kinds of authorizing legislation: “organic” or “enabling” legislation and “authorization of appropriations” legislation. *GAO Red Book*, supra note 25, at 54. Organic or enabling legislation is “legislation that creates an agency, establishes a program, or prescribes a function.” *Id.* For example, a bill establishing a Space Force would be organic or enabling legislation. For the purposes of this Note, “authorizing legislation” primarily refers to authorizations of appropriations.

43. *GAO Glossary of Terms*, supra note 42, at 15.

44. See Constitution, Jefferson’s Manual, and Rules of the House of Representatives of the United States, H.R. Doc. No. 114-192, r. X, cl. 1, § 718, at 448 (2017); Standing Rules of the Senate, S. Doc. No. 113-18, r. XXV, at 20 (2013) [hereinafter *Senate Rules*].

45. *GAO Glossary of Terms*, supra note 42, at 13.

46. *Id.*

47. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1649, 131 Stat. 1283, 1752–53 (2017).



law as part of an authorization bill.<sup>48</sup> The omnibus Appropriations Act for Fiscal Year 2018, which originated in the House Appropriations Committee, appropriated five million dollars for the Department of Defense scholarship program.<sup>49</sup> While the authorizing committees determined that up to ten million dollars should be available for the program, the appropriations committees ultimately determined that the program would actually receive five million dollars within the larger context of federal spending.

5. *The Lack of Practically Binding Requirements.* — In an effort to codify the authorization-appropriations process, Congress has enacted statutes requiring that authorization bills precede appropriations bills. In the area of defense, for example, 10 U.S.C. § 114 requires that “[n]o funds may be appropriated for any fiscal year to or for the use of any armed force . . . unless funds therefor have been *specifically authorized by law*.”<sup>50</sup> However, this statute carries no practical weight because one Congress cannot bind the actions of a future Congress.<sup>51</sup> In the event that Congress explicitly appropriates funds for a program that has expired or has not been authorized, the more recent bill—the appropriations bill—would govern.<sup>52</sup>

Current House and Senate rules also require that federal programs be authorized before they receive funding in appropriations bills.<sup>53</sup> Like the statutory requirements, these rules carry no practical force.<sup>54</sup> Congress

48. See *id.* (authorizing the scholarship program as part of the comprehensive defense authorization bill); Department of Defense Cyber Scholarship Program Act, S. 592, 115th Cong. (2017) (proposing the scholarship program as standalone legislation).

49. See Joint Explanatory Statement to Accompany H.R. 1625, the Consolidated Appropriations Act of 2018: Division C—Department of Defense Appropriations Act, 2018, at 34E, <https://docs.house.gov/billsthisweek/20180319/div%20c%20-%20defensesom%20fy18%20omni.ocr.pdf> [<https://perma.cc/QQC3-UMU5>] (last visited Jan. 20, 2020). Technically, the designation of five million dollars for the program appears in a “joint explanatory statement,” or a report that accompanies the appropriations bill, rather than the statute. This demonstrates congressional intent without formally binding language. See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 236 (D.C. Cir. 2003) (describing how joint explanatory statements “explain[] the legislative language” but “do not have the force of law”).

50. 10 U.S.C. § 114(a) (2018) (emphasis added).

51. See *R.R. Rehab. & Improvement Fund*, 65 Comp. Gen. 524, 527 (1986) (“[S]ince one Congress cannot bind a future Congress, the most recent expression of congressional intent (in this case the appropriation act) controls. In other words, a specific appropriation can become its own authorization when an authorization act is lacking.”).

52. See GAO Red Book, *supra* note 25, at 58, 79–81 (explaining that “as a general proposition, the appropriation of funds for a program whose funding authorization has expired . . . provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent”).

53. See Constitution, Jefferson’s Manual, and Rules of the House of Representatives of the United States, H.R. Doc. No. 114-192, r. XXI, at 868 (2017); Senate Rules, *supra* note 44, at 11.

54. Mark Champoux & Dan Sullivan, *Authorizations and Appropriations: A Distinction Without Difference?* 2 n.2 (2006), [http://www.law.harvard.edu/faculty/hjackson/auth\\_appro\\_15.pdf](http://www.law.harvard.edu/faculty/hjackson/auth_appro_15.pdf) [<https://perma.cc/RZC4-V5PW>].

uses a multitude of tools to ignore the rules, the most basic of which is to simply do nothing. In some circumstances, if no member of Congress raises a “point of order” objecting to a rule violation, consideration of the legislation simply proceeds in violation of the rule.<sup>55</sup> If a member does raise a point of order, the body may vote or the member who is presiding over the chamber may waive the rule.<sup>56</sup> But points of order may not be raised in all circumstances,<sup>57</sup> and points of order rarely defeat bills on the basis of violating House or Senate rules; rather, points of order are sometimes rooted in political motivations instead of a respect for the authorization-appropriations process.<sup>58</sup>

Congress uses several other devices to skirt the rules requiring the authorization of appropriations. For example, Congress may insert authorizing language directly into appropriations bills.<sup>59</sup> This violates the rules to the extent that they are enforced.<sup>60</sup> In some cases, Congress may also include appropriations provisions in authorization bills through a process known as “backdoor spending”: Authorization bills may grant federal agencies “contract authority,” which allows them to enter into contracts before appropriations are enacted, or “borrowing authority,” which allows them to borrow and spend money.<sup>61</sup>

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55. *Id.* at 7.

56. *Id.* at 7–8.

57. For example, the Senate prohibition on funding unauthorized programs does not apply to provisions that are approved by the Senate Appropriations Committee. See Concurrent Resolution on the Budget Fiscal Year 2017: Hearing on Spending on Unauthorized Programs Before the S. Comm. on the Budget, 114th Cong. 67 (2016) [hereinafter Budget Committee Hearing] (statement of Jessica Tollestrup, Ph.D., Specialist on Congress and the Legislative Process, Congressional Research Service).

58. For example, in 2012, Senate Republicans derailed a bipartisan conservation bill by voting against waiving budgetary limitations. See Heather Hansen, Senate Calls a Foul on Sportsmen’s Act, High Country News (Nov. 30, 2012), <https://www.hcn.org/blogs/range/senate-calls-a-foul-on-sportsmens-act> (on file with the *Columbia Law Review*). The Sportsmen’s Act of 2012 included a provision to raise the price of a duck stamp, which duck hunters are required to carry, from fifteen dollars to twenty-five dollars. *Id.* Senator Jeff Sessions cried “fowl” by raising a budget point of order under the Budget Control Act of 2011, which the Senate failed to defeat by a vote of 50–44. *Id.* Some observers noted that Sessions’s interest in enforcing the budget rules represented a “thinly-veiled attack on Sen. Tester [(D-MT)],” who had drafted the bill and just narrowly won reelection, rather than a concern for spending and revenue limitations. See *id.*

59. See generally Champoux & Sullivan, *supra* note 54 (providing a thorough analysis of the ways in which “Congress has little trouble in bending or breaking [the rules] whenever it wishes”).

60. *Id.* at 17.

61. *Id.* at 21.

B. *The Value of the Authorization-Appropriations Process*

Congress's power of the purse has been described as "the most important single curb in the Constitution on Presidential power."<sup>62</sup> But the procedures that Congress uses to enact spending bills determine just how effectively Congress can check the President's authority. A robust authorization-appropriations process promotes informed policymaking, meaningful oversight over the executive branch, and transparency in the legislative process.<sup>63</sup>

1. *Maximizing the Value of Authorizing Committees.* — Empowering the authorizing committees maximizes the potential for spending bills to reflect in-depth policy analysis. The authorizing committees exercise functions that are distinct from those of the appropriations committees, enabling Congress to "consider the substantive justification of a project separately from the fiscal consequences of funding it."<sup>64</sup> Indeed, promoting the development of issue expertise is one of the primary benefits of the committee system.<sup>65</sup>

The current practices and membership breakdowns of the authorizing committees reveal the importance of the authorizing committees for sound policymaking. The Senate has sixteen standing committees, each with its own office, staff, and legislative jurisdiction.<sup>66</sup> Authorizing committees hold open hearings to gather information about pressing issues, compel executive agencies to respond to concerns, and propose workable policy solutions.<sup>67</sup> Authorizing committees also deliberate and vet legislation before it reaches the floor of either chamber.<sup>68</sup> The result is higher-quality policymaking at a lower cost than would be required without these specialized committees.<sup>69</sup>

The benefits of having specialized committees cannot be fully realized if the appropriations committees dominate the policymaking space. By comparison, the appropriations committees' resources are much more

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62. Edward S. Corwin, *The Constitution and What It Means Today* 134 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978).

63. These values are discussed in the context of periodic, rather than permanent, authorization bills. For a discussion of the evolution of temporary authorization bills, see *supra* section I.A.3.

64. *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742, 752 (9th Cir. 1979) (Kennedy, J., dissenting).

65. See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *Cornell L. Rev.* 549, 573–74 (2002) (discussing the benefits of the committee system).

66. Senate Committees, U.S. Senate, <https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm#2> [<https://perma.cc/G9SR-2RH5>] (last visited Jan. 28, 2020).

67. Adler & Wilkerson, *supra* note 34, at 61.

68. Interview with Anonymous III, Former Prof'l Staff Member for the Senate Armed Serv. Comm. (Republican staff), in Washington, D.C. (Jan. 14, 2019) [hereinafter Interview with Anonymous SASC Staffer] (transcript on file with author).

69. Adler & Wilkerson, *supra* note 34, at 64.

limited than those of the authorizing committees.<sup>70</sup> While the appropriations subcommittees must use their limited resources to address the minutiae of budgetary limitations on an annual schedule, the authorizing committees hold agency bureaucrats accountable and delve into substantive policy reforms.<sup>71</sup> The work of the appropriations subcommittees is thus “wide” but not “deep,” whereas the opposite holds true for the authorizing committees.<sup>72</sup>

2. *Direct Oversight of Executive Branch Employees.* — The greater expertise that follows from a robust authorization-appropriations process leads to a second benefit: increased oversight over executive branch actors. Authorizing committees engage in the time-consuming tasks of examining department and agency actions, questioning program personnel, and determining the success or failure of policy implementation.<sup>73</sup> These information-gathering activities enhance Congress’s ability to make strategic changes to federal programs through legislation.<sup>74</sup> Moreover, when the authorizing committees set spending levels, the executive branch is incentivized to grant the authorizers access to information about federal programs that might otherwise go unreported.<sup>75</sup>

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70. The House and Senate each have only one appropriations committee, which is divided into smaller subcommittees that draft large portions of each year’s spending bills. Committee Jurisdiction, U.S. Senate Comm. on Appropriations, <https://www.appropriations.senate.gov/about/jurisdiction> [<https://perma.cc/9CNE-H7J7>] (last visited Jan. 20, 2020); Jurisdiction, U.S. House Comm. on Appropriations, <https://appropriations.house.gov/about/jurisdiction-and-rules> [<https://perma.cc/Y4HH-SXQR>] (last visited Jan. 20, 2020). Thus, the number of authorizing committee staff assigned to a particular issue dwarfs the number of appropriations committee staff working on the same issue. For example, the Senate Foreign Relations Committee (an authorizing committee) had fifty-seven staff as of 2007; the Foreign Operations Appropriations Subcommittee, which is charged with drafting spending bills for nearly all foreign affairs programs, had five. See Charles Flickner, Removing Impediments to an Effective Partnership with Congress, *in* Security by Other Means: Foreign Assistance, Global Poverty, and American Leadership 225, 230 (Lael Brainard ed., 2007). Congressional staff acknowledge that the limited number of appropriations subcommittee staff makes oversight more difficult. Interview with Anonymous SASC Staffer, *supra* note 68.

