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THE AUTHORIZATION-APPROPRIATION PROCESS IN CONGRESS: FORMAL RULES AND INFORMAL PRACTICES

Louis Fisher*

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This article is a revised and expanded version of a study prepared by the author for the Congressional Research Service at the request of the Senate Committee on Appropriations. See Rep. No. 79-161 GOV (Aug. 1, 1979). The views expressed herein, however, are solely those of the author.
It is customary to describe the legislative process as a simple, two-step procedure: authorization of programs as recommended by substantive (legislative) committees, followed by the financing of those programs through measures reported by the funding (appropriations) committees. As a general rule, authorization bills should not contain appropriations, nor should appropriation bills contain authorizations. Consistent with this theoretical model, both Houses of Congress have adopted rules purporting to keep the authorization and appropriation steps distinct and sequential.1 It is a general principle that Congress cannot and does not legislate through the appropriation process.2


The purpose of this article is to demonstrate that, in actual operation, Congress can and does legislate through the appropriation process. The real world of the legislative process differs considerably from the idealized model of the two-step authorization-appropriation procedure. Authorization bills contain appropriations, appropriation bills contain authorizations, and the order of their enactment is sometimes reversed. The Appropriations Committees, acting through various kinds of limitations, riders, and nonstatutory controls, are able to establish policy and act in a substantive manner. Authorization committees have considerable power to force the hand of the Appropriations Committees and, in some cases, even to appropriate. This substantial overlap between the authorization and appropriation stages is part of a longstanding problem dating back more than a century. Moreover, the enactment of the Congressional Budget Act of 1974 further compounds the problem of distinguishing between the two stages.

This article analyzes the authorization-appropriation process, both in theory and in practice. It describes the origin of the distinction and identifies applicable House and Senate rules, including stated exemptions and exceptions. After drawing attention to other departures from the formal model, including court decisions and rulings by the General Accounting Office, this article concludes with an analysis of the effect of the Congressional Budget Act of 1974.

I. THE HISTORICAL RECORD

Article I, section 9 of the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Constitution, however, does not mention Appropriations Committees nor does it distinguish between appropriations and authorizations. In fact, it was not until the Civil War period that Congress first established Appropriations Committees. Prior to that time, the House Ways and Means Committee handled both appropriation bills and revenue measures. On the Senate side, the Finance Committee reported both...
appropriation and revenue bills. In 1865, the House removed from Ways and Means its jurisdiction over appropriation bills, entrusting this responsibility to the newly formed Appropriations Committee. Similarly, in 1867, the Senate reduced the jurisdiction of the Finance Committee by creating a separate Appropriations Committee. While these changes in 1865 and 1867 set the stage for committee conflict and jurisdictional struggles, House and Senate rules on authorization and appropriation reach further back into the nineteenth century.

A. Pre-Civil War Period

In 1789, the House appointed a ten-member Committee on Ways and Means to report on supplies and revenues. The committee was disbanded, however, within a few weeks after Congress created the Treasury Department. In 1794, during Alexander Hamilton’s last year as Secretary of the Treasury, the House revived the Ways and Means Committee. For one session, it operated as a select committee but was not reappointed. Although reestablished late in 1795 to function on a permanent basis, the Ways and Means Committee was not formally recognized by the House Rules as a standing committee until 1802.

The Senate continued to refer general appropriation bills to select committees until 1816, when it established the Committee on Finance as a standing committee. Several decades passed before the Senate consolidated all appropriation bills in that committee. With the exception of two years, the Navy appropriation bill was handled by the Committee on Naval Affairs until 1827. In that year, the Senate assigned the bill to the Finance Committee. An annual bill appropriating funds for Revolutionary War pensions was first referred to the Committee on Pensions, but in 1830, the Finance Committee gained control over that legislation. Similarly, appropriations relating to Indian treaties were handled by the Committee on Indian Affairs until 1834, when the Finance Committee added that bill to its jurisdiction.

Appropriation bills were frequently delayed because legislative items, or “riders,” were attached to them. To avoid this practice, the House Committee on Rules in 1836 recommended a rule providing that: “no appropriation shall be reported in such general appropriation bills, or be in

9. See text accompanying notes 12-30 infra.
11. Id. at 13.
13. Id. at 24-26.
order as an amendment thereto, for any expenditure not previously authorized by law." 14  The House, however, did not adopt the rule. Representative John Bell later proposed a rider to the fortifications appropriation bill that would allow surplus funds in the National Treasury to be distributed. The Senate refused to accept this provision and the bill was not enacted. Apparently this incident prompted the House, on September 14, 1837, to agree to the rule proposed by the Committee on Rules the previous year. 15  On March 13, 1838, in order to prevent the disruption of on-going public works projects, and to permit action on contingencies, the House amended the rule to read:

No appropriation shall be reported in such general appropriation bills, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress and for the contingencies for carrying on the several departments of the Government. 16

This rule only applied to riders in the nature of appropriations — any expenditure not previously authorized by law. Extraneous matter in the nature of policy could still be injected into appropriation bills. In 1855, for example, after the slavery issue infused Congress with new Republican Members, the “Anti-Nebraska” men added a proviso to the army appropriation bill prohibiting the use of federal troops for the enforcement of territorial law in Kansas. Although Democratic Members and President Pierce denounced this language, “the young champions of the new era stoutly maintained that the Representatives were but exercising the ancient right of Englishmen when they imposed conditions on making grants.” 17

Another problem with appropriation bills developed in the period from 1846 to 1848 when the costs associated with the Mexican War led to marked increases in federal expenditures and federal deficits. Various forms of private claims were presented to the executive branch. When rejected there, Senators would add them to the civil and diplomatic appropriation bill at the close of the session, letting them ride to safety on the back of funding legislation. As Senator Bright remarked, “[i]n that way were carried through private claims that had not merit within themselves to be carried through by themselves.” 18  To prevent this abuse, in 1850 the

15. Id.
16. Id.
18. CONG. GLOBE, 32d Cong., 1st Sess. 1287 (1852) (remarks of Sen. Bright). See also id. at 1286.
Senate adopted as part of its rules the following restriction on appropriation bills:

No amendment proposing an additional appropriation shall be received to any general appropriation bill unless it be made to carry out the provisions of some existing law, or some act or resolution previously passed by the Senate during that session, or in pursuance of an estimate from the head of some of the Departments; and no amendment shall be received whose object is to provide for a private claim, although the same may have been previously sanctioned by the Senate.¹⁹

Two years later, the rule was amended to permit a standing committee of the Senate to propose an unauthorized appropriation.²⁰ Part of the purpose was to protect the Senate against actions by the House of Representatives. By custom, the appropriation bills originated there and were subject to amendments by the House committees. Unless the Senate reserved to itself the same privilege, Senators would sit "as a mere register of the decrees of the House of Representatives . . . ."²¹ Also, Senators resented having to go "cap in hand, and ask some head of a Department whether we shall offer an amendment to an appropriation bill."²² It was felt that a deliberate investigation by a senate committee should be treated as equivalent to an estimate by the head of a Department.²³ In 1854, the Senate amended the rule to permit motions from select committees.²⁴ Further modified in 1854 to reflect treaty stipulations, the rule now reads:

No amendment, proposing additional appropriations, shall be received to any general appropriation bill, unless it be made to carry out the provisions of some existing law, or some act or resolution, previously passed by the Senate, during that session, or moved by direction of a standing or select committee of the Senate, or in pursuance of an estimate from the head of some of the Departments; and no amendment shall be received whose object is to provide for a private claim, unless it be to carry out the provisions of an existing law, or a treaty stipulation.²⁵

