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Restoring regular order in congressional appropriations

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Executive Summary

The annual appropriations process is in a state of collapse. A primary symptom is the decline of "regular order," the budget procedure for debating and passing individual appropriations bills in each chamber. Today this procedure has been replaced by the passage of huge "omnibus" packages at the end of the session, with little scrutiny and opportunity for amendment.

While both chambers have some responsibility for the breakdown in this key part of federal budgeting, the Senate's rules and procedures shoulder most of the blame.

It's time to restore regular order. To do this the Senate would need to take several important steps, including:

- Reform the filibuster rule by allowing a simple majority of Senators to end debate on all matters related to appropriations bills.
- Utilize concurrent consideration of appropriations bills. This would allow the Senate to move on appropriations bills without waiting for the House to finish action and would permit greater time for Senate scrutiny.
- Restore limited earmarking. Despite the arguments for eliminating earmarking, doing so has had the unintended effect of making it harder to pass appropriations. A limited restoration of earmarks could help achieve agreement yet maintain a curb on wasteful spending.
- Reduce transparency. While open government is broadly supported, for many lawmakers the intense scrutiny of their votes makes them reticent to vote for any compromise. Members might be more inclined to cast tough votes on appropriations if only final tallies, not individual votes, were reported.

Introduction

The annual appropriations process is in a state of collapse, and it is time to take some serious steps to restore it to health. For the last year, I have been working with the National Budgeting Roundtable, a group of budget analysts and political scientists seeking ways to improve federal budgeting. My focus has been on possible improvements to the annual appropriations process based upon research I conducted for my book *Too Weak to Govern: Majority Party Power and Appropriations in the U.S. Senate* (Cambridge 2014).

A primary symptom of the collapse of appropriations is the decline of what is known as "regular order." Regular order is a time-tested system in which a dozen or so (the exact number has varied) appropriations bills are debated and adopted on an individual basis by the House and Senate. It is advantageous because it breaks the budget into bite-sized pieces and facilitates oversight.

Today, a depressingly familiar pattern has replaced regular order. Most appropriations bills pass the House of Representatives only to die in the Senate. In response, lawmakers bundle appropriations bills together into massive "omnibus" packages near the end of a session. These packages may be thousands of pages long, include over a trillion dollars in spending, and are adopted with little debate or scrutiny. In fact, limiting scrutiny is the goal. Leaders count on end-of-session pressures and the fear of a government shutdown to allow adoption of the package with minimal debate. In their view, it's the only way to push a budget through the gridlocked Senate floor.

The pattern is clear: both chambers have a hand in the creation of omnibus legislation, but the Senate is disproportionately responsible for the breakdown in appropriations. The cost of its failure is high. Omnibus legislating prevents rank-and-file members from exercising genuine oversight over the budget. Unwise spending and policies are more likely to go uncontested. Funding is likely to be provided after the beginning of the fiscal year, forcing agencies to rely on temporary continuing resolutions that create waste and inefficiency. And, disruptive government shutdowns are larger and more likely.

It is time to restore regular order in appropriations. My research shows the following:

- Senators prefer regular order, but turn to omnibus packages because the Senate's individualistic rules permit appropriations bills to be delayed or used to force votes on politically painful amendments.
- Lowering the threshold for cloture on appropriations bills to a simple majority would let the majority party better manage debate on the Senate floor to keep the trains running smoothly.
- Other reforms, such as easing transparency requirements and restoring earmarking, might also ease the path through Congress for these critical bills.

