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**The Use and Misuse of
Appropriations Riders**

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INTRODUCTION

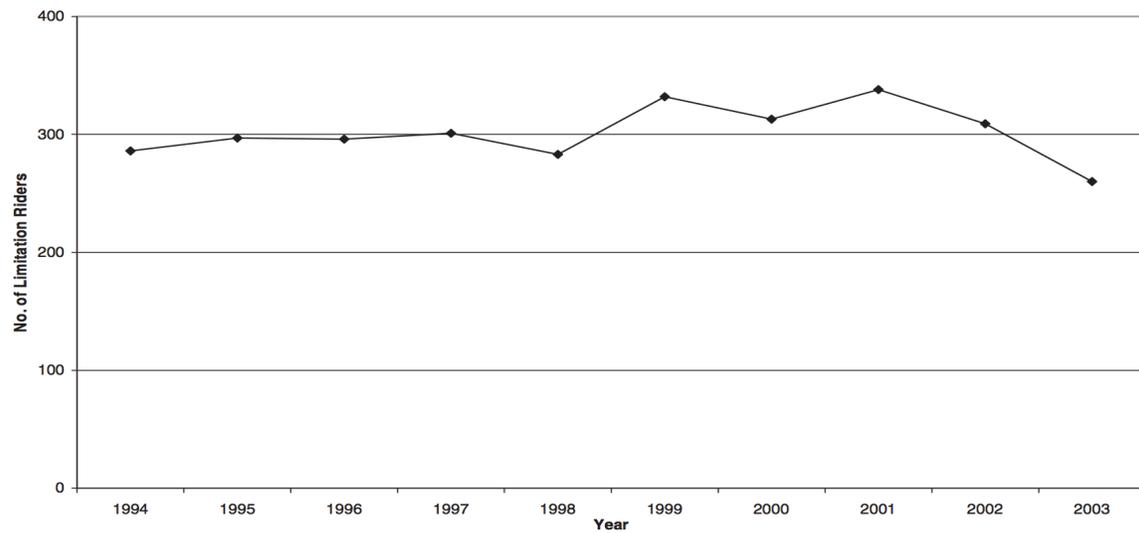
Appropriations riders are one of the most controversial, yet most important, ways that Congress makes policy. Hundreds of riders are enacted every year concerning a wide range of topics. For perspective, as the graph below demonstrates, in *each* year from FY1994 to FY2003 approximately 300 riders affecting policy were passed.¹ The topics that these riders covered ran the gamut from prohibiting regulations from being issued to preventing the implementation of parts of the Clean Air Act.² Although riders can be related to every policy area imaginable, they are still all subject to the same Congressional rules and legal restrictions.

Part I of this paper seeks to explore these rules and restrictions and delineate when riders can and cannot be used. To do this, the paper will focus on the Congressional rules that govern riders—House Rule XXI and Senate Rule XVI—along with the main court cases related to riders. Part II of the paper explores the history of riders, including the Hyde and Boland amendments, and discusses riders' contentious usage in the recent past. Finally, Part III will outline the main arguments for and against the use of riders in the appropriations process.

¹ Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767 (2010).

² *Id.*

FIGURE 1. Number of Limitation Riders Affecting Policy in 12 Major House Appropriations Committee Passed Appropriations Bills, FY 1994–FY 2003



Note: The House Appropriations Committee did not pass two bills in FY 2003, reducing the count of limitation riders for that year.

Source: Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 768 (2010).

TABLE 2. Substance of Limitation Riders Offered by House Appropriations Committee, 1993 (FY 1994)–2002 (FY 2003)

None of the funds can be used to	N	Percentage
(1) Enforce/implement an existing law/regulation	201	4.97
(2) Make a specific decision with policy effects	2,692	66.60
(3) Develop/publish a specific rule/regulation	26	0.64
(4) Develop/publish a regulation described generally ^a	101	2.50
(5) Take action contrary to existing laws or regulations	56	1.39
(6) Implement a treaty	11	0.27
(7) Transfer money from one program to another	120	2.97
(8) Reimburse another agency for an action/service	15	0.37
(9) Publish/release studies, evaluations, reports	44	1.09
(10) Reprogram funds without prior approval	140	3.46
(11) Fund an advisory committee	24	0.59
(12) Release information	12	0.30
(13) Lobby Congress (by agencies)	71	1.76
(14) Lobby Congress (by groups funds money from agencies)	27	0.67
(15) Supersede restrictions placed on executive branch appointment powers (by the president)	22	0.54
(16) Make a specific decision that affects policy outside the agency's jurisdiction	11	0.27
(17) Prevent agencies from taking an administrative action	7	0.17
(18) Perform administrative tasks	462	11.43
Total	4,042	99.99^b

Note: The different types of limitation riders are described in more detail in Online Appedix B.

^a An example of the prohibition of a regulation described generally is found in Table 1, with the limitation rider forbidding the Occupational Safety and Health Administration from developing a regulation with respect to the type of farms described therein.

^b The Percentage column does not add to 100 due to rounding.

Source: Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 769 (2010).

I. WHAT ARE RIDERS AND WHAT IS THE LAW THAT GOVERNS THEM?

A. A DEFINITION OF RIDERS

Appropriations riders, also known as “limitations,” are “amendments to an appropriations bill which ‘prohibit the use of money for part of the purpose [of the bill] while appropriating for the remainder of it.’”³ There are two types of riders—those that completely prohibit the use of funds for a specific purpose and those that limit the amount of funds that can be used to carry out certain activities.⁴ The second type are sometimes referred to as “not to exceed” limitations because they specify that the money put towards a specific purpose is “not to exceed” a given threshold amount.⁵

One important characteristic of riders is that they are phrased in the negative.⁶ For example, riders often begin by stating, “[N]one of the funds in this Act shall be used for [...]”⁷ This phrase, or one similar, is part of what distinguishes riders from the legislative provisions that are often proposed during the appropriations process. In fact, legislative provisions generally start with the phrase, “Notwithstanding any other provision of law...”⁸ In addition to the language they use, riders and legislative provisions differ in their effects. Legislative provisions “mak[e] new law or chang[e] existing law,”⁹ while riders do neither.¹⁰ Accordingly, riders and legislative provisions are treated differently in Congress.

³ Neal E. Devins, *Regulation Of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 461 (1987).

⁴ Jessica Tollestrup, Cong. Research Serv., R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues* (2014).

⁵ *Id.*

⁶ *Id.*

⁷ ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 268 (2007).

⁸ *Id.* at 270.

⁹ Tollestrup, *supra* note 4.

¹⁰ *Id.* at 2.

Characteristics	Limitations	Legislation
Purpose	To prevent appropriations from being available for specific activities	To change the application of existing law, to amend existing law, or to establish new law
Common phraseology	“None of the funds in this act may be used for...”	“Notwithstanding this or any other Act...” or “Notwithstanding any other provision of law...”
Typical placement	In account language, or general or administrative provisions	In general or administrative provisions; in omnibus appropriations acts, significant legislation may be included in a separate title
Status generally under House Rule XXI and Senate Rule XVI	Permitted	Prohibited

Source: ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 270 (2007).