71. Cf. Barbara Headrick, George Serra & Jim Twombly, Enforcement and Oversight: Using Congressional Oversight to Shape OSHA Bureaucratic Behavior, 30 *Am. Pol. Res.* 608, 615 (2002) (describing the different roles and responsibilities of the oversight and appropriations subcommittees for the Occupational Safety and Health Administration).

72. *Id.* at 615.

73. See Norman J. Ornstein & Thomas E. Mann, When Congress Checks Out, Brookings Inst. (Nov. 1, 2006), <https://www.brookings.edu/opinions/when-congress-checks-out> [<https://perma.cc/2UNG-VZB8>] (“Examining a department or agency, its personnel, and its implementation policies is time-consuming. Investigating possible scandals can easily lapse into a partisan exercise that ignores broad policy issues for the sake of cheap publicity.”).

74. Interview with Anonymous SASC Staffer, *supra* note 68 (noting the role of Congress in “helming major strategic changes as a result of oversight that are structural in nature” as well as in “areas where authorizers focus on individual programs”).

75. See Raymond H. Dawson, Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems, 56 *Am. Pol. Sci. Rev.* 42, 56 (1962)

In contrast, both the authorizers and the executive branch have fewer incentives to engage with one another when power is concentrated in the appropriations committees. Authorizers still hold policy hearings on pressing issues, but they are less likely to follow or care about certain small federal programs unless a crisis has occurred.<sup>76</sup> Meanwhile, some executive branch staff grow accustomed to the lack of oversight and operating with little guidance from Congress.<sup>77</sup>

3. *Democratic and Transparent Decisionmaking.* — By empowering the authorizing committees, the authorization-appropriations process promotes democratic and transparent decisionmaking.<sup>78</sup> The fact that the authorization-appropriations process distributes power among the authorizing committees means that more lawmakers become involved in exercising Congress's spending power. This makes the legislative process more democratic and further enables the public to hold its representatives directly accountable for federal spending decisions. It also promotes better policy-making—studies show that committee engagement increases “credit-claiming opportunities” for committee members and encourages them to invest more time and effort in solving problems than they otherwise would.<sup>79</sup>

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(discussing how the authorization process strengthens Congress's access to the strategic aspects of executive branch policymaking). The risk that an unsatisfied committee might propose defunding a program creates enormous incentives for the executive branch to maintain open lines of communication with the authorizers. See Telephone Interview with Anonymous I, Former Staffer for the Office of Mgmt. & Budget (Nat'l Sec. Div.), Dep't of State (Cong. Affairs), Dep't of Def. (Pub. Affairs), and U.S. Senate (Oct. 25, 2018) [hereinafter Telephone Interview with Anonymous White House Employee] (transcript on file with author).

76. Danny Vinik, Meet Your Unauthorized Federal Government, Politico: The Agenda (Feb. 3, 2016), <https://www.politico.com/agenda/story/2016/02/government-agencies-programs-unauthorized-000036-000037> [<https://perma.cc/P2YH-6Y6B>] (“Without regular attention to the normal authorization calendar, budget experts say Congress ends up conducting mostly ‘fire alarm’ oversight, holding hearings and digging into the weeds of an issue only after it has been discovered, often in the media.”).

77. Id. (“Some [agencies], like the FEC, have become so accustomed to their status that they effectively operate on autopilot, with little guidance from Congress.”).

78. In today's political climate, transparency is relative—authorizing committees, like the appropriations committee, can draft and deliberate legislation behind closed doors or shut noncommittee members out of the process. For example, the Senate authorizing committee process for considering the National Defense Authorization Act takes place in secret. Colleen J. Shogan, Defense Authorization: The Senate's Last Best Hope, *in* Party and Procedure in the United States Congress 195, 208–10 (Jacob R. Straus ed., 2016). An open process, however, may not be very transparent. See Interview with Anonymous SASC Staffer, supra note 68 (noting that the House Armed Services' Committee's open process “appears transparent by virtue of appearing in public but is in fact carefully stage-managed to facilitate fifty-odd members and avoid embarrassing any of them by limiting votes on amendments with unknown outcomes”).

79. See Adler & Wilkerson, supra note 34, at 64.

Unlike the authorization process, the nature of the appropriations process leaves little room for transparency. In part, this lack of transparency results from the committees' limited resources.<sup>80</sup> Appropriators work against the pressure of looming budgetary deadlines.<sup>81</sup> Failure to pass appropriations bills on schedule will result in a government shutdown, which jeopardizes priorities ranging from food inspections<sup>82</sup> to weapons development.<sup>83</sup> Thus, the dire consequences of failing to pass appropriations bills lead to a rushed process, leaving most lawmakers who do not sit on the appropriations committees with no choice but to vote for spending bills without any opportunity to make meaningful changes or even analyze them. Senator Sheldon Whitehouse recently summarized this problem in a Senate Budget Committee hearing:

When we are in crisis mode and our budgets are being worked out between the Speaker, the Majority Leader, and the President, then there is zero transparency in that . . . . It is about as untransparent as you can [imagine], and things come in basically based on favoritism, clout, [and] influence. I mean, it is kind of the worst of all possible worlds that we create for ourselves when there is not a proper process and there is just a crisis negotiation at the end.

Second best behind that is having the Appropriations Committees work through all their stuff and then have no proper floor work on what the appropriators propose to us, so that gets jammed down the rest of the body's throat, which is great for the appropriators but not so great for the body. And we have basically been gravitating back and forth between those two models virtually for as long as I have been here in the Senate.<sup>84</sup>

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80. The Senate Appropriations Committee has thirty-one members. Committee Members, U.S. Senate Comm. on Appropriations, <https://www.appropriations.senate.gov/about/members> [<https://perma.cc/AFN7-JEGQ>] (last visited Jan. 20, 2020). The House committee has fifty-three members. Membership, U.S. House Comm. on Appropriations, <https://appropriations.house.gov/about/membership> [<https://perma.cc/F6MJ-VXJR>] (last visited Jan. 20, 2020).

81. Headrick et al., *supra* note 71, at 615.

82. See Matthew DeLuca, 'Routine' FDA Inspections of Food Facilities Suspended Due to Government Shutdown, NBC News (Oct. 8, 2013), <https://www.nbcnews.com/news/us-news/routine-fda-inspections-food-facilities-suspended-due-government-shutdown-flna8C11360066> [<https://perma.cc/R2TL-W8DT>] (describing the impact of a shutdown on FDA inspections).

83. See Loren Thompson, Defense Companies Warn Thousands of Layoffs Imminent Due to Shutdown, Forbes (Oct. 4, 2013), <https://www.forbes.com/sites/lorenthompson/2013/10/04/defense-companies-warn-thousands-of-layoffs-imminent-due-to-shutdown/#75f173964460> [<https://perma.cc/XAU9-MWRU>] (describing the impact of a shutdown on defense contractors).

84. Budget Committee Hearing, *supra* note 57, at 16 (statement of Sen. Sheldon Whitehouse).

The appropriations process is less transparent than the authorization process from the public's perspective as well.<sup>85</sup> Unlike authorizing committees, the appropriations committees do not release public versions of their legislation until after the committees have finalized their bills and voted on amendments.<sup>86</sup> This leaves ordinary citizens unable to determine whether and when to advocate for their spending priorities at the committee level. Moreover, it creates a strategic advantage for those stakeholders who hold close relationships with appropriations committee staff—typically, well-funded and savvy lobbyists.<sup>87</sup>

## II. THE DECLINE OF AUTHORIZATIONS AND THE NDAA

Despite the important benefits of the authorization-appropriations process for Congress's oversight and policymaking functions, as section I.B explains, the authorization process is in decline except in the area of defense. Section II.A discusses the steady decline of authorization bills, with section II.A.1 outlining evidence of the decline and section II.A.2 providing an explanation for the trend. Section II.B introduces the glaring exception to the trend—the NDAA, which authorizes spending for the Department of Defense. Section II.B.1 provides a brief history of the NDAA and section II.B.2 explains how it becomes a law. Section II.C analyzes the NDAA process and extracts several tools that the committees use to pass the bill every year: bipartisanship (II.C.1), close staff interactions (II.C.2), a singular focus on one bill (II.C.3), and unorthodox lawmaking (II.C.4), which is a set of irregular tactics that lawmakers sometimes use to stifle minority objections to legislation.

### A. *The Steady Decline of Authorization Bills*

The authorization process is in decline, and Congress has ceded significant policymaking power to the appropriations committees. This section explains the current state of the authorization process and outlines reasons for its downturn.

1. *Current State of Authorization Bills.* — No existing empirical data provides a complete picture of how much funding Congress appropriates

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85. See Telephone Interview with Anonymous II, Vice President, Gov't Relations, Fortune 500 Co. (Oct. 22, 2018) [hereinafter Telephone Interview with Anonymous Government Relations Expert] (transcript on file with author).

86. See *id.*

87. See *id.* (“I don’t think appropriations is at all as transparent as authorizations . . . . [Y]ou get appropriations after the fact. So, if you haven’t got a friend in there telling you whether you’re in or you’re out, you won’t know. And that’s where you get back to lobbyists.”); see also Press Release, Claire McCaskill, U.S. Senator, McCaskill Delivers Farewell Speech on Senate Floor (Dec. 13, 2018), <https://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-delivers-farewell-speech-on-senate-floor> [<https://perma.cc/M4ME-64BB>] (“Writing legislation behind closed doors, giant omnibus bills that most don’t know what’s in them, K Street lobbyists knowing about the tax bill managers package before even Senators. That’s today’s Senate. And no amendments.”).

for unauthorized programs,<sup>88</sup> or how frequently Congress permits temporary authorizations to expire. However, the Congressional Budget Office (CBO) keeps track of how much funding Congress appropriates annually for *expired* programs.<sup>89</sup> For fiscal year 2020, the CBO estimates that Congress appropriated \$332 billion for expired agencies, programs, or functions that “can be associated with 407 expired laws.”<sup>90</sup> That figure is roughly equal to more than half of the funding that Congress approves for nondefense, discretionary spending annually.<sup>91</sup> The following table breaks down the amount of expired funding by Senate authorizing committee.

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88. Due to the federal government’s size and complexity, this data would be difficult to collect—even for the government office charged with publishing information on the budget for Congress. See Budget Committee Hearing, *supra* note 57, at 15 (“[W]e have not been able to look at programs that have no organic or enabling authority to exist at all[] . . . . [G]etting a comprehensive list of those is very difficult. For example, trying to establish the linkages between appropriation accounts and authorizing statutes for everything would take . . . a long time.” (statement of Keith Hall, Director, Congressional Budget Office)).

89. In rare cases, Congress has taken to passing appropriations for programs that were *never* previously authorized. Champoux & Sullivan, *supra* note 54, at 13–14.

90. Cong. Budget Office, *Expired and Expiring Authorizations of Appropriations: Fiscal Year 2020*, at 4 (Feb. 2020), <https://www.cbo.gov/system/files/2020-02/56082-CBO-EEAA.pdf> [<https://perma.cc/3UZ6-EYNF>] [hereinafter CBO, *Expiring Authorizations 2020*].

91. See Budget Committee Hearing, *supra* note 57, at 2 (“We have a chart showing that last year, \$310 billion of the roughly \$543 billion non-defense discretionary appropriations went to unauthorized programs and activities.” (statement of Sen. Mike Enzi)).



