

NOTES

OMNIBUS LEGISLATION AND SEPARATION OF POWERS: TOO BIG TO FAIL?

*Evan Wright**

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INTRODUCTION

Imagine submitting a paper for class without reading it, or handing a report to your boss before reviewing it. For most people, this will only be an exercise in the hypothetical and not something they can envision based on firsthand knowledge. They know they must, or at least should, read and edit papers, reports, or memorandum before turning them in. However, members of Congress seem to not be like most people. It appears that it is becoming disturbingly common for Congress to pass major legislative initiatives through the use of all-encompassing omnibus

* J.D. Candidate, Notre Dame Law School, 2022; B.A., University of Louisville, 2019.

legislation before actually reading the entire bill voted on.¹ In fact, a leading member of the House of Representatives famously gaffed that Congress has to “pass the bill so that you can find out what is in it.”² Whether this statement looks different in context or not, critics have jumped on the gaffe as an example of Congress’s lack of ambition and political willpower.³

American citizens have become all too familiar with stories of Congress’s last-minute efforts to pass large bills to avoid government shutdowns.⁴ This often leaves very little time, if any, to actually read the bills voted on. The increasing size of these bills compiled with a looming deadline can make it physically impossible for even the most studious member of Congress to read legislation fully.⁵ However, not every member of Congress believes that this is an auspicious or even sustainable form of government. Members of Congress have chastised the legislative branch for passing massive, hurried bills through both chambers for years and on a bipartisan basis. New York Representative Alexandria Ocasio-Cortez, a Democrat, took her frustration to Twitter after Congress passed one of the largest bills on record of over five thousand pages consisting of a \$900 billion Coronavirus relief package and a \$1.4 trillion spending bill.⁶ Representative Ocasio-Cortez tweeted, “Congress is expected to vote on the second largest bill in US history *today*—\$2.5 trillion—and as of about 1pm, members don’t even have the legislative text of it yet.”⁷

Kentucky Senator Rand Paul, a Republican, echoed a similar complaint almost a decade earlier when Congress waived its own rules requiring a forty-eight-hour pause to pass a six-hundred-page bill including, among other things, an extension on highway funding, federal flood insurance, and student loan rates:

[T]his is a 600-page bill. I got it this morning. Not one member of the Senate will read this bill before we vote on it It is 600 pages, and

1. Mary Clare Jalonick, *Too Big to Read: Giant Bill a Leap of Faith for Congress*, AP NEWS (Dec. 22, 2020), <https://apnews.com/article/politics-james-mcgovern-legislation-coronavirus-pandemic-bills-0da216bf0352e92f8a62d8438fc9b519> [https://perma.cc/Z72Y-PL3D].

2. Nancy Pelosi, Speaker of the House, U.S. House of Representatives, Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010) (transcript available at <https://perma.cc/K62J-HPB7>).

3. *Id.*

4. Emily Cochrane, *Biden Signs a Short-Term Spending Bill Swiftly Passed by Congress, Averting a Government Shutdown*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/09/30/us/politics/senate-spend-ing-bill-government-shutdown.html> [https://web.archive.org/web/20221110024247/https://www.nytimes.com/2021/09/30/us/politics/senate-spend-ing-bill-government-shutdown.html].

5. Emily Larsen, *Fact Check: Did Lawmakers Have Less Than a Minute Per Page to Read the Omnibus Before Voting?*, CHECKYOURFACT (Mar. 24, 2018, 12:56 PM), <https://checkyourfact.com/2018/03/24/fact-che ck-less-than-minute-per-page-omnibus/> [perma.cc/ZDW9-JAF9].

6. Jalonick, *supra* note 1.

7. @AOC, TWITTER (Dec 21, 2020, 1:09 PM), <https://twitter.com/aoc/status/1341083488594882561?lang=en> [perma.cc/GE8G-337V].

nobody will read it. No wonder our approval rating is 10 percent. Nobody knows what we are voting on. In fact, provisions were stuck in this bill last night that have nothing to do with any of these bills.⁸

Congress's increased use of omnibus legislation perpetuates the issues and concerns highlighted above. Omnibus legislation generally consists of large bills covering many diverse topics compiled under one heading and put up for a singular vote.⁹ Through the use of omnibus bills, Congress is able to force a vote on one bill, which addresses many of the pressing issues of the day. This exploitation of deadlines and diverse agendas connected to one another can lend congressional leaders the ability to pass massive legislative overhauls that would otherwise not make it out of both chambers of Congress.

This Note proposes that the use of omnibus legislation presents many structural governmental concerns. Therefore, omnibus bills should be avoided. This Note argues that Congress should reform its legislative process to increase its own institutional will and enhance accountability. The passing of omnibus bills does not follow the original vision of the legislative branch, which favors the status quo and structured debate. Furthermore, the use of an omnibus legislative process blurs the lines central to the separation of powers doctrine.

Part I of this Note provides a brief history of the use of omnibus legislation. This Section provides a working definition of what type of legislation qualifies as an omnibus bill. Additionally, this section highlights some of the reasons why such legislation has become popular.

Part II provides examples of recent, impactful omnibus bills. This section provides an overview of the structural problems caused by the introduction of this legislative process, while also addressing counterarguments as to why omnibus legislation is a useful legislative tool.

Finally, Part III highlights the stalled institutional ambition of the legislative branch and how the use of omnibus legislation exacerbates this constitutional concern relating to the separation of powers doctrine. The Note concludes with a solution to address the problems presented by the increased reliance on omnibus legislation.

I. HISTORY OF OMNIBUS LEGISLATION

A. *Omnibus Legislation Defined*

Any discussion about omnibus legislation must first begin with an operational definition as to what is included as an omnibus bill. In modern American political

8. 158 CONG. REC. S4735 (2012) (statement of Sen. Rand Paul).

9. See Glen S. Krutz, *Getting Around Gridlock: The Effect of Omnibus Utilization on Legislative Productivity*, 25 LEGIS. STUD. Q. 533, 533 (2000).

news, the term omnibus has become commonplace. Still, this term can be used to refer to many different types of legislation and can have many different uses.¹⁰ No universal or uniform definition of omnibus legislation currently exists.¹¹ The lack of clarity on what qualifies as omnibus legislation can make understanding the true problem difficult. This blurred line on the definition of omnibus bill is compounded by the fact that “omnibus” has come to be used as a negative epithet used to disparage legislation.¹² Little has been historically known about the use of omnibus legislation; however, recent academic literature has attempted to shed light on the legislative method.¹³ Although there is no agreed-upon definition of omnibus bill, academic literature is not devoid of attempts to define the term.

Glen Krutz, a proponent of omnibus bills and a frequent academic -writer on the nature of their use, has proposed a “behavioral definition” of an omnibus bill in order to provide a base for political science models to examine.¹⁴ Through his behavioral definition, Kurtz defines an omnibus bill as major legislation that “(1) spans three or more major topic policy areas OR ten or more subtopic policy areas, AND (2) is greater than the mean plus one standard deviation of major bills.”¹⁵ While this definition is useful for tracking and algometric purposes, it is not operational for the purpose of this Note. Krutz has presented another definition that seems to apply to a wider category of bills. In this less technical definition, Krutz defines “omnibus legislating” as the “practice of combining numerous measures from disparate policy areas in one massive bill”¹⁶ For the purpose of this Note, this definition provides a better context from which to begin as it highlights the drafting process of a bill. To meet this definition, there are two conditions: first, the legislation must combine statutes from multiple different policy areas; second, the resulting bill must have considerable length.¹⁷ For the purpose of this Note, omnibus legislation will refer to the legislative process which results in a bill meeting these diversity and size conditions.

Omnibus legislation is not a new nor revolutionary invention. The use of omnibus legislation can be traced back to early American Congresses.¹⁸ Moreover, the

10. Adam M. Dodek, *Omnibus Bills: Constitutional Constraints and Legislative Liberations*, 48 OTTAWA L. REV. 1, 8 (2017) (distinguishing omnibus bills parliamentary understanding from its political usage).