²⁰. CONG. GLOBE, 32d Cong., 1st Sess. 1285 (1852).
²¹. Id. at 1286 (remarks of Sen. Badger).
²². Id. at 1287 (remarks of Sen. Rusk).
²³. Id. (remarks of Sen. Berrien).
²⁴. CONG. GLOBE, 33d Cong., 1st Sess. 1380-81 (1854).
²⁵. Id. at 1058. See also C.H. Kerr, THE ORIGIN AND DEVELOPMENT OF THE UNITED STATES SENATE 76-78 (1895); SENATE COMM. ON APPROPRIATIONS, 100TH ANNIVERSARY, 1867-1967, S. Doc. No. 21, 90th Cong., 1st Sess. 3-4 (1967).
B. Period from 1865 to 1922

Under the strain of Civil War financing, the House in 1865 reduced the jurisdiction of the Ways and Means Committee to revenue bills, parceling out its former responsibilities to two new committees — an Appropriations Committee and a Committee on Banking and Currency.\(^\text{26}\) Two years later, the jurisdiction of the Senate Finance Committee was similarly reduced in scope. The Senate's decision to create its own Appropriations Committee was justified as a means of dividing the "onerous labors of the Finance Committee with another committee."\(^\text{27}\)

As the Appropriations Committees gained power and influence, resentment against them deepened, particularly after the House adopted the "Holman Rule" in 1876.\(^\text{28}\) This provision granted the House Committee on Appropriations authority to retrench expenditures by reducing the number and salary of federal officials, the compensation of any person paid out of the Treasury, and the amounts of money covered in an appropriation bill. According to contemporary accounts, the Holman Rule resulted in putting a "great mass of general legislation" in appropriation bills, leading to a revolt that eventually swept from the Appropriations Committee much of its jurisdiction.\(^\text{29}\) Beginning in 1877, but reaching a crescendo in 1885, the House stripped the Committee of its authority over rivers and harbors, agriculture, consular and diplomatic affairs, the Army, the Military Academy, the Navy, the Post Office, and Indian affairs. In each of these areas the authorization committees gained the right to report appropriations. On the Senate side, the Committee on Commerce had received authority to handle the rivers and harbors appropriation bill in 1877, but it was not until 1899 that much of the dismantling of Senate Appropriations occurred. In addition to complaining about the "monopolistic dominance" of the Appropriations Committee, Senators maintained that it was physically impossible for the Committee to attend to its business.\(^\text{30}\)

Just as the magnitude of Civil War financing led to the creation of Appropriations Committees in the House and Senate, so did the financial magnitude of World War I create the need for major reforms in budgetary affairs. The Budget and Accounting Act of 1921\(^\text{31}\) authorized the Presi-
dent to submit a national budget each year, in place of the previous “Book of Estimates” that largely consisted of uncoordinated agency submissions to Congress. With this centralization occurring on the Executive side, Congress took steps to consolidate jurisdiction over all appropriations in a single committee in each house. The House took this action in 1920, and two years later the Senate changed its rules to grant appropriations jurisdiction to a single committee.32

C. Period from 1922 to 1974

Although, under the rules, the Appropriations Committees retained formal control over appropriations, their actual jurisdiction was undercut by the growth of “backdoor spending” recommended by authorization committees. The two major forms were borrowing authority and contract authority. Borrowing authority allows a federal agency to incur obligations and make payments for specified purposes out of borrowed moneys. Borrowing can come from two sources: public debt authority, derived from the sale of public debt securities of the federal government; and agency debt authority, derived from the sale of agency debt securities, the issuance of mortgages, and other sources.33 During the period of January 22, 1932 — when Congress initiated borrowing authority for the Reconstruction Finance Corporation — through June 30, 1973, the amount of authority to spend from debt receipts totaled $133,492,600,000.34 Of that amount, only $17 billion passed through the Appropriations Committees. The balance was handled by other committees.35

Contract authority allowed agencies to enter into obligations prior to an appropriation.36 Certain kinds of contract authority have been subject to restrictions in appropriation bills, but in most cases once an obligation is placed upon the government as a result of contract authority, the Appropriations Committee must liquidate those obligations by appropriating the necessary funds.37

The authorization committees also passed “mandatory entitlements” in

35. Id.
36. See generally Schick, supra note 33, at 105-10.
the form of food stamp amendments, school lunch amendments, veterans' pension increases, social security benefit increases, and railroad retirement. The Congressional Budget Act of 1974 describes entitlements as authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriations Acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law.  

According to legislative precedents, authorizations are not technically binding: "Either or both Houses may refuse to appropriate for any object, either in whole or in part, even though that object may be authorized by law." In a practical sense, however, certain authorizations require payments over which there is little or no control by the Appropriations Committees.

A fourth type of "backdoor" spending takes the form of permanent appropriations. In this case, an appropriation becomes available without any current action by Congress. One example would be interest on the public debt. Most of the permanent appropriations consist of such trust funds as Federal Old-Age and Survivors Insurance, Federal Disability Insurance, Unemployment Compensation, and General Revenue Sharing.

Because of the growth of backdoor spending, the effective jurisdiction of the Appropriations Committees became smaller with each passing year. In 1973, a joint congressional committee estimated that the Appropriations Committees had "effective control over less than fifty percent of the budget ...." Congress attempted to reverse this process in the Congressional Budget Act of 1974 by prohibiting new backdoor spending — of the contract authority and borrowing authority variety — and by giving the Appropriations Committees a review function over entitlement authority. The Act also required the Appropriations Committees to study permanent appropriations with a view towards their modification or termination.

II. Authorization Bills

As a general principle, authorizing committees are responsible for recommending programs and activities to be approved by Congress. The
committees establish program objectives and frequently set dollar ceilings on the amounts that can be appropriated. Once this authorization stage is complete, the Appropriations Committees recommend the actual level of "budget authority," allowing federal agencies to enter into obligations. This, of course, is an idealized model. Actual congressional operation is substantially different.

A. Authorizations that Contain Appropriations

According to House Rule XXI, clause 5, a bill or joint resolution carrying appropriations may not be reported by any committee without jurisdiction to report appropriations. Moreover, a committee not having jurisdiction over a bill may not report an amendment containing an appropriation during the consideration of a bill or joint resolution. If such should occur, a question of order on an appropriation in the bill, joint resolution, or amendment thereto may be raised at any time.

Clause 5 does not apply to private bills, since the committees having jurisdiction over bills for the payment of private claims may report bills making appropriations within the limits of their jurisdiction. Nor is the clause applicable to propositions authorizing the Secretary of the Treasury "to use proceeds from the sale of bonds under the Second Liberty Bond Act (public debt transactions) for the purpose of making loans, since such loans do not constitute 'appropriations' within the purview of the rule." Neither does the rule apply to language "exempting loan guarantees in a legislative bill from statutory limitations on expenditures.

Language reappropriating — that is, extending the availability of funds that would otherwise expire, — making available, or diverting an appropriation or a portion of an appropriation already made for one purpose to another is not in order. This type of appropriation was included in the Special International Security Assistance Act of 1979, which provides support for the peace treaty between Egypt and Israel. The rule accompanying this bill specifically waived clause 5 of Rule XXI.