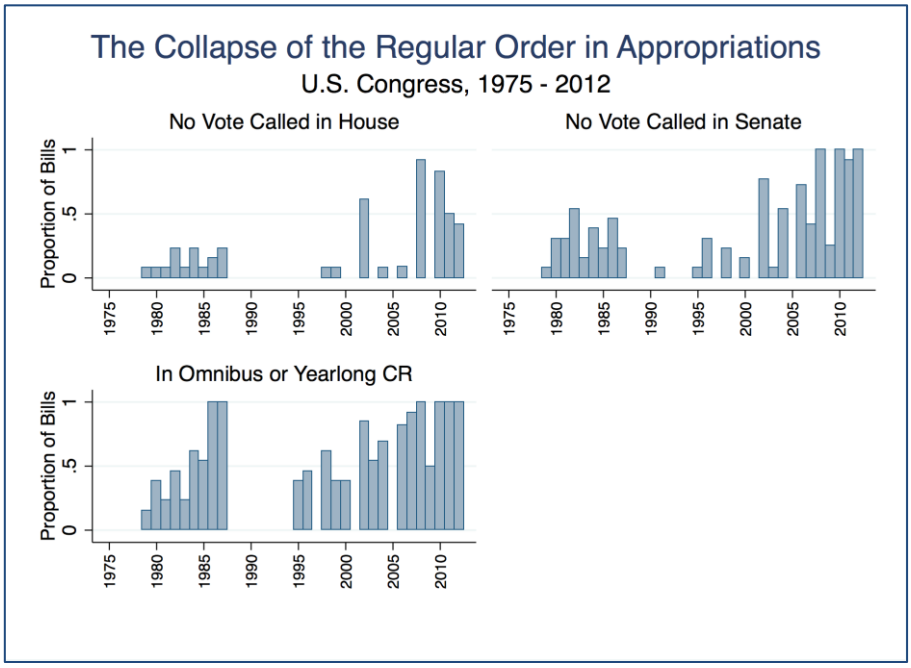
This paper, which summarizes a lengthier paper presented to the Roundtable (Hanson 2015b), explains the research behind these findings and makes the case for reform.

Appropriations Transformed

Appropriations bills fund about a third of the budget, including all "discretionary" spending that must be authorized on an annual basis by Congress. The wide range of programs funded through discretionary spending gives it an importance beyond its share of the budget. If Congress fails to provide discretionary funds, FBI agents won't be paid, cancer research won't be funded, and passports won't be processed. The lives of those who depend on these programs will be disrupted. An effective appropriations process also provides a critical way for Congress to oversee federal agencies, manage the budget and carry out policy.

Historically, Congress provided discretionary funds by adopting appropriations bills through a standard set of procedures known as "regular order" (Schick 2007). Appropriations bills originated in the subcommittees of the House Appropriations Committee. Each bill covered a particular area of jurisdiction, such as defense or agriculture. The bills were approved by the full Appropriations Committee, debated and adopted on the House floor, and then sent to the Senate. The Senate repeated these steps. Both chambers then negotiated a final version of each bill, passed it again, and sent it to the President.

