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Reprogramming and the Department of Defense

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Introduction

While Congress maintains the power of the purse and controls all federal appropriations, the Executive branch is granted some ability to control the expenditure of funds through authorities known as transfers and reprogramming. These actions allow for flexibility in the spending of federal funds, with the understanding from both branches that budget requests and appropriations may be subject to changing circumstances before they are expended. However, policymakers' views of the merits of reprogramming often depend on the specifics of the action. As the Congressional Research Service noted in 2013, "When done so in accordance with the applicable authorities and procedures, transferring or reprogramming funds may enable agencies to operate more effectively or efficiently, and in a manner that is consistent with congressional intent. When transfers or reprogramming actions deviate from the applicable authorities, procedures, and limitations, however, it is possible that funds may be used in ways contrary to congressional intent."¹ To avoid such misuse, limitations on reprogramming exist in order to ensure all major changes in funding are overseen and unopposed by the relevant Congressional committees. Because many of the rules regarding reprogramming are internal to agencies, Congress primarily employs the political threat of restrictions on appropriations in the following fiscal year to maintain its control over the expenditure of funds. Thus, while reprogramming is in many ways a necessary aspect of the budget process, it also represents a fairly fragile balance between the Executive and Legislative branches.

Because the Department of Defense (DoD) has the largest and most complex budget in the US federal government, its policies and procedures regarding reprogramming are the most

¹ (2013). *Transfer and Reprogramming of Appropriations: An Overview of Authorities, Limitations, and Procedures* (CRS Report No. R43098). Retrieved from Congressional Research Service website: <https://crsreports.congress.gov/product/pdf/R/R43098>

thorough and well-established of all federal agencies and exist both at the legislative and agency level. The DoD follows different procedures depending on the category of funding, as well as on the amount of funds and type of funds involved. Within these guidelines, the DoD has significant ability to move funds throughout the year, whether due to routine adjustments to expenditures or due to major changes in warfighting needs. Congress grants reprogramming authority to the DoD on an annual basis and can call into question the DoD's use of reprogramming if it believes the DoD is using that authority in a way that contradicts Congress' intent. The 2019 declaration of a national emergency and the subsequent intention of the DoD to reprogram military construction funds in support of a wall at the US-Mexico border highlights many of the ways in which reprogramming can provide a means for expending funds outside of the original appropriations as well as escalate political tensions between the Executive and Legislative branches.

This paper begins with the timely case study of President Trump's declaration of a national emergency at the Southern border of the United States in 2019, the use of reprogramming to fund border wall construction, and the potential ensuing effects of such an action on the structure of reprogramming authorities as a whole. In the second section, the paper provides a broad explanation of reprogramming authorities, with particular emphasis on how reprogramming is conceived of and executed within the Department of Defense. Later sections examine past controversies surrounding the use of reprogramming within the DoD, including examples of reprogramming during wartime and a discussion of the pros and cons of the existing reprogramming process. Finally, the paper will describe potential avenues for reform of the reprogramming process.

Case Study: the 2019 National Emergency Declaration and the Border Wall

In the early months of 2019, high-profile and highly political debates cast a spotlight on the Department of Defense's reprogramming authorities. On February 15, 2019, President Donald Trump declared a National Emergency at the southern border of the United States "to provide additional authority to the Department of Defense to support the Federal Government's response to the emergency at the southern border... this emergency requires use of the Armed Forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. 1631), that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments."²

Much of the intent of the national emergency proclamation was to allow the Trump Administration to reprogram DoD funds to pay for construction of a border wall designed to prevent illegal immigration. Section 2808 of title 10 of the US Code authorizes the Secretary of Defense to undertake military construction projects not authorized by Congress that are necessary to support the use of the armed forces in the event of a declaration of war or national emergency. In addition, it specifies "such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated."³ It also requires the DoD to notify Congress of the change in costs but does not provide for any mechanism in which Congress can approve of or reject the change.

² "Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States." The White House. Accessed March 18, 2019. <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>.

³ 10 U.S.C. § 2808

The declaration of the national emergency also invoked section 284 of title 10, US Code, which allows the Secretary of Defense to provide support for counterdrug and counter-transnational organized crime activities, which could also include the transferring of funds. Shortly after this proclamation, on March 7, 2019, the leadership of the House Armed Services and Appropriations Committees sent a letter to the Department of Defense leadership requesting notification of any changes in the allocation of military construction funds at least sixty days before the change takes place. The lawmakers also requested specific documentation of all unobligated military construction projects, criteria for the decision-making process of which unobligated funds to use, and justification for the national emergency declaration and the necessity of the use of armed forces, among other documentation. In the same letter to the Secretary of Defense, Congressional leaders included a request for documentation related to both section 284 and section 2808.⁴

Absent the passage of legislation specifically prohibiting this particular expenditure of funds, Congress did not have sufficient ability to stop this reprogramming action within the current fiscal year, because it had already granted reprogramming authority to the DoD in the appropriations bill for fiscal year 2019.⁵ However, Congress could choose to increase restrictions on the DoD's reprogramming authorities more broadly in future years or repeal them altogether.⁶ In particular, lawmakers expressed concern that their consent, or lack thereof, was not requested

⁴ United States. Cong. House. Committee on Armed Services and Committee on Appropriations. Letter to the Honorable Patrick Shanahan, Acting Secretary of Defense. March 7, 2019. <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/documents/2019.03.07%20Approps.HASC%20Border%20Wall%20DOC%20REQ-03072019174224.pdf>.

⁵ The passage of such legislation is considerably unlikely given Congress' previous inability to gain sufficient votes to override President Trump's veto of a bill that would terminate his national emergency declaration. See Cornwell, Susan. "U.S. House Fails to Override Trump Veto, Upholding Border Wall..." Reuters, March 27, 2019. <https://www.reuters.com/article/us-usa-trump-congress-emergency-idUSKCN1R70ZN>.

