The Origins of Transportation Contract Authority

By Jeff Davis

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The process by which most federal transportation dollars are budgeted and spent is unique. Nowhere else in the federal budget process are the lines between authorization and appropriation and between mandatory and discretionary spending so convoluted, and nowhere else in the process does budget authority (defined in law as legislation "making funds available for obligation"[1]) often fail to actually deliver the authority to enter into obligations unless another kind of spending permission is also obtained through a separate process.

Such programs (which include the entire highway, highway safety and motor carrier safety programs, most transit spending, and airport improvement grants) comprised 75 percent of total U.S. Department of Transportation budgetary resources in fiscal 2007. These programs share three features in common. None of the features is unique by itself, but in combination they exist nowhere else in the government:

1. The programs are funded by "contract authority" – a type of budget authority provided outside the appropriations process.
2. Each program is funded out of a federal trust fund account, not out of the general fund.
3. The programs are subject to annual statutory limitations on how much contract authority can be obligated in a given fiscal year.

This article examines the origins of the first, and oldest, irregularity – contract authority. "CA" is almost as old as the centralized federal budget process itself, and was institutionalized in reaction to that budget process at a time when the power centers of Congressional finance were in flux. In order to understand the reasons why Congress created contract authority in 1922, it is first necessary to review the backstory of the fight for control over federal spending decisions.

Antecedents – executive spending power. Article I, Section 9 of the Constitution declares that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law". This provision was placed in the Constitution by the Framers to codify the "power of the purse" that the British House of Commons had painstakingly won from the Crown over the previous six centuries. As it reads, the provisions seems clear: Congress must approve all federal spending through passage of an appropriations law.

However, there were conflicts from the very beginning over how much authority the President would have to enter into commitments that would later require appropriations. This was exacerbated in an era where Congress was only available for a two- or three-month session each year. The First Congress in 1789 passed a law (1 Stat. 54, sec. 3) directing the Secretary of the Treasury to sign contracts to build and man a lighthouse near the entrance of the Chesapeake Bay in advance of any appropriation.

More significant examples came about. The most famous, of course, is the Louisiana Purchase. President Jefferson agreed to a gigantic commitment of federal money without Congressional permission or appropriation, though Congress later passed a law making appropriations for part of the purchase and issuing bonds to pay for the rest. And Congress in 1799 first passed a version of a law that is still on the books – the Feed and Forage Act – that allows an army in the field to purchase supplies in the absence of an appropriation. The law (now at 41 U.S.C. §11) allows the Defense Department (and the Coast Guard) to contract or purchase "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

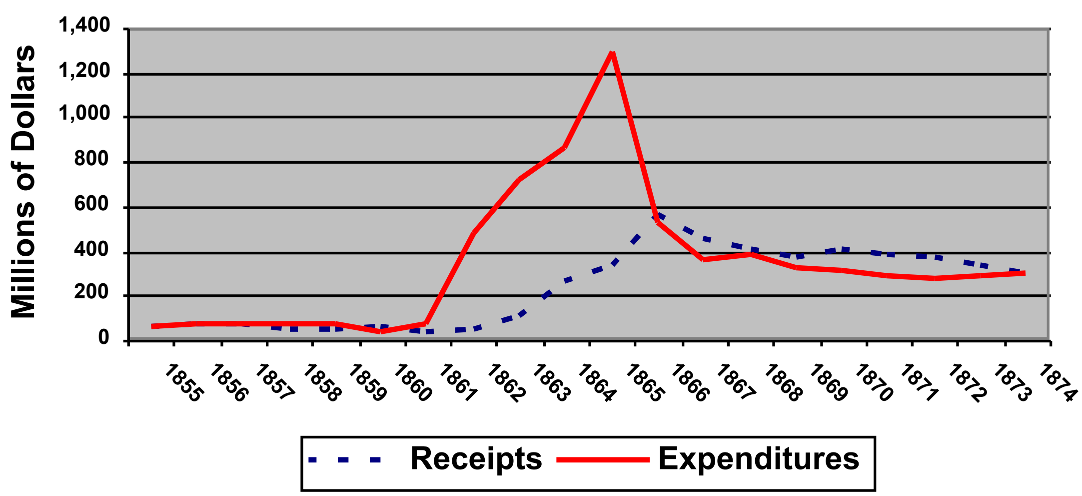
However, none of these antecedents really resembles modern contract authority. All were either for a specific sole purpose or else for an emergency contingency that is by definition impossible to plan for in advance. None of them were permanent federal programs designed to run on spending commitments in advance of appropriations.[2]

Appropriations decentralization. In 1802, the House of Representatives created a permanent Ways and Means Committee to consider all financial measures, and the Senate followed suit by creating a permanent Finance Committee in 1816. These committees had similar and broad jurisdiction over all revenue measures (taxes and tariffs), the public debt, appropriations bills, banking and currency.

This centralized system worked fairly well until the Civil War forced the federal government to live far beyond its means. Federal outlays rose from $67 million in fiscal 1861 to $1.3 billion in 1865 (almost twenty-fold). Since most of that was deficit spending, the national debt rose from $90.6 million to $2.773 billion during that same time – an increase of almost 3000 percent in just five years. That extra spending and debt represented frequent and ever-expanding appropriations acts, as well as new revenue-raising measures that attempted (and failed) to keep pace and a series of Congressionally-authorized bond issues, all of which had to go through the bottlenecks of the Ways and Means and Finance Committees. One historian wrote that:

> So continuously did revenue and appropriations bills occupy the floor that the chairman [of Ways and Means] became in fact as well as officially the "floor leader", ranking in influence next to the Speaker. He arranged the order of business, indicated hours for adjournment, and fixed the time for closing the long sessions.[3]

Federal Receipts and Expenditures, FY 1855 - FY 1874



Near the war's end, on March 2, 1865, Rep. Samuel S. "Sunset" Cox (D-OH) rose to offer a resolution to split Ways and Means into three different committees. Ways and Means would retain taxes, tariffs and debt; a new Banking and Currency Committee would take issues pertaining to banks and paper money, and a new Appropriations Committee would take over all spending bills.