Figure 1

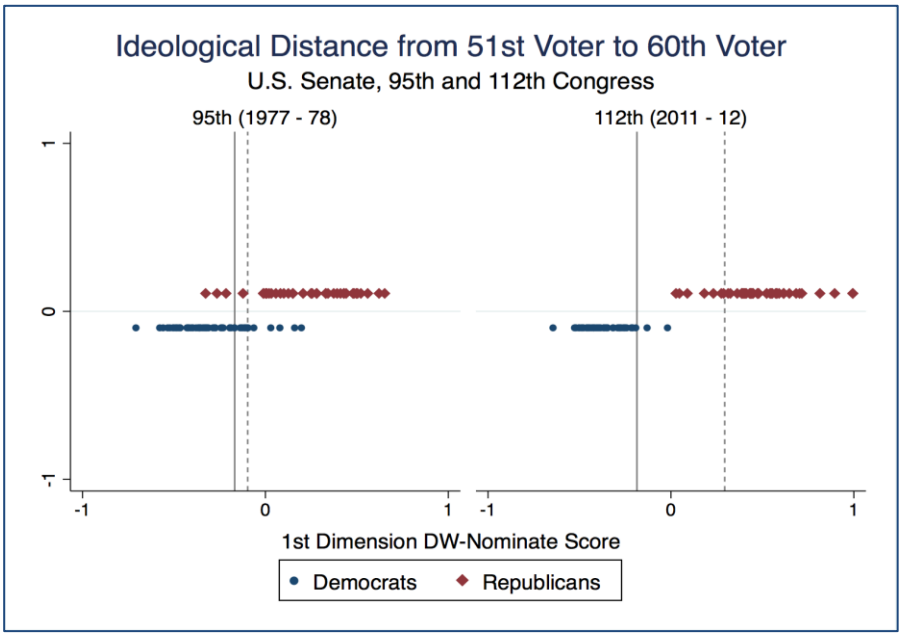


Regular order was standard practice in the House and Senate until the late 1970s. There have been two waves of omnibus appropriating driven by a collapse of regular order in the Senate. Figure 1 illustrates this collapse using the proportion of spending bills receiving an individual vote in each chamber each year as its measure. It also illustrates the proportion of bills enacted as part of a package each year (Hanson 2014a, Hanson 2014b). Between 1975 and 2012, a total of 88 percent of regular appropriations bills received a vote in the House of Representatives, but only 74 percent received a vote in the Senate.[1] A total of 61 percent of bills were enacted on an individual basis in regular order. The remaining bills were enacted as part of an omnibus package, or funding was provided through a yearlong continuing resolution. The trend has grown worse over time. Today, virtually all appropriations bills are passed in a package rather than in regular order.

The roots of the collapse run deep. Research suggests that broad changes in the congressional environment originating in the 1960s made it more difficult to pass spending bills on an individual basis in the Senate. Senators abandoned a culture of deference that characterized the chamber in the mid-20th century in favor of a culture of individual activism (Sinclair 1986, Fenno 1989). Where senators once would have deferred to the decisions of appropriators, they were now more likely to contest them. Sunshine laws opened senators to more public scrutiny than in the past (Wolfensberger 2000). Good government advocates welcomed this transparency, but it also had the effect of making compromise more difficult by raising the cost of straying from publicly-held positions. Rising polarization caused by deep societal changes created an ideological rift between the two parties, increasing the likelihood of filibusters and intensifying partisan competition (Brady and Volden 2006, McCarty, et al. 2006). Deficit politics raised the stakes of budgetary decisions (Wildavsky and Caiden 2004).

These developments are problematic in the Senate because the chamber operates on a principle of accommodation (Smith 2005). The Senate's rules permit unlimited debate on virtually any matter unless 60 senators vote to end it. They also allow unlimited amending by members, including on matters not germane to the topic at hand. The net effect of these rules is that they prevent the majority party from controlling the legislative agenda in the Senate as is possible in the House. The majority generally cannot adopt (or sometimes even debate) legislation without some buy-in from the minority, and the minority can usually ensure that its preferred policies receive a vote. In today's activist, polarized Senate, such agreement is hard to find and gridlock is the common result (Sinclair 2002).

Figure 2



[1] The vast majority of bills voted on by a chamber are approved.

Figure 2 illustrates why gridlock is more likely in today's Senate than in the past. Each marker represents a Democratic or Republican senator placed on his or her estimated position on the DW-Nominate ideological scale. On this scale, -1 represents the most liberal position and 1 represents the most conservative. To end a filibuster, a Democratic majority would have to secure 60 votes by building a coalition from the left to the right. In the 95th Congress (1977-78), the majority had to only bridge a small ideological distance to move from 51 votes (solid vertical line) to 60 (dotted vertical line). Agreements would have been relatively easy to reach. By the 112th Congress (2011-12), the gap between the 51st voter and the 60th had widened into a gulf. The policy concessions required today to build a 60 vote coalition are much larger than in the past, and such agreements are harder to reach. More often than not, members cannot reach agreement and the result is gridlock.