B. THE LAW GOVERNING RIDERS

The rules that govern riders and legislative provisions during the appropriations process once appropriations bills have been brought to the floor and are being considered by the entire chamber are House Rule XXI and its Senate counterpart, Senate Rule XVI.¹¹

1. House Rule XXI

House Rule XXI, entitled “Restrictions on Certain Bills,” provides the main framework under which riders and legislative provisions are regulated. Clause two (attached as Appendix A) contains the language that specifically applies to appropriations bills and their amendments.¹²

a. Clause 2(b)

House Rule XXI, clause 2(b) states:

A provision changing existing law may not be reported in a general appropriation bill,

¹¹ *Id.* at 4.

¹² House Rule XXI, clause 2 (2015), available at <http://clerk.house.gov/legislative/house-rules.pdf>. The language of House Rule XXI, clause 2 has not changed in the recent past. See e.g., House Rule XXI, clause 2 (1999), available at <http://www.gpo.gov/fdsys/pkg/HMAN-106/html/HMAN-106-pg782.htm>.

including a provision making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation, except germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill (which may include those recommended to the Committee on Appropriations by direction of a legislative committee having jurisdiction over the subject matter) and except rescissions of appropriations contained in appropriation Acts.¹³

As written, this section generally outlaws legislative provisions from being included in appropriations bills that are brought to the floor because they “chang[e] existing law.” However, there is an exception to this principle included in the section—the Holman Rule. The Holman Rule exempts “germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill” from the ban on legislative prohibitions.¹⁴ Thus, in short, the inclusion of Holman Rule in House Rule XXI, clause 2(b) means that legislative provisions are permitted in appropriations bills if they are related to the subject of the bill and reduce expenditures.

To better understand the difference between legislative provisions that are prohibited, legislative provisions that are protected by the Holman Rule, and riders, imagine a law that said the government would give everyone aged 70 or older \$300. A legislative provision that said that the government would give everyone aged 69 or older \$300 would be prohibited because it would change existing law. However, a legislative provision that said the government would give everyone aged 71 or older \$300 would be permissible under the Holman rule because it would decrease the amount of money spent by the government, even though it changed existing law. By contrast, a rider would be an amendment that specified that no funds should be used to give anyone \$300.

In House Rule XXI, clause 2(b) is complemented by clause 2(c), which extends the

¹³ *Id.*

¹⁴ Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U. L. REV. 51, 71 (1979).

prohibition on language “changing existing law” from reported appropriations bills to amendments to such bills.¹⁵ Although House Rule XXI bans most legislative provisions from being included within a bill itself or as an amendment, the Rule is “not self-enforcing.”¹⁶ Therefore, to prevent a legislative provision from being passed into law in an appropriations bill, a congressman must raise a point of order against it.¹⁷ The presiding officer, sometimes with the advice of the House parliamentarian, will then rule on the point of order, and it must be sustained in order for a legislative provision to be struck from the bill.¹⁸ Because points of order are not always raised, some legislative provisions that clearly conflict with Rule XXI do get passed as part of appropriations bills.¹⁹ Additionally, the House can vote to waive points of order when considering a bill, thereby allowing legislative provisions to be included.²⁰ Points of order based on House Rule XXI are waived through either special rules or unanimous consent agreements. Special rules are initiated by the Committee on Rules and must be approved by a majority of the House to be valid.²¹ On the other hand, unanimous consent agreements are “orally propounded on the floor by a Member and entered into if no Member objects on the floor at that time.”²²

b. Clause 2(c)&(d)

Although House Rule XXI prohibits most legislative provisions, riders, in contrast, are generally permitted. Clause 2(d) states:

After a general appropriation bill has been read for amendment, a motion that the Committee of the Whole House on the state of the Union rise and report the bill to the

¹⁵ House Rule XXI, *supra* note 12; Tollestrup, *supra* note 4 at 4.

¹⁶ Tollestrup, *supra* note 4 at 5.

¹⁷ *Id.* at 4–5.

¹⁸ *Id.* at 3, 5.

¹⁹ Congressmen may choose not to raise points of order for a variety of reasons, including because they feel that a change in the law should be made. Fisher, *supra* note 14, at 71.

²⁰ *Id.* at 70.

²¹ Jessica Tollestrup, Cong. Research Serv., R42933, Regular Appropriations Bills: Terms of Initial Consideration and Amendment in the House, FY1996-FY2015 5– 6 (2015).

²² *Id.* at 6.

House with such amendments as may have been adopted shall, if offered by the Majority Leader or a designee, have precedence over motions to amend the bill. If such a motion to rise and report is rejected or not offered, amendments proposing limitations not specifically contained or authorized in existing law for the period of the limitation or proposing germane amendments that retrench expenditures by reductions of amounts of money covered by the bill may be considered.²³

The first part of this section, when read with clause 2(c), describes the procedural restrictions that amendments, including those containing limitations (riders), are subject to. Essentially, amendments other than riders can be proposed while the bill is being read to the House, as long as they are related to the paragraph being read.²⁴ After the reading of the bill has ended, amendments will not be considered if the Majority Leader makes a motion to rise and report (i.e. a motion close the proceedings and leave the bill as is), and it is successful. However, if the Majority does not make a motion to rise and report, or if the one that is made fails, riders can be proposed for consideration. Because riders, like some legislative provisions, are amendments to appropriations bills, their scope is restricted by clause 2(c)'s ban on "changing existing law." Combining clause 2(c)&(d), it becomes clear that riders limiting or capping the use of funds can be permitted as amendments to appropriations bills as long as they do not "chang[e] existing law."

To stop a rider from being included in a bill, a congressman can raise a point of order claiming that the rider violates clause 2(c). If a point of order is raised, the burden of proof shifts to the party who proposed the rider to prove that it is appropriate.²⁵ Given that it can often be hard to determine when existing law is being changed, there is a "thin line between" a point of order being overruled, such that a rider is allowed to stand, and a point of order being sustained,

²³ House Rule XXI, *supra* note 12.

²⁴ Tollestrup, *supra* note 4, at 5.

²⁵ *Id.* at 22.

such that a rider is considered to be “legislation” and is rejected.²⁶ How the presiding officer rules on a point of order is often based “on parliamentary precedents and interpretations.”²⁷

2. Precedent in the House

Throughout history, rulings in the House on points of order regarding riders have generated a body of precedent that establishes certain standards used to determine the propriety of a proposed limitation. Of course, because the House can waive points of order when it is considering a bill, these standards are not always indicative of the fate of a rider.²⁸ However, in many cases, they do provide a good sense of whether or not a rider will stand up to a point of order challenge.

a. When Are Riders Permitted?

First, riders have been upheld when they “prohibit funding for the promulgation of a specific rule, as long as such rule is precisely described in the text of the limitation.”²⁹ Relatedly, riders have been allowed when they ban agencies from spending money on specific regulations.³⁰ Even more narrowly, points of order have been overruled for riders that prevent money from being spent on certain activities. For example, one rider included in the FY1974 Department of Housing and Urban Development Space, Science, and Veterans Appropriations Act stated:

Provided, That none of the funds appropriated in this Act shall be used to further in any way the research, development or construction of any reusable space transportation system or space shuttle or facilities therefore.³¹

The scope of this rider was very narrow—it simply prohibited the use of funds for the advancement of certain space technology.

²⁶ Schick, *supra* note 7, at 268.

²⁷ *Id.*

²⁸ Fisher, *supra* note 14, at 70.

²⁹ Tollestrup, *supra* note 4 at 7.

³⁰ *Id.* at 8.

