



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2009

Foreign Policy on the Fly: Legislating Foreign Affairs in Appropriations Acts

Ariel S. Wolf

Georgetown University Law Center, asw38@law.georgetown.edu

This paper can be downloaded free of charge from:
<http://scholarship.law.georgetown.edu/flpr/1>

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <http://scholarship.law.georgetown.edu/flpr>



Part of the [Law and Economics Commons](#), [Legislation Commons](#), and the [Politics Commons](#)

GEORGETOWN LAW

Student Works

Fiscal Law and Policy Reform Briefing Papers Series



September 2009

Foreign Policy on the Fly: Legislating Foreign Affairs in Appropriations Acts

Ariel Wolf

Georgetown University Law Center
asw38@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/flpr/1/>

Posted with permission of the author

Foreign Policy on the Fly: Legislating Foreign Affairs in Appropriations Acts

Federal Appropriations Law, Process, and Application in Today's
Legislative Environment

Georgetown University Law Center

Professor Samuel Mahaney

Ariel Wolf

June 22, 2009

Introduction

When most Americans think of the lawmaking process in Congress, they probably think of the classic formula taught in the typical American government grade-school course.¹ First a member of Congress introduces legislation, then a committee considers it, then the measure is debated and voted on, and after passage in both chambers, the bill is met with presidential approval or veto. But most civic-minded Americans know that in practice, the legislative process is not that simple. Perhaps some have heard the tongue-in-cheek comparison of lawmaking to sausage-making, an analogy that underscores the additional ingredients involved with both processes—and about which citizens would prefer not to know. Indeed, the Legislative Branch’s public website links to this explanation about the complexities of the lawmaking process:

“[I]t is not as tidy as the textbook diagrams suggest...but it is a process that takes into account the need to hear from all points of view and to build consensus in our large, diverse and complicated country. Rarely is that quick or neat work, but it is the fundamental stuff of democracy, and it has served our country well...”²

The deliberative, democratic process described above echoes the high regard the Founders had for the legislative body, establishing it as the “first branch” of our government.³ But in recent years, the idealized concept of the people’s elected

¹ For the basic flowchart designed by the Office of the Clerk of the House of Representatives, see <http://clerkkids.house.gov/laws/index.html>

² The Center on Congress at Indiana University, congress.indiana.edu/radio_commentaries/how_bill_really_becomes_law.php → linked from www.congress.gov

³ Article I of the U.S. Constitution

representatives hashing out and deciding society's most difficult questions has broken down, and warped that classic flow-chart. Rather than dispensing with key legislation through committee debate and amendable floor consideration, a hyper-politicized and oft-deadlocked Congress now turns to the hidden and complicated world of appropriations to force through legislation that otherwise is unable to have its day in the House or Senate.

Some may celebrate the fact that Congress has figured out a way to still conduct its lawmaking duties in this politicized environment. However, legislating through the appropriations process often leads to ad hoc or ill-informed decision-making on the part of members of Congress, as well as inefficient budgetary outcomes. The final legislative product hardly reflects the input of all corners of society, as intended by our system of representative democracy.

The purpose of this paper is to study how Congress and the Executive Branch use this technique to make substantive changes to foreign relations law under the guise of providing funds for foreign operations. In particular, this paper will explore how the problem is associated with supplemental appropriations, which have become increasingly large and significant in the past decade.⁴

The supplemental appropriations process is often opaque, rushed, unilateral, and in some cases, even compulsory. Put another way, the process hardly incorporates all opinions or reflects political consensus. Rather, it exploits temporal and political pressure to insert into emergency appropriations legislation

⁴ These types of appropriations are separate from the thirteen annual appropriations bills. See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS*, 222-256 (2007) [hereinafter Schick, *Budget*]

significant substantive law that would not pass on its own⁵ and increases the total amount of spending. By making certain changes to the procedural rules, Congress may be able to reduce discretionary spending and force greater deliberation on key foreign policy issues. Doing so would promote greater fiscal responsibility and restore a healthy deliberative democracy.

The paper is organized in two sections. The first section examines this increasingly common, but little-studied manipulation of the federal appropriations process to make substantive changes in the law. After providing a brief introduction to the issue of legislative provisions in appropriations acts, the section continues by focusing on foreign affairs provisions in supplemental appropriations, where it is argued that political and temporal factors are most intense. The section concludes with an in-depth example where this manipulation occurred during the supplemental appropriations process, to illustrate the difficulty of thwarting the practice through the normal political process.

The second section contains proposals for statutory and procedural reforms that, if implemented, would curb this practice. In articulating the problem, this paper will not make normative judgments about the changes in foreign policy that result from the manipulation of the appropriations process. Rather, in examining the overall issue, the focus will be on the impact these manipulations have had on the federal budget, in particular the increase in discretionary spending for foreign operations.

⁵ *Id.* at 194

Finally, it is necessary to explain this paper's singular focus on appropriations in the area of foreign affairs. As noted above, there is great pressure on members of Congress to swiftly approve supplemental and omnibus appropriations acts for a number of reasons related to both legislative scheduling and politics. But in the area of foreign affairs there is additional pressure on members. The Supreme Court has repeatedly upheld that Article II of the Constitution confers upon the Executive a plenary authority over foreign affairs.⁶ As such, Congress is expected to grant some deference to the President on matters of diplomacy and national security.

Thus, for example, when the President asks Congress for emergency wartime supplemental appropriations, and significant foreign policy language is slipped into the bill's text at the Administration's request, members of Congress who object to such provisions face the difficult task of both defying the Executive in its recognized sphere of influence, and slowing down funds for the war. This is true even if these foreign policy provisions fall squarely within Congress's reach or oversight, such as authorizing new foreign assistance programs, establishing agencies, or providing bilateral or multilateral aid to a country or government unrelated to the war.⁷

⁶ For a concise summary of the constitutional and judicial sources for the Executive's plenary authority over foreign affairs, see the Department of Justice's Office of Legal Counsel memorandum in response to congressional attempts to relocate the U.S. embassy in Israel from Tel Aviv to Jerusalem. 19 U.S. Op. Off. Legal Counsel 123 (1995).