TABLE 1: SUMMARY OF FY 2020 APPROPRIATIONS WITH EXPIRED AUTHORIZATIONS, BY SENATE AUTHORIZING COMMITTEE<sup>92</sup>

SENATE AUTHORIZING COMMITTEE	TOTAL EXPIRED AUTHORIZATIONS OF APPROPRIATIONS	IDENTIFIABLE APPROPRIATIONS (MILLIONS OF DOLLARS)
Agriculture, Nutrition, and Forestry	17	363
Banking, Housing, and Urban Affairs	41	43,265
Commerce, Science, and Transportation	145	49,464
Energy and Natural Resources	182	16,259
Environment and Public Works	75	4,006
Finance	7	220
Foreign Relations	98	38,986
Health, Education, Labor, and Pensions	234	50,181
Homeland Security and Governmental Affairs	35	6,677
Indian Affairs	41	942
Senate Rules and Administration	4	97
Small Business and Entrepreneurship	10	683
The Judiciary	139	38,233
Veterans' Affairs	18	83,074
<b>TOTAL</b>	<b>1,046</b>	<b>332,450</b>

By comparison, in fiscal year 2006, Congress appropriated approximately \$159 billion for expired provisions contained in 176 laws.<sup>93</sup> At the time, \$159 billion represented the continuation of a “general trend of increasing amounts of such appropriations with expired authorizations.”<sup>94</sup>

92. This table is reproduced, with modifications, from CBO, *Expiring Authorizations 2020*, supra note 90, at 4 tbl.2.

93. Cong. Budget Office, *Unauthorized Appropriations and Expiring Authorizations* 4 tbl.1 (Jan. 13, 2006), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/17596-Senate.pdf> [<https://perma.cc/QR3C-5N7J>].

94. Champoux & Sullivan, supra note 54, at 9.

There is ample anecdotal evidence to support the claim that the authorization process has deteriorated. In addition to the statements of members of Congress<sup>95</sup> and observers,<sup>96</sup> recent history presents glaring examples of Congress's failure to reauthorize certain programs that were previously updated on regular schedules. Most notably, Congress has not enacted a stand-alone foreign aid authorization bill since 1985, despite concerns at the time that failing to do so would vest considerable influence in the appropriations committees.<sup>97</sup> Congress has also not passed an authorization bill for the State Department since 2002, although it used to pass one biennially.<sup>98</sup>

The collapse of the authorization process in some issue areas (but not others) has led to substantive policy changes. For instance, the fact that

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95. See, e.g., Budget Committee Hearing, *supra* note 57, at 17 (statement of Sen. Sheldon Whitehouse) (“[W]hether it’s . . . having no transparent authorization process . . . and having appropriation run on cruise control even where there are not authorizations, it’s really, been a very dramatic collapse of the appropriating and funding function of this body into a very small group of people . . .”); Full Text of John McCain’s Senate Floor Speech: ‘Let’s Return to Regular Order’, USA Today (July 25, 2017), [https://www.usatoday.com/story/news/politics/2017/07/25/full-text-john-mccains-senate-floor-speech/509799001/?utm\\_source=feedblitz&utm\\_medium=FeedBlitzRss&utm\\_campaign=usatodaycomwashington-topstories](https://www.usatoday.com/story/news/politics/2017/07/25/full-text-john-mccains-senate-floor-speech/509799001/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=usatodaycomwashington-topstories) [<https://perma.cc/HF95-A2E8>] [hereinafter McCain Speech on Regular Order] (imploiring senators to “try the old way of legislating” to pass a bill: “Let the [authorizing committee] . . . hold hearings, try to report a bill out of committee with contributions from both sides. Then bring it to the floor for amendment and debate, and see if we can pass something . . .”) [hereinafter McCain Speech on Regular Order]; Vinik, *supra* note 76 (“‘Oversight and authorizations are one thing that Congress has failed over the past decade to do,’ said Sen. Cory Gardner (R-Colo.). ‘And I think going through regular order and an appropriations process will allow us to do a better job of oversight.’”).

96. See, e.g., David Reich, Ctr. on Budget & Policy Priorities, *Proposals to Address “Unauthorized Appropriations” Would Likely Do More Harm than Good 1* (Aug. 31, 2016), <https://www.cbpp.org/research/federal-budget/proposals-to-address-unauthorized-appropriations-would-likely-do-more-harm> [<https://perma.cc/EH9W-Z2W9>] (“In recent years, Congress has fallen further behind in renewing language authorizing appropriations for these and other important activities.”).

97. Foreign Aid Authorization Bill Stalls, CQ Almanac (1987), <https://library.cqpress.com/cqalmanac/document.php?id=cqal87-1144661&type=hitlist&num=1> (on file with the *Columbia Law Review*).

98. See Fisher, *Authorization-Appropriation Process*, *supra* note 2, at 100–02 (describing Congress’s decision to move the State Department authorization to a two-year schedule); Press Release, Bob Corker, Chairman, U.S. Senate Comm. on Foreign Relations, Corker: First State Department Authorization in 14 Years Becomes Law (Dec. 17, 2016), <https://www.foreign.senate.gov/press/chair/release/corker-first-state-department-authorization-in-14-years-becomes-law> [<https://perma.cc/3GDZ-7CP5>] (describing how Congress has not passed a State Department authorization bill since 2002). In 2016, Congress enacted a bill that Senate Foreign Relations Committee Chairman Bob Corker declared as “ending a 14-year drought.” *Id.* In reality, the bill represented “something close to an authorization bill” that outlined policies but contained no spending provisions. Robbie Gramer, *Anti-Abortion Row Derails State Department Policy Bill*, Foreign Pol’y (Apr. 26, 2018), <https://foreignpolicy.com/2018/04/26/anti-abortion-row-derails-state-department-funding-bill-congress-ed-royce-house-foreign-affairs-committee-democrats-republicans-diplomacy-authorization-bill> [<https://perma.cc/2UQV-XKFH>].

Congress fails to consider foreign relations or foreign aid authorization bills, while maintaining a robust authorization process for defense programs, has contributed to the “militarization” of foreign policy<sup>99</sup>—that is, the idea that Congress has vested substantial power in the House and Senate Armed Services Committees to dictate foreign policy. As one former employee of both the State and Defense Departments noted:

A lot of the things . . . that are related to foreign assistance end up all just going through NDAA . . . . And because they go in NDAA, that has in part led to defense mission creep into foreign policy. Because when a Senate Armed Services Committee staffer writes [legislation], it always starts with “the Secretary of Defense shall” or “the Secretary of Defense is responsible for” . . . and then when that legislation goes through the process, [the] State [Department] freaks out and says “no . . . that should say ‘the Secretary of State shall’ or ‘the Secretary of Defense, in coordination with the Secretary of State shall’ . . . . We agree with your amendment, but that’s our job. Stop infringing on our space.”<sup>100</sup>

U.S. security assistance programs present a notable example of how the NDAA, combined with the lack of a regular foreign affairs authorization, has catalyzed the growing imbalance between the Defense and State Departments. For the past half century, the United States has supported other countries’ security programs through State Department programs.<sup>101</sup> Beginning in the 1980s, and especially after 9/11, policymakers’ increased focus on counterterrorism prompted the House and Senate Armed Services Committees to expand the Defense Department’s role in security assistance through the NDAA.<sup>102</sup> This shifting imbalance has created “a complex and confusing ‘patchwork’ of authorities and arrangements” that concern foreign policy advocates and State Department officials alike.<sup>103</sup> But because the NDAA is the only authorization bill that passes annually, the State Department must concede considerable authority to the Defense Department or attempt to use other, less promising committee channels.<sup>104</sup>

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99. Nina M. Serafino, Cong. Research Serv., R44444, *Security Assistance and Cooperation: Shared Responsibility of the Departments of State and Defense* 3 (2016) (noting the view that “Congress’s provision of a growing number of new [DOD] authorities to conduct security assistance missions” has led to “the ‘militarization’ of U.S. foreign policy”). For a comprehensive overview of how “[w]ar has burst out of its old boundaries” and what that means for defense policy vis-à-vis nondefense policy, see generally Rosa Brooks, *How Everything Became War and the Military Became Everything* 13 (2017).

100. Telephone Interview with Anonymous White House Employee, *supra* note 75.

101. Serafino, *supra* note 99, at 1.

102. *Id.*

103. *Id.*; see also Telephone Interview with Anonymous White House Employee, *supra* note 75.

104. Telephone Interview with Anonymous White House Employee, *supra* note 75 (describing how State Department officials can agree to concede security assistance authority to the Department of Defense through the NDAA, and often do, because “[a] lot of times they don’t necessarily want to pull [an NDAA provision] out because if they pull it out it’s

Other nondefense programs have seen similar declines in their authorization processes. Many housing, energy-assistance, and health-care programs that serve low-income communities have continued to receive funding long after their expiration, with no signs of congressional interest in updating their authorizations.<sup>105</sup> Moreover, Congress has struggled to renew expiring authorization bills that contain uniquely important, must-pass authorities. For example, Congress has an interest in preventing Federal Aviation Administration (FAA) authorizations from expiring because they enable the agency to collect revenue that it spends on critical airport-improvement projects.<sup>106</sup> For that reason, Congress used to regularly enact long-term FAA authorization bills with few lapses.<sup>107</sup> But since 2007, Congress has had to enact twenty-six short-term FAA extensions because of repeatedly stalled negotiations over reauthorization legislation.<sup>108</sup>

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not going anywhere”). The State Department also concedes this authority because it has considerably fewer resources than the Department of Defense. See, e.g., Brooks, *supra* note 99, at 102 (describing how the State Department felt “resented and challenged” by the Defense Department’s creation of a combatant command for Africa but ceded that the military was “essentially stepping into a void created by a lack of resources” for civilian agencies (internal quotation marks omitted) (quoting U.S. Dep’t of State & Broad. Bd. of Governors Office of the Inspector Gen., Bureau of African Affairs, ISP-I-09-63, Report of Inspection 8, 13 (Aug. 2009), <https://www.stateoig.gov/system/files/127270.pdf> [<https://perma.cc/FFX5-YHRU>])).

105. See, e.g., Cong. Budget Office, *Expired and Expiring Authorizations of Appropriations: Fiscal Year 2018*, Revised 38 (July 2018), <https://www.cbo.gov/system/files?file=2018-07/54126-eeaa-house.pdf> [<https://perma.cc/EFW3-TYRB>] (noting that homeless assistance grants received \$2.5 billion for Fiscal Year 2018 despite expiring in Fiscal Year 2011). One example of a program that advocates have targeted for reauthorization is the Native American Housing and Self-Determination Act (NAHASDA), which is the primary piece of federal legislation that provides housing assistance to Native Americans. Nat’l Low Income Housing Coal., *Advocates’ Guide 2019*, at 5–25 (2019) (on file with the *Columbia Law Review*). NAHASDA’s most recent authorization expired in 2013, but the program continues to receive \$650 million in annual appropriations. *Id.* at 5–26. Advocates hope that Congress will reauthorize funding for NAHASDA and make legislative improvements to the program. *Id.* at 5–27.

106. See Full FAA Reauthorization Enacted After Four Years of Temporary Laws, CQ Almanac (2012), <https://library.cqpress.com/cqalmanac/document.php?id=cqal12-1531-87298-2553313> (on file with the *Columbia Law Review*) (“Stopgap extensions were required in the meantime to keep the Airport Improvement Program alive and authorize revenue collection for the aviation trust fund.”). In 2011, the FAA authorization bill lapsed for two weeks, which resulted in 4,000 employee furloughs and \$400 million in estimated revenue losses. Brianna Fernandez, *The Importance of Long-Term FAA Reauthorization*, Am. Action Forum (Aug. 28, 2017), <https://www.americanactionforum.org/insight/importance-long-term-faa-reauthorization> [<https://perma.cc/7ED3-WV5X>].