³¹ *Id.*

On a broader scale, riders have also been used to ensure that people who receive funds have, or do not have, specific qualifications. Creating riders of this kind can be tricky, however, because, as a precedent from 1896 states, ““While it is not in order to legislate as to qualifications of the recipients of an appropriation, the House may specify that no part of the appropriation shall go to recipients lacking certain qualifications.””³² Similarly, riders have been upheld that restrict the receipt of funds to people who do not have specific characteristics. For example, one amendment to the FY1973 Labor, and Health, Education, and Welfare Appropriations Act banned funds from being used to buy goods or services from suppliers who “compensate[e] any officer or employee at a rate in excess of level II of the Executive Schedule under section 5313 of title 5, United States Code.”³³ Furthermore, riders can be used to ban the payment of salaries to government and nongovernment employees who behave in specific ways, such as “perform[ing] any service [...] in connection with the printing and binding of part 2 of the annual report of the Secretary of Agriculture.”³⁴

Additionally, “not to exceed” limitations are permitted to cap the amount of funds used for certain activities or for specific purposes. This type of rider is allowed even when it is limiting the amount of funds used for a purpose authorized by law at a level lower than what was previously authorized.³⁵ Relatedly, “not to exceed” riders can limit the amount of funds that can be spent under the budget authority in a specific appropriations act. An amendment to the FY1954 Mutual Security Administration appropriations bill helps illustrate this principle stating:

Money appropriated in this bill shall be available for expenditure in the fiscal year ending June 30, 1954, only to the extent that expenditures thereof shall not result in total aggregate net expenditures of all agencies provided for herein beyond the total of

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 11.

\$5,500,000,000.³⁶

In a similar vein, riders can restrict the percentage of appropriated funds that can be “expended or obligated” by the bodies receiving the appropriation.³⁷

Furthermore, riders that prohibit the use of funds for earmarks are permissible.³⁸

Earmarks are essentially the direct opposite of riders because instead of restricting funds for a specific activity, they provide for a “discrete revenue stream to a particular program within the federal budget, regardless of whether that program is local or national in scope.”³⁹ However, earmarks, unlike riders, usually do not have the force of law because they are generally inserted into the committee report of an appropriations bill, which “lacks the prerequisites of bicameralism and presentment.”⁴⁰ Despite lacking the force of law, earmarked projects are “historically” carried out because agencies want to “avoid being punished in the next year’s appropriations process.”⁴¹ Accordingly, once Congressmen have read the committee report and seen the earmarks included, they can use riders to prevent specific earmarks from being carried out.

Finally, riders have been permitted to regulate the ability to transfer funds between appropriations, accounts, and activities.⁴²

b. When Are Riders Rejected?

First, as a general rule, riders will be prohibited if they ban “activities themselves,” as

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ Rob Porter & Sam Walsh, *Earmarks in the Federal Budget Process* 3 (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 16, 2008).

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² Tollestrup, *supra* note 4 at 12.

opposed to the “*funding*” for them.⁴³ Second, riders that relate to funds outside the scope of the bills they are attached to are inappropriate, as are those that limit the use of funds for longer than the “duration of the period for which the appropriation is available for obligation.”⁴⁴ In essence, this means that riders cannot restrict funds that limit the use of funds for longer than a year (in a standard, year-long appropriations bill) are definitionally legislative. The same holds true for riders that include funds that were appropriated in past years. Accordingly, riders that limit funds previously appropriated or those in future years will be rejected if challenged by points of order. For example, an amendment to the FY1920 Army appropriations bill was rejected because it related to funds previously appropriated, stating:

That no part of any of the appropriations made herein nor any of the unexpended balances of *appropriations heretofore made* for the support and maintenance of the Army or the Military Establishment shall be expended for the purchase of real estate.⁴⁵

In addition, as is perhaps obvious based on House Rule XXI, clause 2(c)’s prohibition on “changing existing law,” riders cannot “waive actions that are mandated by law.”⁴⁶ For the same reason, they also cannot expand the discretion agencies or officials have to take unauthorized actions, even when the actions are “not explicitly prohibited by existing law.”⁴⁷ Moreover, riders are prohibited if they necessitate that an agency or official take an action (aside from an incidental duty) or make a determination that is not otherwise required in law.⁴⁸ Riders that have limitations that are predicated upon contingencies are also generally considered to be inappropriate because they usually expand agency discretion or require new determinations to be

⁴³ *Id.*

⁴⁴ *Id.* at 13.

⁴⁵ *Id.* at 13–14 (emphasis added).

⁴⁶ *Id.* at 14.

⁴⁷ *Id.*

⁴⁸ *Id.*

made.⁴⁹

Finally, although there are numerous precedents that help illuminate whether riders will be accepted or rejected, there are still many unsettled questions regarding when riders can be used. One question that is particularly unclear is how presiding officers will handle riders that force new duties upon *nonfederal* officials. In the past, when questions of this nature have come up, points of order have been sustained on the grounds that the riders would impose new duties on *federal* officials—no mention has been made of the effect on *nonfederal* officials. It is clear, however, that riders that alter the balance of power between federal, state, and local officials or agencies and impose new authority on those at the state or local levels will not be accepted.⁵⁰

3. *Senate Rule XVI*

The Senate's treatment of riders and legislative provisions, while similar to the House's, is unique in many ways. First, on a procedural level, Senate Rule XVI (attached as Appendix B) differs from House Rule XXI, clause 2(c)&(d) because it does not limit the timing of when riders can be proposed to after the bill has been read. Instead, riders can be considered at any time when amendments are in order.⁵¹

However, similar to House Rule XXI, clause 2(b), Senate Rule XVI, clause 2, restricts the Committee on Appropriations from reporting a bill with amendments that “propos[e] new or general legislation.”⁵² Such bills are subject to points of order, which when sustained, send the *entire* bill back to the Committee.⁵³ This procedure contrasts with that of the House, in which the

⁴⁹ *Id.* at 17.

⁵⁰ *Id.* at 20.

⁵¹ *Id.* at 6.

⁵² Senate Rule XVI, clause 2 (2008), available at <http://www.gpo.gov/fdsys/pkg/SMAN-110/pdf/SMAN-110.pdf>.

⁵³ *Id.*

legislative language will be struck from the bill, but the rest of the bill will remain on the floor.⁵⁴

Furthermore, Rule XVI, clause 4 states:

On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency...⁵⁵

This section of the Rule, with its emphasis on amendments that are “germane...to the subject matter contained in the bill,” provides the basis for a significant part of the Senate’s framework for analyzing amendments containing legislative provisions. In fact, such amendments will be considered in order if they are germane to legislative language already inserted into the bill by the House.⁵⁶ Once a germaneness defense is raised to a point of order, the presiding officer will decide if there is “any House language which is arguabl[y] legislative to which the amendment at issue conceivably could be germane.”⁵⁷ If the presiding officer decides that there is, the Senate will vote on the issue.⁵⁸

Clause 4 of Rule XVI also delineates a restriction on riders—they cannot be based on contingencies.⁵⁹ Aside from this explicit prohibition, the Senate’s rules and precedent surrounding riders are much less developed than the House’s. This phenomenon is in part due to the standard that the presiding officer uses to determine if amendments are germane to language the House has inserted into an appropriations bill. It is generally easy for the presiding officer to

⁵⁴ Tollestrup, *supra* note 4, at 4.

⁵⁵ Senate Rule XVI, *supra* note 52, at clause 4.