Cox, a renowned orator and florid writer (his nickname came about because as a young newspaperman, he once spent an entire page describing the beauty of a sunset), took pains to explain that his proposal was in no way a criticism of the Ways and Means membership, only that the job was just too big for any single committee:

> Each member of the Ways and Means has his specialty - each Olympian; and as Spenser described the gods,
>
> "Each easy to be known by his own visnomie,
> "But Jove above them by all his great looks and power imperial."
>
> And yet, sir, powerful as the committee is constituted, even their powers of endurance, physical and mental, are not adequate to the great duty which has been imposed by the emergencies of this historic time. It is an old adage, that "whoso wanteth rest will also want of might," and even an Olympian would faint and flag if the burden of Atlas is not relieved by the broad shoulders of Hercules.[4]

Although some Ways and Means members spoke against the plan, it passed by a voice vote. In his definitive book on the subject, MIT political scientist Charles Stewart III concluded that:

> …the creation of the Appropriations Committee embodied a balance between the perceived need for greater fiscal control and the aversion to concentrating institutional resources among a limited set of individuals. The *technical* problem of overwork was solved by bringing more people to the task; the *political* problem of institutional power was solved by dividing budgetary responsibility between two power centers.[5]

Without debate, the Senate followed suit two years later, creating a separate Committee on Appropriations (though Finance kept jurisdiction over banking and currency until 1913).

However, once decentralization had begun, the genie was tough to re-bottle.

The House Appropriations Committee retained exclusive jurisdiction over appropriations bills for just twelve years. In 1877, the House Commerce Committee, which had authorizing jurisdiction over Corps of Engineers water projects, began to report its own appropriations bills for those projects, and Commerce got around jurisdictional problems by moving the bills through the House under suspension of the rules (the pork-barrel nature of the bills ensured that the bills obtained the two-thirds vote margin necessary for suspension of all rules).

In response, the House Rules Committee proposed in 1879 to increase the suspension threshold from two-thirds to three-fourths. However:

> This move backfired. Not only did Commerce defeat this change in the rules, it secured passage of a substitute giving it "the same privilege to report a bill making appropriations for the improvement of rivers and harbors that is afforded to the Committee on Appropriations in reporting general appropriations bills."[6]

Rivers and Harbors was not considered a "general" appropriations bill, but other appropriations constituencies chafed to consolidate their authorizations and appropriations in one place, and by 1885, House Appropriations had lost control of two annual appropriations bills to the Military Affairs Committee (Army and Military Academy), and one each to Agriculture (Agriculture), Foreign Affairs (Diplomatic and Consular), Indian Affairs (Indian), Naval Affairs (Naval), and Post Office and Post Roads (Post Office). Appropriations retained five regular appropriations bills (Sundry Civil, Legislative-Executive-Judicial, District of Columbia, Fortifications, and Pensions) and deficiency (what today would be called supplemental) appropriations.[7]

The Senate followed suit in 1899, agreeing by unanimous consent to a resolution stripping its Appropriations Committee of jurisdiction over those same seven general appropriations bills (Rivers and Harbors was already gone) and giving them to the authorizing committees.

Early highway funding. It was under this system that Congress took the first steps towards aiding the states in creation of good roads. In 1893, an appropriations bill reported from the Agriculture Committee created the Office of Road Inquiry within USDA to investigate better methods of road construction and management. This outreach and education program of the Agriculture Committees was supplemented by the Post Office and Post Roads Committees in their Post Office appropriations bill in 1912, giving the renamed Office of Public Roads its first construction appropriation for the improvement of selected post-roads.[8] That law also created within Congress a temporary Joint Committee on Federal Aid in the Construction of Post Roads to formulate a long-range roads policy.

The Joint Committee did not issue a report until January 1915, and its report acknowledged great needs but did not put forth a detailed plan. However, according to an official DOT history:

> They warned that small contributions spread over a large mileage would create a "pork barrel" that would dissipate the Federal funds without any permanent upgrading of the roads. The [Joint] Committee also came out against centralization of control over the road program in Washington.[9]