44. House Rules, supra note 1, at 541. This portion of Rule XXI was originally adopted on June 21, 1920 when the House consolidated all appropriations into a single committee.
45. Id.
46. Id. at 541.
47. Id. at 541-42.
48. Id. at 542.
49. Id.
50. Id. at 543.
B. Authorizations that Create Liabilities

Although substantive committees may recommend the authorization of an appropriation, agencies need the appropriation before they can obligate funds. There are, however, occasions when an authorization act alone may create a governmental liability which is enforceable in federal court. The Federal Aviation Act of 1958, 53 for example, empowered the Civil Aeronautics Board to obligate the United States for the payment of a subsidy to helicopter companies, even in the absence of a congressional appropriation. As explained by the United States Court of Claims, once services were rendered by the companies, the authorized subsidy became an enforceable contractual obligation "which could be avoided only by changing the substantive law under which the Board set the rates, rather than by curtailing appropriations." 54 The court noted that it has long been established that Congress' failure to appropriate funds, without further language modifying or repealing the substantive law, either expressly or by clear implication, "does not in and of itself defeat a Government obligation created by statute." 55 The court reasoned:

As a general proposition Congress has the power to amend substantive legislation for a particular year by an appropriation act, although such procedure is considered undesirable legislative form and subject to a point of order. An amendment will not readily be inferred. The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest. 56

In this particular case, the failure of Congress to appropriate funds merely barred the accounting agents of the government from disbursing funds and forced the air carriers to a recovery in the Court of Claims. 57 In other cases, where authorization acts contain permissive language and the statute expressly states that no liability exists in the event that Congress

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54. New York Airways, Inc. v. United States, 369 F.2d 743, 747 (Ct. Cl. 1966). For another decision holding that a failure to appropriate need not stop a statutorily authorized project, see Delaware Valley Conservation Ass'n v. Resor, 269 F. Supp. 181 (M.D. Pa. 1967). Congress authorized a water conservation and recreational project in 1962 and 1965 and authorized appropriations for this project to the Secretaries of the Army and the Interior. Although these funds had not yet been appropriated at the time this action was brought, the court found that this did not render the project constitutionally infirm or deprive plaintiffs of due process.
55. 369 F.2d at 748.
56. Id. at 749.
57. Id. at 752.
fails to make an appropriation, the authorization bill alone does not create a binding obligation. The permissive nature of the language relieves the government of any liability.

C. Authorizations as Ceilings

In addition to setting programmatic objectives, authorization bills often contain dollar ceilings for appropriations. When a ceiling is insufficient to support program needs, supplemental authorization bills are passed to raise the ceiling.

While the Appropriations Committees usually honor such ceilings by appropriating within a dollar limit but not beyond, it is possible to appropriate in excess of an authorization ceiling. Legislation in 1946 authorized the construction of two bridges at a cost not to exceed seven million dollars. Because of cost increases, the Appropriations Committees recommended additional amounts beyond the ceiling, while waiting for the authorization committees to increase the ceiling. The question, therefore, was whether the additional amounts included in the appropriation bill could be spent by the agency. A General Accounting Office (GAO) decision offered this guidance:

As a general proposition, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended and the nature of the work authorized. . . . It is fundamental, however, that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money.

Although Senate Rule XVI contains a restriction against legislating in

58. See, e.g., McKay v. Central Elec. Power Coop., 223 F.2d 623, 625 (D.C. Cir. 1955). Central entered into contracts with the federal government providing that Central construct power facilities and that the government would lease one facility and buy the entire output of the other. The court dismissed Central's suit for breach of contract since the contracts made performance expressly conditional on appropriations from Congress, which appropriations proved insufficient.

59. For example, in 1979 Congress amended the authorization act for the National Aeronautics and Space Administration to increase the dollar ceiling from $1,443,300,000 to $1,628,300,000. Pub. L. No. 96-16, 93 Stat. 33 (1979) (amending Pub. L. No. 95-401, 92 Stat. 857 (1979)).


an appropriation bill, the Senate Committee on Appropriations "may propose to increase appropriations or propose a new item of appropriation in excess of authorizations or even in the absence of any legislative authority as long as the proposed amendment does not contain legislation." Two Senate precedents are cited to support this position. The first precedent does not deal squarely with the issue, while the second is mired in ambiguity and confusion. When the Presiding Officer was pressed for clarification in the second case, he announced that the Parliamentarian joined him in stating that the inquiry was "so involved, complicated, and can be so dependent on contingencies, that we suggest the matter not be pursued any further at this point."

D. Appropriating Without an Authorization

Congress not only appropriates in excess of authorization limits, it also appropriates in the absence of authorizations. In 1975, Congress appropriated funds for three domestic food programs, although the authorizations for those programs were scheduled to expire during that fiscal year. After the Department of Agriculture expressed doubt that it could obligate funds without an extension of the original authorization, the GAO ruled that the funds could be obligated:

"It would seem that the appropriation of funds for a program whose authorization is due to expire during the period of availability of the funds, confers the necessary authority to continue the program during that period of availability, in the absence of indication of contrary intent."

In 1977, during floor debate on the Clinch River breeder reactor project, the question was raised whether funds could be spent without the passage of the authorization bill. The following dialogue occurred between Representatives Tom Bevill and James Weaver:

63. Senate Rules, supra note 1, at 16.
64. Senate Procedure, supra note 1, at 132.
65. See 115 Cong. Rec. 39582-83 (1969) (remarks of Sen. Mansfield and the Presiding Officer). In response to an inquiry by the Senator in regard to amending the foreign aid appropriations bill, the Presiding Officer stated that changes in the appropriations bill that were not in the authorization bill would not be subject to a point of order unless the amendment contained legislation.
66. 113 Cong. Rec. 12162 (1967) (remarks of the Presiding Officer). Senator Mansfield introduced an amendment to the Presidential Election Campaign Fund Act which would render inoperative a provision of the law allowing distribution of campaign funds to the parties. Senator Mansfield stated that the Appropriations Committee could not still authorize such disbursements, since such authorization would constitute legislation.
68. Id. at 292 (1975).
Mr. Bevill: If the prohibition is knocked out, as my amendment will do, the money can be spent, yes.

Mr. Weaver: Even though the authorization bill is not enacted into law?

Mr. Bevill: That is right.69

Representative Walter Flowers added that from “time immemorial we have been passing appropriations bills without authorization, and that is all in the world this is here. There are numerous items within this supplemental, I understand, that do not have authorizing legislation.”70

As a general rule, the Appropriations Committees provide funds for individual programs and activities only after they have been approved by the authorizing committees. As Senator John Stennis noted in 1974, “The Armed Services Committee has insisted all the way through that matters should not be appropriated for unless they have been expressly authorized. Not all Members of Congress agree with that position, but I think it is a sound one . . .”71

An exception to this rule occurred in 1975 when the Senate Appropriations Committee provided $5.6 million to conduct a flight test of the Enforcer close support aircraft. The Senate Committee on Armed Services had held hearings on the aircraft, but only after the Senate had completed action on the appropriation bill.72 Despite this reversal of the authorization-appropriation process, a point of order could not be raised since the Armed Services Committees do not authorize individual programs and projects. Instead, they authorize general categories, such as “Procurement, Aircraft” or “Research, Development, Test, and Evaluation, Navy.”73 Once those categories are authorized for a particular year, and a program or project fits within the category, no point of order lies.

Since the funding of the Enforcer aircraft could not be challenged as legislation in an appropriation bill, Senator Barry Goldwater offered an amendment to delete the $5.6 million from the bill. Senator Howard Cannon, a co-sponsor of the amendment, expressed the view that although authorization of the Enforcer might not be required in a technical sense, [i]t surely violates the spirit of the authorization process. In fact, Mr. President, if the Enforcer funding is allowed to remain in the bill, it will set an unmanageable precedent because everyone with enough political clout will use that precedent as justification to

70. Id.
71. 120 CONG. REC. 13728 (1974).
have included in future appropriation bills their favorite something-or-other.\(^4\)

In a letter to their colleagues, Senators Cannon and Goldwater maintained that the addition of the $5.6 million violated the "established practices and procedures of the authorization and appropriations process."\(^5\) The Senate accepted the Goldwater amendment by a vote of fifty-six to thirty-two.\(^6\)

### E. Appropriation-Forcing Language

In addition to setting dollar ceilings for the Appropriations Committees, legislative committees may try to establish floors, or minimums, below which appropriations may not go. The Appropriations Committees generally resist such language as an improper interference with their jurisdiction and responsibilities.