⁵⁶ Tollestrup, *supra* note 4, at 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Senate Rule XVI, *supra* note 52, at clause 4.

find that an amendment could “conceivably...be germane” to House language that is “arguably legislative,” and for a majority of Senators to agree. Thus, the Senate often does not actually have to decide whether an amendment is an appropriate rider or inappropriate legislation.⁶⁰ Additionally, the Senate has relied on House precedents to make determinations about what riders should be allowed.⁶¹ Thus, the aforementioned precedents can generally be considered the most significant authority for understanding what types of riders are permitted.

4. Riders and Omnibus Appropriations Acts

Under ideal circumstances, Congress will consider and pass 12 separate appropriations acts each year (the acts are divided by subject matter).⁶² However, in recent years, Congress has passed many omnibus appropriations acts—acts that appropriate funds for multiple areas of government at a time—in lieu of passing all 12 acts separately. Omnibus acts can include anywhere from 2 to 12 of the standard appropriations acts, and to pass an omnibus bill, Congress “may set forth the full text of each of the appropriations acts included therein, or it may enact them individually by cross-reference.”⁶³ House Rule XXI and Senate Rule XVI are applicable for omnibus acts, and in some cases appropriations acts are passed by the House and/or Senate before their inclusion in an omnibus bill.⁶⁴ In such instances, since the acts are being considered on their own, the rules function as they always do, and amendments that are not germane to the bill being considered are prohibited (i.e. an act appropriating funds for the Department of Defense could not include provisions about funds for the Department of Health and Human Services). Although research providing explicit insight on the matter could not be found, it

⁶⁰ Tollestrup, *supra* note 4 at 3, 6.

⁶¹ *Id.* at 3.

⁶² Jessica Tollestrup, Cong. Research Serv., RL32473, Omnibus Appropriations Acts: Overview of Recent Practices 1 (2014).

⁶³ *Id.*

⁶⁴ *Id.* at 5.

appears that during debate on the omnibus bill as a whole and in cases in which the acts were not previously passed by the chambers, the rules also apply in the same way. Thus, an omnibus bill that incorporated appropriations for the Department of Defense, the Department of Health and Human Services, and the Internal Revenue Service could include riders relating to any of the three agencies, while a rider about funds for the Department of Agriculture could be challenged by a point of order.

5. Riders in Other Contexts

Although there are many restrictions on riders on appropriations bills, these rules do not apply to riders in other contexts. First, House Rule XXI is not applicable to continuing resolutions.⁶⁵ This limit on the Rule means that legislative provisions can be added to continuing resolutions without restriction. Although Senate Rule XVI is still applicable, its allowance of amendments that are germane to legislative language added by the House results in a lot of new legislation being passed in continuing resolutions.⁶⁶

Like continuing resolutions, the budget reconciliation process is also not governed by House Rule XXI. However, because Congressmen attempted to use the fast-track process that reconciliation provides to pass general legislation, the Byrd Rule (attached as Appendix C) was created in the Senate.⁶⁷ The Byrd Rule attempts to ban “extraneous” material from budget resolutions by creating parameters for what can be included in budget resolutions.⁶⁸ In many cases, the Byrd Rule’s prohibition on provisions that “ [do] not produce a change in outlays or

⁶⁵ Greg Schmidt & Justin Dews, *The Rise of Continuing Resolutions* 6 (Harvard Law School Federal Budget Policy Seminar Briefing Paper, 2014).

⁶⁶ *Id.*

⁶⁷ Derek Lindblom, *The Budget Reconciliation Process* 22 (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 35, 2008).

⁶⁸ 2 U.S.C.A. 644(b)(1)(A-F) (2008), available at <https://www.law.cornell.edu/uscode/text/2/644>.

revenues”⁶⁹ has kept non-budgetary legislation from being passed during reconciliation. Other provisions in the Byrd Rule have also been effective.⁷⁰

	Legislative provisions generally allowed?	What rules are the most relevant?
Standard Appropriations Bills	No	House Rule XXI and Senate Rule XVI
Continuing Resolutions	Yes	Senate Rule XVI (although it does not stop most legislative provisions from being included)
Reconciliations	No	The Byrd Rule (see Appendix C)

6. Supreme Court Cases

Congress’ main justification behind its ability to include limitation riders in appropriations bills is that ““although [it] may authorize an activity, it is under no obligation to fund that activity. [It] can therefore choose to specify those purposes for which funds are not to be used, even if that purpose has been previously authorized.””⁷¹ In general, the court system has respected this idea, upholding riders when their legality has been challenged.⁷² *United States v. Dickerson*, one of the seminal Supreme Court case involving riders, centered around an authorization in Section 9 of an act passed on June 10, 1922.⁷³ Section 9 authorized an enlistment allowance to ““every honorably discharged enlisted man...who reenlists within a period of three months from the date of his discharge.””⁷⁴ However, in 1938, an amendment to the Rural Electrification Administration provided:

[N]o part of any appropriation contained in this or any other Act for the fiscal year ending

⁶⁹ *Id.* at 644(b)(1)(A).

⁷⁰ Lindblom, *supra* note 67, at 23.

⁷¹ Tollestrup, *supra* note 4, at 2.

⁷² J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1206 (1989).

⁷³ *United States v. Dickerson*, 310 U.S. 554, 554 (1940).

⁷⁴ *Id.* at 554–55.

June 30, 1939, shall be available for the payment' of any enlistment allowance for 'reenlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10' of the Act of June 10, 1922.⁷⁵

The Court, in considering the effect of this rider, used strong language to approve Congress' right to create limitations on the use of funds. The Court wrote, "There can be *no doubt* that Congress could suspend or repeal the authorization contained in Section 9; and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise."⁷⁶

Although the Court has generally been supportive of riders, it has limited them in one way—they cannot "accomplish an unconstitutional objective."⁷⁷ The main Supreme Court case that represents this principle is *United States v. Lovett*. In the case, a rider to the Urgent Deficiency Appropriation Act of 1943 prohibited funds for paying the salaries of the three respondents unless the President appointed them to jobs with the advice and consent of the Senate before November 15, 1943.⁷⁸ This rider was enacted because the respondents were thought to be "subversives,"⁷⁹ and the Court ruled that its purpose was to "permanently...bar [the respondents] from government service."⁸⁰ Accordingly, the Court held that the rider was a bill of attainder, which is "a legislative act which inflicts punishment without a judicial trial."⁸¹ Bills of attainder are prohibited by the Constitution in article I, section 9, clause 3,⁸² so the Court ruled that the rider was unconstitutional.⁸³

Similarly, in *News America Publishing, Inc. v. Federal Communications Commission*, the

⁷⁵ *Id.* at 555.

⁷⁶ *Id.* (emphasis added).

⁷⁷ Sidak, *supra* note 72, at 1206.

⁷⁸ *United States v. Lovett*, 328 U.S. 303, 305 (1946).

⁷⁹ *Id.* at 308.

⁸⁰ *Id.* at 313.

⁸¹ *Id.* at 315.

⁸² *Id.* at 306.

⁸³ *Id.* at 318.

D.C. Circuit ruled that a rider violated the First and Fifth amendments.⁸⁴ The rider at issue was an amendment to a continuing resolution that prohibited the use of funds to alter some of the rules of the FCC “or to extend the time period of current grants of temporary waivers to achieve compliance with such rules....”⁸⁵ This rider had the effect of specifically targeting News America Publishing because it was the only current holder of such a waiver.⁸⁶ Accordingly, News America Publishing challenged the rider on First Amendment free speech and Fifth Amendment equal protection grounds.⁸⁷ The court ruled in News America Publishing’s favor, holding the rider unconstitutional.