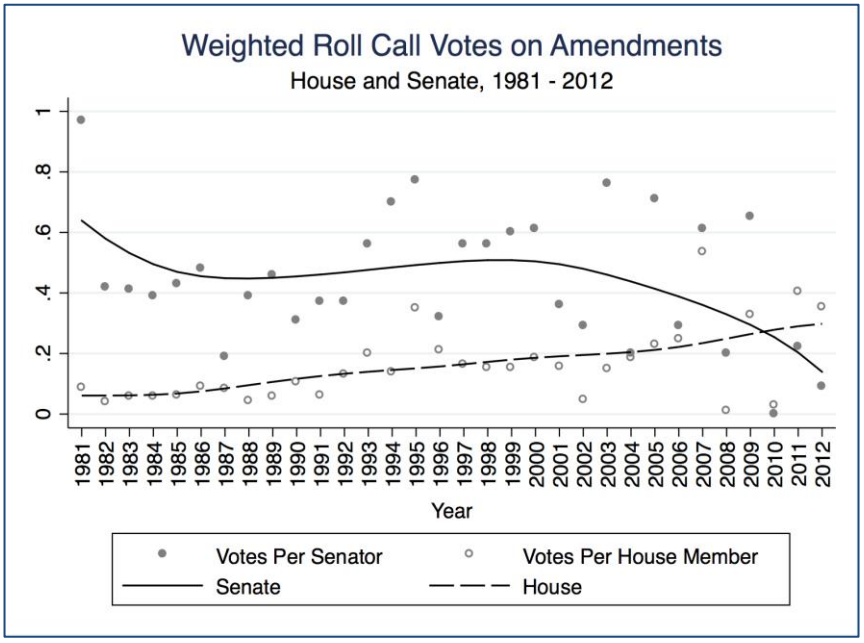
These changes have made the task of adopting appropriations bills in the Senate particularly difficult. My research shows there are two main problems. First, the Senate pays for the sins of the House. The House passes most appropriations bills, but not all. By tradition, the Senate will usually not debate an appropriations bill if the House has not passed it first. Second, appropriations bills that do reach the Senate get caught in the quagmire of the Senate floor. Members target appropriations bills with swarms of amendments designed to cause the other party damage in the next election. They also filibuster spending bills and cause delays that ripple through the already crowded legislative calendar. The net effect of these tactics is to persuade the majority party to pull appropriations bills from the floor before a vote, or not to bring them to the floor at all. Instead, leaders create a package and debate it under tight time constraints near the end of a session. Packaging bills together has the dual effect of broadening the coalition of support for the bill and reducing opportunities for amendment relative to the regular order. It trades an open legislative process for one that is closed and restrictive.

The Cost of the Collapse

Process matters. Rules and procedures shape the opportunities that members have to engage with legislation and affect how legislation is written. Better process, better contents.

Political scientist Matt Green has argued that the advantage of regular order is that it allows members to challenge problematic provisions in open debate and strike or amend them. Unwise policies can be adjusted and wasteful spending can be removed. Abandoning regular order "risks enacting substandard legislation" because it eliminates this natural check in the legislative process (Green and Burns 2010). Omnibus legislating moves lawmaking behind closed doors. Rank-and-file members are given few if any opportunities to change the final package. More errors, mistakes and waste may creep into the final legislation as a result.

Figure 3



The dramatic decline of amending in the Senate illustrates why the collapse in regular order makes it harder to adjust spending bills. Figure 3 plots the total number of roll call votes on amendments to appropriations legislation (both regular and omnibus bills) in the House and Senate for each year between 1981 and 2012, weighted by the number of members in each chamber. The solid line is fitted to Senate amendments, the dotted to House amendments. The number of amendments per member in the House has crept steadily upward over time. Amendments from both parties are debated and voted on in the House. Minority amendments sometimes win. In the Senate, amending has collapsed. The number of votes per member on amendments is trending toward zero. The cause of this decline is simple: senators rarely debate individual appropriations bills on the floor anymore.

While more research is needed on the policy consequence of the collapse of regular order (see, for example, McCarthy 2014), the net result of the shift toward omnibus legislating is legislation that is likely worse than what Congress would produce in effectively managed regular order. Budget hawks say omnibus packages are wasteful. Good government groups say unwise policies are buried in them. As Senator Susan Collins (R-ME) observed: "Those bills are often thousands of pages in length. A lot of times some of the provisions have not had the opportunity to be thoroughly vetted. They really are not very transparent. They contribute to the public's concern about the way we do business here in Washington" (*Congressional Record*, February 27, 2012, S1041).

There also is evidence that the late passage of appropriations bills contributes to poor management of federal agencies and wasteful spending. When Congress fails to adopt appropriations bills by the beginning of the fiscal year, it must adopt a temporary continuing resolution to provide stopgap funding to federal agencies. The Government Accounting Office (GAO 2013) reports that temporary CRs lead to inefficient spending and inhibit federal agencies' ability to carry out their appointed tasks. It also increases the risk of a government shutdown and the serious disruptions to the lives of the American people that it entails. Standard and Poor estimated that the 2013 shutdown cost the economy $24 billion (Hicks 2013).