A recent example concerns the authorization bill for the Department of Justice in 1978.\(^7\) As enacted into law, the bill authorized for the Immigration and Naturalization Service (INS) a total of $320,722,000, "of which $2,052,000 shall be made available for the investigation and prosecution of denaturalization and deportation cases involving alleged Nazi war criminals."\(^8\) The purpose behind this language was to force INS to devote larger sums to this investigative effort.\(^9\) The authorization bill was enacted late, nearly a month after the appropriation bill had provided $299,350,000 for INS without earmarking a specific amount for the Nazi litigation unit.\(^10\)

In a memorandum dated January 16, 1979, the Justice Department's Office of Legal Counsel concluded that the full amount of $2,052 million had to be made available to the Nazi litigation unit,\(^11\) but no formal action was taken to set the money aside until a subcommittee of the House Judiciary Committee raised the issue directly with the Department of Justice. In a letter dated March 27, 1979, the Department notified the House Judiciary Committee that the full $2,052 million had been set aside for the unit, and yet it appeared unlikely that the full amount would be actually spent for

\(^{74}\) 121 Cong. Rec. 36521-28 (1975).

\(^{75}\) Id. at 36526.

\(^{76}\) Id. at 36528.


\(^{78}\) Id. at 3460-61.


that purpose.\textsuperscript{82}

The State-Justice Subcommittee of the House Appropriations Committee opposed the imposition of minimum amounts by the authorization committees since this practice nullifies their discretion to fund at less than authorized levels. Although the amount for the Nazi litigation unit was a small fraction of the total appropriation bill, this type of precedent could permit the authorization committees to narrow progressively the discretionary authority of the Appropriations Committees.

Precisely this kind of development occurred when the Senate Judiciary Committee reported the Department of Justice authorization bill for fiscal year 1980.\textsuperscript{83} The Committee indicated that the Department had expressed concern that the sums appropriated for a specific purpose, pursuant to an authorization, might be less than the sum authorized. In the Senate report on the bill, the Committee stated that “[a]s the Committee understands, the Department fears that, should this occur, the Department will be unable to comply with both the Authorization Act and the Appropriation Act.”\textsuperscript{84} Although there is nothing unusual about authorization levels exceeding the amount appropriated, the mandatory language of the authorization bill, stating that a specific amount shall be made available, complicates the management of funds by the Justice Department; the full amount must be set aside for earmarked programs, leaving inadequate sums for programs not so favored. The Committee said it intended that “should a discrepancy occur between the Appropriation and Authorization Acts with respect to earmarked funds, any amount in the Authorization Act specified to be made available for a particular purpose shall be reduced proportionately with the reduced appropriation.”\textsuperscript{85}

This expression of committee intent, whatever its meaning, was rendered moot within a few weeks when the Senate acted on the authorization bill. The Judiciary Committee successfully offered an amendment to strike from the bill twelve sections that had used the mandatory language “shall be made available.” In place of that language, the committee amendment proposed the customary phrase “not to exceed.”\textsuperscript{86} The Chairman of the Committee, Senator Edward Kennedy, explained that the amendment

\textsuperscript{82} \textit{Id.} For fiscal 1980, the House Judiciary Committee increased the authorization level for the Unit to $3 million. \textit{Id.} at 11.


\textsuperscript{84} S. REP. NO. 173, 96th Cong., 1st Sess. 8 (1979).

\textsuperscript{85} \textit{Id.}

ments of policy direction. The language in no way undoes the committee's estimate of resource needs; rather it permits the Appropriation Committee to respond more flexibly to those needs within the very real constraints of the first concurrent budget resolution. I have been assured that the policy direction and program concerns addressed in the bill will be respected by the appropriation committee to the extent fiscal constraints permit.87

When the House Appropriations Committee reported the State-Justice appropriation bill in 1979, it earmarked a specific amount for the Nazi litigation unit, but at half the amount of the minimum established by the authorization committee. This approach represented a compromise between the prerogative of the authorization committee to establish program priorities and the prerogative of the Appropriations Committee to provide funds at less than the authorized level.88 After action by the Senate and the Conference Committee, Congress decided to remove the earmarking from the bill, preferring to make the dollar amount part of the legislative history (or what might be called "nonstatutory earmarking").89

III. APPROPRIATION BILLS

Specific provisions in House and Senate rules, augmented by precedents established during parliamentary deliberation, permit appropriations for purposes not authorized by law. Rarely does an appropriation bill pass that does not contain some form of "legislation." Floor rulings allow Members to add "limitations" and "riders" to appropriation bills, while the Appropriations Committees use language in committee reports — a nonstatutory control — as a further means of setting policy. All of these actions raise the question, still largely unanswered in the courts, whether appropriation bills are valid instruments for changing substantive policy.

A. Jurisdiction of the Appropriations Committees

Rule X of the House of Representatives reserves to the Appropriations Committee jurisdiction over all bills, resolutions, and other matters relating to "Appropriations of the revenue for the support of the Government."90 Rule XXV of the Standing Rules of the Senate reserves the same

87. Id.
90. House Rules, supra note 1, at 324.
jurisdiction to the Senate Committee on Appropriations.\footnote{91}{\textit{Senate Rules}, supra note 1, at 25.}

The authority to transfer funds from one appropriation account to another was considered "legislative" in previous years and therefore under the jurisdiction of the authorization committees. Prior to 1974, recommendations by the Appropriations Committees to transfer funds were subject to a point of order on the floor. It was necessary, therefore, for the House Appropriations Committee to obtain a rule waiving points of order. For example, in 1973, a supplemental appropriation bill reached the floor accompanied by a rule that waived all points of order for failure to comply with two House rules.\footnote{92}{119 Cong. Rec. 15273 (1973).} Of 109 instances in which these two rules had been violated, eighty involved fund transfer.\footnote{93}{Id. at 15274.} George Mahon, Chairman of the House Appropriations Committee, explained:

I think it might be recited that in prior years, quite a number of years ago, it was in order. It was not held to be in violation of the Rules of the House for the Committee on Appropriations to bring in a bill transferring funds which had previously been approved by Congress.\footnote{94}{Id. For rulings on transfers, see Deschler's Procedure, supra note 52, at 369-71.}

In 1974, the House Select Committee on Committees proposed that the Appropriations Committee be allowed to recommend transfers without obtaining a rule waiving points of order. The Select Committee required that such transfers be identified under separate headings in all bills and reports issued by the Appropriations Committee.\footnote{95}{H.R. Rep. No. 916, Part II, 93d Cong., 2d Sess. 29-30 (1974).} Passage of House Resolution 988\footnote{96}{H.R. Res. 988, 93d Cong., 2d Sess. (1974) (effective January 3, 1975).} expanded the jurisdiction of House Appropriations to include "transfers of unexpended balances." The Committee, therefore, must include separate headings for each transfer along with a listing of all proposed transfers in any bill or resolution it reports. Additionally, a separate section on transfers must be included in the accompanying committee report.

\begin{enumerate}
\item \textit{B. Legislation in an Appropriation Bill}\end{enumerate}

House and Senate rules restrict the addition of "legislation" to a general appropriation bill. House Rule XXI, clause 2 directs that "nothing appropriated bill shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and
objects as are already in progress." Appropriations for a single government agency and joint resolutions containing continuing appropriations for diverse agencies — providing funds until general appropriation bills are enacted — are not "general appropriation bills" within the purview of this clause. According to this rule, authorizations must be in the form of a public law before the Appropriations Committee can even report a bill. Various practices, to be discussed, dilute the force of this rule. The Senate rule is less strict. Senate Rule XVI, paragraph 1, prohibits amendments to general appropriation bills which would increase an appropriation already contained in the bill, or 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 ..." There are, however, two major exceptions to this general prohibition: (1) "unless the same be moved by direction of a standing or select committee of the Senate," and (2) "or proposed in pursuance of an estimate submitted in accordance with law." Permission for an unauthorized appropriation, when moved by a standing or select committee, includes the Appropriations Committee. Senate Rule XVI, paragraph 2, prohibits the Appropriations Committee from reporting an appropriation bill containing amendments 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 ..." If such an appropriation bill is reported to the Senate, a point of order may be raised against the bill. If the point is sustained, the bill must be recommitted to the Appropriations Committee. In contrast, a point of order against an amendment proposing legislation to a general appropriation bill, if sustained, does not recommit the bill under this paragraph, for such is not a point of order against the bill itself. Senate Rule XVI, paragraph 4, prohibits amendments proposing general legislation, or those that are neither germane nor relevant to the bill's subject matter, from being added to any general appropriation bill. Moreover, amendments to