⁶ Copp, Tara. "Capitol Hill Tries to Deny Pentagon Use of \$1B for Border Wall." Military Times, March 27, 2019. <https://www.militarytimes.com/news/your-military/2019/03/26/dod-denied-use-of-1b-for-border-wall/>.

or considered, which upset the balance between the Executive and Legislative branches previously preserved throughout reprogramming procedures and risked additional breaches of trust in the future.⁷ In the press, lawmakers threatened to limit the DoD's ability to reprogram and transfer funds in future years if such requests for documentation were not met.⁸ While the Department eventually provided the requested list of possible reprogramming actions, its delay caused concern within the relevant Congressional committees.⁹

On March 25, 2019, in accordance with the national emergency proclamation and its invocation of Section 284 of Title 10, Acting Secretary of Defense Patrick Shanahan authorized a reprogramming of up to \$1 billion to enable the US Army Corps of Engineers to support the Department of Homeland Security's request to "to build 57 miles of 18-foot-high pedestrian fencing, constructing and improving roads, and installing lighting within the Yuma and El Paso Sectors of the border."¹⁰ The reprogramming action in question would use money originally designated for the DoD counterdrug account, which defense officials reportedly believed would allow the DoD to avoid Congressional approval requirements for reprogramming of military construction funds. The following day, Chairman of the House Armed Services Committee Representative Adam Smith wrote to the DoD denying the reprogramming request. Chairman of the Subcommittee on Defense of the House Appropriations Committee Rep. Pete Visclosky did

⁷ Baldor, Lolita, and Robert Burns. "Lawmakers Denounce Plan to Divert Military Money for Wall." US News & World Report. Accessed April 1, 2019. <https://www.usnews.com/news/business/articles/2019-03-26/congress-likely-to-question-use-of-military-funds-for-wall>.

⁸ Joe Gould, "House Democrats demand Shanahan explain border wall funding scheme," Defense News, March 8, 2019. <https://www.defensenews.com/congress/2019/03/08/house-democrats-demand-shanahan-explain-border-wall-funding-scheme/>

⁹ Copp, Tara. "Here Is the Pentagon's List of Construction Projects That Could Be Cut to Fund a Border Wall." Military Times, March 20, 2019. <https://www.militarytimes.com/news/your-military/2019/03/18/border-wall-milcon-cuts-list-is-in-is-your-base-on-it/>.

Sisk, Richard. "Shanahan Fails to Turn Over List of MilCon Projects Affected by Border Wall | Military.Com." Military.com, March 15, 2019. <https://www.military.com/daily-news/2019/03/15/shanahan-fails-turn-over-list-milcon-projects-affected-border-wall.html>

¹⁰ Copp, Tara. "Capitol Hill Tries to Deny Pentagon Use of \$1B for Border Wall." Military Times, March 27, 2019. <https://www.militarytimes.com/news/your-military/2019/03/26/dod-denied-use-of-1b-for-border-wall/>.

the same later in the week.¹¹ In his letter condemning Acting Secretary Shanahan's reprogramming decision, Chairman Visclosky referenced the Congressional power of the purse and specifically wrote, "The reprogramming transmitted by the Department denies the Congress and the Committee on Appropriations those stated Constitutional prerogatives; these funds were neither requested nor appropriated for the activities described in the reprogramming. With this unilateral action, the historic and unprecedented comity that has existed between the Committee and the Department has been breached."¹² Undersecretary of Defense (Comptroller) David Norquist testified before the House Budget Committee on March 27, 2019, that the money had been transferred to the Army Corps of Engineers the previous evening in direct opposition to Congress's position.¹³ Acting Secretary Shanahan explained, "There are going to be consequences, and I understand the position of the committees. I also have a standing legal order from the commander in chief."¹⁴

In addition to concerns about the separation of powers and Congress' oversight responsibilities, members of Congress have increasingly highlighted their fears that the funds reprogrammed out of military construction accounts for use at the border wall would be taken

¹¹ Gould, Joe, and Aaron Mehta. "'There Are Going to Be Consequences': Shanahan Prepares for Congressional Pushback to Reprogrammed Funds." Defense News, March 28, 2019. <https://www.defensenews.com/pentagon/2019/03/27/shanahan-pushes-reprogramming-through-expects-consequences-from-house/>.

¹² 'Visclosky Denies Request to Use Defense Funds for Unauthorized Border Wall,' Press Release, Office of U.S. Congressman Pete Visclosky, March 27, 2019, <https://visclosky.house.gov/media-center/press-releases/visclosky-denies-request-to-use-defense-funds-for-unauthorized-border>.

¹³ Gould, Joe, and Aaron Mehta. "'There Are Going to Be Consequences': Shanahan Prepares for Congressional Pushback to Reprogrammed Funds." Defense News, March 28, 2019. <https://www.defensenews.com/pentagon/2019/03/27/shanahan-pushes-reprogramming-through-expects-consequences-from-house/>.

¹⁴ Gould, Joe, and Aaron Mehta. "'There Are Going to Be Consequences': Shanahan Prepares for Congressional Pushback to Reprogrammed Funds." Defense News, March 28, 2019. <https://www.defensenews.com/pentagon/2019/03/27/shanahan-pushes-reprogramming-through-expects-consequences-from-house/>.

from important projects in their own districts.¹⁵ This concern highlights another dynamic of reprogramming, namely that funds spent on a new item are then no longer available for the previously intended purpose. In many cases, one or both of these actions may be uncontroversial, but in the case of the border wall, both the new use of funds and the loss of funds for particular projects have caused alarm on the part of Congressional appropriators.¹⁶

The reprogramming of funds for border wall construction has also created distress within the Department itself. Because Congress already set a \$4 billion dollar limit on the total amount eligible for the DoD's reprogramming authority for fiscal year 2019, the reprogramming action on the scale of the border wall comprises over a quarter of this total and significantly restricts the amount of reprogramming authority available for other priorities.¹⁷ In particular, senior military leaders have expressed concern about their ability to reprogram the full amount of funding necessary to rebuild military installations damaged by hurricanes earlier in 2019. In addition to running out of projects from which to pull money, military services faced internal reprogramming limits set by the Office of the Secretary of Defense which were lower than the costs of their respective urgent repairs, and requests for additional appropriations stalled in Congress. This combination of factors ultimately triggered the halting of all repair projects on May 1, 2019.¹⁸ In this way, reprogramming actions can and have had ripple effects impacting agencies' priorities across the fiscal year.