11. See Krutz, *supra* note 9, at 538.

12. Mark Pacilio, Commentary, *Omnibus Legislation, AKA the ‘Big Uglies’—Is This the Right Move for Congress Now?*, UTICA UNIV. CTR. OF PUB. AFFS. & ELECTION RSCH. (Mar. 24, 2020), <https://www.ucpublicaffairs.com/home/2020/3/24/omnibus-legislation-aka-the-big-uglies-is-this-the-right-move-for-congress-now-by-mark-pacilio> [perma.cc/YTX6-UYKB] (referring to omnibus bills as “Big Ugly bills”).

13. Krutz, *supra* note 9, at 533.

14. *Id.* at 539.

15. *Id.* (emphasis omitted).

16. *Id.* at 533.

17. See *id.*

18. See Chester Collins Maxey, *A Little History of Pork*, 8 NAT’L MUN. REV. 691, 691 (1919).

criticism of the use of omnibus legislation is not a new complaint.¹⁹ However, the use of omnibus legislation in recent years has become a “significant feature” of the U.S. Congress.²⁰ As the popularity of omnibus legislation has increased in legislatures across the Western Hemisphere, the negative view of such legislative techniques has increased to the point where omnibus has become to some a “dirty word.”²¹ But to paint omnibus legislation only in a negative light would ignore its rise in popularity and its proponents’ supporting arguments. For example, proponents of the omnibus legislation, argue that omnibus bills are “optimal” and increase efficiency in legislatures.²²

However, the debate over omnibus legislation has not been limited to the U.S. Congress and the United States. In fact, it seems as if the use of the legislative technique is a more highly debated topic in the Canadian Parliament and Canadian media sources.²³ The Canadian Parliament has too grappled with the same definitional ambiguities discussed above. The ambiguity in defining omnibus led the House of Commons Speaker, Andrew Scheer, to remark on the difficulty of banning omnibus legislation because any such effort must overcome the subjective nature of drafting a definition.²⁴ Difficulties aside, leading Canadian political parties have included proposals to ban omnibus legislation in their election platforms.²⁵ In 2015, the Liberal Party of Canada’s platform included a promise to end the “undemocratic” use of omnibus bills.²⁶ This promise to abandon the method has not been realized. Still, Canadian politicians have viciously denied the designation of their bills as omnibus legislation using the subjective nature of omnibus legislation as shelter.²⁷ The subjective nature of what qualifies as omnibus legislation can be used as both a sword or shield for critics and proponents alike.

The use of omnibus legislation is the result of legislative bargaining and strategy.²⁸ The alternative to such a tactic would be to vote individually on several smaller bills. Combining a large number of diverse legislative agendas into one large

19. *Id.*

20. JAMES V. SATURNO & JESSICA TOLLESTRUP, CONG. RSCH. SERV., RL32473, OMNIBUS APPROPRIATIONS ACTS: OVERVIEW OF RECENT PRACTICES 1 (2016).

21. Dodek, *supra* note 10, at 11.

22. Johanna M. M. Goertz, *Omnibus or Not: Package Bills and Single-Issue Bills in a Legislative Bargaining Game*, 36 SOC. CHOICE & WELFARE 547, 548 (2011).

23. Lorne Gunter, *Omnibus Bills in Hill History*, TORONTO SUN (June 18, 2012), <https://torontosun.com/2012/06/18/omnibus-bills-in-hill-history> [perma.cc/M5RE-ZR7Z].

24. *Id.*

25. Dodek, *supra* note 10, at 1.

26. *Id.* (“In its 2015 election platform, the Liberal Party of Canada promised to change the House of Commons’ Standing Orders to end the ‘undemocratic practice’ of using omnibus bills.”).

27. *Id.* at 8–9.

28. Goertz, *supra* note 22, at 548.

omnibus bill can appease competing interests and foster compromise.²⁹ Alternatively, the increased use of omnibus bills can be indicative of polarized and more extreme legislatures.³⁰

B. Use of Omnibus Legislation

Omnibus legislation is used widely throughout the legislative process and is pervasive among various types of legislation within the U.S. Congress. In the United States, omnibus legislation emerges in three primary forms: omnibus appropriations acts,³¹ omnibus reconciliation acts,³² or general legislation. There is also the possibility, and it is often the case, that these three forms of omnibus legislation are further combined for an even larger omnibus bill. One important way omnibus legislation has come to be used is in the form of omnibus appropriations acts, which allocate discretionary spending.³³ Discretionary spending “is under the jurisdiction of the House and Senate Appropriations Committees” and “funds the routine operations of the federal government.”³⁴ Usually, twelve regular appropriation acts must be passed during a fiscal year to fund the federal government and prevent government shut-downs.³⁵ Omnibus reconciliation acts address revenue and federal spending guidelines and allow Congress to alter tax and entitlement laws.³⁶ Finally, omnibus bills that are made up of general legislation include important policy measures, which are lumped together into one bill addressing many subject matters.³⁷ Omnibus bills involving general legislative matters allow Congress to amend many “disparate statutes” with only one vote.³⁸

House and Senate rules have historically encouraged the separation of legislation and appropriations.³⁹ In reality, the line between legislation and appropriation is not bright.⁴⁰ Omnibus appropriation acts often include substantial legislative

29. Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 396.

30. See Goertz, *supra* note 22, at 557 (finding that more extreme legislators prefer to propose omnibus bills in order to package “mostly unfavorable issues” with others to ensure they pass).

31. See generally SATURNO & TOLLESTRUP, *supra* note 20.

32. See generally Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget “Train Wreck,”* 35 HARV. J. ON LEGIS. 589 (1998).

33. SATURNO & TOLLESTRUP, *supra* note 20, at 1.

34. *Id.* at 1 n.1.

35. *Id.* at 1.

36. Krishnakumar, *supra* note 32, at 590.

37. Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for A Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 961.

38. Dodek, *supra* note 10, at 12.

39. SATURNO & TOLLESTRUP, *supra* note 20, at 8.

40. *Id.*

enactments, which can consist of significant statutory and policy revisions.⁴¹ The reverse is also true, with legislative acts amended into omnibus bills distributing large funding appropriations.⁴² This conflation of the two -into -one omnibus is due to a host of motivating factors, such as fending off opposition or fostering compromise.⁴³

Article 1, Section 1 of the U.S. Constitution vests Congress with the legislative powers granted within the Constitution.⁴⁴ Furthermore, Article 1, Section 5 of the Constitution denotes that “[e]ach House may determine the Rules of its Proceedings.”⁴⁵ Together, these provisions ostensibly establish Congress’s authority to bring forth and pass bills through the use of omnibus legislation. Congress has also cited Article I, Section 8, Clause 18 of the Constitution, known as the “Necessary and Proper Clause,” as authority for passing bills that would qualify as omnibus legislation.⁴⁶

One self-imposed limitation, the “germaneness rule,” can prevent Congress’s employment of omnibus legislation, but the rule has had no practical effect. The germaneness rule seeks to limit legislatures by limiting their ability to only consider one subject at a time,⁴⁷ which prevents legislation that addresses multiple policy areas from being lumped into one bill.⁴⁸ In Congress, only the House of Representatives imposes a germaneness requirement; the Senate does not.⁴⁹ However, the House’s germaneness rule is limited to “*amendments* originating in the House,” so it does not restrict the contents of bills and resolutions.⁵⁰ The principle behind the germaneness rule is to “encourage systematic and thoughtful legislative decisions.”⁵¹ Although, in theory, the germaneness principle could limit Congress’s use of omnibus legislation, the House Rules Committee does not even consistently enforce the House’s limited germaneness rule and the Senate recognizes no germaneness rule at all.⁵²

Any Representative or Senator may propose a bill that includes as many agenda items as he or she wants. Recently, the appropriations and reconciliation process

41. *Id.* at 9.

42. *Id.* at 5.

43. Krutz, *supra* note 9, at 537 (noting omnibus legislation is a tool for coalition leaders to get around legislative gridlock).