107. See, e.g., Airport Reauthorization Bill Enacted, CQ Almanac (1987), <https://library.cqpress.com/cqalmanac/document.php?id=cqal87-1145127&type=hitlist&num=36> (on file with the *Columbia Law Review*). Provisions in the 1982 FAA authorization bill, for instance, lapsed on September 30, 1987, but were renewed on December 30, 1987. The 1987 bill authorized spending until 1991. *Id.*

108. In 2018, Congress passed a five-year FAA authorization bill for the first time since the 1980s—but required six short-term stopgap extensions in the process. See Ashley Halsey III, *Senate Gives Final Approval for FAA Reauthorization, Sends Bill to White House*, Wash.

In response to the authorizing committees' inaction, the appropriations committees have stepped in to fill the gap.<sup>109</sup> Unlike most authorization bills, appropriations bills are perceived as "must-pass" because a failure to enact them could result in a complete government shutdown.<sup>110</sup> As was Congress's concern when initially establishing the two-step authorization-appropriations process, lawmakers attempt to attach incidental provisions to appropriations bills that otherwise might not have the political momentum to reach enactment.<sup>111</sup>

As Professor Richard J. Lazarus notes, this power shift from the authorizers to the appropriators has significant procedural and substantive impacts on the legislative process.<sup>112</sup> Procedurally, the appropriations committees have fewer safeguards than the authorizing committees to ensure thoughtful, public debate on legislative proposals.<sup>113</sup> The drastic procedural differences between the two types of legislation inevitably lead to significant substantive differences between the final products—an appropriations bill tends to lack the long-term legislative vision of authorizing legislation and "is typically a grab bag of special interest legislation."<sup>114</sup>

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Post (Oct. 3, 2018), [https://www.washingtonpost.com/transportation/2018/10/03/senate-gives-final-approval-faa-reauthorization-sends-bill-white-house/?utm\\_term=.d4c161d8fc9d](https://www.washingtonpost.com/transportation/2018/10/03/senate-gives-final-approval-faa-reauthorization-sends-bill-white-house/?utm_term=.d4c161d8fc9d) (on file with the *Columbia Law Review*).

109. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 *Geo. L.J.* 619, 638 (2006). House and Senate rules forbid inserting legislation into appropriations. Unsurprisingly, this has not prevented Congress from doing so. Thomas Spulak & George Crawford, *Opinion*, 2015 Appropriations Bills: Are More Policy Riders Inevitable?, *Hill* (Apr. 25, 2014), <https://thehill.com/blogs/congress-blog/lawmaker-news/204230-2015-appropriations-bills-are-more-policy-riders-inevitable> [<https://perma.cc/KJM8-8GJH>]. The Supreme Court, while finding the repeal of substantive legislation by implication through appropriations bills to be "disfavored," has declined to prohibit it. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) ("Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly.").

110. See Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 *Utah L. Rev.* 703, 713–14; *supra* notes 82–83 and accompanying text (describing the adverse consequences of a government shutdown).

111. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 *Duke L.J.* 456, 464–65 (1987) (describing the negative consequences of appropriations riders, including that they permit an evasion of the committee system).

112. Lazarus makes this argument persuasively, using environmental laws as an example. See generally Lazarus, *supra* note 109.

113. For example, the appropriations committees have fewer staff and resources than the authorizing committees and are under no obligation—formal or informal—to consult the authorizers. *Id.* at 653–54. Unlike authorizing committees, the Senate Appropriations Committee is not required to announce its hearings in advance or even permit the ranking minority member to call witnesses. *Id.* at 655. Appropriations hearings tend to be shorter than authorization hearings. *Id.* Members often have few opportunities to review provisions buried in appropriations bills or even know whether certain provisions are included in the bills at all. *Id.* at 660.

114. *Id.* at 661. For example, in 2014, Congress enacted authorizing legislation prohibiting DOD from spending contract dollars on Russian rocket engines. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1608, 128 Stat. 3292, 3626 (2014). The U.S. contractor that uses Russian

Without the requisite compromise that lawmakers must reach to pass discretionary legislation, appropriations bills also promote the adoption of extreme policies.<sup>115</sup>

2. *Explanations for the Decline of Authorization Bills.* — What explains the decline of authorization bills in favor of appropriations bills? Historical data from the last half century suggests that legislative reorganization and political dynamics have driven Congress to focus primarily on the budget blueprint and passing omnibus appropriations legislation.<sup>116</sup> Authorization bills have been crowded out of the legislative calendar, and members of Congress lack the political will to reach long-term agreements on authorizing legislation unless they feel required to do so.<sup>117</sup>

The first overarching reason for the authorization process's decline involves Congress's organizational approach to the budget process. Since the enactment of the Congressional Budget and Impoundment Control Act of 1974, Congress has spent considerable time each year producing a budget blueprint or "resolution" that lays out budget policies and spending priorities for at least five years.<sup>118</sup> The budget resolution is crafted by the House and Senate Budget Committees and sets allocation limits for appropriations—this means that Congress cannot consider appropriations bills until after it has adopted a budget resolution.<sup>119</sup> Therefore, the Act weakens the authorizing committees in two ways: Authorizing committees have less authority to control spending decisions leading up to the appropriations process because the budget committees control the budget resolution, and authorizing committees also have less time available to claim

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rocket engines has a 1.6 million square foot factory in Decatur, Alabama. Mary Troyan & Ledyard King, Sen. Richard Shelby Kills Ban on Russian Rocket Engines, USA Today (Dec. 16, 2015), <https://www.usatoday.com/story/news/politics/2015/12/16/sen-richard-shelby-kills-ban-russian-rocket-engines/77438920> [<https://perma.cc/ST7R-BB32>]. Thereafter, Senator Richard Shelby of Alabama, the Chairman of the Senate Appropriations Committee, inserted a provision that effectively lifted the Russian engine ban into a must-pass, 2,000-page spending bill that was released to the full Senate just two days before the vote. *Id.* Then-Senate Armed Services Committee Chairman John McCain derided the move as a "direct violation of the relationship between the authorizing committees and the Appropriations Committee." 161 Cong. Rec. S8696 (daily ed. Dec. 16, 2015) (statement of Sen. McCain).

115. Lazarus, *supra* note 109, at 665.

116. *Id.* at 664.

117. *Id.* at 667–68.

118. See Ctr. on Budget & Policy Priorities, Policy Basics: Introduction to the Federal Budget Process 1, 3–4, <https://www.cbpp.org/research/policy-basics-introduction-to-the-federal-budget-process> [<https://perma.cc/577G-5X66>] (last updated Apr. 2, 2020). Congress is supposed to pass the budget resolution by April 15, but rarely meets this deadline. *Id.* Appropriations committees receive their funding allocation limits from the budget resolution. *Id.*

119. See *id.* ("In both the House and Senate, the Appropriations Committee receives a single [spending] allocation for all of its programs. It then decides on its own how to divide this funding among its 12 subcommittees . . .").

Congress's attention for enacting authorization bills once a budget resolution has been adopted.<sup>120</sup>

Moreover, partisan gridlock has reduced incentives for Congress to deliberate discretionary authorization measures, while encouraging the use—or misuse—of appropriations bills. In the 1990s, the House Republican majority developed a strategy to leverage the appropriations process's must-pass nature to enact politically controversial policy provisions.<sup>121</sup> The House Majority Leader, Dick Armey, even made a point of informing the authorizing committee chairs of their reduced authority: "You'll get a lot of stuff done," he told them, "but using the appropriations process."<sup>122</sup>

In other words, Republican leaders in the 1990s sought to exploit appropriations riders in the same way that early lawmakers did.<sup>123</sup> But unlike in the nineteenth century, Congress did not unify behind a remedial strategy. Instead, rising conflicts between the political parties drove Republican leaders to seek centralized power, and lawmakers subsequently acquiesced.<sup>124</sup> The appropriations process became the dominant forum for policymaking, while authorizing committees found fewer incentives to bridge growing ideological divides and pass discretionary legislation.<sup>125</sup>

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120. See Lazarus, *supra* note 109, at 666–70.

121. See *id.* at 674.

122. John H. Aldrich & David W. Rohde, *The Republican Revolution and the House Appropriations Committee*, 62 *J. Pol.* 1, 14 (2000) (internal quotation marks omitted). In addition to focusing on the appropriations committees, Congressional leaders broke with common practice by appointing committee chairs according to party loyalty and ideology, rather than seniority. See Lazarus, *supra* note 109, at 674–75. This effort further stymied deliberations over authorization bills. *Id.*

123. See *supra* note 25 and accompanying text.

124. See Lazarus, *supra* note 109, at 674 n.223 (explaining how political scientists predicted that the concentration of political power within party leadership would occur with increased polarization). Studies of Congress illuminate the degree of polarization that drove party leaders to exploit the appropriations process. In the 1950s, as Congress began to embrace annual authorization bills, political scientists argued that the parties needed to be *more* ideologically divergent. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 *Colum. L. Rev.* 1689, 1734–35 (2015). But since the 1980s, the ideological gap between Republican and Democratic lawmakers has grown substantially. *Id.* at 1692; see also Philip Bump, *The Unprecedented Partisanship of Congress, Explained*, *Wash. Post* (Jan. 13, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/13/heres-why-president-obama-failed-to-bridge-the-partisan-divide-graphed> (on file with the *Columbia Law Review*). Some commentators believe that hyperpartisanship has grown so substantially that the nation is headed towards “democratic breakdown and violence.” Lee Drutman, *We Need Political Parties. But Their Rabid Partisanship Could Destroy American Democracy.*, *Vox* (Sept. 5, 2017), <https://www.vox.com/the-big-idea/2017/9/5/16227700/hyperpartisanship-identity-american-democracy-problems-solutions-doom-loop> [<https://perma.cc/E2KL-ALSS>].

125. See Lazarus, *supra* note 109, at 674 (arguing that, in the context of environmental policy, “[s]o long as such gridlock disables the authorization committees, the appropriations process is likely to continue to dominate environmental lawmaking”).

Partisan gridlock has exacerbated an additional, significant hurdle to enacting authorization bills: securing “floor time” for the deliberation and passage of legislation in the Senate. Without cooperation from the minority party, enacting legislation and approving nominations can take several days or weeks.<sup>126</sup> Moreover, the Senate often may not use the intervening time to conduct other business.<sup>127</sup> During the Obama Administration, senators in the minority party began obstructing nominations to an unprecedented extent, which slowed the confirmation process substantially and chewed up valuable floor time.<sup>128</sup> This practice has endured through the Trump Administration, resulting in showdowns over whether to devote

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126. Ending debate on a bill or nomination requires approval from three-fifths of the Senate. Jeanne Shaheen, *Gridlock Rules: Why We Need Filibuster Reform in the U.S. Senate*, 50 *Harv. J. on Legis.* 1, 3 (2013). A vote to end debate cannot occur until two calendar days after the motion to end debate (or “invoke cloture”) has been filed. *Id.* at 4. Once the Senate has voted to invoke cloture, the rules provide for up to thirty hours of additional debate before a final vote. *Id.* The rules severely limit the number of items that the Senate may consider in a calendar year, considering that they only meet for roughly 137 days and have dozens of nominations to address. See Ian Millhiser, *Ctr. for Am. Progress*, *The Tyranny of the Timepiece* 3 (Sept. 28, 2010), <https://www.americanprogress.org/issues/courts/news/2010/09/28/8327/the-tyranny-of-the-timepiece> [<https://perma.cc/L7LD-GTP4>]. In 2019, Senate Republicans changed the rules to limit the hours required for post-cloture debate on nominations from thirty to two. Paul Kane, *Republicans Change Senate Rules to Speed Nominations as Leaders Trade Charges of Hypocrisy*, *Wash. Post* (Apr. 3, 2019), [https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6\\_story.html](https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6_story.html) (on file with the *Columbia Law Review*). The thirty-hour requirement remains in place for legislation. *Id.*

127. See Jennifer Shutt, *Appropriations vs. Judges: Battle for Senate Floor Time Nears, Roll Call* (May 15, 2018), <https://www.rollcall.com/news/politics/appropriations-vs-judges-battle-senate-floor-time-nears> [<https://perma.cc/56AF-378P>]. The 2019 rule change for nominations has relieved some of the pressure on lawmakers to choose between enacting legislation and confirming nominations. See Kane, *supra* note 126 (describing the rule changes). Nevertheless, floor time remains a precious resource. See Jordain Carney, *Trump Faces Roadblocks with Threat to Adjourn Congress*, *Hill* (Apr. 16, 2020), <https://thehill.com/homenews/senate/493253-trump-faces-roadblocks-with-threat-to-adjourn-congress> [<https://perma.cc/MP7P-JPN9>] (describing how “[f]iling cloture forces the Senate to eat up days of floor time on a nomination”).

