Authorizing Policy

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Published by The Ohio State University Press

Hall, Thad.
Authorizing Policy.
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The New Policy Environment

“Virtually all of my bill has been unauthorized. The Justice Department has not been reauthorized since I’ve been in Congress—almost 20 years. It makes my job triply difficult.”
—Representative Harold Rogers (R-KY), Appropriations Committee Subcommittee Chairman.

In the previous chapters, the use of short-term authorizations as a control mechanism has been explored in depth. However, the utility of this mechanism in some policy areas is diminishing because certain committees are having a more and more difficult time successfully crafting reauthorization legislation. As the quote from Congressman Rogers emphasizes, the failure to reauthorize has effects across Congress and across the policy process more broadly, as members and other policy actors have to find other ways in which to change policy.

The origins of the deterioration of the reauthorization process may lie in the expansive use of this mechanism and in the deficit politics years of the 1980s. On the first point, the abundance of short-term authorizations allows Congress to evaluate how agencies are implementing federal programs, but they also increase the workload for congressional committees. This is especially true for programs operating with an annual authorization. These programs require a committee to hold hearings and then write new authorization legislation every year. Not surprisingly, these programs dominate the agenda of the relevant committee. The defense authorization, which is perhaps the most prominent annual authorization, is the only major piece of legislation the Armed Services Committees considers each year. Many committees use multiyear authorizations to minimize the costs associated with having to act to reauthorize these programs (LeLoup 1980). However, even committees with multiyear authorizations can have problems reauthorizing the programs under their control.

The second issue is that reauthorization politics often require money.
Oleszek (1989) argues that the influence of short-term authorizations on the budget and policy process is linked to the availability of funds to pay for these programs. When money is tight and deficits exist, the budgeters and the appropriators have most of the power. This makes being an authorizing committee member less important. One authorizing committee member summed up the situation by saying: “It’s no fun being an authorizing committee chairman anymore. They can’t get new programs passed. The best they can do is preserve their most beloved programs at some level that makes sense” (Oleszek 1989, 76).

During the 1980s and early 1990s, authorization committees were forced to cut program funding, make them more efficient, and find ways of creating programs on the cheap. Beginning with the Reagan Administration, the use of the reconciliation process put the budget committees and the Appropriations Committees in the position of instructing authorizing committees to cut program and entitlement expenditures (Tiefer 1989). The budget deficits in the 1980s also made it harder for authorizing committees to build legislative coalitions and distribute program benefits to committee members.

Still, by the beginning of the 1990s there were relatively few programs that were operating with an expired authorization. According to the Congressional Budget Office (CBO 1990), 49 programs received appropriations with an expired authorization in 1990. By 1995 there had been a 110
percent increase in the number of programs receiving unauthorized appropriations, with 103 programs being expired but receiving appropriations (CBO 1995). Over this six-year period, the number of House committees with ten or more expired authorizations went from one to four, and, by the end of the decade, six House committees had ten or more expired authorizations that received appropriations. Figure 8.1 shows the change in the total number of unauthorized appropriations over the past decade.

The number of programs operating with expired authorizations varies across committees, with some committees—such as the Armed Services Committee—maintaining a business as usual approach to their annual defense authorization. However, other committees, such as the Commerce Committee, have seen a marked rise in the number of expired authorizations under their jurisdiction. This has led several observers to note that Congress no longer is doing its job. As Baumann (1999, 688) explains:

> While Congress likes to tackle such high-profile issues as tax cuts or military pay raises, one of Washington's dirty little secrets is that in many cases, lawmakers increasingly tend to neglect routine reauthorization bills for federal programs. The result: A myriad of programs are on automatic pilot because the House and Senate committees that have direct power over them have allowed their governing laws to expire.

Committees in Congress have always varied in their ability to pass legislation renewing the authorization of the programs under their jurisdiction that operate with a short-term authorization. Committees with large distributive programs, such as Public Works/Transportation and Infrastructure, Agriculture, and Armed Services, have traditionally been able to get their work done in a timely manner. With so many members reliant on the benefits of their work, these committees are able to craft coalitions and get their bills through both chambers. Typically, if one of these bills fails to be reauthorized in a timely manner, it is because committee members are fighting to increase the overall size of the program in order to have more money to distribute. This has been the case in the last four transportation authorizations, when the committees delayed producing a bill until the authorizers could secure the highest overall funding levels possible. Committees who handle regulatory issues, by contrast, often have more difficulty getting their programs reauthorized. In part, this is a function of the conflictive nature of the issues involved, and the level of conflict among the members of the committees involved.