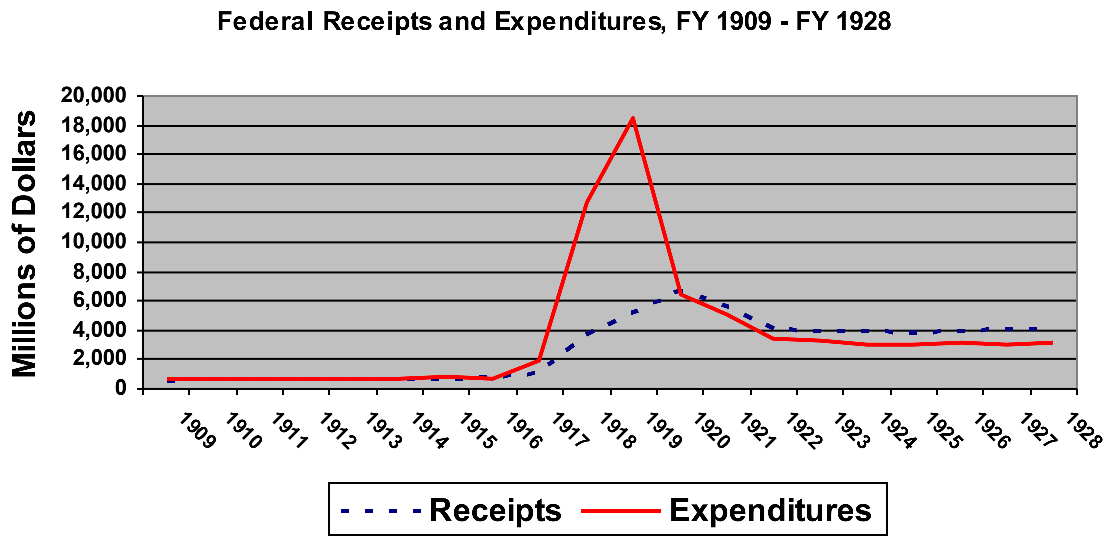
The burgeoning public interest in good roads, combined with the confused jurisdictional situation, caused the House to create a separate and permanent Committee on Roads in June 1913. The new Roads panel had all authorizing jurisdiction over roads and post-roads but had no general appropriations bill of its own. In the Senate, however, authorizing jurisdiction over roads stayed with the Post Office and Post Roads Committee.

Together, the House Committee on Roads and the Senate Committee on Post Office and Post Roads drafted and passed the Federal Aid Road Act of July 11, 1916, which created the first system of federal road aid to states. The Act authorized USDA to "cooperate with the States, through their respective State highway departments, in the construction of rural post roads".[10] Since House and Senate rules of the time did not prohibit authorizing committees from reporting their own special purpose appropriations (as opposed to multi-purpose "general" appropriations bills, which were restricted to the committees listed above), the Act contained its own appropriation – $75 million spread across fiscal years 1917-1921.

The Act also provided that each year's appropriation would be apportioned to states by formula (one-third state area, one-third state population, and one-third state rural delivery route mileage). With the foundation of the Federal-aid highway program in place, things looked promising for the future of the roads program, with the roads committees in both chambers able to write their own combined authorization-appropriations bills.

Events, however, intervened.

World War I and recentralization. World War I had much the same effect on the federal government as the Civil War – massive increases in federal spending, taxes, and debt. Although the national debt only increased about sevenfold during the war, federal outlays rose from $734 million in FY 1916 to $18.5 billion in FY 1919 – an increase of about 2500 percent. (The big difference between the Civil War and WWI situations was that the ratification of the Sixteenth Amendment in 1913 had given Congress the ability to raise significantly higher wartime revenues through the new income tax.)



Even before the war, the steady rise of federal spending and systemic federal deficits had prompted attempts by lawmakers to find ways to cut spending in an organized way, beginning with the creation of an independent commission in 1910 (the "Taft Commission"), which recommended that the President be given the power to submit a centralized budget. Traditionally, each Cabinet department submitted its annual appropriations requests to the Treasury Department, which then bound them up and submitted them to Congress without substantive change. The President's control and coordination over spending requests depended on the quality of his relationships with his Cabinet.

Stewart reports that Taft issued an executive order in July 1912 requiring all departments to submit their appropriations requests to the White House for approval, but that the new Democratic Congressional majority instead passed an appropriations rider specifically forbidding the President from making any changes in the budget estimates.[11]

However, the fiscal consequences of the war changed some minds, and the postwar elections put the more deficit-conscious Republicans in charge of Congress once again. In 1919, the House and Senate each appointed a Special Committee on the Budget, and those panels promptly reported legislation[12] requiring the President to submit a consolidated budget for the entire federal government, creating a new Bureau of the Budget to help the President with this duty, and creating a General Accounting Office to help Congress and the President audit expenditures.

At the same time that Congress was looking at reforming the processes by which the executive branch made spending decisions, Congress also looked to reform itself. It had been obvious for years that the fragmentation of appropriations was having a negative effect on fiscal discipline. One historian summed up the practical effects of the power shift within the House so:

> As a result of this decentralization of fiscal control amongst several spending committees, the House of Representatives lost an overall coordinated view of income and outgo and the several appropriation committees tended to become protagonists rather than critics of the fiscal needs of their departmental clientele.[13]

The practical effects of the Senate fragmentation were similar to those in the House according to a recent history of the Senate Appropriations Committee:

> With no centralized responsibility for budgetary consideration, eight different committees pursued their own courses, and appropriations for a single department might be handled by several different committees…Over the years, many legislators contended that such fragmentation of appropriations among numerous committees was in the end extravagant, with some describing the prevailing system as "illogical, unscientific and universally condemned by disinterested students of our Government."[14]

Political scientists David Brady and Mark Morgan did a study of two constituency-oriented appropriations bills (the Rivers and Harbors bill and the Agriculture bill) under both systems. Their findings:

> Decentralizing the appropriations power by creating seven committees with monopoly control over special interests resulted in higher increases in total budget outlays, higher increases in appropriations for rivers and harbors and agriculture independent of the government's financial position, and clear indications of pork barrel politics in the rivers and harbors bills…When the House created a new set of monopoly committees based on special interests they expected a rise in expenditures; and, as we have seen, they got it.[15]