II. A LOOK AT RIDERS THROUGHOUT HISTORY TO THE PRESENT

A. RIDERS FROM THE BEGINNING AND PROPOSALS TO RESTRICT THEM

Part of the reason that there are so many precedents and cases involving riders is that the practice of using them is over a century old. In fact, the first limitation rider was attached to an appropriations bill in 1878. It banned the “use of Army personnel at polls on election day.”⁸⁸ Subsequent riders in the nineteenth century “involved war powers, federal supervision of elections, and extension of the Constitution and revenue laws to territories.”⁸⁹ In general, once congressmen began attaching riders to appropriations bills, they quickly gained popularity.

Similarly, legislative provisions were being added to appropriations bills even before 1836, when the House Committee on Rules proposed the first restriction on their use.⁹⁰ Although the rule was not adopted,⁹¹ over time, other measures were taken to limit the legislative

⁸⁴ News America Publishing, Inc. v. Federal Communications Commission, 844 F.2d 800, 805 (D.C. Cir. 1988).

⁸⁵ *Id.* at 802.

⁸⁶ *Id.*

⁸⁷ *Id.* at 804.

⁸⁸ Devins, *supra* note 3, at 462 n.34.

⁸⁹ *Id.* at 462.

⁹⁰ Fisher, *supra* note 14, at 54–55.

⁹¹ *Id.* at 55.

provisions included in appropriations bills.⁹² In 1946, the use of legislative provisions and riders was so great that the Joint Committee on the Organization of Congress “recommended that the practice of attaching legislation to appropriation bills be discontinued.”⁹³ Additionally, the Committee “recommended that the rules be ‘tightened effectively’ to prevent limitations that [were] actually efforts designed to effect legislative changes.”⁹⁴ Despite the fact that the Committee’s recommendations were adopted as the Legislative Reorganization Act of 1946,⁹⁵ the utilization of riders continued to grow. In fact, “from 1963 to 1970, 116 limitation amendments (26% of all amendments) were offered to appropriations bills; from 1971 to 1977, 225 limitation amendments (31% of all amendments) were offered to appropriations bills.”⁹⁶

The prevalence of riders and legislative provisions led Representative Herbert Harris to propose even harsher restrictions on what could be included in appropriations bills. Harris’ proposal would have repealed the Holman rule and prohibited all limitations riders.⁹⁷ His rule would also have extended to continuing resolutions and would have amended Rule XXI, clause 2 to read: “No provision in any appropriation bill or amendment thereto changing existing law or having the effect of imposing any limitation not contained in existing law shall be in order.”⁹⁸ Despite Harris’ passionate disapproval of riders,⁹⁹ his proposal was never adopted.

B. THE HYDE AMENDMENT

One of the most significant riders that Harris was reacting to was the Hyde amendment,

⁹² *Id.* at at 55–58.

⁹³ *Id.* at 78.

⁹⁴ *Id.*

⁹⁵ *Id.* at 78.

⁹⁶ Devins, *supra* note 3, at 462.

⁹⁷ Fisher, *supra* note 14, at 79.

⁹⁸ *Id.*

⁹⁹ *See* Fisher, *supra* note 14, at 79.

which prohibits the use of federal funding for abortions in most circumstances.¹⁰⁰ The Hyde amendment originated as a limitation in the 1977 Labor-HEW¹⁰¹ appropriations bill.¹⁰² In its initial form, the amendment banned the use of funds for abortions ““except where the life of the mother would be endangered if the fetus were carried to term.””¹⁰³ A point of order was raised, and sustained, against the provision on the grounds that it would require the federal government to make a determination about the endangerment of the mother.¹⁰⁴ The provision was accordingly altered to read, ““None of the funds appropriated under this Act shall be used to pay for abortions or to promote or encourage abortions, except where a physician has certified the abortion is necessary to save the life of the mother.””¹⁰⁵ However, this version too was rejected as being legislative because some physicians were paid directly by the government and because it would have forced a federal agency to obtain signed waivers from physicians before dispensing money.¹⁰⁶

To avoid points of order, Representative Henry Hyde then proposed even narrower language: ““None of the funds appropriated under this Act shall be used to pay for abortions or to promote or encourage abortions.””¹⁰⁷ Because this form of the provision did not require any determinations to be made by federal officials, there were no points of order raised against it.¹⁰⁸ Ironically, the restrictions put on riders to prevent them from being too legislative were what motivated the switch to stricter language in this case. The policy could have been less rigid and

¹⁰⁰ Devins, *supra* note 3, at 466.

¹⁰¹ “HEW” refers to the Department of Health, Education and Welfare, which was the predecessor to the Department of Health and Human Services. *Historical Highlights*, HHS.GOV, <http://www.hhs.gov/about/hhshist.html> (last updated Aug. 22, 2014).

¹⁰² See Fisher, *supra* note 14, at 74.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

allowed for exceptions, but instead the rule was forced to its extremes. Hyde himself recognized this irony and expressed his regret at how the situation had unfolded, saying, “I am forced into this position today by points of order.”¹⁰⁹

Fortunately for Hyde, he did not have to live with his regret for too long. When the appropriations bill was considered in the Senate, the Hyde provision was amended to allow federal funding for abortions that were “medically necessary” for the mother or were for the “treatment of rape or incest.”¹¹⁰ Although a point of order was raised against this amendment, the Senate voted “seventy-four to twenty-one in favor of its germaneness,” so it was allowed to stand.¹¹¹ In the end, the Senate and House failed to agree on the Labor-HEW appropriations bill and were forced to pass a continuing resolution. A version of the Hyde amendment embodying the exceptions from the Senate amendment was included in the continuing resolution and thus became law.¹¹² As discussed, continuing resolutions are not subject to House Rule XXI, so the House was able to accept the final version of the Hyde amendment, even though it was forced to reject the similarly-worded initial version. Overall, contention over the Hyde amendment was widespread, and “debate over the fiscal year (FY) 1977 rider lasted eleven weeks, with dozens of compromise proposals on the floor.”¹¹³

Despite the controversy surrounding it, versions of the Hyde amendment have been enacted ever since 1977. In 1978 the amendment was again contentious, with a stalemate over it lasting more than five months.¹¹⁴ However, in 1980, in *Harris v. McRae*, the Supreme Court upheld the constitutionality of the Hyde amendment with the life endangerment exception,

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Devins, *supra* note 3, at 468.

¹¹⁴ *Id.*

asserting that it did not violate the Fifth Amendment or the establishment clause of the First amendment.¹¹⁵ Thereafter, from the second half of fiscal year 1981 to fiscal year 1993, the Hyde amendment was enacted with only that exception¹¹⁶ and was a “political nonissue.”¹¹⁷ In 1994, further exceptions were added for rape and incest.¹¹⁸ To include these exceptions and avoid the point of order pitfalls encountered in the 1970s, Congressmen rephrased the prohibition to state:

None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.¹¹⁹

Because the new amendment specified that an exception could only be made “when it is made known to the federal entity or official” that the mother’s life was in danger or that the pregnancy was a consequence of rape or incest, the amendment did not require any new determinations to be made. Accordingly, it was allowed to stand. As in 1994, the current manifestation of the Hyde amendment prohibits the use of funding for abortions except “in cases of life endangerment, rape or incest.”¹²⁰

C. THE BOLAND AMENDMENTS

Notwithstanding Harris’ attempt to ban riders after the Hyde amendment, the use of riders “[grew] significantly” in the following decade.¹²¹ In fact, one series of riders, the Boland

¹¹⁵ Harris v. McRae, 448 U.S. 297, 298 (1980).