44. U.S. CONST. art. I, § 1.

45. *Id.* § 5, cl. 2; see also Stanley Bach, *Germaneness Rules and Bicameral Relations in the U.S. Congress*, 7 LEGIS. STUD. Q. 341, 342 (1982).

46. See 165 CONG. REC. H214 (daily ed. Jan. 3, 2019) (statement of Rep. Henry Cuellar) (constitutional authority statement for the bill that became the omnibus appropriations bill for fiscal year 2021).

47. VALERIE HEITSHUSEN, CONG. RSCH. SERV., 96–548, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 6 (2019).

48. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., 98–995, THE AMENDING PROCESS IN THE HOUSE OF REPRESENTATIVES 9 (2015).

49. *Id.*; HEITSHUSEN, *supra* note 47, at 6.

50. *Id.* (emphasis added).

51. *Id.*

52. Goertz, *supra* note 22, at 557.

have become a desirable vehicle for passing omnibus legislation because of the unique rules that apply in the appropriations-and-reconciliation context.⁵³ These “special rules” make reconciliation and appropriations bills attractive receptacles for attaching unrelated legislative items, which may be more difficult to pass on their own.⁵⁴ The Senate has enacted additional rules to prevent the use of reconciliation acts as vehicles for unrelated legislation,⁵⁵ but these rules can likewise be waived by the Senate.⁵⁶ In furtherance of the appropriations process, Congress passed the first continuing resolution to fund government functions in 1876.⁵⁷ Since the 1980s, the appropriations process has seen bills increase in length and inclusion of unconnected legislative agendas.⁵⁸ In recent years, omnibus legislation has become a “significant feature” of the legislative process.⁵⁹ A likely explanation for the increased use of omnibus legislation is the favorable odds of omnibus bills—they are far more likely to pass Congress than single-issue bills.⁶⁰

C. *History of the Use of Omnibus Legislation*

Given the utilitarian advantages of omnibus legislation, its use has been present since the early legislative years of the Republic.⁶¹ One account observed May 20, 1826, as a “red-letter date in American political history.”⁶² This was the first use of omnibus legislation to enact sweeping measures relating to the improvement of rivers and harbors.⁶³ While omnibus legislation has been used sparingly since the founding of the country, its use was not prolific nor pervasive until more recent Congresses. The “traditional lawmaking process,” which included the passage of smaller single-issue bills, transformed significantly when the use of omnibus legislation increased.⁶⁴ Indeed, many scholars who study the legislative branch have described the increased dependence on omnibus legislation as “one of the most major recent changes in the

53. Krishnakumar, *supra* note 32, at 597. Rules governing reconciliation acts prevent the use of ordinary debate time allotments, filibusters, and amendments being used to oppose the legislation. *Id.*

54. *Id.*

55. *Id.* (discussing the “Byrd Rule”).

56. *Id.*

57. Devins, *supra* note 29, at 392.

58. *Id.*

59. SATURNO & TOLLESTRUP, *supra* note 20, at 1.

60. Glen S. Krutz, *Tactical Maneuvering on Omnibus Bills in Congress*, 45 AM. J. POL. SCI. 210, 210 (2001) (concluding that “over 98 percent of the omnibus bills identified in this study were enacted”).

61. Devins, *supra* note 29, at 408 (noting that the United States has had “omnibus bills from the start,” and “the first three appropriations bills passed by Congress were omnibus measures”); *see also id.* at 408 n.127 (establishing that many Framers served in the First Congress, which utilized omnibus legislation).

62. Maxey, *supra* note 18, at 691.

63. *Id.*

64. Krutz, *supra* note 9, at 533.

legislative process.”⁶⁵

The first modern use of omnibus legislation was employed in 1950.⁶⁶ However, omnibus legislation utilization did not dramatically increase until the 1980s, sparked by post–New Deal and World War II legislatures.⁶⁷ 1950 was a seminal year for the use of omnibus legislation as Congress conducted a “one-time experiment in improving legislative efficiency by considering all of the regular appropriations acts for [fiscal year] 1951 in a single bill.”⁶⁸ Before this, the regular process was to consider appropriations bills individually as “standalone laws.”⁶⁹ While this “one-time” employment of omnibus legislation was abandoned shortly after,⁷⁰ the election of the Reagan administration in 1981 prompted congressional Republicans to again employ the use of omnibus legislation in the reconciliation process to “package” Reagan’s economic agenda into one bill.⁷¹ Congressional Republicans reasoned that a single vote on an “entire budget agenda” was more likely to pass Congress and less susceptible to minority obstruction.⁷² Regardless of the widespread modern use of omnibus legislation, both Democrat and Republican congressional groups have advocated for the abandonment of the tactic based on, among other complaints, the decreased ability to consider and debate the statutory and financial alterations effectively.⁷³

D. *Reasons for Use of Omnibus Legislation*

If academics, citizens, and politicians from across the political aisle have criticized the use of omnibus legislation for a century and increasingly so in the last several decades, why are omnibus bills still widely employed during the legislative process? There are many arguments in favor of the use of omnibus legislation, both utilitarian and normative.⁷⁴ Scholars generally accept that Congress’s circumstance of large budget deficits is a leading cause for the increased prevalence of the employment of omnibus legislation.⁷⁵ Additionally, this Note proposes another cause for the increased use of omnibus legislation.⁷⁶

Many arguments have been put forth in favor of the use of omnibus legislation.

65. See GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* 1–2 (Samuel C. Patterson ed., 2001).

66. Krutz, *supra* note 9, at 541.

67. *Id.*; see also Denning & Smith, *supra* note 37, at 973.

68. SATURNO & TOLLESTRUP, *supra* note 20, at 2.

69. *Id.*

70. *Id.*

71. Krishnakumar, *supra* note 32, at 595–96.

72. *Id.*

73. Devins, *supra* note 29, at 392, 392 n.18.

74. See generally Krutz, *supra* note 9.

75. Krutz, *supra* note 60, at 212.

76. See *infra* Part III.

First, the use of omnibus bills to add unrelated amendments to an uncontentious bill can advance a policy item that would otherwise not make it out of committee.⁷⁷ This device can have the effect of circumventing the traditional committee leadership supervision of the agenda and can promote minority agendas. Second, the use of omnibus legislation can persuade compromise among legislators. Models analyzing the use of omnibus legislation suggest that more extreme legislators prefer to propose omnibus bills while moderate legislators prefer single-issue bills.⁷⁸ These models support the argument that omnibus bills are used to package both favorable and unfavorable legislative items in order to foster compromise and vote-trading amongst majority and minority legislators.⁷⁹ This reason suggests that favorable legislation is used as a “vehicle” to advance extraneous policy goals.⁸⁰ Additionally, the omnibus process may force begrudged compromise by packaging controversial proposals with highly popular items to “generate embarrassment for [the] opposition.”⁸¹ Third, the timing within a legislative cycle can increase the likelihood of the use of omnibus legislation. Acts that could not or did not pass earlier in the congressional session can be combined into one large omnibus bill.⁸² Certain congressional rules may encourage this type of last-minute action.⁸³ Finally, omnibus legislation can make the entire legislative process more efficient by shortening the proceedings, shortening the preparation needed, and limiting debate.⁸⁴ Here, omnibus legislation maximizes the legislative process by providing convenience and efficiency.

The leading and most persuasive argument in support of omnibus legislation is its ability to increase the productivity of a legislature.⁸⁵ Even opponents of the use of omnibus legislation concede it is an “indispensable device” in congressional productivity, concluding that to deprive legislatures of the use of the process would impede the work of the legislative branch to an unacceptable level.⁸⁶ The omnibus technique allows for more time that would otherwise be spent on drafting and scrutinizing multiple smaller bills and more economically allocates such time into one proceeding. While there are arguments in support of omnibus legislation being optimal,⁸⁷ congressional reports have cautioned the legislative branch against such

77. Bach, *supra* note 45, at 344.

78. Goertz, *supra* note 22, at 557.

79. *Id.* at 547.

80. Bach, *supra* note 45, at 344.

81. Dodek, *supra* note 10, at 13–14.

82. SATURNO & TOLLESTRUP, *supra* note 20, at 1.

83. Devins, *supra* note 29, at 395–96 (arguing the Gramm-Rudman Act encourages the use of omnibus continuing resolution).