Even before the war, the issue had been elevated to the point that in 1916, both the Democratic and Republican party platforms addressed the issue, with the Democrats explicitly calling for re-consolidation of appropriations inside the House Appropriations Committee, and the GOP platform endorsing by reference all of the Taft Commission recommendations, of which appropriations consolidation was a part.[16]

At the same time the House Special Committee on the Budget reported the budget bill, the panel also reported a resolution (H. Res. 324, 66th Congress) to amend House rules and consolidate all jurisdiction over general and special-purpose appropriations within the Appropriations Committee once again. The resolution also prohibited House conferees on non-appropriations bills from agreeing to Senate amendments making appropriations. Of the existing, fragmented system, the Committee said that:

> Without the adoption of this resolution true budgetary reform is impossible. Its adoption will permit Congress to treat appropriations in a businesslike and economical way. While it means the surrender by certain committees of jurisdiction which they now possess and will take from certain members on those committees certain powers now exercised, we ought to approach the consideration of the big problem with a determination to submerge personal ambition for the public good.[17]

(It should be noted that the Senate budget panel did not agree that appropriations consolidation was essential and did not report a resolution changing Senate rules to consolidate Senate jurisdiction).

The House and Senate passed the final conference report on the budget bill on May 29, 1920, sending the bill to the White House. Having finalized the centralization of spending authority in the executive branch, the House then turned to centralizing its own spending. H. Res. 324 was brought up on June 1, 1920. Rather than cast an "anti-reform" vote, opponents of the centralization plan instead chose to contest the vote on the special rule[18] allowing the consolidation plan to be brought up for a vote. The rule passed by a narrow margin of 158 to 154. Richard Fenno, in his magisterial book on the House Appropriations Committee, said that the majority voting in favor of the special rule:

> …consisted of 105 members (64 percent) of the majority party Republicans and 54 members (36 percent) of the Democratic party. In opposition to the House majority and to the Appropriations Committee were 57 (35 percent) Republicans and 97 (64 percent) Democrats…The Appropriations Committee, which stood to gain most directly, voted unanimously (15 to 0) in support of the rule. And the members of the 7 committees which this time stood to lose most directly voted 67 to 38 against the rule. A majority of both the Republicans and the Democrats on these 7 committees opposed the rule…[19]

The underlying resolution consolidating appropriations jurisdiction passed by a 200 to 117 vote. The plan had clearly been carried to victory by the idea that in-house consolidation was part of a package with executive branch consolidation, which had already been sent to the White House.

Woodrow Wilson was a keen political scientist, but his communications with Congress were poor. He stunned Congress by vetoing the budget bill on June 4, 1920, because he wanted the ability to fire the Comptroller General. Congress failed to override the veto by a 178 to 103 margin, ten votes short of two-thirds. A nearly identical bill was sent to President Harding the following year, and the Budget and Accounting Act became law on June 10, 1921.

The 1921 highway bill. While all this was going on, World War I had drawn the attention of Congress away from the road program. The original five-year, $75 million appropriation from the 1916 Act had been supplemented in 1919 with an additional $200 million for the Federal-aid program over fiscal years 1919-1921,[20] with the additional appropriations justified by the wear and tear that the war's logistical demands had put on state roads, but the new appropriation, like the old, was due to expire on June 30, 1921.

The impending lapse in funding was felt before the start of the fiscal year, due to the practice of the Bureau of Public Roads of issuing certificates of apportionment to states on January 1 of each year for each state's share of the appropriated funds that would then be released to the states for obligation on the start of the fiscal year on July 1. The Chief of the Bureau of Public Roads later said that:

> The fact that a new apportionment of funds was not made in January 1921 made it impossible for the States to maintain an unbroken continuity of policy and administration in respect to Federal-aid work, and this condition has resulted in an unprecedented number if withdrawals, cancellations, and modifications of existing projects as the States have endeavored to adjust their programs to a reduced rate of expenditure.[21]

During the third session of the 66th Congress the House passed a one-year public roads appropriation but the Senate failed to pass the bill before that Congress expired on March 3, 1921.[22]

During the next (67th) Congress, after long negotiation, the House and Senate roads committees responded with the Federal Highway Act, signed into law on November 9, 1921. The Act created the modern highway program, requiring each state to designate up to seven percent of its total highway mileage as part of the Federal-aid system and requiring the states to split their systems between primary, or interstate, highways and secondary, or intercounty, highways. States would receive apportionment of appropriations under the formula set by the 1916 Act except that each state was given a one-half of one percent minimum apportionment.

However, the 1921 Act only contained one year's worth of appropriations for the program – $75 million for fiscal 1922. (This did not violate the new House rules because, seeing a conflict coming in a conference between a non-appropriating House committee and an appropriating Senate committee, the House voted in advance to approve a special resolution giving the Committee on Roads one-time-only authority to agree to an appropriation in the road bill during conference negotiations with the Senate.[23])

But the special authority given to the House Roads panel to agree to an appropriation in conference was only good for that one bill. Subsequent appropriations for the road program were uncertain.

The first budget. On December 6, 1921, President Harding transmitted to Congress the first centralized federal budget under the terms of the new law. For the first time, all of the appropriations requests were matched with federal revenue and expenditure (outlay) tables. The budget called for federal receipts of $3.338 billion and expenditures of $3.506 billion in fiscal 1923.

The budget assumed $105 million in FY 1922 expenditures and $125.7 million in FY 1923 expenditures for the Federal-aid highway program under the terms of the law signed the previous month. However, those were all expenditures that were anticipated to be made from the unexpended balances of prior appropriations for the road program. The budget requested no additional appropriations for the program.