¹⁵ Joe Gould, "House Democrats demand Shanahan explain border wall funding scheme," Defense News, March 8, 2019. <https://www.defensenews.com/congress/2019/03/08/house-democrats-demand-shanahan-explain-border-wall-funding-scheme/>

¹⁶ Sisk, Richard. "Lawmakers Fear Border Wall Funding Will Hit Local Military Projects." Military.com, February 25, 2019. <https://www.military.com/daily-news/2019/02/25/lawmakers-fear-border-wall-funding-will-hit-local-military-projects.html>.

¹⁷ "Public Law 115-245: Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019," (Date: 9/28/18; enacted H.R. 6157) Text from: United States Public Laws. Available from: <https://www.congress.gov/bill/115th-congress/house-bill/6157/text>.

¹⁸ LaPorta, James. "Military Bases Damaged by Hurricanes Will Receive Funds but More Will Be Needed." Newsweek, April 5, 2019. <https://www.newsweek.com/marine-bases-receive-recovery-aid-congress-1387750>; Duehren, Andrew. "Hurricane-Torn Air Force Base's Recovery Stalls as Congress Lingers on Disaster Aid." Wall

What is Reprogramming?

While reprogramming is of particular current interest, it is a fairly routine aspect of the regular federal budget process.¹⁹ Between the time when funds are appropriated by Congress and the time they are spent by agencies, those agencies may discover legitimate needs to spend funds in a way different than in their original budget estimate. The two primary methods for altering the execution of funds are transferring and reprogramming.²⁰

Transferring

According to the GAO definition, transferring is the ‘shifting of funds between appropriations.’²¹ Under 31 U.S.C. § 1532, transfers must be expressly authorized by law. Unauthorized transfers constitute an unauthorized augmentation of the receiving appropriation and violate 31 U.S.C. § 1301(a), which prohibits the use of authorizations for purposes other than those which Congress intended.²² An unauthorized transfer also risks violating the Antideficiency Act if the transfer leads to an over-obligation of the receiving appropriation.²³

Transfers include the shifting of funds between agencies, between accounts within the same agency, or between a single agency and an interagency or intra-agency working fund.²⁴ Temporary shifts of funds fall into the same category, even when the agency intends to reimburse the account, and are not allowed without statutory authority.²⁵ Similarly, the

Street Journal, May 4, 2019, sec. US. <https://www.wsj.com/articles/hurricane-torn-air-force-bases-recovery-stalls-as-congress-lingers-on-disaster-aid-11556988607>.

¹⁹ For a history of transfers and reprogramming, as well as a more in-depth explanation of misappropriations and the Antideficiency Act, see Fujitani, Takeshi and Jared Shirck. “Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound,” Harvard Law School Federal Budget Policy Seminar Briefing Paper 8, 2005.

²⁰ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-38

²¹ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-38

²² GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-38

²³ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-38

²⁴ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-38-9.

²⁵ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-39.

consolidation or pooling of all or part of multiple appropriations into a single account is not allowed without statutory authority.²⁶

Statutory authority can be set either in permanent legislation or in appropriation act provisions.²⁷ Typically, the limits for transfers are either set as a percentage of a total appropriation or restricted to a specific amount of total funds. Transfer caps are included in the annual appropriations bill.²⁸ The specific rules governing each transfer vary depending on the transfer in question, which can prove very complicated based on the restrictions of the receiving and donor accounts.²⁹

Reprogramming

Unlike with transfers, agencies have the authority to reallocate their own funds within lump-sum appropriations, a process known as reprogramming. Reprogramming occurs when funds are spent for purposes outside those contained in budget submissions or considered by the appropriations committee but still within the general purposes of the appropriation.³⁰ In reprogramming, funds are shifted within a single appropriation, rather than changing accounts, as occurs in transfers.

Unlike transferring, reprogramming does not require agencies to have statutory authority.³¹ Reprogramming requires that agencies ensure consistency between the actual obligations and expenditures and the intended purpose of the original appropriation. Agencies do

²⁶ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-40.

²⁷ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-39.

²⁸ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-40.

²⁹ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-43.

³⁰ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-44.

³¹ See *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (“After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way”)

not need to ensure consistency between the actual obligations and expenditures and the original budget estimates provided to Congress.³²

Congress is responsible for granting general reprogramming authority to agencies, and also has the ability to restrict such authority. In particular, it can be difficult to determine whether a shift in funds is a reprogramming if an appropriations act does not provide sufficient clarity as to the subdivisions governing a specific appropriation. Clearly defined subdivisions help delineate between movements of funds that require statutory authority and those that do not and allow Congress to establish barriers between restricted transfers and allowed reprogramming.³³ In many cases, Congressional intent regarding the use of appropriations is provided through guidance at the line-item level located in conference reports that accompany each appropriations bill. However, the conference reports themselves are not law.

In some cases, statutory reprogramming restrictions require Congressional notification or approval.³⁴ While statutory committee approval or veto provisions are not permissible under *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), many agencies continue to informally request committee approval when contemplating reprogramming.³⁵ This is done as part of the ‘gentleman’s agreement’ that maintains the balance of power between the Executive and Legislative branches, giving Congress the amount of oversight it deems necessary to feel comfortable continuing to grant reprogramming authority on an annual basis.³⁶ Similar informal arrangements between agencies and Congressional committees exist for the notification of

³² GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-44.

³³ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-46.

³⁴ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-46.

³⁵ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-46.