97. HOUSE RULES, supra note 1, at 562. See DESCHLER'S PROCEDURE, supra note 52, at 326-30.
98. HOUSE RULES, supra note 1, at 564.
99. Id.
100. SENATE RULES, supra note 1, at 15.
101. Id.
102. SENATE PROCEDURE, supra note 1, at 132.
103. SENATE RULES, supra note 1, at 15-16.
104. SENATE PROCEDURE, supra note 1, at 120.
105. SENATE RULES, supra note 1, at 16.
any item or clause of the bill not directly related to or restricting the expenditure of the funds appropriated on a contingent basis may not be added.\textsuperscript{106} All questions of relevance of amendments under this rule, when raised, must 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."\textsuperscript{107} If a point of order is made against legislation in an appropriation bill, and a Senator submits that the item being challenged is germane, the Senate must first vote on the issue of germaneness. If the Senate rules that the amendment is germane, the point of order falls.\textsuperscript{108} Language may not be added to a general appropriation bill conditioning the availability of funds upon the subsequent enactment of authorizing legislation. Such language is considered legislation and subject to a point of order under House Rule XXI, clause 2.\textsuperscript{109} If a point of order is not raised, however, such conditional funding may occur. Thus, Representative Ray Roberts successfully added an amendment to the energy appropriation bill in 1979 prohibiting the expenditure of any funds by the Water Resources Council "unless funds for these purposes are authorized to be appropriated by Congress in a statute enacted after the date of enactment of this Act."\textsuperscript{110}

House Rule XXI, clause 6, prohibits general appropriation bills, or amendments thereto, from being received or considered if they contain 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."\textsuperscript{111} Despite this provision, reappropriations are still used either because no one raises a point of order or because points of order have been specifically waived in the resolution that accompanies an appropriation bill to the House floor.\textsuperscript{112}

\textbf{1. Failure to Raise a Point of Order}

Although House and Senate rules provide that legislation on a general

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} SENATE PROCEDURE, supra note 1, at 115-16. For a fuller explanation of the procedure, see text accompanying notes 246-57 infra.

\textsuperscript{109} DESCHLER'S PROCEDURE, supra note 52, at 375-77. For further rulings on legislation in appropriation bills, see id. at 367-99.

\textsuperscript{110} 125 CONG. REC. H4663-64 (daily ed. June 18, 1979).

\textsuperscript{111} HOUSE RULES, supra note 1, at 581-82. For a recent point of order successfully raised against a reappropriation, see 125 CONG. REC. H7281-82 (daily ed. Sept. 5, 1979) (remarks of Rep. Young of Florida).

\textsuperscript{112} See FISHER, supra note 10, at 130-33. For a recent example of a waiver of clause 6, see 125 CONG. REC. H4674 (daily ed. June 18, 1979) (remarks of Rep. Beilenson).
appropriation bill is subject to a point of order and can be stricken from
the bill by a single objection from the floor, such objection might not be
forthcoming on relatively noncontroversial legislation that Members find
beneficial. Comity among Members may, therefore, permit the inclusion
of some legislation in an appropriation bill. A Member who generally
raised points of order against appropriation bills on the ground that they
contained legislation explained why he acquiesced on occasion: “I don’t
make points of order on all legislation on an appropriation bill, because
some may be necessary due to changing conditions.”113

Points of order must be made in a timely manner. In 1975, Representa-
tive Gene Snyder offered the following amendment to the State-Justice
appropriation bill: “None of the funds appropriated in this title shall be
used for the purposes of negotiating the surrender or relinquishment of
any U.S. rights in the Panama Canal Zone.”114 After a quorum call, and
upon being recognized by the Chair, Representative Snyder asked unani-
mous consent that the Clerk reread his amendment, since there had been
inadequate attendance for the first reading. The Clerk reread the amends-ment, at which point Representative Robert Leggett inquired, “[i]s it too
time to make a point of order with respect to the amendment?”115 The
Chair informed him that the point of order came too late.116

C. The Holman Rule

House Rule XXI permits the inclusion of provisions that have the pur-
pose of retrenching expenditures.117 Under this clause, known as the
“Holman Rule,” provisions changing existing law are not in order,
except such as being germane to the subject matter of the bill
shall retrench expenditures by the reduction of the number and
salary of the officers of the United States, by the reduction of
compensation of any person paid out of the Treasury of the
United States, or by the reduction of amounts of money covered
by the bill . . . .118

The Holman Rule originated in 1876. After being dropped from the
rules from 1895 to 1911, it was readopted in the Sixty-second and subse-
quent Congresses.119

113. FENNO, supra note 32, at 74.
114. 121 CONG. REC. 20945 (1975).
115. Id. at 20945-46.
116. Id.
117. HOUSE RULES, supra note 1, at 562. For precedents on the Holman Rule, see
DESHLER’S PROCEDURE, supra note 52, at 378-80.
118. HOUSE RULES at 562.
119. Id. at 526.
D. Changing Existing Law

Although House Rule XXI, clause 2, prohibits provisions in a general appropriation bill that change existing law, other than the Holman exception, such bills frequently alter statutory authority. The Energy and Water Development appropriation bill for fiscal 1980, as reported from the House Committee on Appropriations, provided that certain appropriation items remain available until expended ("no-year money") where the programs or projects are continuing in nature. The authorizing legislation stipulated a fixed period of years for availability of the funds.

So frequently does legislation from the Appropriations Committees change existing law that House Rules now require regular reports. Thus, House Rule XXI, clause 3, requires that a report from the Committee on Appropriations accompanying any general appropriation bill "making an appropriation for any purpose shall contain a concise statement describing fully the effect of any provision of the accompanying bill which directly or indirectly changes the application of existing law." This clause became part of the rules effective January 3, 1975 as one of the reforms generated by the House Select Committee on Committees. The clause was amended on January 14, 1975 to confine its applicability to general appropriation bills. In contrast, Senate Rule XVI, paragraph 8, requires every report on general appropriation bills filed by the Appropriations Committee to identify with "particularity" each recommended amendment proposing an item of appropriation "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."

Appropriations subcommittees often point out that their changes to existing law are consistent with the wishes of authorization committees. The House report accompanying the agriculture appropriation bill for fiscal 1980 contains this statement regarding provisions that directly or indirectly change the application of existing law: "In most instances, these provisions have been included in prior appropriation bills, often at the request of or with the knowledge and consent of the responsible legislative committees."

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121. Id.
122. HOUSE RULES, supra note 1, at 578.
125. HOUSE RULES, supra note 1, at 578. For the debate over this amendment, see 120 CONG. REC. 34416-19 (1974).
126. SENATE RULES, supra note 1, at 17.
House Rule XIII, clause 3, requires that whenever a committee reports a bill or a joint resolution repealing or amending a statute or part thereof, it must include in its report or in an accompanying document both the text of the statute or part which is proposed to be repealed and a comparative print of that part of the bill or joint resolution making the amendment, and of the statute or part proposed to be amended. Stricken-through type, italics, parallel columns, or other appropriate typographical devices are used to indicate omissions and insertions. This rule applies to appropriation bills that include legislative provisions.