⁷ The assumption is made that the dynamic is less intense in situations where the member of Congress objects to domestic policy language—for example, a minimum wage provision—that is inserted into the supplemental bill's language. *See, e.g.*, the Fair Minimum Wage Act of 2007, 121 Stat.188-189 (included in the 2008 War Supplemental, Pub. L. No. 110-128). In those situations, the member has stronger ground to insist on full debate both because the measure clearly falls within the control of Congress, and because it is totally unrelated to the goal of paying for the war. Unlike in these situations, with respect to foreign affairs, the Executive tends to use the cloak of plenary authority to "bully" congressional opposition into acquiescing to substantive changes to the law

Part I. The Problem

A. Legislative Provisions in Appropriations Acts⁸

Both the House of Representatives and the Senate have rules designed to separate the process of legislating substantive law—known as authorizations, which establish, alter, and regulate the operation of federal agencies and programs—from the process of legislating funds to the federal government—known as appropriations, which allow federal agencies to obligate and expend funds.⁹ In theory, the rules are designed so that each specific appropriation has a corresponding authorization. The reason for establishing these procedural rules was to ensure that political controversies related to specific policies and programs would not get in the way of funding the government, and vice versa, that budget authority provided to Executive agencies was properly legislated and conditioned by Congress.¹⁰ To be sure, annual appropriations bills have always contained a

without full and open debate. Nonetheless, some argue that members of Congress should not be dissuaded. See Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 Geo. L.J. 619, 633 (2006) (“[n]o matter how otherwise plenary the executive branch authority, including the President’s role as Commander-in-Chief, only Congress can provide that separate branch with the necessary monies.”)

⁸ The term “legislative provision” refers to substantive legislation that deals with matters extraneous to spending and usually is deemed out of order under House and Senate rules. See Robert Keith, *Examples of Legislative Provisions in Annual Appropriations Acts*, Congressional Research Service, RL30619, (2008), at 1 [hereinafter Keith, *Leg. Provisions*].

⁹ Schick, *Budget*, *supra* note 4, at 191. See, generally, Mark Champoux & Dan Sullivan, *Authorizations and Appropriations: A Distinction Without Difference?* (Harvard Law School Briefing Papers on Federal Budget Policy, Paper No. 15, 2006), available at http://www.law.harvard.edu/faculty/hjackson/auth_appro_15.pdf;

Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 51, 54 (1979)

¹⁰ Keith, *Leg. Provisions*, *supra* note 8, at 4. It is worth noting that these rules are enforced only to the extent that Congress itself adheres to them. See 71 Comp. Gen. 378, 380 (1992) stating that “there is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act.” The exception to this is in foreign affairs, where the law requires authorization prior to appropriation. § 10 of the Foreign Military Sales Amendments, 1971 (Pub. L.

number of general provisions that tweak existing authorizations and provide for reporting requirements, or are otherwise routine, technical, and noncontroversial.¹¹

But while in any given year there is no guarantee that proposals for new programs, agencies, oversight, and regulation will pass through the authorizing process,¹² the appropriations track does send through bills that are virtually guaranteed to pass into law each year.¹³ The increasingly crowded legislative calendar, as well as heightened political partisanship, has put additional pressure on the legislative system in a way that has diverted significant legislative language into appropriations bills.¹⁴ There can be little doubt that in current practice, appropriations bills are viewed by presidential Administrations and congressional members, including and especially congressional leadership, as desirable vehicles to attach unrelated authorizing legislation that otherwise has bogged down elsewhere in the legislative wilderness.¹⁵

B. Proliferation in Supplemental Appropriations.

Supplemental appropriations [supplementals] provide to agencies and programs budget authority that is in addition to the annual appropriation received,

No. 91-672; 22 U.S.C. 2412). However, this requirement is routinely waived by explicit reference in appropriations bills.

¹¹ Keith, *Leg. Provisions*, *supra* note 8, at 3

¹² Schick, *Budget*, *supra* note 4, at 200. *See also* id. at 202 (explaining the steep decline in authorizations since 1950s)

¹³ The one positive exception to this is the Defense Authorization bill, passed by the Armed Services Committees and successfully enacted into law for the past 50 years. The negative exception was in 1995 when Congress and the Administration failed to reach accord on appropriations, resulting in a government shutdown.

¹⁴ Schick, *Budget*, *supra* note 4, at 219-220

¹⁵ Interview with Rachel Carter, appropriations director for the Ranking Member of the House Appropriations Subcommittee on State and Foreign Operations (April 30, 2009).

typically when that amount is deemed insufficient.¹⁶ Supplementals usually “cover emergencies, such as disaster relief, or other needs deemed too urgent to be postponed until the enactment of next year’s regular appropriations act.”¹⁷ Most supplementals in recent years have been used to fund the wars in Afghanistan and Iraq, and were requested by the President.¹⁸ The total budget authority included in each supplemental has been rising over the past decade, indicating growing congressional preference to depart from the regular, annual appropriations process and fund matters through emergency supplementals.¹⁹

Unrelated legislative provisions have proliferated in supplemental appropriations bills in recent years.²⁰ One explanation for this trend is that supplementals, even more so than annual appropriations bills, receive expedited consideration in the House and Senate, making it easier and faster for members of congress to change substantive law, so long as they are able to include the language somewhere in the final text of the supplemental. A second explanation is that supplementals, by their very nature of paying for emergencies and wartime