The FY 1923 budget was a landmark piece of work in many ways. Prepared by future Nobel laureate (and Vice President of the U.S.) Charles Dawes, the first budget director, the budget brought a typically Republican approach to federal spending, viewing the government as a corporation, the President as CEO, the Cabinet as executive vice presidents, and taxpayers as shareholders.

That first budget contained much that is still with us, including object classification schedules, a division of all accounts by fund type (general, loan, trust or revolving), functional category classification, and circular #11, which told agencies how to fill out their budget request forms.

But most of all, the budget shifted the focus away from appropriation amounts and toward expenditure (outlay) amounts, with an emphasis on the deficit – or what the budget termed "the one great important question, to wit, the relation of the money actually to be spent by the Government to the money actually to be received by the Government in any given year…"[24] The budget criticized the existing practice of appropriating all the money for a multi-year project at once:

> …if [Congress] will pass the budget providing simply for the amount actually to be expended during the fiscal year, with Executive pressure now being exerted to keep the departments within the limit of this expenditure, a continuance of the method will automatically largely eliminate the indefinite cash demands made in the past by departments on account of unexpended balances in addition to their current appropriations.
>
> A system by which requests for appropriations are based on the actual need of money for disbursement during the fiscal year for which the appropriation is made will thus tend to prevent hereafter the wide, indefinite and fluctuating margin between the expenditures for a given year and the appropriations requested of Congress to cover the same period.[25]

The budget specifically addressed capital-intensive multi-year contractual accounts like the highway program:

> The fact that contracts are let by the Government which, of necessity, can not be completed within the fiscal year during which they are let does not imply the necessity of immediately making available to the contracting department the entire sum of money eventually to be expended on the contract. While in many instances the amount appropriated has been only that which could properly be expended during the year for which the appropriation was made, there have been other instances in which the total amount called for by the project was appropriated at one time, without regard to the need for the expenditure during the current year. No properly organized private corporation would handle its business this way.[26]

It was in this environment that the need for more appropriations for the highway program for fiscal 1923 was considered.

The FY 1923 appropriations process. While the road program faced fiscal uncertainty, the rest of the government went about its business. In January 1922, the House Appropriations Committee reported, and the House passed, a fiscal 1923 appropriations bill for the Post Office (H.R. 9859, 67th Congress). The House-passed bill made no mention of roads, but it was referred to the Senate Committee on Post Office and Post Roads.

Meanwhile, the Senate had been wrestling with the idea of following the House and recentralizing appropriations jurisdiction within the Appropriations Committee. Appropriations chairman Francis Warren (R-WY) introduced a resolution on January 18, 1922 (S. Res, 213, 67th Congress) to amend Senate rules to bring this about. Warren noted that the FY 1923 budget called for a wholesale reorganization of the annual appropriations bills that would make the Senate jurisdictional lineup unworkable, and that the House Appropriations Committee was going along with the plan.[27]

Warren asked for his resolution to be referred to the Senate Rules Committee, and suggested a course of action for Rules:

> …it is also undoubtedly true, in the event this course should be followed, that there could be drawn and added to the main committee members from the other committees, experienced in appropriations, thus enlarging to some extent the general Appropriations Committee…if not as permanent members, then surely as ex officio members.[28]

The Rules Committee was listening, and when the resolution was reported in March 1922 it matched the House rule for centralization of appropriations but also provided that two members of each of the committees set to lose jurisdiction over an appropriations bill would be made *ex officio* members of Appropriations for consideration of that bill. After much debate and a series of amendments (one of which required that one of the *ex officio* members be named to any House-Senate conference committee on their bill), the Senate passed S. Res. 213 on March 6, 1922 by a vote of 63 to 14.

However, the resolution passed by the Senate grandfathered one, and only one, bill:

> *Provided*, That this rule shall not apply to the bill making appropriations for the Post Office Department for the fiscal year ending June 30, 1923.[29]

In essence, the members of the Senate Post Office and Post Roads Committee were being given one last chance to work their will on both highway policy and funding before ceding control over the funding side of the equation to Appropriations.

One week after the Senate agreed to S. Res. 213, the Post Office and Post Roads Committee reported the grandfathered Post Office appropriations bill. One of the amendments recommended by the committee to H.R. 9859 added a section 6 to the bill appropriating $50 million for the Federal-aid highway program for FY 1923 and authorizing (but not appropriating) an additional $65 million in 1924 and $75 million in 1925. The Senate agreed to the amendment and to the amended bill by voice vote on March 20.

In April, conferees on H.R. 9859 were appointed from the House Appropriations Committee and the Senate Post Office and Post Roads Committee. The House conferees were presented with two problems. First, the House Post Office Appropriations Subcommittee did not have jurisdiction over the Agriculture Department's Public Roads Office appropriation. (Moreover, most of the Post Office budget came from postal revenues, and transferring those revenues to USDA would have been problematic). And second, the authorization portion of the Senate amendment constituted legislation on an appropriations bill in violation of the new rules, meaning that House conferees were not free to agree to the amendment in the body of the conference report.

A conference report was filed on May 8, 1922 which left amendment number 58 (section 6 of the Senate bill) in true disagreement. The Senate agreed to the conference report that day and the House agreed to the report on May 13. At that time, the House concurred to Senate amendment 58 with an amendment consisting of the entire text of a highway authorization bill[30] reported from the Committee on Roads and which had passed the House on May 1 by a 240 to 31 margin. The House amendment contained funding authorizations only, with no appropriations, and also contained controversial language capping Federal-aid project costs at $12,500 per mile. The House then agreed to a second conference on amendment 58 and other amendments remaining in disagreement and appointed the same conferees, with the Senate following suit on May 27. A second conference report[31] was filed on June 3.