Appropriations Reform

Many of the root causes of the collapse in appropriations are with us for the foreseeable future. We can't turn back the clock on partisan polarization or persuade senators to restrain themselves from offering amendments. But, the appropriations process can obviously be improved.

Successful reforms must follow an important rule: they must advance the interests of members to be effective. This rule reflects an insight dating back to the framing of the American constitution. James Madison understood that institutions and rules alone would not protect liberty. Madison's solution was to rely on the natural ambition of elected leaders to do this work. In his design, ambitious members of each branch limit the power of competing branches through their effort to protect their own power, thereby preventing power from ever being centralized enough to threaten liberty. In Madison's famous words, ambition is made to counteract ambition.

Political scientists often assume that the most basic interest of members is to win re-election (Fenno 1973, Mayhew 1974). Studies show that assuming members prioritize re-election over other goals can explain everything from policy outcomes to why parties have such a hard time disciplining members. It also explains why budget reforms usually fail—too often they are thinly disguised efforts to compel members to take steps that will cause them political harm. Members either water down reforms or circumvent them at the first opportunity (Primo 2007).

My research shows that well-managed regular order would advance member re-election interests. Debating appropriations bills gives members the chance to claim credit for accomplishments and take positions on matters important to their constituents—both activities that help them win re-election. Members prefer to follow regular order when they adopt appropriations bills, and they only abandon it when runaway amending and filibusters threaten to impose unacceptable political costs on them. Members have an incentive to return to regular order as long as those costs can be managed.

Restoring regular order will not be easy, especially because newer members may never have experienced a time when omnibus legislating was not routine. Below, I suggest a set of Senate reforms designed to help smooth the path of appropriations bills through the floor and be compatible with the re-election interests of members.

1. Reform the Filibuster: allow a simple majority of senators to end debate on all matters related to appropriations bills.

Effective debate in regular order requires one of

two things. Either members must exercise restraint during debate, as was common in the past, or leaders must manage debate to keep it under control. In today's Senate, senators no longer exercise restraint and leaders lack basic tools to manage debate. The majority party faces an unpalatable choice: it can bring bills to the floor in regular order and face runaway amending and filibusters, or it can bypass the floor, make an omnibus, and bring it up at the last minute when debate will be expedited. Reforming the filibuster would give Senate leaders a third option: managed debate.

By filibuster reform, I mean changing the Senate's rules to allow a simple majority of senators to end debate on all matters related to appropriations bills. This step would simultaneously allow a majority to control amending, as well as prevent dilatory tactics by a minority. Existing germaneness requirements would also have to be strengthened to prevent senators from being tempted to add non-appropriations legislation to spending bills as well.

Senators have already demonstrated that they believe filibuster reform is in their interest and that it can improve the Senate's productivity. In November of 2013, Democrats exercised the so-called "nuclear option" to allow the Senate to proceed to a vote on certain presidential nominations by a simple majority vote. The number of federal judges confirmed by the Senate jumped dramatically as a result (Kamen and Kane 2014). The Senate could be equally productive with appropriations bills.

Policy would be impacted as well. In a reformed Senate, legislation would be written to satisfy the preference of the member needed to provide a majority just as the 60th senator whose vote is needed for cloture must be satisfied today. Members would debate spending, scrutinize the budget and offer amendments. If they abused the process, the majority would have the option of ending debate and moving to a vote.

Critics of this idea have expressed several concerns. Some say the filibuster protects debate in the Senate, and eliminating it would allow the majority to suppress debate on appropriations bills. The evidence suggests otherwise. As shown above, senators now have a worse opportunity to debate spending bills than members of the House because Senate leaders are determined to avoid the floor. Meanwhile, House leaders have taken minimal steps to suppress debate on appropriations bills even as polarization has risen to historic levels. Bills come to the floor under modified open rules that allow any amendment to be debated as long as it is pre-printed in the *Congressional Record*. When the members abuse this system, the majority cracks down with a structured rule (Hanson 2015a). There is no reason to think the Senate would do worse than the majoritarian House.