¹⁶ Schick, *Budget*, *supra* note 4, at 215

¹⁷ http://senate.gov/reference/glossary_term/supplemental_appropriation.htm

¹⁸ See Cong. Budget Office, *Supplemental Appropriations from 2000 to 2009*, (2008), available at <http://www.cbo.gov/publications/collections/collections.cfm?collect=3>

¹⁹ See *id.* Perhaps the biggest driving factor behind this trend is that under the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. § 901(c) (2000)), Congress enacted caps on discretionary spending, but at the same time exempted “emergency spending” from counting towards the cap (2 U.S.C. § 901(b)(2)(A)). Appropriators in Congress, looking for ways to maximize their budgetary influence and press the limits of these caps, began taking advantage of the loophole created by the Act by underfunding programs during the annual appropriations cycle (and staying under their caps). Then, after the fiscal year began, they would then use “emergency supplementals” to provide funding that could have been foreseen in preparation for the fiscal year and could hardly be considered “emergent.” See Cong. Budget Office, *Emergency Spending Under the Budget Enforcement Act: An Update*, (1999); Cong. Budget Office, *Supplemental Appropriations in the 1990s*, (2001), available at CBO website, *supra* note 16. See also Saikrishna Prakash, *The Constitution as a Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1306 (2004)

²⁰ Keith, *Leg. Provisions*, *supra* note 8, at 4

expenses, often take on a sense of *fait accompli* for passage, since few members of congress wish to vote against a bill that provides funds to the troops in the field or to the survivors of a natural disaster. Thus, these bills make the ideal vehicle for attaching legislative provisions to the text.

What this means is that authorizing legislation otherwise intended to be debated in committee and by Congress as a whole is increasingly making its way into spending bills with little or no debate at all. More often than not, such authorizations are inserted at the eleventh hour before final passage of the bill.²¹ In many cases, the legislation provides for sweeping changes in the substantive law affecting foreign policy, and, as is argued here, can provide for significant new budget authority available to appropriators, who indeed avail themselves of the opportunity to appropriate the funds in the same bill in which the provision granting the authorization is included.

C. Foreign Affairs Legislative Provisions in Appropriations Acts:

Over a 20 year period from 1984 to 2004, the number of general provisions in the Foreign Operations Appropriations bill increased from one to one-hundred one, representing the third highest increase in the number of such provisions compared with the other twelve appropriations bills.²² The propagation of foreign affairs legislative provisions in appropriations acts can be traced to the failure of

²¹ Interview with Landon Fulmer, former appropriations director, senior Senator on Appropriations Committee (May 6, 2009).

²² Schick, *Budget*, *supra* note 4, at 266. Table 9-10, General Provisions in Regular Appropriations Acts.

Congress to pass regular foreign relations authorization bills since 1985.²³ Such legislation is designed to provide for timely reauthorizations of expiring programs and offers Congress the opportunity to update the Foreign Assistance Act of 1961 and assert its view on how and when the Executive should incur and obligate funds for foreign operations.

Without such a mechanism at its disposal, Congress has relied over the past twenty-five years on the appropriations process to reauthorize foreign assistance programs, condition funds, and even authorize new programs and agencies.²⁴ Many of these legislative provisions, inserted for a particular reason into an appropriations bill in one year, have become recurrent provisions in subsequent years. While few of these provisions have been codified as notes in the U.S. Code, their recurrence each year has been statutory de facto.²⁵

Over the years, several recurring provisions that originally represented significant changes to the substantive foreign relations law have been added in supplementals. For example, funding for non-military programs in Afghanistan has recurred in every year since funds were first appropriated in 2001 by the Emergency Supplemental Appropriations Act for Recovery and Response to Terrorist Attacks on the United States.²⁶ In that act, the bill language did not explicitly mention authorizing any Afghanistan humanitarian assistance programs. However, Section 102 of the act, one of only two legislative provisions, specifically

²³ Dianne E. Rennack, *Foreign Operations Appropriations: General Provisions*, CRS R40557, at 1 (2009)

²⁴ *Id.*

²⁵ *Id.* at 2

²⁶ Pub. L. No. 107-38

made funds available “notwithstanding section 10 of Public Law 91-672, section 313 of the Foreign Relations Authorization Act,” opening the door for obligations that were not previously authorized by law.²⁷

Indeed, according to the Special Inspector General for Afghanistan Reconstruction, \$192.15 million was spent in Fiscal Year [FY] 2001 for humanitarian assistance in Afghanistan, and \$883.81 million in FY2002.²⁸ It was not until December of 2002 that Congress passed the Afghanistan Freedom Support Act, specifically authorizing non-military assistance to Afghanistan for Fiscal Years 2003-2006 at an annual appropriation of \$425 million.²⁹ All told, Congress appropriated, and the Administration obligated, more than \$1.1 billion in assistance before any of it was authorized by law or after a process of open congressional debate.³⁰ The fact that this was placed in an emergency supplemental, in the immediate aftermath of the attacks of September 11, foreclosed any legitimate chance that the budget authority granted to the President for obligations and expenses in Afghanistan would be limited, conditioned, or otherwise challenged by congressional authorizers.

Another example of a legislative provision that has led to significant new budget authority provided to the State Department and the United States Agency for

²⁷ Id.

²⁸ Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to Congress*, (2008), available at <http://www.sigar.mil/reports/quarterlyreports/Oct08/pdf/Report - October 2008.pdf>

²⁹ Pub. L. No. 107-327, § 108 Authorization of Appropriations

³⁰ It is worth mentioning again that this conclusion is not intended to indict Congress or any obligating agency, nor to imply mismanagement of funds. The purpose only is to demonstrate the impact that these unauthorized appropriations, stuck into a supplemental, had on the budget. Moreover, it is proper to assume, given the legislation that passed in December, 2002, that Congress would have authorized *some* level of appropriations if the authorizing committees had passed a bill in 2001. The question is what the differential would have been between what was actually spent and what Congress would have authorized had it acted up front.