E. Limitations

It has become the custom in the House to admit certain “limitations” in an appropriation bill. Since Congress, under its rules, may decline to appropriate for a purpose authorized by law, “so it may by limitation prohibit the use of the money for part of the purpose while appropriating for the remainder of it.” According to House precedents, the limitations must apply solely to the money of the appropriation under consideration and may not be made applicable to money appropriated in other Acts. Although an amendment or language in an appropriation bill may not impose additional duties or require judgments and determinations not required by law, certain incidental duties are allowed. Limitations in an appropriation bill are not necessarily efforts on the part of the Appropriations Committees to “legislate” or to invade the jurisdiction of the authorization committees. Frequently, such limitations are added at the request of authorization committees. Representative Neal Smith observed in 1979:

I just want to point out that this bill now has two or three pages of authorizations in the form of limitations on an appropriation bill. This is a classic example. Time after time tonight we have had other additional authorizing language put in on this appropriation bill.

Do my colleagues know who has been doing it? I notice the Committee on Appropriations has been resisting this. It is the

128. HOUSE RULES, supra note 1, at 481.
129. Id. at 449.
130. Id. at 534.
131. Id.
132. Id. at 533. For an example of a limitation stripped of duties, see the debate on the energy and water development appropriations bill, 125 CONG. REC. H4648-62 (daily ed. June 18, 1979).
133. DESCHLER’S PROCEDURE, supra note 52, at 341-44. For other rulings on limitations, see id. at 339-54.
members of the authorizing committees that come in here and want authorizing legislation put on appropriation bills. Here is a classic example at 20 minutes until 12 [midnight] where we are deciding an important question that needs two or three days of hearings...134

1. The 1977 Anti-Abortion Amendment

The use of limitations in an appropriation bill and the resulting controversy over whether such limitations constitute substantive changes to existing authorizing statutes are illustrated vividly by the effort in 1977 to restrict federal funds for abortions. The dispute also suggests the difficulty in fashioning limitation language that will both satisfy the sponsor and conform to House and Senate rules.

Section 209 of the Labor-HEW appropriation bill, as considered by the House in 1977, contained a limitation prohibiting the use of funds “to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.” 135 A point of order was raised against this section on the ground that it constituted legislation in an appropriation bill:

Obviously and implicitly in this language is the duty on the part of some administrative agency, or on the part of whoever is going to disburse the funds, to ascertain from some physician that the life of the mother or the pregnant woman would be endangered if the fetus is carried to term. 136

The floor manager of the bill defended the language, arguing that a determination whether the life of the mother is endangered would be made by a physician, not a federal official. In support of this position, another Member pointed out that the Medicaid funds which the section affected are administered by the states, not by the federal government. However, the Chair sustained the point of order after concluding that the section required the federal government to determine whether the life of the mother was endangered: “Whether or not such determinations are routinely made by practicing physicians on a voluntary basis, the language in the bill addresses determinations by the Federal Government and is not limited by its terms to determinations by individual physicians or by the respective States.” 137

To avoid a further point of order, the language was revised to read:

137. Id. (remarks of the Chairman).
“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.” Once again, the language was challenged as legislation in an appropriation bill, particularly since some of the physicians work in federal hospitals and are paid directly by the federal government. Furthermore, the language would have required the disbursing officer of a federal agency to obtain a written certification from a physician before disbursing the funds. On those grounds, the Chair sustained the point of order. At this juncture, the following language was offered for section 209: “None of the funds appropriated under this Act shall be used to pay for abortions or to promote or encourage abortions.” The sponsor of this language, Representative Henry Hyde, regretted the need to omit the exception for therapeutic abortions, “[but] I am forced into this position today by points of order.” No point of order was raised against this strict prohibition, since it eliminated the need for judgment and determination by federal officials.

When the bill reached the Senate, Senator Edward Brooke offered an amendment to permit federal funding for certain types of abortions:

None of the funds in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term, or where medically necessary, or for the treatment of rape or incest. This section does not prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

When Senator Goldwater raised a point of order that the amendment constituted legislation on an appropriation bill, Senator Brooke countered by asking for a vote on the germaneness of his amendment. The Senate voted seventy-four to twenty-one in favor of its germaneness, thereby obviating the point of order.

Because the House and Senate failed to agree on compromise language, the Labor-HEW appropriation bill for that fiscal year was never enacted into law. Programs had to be funded by a continuing resolution, which included the following language, known as the Hyde Amendment:

None of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be

138. Id. at H6083.
139. Id. (remarks of the Chairman).
140. Id.
143. Id. at S11055-56.
endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.\textsuperscript{144}

Federal courts differ on the question whether the Hyde Amendment effects a substantive change to Title XIX of the Social Security Act,\textsuperscript{145} which governs the Medicaid program. In \textit{Preterm, Inc. v. Dukakis},\textsuperscript{146} the First Circuit held that Congress utilized the device of withholding federal funds as the means of making a substantive change in the law:

[T]he record is clear that both Houses of Congress were acutely conscious that they were engaging in substantive legislation. The very first event which took place in the House of Representatives was the making of two points of order, the sustaining of the same, and an amendment by sponsor Hyde simply confining his Amendment to a ban on spending federal funds for abortions, any abortions.\textsuperscript{147}

Thus, although two points of order were sustained on amendments adding “legislation,” the court nevertheless held that the third and successful amendment constituted substantive legislation: “[W]e are persuaded that Congress realized that it was using the unusual and frowned upon device of legislating via an appropriations measure to accomplish a substantive result.”\textsuperscript{148}

In contrast, in \textit{Doe v. Busbee},\textsuperscript{149} a federal district court gave greater weight to the “recognized and settled policy of Congress against legislating in the appropriations context . . . .”\textsuperscript{150} The district court found that the statements made by the proponents of the Hyde Amendment indicated that they hoped it would accomplish their desires “even though they were unable to change the substantive law on abortions . . . .”\textsuperscript{151} On the basis of this reading, the district court held that the Hyde Amendment merely restricts the use of federal funds for abortions and does not constitute a

\begin{footnotes}
\item[146] 591 F.2d 121 (1st Cir. 1979).
\item[147] \textit{Id.} at 129.
\item[148] \textit{Id.} at 131.
\item[150] \textit{Id.} at 2802.
\item[151] \textit{Id.}
\end{footnotes}
substantive change in Title XIX.\textsuperscript{152}

2. \textit{Unconstitutional Conditions}

Depending on the circumstances, the courts might regard congressional limitations as unconstitutional conditions. For example, in 1943 Congress added the following provision to an appropriation bill:

No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services [of three named individuals] unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate . . . .\textsuperscript{153}

A point of order had been raised that the amendment sought to limit an appropriation in some other appropriation bill and thus went beyond House precedents. In rebuttal, the Chairman of the House Appropriations Committee noted that the amendment was proper because of a previous House resolution\textsuperscript{154} that authorized a special committee investigation leading to the proposed amendment. The report accompanying the resolution stated: "Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee or may be offered as a committee amendment to any such measure notwithstanding the provisions of clause 2 of rule XXI."\textsuperscript{155} The Chair overruled the point of order because, in effect, the rule had been waived in advance by another House resolution.\textsuperscript{156}

The three individuals brought an action in the Court of Claims to secure compensation for their post-November 15 work.\textsuperscript{157} Counsel for Congress argued that the condition simply involved an exercise of congressional powers over appropriations, which, according to counsel's argument, were plenary and not subject to judicial review.\textsuperscript{158} However, in \textit{United States v.}

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} For a discussion of other cases analyzing the authorization-appropriation distinction, see text accompanying notes 194-206, 215-22 infra.
\item \textsuperscript{153} \textit{Urgent Deficiency Appropriations Act of 1943}, Pub. L. No. 78-132, § 304, 57 Stat. 431 (1943).
\item \textsuperscript{154} H.R. Res. 105, 78th Cong., 1st Sess. (1943).
\item \textsuperscript{155} H.R. Rep. No. 448, 78th Cong., 1st Sess. 2 (1943).
\item \textsuperscript{156} 89 Cong. Rec. 4558 (1943).
\item \textsuperscript{157} Lovett \textit{v. United States}, 66 F. Supp. 142 (Ct. Cl. 1945), \textit{aff'd}, 328 U.S. 303 (1946).
\item \textsuperscript{158} \textit{Id.} at 148 (Whitaker, J., concurring); 89 Cong. Rec. 4558 (1943).
\end{itemize}
The Supreme Court decided that the appropriations language accomplished the punishment of the named individuals without a judicial trial and therefore violated the constitutional prohibition against the enactment of any bill of attainder.