³⁶ House Armed Services Committee Chairman referred to reprogramming as a ‘gentleman’s agreement’ in his questioning of Acting Defense Secretary Shanahan in a March 26, 2019 hearing on the topic of ‘Defense Department Fiscal Year 2020 Budget Request’. For full video clip, see “Defense Department Fiscal Year 2020 Budget Request | C-SPAN.Org.” Accessed May 8, 2019. <https://www.c-span.org/video/?459005-1/acting-secretary-shanahan-general-dunford-testify-pentagons-2020-budget-request&start=1562>.

reprogramming, but such non-statutory arrangements also do not have the full force and effect of law.³⁷ The consequences of ignoring these long-standing but informal agreements are political rather than legal but can have a huge impact on agencies' future reprogramming authorities, as seen in the 2019 border wall case and in other historic cases.

Reprogramming does not include requests for additional funds, and can only be applied within the same fiscal year as the original appropriation.³⁸ In practice, major reprogramming actions allow for negotiation between the Executive and Legislative branches when there are disagreements about the necessity of certain appropriations or when circumstances change during the execution of such funds.³⁹ Reprogramming is considered distinct from impoundment because it is the diversion of funds within a particular appropriation, not a failure to spend funds designated for said use.⁴⁰ The ability of agencies to use discretion in executing funds often depends on the specificity of the line item in the appropriation. If Congress wants to ensure an agency executes funds within narrow guidelines, it must include such details explicitly. The lack of statutory requirement for reprogramming renders it less formal than transferring, and the process of reprogramming varies significantly across agencies within the Executive branch.⁴¹

³⁷ GAO Principles of Federal Appropriations Law, Chapter 2, Page 2-46.

³⁸ "Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management," Defense Acquisition University. 18.

³⁹ Fujitani, Takeshi and Jared Shirck. "Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound," Harvard Law School Federal Budget Policy Seminar Briefing Paper 8, 2005. 1.

⁴⁰ Fujitani, Takeshi and Jared Shirck. "Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound," Harvard Law School Federal Budget Policy Seminar Briefing Paper 8, 2005. 4.

⁴¹ For a further discussion of issues around separation of powers issues and reprogramming, see Fujitani, Takeshi and Jared Shirck. "Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound," Harvard Law School Federal Budget Policy Seminar Briefing Paper 8, 2005.

Reprogramming within the Department of Defense

The Department of Defense has the most elaborate reprogramming processes of the federal government, and also uses its reprogramming authorities to the greatest effect. In addition to the informal requirements for reprogramming established between the Department of Defense and Congress and the limitations on reprogramming included in the annual defense authorization and appropriations bills, policies for reprogramming within the Department of Defense are laid out in the DoD's internal Financial Management Regulation, DoD 7000.14-R.⁴² Typically, Congress approves a multi-billion dollar general transfer authority (GTA) limit for the DoD's reprogramming authority each fiscal year in the annual defense appropriations bill.⁴³ GTA often includes requirements that transfers are "necessary in the national interest" and "based on unforeseen military requirements."⁴⁴ In fiscal year 2019, Congress set a reprogramming limit of \$4 billion across the entire DoD budget of approximately \$717 billion, in addition to lower reprogramming limits within specific accounts.⁴⁵ Within the DoD, reprogramming falls into four major categories: Congressional prior approval, Congressional notification, internal, and below-threshold.

⁴² DoD 7000.14-R Financial Management Regulation, September 2015, VOLUME 3, CHAPTER 6: "REPROGRAMMING OF DOD APPROPRIATED FUNDS."

⁴³ See Section 8005, "Public Law 115-245: Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019," (Date: 9/28/18; enacted H.R. 6157) Text from: United States Public Laws. Available from: <https://www.congress.gov/bill/115th-congress/house-bill/6157/text>. Previous defense appropriations bills provide comparable authorities.

⁴⁴ Recommendation 46. Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Volume 3, January 2019. https://section809panel.org/wp-content/uploads/2019/02/Recommendation_46.pdf

⁴⁵ Leo Shane III. "Taking Personnel Funds to Help Build Trump's Border Wall Won't Hit Military Paychecks, but Could Cause Budget Woes." Military Times, March 8, 2019. <https://www.militarytimes.com/news/pentagon-congress/2019/03/08/taking-personnel-funds-to-help-build-trumps-wall-wont-hit-military-paychecks-but-could-cause-budget-woes/>.

Reprogramming with Congressional prior approval

Reprogramming with Congressional prior approval involves requests for quantity increases for major procurement items, items of special interest to multiple committees, uses of the Secretary of Defense's general transfer authorities, requests for within-account transfers that exceed below-threshold reprogramming limits, and new starts and program terminations above certain dollar thresholds. To reprogram with Congressional prior approval, prior to reallocating any funds the Undersecretary of Defense (Comptroller) submits a request on behalf of the Department to the House and Senate Armed Services and Appropriations Committees, including the House and Senate Select Committees on Intelligence if the reprogramming involves intelligence funds. Requests must show that reprogramming will move funds to higher priority items and cannot be submitted for items that Congress has previously declined to fund.⁴⁶ Each committee must approve in writing both the amount and the source of the funding to be reprogrammed. Should any committee choose to disapprove part of a request or to reduce the allowed amount, the Undersecretary for Defense (Comptroller) implements the most restrictive version approved by all committees and notifies the relevant agencies within the DoD of the approved request.⁴⁷

Typically, the DoD submits an 'omnibus' request for reprogramming by May 1st and receives responses from Congress in July or August, although individual reprogramming requests can be submitted at any time.⁴⁸ For example, the DoD submitted an omnibus prior approval request constituting over \$4 billion in reprogramming requests in June of 2018 across

⁴⁶ "Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management," Defense Acquisition University. 19-20.

⁴⁷ "Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management," Defense Acquisition University. 20.