International Development is the Special Authorities provision, first inserted in the Foreign Operations, Export Financing, and Related Programs Appropriations Bill for FY1994.³¹ The provision provides for funds to be expended in several countries otherwise subject to prohibitive sanctions, by granting limited authority for the Administration to use the funds “notwithstanding” the prohibitions authorized by law. The stated purpose of this provision, according to the House Report accompanying the bill, was to provide flexibility for the Administration to pursue multilateral diplomacy, an objective surely desired by the new Clinton Administration, and supported by the Democratic majority.³² Ironically, the House Committee Report justifies the Committee’s explicit venture into shaping foreign policy by claiming to be laying the groundwork for a return to a healthy separation of the authorizing and appropriations processes. The Report states:

The fiscal year 1994 appropriations bill represents a transition to [foreign assistance reform] in terms of the elimination of earmarks and the elimination of a significant number of legislative provisions. In a sense, the bill attempts to re-establish an orderly appropriation and authorization process.

Under this bill, the Administration would be given maximum flexibility to deal with world problems. The authorizing committee would be restored to its rightful role in defining foreign policy, and the Appropriations Committee would be returned to its proper role in allocating resources on the basis of that policy.³³

Fifteen years later, not only has there yet to be any significant rewriting of the Foreign Assistance Act, but this Special Authorities provision—rather than being modified or adopted by the authorizing committees—has instead remained a permanent fixture of the appropriations process, appearing in each subsequent

³¹ Pub. L. No. 103-87

³² H.R. Rep. No. 103-125, at 27 (1993)

³³ *Id.* at 6

Foreign Operations Appropriations bill, with modifications along the way. Indeed, these modifications carry enormous significance, opening or shutting the door for an Administration to obligate budget authority to a particular country. In some sense, the history of this provision over the past fifteen years mimics the game of “telephone,” where a phrase is passed by word of mouth down a line of children, and when said aloud at the end, the phrase rarely corresponds to the original given phrase.

Similarly, the original 1994 special authority provision made funds available “for Haiti, Afghanistan, Lebanon, and Cambodia, and for victims of war, displaced children, displaced Burmese, humanitarian assistance for Romania, and humanitarian assistance for the peoples of Bosnia-Herzegovina, Croatia, and Kosova.”³⁴ In 2003, Section 534 of the Consolidated Appropriations Act made funds available “for Afghanistan, Lebanon, **Montenegro**, and for victims of war, displaced children, and displaced Burmese, and to assist **victims of trafficking in persons**” [emphasis added], dropping Haiti and Cambodia, swapping in Montenegro for the other Balkan states, and adding trafficking victims.³⁵

The provision as passed in the recent Omnibus Appropriations Act of 2009 makes funds available “for Afghanistan, **Iraq**, Lebanon, Montenegro, **Pakistan**, and for victims of war, displaced children, and displaced Burmese, and to assist victims

³⁴ Pub. L. No. 103-87, § 549

³⁵ Pub. L. No. 108-7, § 534

of trafficking in persons”³⁶ [emphasis added], reflecting the addition of Iraq and Pakistan to the list of exempted countries for bilateral economic assistance.

These seemingly small modifications to the text of the provision carry great significance, if only because they are usually made quietly and quickly by Appropriations Committee members or staff, usually at the behest of the Administration.³⁷ Typically, Members of Congress are thrust a copy of the appropriations bill with only days to review it, or, for supplementals and omnibus bills, sometimes even just hours to look it over before a final vote takes place. In such instances, faced with hundreds of pages of bill text and report language to read through, members and staff of non-appropriators are unable to locate this nuance, and the change to the provision sneaks through, reflecting not the will of Congress but the fruits of an agreement between the Administration and the Chairman of the subcommittee.

The inclusion of Pakistan and Iraq in the special authority provision presents a striking contrast between appropriations authorized by preexisting law and appropriations authorized by provisions inserted into the appropriations act itself. In the case of Pakistan, in the aftermath of September 11, the Administration sought to drastically increase economic aid to the Pakistani government, but was prevented from doing so by sanctions automatically triggered by the Foreign Assistance Act as

³⁶ Pub. L. No. 111-8, § 7034. At the time of this writing, the provision has undergone yet another transformation, as a result of the Supplemental Appropriations Act that now is on its way to the President’s desk for an expected signature. The conference report accompanying H.R.2346, states, “The conference agreement includes limited notwithstanding authority for Burma under the heading ‘Economic Support Fund’ and a limited notwithstanding authority for Zimbabwe in § 1108. The conferees also provide limited notwithstanding authority for Afghanistan.”

³⁷ See Interview with Carter, *supra* note 15,

a result of Pakistan's nuclear detonation and the military coup. Rather than acceding to the Administration's request by stuffing legislative provisions into emergency appropriations bills, Congress instead took up freestanding legislation designed to provide the Administration with the desired authority.³⁸

The resulting legislation was a true reflection of the deliberative process. The first version of the bill that was introduced was designed "to authorize the President to provide assistance to Pakistan and India," granting a broad waiver of all foreign assistance sanctions imposed on both Pakistan and India.³⁹ After discussions within the Senate Foreign Relations Committee, the version reported out by the committee to the full Senate was markedly narrower, providing limited and specific waiver authority for Pakistan only.⁴⁰ This bill was amended an additional time before passing the Senate by unanimous consent. As the House prepared to take up the bill, the Congressional Budget Office was able to provide a cost estimate for the bill, giving House Members additional information before casting their vote on the bill on the suspension calendar twelve days later.⁴¹ Having seen the authorizing committees provide the necessary waiver to allow economic assistance to flow to Pakistan for fiscal years 2002 and 2003, the appropriations committee acted on this example by extending the authority in the following fiscal years. Overall, the authority that Congress ultimately provided for assistance to

³⁸ S.1465, 107th Congress (2001) (introduced)

³⁹ *Id.*

⁴⁰ S.1465, 107th Congress, (2001) (reported).