3. Proposals To Prohibit Riders

In 1946, the Joint Committee on the Organization of Congress recommended that the practice of attaching legislation to appropriation bills be discontinued. It also recommended that the rules be "tightened effectively" to prevent limitations that are actually efforts designed to effect legislative changes.

The joint committee's bill, enacted as the Legislative Reorganization Act of 1946, included changes in Senate Rule XVI regarding amendments to appropriation bills. Nevertheless, the problem of defining "limitations" and "germaneness" continued to leave the door open to legislation in appropriation bills. The practice of attaching riders to appropriation bills prompted Representative Herbert Harris to introduce remedial legislation in 1978. He noted that in recent years the House had voted a variety of riders to ban the Supersonic Transport, to bar trade with Cuba, to restrict

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159. 328 U.S. 303 (1946).
160. 328 U.S. at 315-18; U.S. Const. art. I, § 3, cl. 9.
161. The report stated:

   The practice of attaching legislation to appropriation bills is often destructive of orderly procedure. Riders obstruct and retard the consideration of supply bills. Sometimes they contradict action previously approved in carefully considered legislation.

   In most cases such legislation is adopted under the parliamentary guise of "limiting provisos," avoiding points of order that would be raised against them by purporting to restrict the spending of Government funds. These practices, when used for purposes other than to effect real economies, should be prohibited by a tightening of the rules.

   Otherwise the regular jurisdiction of the standing committees of the House and Senate will continue to be impinged upon by the appropriating committees. Much added work in Government departments and by private attorneys is caused by attaching legislative riders on appropriation bills.

   We further recommend that the Appropriations Committees seek to restrict limiting amendments to those which genuinely effect economies. Sometimes the limiting amendments require far greater expenditure of funds to comply with the limitations imposed than would otherwise be necessary. We recommend that the Comptroller General be requested to make a study of this type of extravagant "economy limitations" with a view to eliminating those which add to Government expense rather than reduce it.


the Occupational Safety and Health Administration, to bind multilateral lending institutions, to upgrade veterans' discharges, to review the status of soldiers missing in war, to stop the B-1 bomber, and to limit peanut price supports. In the first session of the Ninety-fifth Congress, he said, "We underwent a tortuous and protracted experience attempting to resolve the 'Hyde Amendment' [to prohibit the use of federal funds for abortion] with 11 votes in the House and a total of 28 votes in both houses."163

The Harris resolution to limit legislation in appropriation bills was based on the belief that the separation of legislation and appropriations "is a fundamental principle of constitutional government, from which derives our authorizations-appropriations process and the jurisdictional structure of our committees."164 Moreover, legislating on the floor in appropriation measures "can result in superficial, unsound, or unsatisfactory public policy."165 In Representative Harris' view, substantive issues should be handled by the authorization committees that have expertise in particular areas and should be brought to the floor with that preparation.

Harris' proposal would have barred limitation amendments and deleted the Holman Rule. Under his proposal, Rule XXI, clause 2, would have 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."166 This change in the House Rules would have covered all appropriation measures, including continuing resolutions.

Harris directed much of his criticism at the uneven history of parliamentary rulings attempting to distinguish between "legislation" and "limitation." He noted that interpretations of House Rule XXI, clause 2, "have resulted in conflicting, ambiguous, and inconsistent rulings — leaving great confusion about what is and is not allowed."167

Other Members of Congress defend the Holman Rule and appropriation riders. Representative Tom Hagedorn argued in 1978: "[n]othing could be more consistent with the congressional power of the purse than the right of this body and its Members to eliminate wasteful expenditures."168 As to riders, he contended:

164. Id.
165. Id.
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.\textsuperscript{169}

Hagedorn also pointed out that if appropriation bills were more detailed and precise than they are at present, "many, if not most, limitation amendments could be offered instead as amendments to reduce or to strike specific itemized appropriations in the bills."\textsuperscript{170}

As a result of the exceptionally strong interest in appropriation riders, the Democratic Study Group (DSG) released a special report dealing with this issue in 1978.\textsuperscript{171} The report concluded that the number of limitation amendments had increased markedly in recent years and that this increase partly reflected the record teller vote reform, which took effect in 1971, and congressional assertiveness in exercising control over federal expenditures.\textsuperscript{172} Moreover, sponsorship of limitation amendments was affected by which political party controlled the White House. During the Nixon-Ford years, Democrats offered nearly sixty percent of the limitation amendments, whereas Republicans offered nearly eighty percent of the limitation amendments during the Kennedy-Johnson years. However, during the first year of the Carter Administration, Republicans offered only half of the limitation amendments.\textsuperscript{173} The DSG report summarized the arguments for and against various reforms, including: (1) prohibiting all appropriation riders; (2) prohibiting floor amendment riders only; (3) prohibiting riders unless directed by authorizing committees; (4) requiring a two-thirds vote for approval; and (5) dealing with riders on an ad hoc basis in the Rules Committee.\textsuperscript{174}

The difficulty of reconciling general principles with specific needs is illustrated by the record of Senator John Stennis. In 1977 Stennis objected to "obscure rules about amendments on appropriation bills, that contain legislation on appropriation bills."\textsuperscript{175} He complained that all too often on points of order and germaneness "the membership votes on the merits of these proposed amendments rather than voting on an interpretation of the

\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{172} Id. at 6.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 7-11.
rules.” Stennis proposed that something be done to make the rules more specific with reference to legislation on appropriations bills: “It chokes the committees; it slows down the floor consideration, and it is a millstone around our necks . . . .”

In 1979, however, when faced with a specific case of flooding in his home state, coupled with the failure of Congress to enact an authorization bill providing low-interest loans to victims of disasters, Senator Stennis offered an amendment to an appropriation bill to provide three percent distress loans. He noted that the House and Senate had already taken roll call votes in favor of this policy but that the authorization bill remained in conference. When Senator Lowell Weicker raised a point of order against the amendment on the ground that it violated the Senate rule prohibiting legislation in an appropriation bill, Stennis replied that the flood disaster victims needed immediate assistance: “I do not know whether they can live on germaneness or the regular order very long or not.” Senator Walter Huddleston, a member of the Appropriations Committee, the Agriculture Committee, and the Small Business Committee (the latter having jurisdiction over the authorization bill for distress loans), sided with Stennis: “It is difficult to tell the people of the United States that Congress cannot respond to their dire problem because of a particular parliamentary procedure with which we are confronted.”

Before the Chair had an opportunity to rule on Weicker’s point of order, Stennis raised a question of germaneness. Under the rules of the Senate, that question must be determined by the Senate without debate. If the Senate decides that the amendment is germane, the point of order that it is legislation will not lie. In this case, the Senate voted eighty-three to eleven that the Stennis amendment was germane.