128. See Doug Kendall, *The Bench in Purgatory*, *Slate* (Oct. 26, 2009) <https://slate.com/news-and-politics/2009/10/obama-s-nominees-to-the-bench-are-waiting-too-long.html> [<https://perma.cc/GPU5-YHF2>]; Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, *N.Y. Times* (Aug. 17, 2012), <https://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html> (on file with the *Columbia Law Review*) (“[Nominees] faced significant obstacles on the Senate floor. Republicans used procedural rules to delay votes on uncontroversial appeals court nominees and on district court nominees, forcing Democrats to consume hours of precious Senate floor time on confirmation votes for judges . . . that previously would have been quickly handled.”).



floor time to confirming judges or enacting must-pass spending bills.<sup>129</sup> Authorization bills are not even part of the conversation.<sup>130</sup>

B. *The NDAA: A Shining Exception*

In the face of this growing crisis, the NDAA stands as a clear anomaly: It has been passed on an annual basis, under mostly regular order and with broad bipartisan support, for the last fifty-nine years. In 2010, the Senate even passed the NDAA by unanimous consent—an unprecedented move for a bill that authorized \$726 billion in national security spending.<sup>131</sup> This section outlines the history of the NDAA and how the current process for passing the bill works.

1. *History and Normalization.* — In effect, the defense program authorization process developed as a wholly separate set of norms—one that followed a different track than the authorization-appropriations process and has survived as other authorization norms have withered. Congress enacted the first defense authorization bill in 1961.<sup>132</sup> During the 1950s, the Senate Armed Services Committee held hearings on military weapons programs that revealed problems of duplicative efforts and wasteful spending.<sup>133</sup> The Committee also realized that power over policy and budgetary decisions largely rested with the appropriations committees and the executive branch.<sup>134</sup> In response, Senate Armed Services Committee Chairman Richard Russell inserted a provision into a 1959 military construction bill that required, for the first time, the prior authorization of

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129. See Shutt, *supra* note 127.

130. Congress has also succumbed to gridlock in other ways. For example, the elimination of earmarks—or “congressionally directed pots of federal funds for projects in specific districts”—has reduced incentives for lawmakers to work together. Kate Ackley, Democrats Weighing Earmark Revival if They Take Back House, Roll Call (Sept. 13, 2018), <https://www.rollcall.com/news/politics/hoyer-pitches-earmark-revival-under-potential-democratic-house> [<https://perma.cc/4WYE-ZMYZ>]. This Note does not attempt an exhaustive recitation of the effects of gridlock.

131. H.R.6523—Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Congress.gov, <https://www.congress.gov/bill/111th-congress/house-bill/6523/actions?q=%7B%22search%22%3A%5B%22Ike+Skelton+national+defense%22%5D%7D&r=3> [<https://perma.cc/6TLS-96A6>] (last visited Jan. 22, 2020); The National Defense Authorization Act for Fiscal Year 2011, U.S. House Armed Servs. Comm. Democrats, <https://democrats-armedservices.house.gov/fy11-ndaa> [<https://perma.cc/TQ4U-5WW5>] (last visited Jan. 22, 2020).

132. Katherine Blakeley, *Fighting Green: How Congress and the Pentagon Make Defense Policy* 42 (Dec. 2017) (unpublished Ph.D. dissertation, University of California Santa Cruz) (on file with the *Columbia Law Review*).

133. See Fisher, *Durable Roadblocks*, *supra* note 32, at 32–33.

134. *Id.*

any appropriation of funding for the procurement of military planes, missiles, or ships.<sup>135</sup> The Committee soon expanded the requirement to other areas of defense.<sup>136</sup>

The resulting annual authorization process increased congressional oversight over defense. By 1971, members of the House and Senate Armed Services Committees believed that “the new authorization role [had] provided the committees with considerable power and influence over defense programs.”<sup>137</sup> Debate over the Vietnam War sparked heated confrontations during the authorization process, which adapted more readily to changing circumstances than the appropriations process.<sup>138</sup> Over time, the authorizing subcommittees became more powerful and the process eventually grew to incorporate significant input from individual legislators.<sup>139</sup>

Today, the defense authorization process is one of Congress’s most durable, institutionalized routines.<sup>140</sup> The Constitution imposes no affirmative obligation on Congress to appropriate—let alone authorize—spending for defense.<sup>141</sup> Yet members of Congress view the NDAA as an exercise

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135. Extra Funds Approved for Planes, Missiles, Ships, CQ Almanac (1961), <http://library.cqpress.com/cqalmanac/document.php?id=cqal61-1373672> (on file with the *Columbia Law Review*).

136. See Fisher, *Durable Roadblocks*, supra note 32, at 33.

137. Herbert W. Stephens, *The Role of the Legislative Committees in the Appropriations Process: A Study Focused on the Armed Services Committees*, 24 *Pol. Res. Q.* 146, 160 (1971).

138. See Edward J. Laurance, *The Changing Role of Congress in Defense Policy-Making*, 20 *J. Conflict Res.* 213, 236 (1976) (describing longer floor debates and the breakdown of previously existing legislative norms during the Vietnam War period).

139. Blakeley, supra note 132, at 53 (describing how the base text of the NDAA that emerges from the subcommittees must be supported by the minority and majority subcommittee members); Interview with Anonymous SASC Staffer, supra note 68 (describing why committee staff feel compelled to heed committee members’ requests when drafting the NDAA, including “prevent[ing] . . . really ugly votes” and “help[ing] members realize whatever their vision was” if an idea was “in good faith and . . . not complete[ly] crazy”).

140. This Note does not seek to explain *why* Congress continues to prioritize the NDAA as other authorization norms wither. It focuses on the procedural norms that have crystallized as part of the NDAA separation-of-powers convention and how those norms might be adapted to other legislative processes. Although the specific “why” question has not been addressed, scholars have explored the durability and expansion of defense politics at length. See generally Brooks, supra note 99 (analyzing and explaining the expanding role of the U.S. military from, among other things, a policymaking perspective).

141. See John Harrison, *Power, Duty, and Facial Invalidity*, 16 *U. Pa. J. Const. L.* 501, 502 (2013) (“Many constitutional rules, and in particular, the rules that govern the legislative authority of Congress, are about power and not duty.”); Pozen, supra note 10, at 38–39 (noting that affirmative obligations are “especially notable” constitutional norms because the Constitution’s text imposes very few obligations on Congress).

of Congress's constitutional "obligation" to "provide for the common defense."<sup>142</sup> Consequently, the NDAA remains a top priority for most lawmakers every year and has been passed on an annual basis since its inception.<sup>143</sup>

2. *The Enactment Process.* — The process for drafting the annual NDAA begins in earnest with the executive branch. The Department of Defense, in coordination with the White House Office of Management and Budget (OMB) and other agencies, prepares and submits hundreds of legislative proposals for committee staff to consider inserting into the NDAA.<sup>144</sup> This process benefits both sides—the executive branch provides significant input into its own oversight, while Congress enjoys the assistance of the executive branch's greater resources and expertise.<sup>145</sup> In addition, both branches develop and retain the muscle memory to repeat the process, which becomes useful when one side experiences turnover.<sup>146</sup>

At the committee level in both the House and Senate, the procedure for drafting and approving the NDAA is a "well-oiled machine."<sup>147</sup> The committee process begins with the submission of the President's Budget Request<sup>148</sup> to Congress on the first Monday in February.<sup>149</sup> Right away, the committees hold hearings to review the President's Budget Request and engage with senior military officials on the state of affairs across the

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142. See H. Armed Servs. Comm., Reform and Rebuild: The Next Steps: National Defense Authorization Act: FY-2019, 115th Cong. 1 (2018), [https://republicans-armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg\\_upload/FY19%20NDAA%20Conference%20Summary%20.pdf](https://republicans-armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_upload/FY19%20NDAA%20Conference%20Summary%20.pdf) [<https://perma.cc/EW9U-UBWM>] ("The Constitution requires Congress to provide for the common defense, . . . to 'raise and support Armies,' 'provide and maintain a Navy,' and 'make Rules for the Government and Regulation of the land and naval Forces.' For 57 years, the [NDAA] has been the primary way Congress executes this constitutional obligation." (quoting U.S. Const. art. I, § 8)).

143. See Bill Greenwalt, 'Last Bill that Works:' End of an Era for National Defense Authorization Act?, *Breaking Def.* (Dec. 10, 2013), <https://breakingdefense.com/2013/12/last-bill-that-works-end-of-an-era-for-national-defense-authorization-act> [<https://perma.cc/RQZ8-6ZR7>].

144. Telephone Interview with Anonymous White House Employee, *supra* note 75.

145. *Id.*

146. *Id.*

147. Telephone Interview with Anonymous Government Relations Expert, *supra* note 85.

148. The President's Budget Request "details the administration's position on the full range of federal revenue and spending . . . as well as detailed program-by-program funding levels . . . . [It also] introduce[s] new policies, programs, or changes they would like to see enacted." A Brief Guide to the Federal Budget and Appropriations Process, Am. Council on Educ., <https://www.acenet.edu/news-room/Pages/A-Brief-Guide-to-the-Federal-Budget-and-Appropriations-Process.aspx> [<https://perma.cc/8YSP-9ER2>] (last visited Oct. 23, 2018).

149. Valerie Heitshusen & Lynn M. Williams, Cong. Research Serv., IF10515, *Defense Primer: The NDAA Process I* (2016). The budget has been submitted late in recent years. Kellie Mejdrich, *Deadline for Presidential Budget Request Often Missed*, *Roll Call* (Jan. 31, 2017), <https://www.rollcall.com/2017/01/31/deadline-for-presidential-budget-request-often-missed> [<https://perma.cc/7TVP-JDEJ>].

Department of Defense.<sup>150</sup> Subcommittees will hold additional hearings to dive deeper into the subject matter within their jurisdiction.<sup>151</sup> Throughout the process, committee staff in both chambers work simultaneously to draft the legislation.<sup>152</sup>

By late April or May, the committee staff will be prepared for “markup”: the process of considering, amending, and voting on the bill.<sup>153</sup> The markup process begins at the subcommittee level, with the subcommittee chairmen and ranking members exercising power over the portions of the bill in their jurisdiction.<sup>154</sup> This empowers the lawmakers with the deepest knowledge of the policy issues to draft and debate their pieces of the bill.<sup>155</sup>

Power does not lie solely with the committee and subcommittee chairs—individual committee members and their staff also have opportunities to suggest provisions for the year’s NDAA at every stage of consideration.<sup>156</sup> This facilitates the creation of credit-claiming opportunities, which generates buy-in for the NDAA.<sup>157</sup> The openness of the process prompted one Senator to observe that “[e]veryone is heard; no one is shut out.”<sup>158</sup>

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150. Heitshusen & Williams, *supra* note 149, at 1.