⁴¹ CBO Cost Estimate, S.1465, as Passed the Senate October 4, 2001, *available at* <http://www.cbo.gov/doc.cfm?index=3082&type=0>

Pakistan was more limited in scope than what was first proposed,⁴² indicating that the deliberative process had a mitigating effect on the total budget authority provided to the Executive Branch.

By contrast, the authority to provide Iraq reconstruction funds did not follow such an open, deliberative process. Iraq reconstruction was funded almost exclusively through supplemental appropriations, and the programs and accounts set up for the Executive Agencies to obligate funds were authorized within the supplementals themselves by way of legislative provisions. In 2003, the Emergency Wartime Supplemental contained an extensive section authorizing the new Iraq Relief and Reconstruction Fund [IRRF].⁴³ The House Appropriations Committee explained the provision in its report:

The Committee recommendation provides \$2,483,300,000, to remain available until September 30, 2004, for **a new 'Iraq Relief and Reconstruction Fund'**, an increase of \$40,000,000 above the request. The Committee is providing these funds as bilateral economic assistance **under the authorities of the Foreign Assistance Act of 1961**, as amended...In return for providing extraordinary flexibility in use of this new account, the Committee has included language making all programs and activities subject to prior notification not less than 5 days prior to obligation.

As requested by the President, the Iraq Relief and Reconstruction Fund [the Fund] will be used for such programs as (1) water/sanitation infrastructure; (2) feeding and food distribution; (3) supporting relief efforts related to refugees, internally displaced persons, and vulnerable individuals; (4) humanitarian demining; (5) healthcare; (6) education; (7) electricity; (8) transportation; (9) telecommunications; (10) rule of law and governance; (11) economic and financial policy; and (12) agriculture. [emphasis added]⁴⁴

In the Supplemental Appropriations for FY2004, Congress again relied on an extensive array of legislative provisions in the appropriations bill—rather than

⁴² Pub. L. No. 107-57; 115 Stat. 404

⁴³ Pub. L. No. 108-11; 117 Stat. 573, 573-74

⁴⁴ H.R. Rept. No. 108-055, at 26 (2003)

legislation promoted by the authorizing committees—to rework, and augment, the way in which Iraq reconstruction funds were to be spent. The bill language was heavily legislative:

Provided further, That funds appropriated under this heading shall be used to protect and promote public health and safety, including for the arrest, detention and prosecution of criminals and terrorists: *Provided further*, That of the funds appropriated under this heading, assistance shall be made available for Iraqi civilians who have suffered losses as a result of military operations: *Provided further*, That contributions of funds for the purposes provided herein from any person, foreign government, or international organization, may be credited to this Fund and used for such purposes: *Provided further*, That the Administrator of the Coalition Provisional Authority shall seek to ensure that programs, projects and activities funded under this heading, comply fully with USAID's 'Policy Paper: Disability' issued on September 12, 1997: *Provided further*, That the Coalition Provisional Authority shall work, in conjunction with relevant Iraqi officials, to ensure that a new Iraqi constitution preserves full rights to religious freedom and tolerance of all faiths:

The House Committee Report recommended specific sums for each of these functions it had established, but nowhere in the record does it state how the Committee arrived at those numbers.⁴⁵ Indeed, FY2004 supplemental funds for Iraq reconstruction were extremely high relative to prior and later years, hitting close to \$18.4 billion.⁴⁶ Eventually, the Appropriations Committees moved Iraq reconstruction funds from the IRRF account to the Economic Support Fund Account (and used the special authority legislative provision to facilitate the granting of budget authority). This move signaled a change in policy with respect to how aid was to be delivered, and marked the end of an account whose life and purpose existed entirely within the appropriations process. Although it is difficult to assume the hypothetical, it is not without reason to assert that had the authorizing

⁴⁵ H.R. Rept. No. 108-312, at 15-21 (2003)

⁴⁶ Curt Tarnoff, *Iraq: Reconstruction Assistance*, CRS RL31833, (2009)

committees been required to report Iraq reconstruction legislation, the amounts ultimately authorized and appropriated would have been mitigated similar to the way in which authority for assistance to Pakistan was curtailed by the full legislative process.⁴⁷

The question of how much foreign affairs legislative provisions in appropriations bills affect the budget depends on the extent of assistance provided to the newly authorized programs. With respect to both Pakistan and Iraq, the budget authority provided to the Administration was substantial, since Executive agencies were permitted to draw upon all recognized forms of bilateral economic assistance and expend those funds for programs in the two respective countries.⁴⁸ But while the Pakistan example demonstrates deliberative democracy functioning smoothly, the Iraq example shows otherwise. The insertion of major authorizations for Iraq reconstruction took place without legislative action or statutory guidance from the authorizing committees, resulting in significant federal expenditures without clear or widespread congressional input, and only limited oversight by leadership of the appropriations committees. Such a practice distorted the will of Congress and probably wasted millions of dollars in budget authority that was either misdirected or otherwise unobligated.⁴⁹

⁴⁷ The issue of waste, fraud and abuse has been raised in many contexts with regard to the IRRF funds. See Quarterly Reports by the Special Inspector General for Iraq Reconstruction, *available at www.sigir.mil*. The question of whether the process would have been more efficient or accountable had Congress had the opportunity to legislate fully on the matter is indeterminable, but interesting nonetheless.

⁴⁸ In each instance of the “special authorities” provision in appropriations acts, the “notwithstanding” authority extends only to the titles of the act that provide export and investment assistance, and bilateral economic assistance.