84. Dodek, *supra* note 10, at 13.

85. Krutz, *supra* note 9, at 535 (concluding omnibus usage is a “positive and significant independent influence on legislative productivity”).

86. Maxey, *supra* note 18, at 702.

87. *See* Goertz, *supra* note 22.

methods. One such House Report criticized the inclusion of nongermane items into bills for three reasons:

What concerns many Members is that this practice (1) by-passes the normal, orderly legislative process in the House and necessitates hasty decisions on the floor without adequate consideration, (2) deprives House committees of the right to consider matters pending before the House that fall within their jurisdiction, and (3) denies the House membership an opportunity to engage in meaningful debate on vital issues pending before it.⁸⁸

II. OVERVIEW OF OMNIBUS LEGISLATION

Next, to fully understand the impact of omnibus legislation, it is necessary to provide examples of the process and how it has been employed. This Part provides two such examples: the Removal Clarification Act of 2010 (“RCA”)⁸⁹ and the Consolidated Appropriations Act of 2021 (“CAA 2021”).⁹⁰ The RCA provides an example of omnibus legislation used unsuccessfully to propose sweeping changes to general legislative policy matters. CAA 2021 is an example of an omnibus appropriations act lumping together multiple appropriations bills and general legislative items into one massive omnibus bill. This Part also provides an overview of some commonly expressed complaints of the use of omnibus legislation and common criticisms addressed by such complaints.

A. *Examples of Omnibus Bills*

1. Removal Clarification Act of 2010

While the RCA is a relatively small bill compared to other omnibus packages, the RCA provides a paradigmatic example of how Congress lumps together unconnected general legislative matters into single omnibus bills. The RCA shows how legislators attach fiercely debated and controversial legislative proposals that would result in dramatic policy shifts to neutral, uncontested legislation in an attempt to increase the likelihood that the controversial elements are passed. Though the RCA ultimately did not pass, the omnibus bill progressed further through the legislative process than any of the single-issue legislative proposals in the previous decade.

On May 12, 2010, California Representative Hank Johnson, a Democrat, introduced the RCA in the House.⁹¹ According to Representative Johnson, the RCA as

88. H.R. REP. NO. 91-1215, at 9 (1970).

89. H.R. 5281, 111th Cong. (2010).

90. H.R. 133, 111th Cong. (2010).

91. 156 CONG. REC. 8091 (2010).

introduced would have “ma[de] clear that the [federal] removal statute applies to all State judicial proceedings in which a legal demand is made for a Federal officer’s testimony” and that “Federal officer[s] need not wait until he or she is subject to contempt in order to seek removal.”⁹²

The RCA as introduced was short; it consisted of only a two–page revision to 28 U.S.C. § 1442.⁹³ The act effortlessly passed the House by a simple voice vote after the House amended the bill to include minor procedural qualifications.⁹⁴ Thereafter, the RCA went to the Senate,⁹⁵ where it remained uncontentious. The Senate made minor amendments to the bill before passing it with unanimous consent.⁹⁶

The RCA then underwent drastic changes after the Senate returned it to the House to resolve the differences between the versions of the RCA passed by the Senate and the House. Michigan Representative John Conyers, a Democrat, proposed a further amendment to the RCA that would have added the text of the Development, Relief, and Education for Alien Minors Act of 2010, also known as the DREAM Act, to the RCA.⁹⁷ Language from the DREAM Act in Representative Conyers’s amendment authorized the Secretary of Homeland Security to “cancel [the] removal of an alien who is inadmissible or deportable from the United States, and grant the alien conditional nonimmigrant status” if certain conditions were present.⁹⁸ This grant of conditional nonimmigrant status applied to aliens who entered the United States as children.⁹⁹ Representative Conyers’s proposed amendment transformed the once uncontroversial single–issue act into a passionately contested thirty–page omnibus bill.

The limited debate on the House floor following Representative Conyers’s proposed omnibus amendment is emblematic of the arguments in favor of and against omnibus legislation. Comments made by Representative Hank Johnson, the bill’s original sponsor, reveal why the omnibus process was utilized for this proposal:

Mr. Speaker, I am grateful and proud that my bill, H.R. 5281, the Removal Clarification Act of 2010, is the vehicle through which the DREAM Act comes to the floor today. My bill will enable Federal officials to remove cases filed against them to Federal Court in accordance with the spirit and intent of the Federal Officer Removal statute. By attaching the DREAM Act to this noncontroversial bipartisan bill, we are able to expedite the

92. *Id.* at 8091.

93. *See* H.R. 5281 (as introduced in House, May 12, 2010).

94. 156 CONG. REC. at 14190.

95. *See id.* at 14290.

96. *Id.* at 18957; *see also* H.R. 5281 (as passed by Senate, Dec. 3, 2010).

97. 156 CONG. REC. at 19324–28.

98. *Id.* at 19325.

99. *Id.*

process.¹⁰⁰

Texas Representative Lamar Smith, a Republican, opposed the omnibus process employed, claiming it was not transparent, did not allow for time to review the bill, avoided the proper committee process, and prevented amendments.¹⁰¹ The House passed the DREAM Act amendment to the RCA,¹⁰² but the amended RCA ultimately failed in the Senate due to failure to invoke cloture because of partisan divides on the controversial alteration to immigration policy.¹⁰³ Moreover, the Removal Clarification Act of 2011 passed in the very next session of Congress containing similar language as originally proposed for the 2010 RCA.¹⁰⁴ A report on the new bill by the House Committee on the Judiciary described why the originally uncontroversial 2010 RCA failed to become law noting, “[a] later attempt by the House and Senate to amend the bill with an *unrelated* immigration issue (the “DREAM Act”) *scuttled* further consideration of H.R. 5281.”¹⁰⁵

2. Consolidated Appropriations Act of 2021

CAA 2021 is one of the most dramatic and significant uses of omnibus legislation in the history of the United States. CAA 2021 came from humble beginnings but was inexplicably destined for so much more. The act started its life as H.B. 133, a meager six-page bill titled the “United States-Mexico Economic Partnership Act” that was introduced in the House on January 3, 2019.¹⁰⁶ One week later, the uncontroversial act passed the House by a simple two-thirds voice vote.¹⁰⁷ The Senate received the bill and reported it to the Senate Committee on Foreign Relations,¹⁰⁸ which substituted the entire text of the bill through an amendment.¹⁰⁹ However, the Committee’s substitutions were largely structural, and the Senate passed H.B. 133 as amended by the Committee by unanimous consent.¹¹⁰ Two years later, H.R. 133 took a dramatic turn. On December 21, 2020, the House tacked on to the humble bill all twelve appropriations bills for the 2021 fiscal year and other additions that

100. *Id.* at 19332 (emphasis added).

101. *Id.* at 19339–40.

102. *Id.* at 19349.

103. *Id.* at 22934.

104. H.R. 368, 112th Cong. (2011).

105. H.R. REP. NO. 112-17, at 1 (2011) (emphasis added).

106. United States-Mexico Economic Partnership Act, H.R. 133, 116th Cong. (as introduced in House, Jan. 3, 2019).

107. 165 CONG. REC. H432 (daily ed. Jan. 10, 2019).

108. *Id.* at S162.