151. *Id.* These hearings provide critical opportunities for committee members to engage with military officials on the rationales behind the budget request. See Blakeley, *supra* note 132, at 56. Moreover, the hearings ensure that members have no shortage of face time with the military to seek feedback about defense policy issues that they can address in the NDAA. In 2013, the House Armed Services Committee scheduled forty-five hearings between February and May. *Id.*

152. See Heitshusen & Williams, *supra* note 149, at 1; Blakeley, *supra* note 132, at 56.

153. See Heitshusen & Williams, *supra* note 149, at 1.

154. *Id.*

155. See Blakeley, *supra* note 132, at 58 (discussing how committee members may work on provisions of the bill that have particular importance to them).

156. Initially, members can try to have provisions added to early drafts in the subcommittee markups or the “Chairman’s Mark,” which increase their likelihood of inclusion in the final bill by earning the approval of the committee chairman. See Blakeley, *supra* note 132, at 57–58; Interview with Anonymous SASC Staffer, *supra* note 68 (describing how committee staff would try to incorporate individual members’ priorities into early drafts of the NDAA). The Chairman’s Mark is the chairman’s draft of the bill, which acts as a base draft for the provisions that do not fall within a subcommittee’s jurisdiction. See Heitshusen & Williams, *supra* note 149, at 1. Later, committee members can introduce proposals as amendments during the full committee markup. Blakeley, *supra* note 132, at 58. During the Senate markup, every senator has an unlimited opportunity to offer amendments until none remain. Tim Kaine, Opinion, What John McCain Taught Me About Governing, Losing and Life, *Time* (Aug. 26, 2018), <http://time.com/5378683/john-mccain-tim-kaine-senate> [<https://perma.cc/P83Z-VY4A>].

157. See Adler & Wilkerson, *supra* note 34, at 64 (discussing how credit-claiming opportunities generate support from individual committee members for committee legislation).

158. Kaine, *supra* note 156. If securing inclusion of a provision fails during markup, a senator can then try to pass the amendment when the whole chamber debates the bill or insert it into a package of preapproved amendments that the chamber votes on simultaneously. See Heitshusen & Williams, *supra* note 149, at 2.

At every stage of the process, committee leadership enforces norms that build bipartisanship and guard against the insertion of controversial provisions. The House Armed Services subcommittees, for example, require approval of amendments at the subcommittee level from both the Republican and Democratic subcommittee leaders.<sup>159</sup> Although committee staff work for either the “majority” or the “minority,” they generally will not include policy provisions without agreement from their partisan counterparts.<sup>160</sup> Controversial amendments are held until the end of full committee consideration so as to prevent impediments to the otherwise collegial, efficient process.<sup>161</sup> If members disagree about a provision in the base bill, the chair may set it aside and instruct committee staff to work with the concerned members to craft an agreeable compromise.<sup>162</sup>

After the committees approve the NDAA, each chamber must make time for the full body to debate and amend the bill. This is especially difficult in the Senate, where floor time is particularly valuable.<sup>163</sup> The committee chair and ranking member negotiate with Senate leadership to reserve roughly two weeks for floor consideration of the NDAA, which inevitably prompts the introduction of hundreds of amendments.<sup>164</sup> Many of these amendments are ultimately considered.<sup>165</sup>

After both chambers approve the NDAA, a “conference committee” is typically used to resolve the differences between the two bills.<sup>166</sup> The conference committee is led by the “Big Four”—the Chairs and Ranking Members of the House and Senate Armed Services Committees—and typically includes members of the authorizing committees and congressional leadership.<sup>167</sup> Most disagreements in conference are worked out at the staff level.<sup>168</sup> Notably, in the continued interest of bipartisanship, the conference committee plays a key “dampening role” by eliminating provisions that one chamber approved but the other chamber would find controversial.<sup>169</sup> The final product is sent back to each chamber for debate and final approval.<sup>170</sup>

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159. Blakeley, *supra* note 132, at 58.

160. Interview with Anonymous SASC Staffer, *supra* note 68.

161. See Blakeley, *supra* note 132, at 58. This approach differs sharply from that of other committees, which typically insert controversial provisions into the Chairman’s Mark on the basis that the full committee can vote to have them removed. See Shogan, *supra* note 78, at 205.

162. Shogan, *supra* note 78, at 202.

163. See *supra* notes 126–129 and accompanying text.

164. Shogan, *supra* note 78, at 202.

165. See Heitshusen & Williams, *supra* note 149, at 2. Controversial amendments may be subject to procedural hurdles. *Id.*

166. *Id.*

167. See Blakeley, *supra* note 132, at 54–55.

168. Shogan, *supra* note 78, at 203.

169. Blakeley, *supra* note 132, at 203.

170. See Heitshusen & Williams, *supra* note 149, at 2.

C. *Positive Takeaways from the NDAA Process*

The NDAA is routinely commended as “one of the last remaining relics of bipartisan consensus” and “perhaps the last bill, the last legislative process, that still actually works.”<sup>171</sup> Indeed, the bill’s survival through the eras of Vietnam, Iran-Contra, the Cold War, the Iraq War, and the War on Terror shows that Congress can overcome extraordinary challenges to serve its most powerful function: acting as a check against the executive branch.<sup>172</sup> And the bill enables Congress to play this role in a relatively transparent way that maximizes the benefits of the authorization-appropriations process.

Moreover, the NDAA’s survival provides for a rich examination of what is necessary to create a successful authorization process in today’s political climate. This section highlights key elements of the NDAA process that inform proposed solutions in Part III for reviving the authorization-appropriations process.

1. *Bipartisanship and Incrementalism.* — First and foremost, the NDAA’s culture of bipartisanship is essential to its annual passage. Although national security dynamics create uniquely high stakes, this alone does not explain the bipartisan culture in the House and Senate Armed Services Committees. The House Permanent Select Committee on Intelligence handles issues of similar import, but has suffered a major breakdown in bipartisan relations over the Mueller investigation, for example.<sup>173</sup> Hostilities have impeded the committee’s ability to exercise oversight over the intelligence agencies.<sup>174</sup>

One might criticize the NDAA’s bipartisan approach as preventing meaningful policy changes. Indeed, forbidding controversial provisions inherently inhibits the inclusion of ambitious or sweeping overhauls of Defense Department programs. Instead, the bill strives for incremental progress that lawmakers can build upon over time.<sup>175</sup> With regular updates and repetition of the NDAA cycle, these incremental, noncontroversial

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171. Greenwalt, *supra* note 143.

172. See Shogan, *supra* note 78, at 195.

173. See Derek Hawkins & Kyle Swenson, Adam Schiff and Devin Nunes: From ‘Bromance’ to Bitter Adversaries, *Wash. Post* (Feb. 1, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/02/01/adam-b-schiff-and-devin-nunes-from-bromance-to-bitter-adversaries/?utm\\_term=.4454755dfe53](https://www.washingtonpost.com/news/morning-mix/wp/2018/02/01/adam-b-schiff-and-devin-nunes-from-bromance-to-bitter-adversaries/?utm_term=.4454755dfe53) (on file with the *Columbia Law Review*). “Mueller investigation” refers to special counsel Robert Mueller’s probes into whether Donald Trump’s presidential campaign coordinated with Russia to influence the 2016 election. *Id.*

174. See Olivia Beavers, Lawmakers Fail to Pass Annual Intel Bill After Key Dem Objects, *Hill* (Sept. 28, 2018), <https://thehill.com/policy/national-security/408987-intel-panels-fail-to-pass-key-2018-intel-authorization-bill-over-key> [<https://perma.cc/L6ST-HG5B>].

175. See McCain Speech on Regular Order, *supra* note 95 (“Incremental progress, compromises that each side criticize but also accept, just plain muddling through to chip away at problems . . . isn’t glamorous or exciting. . . . But it’s usually the most we can expect from our system of government, operating in a country as diverse and quarrelsome and free as ours.”).

policies do lead to gradual, meaningful change. For example, Congress enacted eighty-seven provisions related to the Department of Defense's energy consumption between fiscal years 2004 and 2013.<sup>176</sup> These small, noncontroversial policy provisions have effectively curbed the Department's energy consumption and have the potential for higher-yield results in the long term.<sup>177</sup>

2. *Staff Relationships and Expertise.* — Second, staff interactions and knowledge can make or break the legislative process. The majority and minority staff of the House and Senate Armed Services Committees trust each other, frequently consult each other throughout the NDAA drafting process, and even regularly travel together.<sup>178</sup> Such collegiality is not presumed elsewhere on Capitol Hill.<sup>179</sup> By maintaining strong relationships, the authorizing committees can work efficiently to resolve disagreements without jeopardizing the NDAA.

Committee staff and their executive branch counterparts also hold invaluable institutional knowledge that enables the regular enactment of the NDAA. In Congress, some professional staff members on the armed services committees tend to stay in their jobs through transitions at the leadership level, and many hold advanced degrees in their areas of expertise.<sup>180</sup> However, turnover and lack of expertise pose significant challenges elsewhere in Congress.<sup>181</sup> The same holds true in the executive branch.

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176. Blakeley, *supra* note 132, at 169.

177. *Id.* at 4–5.

178. See Shogan, *supra* note 78, at 206–08.

179. For example, in 2015, the Senate considered a bipartisan measure to combat human trafficking that had died in the previous session. But when Republican staffers reintroduced the bill, they inserted an obscure anti-abortion provision into the new language and did not tell Democratic staff. Burgess Everett & Seung Min Kim, *How Abortion Politics Scuttled a Human-Trafficking Bill*, Politico (Mar. 12, 2015), <https://www.politico.com/story/2015/03/how-abortion-politics-scuttled-a-human-trafficking-bill-116042> [<https://perma.cc/8QTN-HN7A>] (last updated Mar. 13, 2015). The gimmick led to a brutal floor fight over what was supposed to be a quick, painless victory for human trafficking victims. *Id.* Democratic staffers told the media that it “would be hard to trust Republicans again after the episode.” *Id.*

180. Telephone Interview with Anonymous Government Relations Expert, *supra* note 85 (“[T]he [committees] have professional staffers who’ve been in their jobs for years . . . . Most . . . have worked in the military or have [degrees] in physics or a specific issue area . . . . [T]hough the chairman may rotate out, they keep the staffers and . . . tend to hire people . . . independent of the . . . political process . . .”).

181. See Lee Drutman & Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, Atlantic (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295> [<https://perma.cc/UF6V-EXM6>] (describing the decline in committee staff numbers and salaries, and proposing ways in which Congress can “develop long-term incentives that align with long-term institutional success” for committee staff); see also Telephone Interview with Anonymous Government Relations Expert, *supra* note 85 (“[In] the House Science Committee, the chairman, when he took over, . . . fired everybody and brought in all Republican staffers. Some . . . were technically astute but a lot of them were not. And so they

Defense officials possess the knowledge to draft hundreds of provisions for the NDAA,<sup>182</sup> while the State Department—which has not had spending authorizations since 2002<sup>183</sup>—lacks the “muscle memory” to produce a similar bill.<sup>184</sup>

3. *One Bill at a Time.*—Another reason the House and Senate Armed Services Committees are able to pass an NDAA every year is because that bill is each committee’s primary legislative focus.<sup>185</sup> The committees’ singular focus on the NDAA is important because congressional committees today have very little capacity relative to previous decades.<sup>186</sup> Specifically, committees have fewer staff, smaller budgets to recruit and retain top talent, and less time for committee meetings during which members of Congress can learn and debate the issues.<sup>187</sup> Temporary authorizations like the NDAA, while requiring committees to revisit legislative issues on a reg-

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wouldn’t understand the subject matter, whereas in the defense world they are subject matter experts.”).

182. See *supra* note 144 and accompanying text.

183. See *supra* notes 97–98.

184. Telephone Interview with Anonymous White House Employee, *supra* note 75 (“Part of the problem is [the State Department has] institutionally lost the muscle memory . . . to produce [a bill] . . . [I]t hasn’t happened in so long that they kind of have given it up.”).