⁴⁸ "Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management," Defense Acquisition University. 21.

ten major categories, ranging from an increase in funds for missile procurement to the diversion of funds from the under-execution of basic food and housing allowances. Congress approved some, but not all of the requests.⁴⁹

Reprogramming with Congressional notification

Reprogramming with Congressional notification involves new programs or line items that do not require prior approval, often underneath dollar thresholds, as well as the termination of programs under threshold reprogramming amounts, provided the line item or program element is not eliminated.⁵⁰ In such instances, the DoD provides the House and Senate Armed Services and Appropriations Committees with a written notification of the intent to reprogram. If no committees choose to object, the DoD may implement the reprogramming action 30 days after Congress received the notification.⁵¹ The Department may submit notification of reprogramming actions within this category at any time.

Internal reprogramming

Internal reprogramming applies to actions that do not change the purpose or amounts of funds from those appropriated by Congress. Internal reprogramming is requested by the DoD components and approved by the Undersecretary of Defense (Comptroller) and the Office of Management and Budget.⁵² The action of internal reprogramming essentially reclassifies funds

⁴⁹ DD 1415-1, FY 18-17 PA, “Reprogramming Action – Prior Approval: June 2018 Prior Approval Request (Omnibus),” July 11, 2018. Accessed at: https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2018/prior1415s/18-17_PA_June_2018_Omnibus_Request.pdf

⁵⁰ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 22.

⁵¹ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 22.

⁵² “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 23.

to enable their proper execution, often by changing the exact line item from their original location. Internal reprogramming is technically a change in appropriations and requires general transfer authority despite the lack of Congressional involvement in the process.⁵³ An example of internal reprogramming would be moving funds for the same effort from a Service-specific account to a DoD-wide account, while the amount and purpose of the funds remain the same.⁵⁴ In fiscal year 2017, the Department used internal reprogramming to transfer funds from their original appropriated location to the operating accounts which were used for their execution during that year's continuing resolution.⁵⁵

Below-threshold reprogramming

Below-threshold reprogramming covers all other aspects of reprogramming and can be approved by the individual military services and defense agencies. Below-threshold reprogramming concerns shifts of funds within an individual appropriation between elements at the specified level of control. The DoD can also use below-threshold reprogramming to increase or decrease funding from elements at the level of control within certain dollar amount thresholds established by Congress. These thresholds allow the DoD to manage programs more flexibly than at lower levels, while still ensuring Congressional oversight of spending at higher levels.⁵⁶ Reprogramming above these thresholds falls into the prior Congressional approval category

⁵³ The general transfer authority is given by Congress to the Department of Defense annually in the National Defense Authorization Act.

⁵⁴ "Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management," Defense Acquisition University. 23.

⁵⁵ DD 1415-1, FY 17-26 IR, "Reprogramming Action – Internal: Counter-ISIL Train and Equip Fund," September 19, 2017. Accessed at:

https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2017/ir1415s/17-26_IR_Counter-ISIL_Train_and_Equip_Fund.pdf

⁵⁶ "Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management," Defense Acquisition University. 30.

discussed earlier. The thresholds for such action vary at different levels of the appropriations structure.⁵⁷

Generally, appropriations are broken down into five major categories: Research, Development, Test, and Evaluation (RDT&E), Procurement, Operation and Maintenance (O&M), Military Personnel (MILPERS), and Military Construction (MILCON). For RDT&E appropriations, each budget activity is divided into program elements, which consist of one or more projects. Congress authorizes and appropriates at the program element level.⁵⁸ For Procurement appropriations, each budget activity is divided into line items, which correspond to either a single weapons system or a group of small systems. Congress authorizes and appropriates at the line item level.⁵⁹ For O&M appropriations, each budget activity is divided into activity groups, which are further divided into sub-activity groups. Congress authorizes and appropriates at the budget activity level.⁶⁰ For MILPERS appropriations, each budget activity is divided into budget sub-activities. Congress authorizes and appropriates at the budget activity level.⁶¹ For MILCON appropriations, each appropriation is divided into immediate subordinate accounts, which are further divided into projects. Congress authorizes and appropriates at the project level.⁶²

Below-threshold reprogramming actions occur at the level of appropriation. Specific thresholds are calculated by comparing cumulative funding changes relative to the baseline

⁵⁷ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 26.

⁵⁸ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 27.

⁵⁹ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 27.

⁶⁰ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 28.

⁶¹ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 29.

⁶² “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 29.

amount, or amount appropriated by Congress. The upper threshold is equivalent to the cumulative change added to the baseline amount and the lower threshold is equivalent to the cumulative change subtracted from the baseline amount. If the reprogramming action falls between the upper and lower thresholds, below-threshold reprogramming rules apply. These calculations may be done either in terms of dollar amounts or in terms of percentages, and in cases where the amounts of each differ, the smaller dollar amount applies as the limit.⁶³

Table 1. Summary of Reprogramming Thresholds for FY 2019⁶⁴

Appropriation Type	Maximum Into	Maximum Out Of	Level of Control and Appropriation
RDT&E	Lesser of \$10 million or 20 percent of the appropriated amount	Lesser of \$10 million or 20 percent of the appropriated amount	Program element
Procurement	Lesser of \$20 million or 20 percent of the appropriated amount	Lesser of \$20 million or 20 percent of the appropriated amount	Line item
Operation and Maintenance	\$15 million	\$15 million	Budget activity, some subactivity limitations

⁶³ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 31.

⁶⁴ “Fiscal Laws and Reprogramming: Business, Cost Estimating, and Financial Management,” Defense Acquisition University. 31.

All dollar amounts are based on fiscal year 2019 levels, which can be found in the Summary of Reprogramming Requirements Effective for FY 2019 Appropriation provided by the Undersecretary of Defense (Comptroller) at https://comptroller.defense.gov/portals/45/documents/execution/reprogramming/reprogramming_overview.pdf.