⁴⁹ See SIGIR *Quarterly Report*, *supra* note 47

D. Examples of Deliberative Breakdown

Having described the overall problem, it would be useful to examine a case in depth to understand how the political and temporal pressures of supplemental appropriations affect how difficult it is for members of Congress to object to, or amend, controversial foreign relations legislative provisions in supplemental appropriations bills.

Case 1. Waiving Sanctions on North Korea:

In the afternoon of May 15, 2008, the Senate Appropriations Committee, meeting in the largest Senate committee room and packed with public spectators, convened to finalize its draft of the emergency wartime supplemental bill as requested by President Bush.⁵⁰ In what was to be one of his last acts as chairman of the committee, Senator Robert C. Byrd, the longest serving member of the Senate in U.S. history, presided over the proceedings with characteristic melodrama, silencing boisterous anti-war activists while at the same time excoriating the president for his war policies in a lengthy diatribe.⁵¹ He also lambasted the Administration for requesting yet another emergency supplemental, which greatly irked a Senate legend like Byrd who was used to the “regular order” for appropriations.⁵²

But Byrd’s outrage against the Administration for insisting on funding the war through supplemental appropriations was a classic example of the pot calling

⁵⁰ Senate Appropriations Committee Markup of H.R.2642, the Emergency Supplemental Appropriations Act of 2008, May 15, 2008, 2:15pm

⁵¹ *Full Committee Markup of the FY08 War Supplemental*, 110th Cong. (2008) (statement of Sen. Robert C. Byrd, Chairman, S. Comm. On Appropriations).

⁵² the term “regular order” refers to the passage of all 13 appropriations bills by Congress individually, without resorting to omnibus acts, continuing resolutions, or supplemental appropriations.

the kettle black. Packed into Chairman Byrd's draft bill were countless spending items unrelated to the war and not requested by the Administration, aimed at funding programs and projects in a manner outside of the regular appropriations order. But in addition to these parochial spending items, the emergency war bill also contained numerous legislative provisions that, if enacted, would significantly change substantive law, including some entire statutes dealing with Medicaid provisions, unemployment compensation, and government transparency.⁵³

One of these legislative provisions, inserted at the request of the Administration, waived certain sanctions on North Korea that were triggered as a result of North Korea's illegal nuclear detonation in 2006.⁵⁴ Known as the "Glenn Amendment," these sanctions were designed to prohibit any Administration from sending military or dual-use equipment to a country that detonated a nuclear weapon without being designated a nuclear weapon state by the Nuclear Nonproliferation Treaty.⁵⁵ The Administration wanted a waiver in order to conduct nuclear disablement and dismantlement operations in North Korea, as arranged through the Six Party Talks for North Korean Nuclear Disarmament, but because of the triggered sanctions, the Department of Energy was unable to move in the required materials, personnel, and monitoring equipment.

The problem arose when the Senate Appropriations Committee released the draft of the bill two days before the full committee markup.⁵⁶ After discovering the

⁵³ Keith, *Leg. Provisions*, *supra* note 8, at 5

⁵⁴ Pub. L. No. 110-252, § 1405

⁵⁵ Arms Export Control Act (22 U.S.C. 2799aa-1(b)), § 102(b)(2)

⁵⁶ As gleaned in interviews with appropriations committee staff from both the House and Senate, in addition to this author's personal experience as a foreign policy staffer in the Senate. Indeed, the

waiver authority written into the base bill, Senator Sam Brownback (R-KS), who served on the Appropriations Committee, felt that the authority being provided was too broad, and could result in allowing the Administration to provide economic assistance to North Korea, an outcome he strongly opposed.⁵⁷ With little time to prepare, Brownback's options were limited. Since the chairman had inserted the language into the base bill as a general provision, the Senate Rule designed to keep authorizing legislation out of appropriations bills was inapplicable, since the Rule only applied to amendments on the floor of the Senate.⁵⁸

Brownback tried in vain to convince the Chairman of the Foreign Operations subcommittee—who had exclusive responsibility for this Division of the supplemental—to remove, or amend the language, but was rebuffed by the subcommittee staff who were having the bill printed and prepared for the full committee markup the next day. They also remained un-persuaded by the fact that at that very moment on the other side of Capitol Hill, the House Foreign Affairs Committee was debating freestanding authorizing legislation that would grant the

entire practice of how subcommittee leadership—Chairman, Ranking member, and majority and minority clerks—releases the text of the bill to other members of the subcommittee is in fact designed to provide as little opportunity as possible for subcommittee members to provide input throughout the markup process. Staff is given only a few hours to review limited copies of the bill and its accompanying report in a closed room. But unlike other appropriations subcommittees, where members are primarily interested in checking that their submitted earmarks have been accepted, each accounting decision in Foreign Operations carries the enormous weight of diplomacy, capable of influencing decisions of foreign governments.

⁵⁷ Fulmer Interview, *supra* note 21

⁵⁸ Sen. Rule 16

Administration a waiver, albeit much narrower and conditioned than that which was fed into in the Senate supplemental by the Administration.⁵⁹

Knowing that the supplemental would almost surely not make it to the floor of the Senate, since the Senate has failed to act on a freestanding Foreign Operations Bill for several years, Senator Brownback's options were greatly limited. The only opportunity to change the language would be through the markup process, but the Foreign Operations subcommittee is one of the few subcommittees that does not hold its own markup, deferring all official subcommittee action and amendments to the full committee.⁶⁰ Senator Brownback prepared an amendment to offer at the full committee markup, and notified the subcommittee staff members, who were managing that section of the bill at the markup.