109. H.R. 133 (as reported by S. Comm. on Foreign Relations, Dec. 17, 2019).

110. 165 CONG. REC. S251 (daily ed. Jan. 15, 2020).

constituted thousands of pages of text.¹¹¹ The House created a Frankenstein’s Monster and changed H.B. 133’s name to the Consolidated Appropriations Act of 2021.¹¹² Nevertheless, the original text of the United States-Mexico Economic Partnership Act was included as Division FF, Title XIX of H.R. 133—the third-to-last title in the amended bill.¹¹³ The new, approximately six-thousand-page, omnibus bill passed both the House and Senate after both chambers limited debate to only one hour¹¹⁴ and was signed into law three days later.¹¹⁵

The omnibus CAA 2021 included all twelve appropriations bills for fiscal year 2021 and much, much more. The bill included a broad coronavirus relief package, including grants for venue operators shuttered during the pandemic¹¹⁶ and funding for pandemic-related unemployment benefits.¹¹⁷ The act also incorporated legislation unrelated to COVID-19, like the Copyright Alternative in Small-Claims Enforcement Act of 2020,¹¹⁸ the Protecting Lawful Streaming Act of 2020,¹¹⁹ and the Water Resources Development Act of 2020.¹²⁰ The act further enacted abortion funding restrictions¹²¹ and created the Horseracing Integrity and Safety Authority.¹²²

In all, the 5,593-page omnibus bill amounted to \$2.3 trillion in discretionary spending—\$1.4 trillion for general government funding and \$900 billion for COVID-19 relief and stimulus packages.¹²³ The amount Congress appropriated to fund the

111. See 166 CONG. REC. H7301–15 (daily ed. Dec. 21, 2020).

112. H.R. 133 (as passed by House, Dec. 21, 2020).

113. *Id.* div. FF, tit. XIX.

114. See H.R. Res. 1271, 116th Cong. (2020); 166 CONG. REG. S7922 (daily ed. Dec. 21, 2020) (statement of Sen. Mitch McConnell).

115. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182.

116. See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Pub. L. No. 116-260, § 324, 134 Stat. 1993, 2022 (codified as amended at 15 U.S.C.A. § 9009a (Westlaw through Pub. L. No. 117-262)).

117. See CONG. RSCH. SERV., IF11723, UNEMPLOYMENT INSURANCE PROVISIONS IN THE CONSOLIDATED APPROPRIATIONS ACT, 2021 (DIVISION N, TITLE II, SUBTITLE A, THE CONTINUED ASSISTANCE FOR UNEMPLOYED WORKERS ACT OF 2020) (2020).

118. Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, 134 Stat. 2176 (codified in scattered sections of 17 and 26 U.S.C.).

119. Protecting Lawful Streaming Act of 2020, Pub. L. No. 116-260, § 211, 134 Stat. 2175, 2175–76 (codified at 18 U.S.C. § 2319C (2018 Supp. II)). See generally Dakota Foster, *Protecting Video Game Gameplay Creators: A Two-Pronged Copyright Approach*, TEX. A&M L. REV. 711, 724–25 (2022).

120. Water Resources Development Act of 2020, Pub. L. No. 116-260, 134 Stat. 2615 (codified in scattered titles of U.S.C.).

121. See JON O. SHIMABUKURO, CONG. RSCH. SERV., RL33467, ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE 23–24 (2021).

122. Horseracing Integrity and Safety Act of 2020, Pub. L. No. 116-260, 134 Stat. 3252 (codified at 15 U.S.C. §§ 3051–3060 (2018 Supp. II)). The Horseracing Integrity and Safety Act implements and enforces programs on anti-doping and medication control and racetrack safety. See *id.*

123. CONG. BUDGET OFF., DISCRETIONARY APPROPRIATIONS (INCLUDING ADJUSTMENTS) FOR FISCAL YEAR 2021 UNDER DIVISIONS A THROUGH L (2021) [hereinafter CAA 2021 APPROPRIATIONS PT. I]; CONG. BUDGET OFF., SUMMARY ESTIMATE FOR DIVISIONS M THROUGH FF H.R. 133, CONSOLIDATED

federal government included \$695 billion in defense spending and \$710 billion in funding for other departments and programs,¹²⁴ including initiatives related to climate-change and building a border wall.¹²⁵ The thousands of pages included in the omnibus Consolidated Appropriations Act of 2021 were introduced to members of Congress and American citizens just hours before its passage.¹²⁶ The lack of transparency was compounded by difficulties in downloading and printing the massive omnibus bill.¹²⁷ According to the Senate Historical Office, this omnibus bill was “by far the longest bill ever” passed by Congress.¹²⁸

B. Common Criticisms Associated with the Use of Omnibus Legislation

The sheer length and impact of massive omnibus legislation, like the Consolidated Appropriations Act of 2021, has left such bills open to criticism.¹²⁹ Omnibus legislation can have large repercussions affecting both law and the economy.¹³⁰ Given the massive importance of these bills, these criticisms should not go unnoticed. With the two examples of omnibus legislation above and other similar legislation in mind, what are some of the common complaints against grouping unconnected appropriations and policy items together in one large omnibus bill?

One common complaint is that omnibus legislation frequently “by-passes” the normal legislative process.¹³¹ The need to bypass the traditional path of legislation often results in the suspension of normal operating rules, which would ordinarily prevent the use of omnibus legislation.¹³² One repeated justification for omnibus legislation to originating outside of the ordinary lawmaking process is that it often combines multiple items, often important policy items which were not passed before

APPROPRIATIONS ACT, 2021 (2021).

124. CAA 2021 APPROPRIATIONS PT. I, *supra* note 123.

125. Niv Elis, *Congress Unveils \$2.3 Trillion Government Spending and Virus Relief Package*, THE HILL (Dec. 21, 2020, 2:40 PM), <https://thehill.com/policy/finance/531164-congress-unveils-23-trillion-government-spending-and-virus-relief-package> [<https://perma.cc/REM7-ES78>].

126. *Id.*

127. *Id.*

128. Andrew Taylor, *\$900B COVID Relief Bill Passed by Congress, Sent to Trump*, AP NEWS (Dec. 22, 2020), <https://apnews.com/article/congress-900-billion-coronavirus-bill-75389549d3eaf2f3828b16d45c9706e6> [<https://perma.cc/9XRF-P7R4>].

129. *See, e.g.*, Luke Broadwater et al., *Buried in Pandemic Aid Bill: Billions to Soothe the Richest*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/us/politics/whats-in-the-covid-relief-bill.html> [https://web.archive.org/web/20220928224759/https://www.nytimes.com/2020/12/22/us/politics/whats-in-the-covid-relief-bill.html].

130. Denning & Smith, *supra* note 37, at 1003 (arguing that omnibus legislation facilitates “logrolling and pork barrel politics that undermine[] majority rule and diminish[] accountability”); *see also supra* text accompanying notes 116–124.

131. Bach, *supra* note 45, at 346.

132. *See supra* notes 48–58 and accompanying text.

the legislative session ends.¹³³ However, the rushed nature of many omnibus bills deprives committees of their traditional supervisory role and prevents them from exhibiting their expertise over policy matters inserted into the legislation.¹³⁴ Likewise, omnibus legislation rushed against looming deadlines thwarts meaningful debate on an individual item's efficacy.¹³⁵ Therefore, omnibus legislation can lack the precision and thoughtful consideration of details that accompany more thoroughly considered and narrower legislation. Omnibus legislation can also be used as a device to hide controversial amendments from scrutiny and political damage.¹³⁶ Even if a proactive legislator or interest group can identify a controversial amendment in the limited time before its passage, the use of omnibus appropriations acts often reduce the opportunity for debate and amendment.¹³⁷

Furthermore, the expedited, helter-skelter backdrop frequently accompanying omnibus legislation, compounded by their incredible length, can erode public trust in the process and prevent constituents and legislatures alike from properly scrutinizing the bill before it takes effect.¹³⁸ Popular parts of omnibus bills can be used as diversions against unpopular ones, which legislatures can present to voters.¹³⁹ Information about what is in an omnibus bill is not always "cohesive," forcing voters to untangle "political posturing and grandstanding" of competing politicians, further harming public trust.¹⁴⁰ The ability to hide items within the depths of a massive omnibus bill increases the opportunity for corruption.¹⁴¹ Likewise, the gigantic length that some omnibuses reach decreases the likelihood lawmakers will detect mistakes and rule violations.¹⁴²

Additionally, the effect of large, rushed omnibus legislation can result in lawmakers not knowing what precisely is in the bills they pass.¹⁴³ Provisions can be inserted during drafting or through negotiations that are never formally discussed, and many, if not most, members are unaware.¹⁴⁴ Members of Congress have been blunt regarding the non-transparent omnibus process. Arizona Senator John McCain, a Republican, described omnibus negotiations as being "conducted behind closed

133. Pacilio, *supra* note 12.

134. See Bach, *supra* note 45, at 346.

135. Denning & Smith, *supra* note 37, at 960.

136. Gunter, *supra* note 23.

137. SATURNO & TOLLESTRUP, *supra* note 20, at 5.

138. Denning & Smith, *supra* note 37, at 974.

139. Pacilio, *supra* note 12.

140. *Id.*

141. See Maxey, *supra* note 18, at 699 ("The flood of special pension grants through the omnibus pension bills continues unabated and unchecked.").

142. Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 821 (2010).

143. Dodek, *supra* note 10, at 13–14; see *supra* notes 7–8 and accompanying text.

144. Devins, *supra* note 29, at 419.

doors—out of the sight of the people as well as most members of Congress.”¹⁴⁵ Likewise, West Virginia Senator Robert Byrd, a Democrat, remarked on the mystery of the content of many omnibus bills, stating, “Only God knows what’s in this monstrosity.”¹⁴⁶ Finally, the effect that grouping nongermane items into one omnibus bill has on the relationship between the executive branch and legislative branch and its diminution of the President’s veto power has been discussed in length.¹⁴⁷ The grouping of many vital provisions for one vote also has effects on inter-branch relations by causing government shutdowns if not passed in time.¹⁴⁸

III. CONSTITUTIONAL CONCERNS FOR THE USE OF OMNIBUS LEGISLATION

A. *The Legislative Branch’s Stalled Institutional Ambition*

The use of omnibus legislation propagates a continuing constitutional concern. At the heart of this concern is the notion that the legislative branch in recent decades has suffered from a decrease in institutional will, often referred to as the “ambition” of the branch.¹⁴⁹ Academia and scholarly writing have paid increasing attention to this stalled institutional ambition.¹⁵⁰ Dr. Jasmine Farrier has dedicated many scholarly works on the subject and has concluded that Congress has become ambivalent, resulting in delegations of authority to the executive branch on issues of “national interest” with profound consequences.¹⁵¹ Farrier defines this “institutional ambivalence” as “a cycle . . . that generally follows a pattern of delegation of power, followed by expressions of regret in various direct and indirect ways, followed often by

145. John McCain, Opinion, *A Budget We Should Be Ashamed of*, N.Y. TIMES (Oct. 25, 1998), <https://www.nytimes.com/1998/10/25/opinion/a-budget-we-should-be-ashamed-of.html> [<https://web.archive.org/web/20180131030843/https://www.nytimes.com/1998/10/25/opinion/a-budget-we-should-be-ashamed-of.html>].

146. George Hager, *House Passes Spending Bill*, WASH. POST (Oct. 21, 1998), <https://www.washingtonpost.com/archive/politics/1998/10/21/house-passes-spending-bill/4de4707c-0080-41c9-ae0b-84dc283f3801/> [https://web.archive.org/web/20170828060008/https://www.washingtonpost.com/web/20170828060008/https://www.washingtonpost.com/archive/politics/1998/10/21/house-passes-spending-bill/4de4707c-0080-41c9-ae0b-84dc283f3801/?utm_term=.15c24437de4e].

147. Compare Bar-Siman-Tov, *supra* note 142, at 857, and Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 79 (1995) (arguing the use of omnibus legislation “raises the ‘cost’ to the President of vetoing a bill” and “reduces the likelihood that the President’s national, anti-factional voice will be heard”), with Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RESV. L. REV. 1605, 1619–23 (1997).

148. Will Schildknecht, Note, *Designing for Robustness: Overcoming Systemic Risk in the Political Branches*, 103 CALIF. L. REV. 433, 463 (2015).

149. See Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 24–28 (2009).

150. See *e.g.*, JASMINE FARRIER, CONGRESSIONAL AMBIVALENCE: THE POLITICAL BURDENS OF CONSTITUTIONAL AUTHORITY (2010).

151. *Id.* at 2; see also Jasmine Farrier, *The Contemporary Presidency: Executive Ambition Versus Congressional Ambivalence*, 40 PRESIDENTIAL STUD. Q. 310, 311 (2010).

more delegation.”¹⁵² Many causes have been theorized to explain this decrease in institutional ambition. Foremost among these theories are the primary goal of reelection and the desire to enact policy preferences of congressional members.¹⁵³

Congress’s ambivalence to authority caused by congressional members’ fixation on reelection and policy preferences may also encourage the increased use of omnibus legislation. Omnibus legislation allows Congress to bypass the traditional legislative path, which by design is “extremely challenging” to pass new enactments.¹⁵⁴ The omnibus strategy provides a tool for Congress to pass legislation more easily without the added effort it would require to energize the branch. Likewise, Presidents are aware of these challenging institutional hurdles in the legislative branch and benefit from encouraging the use of omnibus legislation.¹⁵⁵ All of these factors can lend support as to why Congress has continually legislated away its own ambition through omnibus legislation. Additionally, omnibus appropriation legislation is an increasing source of legislative branch delegation of authority. The lack of “political will” and “procedural discipline” has contributed significantly to the use of large, last-minute omnibus appropriation acts.¹⁵⁶ Members of Congress themselves have explicitly expressed the institution’s lack of political will in regard to the budgeting process.¹⁵⁷

A reinvigoration of Congress’s ambition is not likely to come from external forces. It is therefore dependent on “institutionally protective” members to both protect and restore congressional authority within the federal government.¹⁵⁸ While the legislative branch’s ambition continues to flutter, the executive branch’s ambition is stronger than ever as the President has become the “dominant political institution.”¹⁵⁹ Particularly, the executive branch continues to amass authority under a broad notion of the unitary executive theory.¹⁶⁰ Therefore, the executive continues to benefit from

152. FARRIER, *supra* note 150, at 2.

153. Krutz, *supra* note 60, at 211.

154. *Id.* at 212.

155. *Id.* at 210.

156. Denning & Smith, *supra* note 37, at 961.

157. Farrier, *supra* note 151, at 323 (“[M]ajority leader Steny Hoyer is in favor [of a commission to promote Congressional fiscal responsibility], saying that Congress lacks the political will to budget responsibly.”).

158. JASMINE FARRIER, CONSTITUTIONAL DYSFUNCTION ON TRIAL: CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS 93 (2019).

159. John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1936 (2008).

160. Professor Laura Cisneros described the unitary executive theory in three parts:

(1) [D]epartmentalism, which asserts that the President’s power to interpret the Constitution is at least equal to that of the Court or Congress; (2) exclusivism, which asserts that all executive power under the Constitution rests solely with the President; and (3) executive power protectionism, which holds that the executive powers of the President may not constitutionally be appropriated, divested, or diluted by Congress.

Laura A. Cisneros, *Standing Doctrine, Judicial Technique, and the Gradual Shift from Rights-Based Constitutionalism to Executive-Centered Constitutionalism*, 59 CASE W. RESV. L. REV. 1089, 1128 (2009). Judge

the decreased ambition of Congress and has no motivation to intervene. Likewise, the judicial branch is not likely to come to the aid of a weakening legislative branch. As Farrier points out, “the federal court system cannot provide the institutional ambition.”¹⁶¹ Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* echoed similar sentiments stating, “[b]ut I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.”¹⁶²

Just as the judiciary cannot reinvigorate Congress, it can neither prevent Congress’s use of omnibus legislation. As Farrier puts it, “judges cannot force Congress to want power back.”¹⁶³ Even if the use of omnibus legislation is damaging to congressional authority, omnibus legislation is not, on its face, unconstitutional. The Constitution does not mandate or prescribe any requirements regarding the length of debate for proposed legislation.¹⁶⁴ Article I only requires bicameralism and presentment for a bill to pass.¹⁶⁵ Traditional omnibus legislation meets these constitutional requirements. Therefore, the judicial branch is not likely to interfere and prevent the legislative branch’s use of omnibus legislation. Through the use of vast delegations of power of the executive branch and the increased use of omnibus legislation, Congress has clearly demonstrated to the American people that it lacks the institutional will to maintain its constitutionally delegated ambition and is more than willing to fall in line behind the executive branch.