Military Personnel	\$10 million	No congressional restriction	Budget activity
Military Construction	Lesser of \$2 million or 25 percent of the appropriated amount	No congressional restriction	Project

In this way, the DoD has some latitude to move funds between elements at the specified level of control, provided they fall under the same individual appropriation. Moving between categories of funding and moving comparatively large sums induces burdens for Congressional notification and approval, which can slow down the reprogramming process but still allows the DoD to adjust appropriations to fit its changing needs throughout the fiscal year. For example, the Navy Comptroller could hypothetically reprogram funds under the dollar thresholds from the procurement of missiles to the procurement of torpedoes, because both fall under “Weapons Procurement, Navy” in the defense appropriations bill. However, the Navy could not reprogram funds from the procurement of one weapon to the RDT&E of the same weapon, as “Research, Development, Test And Evaluation, Navy” is appropriated separately.⁶⁵

Reprogramming with OCO Funds

An increasingly common source of reprogramming action results from Overseas Contingency Operations (OCO) funds. OCO funds are specifically intended to finance ongoing overseas combat operations, and OCO funding has become a permanent and significant fixture in

⁶⁵ For examples of appropriations line items, see “Public Law 115-245: Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019,” (Date: 9/28/18; enacted H.R. 6157) Text from: United States Public Laws. Available from: <https://www.congress.gov/bill/115th-congress/house-bill/6157/text>.

the Defense budget since the early 2000s. OCO funding follows different appropriations rules than does the base budget, and the caps on transfer abilities vary between OCO funds and the base.⁶⁶ Reprogramming actions involving OCO funds are allowed only if the expenditures of the funding marked for OCO are less than the original appropriations.⁶⁷ Due to the unpredictable nature of overseas combat operations, these discrepancies happen fairly often, although the direction of the change can vary depending on the specific appropriation and year. This means OCO funds are frequently subject to transfers and reprogramming and funds may or may not ultimately be spent on the same operations for which Congress originally intended. For example, in fiscal year 2016, the DoD used reprogramming to move \$50 million of OCO funding from the Counterterrorism Partnerships fund to the Army to provide assistance to members of the Syrian opposition. This reprogramming action was submitted for prior approval, in part due to its scale.⁶⁸

In fiscal year 1997, Congress established the Overseas Contingency Operations Transfer Fund (OCOTF) to provide additional flexibility for the DoD to meet requirements. The OCOTF is a no year transfer account, meaning that funds remain available in the account until they are used without limits as to the fiscal calendar.⁶⁹ The OCOTF follows regular reprogramming procedures. Throughout the last two decades, Congress has chosen to appropriate OCO funds

⁶⁶ Brendan McGarry and Susan Epstein, "Overseas Contingency Operations Funding: Background and Status," Congressional Research Service, January 15, 2019, 41. <https://fas.org/sgp/crs/natsec/R44519.pdf>

⁶⁷ Harte, Julia. "The Pentagon's Slush Fund." POLITICO Magazine. Accessed March 18, 2019. <http://www.politico.com/magazine/story/2014/12/omnibus-bill-pentagon-slush-fund-113517.html>.

⁶⁸ DD 1415-1, FY 17-01 PA, "Reprogramming Action – Prior Approval: Counterterrorism Partnerships Fund for Syria Train and Equip," September 19, 2016. Accessed at: https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2017/prior1415s/17-01_PA_CTPF_Syria_Train_and_Equip.pdf

⁶⁹ Brendan McGarry and Susan Epstein, "Overseas Contingency Operations Funding: Background and Status," Congressional Research Service, January 15, 2019, 41. <https://fas.org/sgp/crs/natsec/R44519.pdf>

directly into specific accounts rather than to the OCOTF, and the last time the DoD requested an appropriation directly into the OCOTF was FY2014.⁷⁰

Timing requirements and the 80/20 rule

The “80/20” rule is a statutory requirement that requires the DoD to spend eighty percent of its funds before the final twenty percent of the fiscal year, or approximately by mid-July.

While this rule is intended to prevent excessive year-end purchases, it often can create two rounds of urgent spending – one in July and one in late September at the end of the fiscal year.⁷¹

This rule is most often applied to Operations and Maintenance (O&M) funding. O&M funding is unique from other categories in that it has fairly strict one-year spending limitations, while other categories often include multi-year appropriations. This means O&M funding is often susceptible to reprogramming because all O&M funds must be spent before the end of the fiscal year and before the 80/20 deadline, whereas other categories include multi-year appropriations and therefore have greater flexibility to spend funds across fiscal years.

The 80/20 deadline can cause problems across all budget categories when Congress passes annual appropriations late in the fiscal year, often after lengthy continuing resolutions. For example, in 2018, Congress did not appropriate funds for the DoD until March 22nd, 2018, almost halfway into the fiscal year. That bill included additional flexibility for the spending of funds in that latter portion of the fiscal year – up to twenty five percent in the last two months, effectively changing the 80/20 rule to a 75/25 rule – as well as additional flexibility for reprogramming by raising the thresholds for Congressional approval from \$15 million to \$20

⁷⁰ Brendan McGarry and Susan Epstein, “Overseas Contingency Operations Funding: Background and Status,” Congressional Research Service, January 15, 2019, 41. <https://fas.org/sgp/crs/natsec/R44519.pdf>

⁷¹ Rametta, Jack, and Steve Bell. “Pentagon Has Six Months to Spend \$80 Billion. Can Congress Help? Five Options.” Bipartisan Policy Center (blog), March 13, 2018. <https://bipartisanpolicy.org/blog/pentagon-has-six-months-to-spend-80-billion-can-congress-help-five-options/>.

million.⁷² Some senior leaders in the DoD did not believe these modifications provided sufficient flexibility, given the particularly short time frame in which to execute them.⁷³ This expansion of authorities highlights the usefulness and flexibility of reprogramming as a tool for policymakers to adapt the defense budget to the evolving needs of the department while still operating within the appropriations rules set by Congress.

Examples of Reprogramming

In addition to the multitude of routine uses of its reprogramming authority, there are many historical examples of the Department of Defense effectively using its reprogramming authority during times of conflict as well as cases in which the legislature reacted negatively in response to the DoD's abuse of reprogramming authorities.