Over the course of the next twenty-four hours, White House liaisons, State Department officials, and other administration officials, contacted Senator Brownback and his staff to express their strong disapproval of any attempt to

⁵⁹ Security Assistance and Arms Export Control Act Reform Act of 2008, H.R. 5916, 110th Cong. (2008). Upon introducing the legislation, House Foreign Affairs Chairman Howard Berman explained the reasons behind the committee's waiver: "Title III of our bill [Glenn Amdt waiver] allows for more rational funding and planning of [DOE] activities without giving the administration a blank check. It provides a narrow, carefully tailored authority. It also requires the administration to document for Congress each year the need for keeping this authority in place. Title III also includes a provision authored by ranking member *Ileana Ros-Lehtinen* that reinforces U.S. policy regarding removing North Korea from the State Department's list of countries supporting terrorism." Congressional Record, H3735.

⁶⁰ Although here, too, great pressure is applied to subcommittee members by appropriations committee staff, who ask the members to refrain from offering any amendments at all in the full committee markup, and offer them instead when the bill is up on the Senate floor. The growing problem is that the Senate has failed to act on a freestanding Foreign Operations Bill in several years, instead rolling it into an omnibus bill, so missing the markup means having no chance to amend the text.

change the waiver language.⁶¹ They also lobbied other members of the committee, who were otherwise unaware of the amendment planned by Senator Brownback and not closely tracking the House legislation.

By the time the markup took place the next day, the outcome of the Senator's amendment was predetermined. Appropriations committee members, most of who did not serve on the Foreign Operations subcommittee and had not thoroughly reviewed the bill, let alone studied the single provision that was to remove sanctions on North Korea, were unwilling to cross swords with the Administration, and gave deference to its foreign policy request by remaining silent during the short debate and voting against the amendment. The exchange between Senator Brownback, Senator Byron Dorgan (D-ND), and Chairman Pat Leahy (D-VT), while debating the Brownback amendment, is worth noting here as a demonstration of the powerful sense of deference created by an unnecessarily rushed process and an assertive Administration on a matter of foreign affairs:

SENATOR BROWNBACK: Within Amendment 1 [the Committee's draft of the Supplemental], there is a huge piece of authorizing legislation, it has enormous significance...What is proposed in the base bill, here, in this supplemental is an allowance of a complete waiver of the Glenn Amendment sanctions on North Korea. Let's give the Administration the waiver authority, but let's...not allow the Administration to use this waiver to provide economic aid to North Korea...Let them come back to the Congress for that. Now we're going to waive all the sanctions by one stroke? No hearings on this?...

SENATOR DORGAN: We have a letter from Senator Lugar and Senator Biden [Ranking member and chairman of the Foreign Relations Committee] strongly in support of the underlying language...The Senator from Kansas said this is a very serious issue...I certainly agree, I understand his interest in it, but I do think the language in the bill, as it comes to us, to the committee, I think that's the language we ought to support.

SENATOR LEAHY: I find myself in the unique position of advocating for the Bush Administration here [laughter]...I totally agree with my friend from Kansas about the atrocities of the North Koreans, but here is what the Department of Energy, the

⁶¹ Fulmer interview, *supra* note 21

Bush Administration, said about his amendment...[letter from Department follows]⁶²

Following these remarks, Senator Brownback made the committee aware of a letter from seventeen Senators serving on both the Foreign Relations Committee and the Armed Services Committee (the committees with authorizing jurisdiction for this matter), expressing opposition to the provision as formulated in the committee text, and supporting the Brownback amendment. Yet after only a few minutes of debate, Senator Leahy moved for a vote on the amendment, which failed 23-6.⁶³ Since the supplemental never was made amendable on the Senate floor, the provision carried through and was signed into law, with some modifications being made to reflect the House legislation. In the end, the Administration was granted relatively broad authority to waive the Glenn sanctions, opening the door for nuclear dismantlement funds and equipment to flow into North Korea. Combined with the \$68 million of energy-related assistance the Supplemental provided to the North Korean government “notwithstanding any other provision of law,” the price tag on this waiver was high.⁶⁴ One can only speculate whether the budgetary impact would have been lower had the Senate Foreign Relations Committee taken up its own authorizing legislation or passed the House bill. But based on the bipartisan agreement in the House to narrow the waiver, as well as skeptical members of the Foreign Relations Committee, it is fair to conclude that the final

⁶² *Full Committee Markup of FY08 War Supplemental Appropriations*, 110th Cong. 2008. Unedited Transcript, at 99-104, obtained from Senate Appropriations Committee, Dirksen Senate Office Buildings.

⁶³ *Id.*

⁶⁴ Pub. L. No. 110-252; 122 Stat. 2330 (providing \$53 million for energy-related assistance to North Korea), and 122 Stat. 2333 (providing \$15 million for energy-related assistance to North Korea)

product of a properly debated and authorized measure would have limited the amount of funds that were ultimately made available for North Korea.

The Glenn waiver fight on the FY2008 Supplemental was one of many in a growing trend of controversial foreign affairs provisions in appropriations acts that provide significant budget authority for programs before the authorizing committees have reported a bill or have given due consideration to the issue. In the FY2009 Supplemental Appropriations Act, the Administration requested inclusion of language that would allow the Secretary of State to waive provisions of the Palestinian Anti-Terrorism Act of 2006 [PATA],⁶⁵ allowing funds to be obligated for the Palestinian Authority even if the terrorist group Hamas joined a Palestinian unity government.⁶⁶ Restrictions on aid to the Palestinians in the West Bank and Gaza are far and away the most extensive, deriving from several statutory sources as well as a long tradition of recurring provisions in Foreign Operations acts.⁶⁷ Nonetheless, the Administration prevailed upon the Appropriations Committee leadership to insert the waiver into the base text of the Supplemental, and despite efforts by members in both the House and the Senate to remove it, the waiver was retained in the supplemental appropriations bill. By utilizing an appropriations strategy to circumvent the authorizing committees, the Administration will soon have the ability to make a cash transfer of \$200 million to the Palestinian Authority

⁶⁵ Palestinian Anti-Terrorism Act, Pub. L. No. 109-446

⁶⁶ See H.R.2346, FY2009 Supplemental Appropriations, § 1107. PATA expressly prohibited assistance to the Palestinian Authority if Hamas were brought into the government, subject to a presidential certification that Hamas had ceased acting and operating as a terrorist group devoted to the destruction of Israel. See 22 USC 2378b; 120 Stat. 3318, 3319.