185. From 2009 to 2018, the Senate Armed Services Committee acted on only nineteen bills out of 573 introduced in its jurisdiction. Search Results, Congress.gov, <http://www.congress.gov/search> [<https://perma.cc/9BZY-99WX>] (last visited Jan. 22, 2020) (narrow by: “Congress: 111–15,” “Legislation,” “Status of Legislation: Committee Consideration,” “Chamber of Origin: Senate,” and “Senate Committee: Armed Services”). Of the bills that were not NDAs, the committee only voted on three—the rest were the subject of hearings with no further action. *Id.*

In contrast with Armed Services, the Senate Foreign Relations Committee considered 302 bills that originated in the Senate during the same time period. Search Results, Congress.gov, <http://www.congress.gov/search> [<https://perma.cc/B88D-LKRT>] (last visited Jan. 21, 2020) [hereinafter Foreign Relations Search Results] (narrow by: “Congress: 111–15,” “Legislation,” “Status of Legislation: Committee Consideration,” “Chamber of Origin: Senate,” and “Senate Committee: Foreign Relations”). One hundred and sixty of those bills were resolutions. *Id.* Resolutions “are used to express nonbinding positions of the Senate or to deal with the Senate’s internal affairs.” Bills and Resolutions, U.S. Senate, [https://www.senate.gov/reference/glossary\\_term/simple\\_resolution.htm](https://www.senate.gov/reference/glossary_term/simple_resolution.htm) [<https://perma.cc/A63N-JB8J>] (last visited Jan. 21, 2020). Thirty-two bills that were not simple resolutions became law. Foreign Relations Search Results, *supra*. By and large, the bills that became law appear to represent an ad hoc approach to foreign relations policymaking by addressing individual countries or regions without consideration of the bigger picture. See, e.g., Venezuela Defense of Human Rights and Civil Society Extension Act of 2016, Pub. L. No. 114-194, 130 Stat. 674; Assessing Progress in Haiti Act of 2014, Pub. L. No. 113-162, 128 Stat. 1858; Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209.

186. See Drutman & Teles, *supra* note 181 (explaining how “the flatlining of congressional capacity has happened at a time of exploding social complexity and lobbying demands. With staff numbers fixed and the demands on them increasing, the actual capacity of congressional staff to engage seriously with issues has gone down—and stayed down”).

187. *Id.*



ular basis, provide committees with the immense benefit of reduced pressure to act when an issue is not up for reauthorization or at a stage of the process when it can be considered—this allows committees to “more efficiently allocate their own limited time and resources.”<sup>188</sup> Thus, if a committee only focuses on one bill, lawmakers and their staff can devote their resources to that process and be free of the pressure to act outside of the planned cycle (barring a crisis).

4. *Unorthodox Lawmaking*. — Finally, the House and Senate Armed Services Committees have employed certain “unorthodox lawmaking” tools to enact the NDAA during particularly difficult times. Professor Barbara Sinclair coined the term “unorthodox lawmaking” to denote departures from the regular legislative process as it should be.<sup>189</sup> Lawmakers can use unorthodox tactics to exert more control over the legislative process and prevent a single individual or opposing force from derailing the entire process.<sup>190</sup> Consequently, unorthodox tactics have potentially negative effects, such as excluding minority viewpoints from the lawmaking process.

The NDAA strategically incorporates certain unorthodox lawmaking tactics that reduce transparency within the process, but make significant contributions to the legislative branch’s transparency overall by keeping the authorization-appropriations process alive. For example, the Senate Armed Services Committee markup is closed to the public, contrary to other authorizing committee markups.<sup>191</sup> This facilitates bipartisanship, which enables the bill’s movement to the Senate floor.<sup>192</sup>

The “Big Four” have also, on occasion, resorted to unorthodox lawmaking tactics that reduce minority input into the NDAA. In 2010, the Senate required unanimous approval to pass the NDAA as a procedural last resort, in order to sidestep the time requirements normally associated with holding a roll call vote.<sup>193</sup> In 2012, the Senate did not debate the NDAA at all; instead, the House and Senate Armed Services Committees “pre-conferenced” the bill and presented the final version to each chamber for an up-or-down vote.<sup>194</sup> This departure from regular order infuriated lawmakers from both parties, but enabled the bill’s timely passage.<sup>195</sup>

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188. Adler & Wilkerson, *supra* note 34, at 84.

189. See Barbara Sinclair, *Unorthodox Lawmaking* 42 (3d ed. 2007).

190. *Id.*

191. See Shogan, *supra* note 78, at 208.

192. *Id.* at 209.

193. See Greenwalt, *supra* note 143.

194. Blakeley, *supra* note 132, at 32.

195. With Just Days to Spare, Senate Extends NDAA Streak, Ass’n Naval Aviation: Hampton Roads Squadron (Dec. 20, 2013), <http://hrana.org/hot-topics/2013/12/with-just-days-to-spare-senate-extends-ndaa-streak> [<https://perma.cc/PE8X-QCXE>].

### III. HOW THE NDAA PROCESS CAN REVIVE THE AUTHORIZATION PROCESS

Congress should use the NDAA as a model to restore the authorization-appropriations process in other policy areas. Doing so would strengthen congressional oversight, policymaking, and transparency.<sup>196</sup> Part III approaches this problem from two different angles. Section III.A proposes solutions for a willing Congress, in which most members earnestly wish to restore the authorization-appropriations process and the benefits that come with it. Section III.B assumes that the hostility that plagues today's legislative politics will continue to dominate the space and impede progress.

#### A. *Solutions for a Willing Congress*

1. *Bipartisanship and Incrementalism.* — Part of the NDAA's success depends on the Senate Armed Services Committee's bipartisan, incremental approach to policymaking.<sup>197</sup> Bipartisanship does not require that committee members agree on the entire substance of an authorization bill ahead of time. Rather, the bipartisan NDAA approach requires a collective agreement as to the process of incorporating potentially controversial provisions. Lawmakers have little success including controversial provisions in the base text of the NDAA without consensus from the entire committee.<sup>198</sup>

Other authorizing committees should take a similar approach. Without an upfront commitment to bipartisan lawmaking, the threat of partisan provisions can swiftly derail an authorization process.<sup>199</sup> Indeed, every attempt to reauthorize the State Department “has stumbled and faltered due to specific provisions members threw in that were non-starters for the other party.”<sup>200</sup>

Committee leaders should therefore make an upfront commitment to exclude controversial provisions from base authorization bills, while providing ample opportunities for committee members to propose amendments in markup.<sup>201</sup> As in the Senate Armed Services Committee,

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196. See *supra* section I.B (describing the values of a robust authorization-appropriations process).

197. This section assumes that members of Congress share a common goal of restoring the authorization-appropriations process. It does not assume, however, that members have the same policy goals. A discussion of bipartisan lawmaking is therefore warranted.

198. See *supra* note 161 and accompanying text.

199. For example, in 2018, the House Foreign Affairs Committee attempted to reauthorize authorities for the State Department. Department of State Authorization Act of 2018, H.R. 5592, 115th Cong. (2018). After six months of legislative drafting, the process was derailed by Representative Chris Smith, who sought to include anti-abortion language in the bill's policy guidance for the Office of Global Women's Issues. Gramer, *supra* note 98.

200. Gramer, *supra* note 98.

201. Interview with Tim Kaine, U.S. Senator, in Washington, D.C. (Jan. 20, 2019) [hereinafter Interview with Senator Kaine] (transcript on file with author) (“[The NDAA's] open

senators may introduce controversial provisions as amendments but should wait until the end of markup so as not to slow down the process. If individual members find that provisions in the base bill are controversial, committee leaders should remove those provisions and direct committee staff to reach a compromise.<sup>202</sup> The resulting legislation will likely contain incremental policy changes while maintaining oversight over important executive branch policies.<sup>203</sup>

2. *Staff Expertise.* — The NDAA's regular passage depends on the institutional knowledge of committee staff. If Congress wants to restore the authorization-appropriations process in earnest, it must get serious and creative about attracting and retaining capable committee staff on the authorizing committees. First, Congress should allocate more resources to hiring additional committee staff.<sup>204</sup> Second, salaries for committee staff should reflect the realities of competition from lobbying firms and other government-facing entities.<sup>205</sup> At the very least, Congress should ensure that salaries maintain their value and account for inflation and increasing costs of living.<sup>206</sup>

Moreover, because few committee staff today take part in drafting regular authorization bills like the NDAA, Congress should develop a creative plan for sharing institutional knowledge between armed services committee staff and other committee staff. One option might be to establish a rotation system, in which committee staff from other authorizing committees spend short periods shadowing armed services committee staff in order to observe the mechanics of the NDAA process from within.<sup>207</sup> Congress frequently utilizes fellowship programs to make temporary staff

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process results in a better bill with strong bipartisan support, and if more committees followed that example, you'd see better and more bipartisan bills coming to the Senate floor.”).

202. See *supra* note 162 and accompanying text.

203. See *supra* notes 176–177 and accompanying text.

204. In 2015, Congress had roughly 61.5% of the committee staffers it had in 1979. See Vital Statistics on Congress, Brookings Inst., <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress> [<https://perma.cc/EW3C-UDXJ>] (last updated Mar. 4, 2019).

205. See Drutman & Teles, *supra* note 181 (noting the salary differences between congressional staff and their lobbyist counterparts). One might argue that committee positions offer unique public service incentives that sufficiently attract talent. This may be true, but only to a point. Cf. Ryan Lizza, *Why Congressional Staffers Hate the Vitter Amendment*, *New Yorker* (Oct. 15, 2013), <https://www.newyorker.com/news/news-desk/why-congressional-staffers-hate-the-vitter-amendment> [<https://perma.cc/RF6Y-ZCRW>] (sharing messages from career congressional staff who, facing the threat of losing their health insurance subsidies currently included in their salaries, declared that they would respond by fleeing for the private sector).

206. From 2001 to 2015, professional staff members for house committees suffered a 22.32% decline in their median salaries. R. Eric Petersen & Lara E. Chausow, *Cong. Research Serv.*, R44322, *Staff Pay Levels for Selected Positions in House Committees, 2001–2015*, at 12 (2016).

207. A similar idea has been proposed for rotating staff between committees and the personal offices of committee members. See Drutman & Teles, *supra* note 181.

out of outside policy experts and executive branch personnel.<sup>208</sup> These individuals gain institutional knowledge in exchange for their substantive expertise. In a similar fashion, Congress could craft an intrabranch program for sharing knowledge among committee staff.

3. *Timing.* — Today's political dynamics impose significant scheduling challenges on Congress.<sup>209</sup> This is especially problematic in the Senate.<sup>210</sup> However, these issues affect individual members, committees, and the legislative branch as a whole.

At the committee level, each authorizing committee should follow the House and Senate Armed Services Committees' lead by focusing on only one comprehensive bill per year that authorizes programs and spending in their legislative jurisdiction.<sup>211</sup> The process for crafting that bill should begin with a series of hearings to inform committee members about federal programmatic activities. As with the NDAA hearings, these hearings would allow executive branch witnesses to advocate publicly for the value of their programs.<sup>212</sup> Hearings would also allow committee members to ask questions on the record about their particular interests, which would facilitate the creation of credit-claiming opportunities.<sup>213</sup> Individual committee members can also use the record to craft and later incorporate stand-alone legislation into a comprehensive bill, thereby generating additional credit-

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208. See, e.g., Legis Congressional Fellowship, Brookings Inst., <https://www.brookings.edu/fellowships-programs/legis> [<https://perma.cc/KA9B-E6V5>] (last visited Jan. 22, 2020); Training and Development: Rotational Opportunities, Presidential Management Fellows Program, U.S. Office of Pers. Mgmt., <https://www.pmf.gov/current-pmfs/training-and-development/rotational-opportunities.aspx> [<https://perma.cc/9B3W-XPYB>] (last updated Nov. 15, 2019).