Contract authority. Sometime between the House vote on May 13 and the filing of the second conference report on June 3, contract authority was born. (Neither the National Archives nor the House Appropriations Committee has any records of conference committee meetings or negotiations on that bill, so the exact dates and details of the conference meetings are apparently lost to history.) In lieu of the Senate appropriation-authorization amendment and the House's authorization-only amendment to that amendment, the conference report recommended compromise language. The final bill would contain authorizations only – $50 million in 1923, $65 million in 1924 and $75 million in 1925. However, the conference report contained new and unprecedented language pertaining to the $50 million authorization for FY 1923:

> The Secretary of Agriculture is hereby authorized, immediately upon the passage of this Act, to apportion the $50,000,000 herein authorized to be appropriated for the fiscal year ending June 30, 1923, among the several States as provided in section 21 of the Federal Highway Act approved November 9, 1921: *Provided*, That the Secretary of Agriculture shall act upon projects submitted to him under his apportionment of this authorization and his approval of any such

> project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.[32]

Conferees from an appropriations-only committee and an authorizing committee whose ability to originate appropriations was being taken away, sent to resolve differences between language making an appropriation and language making a simple authorization, found a way to split the baby successfully – by *creating an authorization that behaved like an appropriation*, making the government responsible for commitments made under the authorization, in advance of any appropriation.

During House debate on the conference report, the strategy was explained. House Majority Leader Frank Mondell (R-WY) said:

> In the Senate certain appropriations were made for carrying on road work. The conferees on the part of the House were naturally and properly anxious to eliminate from the Post Office bill a direct appropriation for public roads. Such appropriations should not be carried on a Post Office appropriation bill. At the same time the conferees were anxious to carry out the will of the House in making sufficient and abundant provision for carrying on road work. Certain of the Senate conferees were not entirely willing to trust the Congress to make the deficiency appropriation, as might be necessary if nothing but an authorization were left in the bill with no definite provision under which road funds would unquestioningly be available.[33]

Rep. (and future longtime Sen.) Carl Hayden (D-AZ) questioned Mondell:

> Mr. HAYDEN. I want to get the idea correctly in my head. This bill authorizes the good roads office to create a deficiency that Congress will meet?
>
> Mr. MONDELL. That is what it amounts to. There is no difference of opinion in regard to carrying out the road program.[34]

The chairman of the House Post Office Appropriations Subcommittee, C. Bascom Slemp (R-VA), amplified:

> It was felt that under these circumstances contracts can be made and appropriations be made by Congress in accordance with the need. In that way we will prevent the piling up of a large amount of money in the Treasury that cannot be used…
>
> …The fiscal year will be at an end in 30 days and while the appropriation committee did not have any desire to have this thrust upon them, because it is legislation, it was the simplest way out of it.[35]

The binding nature of the new contract authority was made clear during the debate during a colloquy between Chairman Slemp and Rep. William Stafford (R-WI):

> Mr. STAFFORD. I notice for the first time in the history of road legislation that the conferees have bound the Government in the form of a contract to carry out the amount that would be apportioned of the $50,000,000 authorization for expenditures in the next fiscal year.
>
> Mr. SLEMP. Yes.
>
> Mr. STAFFORD. What is the reason why by legislation we should make a contractual obligation to carry out the apportionment fixed by the Department of Agriculture?
>
> Mr. SLEMP. As far as I could get the thought, it is this: The authorization passed by Congress would carry necessarily an obligation on the part of Congress, certainly moral, at least, to carry out the proposition in accordance with the amount authorized…It has been represented that contractors might not know for sure whether they could make the contracts under these circumstances, and we felt this provision placed in there would make it absolutely sure.
>
> Mr. STAFFORD. This applies only for the year 1923?
>
> Mr. SLEMP. Yes.
>
> Mr. STAFFORD. And as the chairman of the committee, the gentleman from Illinois (Mr. MADDEN) just stated, it should be made a permanent policy. If that is so, there is no need for an authorization. You might as well appropriate the money at the beginning.[36]

The ranking minority member on the Post Office Appropriations subcommittee, Thomas Sisson (D-GA), made clear that the extra $50 million for FY 1923 was necessary because, while most states had more unexpended apportionment balances than they needed for the upcoming year, fourteen fast-spending states were out of money and would have no new program in 1923 without new apportionments.[37]

Appropriations chairman Martin Madden (R-IL) closed the debate by saying:

> [The bill] authorizes an appropriation of $50,000,000. It authorizes the Secretary of Agriculture to enter into contract obligations with the States to up to the amount of their allotments. It

> authorizes the States to enter into contracts with people who are going to build their roads. It binds the Congress of the United States to make the appropriations of the money as needed. What more is there to be done?[38]

The House agreed to the conference report by a 211 to 26 vote. The next day, on June 7, the Senate agreed to the conference report by voice vote without debate. The bill became law on June 19, 1922.[39]

Epilogue. As Rep. Stafford pointed out during the debate, only the FY 1923 authorization in the Post Office bill was legally binding "contract authority." The FY 1924 and 1925 authorizations, as originally enacted, were simply authorizations – permission slips for future appropriations. But the FY 1924 Agriculture Appropriations Act, enacted on February 26, 1923, deemed the $65 million authorization for FY 1924 to be a contractual obligation of the federal government, and the FY 1925 Agriculture spending bill did the same for the $75 million FY 1925 authorization. The next authorization bill, enacted on February 12, 1925, authorized $75 million per year for FY 1926 and 1927 for the highway program, and designated both years' authorizations to be contract authority along with any apportionments "which may hereafter be authorized" – making all future highway authorizations contract authority as well.[40]