⁶⁷ Jim Zanotti, *US Foreign Aid to the Palestinians*, CRS RS22967, (2009)

in the event Hamas is brought into the government.⁶⁸ It is worth noting that this is an outcome expressly prohibited by PATA, the passage of which was the last time the authorizing committees and the full Congress expressed themselves on the matter.⁶⁹

Part II. The Solution

While contributing to budgetary excess and other inefficiencies, the problem examined in Part 1 is not intractable. The measures discussed in this section are ones that, if implemented, could help restore the balance between authorizers and appropriators on matters of foreign policy and promote the benefits of real deliberative democracy. They are organized in descending order of potential efficacy.

A. Foreign Assistance Reform

There is no question that the primary solution to the proliferation of foreign affairs general provisions in appropriations acts is for Congress to pass comprehensive foreign assistance reform.⁷⁰ Doing so would help to solve the problem in three ways.

First, comprehensive reform of the Foreign Assistance Act of 1961 would greatly reduce the number of recurring provisions by codifying them as part of the

⁶⁸ \$200 million is the amount set aside in § 1107 of the Supplemental Act, *supra*, note 66

⁶⁹ See PATA provision, *supra*, note 65

⁷⁰ See Susan B. Epstein, *Foreign Aid Reform: Studies and Recommendations*, CRS R40102, Table 1 (2008) (summarizing the recommendations of 14 different commissions and organizations, 7 of which recommended that Congress take on a larger role in directing foreign assistance, rather than relying only on the appropriations process to give the Administration flexible budget authority). To that end, on April 28, 2009, the Chairman of the House Foreign Affairs Committee introduced the Initiating Foreign Assistance Reform Act of 2009, H.R.2139, 111th Cong. (2009)

statutory overhaul. Many of the provisions relate to reporting requirements, which could be condensed into a single section of an updated Foreign Assistance Act, and there would be no need to include such provisions at the end of the Foreign Operations bills, or they could be referenced succinctly. Second, the process of overhauling foreign assistance would force legislators to confront unnecessary or vague provisions that have recurred in appropriations bills. The authorizers would have to decide whether these provisions need clarification, or whether they should be discarded entirely. In other words, it is probable that the deliberative process would reduce the volume of foreign affairs statutory requirements, or would at least eliminate extraneous or obsolete requirements.

Finally, by removing most, or all, of the legislative provisions from appropriations acts, the process of foreign assistance reform will shorten future foreign operations and supplemental appropriations bills, making them more readable and accessible. In turn, this would also provide a starker textual contrast if appropriators attempt to insert legislative language into their bill. In other words, the process would act as a “reset” button for the general provisions section of the appropriations bill. Appropriators would have to justify any new insertion, rather than hide behind the complexities of the appropriations process or Administration support.

B. Reform House and Senate Rules to Protect Jurisdiction of Authorizing Committees

Another proposal to solve the proliferation of foreign affairs legislative provisions is to change the Rules of each House of Congress to close the loopholes that continue to be exploited, particularly in supplemental appropriations. The first, and perhaps most drastic rule change would be to make both House Rule XXI and Senate Rule XVI self-enforcing, or merely subject to the determination of the parliamentarian. This would reduce the cost of any member seeking to challenge the provision by eliminating the need for a vote on sustaining the point of order. However, it would be naïve to assume that either chamber would consider granting such sweeping authority to the parliamentarian. In particular, the leadership of the House of Representatives would balk at placing in the hands of a single member of the minority the ability to strip a desired legislative provision from a must-pass supplemental or omnibus bill. This is in contrast with the Senate, where individual members have significant power under the rules to affect the scheduling and content of legislation.

Another change that could have a dramatic impact on eliminating these provisions would be to extend the application of Senate Rule XVI to legislative provisions written into a Senate-originated appropriations bill. As it stands today, the Rule only applies to amendment on the Senate floor. But as a way of circumventing the Rule, the Senate Appropriations Committee began reporting its own appropriations bills, with legislative provisions written into the base text. The full Senate would amend that bill (subject to Rule XVI), and then the entire bill

would be “amended” to the House bill.⁷¹ Making Rule XVI apply to the base text of any Senate appropriations bill would close this loophole by deterring Senate Appropriators from inserting language that would be subject to a point of order on the floor and potentially get stripped.

C. Reform the Appropriations Committee Process

Finally, the Appropriations Committee could reform the way it writes and reports appropriations bills, particularly supplementals, which by their nature of responding to emergencies, require swift consideration. For example, the Committee could adopt a rule requiring subcommittees to hold markups. It could also require subcommittees to provide members with the text of the bill at least seven days of prior to the markup. As a compromise measure, perhaps the Committee could impose these rules only for those appropriations bills that contain a certain number or percentage of legislative provisions.

Conclusion.

The classic flowchart describing how a bill becomes a law, known to most civic-minded Americans, does not explain a key way in which lawmakers add, change, or rescind laws outside the view of the public and without input from all voices in the legislature. In the area of foreign affairs, the exploitation of this process in supplemental appropriations has resulted in significant changes to the substantive law, with large, and possibly unnecessary, budgetary impacts.

⁷¹ This is done to conform with the constitution requirement that “All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.” U.S. CONST. art. I, § 7.

By making certain statutory and procedural reforms, Congress could restore the foreign affairs lawmaking process to the public view, and ensure that legislative outcomes reflect the diverse opinions of the country as expressed by the people's representatives in the legislature.