¹¹⁶ *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, ACLU, <https://www.aclu.org/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion>.

¹¹⁷ Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL’Y REV. 12, 13 (2007).

¹¹⁸ *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, *supra* note 116.

¹¹⁹ *The Hyde Amendment*, NCHLA, <http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf>.

¹²⁰ *State Funding of Abortion Under Medicaid*, GUTTMACHER INSTITUTE (Apr. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

¹²¹ Devins, *supra* note 3, at 468.

amendments, gained national prominence because they were at the heart of the Iran-Contra scandal.

The Iran-Contra affair involved the U.S. covertly selling arms to Iran and then using the proceeds to fund the Contras in Nicaragua.¹²² While there were many questionable aspects of this scheme, arguably its biggest problem was that it violated the Boland amendments. The first Boland amendment was passed on December 21, 1982 and passed with a vote of 411-0.¹²³ It stated:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.¹²⁴

The second version of the amendment, passed in 1983, altered two aspects of the rider. First, instead of completely prohibiting aid to the Contras, the rider limited the amount of funds available for such purposes to \$24 million.¹²⁵ Second, it expanded the scope of the rider to funds for activities “... which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.”¹²⁶ The third iteration of the rider, passed a year later in 1984, retained most of the language from the 1982 version. However, rather than capping the amount of funding that could be given to the contras, it completely banned aid to them.¹²⁷ The fourth enactment of the Boland

¹²² Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1265 (1988).

¹²³ Edwin Timbers, *Legal and Institutional Aspects of the Iran-Contra Affair*, 20 PRESIDENTIAL STUD. Q. 31, 32 (1990).

¹²⁴ Act of Dec. 21, 1982, Pub. L. No. 97-377, §783, 96 Stat. 1830, available at [https://a.next.westlaw.com/Document/I03013DA967D44486928639997AF2852E/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.Default\)&userEnteredCitation=P.L.+97-377](https://a.next.westlaw.com/Document/I03013DA967D44486928639997AF2852E/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=P.L.+97-377).

¹²⁵ Timbers, *supra* note 123, at 32.

¹²⁶ *Id.*

¹²⁷ *Id.*

amendment, covering 1985 to 1986, allowed for \$27 million in “humanitarian” aid to the Contras.¹²⁸ Finally, the fifth version of the rider provided the Contras with a classified amount of aid.¹²⁹

After the Iran-Contra affair, members of the Reagan administration argued that they had not violated the Boland amendments by claiming that the National Security Council (“NSC”), a main player in the affair, was not covered by the amendments. This argument was premised upon the fact the NSC was not mentioned explicitly in the amendments and upon the idea that the phrase ““involved in intelligence activities”” was a “statutory term of art.”¹³⁰ Despite these assertions, the congressional investigative committees found that the NSC had in fact violated the amendments.¹³¹ Additionally, John M. Poindexter, Assistant to the President for National Security Affairs,¹³² was indicted for “a conspiracy to violate the Amendments.”¹³³ However, Poindexter was never punished for any of his actions in connection with the Iran-Contra affair because the D.C. Circuit ruled that his immunized testimony was misused at trial.¹³⁴

Although there was a lot of litigation in the wake of Iran-Contra, one issue that was never decided by a court was that of the Boland amendments’ constitutionality. As discussed, one limitation on riders is that they cannot have unconstitutional purposes.¹³⁵ The Iran-Contra affair and the violation of the Boland amendments provoked fierce debate amongst scholars about the scope of Congress’ power to deny appropriations through riders. In one camp, led by Professor Kate Stith, were those who believed that the Boland amendments were constitutional. Professor

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1534, 1569 (1988).

¹³¹ *Id.* at 1534.

¹³² Timbers, *supra* note 123, at 33.

¹³³ Hayes, *supra* note 130, at 1534.

¹³⁴ *United States v. Poindexter*, 951 F.2d 369, 388 (D.C. Cir. 1991).

¹³⁵ *See supra* p.19.

Stith argued that “Congress retains significant constitutional power to constrain the President through appropriations limitations as long as these constraints do not prevent the Executive from fulfilling indispensable constitutional duties.”¹³⁶ Under this framework, the Boland amendments were constitutional because providing aid to foreign groups is not a “constitutionally mandated activit[y],” so Congress did not have to appropriate for it.¹³⁷

On the other side of the debate was J. Gregory Sidak, who claimed that Congress could not “under the pretext of guarding the public purse, deny the President the funds necessary to perform the duties and exercise the prerogatives conferred on him by article II.”¹³⁸ Using this perspective, and given Sidak’s position that the powers conferred upon the executive by article II are much broader than the text itself suggests,¹³⁹ the Boland amendments were unconstitutional encroachments on the President’s foreign affairs powers. Because the court system never ruled on the constitutionality of the Boland amendments and has yet to define the extent to which Congress can limit the President’s power through riders, the issue is one that could resurface in the future.

D. RIDERS IN THE PRESENT DAY AND THEIR INFLUENCE ON BUDGET CRISES

Although Hyde and Boland amendments dealt with politically sensitive subjects, the controversy surrounding some of the riders in recent years has been unparalleled. In particular, some of President Obama’s policies have prompted Congressmen to propose highly restrictive prohibitions on funding. Although none of the extreme riders have been enacted, debate over them led to one government shutdown in 2013 and almost led to another in 2015.

¹³⁶ Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1352 (1987).

¹³⁷ *Id.* at 1350–51.

¹³⁸ Sidak, *supra* note 72, at 1164.

¹³⁹ *Id.* at 1235–38.

1. Riders Related to the Affordable Care Act

Since the passage of the Affordable Care Act (“ACA”) in 2010, there have been numerous attempts made to prevent its implementation. In fact, by one count, there were 54 attempts in the House to diminish the Act’s impact in the four years after its enactment.¹⁴⁰ Many of these attempts took the form of riders to appropriation bills. For example, in a 2011 appropriations bill, riders were proposed that would have prohibited implementation funding for many parts of the Act, including its “Medical Loss Ratio Provision” and its “Independent Patient Advisory Board.”¹⁴¹ In addition, even broader riders were proposed that would have prohibited funding for the salaries of officials who implemented the Act and “ensur[ed] that no money in the appropriations bill would [have been] used to implement the law.”¹⁴² Although these riders were supported by Congressmen in the House, the Senate removed all of them before the final bill was passed.¹⁴³

These failures did not deter the House from again trying to block funding for the ACA in the 2014 continuing resolution. In fact, in its version of the resolution, the House “incorporated language that would have prohibited the use of *any* federal funds—mandatory or discretionary—to carry out the ACA.”¹⁴⁴ The Senate removed this provision from the bill, which returned to the House where further provisions were added to delay implementation of the ACA.¹⁴⁵ Ultimately, the tension between the House and Senate over what should be included in the continuing resolution proved to be too much. No continuing resolution was passed, and on October 1, 2013,

¹⁴⁰ Ed O’Keefe, *The House has voted 54 times in four years on Obamacare. Here’s the full list.*, WASH. POST, Mar. 21, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ C. Stephen Redhead & Janet Kinzer, Cong. Research Serv., R43289, *Legislative Actions to Repeal, Defund, or Delay the Affordable Care Act 6–7* (2015).

¹⁴⁴ *Id.* at 23 (emphasis added).