209. See *supra* notes 126–130 and accompanying text.

210. See *supra* notes 126–130 and accompanying text.

211. See *supra* note 185 and accompanying text.

212. Interview with Anonymous IV, Legislative Assistant, U.S. Senate, in Washington, D.C. (Jan. 7, 2019) (transcript on file with author).

213. See *id.* (“Personal offices will use the posture hearing . . . to prep questions . . . to be answered on the record, and then those go into justifications in the member’s [requests of the committee], which also helps build out the half of the bill that’s not internally crafted by committee staff.”).

claiming opportunities<sup>214</sup> and buy-in from individual committee members.<sup>215</sup> Furthermore, considering authorization bills all at once would reduce the risk of accidental lapses in authority or partial authorizations within a committee's jurisdiction.<sup>216</sup>

Moving only one or two legislative vehicles on an annual or biennial basis would also relieve pressure on lawmakers to constantly respond to demands in every policy area.<sup>217</sup> As with the NDAA, lawmakers would have a short window of time—for example, from the release of the President's Budget until the bill's markup—to receive and consider new policy proposals on an issue. Once the markup is over, lawmakers and their staff would be able to focus on the remainder of the legislative process, deferring new policy requests until the beginning of the next drafting cycle. This reduced pressure would free up important committee resources. It would also make the process much more transparent to outsiders who could learn and follow the schedule.<sup>218</sup>

4. *Unorthodox Lawmaking.* — The House and Senate Armed Services Committees have employed various unorthodox lawmaking tactics to

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214. See, e.g., Press Release, Mazie K. Hirono, U.S. Senator, Hirono Secures Hawaii Priorities in National Defense Authorization Act (May 24, 2018), <https://www.hirono.senate.gov/news/press-releases/hirono-secures-hawaii-priorities-in-national-defense-authorization-act> [https://perma.cc/9JYY-JBV7] (“The NDAA includes Senator Hirono’s Military Domestic Violence Reporting Enhancement Act, which closes a dangerous loophole in the Uniform Code of Military Justice (UCMJ) that enables convicted abusers to purchase firearms.”).

215. See *supra* note 157 and accompanying text.

216. Interview with Senator Kaine, *supra* note 201 (“Because we have only one defense authorization bill, Senators recognize how important it is to pass, and the Department of Defense never ends up only partially authorized.”).

217. Adler & Wilkerson, *supra* note 34, at 84 (“[T]he same committee is under less pressure to act when the issue is not up for reauthorization because—barring a crisis of some sort—there is little chance of congressional action.”).

218. There remains an issue of how and when temporary authorization bills would earn space on the crowded legislative calendar—especially in the Senate. Reducing each authorizing committee’s workload to one or two vehicles per year might better enable Senate leadership to schedule floor time in advance, as it does with the NDAA. See *supra* note 164 and accompanying text.

Another option would be to shift the budget and appropriations cycles from annual to multiyear schedules. A bipartisan coalition of lawmakers has pushed for moving to a two-year cycle, in which the first year would be spent on budget and appropriations and the second year would involve oversight and authorizations. See Biennial Budgeting and Appropriations Act, S. 284, 116th Cong. (2019); see also Rebecca Shabad, *Senators’ Budget Fix: Make It Last Two Years*, Hill (Jan. 13, 2015), <https://thehill.com/policy/finance/229347-senators-renew-effort-to-convert-budget-process-to-2-years> [https://perma.cc/UZ8L-YXU6]. This proposal risks exacerbating the drawbacks of passing temporary spending bills on longer timelines—namely, that doing so reduces oversight and incentivizes Congress to revisit important issues less frequently than they currently do. Cf. *supra* section I.A.3 (describing the benefits of annual spending bills). However, the current process is too rushed in practice to involve much participation from most lawmakers. See *supra* note 84 and accompanying text. Moving the budget and appropriations processes to longer cycles may inspire more careful oversight of spending bills, while adding the further benefits of restoring the authorization process.

maintain the NDAA's annual streak.<sup>219</sup> Some of these tactics, such as the Senate's closed-door committee markup, have earned criticism for reducing transparency.<sup>220</sup> But other tactics may prove valuable for restoring the authorization process in nondefense policy areas. Specifically, "pre-conferencing" legislation—having committees hammer out the differences between the two chambers' bills before presenting one identical bill to each body for an up-or-down vote—allows lawmakers to reduce the amount of time that legislation requires on the floor.<sup>221</sup> This process has enabled Congress to enact reauthorization bills for low-priority issues in recent years.<sup>222</sup>

Assuming a willing Congress, one unorthodox solution might be to "pre-conference" authorization bills and make them binding on the appropriations committees by agreement. Then, when Congress passes appropriations bills, the authorization bills would be attached. For example, suppose that the Senate Foreign Relations and House Foreign Affairs Committees each drafted authorization bills for the State Department. Once each committee approved a bill, they would move to conference to reconcile the differences. Instead of then awaiting floor time, the committees would send the conferenced authorization bill to the appropriations committees, with the understanding that it is final and no longer amendable. The appropriations committees would then follow the bill's guidance when drafting appropriations legislation, and attach the authorization bill to the appropriations bill that is ultimately reported out of committee.<sup>223</sup>

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219. See *supra* section II.C.4.

220. See, e.g., Danielle Brian, *SASC Marks Up the Defense Budget in the Dark*, HuffPost (June 14, 2012), [https://www.huffingtonpost.com/danielle-brian/sasc-marks-up-the-defense\\_b\\_1593519.html](https://www.huffingtonpost.com/danielle-brian/sasc-marks-up-the-defense_b_1593519.html) [<https://perma.cc/2H46-NJQK>] (last updated Aug. 14, 2012) ("Shutting the public out of discussion of defense policy and programs represents an affront to our democratic principles, and it only ensures that special interests continue to have near-exclusive access to lawmakers.").

221. For a reference to pre-conferencing and the NDAA, see *supra* note 194 and accompanying text.

222. See, e.g., Will Thomas, *Congress Passes Bipartisan NASA Authorization Legislation*, Am. Inst. of Physics (Mar. 9, 2017), <https://www.aip.org/fyi/2017/congress-passes-bipartisan-nasa-authorization-legislation> [<https://perma.cc/29PJ-GHDT>] (discussing how a NASA reauthorization bill was pre-conferenced and approved by unanimous consent in the Senate to "ensure a smooth passage").

223. This idea raises several issues. First, it assumes that all parties involved would be capable of collaborating in this way. The appropriators, for example, would likely prefer not to be bound by legislation that lacks the force of an enacted statute. Second, this process would cut lawmakers who do not sit on the appropriations or the authorizing committees—in this example, the foreign relations committees—out of the oversight process almost entirely. This proposal might also be antithetical to the goal of increasing transparency and democratic involvement in the oversight process. However, given the existing reliance on committees to write authorization bills, even in a regular authorization-appropriations process such as the NDAA, it is not clear how much difference would be made by enabling floor amendments or formal noncommittee lawmaker involvement. For examples of instances in which Congress enacted the NDAA without modifications from noncommittee members,

B. *Solutions for a Polarized Congress*

Without the political will to increase transparency and congressional oversight over the executive branch through the authorization process, the above solutions will likely not be realized or effective. As one congressional hearing witness observed, “[u]nauthorized appropriations . . . are a symptom of political polarization and gridlock. Changing the process will not change the will of the members nor the extreme polarization.”<sup>224</sup> Indeed, lawmakers who came to Congress on the promise of slashing government spending would likely balk at the idea of banding together to authorize billions of dollars in discretionary funds.

In fact, several prominent Republican lawmakers have proposed reforms to the authorization-appropriations process that would trigger spending cuts without enhancing oversight. The Unauthorized Spending Accountability Act of 2017, for example, would automatically reduce spending levels for unauthorized programs by ten percent one year after their expiration and fifteen percent after the second year, if enacted.<sup>225</sup> All expired program authority would terminate if not reauthorized within three years of their expiration.<sup>226</sup> Without substantial reforms to ensure that Congress has the resources or the will to meaningfully reengage in the reauthorization process, the Act would essentially guarantee a series of “cliffs” and expirations of federal programs.<sup>227</sup>

Nevertheless, there are smaller ways in which Congress might adapt lessons from the NDAA to satisfy the current goals of Republicans and Democrats. For those committee leaders who wish to reestablish their committees as forces for oversight and policymaking, the House and Senate Armed Services Committees have set strong examples of bipartisan leadership that should be replicated elsewhere. Proposals for biennial budgeting have also gained bipartisan traction—the most recent Senate proposal has seventeen cosponsors, eight of whom are Democrats.<sup>228</sup> And while Congress may not be inclined to increase appropriations for legislative

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see *supra* notes 193–194 and accompanying text. At the same time, the authorizing committees would advance the values of oversight and transparency by holding open hearings, engaging with the executive branch, and boring deeper into policymaking proposals without the restraints of requiring floor time for their legislation.

224. Budget Committee Hearing, *supra* note 57, at 54 (statement of James A. Thurber, Ph.D., University Distinguished Professor of Government, Founder and Director, Center for Congressional and Presidential Studies, School of Public Affairs, American University).

225. H.R. 2174, 115th Cong. (2017). The bill would also establish a commission to set an authorization schedule and assist with finding opportunities for budget cuts. *Id.*

226. *Id.*

227. See Reich, *supra* note 96 (discussing how Republican proposals to reform the authorization process would “likely worsen the delays and difficulties” of the budget process).

228. Biennial Budgeting and Appropriations Act, S. 284, 116th Cong. (2019); Cosponsors: S.284—116th Congress (2019–2020), Congress.gov, <https://www.congress.gov/bill/116th-congress/senate-bill/284/cosponsors> [<https://perma.cc/FM2A-Q3Q2>] (last visited Apr. 23, 2020).

branch salaries, intrabranh staff rotational programs may appeal to lawmakers on both sides if they can be done in a cost-effective way.<sup>229</sup>

#### CONCLUSION

Historically, congressional lawmakers understood and acknowledged the importance of the authorization-appropriations process for ensuring vigilant oversight over the executive branch. In gradually abandoning the process, Congress has come to exercise the spending power primarily through the appropriations committees in a way that has been described as “wide” but not “deep.”<sup>230</sup>

The NDAA stands as a striking exception to the decline of the authorization-appropriations process. With the relevant authorizing committees taking the lead, Congress has passed the NDAA (or an equivalent measure) on an annual basis for fifty-nine years, despite varying degrees of political turmoil and changes in committee leadership.<sup>231</sup> Indeed, the NDAA is one of Congress’s most regularized processes, with legislators routinely declaring that it is their duty to pass the bill.

This Note argues that congressional committees should use the NDAA as a model for improving transparency and oversight over the executive branch by restoring the two-step authorization-appropriations process. Specifically, congressional authorizing committees should adopt practices established by the House and Senate Armed Services Committees for the NDAA, including bipartisan procedures for considering controversial measures and a “one bill at a time” approach. Authorizing committees should also prioritize recruiting expert staff who will develop the muscle memory to recreate the authorization process on an annual or biennial basis, as the House and Senate Armed Services Committees do. While political obstacles will undoubtedly remain difficult to overcome, adopting these procedures would facilitate committee efforts to pass regular authorization bills in advance of appropriations.

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229. Lawmakers from both parties utilize fellowship rotational programs. See *supra* note 208 and accompanying text.

230. See *supra* note 72 and accompanying text.

231. See *supra* note 8 and accompanying text.