In table 8.1, I examine the changes in unauthorized programs across House committees. The table shows that, in Fiscal Year 1990, there were only forty-nine programs operating with an expired authorization and 39
percent of those programs were in one committee—Energy and Commerce. In FY 1992 and FY 1994, the numbers slowly grew to total seventy-one programs with unauthorized appropriations. Although the Energy and Commerce Committee remained the largest offender with the most unauthorized programs, its percentage of the overall number of unauthorized appropriations actually declined slightly. Most committees saw a slight rise in the number of unauthorized appropriations, but it was the Merchant Marine and Fisheries Committee, a small, low conflict, narrow jurisdiction committee, that saw the total number of unauthorized programming rise dramatically from three in FY 1990 to twenty-one in FY 1994. Two other committees—International Relations and Resources—also saw the number of programs under their jurisdiction receiving appropriations without an authorization increase by a sizable number.

Since 1995, six House committees have had chronic problems addressing the short-term authorizations under their control. The Commerce Committee and the Resources Committees are by far the most troubled. The Commerce Committee has averaged having more than thirty-four programs receive appropriations without authorization during the fiscal years 1996 through 2000, and the Resources Committee has averaged having almost twenty-six programs per year operate without authorization.

Table 8.1 Expired Authorizations by Committee, 1990–2000

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Source: Unauthorized Appropriations and Expired Authorizations. This is an annual report of the Congressional Budget Office that has been produced since 1985.

Note: The totals in each column do not equal the sum of the cells because some authorizations are assigned to more than one committee.
Four other committees have averaged having more than ten programs annually receive appropriations without an authorization—Judiciary, Education, Science, and Transportation. One interesting feature in these data is that problems with reauthorizing programs permeate all types of committees. The problem with reauthorizing programs affects programs with highly fragmented jurisdictions (e.g., Commerce) and with very tight jurisdictions (e.g., Science). Committees with goals that are primarily constituent related (e.g., Resources) and policy oriented (e.g., Judiciary) have problems, as do committees that address issues with high (e.g., Education), medium (e.g., Transportation), and low (e.g., Science) issue salience. Across the board, reauthorizations have become more problematic.

**Why the Failure to Reauthorize?**

Although the procedural explanation given in chapter 2 explains how unexpired authorizations get funded, it does not explain why committees cannot reauthorize programs in the first place. Two complementary reasons are generally offered for why Congress fails to reauthorize programs. One theory argues that committees fail to renew a short-term authorization because of high transaction costs associated with this action. The second theory argues that conflicts between the branches, or between the chambers in Congress, can cause the failure to reauthorize a program.

Cox (1996) notes that when committees use short-term authorizations as a means of controlling policy, it can cause them to have to pay high transaction costs. Specifically, when House and Senate committees make an authorization short-term, they put themselves in the position of having to reauthorize the legislation in the future, and assembling new legislative coalitions can be quite costly. Not only do the committees themselves have to agree on a policy when a program is reauthorized, but the committees then have to create floor coalitions that will support the reauthorization as well. Cox finds that committees sometimes realize when they create a new program that building legislative coalitions in the future will be extremely difficult, especially when the committee has no easy way to buy a coalition by distributing benefits among members. For example, when the bill to create the Occupational Safety and Health Administration (OSHA) was considered on the floors of the House and Senate, both authorizing committees lost control of the legislative process. The committees then worked to ensure that the new legislation made OSHA permanently authorized so that they did not have to consider this legislation in the future.

The failure to act at any point in the legislative process means that the program will not be reauthorized, and there are numerous points in the
legislative process, other than the committee stage and floor stage, where a bill can stall. Not surprisingly, as conflict between parties increases, and when the average level of conflict among committee members is higher, it is harder to reauthorize legislation. Cox finds that authorization committees that historically have high levels of conflict among members tend to use permanent authorization for agencies, as compared to committees with lower levels of internal conflict. Short-term authorizations come at the cost of having to enact new legislative coalitions when authorizations expire. When the costs of coalition creation and maintenance are too high, reauthorization efforts fail.