The contracts issued pursuant to the original $50 million of FY 1923 contract authority were paid off, or "liquidated," by subsequent appropriations in two parts – half in a FY 1923 deficiency appropriations bill, and half in the FY 1926 Agriculture Appropriations Act. Liquidating appropriations in the early days would specify which year's authorizations they were redeeming – for example, the $76 million appropriation provided in the FY 1926 Agriculture appropriations bill for the highway program was allocated in the bill text as follows:

> $25,000,000, the remainder of the sum of $50,000,000 authorized to be appropriated for the fiscal year ending June 30, 1923; $35,700,000, the remainder of the sum of $65,000,000 authorized to be appropriated for the fiscal year ending June 30, 1924; and $15,300,000, being part of the sum of $75,000,000 authorized to be appropriated for the fiscal year ending June 30, 1925…[41]

FEDERAL-AID HIGHWAY FUNDING, FY 1917-1929
(Millions of Dollars)

FY 1917-1922: Direct Appropriations

FY	$$	FY	$$
1917	5	1920	95
1918	10	1921	100
1919	65	1922	75

FY 1923-1927: Contract Authority and Subsequent Liquidating Appropriations

Contr. Auth.		Year of Liquidating Approp.			
FY	$$	Year 1	Year 2	Year 3	Year 4
1923	50	25			25
1924	65	29.3		35.7	
1925	75	13	38.2	23.8	
1926	75		51.2	23.8	
1927	75		47.2	27.8	
1928	75		43.2	31.8	
1929	75		42.2	32.8	

NOTE: "Year 1" of the liquidating appropriation is the year in which the contract authority was made available. For example, for the FY 1923 contract authority, Year 1 is FY 1923, Year 2 is FY 1924, etc.

The table at right shows how the switch from direct appropriations to contract authority was able to postpone the recording of tens of millions of dollars per year in inevitable appropriations into subsequent budget years.

The legally binding nature of contract authority was recognized over the decades by various courts and by the U.S. Comptroller General, who summed up the possible consequences of failure to provide liquidating appropriations:

> We have held in several cases that the United States is obligated to pay under contracts where Government officials were statutorily authorized to enter into contracts in excess of or in advance of appropriations. 28 Comp.Gen. 163, 165 (1948); 29 Comp.Gen. 504, 506 (1950). While no one can force the Congress to appropriate liquidating monies, (B-203841, March 30, 1955) the States could sue the United States in Federal Court to enforce its right to be paid under the Act. Any award to the States would then be paid from the permanent judgment appropriation. 31 U.S.C. Sec. 1304(a)[42]

The "permanent judgment appropriation" referred to in 31 U.S.C. §1304 is a provision of law that automatically appropriates such sums as necessary from the U.S. Treasury to pay off court judgments against the federal government. In other words, if the Appropriations Committees fail to provide sufficient appropriations to liquidate contract authority, they won't necessarily be saving the Treasury any money, as the states could simply go to court and get the money that way.

The Supreme Court summarized contract authority in this way:

> …there are authorizations for future appropriations, but also initial and continuing authority in the Executive Branch contractually to commit funds of the United States up to the amount of the authorization. The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations.[43]

Contract authority proved to be an extremely useful means of financing the highway program. FHWA's official history of American highways said that:

> The impact of this change in the method of authorizing and funding the Federal-aid highway program was vast because:
>
> - It was essential that States be provided ample time to prepare to participate in the program.
> - It was not reasonable to expect the States to proceed with preparatory work and costs without assurance from the Federal Government that the apportionments would be funded.
> - It was essential that Federal funds be available for prompt payment of State claims for reimbursement.
> - It was not efficient money management to appropriate the full program funds for a 2- or 3-year period awaiting annual apportionment and an additional five or more years before a given fiscal year's need for actual reimbursement. Under this system, large sums would be tied up awaiting eventual reimbursement.
> - It was assurance of the continuity of the program because the program was then dependent only upon obtaining future authorizations.[44]

In future decades, the dollars spent via highway contract authority would increate greatly, and authorizing committees would expand contract authority to fund other capital-intensive multi-year cooperative programs like mass transit and airport grants and highway and trucking safety grants.

And although it was Congressional appropriators who created contract authority in a general appropriations bill, they eventually began to resent the fact that they were legally obligated to appropriate billions of dollars to liquidate the obligations of a program over which they had comparatively little influence. Likewise, subsequent Presidents and budget directors would later struggle to find ways to gain some sort of control over the presumptively "uncontrollable" flow of highway funds out of the Treasury.

The creation of contract authority was a direct reaction to the federal cash management focus of the 1921 Budget and Accounting Act and the corresponding recentralization of appropriations authority in one committee in each chamber. It was created during a two-year window when House appropriators went to conference with Senate authorizers on general appropriations bills, a situation which has not recurred since and is unlikely to recur in the future. And importantly, the creation of contract authority gave authorizing committees another way to pursue their policy agendas outside of the annual budgetary constraints imposed by the appropriations process.

Eventually contract authority's popularity as a "backdoor" way around the appropriations process would be restricted by the 1974 Budget Act, which amended House and Senate rules to prohibit any new contract authority from being created unless it was specifically made subject to available appropriations and unless it was drawn from an excise-tax-supported trust fund – which basically means the Highway Trust Fund and the Airport and Airway Trust Fund.