A second criticism is that the filibuster is a critical part of the nation's system of checks and balances that protects the public from bad legislation. This criticism also does not withstand scrutiny. First, the Framers' system of checks and balances only requires majorities in the House and Senate, and the President, to agree on legislation. The filibuster is an additional hurdle that was created accidently when senators updated their rules and failed to include a motion to call previous question (Binder and Smith 1997). Second, senators would still be able to filibuster general legislation. Appropriations bills would be treated differently because of the requirement to pass them every year. General legislation could continue to simmer as long as it takes 60 senators to reach agreement.

2. Utilize Concurrent Consideration of Appropriations Bills

The House of Representatives also fails at times to pass appropriations bills. These failures are infrequent and idiosyncratic in their causes, but they are consequential because the Senate typically respects a tradition that it will not adopt (or often even debate) appropriations bills that have not first passed the House.

There is no reason senators should be denied the opportunity to debate an appropriations bill because of a failure in the House. It is a common misunderstanding that the Constitution requires appropriations bills to be initiated by the House of Representatives like tax legislation. The Senate should debate appropriations bills concurrently with the House instead of waiting for the House to adopt them first. This step would ensure that at least one chamber debates a spending bill in regular order and that members have an opportunity to work their will on the legislation. It would also be in the interest of senators because it would give them expanded opportunities to take positions and claim credit for accomplishments.

3. Restore Limited Earmarking

Political science research shows that earmarking helps congressional leaders build a coalition of support for a bill (Evans 2004). The ban on earmarking in appropriations bills has had the unintended effect of making it harder to pass this

vital legislation. Restoring limited earmarking could create an important tool for coalition building, thus facilitating passage of appropriations bills.

The backlash against earmarking was rooted in the fact that the number of earmarks rose rapidly from the 1990s to the early 2000s. Appropriators complained that they were overwhelmed with requests and budget hawks claimed earmarks were wasteful spending.

A limited restoration of earmarks could satisfy both concerns. Member requests could be capped to prevent appropriators from being flooded with requests. Members have historically understood earmarks to be in their re-election interest, and would likely do so again as long as the number of requests is effectively managed.

4. Reduce Transparency

Good government reformers have made a decades-long push to make the activities of members more transparent to the public so that members can be held accountable for their decisions. Some political scientists say these efforts have been too successful, and that the deal-making needed for orderly government is now too difficult because members are criticized the moment they stray from an established public position (Binder and Lee 2013).

One option would be to return to an earlier system in which total vote tallies – rather than the votes of individual members – are reported for appropriations bills. Members might be more willing to cast tough votes, and there would be a reduced incentive for "gotcha" amendments aimed only at causing members political harm. The path of appropriations bills through the floor would likely be smoother.

Conclusion

Fixing appropriations requires a clear understanding of where the process is breaking down and why. My research shows that the Senate is the primary culprit. The House occasionally fails to pass spending bills, but the reasons for this are idiosyncratic and hard to fix. Meanwhile, the main breakdown is happening in the Senate. Leaders bypass the floor because they have no way to control amendments and filibusters. Instead, they turn to omnibus bills despite widespread agreement that these are a poor way to legislate. It's time to return to a more rational way of legislating.

Some of the reforms outlined above are likely to be controversial—particularly reforming the filibuster. As the parties have grown farther apart, the perceived stakes each party sees in stopping its opponent from enacting its agenda have grown higher. Defenders of the filibuster see it as the only thing protecting them from a policy catastrophe. The problem is that inaction also has a cost. When neither party can implement a coherent policy agenda, critical problems go unaddressed. Ultimately, critics must understand that it is not the responsibility of a Senate minority to protect the public from bad policy. Senate majorities should be allowed to govern in conjunction with the House and the Executive Branch. Voters can hold them accountable for their decisions in elections.

Restoring regular order in appropriations won't solve all our budget woes or slay the deficit dragon. But, as President Barack Obama said of foreign policy, sometimes policymakers must hit singles and doubles to advance national interests one step at a time (Obama 2014). The same is true of the budget. Taking the steps outlined here to restore regular order would improve the capacity of Congress to adopt appropriations bills in a timely way with appropriate scrutiny by lawmakers. Omnibus bills and last minute budget deals would be smaller and more infrequent. After nearly two decades of careening from budget train wreck to budget train wreck, that would be a good start.

— ***Peter Hanson*** *is an assistant professor of political science at the University of Denver and a former staff member in the office of Senator Tom Daschle.*

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