Krehbiel (1998) provides a slightly different argument about why legislation generally fails to be enacted. He points out that legislative efforts often fail because the preferences of the House, Senate, and president do not coincide. All three sets of stakeholders have to agree for a change in the status quo to occur; the new policy has to be better than existing policy for all three stakeholders. Krehbiel notes that efforts to develop a proposal that all three stakeholders will agree should be enacted are further hindered by two supermajoritarian procedures. First, at least sixty senators have to agree on a proposal for a filibuster to be prevented. Second, if the House and Senate want to act without the support of the president, two-thirds of both chambers have to support the proposal in order to overcome a veto by the president. Two examples highlight the problem identified by Krehbiel (1998). President Clinton’s 1993 economic stimulus package was supported by a majority of senators and representatives. However, it was not enacted because of the supermajoritarian nature of the filibuster in the Senate; sixty senators did not support the proposal (Krehbiel 1998, 28–31). Similarly, supermajorities of the House and Senate supported the Family and Medical Leave Act in 1991, but these majorities were not large enough to overcome President Bush’s veto of the bill; thus, the bill was not enacted (Krehbiel 1998, 31–33).

Krehbiel’s (1998) argument is explicitly nonpartisan, but other scholars have suggested that partisan differences can make reauthorizations more difficult. Tiefer (1989) suggests that conflicts between the legislative chambers in the reauthorization process began in 1981, when Republicans took over control of the Senate. Senate Republicans were interested in enacting the initiatives of the Reagan Administration, preferably through permanent law. House Democrats, conversely, used the authorization process to critique and thwart the actions that Republicans were promoting. This form of intrabranch rivalry has been shown to be a major problem and an important cause of legislative inaction in recent years (Binder 1999).

Given the difficulty of crafting legislative agreements between the House, the Senate, and the president, the failure to reauthorize programs
does not seem odd. Although there are gains in control over a program that occur with short-term authorizations, there are also procedural hurdles and transaction costs that must be overcome for a program to be reauthorized. In recent years, building legislative coalitions has become somewhat more difficult, especially since the Republicans took control of Congress. Richard Fenno (1997) has argued that the Republican takeover of the House resulted in highly inexperienced people being in charge of the chamber’s operations. The lack of governing experience was complicated further by the large influx of inexperienced freshmen. Fenno notes (1997, 20):

The governing expertise of which I speak is ... expertise about the business of legislating. That business involves a practical grasp of lawmaking as a lengthy, incremental, multilevel, coalition-building process. And it involves a seasoned strategic sense in matters such as establishing priorities, negotiating outcomes across the separated institutions of government, and calculating feasibilities, trade-offs, and timing at every decisionmaking juncture. In short, successful governing takes a lot of practice, and the Republicans hadn’t had any.

The regularized business of committees, of which the reauthorization of existing programs is a large and important part, was also affected by the way in which House Speaker Newt Gingrich (R-GA) organized the chamber after the Republican takeover. Fenno argues that Gingrich wanted to subordinate committee power to the power of the party’s leadership. He did this by making a series of important changes to the existing committee system:

The new Speaker abolished some committees and subcommittees, appointed the committee chairmen, extracted loyalty pledges from committee leaders, controlled committee staff, selected committee members, created and staffed ad hoc task forces to circumvent committees, established committee priorities and time lines, and monitored committee compliance. The end product was an American version of a prime minister in a system of party government and a legislative process with a lot less of the deliberative and incremental pacing that a committee-centered system can provide (Fenno 1997, 31).

The first two years of Republican control of Congress were also dominated by the bitter battles over federal appropriations. Because reauthorizations are often linked to the budget and appropriations processes—authorizing committees often want to maximize the benefits a program
under their jurisdiction can provide—the uncertainty about the appropri-
ations for Fiscal Year 1996 likely hindered the work of authorizers. It is
clear that the debate over the budget dominated Washington and Congress
for almost a year, eating up valuable time and resources that might other-
wise have been used to revamp programs. The confrontation over the bud-
get also serves to highlight the general clash of ideology and cultures that
existed at the time between the House, Senate, and president. This clash
made finding an ideal point for any policy more difficult, a factor that
Krehbiel (1998) attributes to failures that occur generally in the legislative
process.

The Policy Implications of Unauthorized Programs

There are also important policy implications that arise from a failure to
reauthorize programs. As David Baumann (1999, 689) wrote in the
National Journal:

The consequence of [the failure to reauthorize programs] is increasingly
poor congressional oversight over federal programs. Moreover, the annu-
al congressional appropriations process gets bogged down in debates over
controversial legislative issues that the authorizing committees of jurisdic-
tion are supposed to deal with separately. Important policy issues that
should be examined carefully and systematically are handled instead in the
context of the appropriations bills, often during the frenzied final days of
a legislative session.