B. Omnibus Legislation and Separation of Powers

This Note is a continuation of the previous literature concerning Congress’s decreased ambition. This Note adds to this scholarly debate by presenting the argument that the use of omnibus legislation is yet another symptom of the ambivalence disease which has plagued Congress in recent decades. In recent years, Congress has increasingly delegated authority to the executive branch.¹⁶⁶ This increased delegation creates a separation of powers issue that is perpetuated and exacerbated by the use of omnibus legislation. The legislative branch’s lack of institutional ambition has led

Steven Calabresi found three reasons for an energetic, unitary executive:

First, a unitary executive was said to be necessary to ensure energy in government; second, a unitary executive was said to be necessary to ensure accountability for all exercises of executive power; and third, a unitary executive was said to be necessary to enable the President to defend himself from constitutional encroachments on his powers by the legislature.

Calabresi, *supra* note 147, at 37.

161. FARRIER, *supra* note 158, at 93.

162. 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

163. FARRIER, *supra* note 158, at 56.

164. *Common Cause v. Biden*, 909 F. Supp. 2d 9, 13 (D.D.C. 2012).

165. Devins, *supra* note 29, at 407.

166. *See supra* Section III.A.

to the increased use of omnibus legislation. Therefore, the use of omnibus legislation presents a unique challenge for the separation of powers system to address.¹⁶⁷ Delegation is an attractive strategy for Congress as it can defer tough decisions to the executive branch and dissipate any political risk to electability.¹⁶⁸ Omnibus legislation also provides a technique to get mass legislation passed through a system that was designed to favor the status quo and be “extremely challenging” to pass new legislation.¹⁶⁹ The use of omnibus legislation is an attractive delegation strategy because it allows Congress to pass legislation as quickly as possible and with little transparency. The result of this process is an often long, complicated, and vague bill that requires the executive branch to interpret it with wide latitude.

The idea of institutional ambition derives from the constitutional structure designed by the Framers of the Constitution.¹⁷⁰ The system of separation of powers is central to the design of the United States Constitution.¹⁷¹ An inherent and crucial part of the system of separation of powers is the inter-branch back -and -forth.¹⁷²

An appropriate beginning to any argument about the structure of the federal government is with the *Federalist Papers*. The *Federalist Papers* provide a primary source behind the reasoning, which went into the adoption of the structure of the federal government and has been an increasing source of reliance in the judiciary.¹⁷³ James Madison described it best in *Federalist No. 51*: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”¹⁷⁴ “The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.”¹⁷⁵ Therefore, the balance created by the system of separation of powers should not just be preferred, but is absolutely necessary. Justice Antonin Scalia in *Morrison v. Olson* best described the importance of separation of powers within the constitutional structure:

Without a secure structure of separated powers, our Bill of Rights would

167. Dodek, *supra* note 10, at 1.

168. Farrier, *supra* note 151, at 323.

169. Krutz, *supra* note 60, at 212.

170. See generally THE FEDERALIST NO. 51 (James Madison).

171. *Id.*

172. *Id.*

173. Chief Justice Marshall discussed the *Federalist Papers* in *Cohens v. Virginia*, 19 U.S. (3 Wheat.) 264 (1821), and “[t]he serious attention given to the Federalist Papers has not waned, but instead has grown since Chief Justice Marshall wrote th[ose] words.” Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007). Then-Professor (now Judge) Gregory Maggs has explained that “[i]n the aggregate, academic writers and jurists have cited the Federalist Papers as evidence of the original meaning of the Constitution more than any other historical source except the text of the Constitution itself.” *Id.*

174. THE FEDERALIST NO. 51 (James Madison).

175. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. . . .

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized “[t]he insufficiency of a mere parchment delineation of the boundaries” to achieve the separation of powers. “[T]he great security,” wrote Madison, “*against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.* The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.”¹⁷⁶

Congress’s stalled institutional ambition presents serious constitutional ramifications because of its damaging effects on the separation of powers design within the Constitution. Its increased reliance on omnibus legislation and the consequence of such use diminishes the legislative branch’s “constitutional means and personal motives” to maintain its constitutionally delegated ambition and leaves a power vacuum for other branches, especially the executive branch, to fill.¹⁷⁷

Furthermore, the structure of the national government, and especially the legislative branch, is designed to promote and reinforce the status quo, meaning that government legislation (change) is supposed to track along at a slow pace. The challenging process a bill must navigate in order to become law is intentional and designed to protect the interest of the people:

The two-chambered Congress, each elected by different constituencies for different terms of office in (originally) different manners of selection, was an explicitly planned obstacle to national consensus, and still is, as these structures were meant to encourage different constituent perspectives while keeping the entire federal structure relatively slow-moving.

. . . Multiple layers of representation, deliberation, and power distribution among the branches thus become avenues for slowing down majority will

176. *Id.* at 697–98 (second and third alterations in original) (emphasis added) (citations omitted) (first quoting THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and then quoting THE FEDERALIST NO. 51, *supra*, at 321–22 (James Madison)).

177. *Id.* at 698.

and the potential for the tyranny of repressive, and simply bad, ideas.¹⁷⁸

The passing of omnibus bills does not follow the original vision of the legislative branch, which favors the status quo and structured debate.¹⁷⁹ The structural problems created through the use of omnibus legislation are twofold. On one hand, it fosters an unambitious atmosphere within the legislative branch, which is all too willing to forgo actual debate and compromise for rushed stopgap bills that include vast delegations to the executive. On the other hand, it creates misguided legislative production to pass agenda matters which could not otherwise pass through the intentionally slow system during a traditional legislative cycle with appropriate debate and scrutiny.

The shadowy process of omnibus legislation and its dangerous loophole around the traditional process and status quo are outlined in Krutz's book on omnibus legislation:

Bills that become overly controversial, have too much attention paid to them, and therefore are likely to fail alone can be tucked away in an omnibus bill. There they are overshadowed by the larger issue of the omnibus nucleus, which draws the most controversy and attention. Once assembled, the nucleus is what is debated, not the attachments.

Members at large, busy people with too much to do, pay attention to the main part of the bill as it is processed through Congress. They are seldom aware of the minutiae of omnibus packages.¹⁸⁰

It is in this way that omnibus legislation alters "the time-honored legislative process."¹⁸¹ Even supporters of the efficiency produced by omnibus legislation, such as Krutz, identify the dangers of omnibus legislation for enacting "major changes" because of an omnibus bill's inability to provide for "full deliberation and consideration" of all issues included.¹⁸²

The issue omnibus legislation presents to the separation of powers doctrine has gone unaddressed by the courts. On one occasion, litigants in *News America Publishing, Inc. v. FCC* raised a separation of powers argument in opposition to the legality of an omnibus bill; however, the case was decided on alternative grounds,

178. JASMINE FARRIER, *PASSING THE BUCK: CONGRESS, THE BUDGET, AND DEFICITS* 22 (2004).

179. Lisa Schultz Bressman, Essay, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1423 n.155 (2000) (noting that the constitutional structure intentionally favors the status quo, and stating that Professors "William Eskridge and John Ferejohn have demonstrated that delegation disrupts the strong status quo bias built into the Article I lawmaking scheme").

180. KRUTZ, *supra* note 65, at 2.

181. *Id.* at 3.

182. *Id.* at 142.

leaving the issue unaddressed by the court.¹⁸³ The question of whether omnibus legislation presents an unconstitutional delegation under the doctrine of separation of powers is still unresolved, but it is not likely to be addressed by courts any time soon. Judges are hesitant to rule on cases in a way that would entangle them between the political branches.¹⁸⁴ The more Congress delegates to the executive branch, the weaker the legislative branch becomes.¹⁸⁵ Omnibus legislation has been a convenient and often used tool for Congress to delegate a wide range of authority to the executive branch.¹⁸⁶ The large delegations possible through omnibus legislation exacerbate this concern and speed up the decline of the body. One concern of omnibus legislation when used to pass appropriations acts is that it does not allow Congress to properly debate the merits and needs of programs created by the passage of the legislation.¹⁸⁷ Today, omnibus legislation has been used extensively and repeatedly to package all appropriations acts into one bill, thus negating the ability for members to fully vet delegations of powers to executive agencies. The broad range of omnibus bills and lack of debate prevents Congress from exercising any form of expertise and therefore requires Congress to operate in such a level of generality as to delegate increasing authority to the executive branch.