During the mid-1980s, President Reagan used reprogramming to fund activities in Latin America, including the stationing of troops and the construction of military bases in Honduras. These bases and arms were eventually provided to the anti-Communist Contras, which explicitly contradicted authorizations provided by Congress. The actions of the Reagan Administration eventually prompted Congress to enact stricter prohibitions on the use of reprogramming authorities. Two reforms that remain present in reprogramming authorities today include provisions specifying reprogramming be used for "higher priority items based on unforeseen military requirements" and prohibiting the use of reprogramming for items for which Congress has already denied a request.⁷⁴

⁷² Kheel, Rebecca. "Pentagon to Get Some Flexibility in Spending \$700B Windfall." Text. The Hill, March 21, 2018. <https://thehill.com/policy/defense/379671-pentagon-to-get-some-flexibility-in-spending-700b-windfall>.

⁷³ Maucione, Scott. "DoD Gets Nearly \$655 Billion and Some Flexibility on Funding in Omnibus Bill." Federal News Network, March 22, 2018. <https://federalnewsnetwork.com/budget/2018/03/dod-gets-nearly-655-billion-and-some-flexibility-on-funding-in-omnibus-bill/>.

⁷⁴ William C. Banks and Peter Raven-Hansen. *National Security Law and the Power of the Purse*, Oxford University Press, New York. 1994. 76-77.

In Somalia in 1993, the DoD sought to use reprogramming to cover \$750 million in operational costs, but Congress rejected the reprogramming and instead chose to appropriate additional funds for the conflict. This was due to objections regarding which accounts the reprogrammed funds would originate from, and reflected Congress' desire to see their original appropriations kept intact.⁷⁵ This situation highlighted the limitations of reprogramming and the usefulness of continued involvement of both the Executive and Legislative branches in appropriations decisions.

During the first two months of Desert Storm, the DoD largely depended on reprogramming authority to free up the funding necessary to fight the war. In particular, the DoD was able to internally shift approximately \$625 million in funds to support the war effort. However, Desert Shield, the initial buildup that occurred prior to Desert Storm, began in August of fiscal year 1990, when the Department was already close to the \$3 billion limit placed on transfers for the fiscal year, rendering reprogramming a significantly less useful tool.⁷⁶ During the invasion of Iraq following the September 11, 2001 attacks, the Department relied on reprogramming to cover the initial bills associated with the conflict, which cost approximately \$700 million within a matter of months.⁷⁷

More recently, in June 2018, the Department submitted a large reprogramming request which included \$75 million to establish a Joint Artificial Intelligence Center. Along with the request, the Department indicated its plans to spend \$1.75 billion over six years, including additional reprogramming requests for fiscal year 2019 as well as regular budget requests for

⁷⁵ William C. Banks and Peter Raven-Hansen. *National Security Law and the Power of the Purse*, Oxford University Press, New York. 1994. 210.

⁷⁶ Brian Callanan and David Weiler, "War Budgeting Strategies: Case Studies of The Gulf War and The Iraq War," Harvard Law School Federal Budget Policy Seminar Briefing Paper 39, 2008. 13.

⁷⁷ Brian Callanan and David Weiler, "War Budgeting Strategies: Case Studies of The Gulf War and The Iraq War," Harvard Law School Federal Budget Policy Seminar Briefing Paper 39, 2008. 26-7.

fiscal year 2020 and beyond.⁷⁸ This reprogramming action constitutes a new start program, which requires Congressional approval under existing practices. While this example does not reflect more conventional forms of warfare and major operational changes as in Desert Storm, Latin America, or Somalia, it does show how shifting priorities, particularly those surrounding emerging technologies, may need to be addressed partway through a fiscal year and how reprogramming can provide a useful process for such changes.⁷⁹

Benefits and Risks of Reprogramming

Reprogramming exists to provide flexibility to Executive branch agencies, but such flexibility must be balanced with accountability to Congressional appropriators. Both flexibility and accountability pose benefits and risks to all participants in the budget process.

Flexibility

Due to the lengthy timeline of writing the defense budget, it is inevitable that needs justified in original budget requests will not exist in the same form by the time funds are available to be spent. In 1985, then-Deputy Secretary of Defense William Howard Taft IV explained: “The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to

⁷⁸ Selinger, Marc. “DoD Setting Up Joint Center To Advance Artificial Intelligence.” ClearanceJobs, July 20, 2018. <https://news.clearancejobs.com/2018/07/20/dod-setting-up-joint-center-to-advance-artificial-intelligence/>.

⁷⁹ Cassano, Jay. “Pentagon’s Artificial Intelligence Programs Get Huge Boost in Defense Budget.” Fast Company, August 15, 2018. <https://www.fastcompany.com/90219751/pentagons-artificial-intelligence-programs-get-huge-boost-in-defense-budget>.

respond to these unforeseen changes and still meet our defense requirements.”⁸⁰ In this way, reprogramming is an essential tool for the Department, because without it, budgets would be all but impossible to execute in their entirety.

Reprogramming is also beneficial from the Congressional perspective. The House Appropriation Committee has explained that reprogramming actions are effectuated for such reasons as “unforeseen requirements, changes in operating conditions, incorrect price estimates, wage rate adjustments, legislation enacted subsequent to appropriation action, and the like.”⁸¹ Allowing agencies to reprogram on their own is seen by Congress as a legitimate authority and is a useful mechanism for correcting for Congress’ own limitations in drafting the budget on an annual schedule. Although appropriators do not enjoy relinquishing control to the Executive Branch, they understand reprogramming to be a ‘necessary evil.’⁸²

Flexibility is also essential to the Department as a release valve for funding constraints in times of war or national emergency, as in the historical cases and President Trump’s 2019 national emergency declaration discussed above.

Accountability

A broad risk of allowing reprogramming as a common procedure is the possibility that Executive agencies could spend money in ways unintended by or objectionable to Congress. Although reprogramming is considered a relatively informal tool and the procedures around Congressional notification and approval are not legally binding, agencies comply with such

⁸⁰ Reprogramming Action Within the Department of Defense: Hearing Before the House Armed Services Committee (Sept. 30, 1985) (remarks prepared for delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, unprinted).