When authorizing committees fail to reauthorize programs, the gains
that Senator Russell pressed for when he moved the authorization for
defense weapons systems acquisitions to a short-term authorization are
lost. These committees cannot apply their subject matter expertise to the
policy issue in question. They cannot provide effective ex ante oversight by
changing the laws that underlie the program in question. And perhaps
most detrimentally, authorizers end up ceding authority over the policy to
appropriators and to the chamber as a whole, making appropriators the
arbiters of policy. Several cases illustrate this point. First, Representative
David Obey (D-WI) noted that

when he chaired the Foreign Operations, Export Financing and Related
Programs Appropriations Subcommittee, he added legislative language one
year to his spending bill [affecting a program with an expired authoriza-
tion], at the request of some authorizers—only to find out that
The authorization for the National Endowment for the Arts (NEA) is another case in point. The NEA was last authorized in 1990. Since that time, there have been calls by many conservatives to terminate the program. However, Democrats and some Republicans in Congress continue to support the program and its goals. Because the committee with jurisdiction has been unable to determine what should be done with the program, it has fallen on the appropriations committees to be the arbiters of the program's status. House Appropriations Subcommittee Chairman Ralph Regula (R-OH) recognizes that he is one of the people who get to make almost all choices about arts funding and policy, even though it is not an issue he cares about strongly. "To me, [adding legislative riders to the appropriations bill is] just a matter of getting the bill out. I have no strong feelings about the NEA one way or another, but I've had to [add riders increasing the percentage of arts funds going directly to the states and adding members of Congress to an NEA oversight group] to get my bills through (Baumann 1999, 690).

The Education and the Workforce Committee had not addressed the bill because the Committee chairman, William Goodling (R-PA), doubted he could craft a coalition to support any revision to the law. With some members wanting to kill the program, others wanting to modify it, and others wanting to keep it as is, finding the right balance of policy for a reauthorization bill has proven quite difficult. This impasse forces all interested parties—legislators, interest groups, and the NEA itself—to use the appropriations process as the mechanism for making policy change to the program. The authorization process still occurs; it just occurs outside the authorization committees, and appropriators, not authorizers, become the final arbiters of the policy.

The change in congressional control has also had an impact on oversight more broadly. Joel Aberbach’s recent analysis (2001) finds that in the 1990s there was a decline in the quality of oversight. However, the decline was not in the amount of oversight conducted by congressional committees. When oversight days for the first six months of the year are considered as a percentage of the total number of legislative days, the percentage of days allocated for oversight was similar across the three years. In fact, the percentage of time devoted to oversight in the 1990s was roughly double the amount that occurred in the 1970s, and sizably more than in the 1980s.

However, while the percentage of days dedicated to oversight has grown dramatically in the 1990s, the total number of days is only slightly higher than the number of hearing days held in the late 1970s and early 1980s. In
fact, the total number of hearing days in 1997 was the lowest since 1973. What accounts for the rise in the percentage of time being spent on oversight but not a rise in the absolute number of oversight days? Quite simply, congressional committees are in session far less than they have been in the past. In the 1970s and 1980s, the total number of committee days was never below 2,063; in the 1990s, the number never exceeded 1,483. In fact, committees met for 508 more days in 1961 than they did in 1997!

The result of this decline is that there are fewer committee days in which legislative work can be accomplished, and short-term authorizations have suffered as a result. Aberbach warns that the “decline in legislative activities, particularly reauthorizations and amendments, represents a serious decline in the amount . . . and quality, of oversight” (2001, 8), especially since legislative change is one of the most potent oversight tools in the congressional arsenal. Aberbach’s view is supported by the comments of congressional leaders as well. As House Commerce Committee Chairman Thomas J. Bliley (R-VA) noted, in a busy legislative session, reauthorizing programs often takes a low priority. “Some of (the problem) is that Congress runs out of time. Committees feel there are other priorities. All of us start out every year saying we’re going to do it, and then other events overtake us” (Baumann 1999, 691). Because committees meet for fewer days, they have to squeeze more legislative action into a shorter time frame, making the routine tasks more difficult to accomplish.

Summary

Over the past decade, there has been a marked rise in the number of programs operating with expired authorizations. This has been the result, in part, of a marked decline in the number of days in which congressional committees have met. Congress spends less and less time in committee, and this decline in the number of days has occurred roughly concomitantly with the rise in the number of programs with expired authorizations. The change in party control of Congress also resulted in one chamber of Congress having to learn an entirely new activity: governing. One result of this problem is that the policy process for many programs moved away from the authorizing committees and into the Appropriations Committees. Many appropriators found themselves with the job of attaching riders and approving policy for numerous programs that had been orphaned by authorizing committees. This abdication of responsibility made appropriations bills one of the key legislative vehicles for changing public policy.