Conversely, the inverse position can be raised. Instead of arguing that omnibus legislation is symbolic of the legislative branch's loss of institutional ambition, one could state that omnibus bills are the legislative branch's attempt to compete with an increasingly energetic and vast executive branch. However, if this was the case, the complexities and ambiguities left in the wake of many omnibus bills seem to only bolster the regulatory arm of the executive branch. Furthermore, if omnibus legislation was an attempt to bolster the legislative output of Congress and regain its foothold in the political arena, the lack of trust, transparency, and explanation as a result of the often rushed and secretive process seems to have the exact opposite effect. Instead, it seems more likely that omnibus legislation is a tactic for congressional members to present to constituents as if they have done something tangential but without having to answer for any particular statutory or policy shifts. Omnibus legislation simply provides Congress with an easy tool to hold off any actual decision making to the end of session and avoids drawn-out public debates over sensitive topics for which legislators may be held accountable. Instead, they can secretly bundle old and new legislative proposals together in the dead of night and behind closed doors and leave the executive branch to answer for any implementation and enforcement. Of course, members of Congress will often complain about this delegation to

183. 844 F.2d 800, 805 n.8 (D.C. Cir. 1988).

184. FARRIER, *supra* note 158, at 13.

185. Leigh Osofsky, *Agency Legislative Fixes*, 105 IOWA L. REV. 2107, 2145 (2020).

186. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1967 (2020) (noting the Farm Bill delegated "a wide range of authority to the U.S. Department of Agriculture").

187. FARRIER, *supra* note 178, at 33.

their constituents, but nothing will be done to restore the balance of powers.¹⁸⁸

Another argument takes the position that omnibus legislation is a tool in favor of congressional legislative power to avoid the presidential veto.¹⁸⁹ The effects of omnibus legislation on the President's veto power have been thoroughly considered in academic and legal writing.¹⁹⁰ This Note does not seek to retread much of that discussion, but for the sake of the Note, it is important to acknowledge the pervasive effects omnibus legislation has on the system of separations of powers. While omnibus legislation may be a tool for Congress to pass unfavorable legislation around the President and therefore is a tool in favor of Congress, this theory does not account for the vast delegations of authority to the executive branch and away from the legislative branch. Therefore, omnibus legislation does more harm to the legislative branch in the larger system of separations of powers than to embolden it.

C. Solutions

Many solutions have been presented to address the continuing problems presented by the systemic use of omnibus legislation.¹⁹¹ First, the House and Senate could amend their standing rules to forbid the use of large omnibus bills with little -to -no -time for deliberation. However, this will not provide a prolonged solution. Congress has already exhibited its propensity to rescind its own rules currently in place, which prohibit such limited debate, and there is no reason to think that it would not continue to ignore any additional restrictions on the use of omnibus legislation.¹⁹² Secondly, a promising solution has been proposed in the form of single-subject requirements.¹⁹³ One such proposal was called the Truth-in-Legislation Amendment, which would amend the Constitution to “requir[e] that Acts of Congress deal with a single subject, and express that subject in the Act’s title.”¹⁹⁴ Forty-three states have similar single-subject provisions.¹⁹⁵ Single-subject requirements are widely employed by state constitutions and limit the use of omnibus legislation.¹⁹⁶ However, even at the state level, single-subject requirements are often not an effective limit on state governments because of the large deference given to legislators to draft

188. See FARRIER, *supra* note 150, at 2.

189. KRUTZ, *supra* note 65, at 124–26.

190. See generally Devins, *supra* note 29, at 406 (arguing that “[c]ommon sense suggests that [the veto power] is threatened by omnibus legislation”).

191. See Denning & Smith, *supra* note 37, at 961–62 (highlighting campaign finance reform, term limits, the balanced-budget amendment, and the line-item veto as solutions to problems within the legislative process).

192. See *supra* notes 53–57 and accompanying text.

193. See generally Denning & Smith, *supra* note 37.

194. *Id.* at 962–63.

195. *Id.*

196. *Id.* at 965–67.

legislation.¹⁹⁷

While these solutions may provide a temporary bandage on the wound caused by omnibus legislation, they will not provide a lasting solution to the underlying cause. These solutions cannot force Congress to do what it does not want to do—reinvigorate its own institutional ambition. Instead, the most efficient and long-lasting solution is to foster an increased institutional ambition within the legislative branch by holding legislators who vote for omnibus legislation accountable at the ballot box. The problems inherent in any legislative process are solely in the domain of Congress itself to fix; therefore, only the electorate can hold it accountable.¹⁹⁸

In order to address the issues created in the wake of increased use of omnibus legislation, it is important to focus on the institutional ambition of Congress rather than changes to the rules guiding the legislative process or constitutional amendments. This is because a solution centered on addressing the legislative branch's institutional will seeks to get to the heart of the true problem plaguing Congress and why the use of omnibus legislation has become increasingly popular—a lack of institutional ambition. This solution addresses the underlying problem instead of treating the symptoms. Congress must find a way to internally increase its own institutional ambition, which was envisioned by Madison in *Federalist* 51.¹⁹⁹ Since Congress does not seem particularly interested in increasing its own ambition, this can only be achieved by voters holding their representatives accountable.

To address the problem of stalled ambition of the legislative branch, it is just as important to raise public awareness and perception of the issue. This way, voters can either hold current members of Congress accountable or elect new institutionally – minded members. The increase in public awareness of the dangers of omnibus legislation can thereby embolden the electorate to hold Congress accountable, resulting in a sustained increase in institutional ambition of the legislative branch. It has been argued that passing individual legislation is not “manageable in Congress” and that Congress is unable to cooperate enough resulting in the necessity of omnibus legislation, especially in the appropriations context.²⁰⁰ But are the American voters okay with throwing their hands up and saying Congress is not functional and, therefore, this is the best it can do? Or ought they hold Congress to a higher standard while also holding them accountable?

CONCLUSION

In conclusion, the process of introducing many diverse topics under one heading for a singular vote, known as omnibus legislation, is not a new invention within the

197. *Id.* at 993.

198. Bach, *supra* note 45, at 342.

199. *See generally* THE FEDERALIST NO. 51 (James Madison).

200. Devins, *supra* note 29, at 400.

U.S. Congress, but it is a radical invention. The use of omnibus legislation by-passes the normal legislative process creating large, hurried bills which lack the precision and consideration of smaller, single-issue bills. As a consequence of this enigmatic process, the accountability of Congress and its transparency to voters is diminished. Instead, the drastic change has come in the form of a Congress with a stalled institutional ambition. Congress is all too willing to take a back seat to an increasingly energetic executive branch. Omnibus legislation allows the legislative branch to push critical legislation to the last minute when public, extensive, and meaningful debate is hopeless. The result is immense, stopgap omnibus legislation which includes consequential policy shifts that have profound impacts on the American people and which otherwise could not have passed. The executive branch is often left in the wake of vague omnibus legislation with wide discretion to interpret and implement the new policy.

Members of Congress and congressional committees alike have decried the use of omnibus legislation as damaging and sloppy. Nevertheless, the use of omnibus legislation continues to grow, and its application continues to encompass increasingly vital legislation for the country, such as the Consolidated Appropriations Act of 2021. While solutions have been proposed to address the use of omnibus legislation, these efforts only seek to address the symptoms of the ambivalence which plagues Congress.

Increasing attention must be paid to the institutional ambition of the legislative branch. A reinvigoration of the separation of powers system envisioned by the Framers of the Constitution is necessary. This reinvigoration of the legislative branch is only possible through increased pressure by an attentive electorate to support institutionally minded legislators.