¹⁴⁵ *Id.*

a partial shutdown of the government began.¹⁴⁶ The government did not reopen until seventeen days later, when Congress finally agreed on the Continuing Appropriations Act of 2014.¹⁴⁷ Although the shutdown was less a month long, it had significant impacts for the United States' economy. Notably, the “lost productivity of furloughed workers [...] was 2.0 billion,” and “import and export licenses and applications were put on hold, negatively impacting trade.”¹⁴⁸

2. Riders Related to Immigration Policy

The federal government very narrowly avoided another partial government shutdown in early 2015. This time, Congress was divided over funding for the Department of Homeland Security (“DHS”), which was set to expire on February 27, 2015.¹⁴⁹ In January, the House Appropriations Committee introduced a bill to fund DHS. When the bill was considered on the floor, three riders were amended to it. The first was a “general provision that would restrict the use of any federal funds for carrying out the Administration’s immigration initiative of November 2014, or implementing the direction in several memoranda on prosecutorial discretion and immigration enforcement priorities that were issued in 2011 and 2012.”¹⁵⁰ This rider was applicable to “this Act or any other Act for any fiscal year,”¹⁵¹ so a point of order could theoretically have succeeded against it for extending to funds outside of the scope of the considered appropriations bill.¹⁵² However, the House had voted to waive points of order against the amendments, so it was unchallenged.¹⁵³ Two additional riders prohibited funding for

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 7.

¹⁴⁸ OFFICE OF MANAGEMENT AND BUDGET, IMPACTS AND COSTS OF THE GOVERNMENT SHUTDOWN, Nov. 7, 2013, <https://www.whitehouse.gov/blog/2013/11/07/impacts-and-costs-government-shutdown>.

¹⁴⁹ William L. Painter, Cong. Research Serv., R43884, Homeland Security Appropriations: FY2015 Action in the 114th Congress 1 (2015).

¹⁵⁰ *Id.* at 2.

¹⁵¹ H.R. 240, 114th Cong. §579 (2015), available at <https://www.govtrack.us/congress/bills/114/hr240/text/eh>.

¹⁵² See *supra* p.13.

¹⁵³ H.R. 240 Rule Information, available at <https://rules.house.gov/bill/114/hr-240>.

“consider[ing]...applications for temporary relief for removal under the deferred action for childhood arrivals (DACA) program” and restricted funds such that DHS would have been forced to treat aliens convicted of certain offenses as being of the highest priority for deportation.¹⁵⁴

Although the House passed its version of the appropriations bill (including the riders) with a vote of 236-191, the Senate removed the riders when it considered the bill.¹⁵⁵ As in 2013, a showdown between the House and Senate ensued, with neither side agreeing to compromise. Just three days before the partial government shutdown would have started,¹⁵⁶ the House gave in and passed a version of the appropriations bill that did not include any riders related to immigration.¹⁵⁷

III. ARGUMENTS FOR AND AGAINST RIDERS

A. ARGUMENTS IN FAVOR OF RIDERS

The strong effects that riders can have on both the government’s policies and ability to function have led many to wonder if allowing riders on appropriations bills is beneficial or not. On the one hand, there are many arguments in favor riders. First, riders “lead to policy outcomes that are preferable to a majority of legislators compared to outcomes that would occur if [they] did not exist.”¹⁵⁸ As explained in a study by Jason M. MacDonald, this phenomenon occurs because riders a “confer negative power” on Congress that “force[s] the president and agencies to limit how much he directs the bureaucracy to move policy away from the chambers’

¹⁵⁴ Painter, *supra* note 149, at 2.

¹⁵⁵ *Id.* at 2–3.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ Ashley Parker, *House Approves Homeland Security Budget, Without Strings*, N.Y. TIMES, Mar. 3, 2015, http://www.nytimes.com/2015/03/04/us/house-homeland-security.html?_r=0.

¹⁵⁸ MacDonald, *supra* note 1, at 766.

priorities.”¹⁵⁹ Riders are an effective way for Congressional majorities to enforce their preferences because they allow Congress to explicitly prohibit or limit funding for specific activities that it does not want to fund. If, instead of using a rider, Congress simply declines to appropriate funds for a program it does not like, agencies can generally still fund the program by reallocating other funds.¹⁶⁰ However, this is not the case with riders. In fact, MacDonald’s study found that the actual effects of limitation riders on agencies’ policies were highly significant. In his study, MacDonald drew a random sample of 108 riders from a pool of 3,087 riders that were meant to affect policy. Of the 108 riders in his sample, MacDonald was able to find information on 58 of them. He observed that of the 58 riders he found information on, “48 (or 44.44% of the 108 limitation riders and more than 80% of the limitations on which [he] found information) amounted to instances in which the limitation rider stopped agencies from proceeding with actions affecting policy.”¹⁶¹ Thus, for those who believe that agency actions should be in keeping with Congress’ preferences, riders are advantageous.

Similarly, riders can allow Congress to enforce its policy preferences in times of war. John Hart Ely posits that “in the absence of a war declaration or clear authorization, a pattern of congressional appropriations to support an ongoing war effort can serve as a proxy for congressional war authorization.”¹⁶² Accordingly, in instances in which a war has already begun, inserting riders can be an effective way (and perhaps the only way) for Congress to check the President’s war authority and express its perspective on how the war should progress.

In addition to being highly impactful, riders make sense for practical reasons. Riders allow Congress to proceed more efficiently by “provid[ing] needed flexibility to the legislative

¹⁵⁹ *Id.* at 772.

¹⁶⁰ Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 87 (2006).

¹⁶¹ MacDonald, *supra* note 1, at 770.

¹⁶² Brian Callanan & David Weiler, *War Budgeting Strategies: Case Studies of The Gulf War and The Iraq War 2* (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 39, 2008).

process.”¹⁶³ This argument is based upon the fact that many riders are added to appropriations bills at the request of the authorizing committees.¹⁶⁴ Because authorizing committees could have failed to authorize funds for certain programs during the authorization process, riders are an efficient way for them to convey further policies at the appropriations stage. Finally, riders are supported as a way for Congress to express its preferences when bills have to be passed quickly to avoid government shutdowns. In 1978, Representative Tom Hagedorn explained:

It would be a serious mistake for the House to accept restrictions on its freedom of action in the form of outlawing limitation amendments. Such amendments serve a valuable function in enabling the House to act in a timely fashion when time is of the essence, and even to act at all on matters which might otherwise never reach the floor for decision.¹⁶⁵

B. ARGUMENTS AGAINST RIDERS

Despite the arguments of those who support riders, there are still many critics of them. Directly responding to Hagedorn’s praise for riders and reversing it, people who are against riders argue that part of the problem with them is that they are enacted so quickly. Because the process is rushed, critics claim that there is “little opportunity for thoughtful deliberation of the issues.”¹⁶⁶ A similar argument against riders is that because they are part of the appropriations process, they prevent authorizing committees from scrutinizing them using their expertise. These two contentions are especially relevant for riders containing “substantive objectives that have not been considered previously.”¹⁶⁷

Additional critiques of riders center around other aspects of the process by which riders are enacted. For example, critics argue that it is easy for riders to go unnoticed by many of the

¹⁶³ Robert Keith, Cong. Research Serv., RL30337, Legislative Provisions (“Riders”) in Annual Appropriations Acts: Illustrative Examples 4 (1999).

¹⁶⁴ *Id.* There does not seem to be any data on exactly how often the authorizing committees request that riders be included.

¹⁶⁵ Fisher, *supra* note 14, at 79–80.