Because of the 1974 Budget Act's restrictions and the relative scarcity of excise-tax-supported trust funds, outside the U.S. Department of Transportation, there is no longer much federal contract authority used for transactions with non-federal entities. (There are two other significant instances of contract authority currently in use. Some federal working capital or other revolving funds use contract authority so that an agency can advance money to itself. And in the case of U.S. arms sales to foreign countries, U.S. government arms purchases from a manufacturer are recorded as obligations of contract authority, and when the foreign government pays for the armaments, that payment liquidates the obligation. This indefinite authority predates the Budget Act. But in neither of these instances is Congress required to make a liquidating appropriation.[45]) As the 2008 federal budget noted, "The use of contract authority is traditionally limited to transportation programs."[46]

And it was the 1974 Budget Act that necessitated the invention of the other oddity of federal transportation spending – annual statutory obligation limitations on contract authority – which gave appropriators, Presidents and the new Budget Committees a method for controlling expenditures from contract authority.

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[1] See section 3(2)(A) of the Congressional Budget and Impoundment Control Act of 1974, as amended (2 U.S.C. 601 et seq.).
[2] See Louis Fisher, *Presidential Spending Power* (Princeton: Princeton University Press, 1975) generally, and especially chapter 10 on "Executive Commitments"
[3] DeAlva Stanwood Alexander, *History and Procedure of the House of Representatives* (Boston and New York: Houghton Mifflin, 1916), p. 234.
[4] *Congressional Globe*, 38th Congress, 2nd session, March 2, 1865, p. 1312.
[5] Charles Stewart III, *Budget Reform Politics: The Design of the Appropriations Process in the House of Representatives, 1865-1921* (Cambridge: Cambridge U. Press, 1989) p. 83.
[6] Congressional Research Service, *History of the United States House of Representatives, 1789-1994* (Washington: GPO, 1994 – H. Doc. 103-324), pp. 213-214.
[7] House Report No. 373, 66th Congress, 1st Session, p. 4.
[8] Federal Highway Administration. *America's Highways 1776-1976: A History of the Federal-Aid Program* (Washington: GPO, 1976) p. 81.
[9] *America's Highways 1776-1976*, p. 86.
[10] 39 Stat. 355.
[11] Stewart, *Budget Reform Politics*, p. 187.
[12] H.R. 9783, 66th Congress.
[13] George B. Galloway, *History of the United States House of Representatives* (Washington: GPO, 1962 –H. Doc. 246, 87th Congress) p. 160.
[14] U.S. Senate. Committee on Appropriations. *United States Senate Committee on Appropriations, 138th Anniversary, 1867-2005* (Washington: GPO, 2005 – S. Doc. 109-5), p. 12.
[15] David Brady and Mark A. Morgan, "Reforming the Structure of the House Appropriations Process: The Effects of the 1885 and 1919 Reforms on Money Decisions," in *Congress: Structure and Policy* (New York: Cambridge University Press, 1987), Matthew McCubbins and Terry Sullivan, Eds., pp. 224-226.
[16] John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: http://www.presidency.ucsb.edu/ws/?pid=29634.
[17] House Report No. 373, 66th Congress, 1st Session, p. 10.
[18] H. Res. 527, 66th Congress.
[19] Richard F. Fenno, Jr., *The Power of the Purse: Appropriations Politics in Congress* (Boston: Little, Brown, 1966) p. 45.
[20] 40 Stat. 1189, 1201 (1919).
[21] Bureau of Public Roads, Annual Report, 1921, p. 6.
[22] *America's Highways 1776-1976*, p. 107.
[23] *Congressional Record*, 67th Congress, 1st Session, October 27, 1921, p. 6897.
[24] *Budget of the United States for the Service of the Fiscal Year Ending June 30 1923* (Washington: GPO, 1921 – H. Doc. No. 126, 67th Congress), p. xv.
[25] FY 1923 *Budget*, p. xiv.
[26] FY 1923 *Budget*, pp. xiv-xv.
[27] *Cong. Record*, 67-2, January 18, 1922, p. 1320.
[28] *Cong. Record*, 67-2, January 18, 1922, p. 1325.
[29] *Cong. Record*, 67-2, March 6, 1922, p. 3431 (text of S. Res. 214 as agreed to).
[30] H.R. 11131, 67th Congress.
[31] H. Rept 1065, 67th Congress.
[32] *Cong. Record,* 67-2, June 6, 1922, p. 8255.
[33] *Cong. Record*, 67-2, June 6, 1922, p. 8286.
[34] *Cong. Record*, 67-2, June 6, 1922, p. 8286.
[35] *Cong. Record*, 67-2, June 6, 1922, pp. 8284-8285.
[36] *Cong. Record*, 67-2, June 6, 1922, p. 8285.
[37] *Cong. Record*, 67-2, June 6, 1922, pp. 8285-8286.
[38] *Cong. Record*, 67-2, June 6, 1922, p. 8289.
[39] 42 Stat. 660 (1922).
[40] 43 Stat. 889 (1925).
[41] 43 Stat. 822, 852 (1925).
[42] Comptroller General opinion B-211190, April 5, 1983.
[43] *Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975).
[44] *America's Highways 1776-1976*, p. 206.

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[45] U.S. General Accounting Office, I*nventory of Accounts With Spending Authority and Permanent Appropriations, 1996* (GAO/AIMD-96-79).
[46] Office of Management and Budget. *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2008* (Washington: GPO, 2007) p. 400.