⁸¹ H.R. Rep. No. 493, 84th Cong., 1st Sess. 8 (1955)

⁸² Mrdeza, Michelle, and Kenneth Gold. “Reprogramming Funds: Understanding the Appropriators’ Perspective | The Government Affairs Institute.” The Government Affairs Institute. Accessed March 18, 2019. <https://gai.georgetown.edu/reprogramming-funds-understanding/>.

procedures in order to maintain positive relationships with the Committees. Because of the annual nature of the appropriations process, agencies seen as abusing their reprogramming power risk retaliation from the Committees in the form of reduced reprogramming authority in the following year.⁸³

An additional potential risk for Congress is that funding changes resulting from reprogramming could be intentionally planned by the DoD if it believes Congress is unwilling or unlikely to directly appropriate funds for a particular need. As Constitutional scholar Louis Fisher noted, “the opportunity for mischief is substantial.”⁸⁴ As the reprogramming procedures have been refined over time, many of these risks have been addressed, as seen in the historic cases. But as reprogramming remains a fairly complex process without substantial transparency, the potential resurfacing of these risks remains.

Potential Reforms

Increasing the visibility and transparency of reprogramming through increased requirements for Congressional notification and approval would add a significant burden to agencies as well as overwhelm the workload of Congressional committees. It also would eliminate the benefits of flexibility that reprogramming provides, rendering it less effective as a policy tool.⁸⁵ The DoD is already required to provide quarterly budget execution reports to Congress, which include information on internal and below-threshold reprogramming actions.⁸⁶

⁸³ Fujitani, Takeshi and Jared Shirck. “Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound,” Harvard Law School Federal Budget Policy Seminar Briefing Paper 8, 2005. 7.

⁸⁴ Louis Fisher. *Presidential Spending Power*. Princeton: Princeton University Press, 2015. <https://muse.jhu.edu/> (accessed March 18, 2019). 88.

⁸⁵ Fujitani, Takeshi and Jared Shirck. “Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound,” Harvard Law School Federal Budget Policy Seminar Briefing Paper 8, 2005. 18.

⁸⁶ DoD 7000.14-R Financial Management Regulation, September 2015, VOLUME 3, CHAPTER 6: “REPROGRAMMING OF DOD APPROPRIATED FUNDS.” 6-25-27.

This provides Congress fairly frequent visibility into such actions, although it does not give Congress the ability to object before the reprogramming actions are enacted.

Alternatively, changes to reporting thresholds could significantly reduce the number of reprogramming actions the DoD reports to Congress in a given year. When setting reprogramming limits, Congress must be cognizant of the change in magnitude of such limits over time both relative to nationwide inflation and to the defense budget. As the DoD lobbies for and Congress considers other reforms to the infamously sluggish acquisitions process, groups such as the Section 809 panel have recommended raising reprogramming thresholds, particularly in acquisitions space.⁸⁷ Specifically, in January 2019 the panel recommended doubling the thresholds for procurement and RDT&E, from \$20 million to \$40 million and from \$10 million to \$20 million, respectively. They also recommended delegating authority for below-threshold reprogramming actions at lower levels in order to more expediently facilitate the process and to shift decision-making towards those with the most knowledge about specific programs.⁸⁸ It remains to be seen whether Congress will accept these recommendations, or what impact they would have on the historically rigid defense acquisitions process.

An additional measure currently available to Congress is to improve the consistency and specificity of the descriptions of various line items in appropriations. While this is not strictly a reform in that it does not require a formal change to the existing process, additional specificity in

Examples of such reports for FY2018 can be found on the Under Secretary of Defense (Comptroller)'s website at: <https://comptroller.defense.gov/Budget-Execution/1416OrtlyRptsfy2018/>

⁸⁷ Gould, Joe. "Reform Panel Warns Congress to Overhaul Pentagon Acquisitions, or Lose Technological Edge." Defense News, January 24, 2019. <https://www.defensenews.com/news/pentagon-congress/2019/01/15/reform-panel-overhaul-pentagon-acquisitions-or-lose-technological-edge>; The Section 809 panel was established under section 809 of the 2016 National Defense Authorization Act (NDAA) in order to research major issues and potential solutions for the DoD acquisitions system. For more, see Mehta, Aaron. "Acquisition Reform Panel: Cut Restrictions so DoD Can Take 'mission First' Approach." Defense News, August 8, 2017. <https://www.defense.com/congress/2017/05/17/acquisition-reform-panel-cut-restrictions-so-dod-can-take-mission-first-approach/>.

⁸⁸ Recommendation 46. Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Volume 3, January 2019. https://section809panel.org/wp-content/uploads/2019/02/Recommendation_46.pdf

appropriations would effectively restrict the Department's latitude to reprogram in ways that contradict Congressional intent. Ultimately, no reform short of eliminating reprogramming entirely will definitively prevent action on the part of the Executive Branch akin to the recent action regarding the border wall. In large part, this latter situation is due to the national emergency declaration by President Trump together with Congress' inability to pass legislation specifically prohibiting the use of funds for a border wall. While Congress could attempt to bar individual reprogramming actions above a certain threshold, such as \$1 billion, it will remain possible for agencies to continue to reprogram within such restrictions in ways that contradict Congressional intent.

Conclusion

Ultimately, reprogramming is a useful, though occasionally controversial, tool for the Executive branch to exert control over the expenditure of federal appropriations. The Department of Defense has built a structured internal process for reprogramming, but the variation in and inconsistency of reprogramming rules can cause confusion and allow for flexibility where appropriators may have not intended it, as the 2019 border wall case study exemplifies. The norms surrounding the use of reprogramming are political rather than legal, and as a result, the Congressional restrictions on reprogramming are responsive to its exploitation. However, reprogramming is considered a 'necessary evil' by appropriators in that without it, the Executive branch would be unable to address the inevitable changes in need and cost that arise between the time a budget is written and the time it is executed. Through its intricacies and evolution, reprogramming highlights the inherent tension and balance between appropriations and expenditures, as well as between Congressional appropriators and the Department of Defense.

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