¹⁶⁶ Devins, *supra* note 3, at 458.

¹⁶⁷ *Id.*

people voting on appropriations bills.¹⁶⁸ To those who believe that Congressmen should be making informed decisions, this circumstance is a big problem. Furthermore, critics cite riders “as a method for Congress to dodge responsibility for its legislative actions.”¹⁶⁹ Given the nature of appropriations bills, Congressmen are under a lot of pressure to vote in favor of them, so critics believe that provisions can be snuck into the bills that might otherwise not be approved.

Finally, other arguments against riders focus on the inter-governmental problems they create. First, as demonstrated in the cases of the near and actual government shutdowns, riders can motivate tension between the House and the Senate.¹⁷⁰ Second, riders can confuse agencies. Because riders are only applicable to the yearly appropriation bills, it is hard for agencies to know how long certain prohibitions or limitations will last. Accordingly, they will struggle to plan more than a year into the future.¹⁷¹ Similarly, “courts called upon to give effect to limitation riders are place in an untenable position.”¹⁷² Because riders have to be re-enacted every year, the purposes for which they are passed can change over time. Thus, “court interpretations of limitation riders as amendments to previously enacted legislation, therefore, are inherently unreliable; they may be accurate one day, inaccurate the next, and irrelevant at the end of the fiscal year.”¹⁷³

CONCLUSION

Although riders have been controversial since their inception in the nineteenth century, there is no question that they have played an important role in Congress’ policymaking throughout history. Given that the recent actual and near partial government shutdowns were

¹⁶⁸ Beermann, *supra* note 160, at 88.

¹⁶⁹ *Id.* at 88–89.

¹⁷⁰ Fisher, *supra* note 14, at 464.

¹⁷¹ *Id.* at 465.

¹⁷² *Id.* at 458.

¹⁷³ *Id.*

caused by controversy over riders, it is hard to know for sure what the future status of riders will be. The debate over the DHS appropriations riders could motivate congressmen or the public to campaign for a prohibition on all riders, just as the Hyde amendment catalyzed Representative Harris in the 1970s. However, considering riders' historical salience, it seems more likely that the practice will continue for many years to come. Although there are many criticisms of riders, they have proved to be an effective way for Congress to protect its interests and implement its policy preferences.

Appendix A

House Rule XXI, Clause 2:

General appropriation bills and amendments

2. (a)(1) An appropriation may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law, except to continue appropriations for public works and objects that are already in progress.

(2) A reappropriation of unexpended balances of appropriations may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, except to continue appropriations for public works and objects that are already in progress. This subparagraph does not apply to transfers of unexpended balances within the department or agency for which they were originally appropriated that are reported by the Committee on Appropriations.

(b) A provision changing existing law may not be reported in a general appropriation bill, including a provision making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation, except germane provisions that retrench expenditures by the reduction of amounts of money covered by the bill (which may include those recommended to the Committee on Appropriations by direction of a legislative committee having jurisdiction over the subject matter) and except rescissions of appropriations contained in appropriation Acts.

(c) An amendment to a general appropriation bill shall not be in order if changing existing law, including an amendment making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation. Except as provided in paragraph (d), an amendment proposing a limitation not specifically contained or authorized in existing law for the period of the limitation shall not be in order during consideration of a general appropriation bill.

(d) After a general appropriation bill has been read for amendment, a motion that the Committee of the Whole House on the state of the Union rise and report the bill to the House with such amendments as may have been adopted shall, if offered by the Majority Leader or a designee, have precedence over motions to amend the bill. If such a motion to rise and report is rejected or not offered, amendments proposing limitations not specifically contained or authorized in existing law for the period of the limitation or proposing germane amendments that retrench expenditures by reductions of amounts of money covered by the bill may be considered.

(e) A provision other than an appropriation designated an emergency under section 251(b)(2) or section 252(e) of the Balanced Budget and Emergency Deficit Control Act, a rescission of budget authority, or a reduction in direct spending or an amount for a designated emergency may not be reported in an appropriation bill or joint resolution containing an emergency designation under section 251(b)(2) or section 252(e) of such Act and may not be in order as an amendment thereto.

(f) During the reading of an appropriation bill for amendment in the Committee of the Whole

House on the state of the Union, it shall be in order to consider en bloc amendments proposing only to transfer appropriations among objects in the bill without increasing the levels of budget authority or outlays in the bill. When considered en bloc under this paragraph, such amendments may amend portions of the bill not yet read for amendment (following disposition of any points of order against such portions) and are not subject to a demand for division of the question in the House or in the Committee of the Whole.

Appendix B

Senate Rule XVI:

1. On a point of order made by any Senator, no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or of a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.
2. The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation or any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law if such restriction is to take effect or cease to be effective upon the happening of a contingency, and if an appropriation bill is reported to the Senate containing amendments to such bill proposing new or general legislation or any such restriction, a point of order may be made against the bill, and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations.
3. All amendments to general appropriation bills moved by direction of a committee having legislative jurisdiction of the subject matter proposing to increase an appropriation already contained in the bill, or to add new items of appropriation, shall, at least one day before they are considered, be referred to the Committee on Appropriations, and when actually proposed to the bill no amendment proposing to increase the amount stated in such amendment shall be received on a point of order made by any Senator.
4. On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill.
5. On a point of order made by any Senator, no amendment, the object of which is to provide for a private claim, shall be received to any general appropriation bill, unless it be to carry out the provisions of an existing law or a treaty stipulation, which shall be cited on the face of the amendment.
6. When a point of order is made against any restriction on the expenditure of funds appropriated in a general appropriation bill on the ground that the restriction violates this rule, the rule shall be construed strictly and, in case of doubt, in favor of the point of order.

7. Every report on general appropriation bills filed by the Committee on Appropriations shall identify with particularity each recommended amendment which proposes an item of appropriation which is not made to carry out the provisions of an existing law, a treaty stipulation, or an act or resolution previously passed by the Senate during that session.

8. On a point of order made by any Senator, no general appropriation bill or amendment thereto shall be received or considered if it contains a provision reappropriating unexpended balances of appropriations; except that this provision shall not apply to appropriations in continuation of appropriations for public works on which work has commenced.

Appendix C

2 U.S.C.A. 644(b)(1)(A-F):

(A) Except as provided in paragraph (2), a provision of a reconciliation bill or reconciliation resolution considered pursuant to section 641 of this title shall be considered extraneous if such provision does not produce a change in outlays or revenues, including changes in outlays and revenues brought about by changes in the terms and conditions under which outlays are made or revenues are required to be collected (but a provision in which outlay decreases or revenue increases exactly offset outlay increases or revenue decreases shall not be considered extraneous by virtue of this subparagraph);

(B) any provision producing an increase in outlays or decrease in revenues shall be considered extraneous if the net effect of provisions reported by the committee reporting the title containing the provision is that the committee fails to achieve its reconciliation instructions;

(C) a provision that is not in the jurisdiction of the committee with jurisdiction over said title or provision shall be considered extraneous;

(D) a provision shall be considered extraneous if it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision;

(E) a provision shall be considered to be extraneous if it increases, or would increase, net outlays, or if it decreases, or would decrease, revenues during a fiscal year after the fiscal years covered by such reconciliation bill or reconciliation resolution, and such increases or decreases are greater than outlay reductions or revenue increases resulting from other provisions in such title in such year; and

(F) a provision shall be considered extraneous if it violates section 641 (g) of this title.

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