F. Continuing Resolutions

When regular appropriation bills are not enacted by the time a new fiscal year begins, Congress passes “continuing resolutions” to provide uninterrupted funding for the affected agencies. Continuing resolutions allow Congress to authorize and appropriate at the same time since joint resolutions containing continuing resolutions for diverse agencies are not

176. Id.
177. Id.
179. Id. at S8508.
180. Id.
181. For a discussion of germaneness, see text accompanying notes 246-57 infra.
"general appropriation bills" within the meaning of House Rule XXI, clause 2.\textsuperscript{183} However, points of order may be made in the Senate under Rule XVI, paragraph one.\textsuperscript{183a}

There have been occasions where the House is confronted with a hybrid appropriation bill — a continuing resolution that contains some regular annual appropriations. An effort to challenge the latter, on the ground that they violated Rule XXI, clause 2, failed when the Chair ruled that the resolution "was not introduced or reported as a general appropriation bill. This is a continuing resolution, and no point of order would lie . . . ."\textsuperscript{184}

Because of this exemption from House Rule XXI, clause 2, continuing resolutions are convenient instruments for expressing congressional policy. For instance, a continuing resolution for fiscal year 1975 stated that "[n]one of the funds herein made available shall be expended to aid or assist in the reconstruction of the Democratic Republic of Vietnam (North Vietnam)."\textsuperscript{185} The resolution also prohibited any funds from being obligated or expended to finance "directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia."\textsuperscript{186} Additionally, the resolution addressed the impoundment dispute in the federal courts, stating that "[a]ny provision of the law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds."\textsuperscript{187}

In 1978, when funds were omitted from a Labor-HEW appropriation bill because of a lack of authorizations, the matter was later resolved by a continuing resolution. The joint resolution made special provision for certain programs that would normally be funded in the regular appropriation bill "but which were not included in either the House or Senate versions of that bill because of expiring authorizing legislation."\textsuperscript{188} By the time the Senate Appropriations Committee reported the continuing resolution eleven days into the new fiscal year, most of the expiring authorizing legislation still had not been extended.\textsuperscript{189} Funds for the Labor-HEW programs receiving authorization and appropriation in the continuing resolution

\textsuperscript{183} House Rules, supra note 1, at 562-63; Deschler's Procedure, supra note 52, at 325.
\textsuperscript{186} Id. § 110.
\textsuperscript{187} Id. § 111.

Another opportunity to legislate in a continuing resolution arose in 1979. The House Appropriations Committee reported a separate continuing resolution for the Federal Trade Commission (FTC), whose authorization had expired at the end of fiscal year 1977. Attempts to pass authorization bills for fiscal year 1978 and fiscal year 1979 were unsuccessful, largely because the House and the Senate disagreed on the need for a legislative veto over FTC rulemaking.\footnote{H.R. REP. No. 437, 96th Cong., 1st Sess. 1-2 (1979).} During the forty-five days of interim financing covered by the resolution, the House prohibited the FTC from issuing any final trade regulation rules under the Magnuson-Moss Act or starting any new programs or projects under any of its authorities.\footnote{\textit{Id.} at 2.} The objective of this language was to force action on the authorization bill.\footnote{125 \textit{CONG. REC.} H8239-42 (daily ed. Sept. 20, 1979). The Senate accepted similar restrictions on the FTC, during action on the continuing resolution, but added some clarification in the legislative history regarding the initiation of new activities. 125 \textit{CONG. REC.} S13780 (daily ed. Oct. 1, 1979).}

\section*{G. Using Appropriation Bills to Set Policy}

Deep disagreement exists over whether appropriation bills are instruments for setting congressional policy. For example, officials in the Johnson Administration had contended that Congress had authorized the Vietnam War by appropriating for that purpose. In \textit{Berk v. Laird},\footnote{317 F. Supp. 715 (E.D.N.Y. 1970), aff'd sub nom. Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971).} experts from the academic community challenged this position, advising the judiciary that appropriation bills do not encompass major declarations of policy. They cited House and Senate rules designed to prevent substantive legislation from being included in appropriation bills.\footnote{317 F. Supp. at 718, 721 (testimony of Professors Richard F. Fenno, Jr., and Don Wallace, Jr.).} The court noted that numerous statements of policy had been included in appropriation acts, House and Senate rules notwithstanding,\footnote{\textit{Id.} at 725.} and concluded by stating:

\begin{quote}

The Constitution is not concerned with boundaries between the jurisdiction of appropriations sub-committees and substantive committees. Rules limiting amendment, even if enforced, are not of constitutional significance . . . . Plaintiff contends that any authorizations for Vietnam hostilities are not sufficiently explicit.
\end{quote}

This argument puts too narrow a limit on Congress' manner of expressing its will. The entire course of legislation shows that Congress knew what it was doing, and that it intended to have American troops fight in Vietnam.\(^\text{197}\)

Some members of the federal judiciary had second thoughts about the proposition that Congress can indirectly endorse a war simply by appropriating funds. In 1972, Circuit Judge Arlin Adams said that such a determination would require members of the judiciary to ask legislators what they meant by their votes and then to synthesize their replies.\(^\text{198}\) He concluded that it was impossible to expect the judiciary to gather and evaluate such information.\(^\text{199}\)

Judge Charles Wyzanski and Chief Judge David Bazelon, who initially had accepted appropriation acts as equivalent to congressional consent, changed their positions several years later in *Mitchell v. Laird*.\(^\text{200}\) In *Mitchell*, the judges recognized that in voting to appropriate money or to draft men, "a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war."\(^\text{201}\) They reasoned that a Congressman wholly opposed to a war might vote for the military appropriation and the draft measure "because he was unwilling to abandon without support men already fighting."\(^\text{202}\) Thus, the court found that assisting men in peril did not constitute "proof of consent to the actions that placed and continued them in that dangerous posture."\(^\text{203}\)

The War Powers Resolution of 1973\(^\text{204}\) expressly provides that defense appropriations do not, by themselves, endorse a military policy. The authority to introduce armed forces into hostilities, or into situations where circumstances indicate involvement, may not be inferred from any provision of law — including any provision contained in any appropriation act — unless the provision specifically authorizes the introduction of troops.\(^\text{205}\)

In a recent decision striking down President Carter's executive order on wage-price guidelines, a federal judge compared administrative efforts to

\(^\text{197}\) Id. at 728.
\(^\text{199}\) Id.
\(^\text{201}\) 488 F.2d at 615.
\(^\text{202}\) Id.
\(^\text{203}\) Id.
\(^\text{205}\) Id.
control inflation with legislation on racial discrimination. For the latter, he noted that Congress had, over the years, "steadily and knowingly" appropriated funds to carry out executive orders requiring contractors to practice affirmative action in the equal opportunity program. The judge concluded that such appropriations constituted "a tacit, positive endorsement of these programs."206

I. Presidential Objections

Although the authorization-appropriation distinction is primarily a matter of internal congressional operations, presidents have voiced objections to the practice of adding legislation to appropriation bills. President Rutherford Hayes denounced Congress on several occasions for tacking irrelevant amendments (riders) onto appropriation bills. Since these bills were essential to the operation of government, he regarded the riders as coercive instruments, designed to strip him of his veto power. "The practice of annexing general legislation to appropriation," he said, "has become a serious abuse."207 Every measure "should stand on its own bottom."208 He prevailed on a number of vetoes, but Congress never relinquished its power to legislate on appropriation bills. In 1945, President Truman received a bill from Congress rescinding billions of dollars in defense appropriations no longer needed. However, the bill also included a rider to require decentralization of public employment offices. Truman objected to the latter provision, insisting that such issues "should not be dealt with as riders to appropriation bills."209 Refusing to sign the bill into law, he told Congress that he would heed those sections only that dealt with rescissions. He then directed the Budget Bureau to designate those amounts as nonexpendable.210

Some scholars argue that a separate veto of a rider might be upheld in the courts if the amendment bore no relationship to the basic legislation.211 The decision would depend on what constitutes a "bill" under article I,
section 7 of the Constitution, which empowers the President to sign, or to
return with his objections, "every bill which shall have passed the House of
Representatives and the Senate." The President might be receiving not
one bill but two consisting of the basic legislation and the rider. Other
writers, however, maintain that extending to the President this discretion-
ary authority to "item veto" riders might undermine the policy-setting role
of Congress and violate the separation of powers doctrine.

2. Repeal by Implication

Federal courts have been reluctant to conclude that Congress uses ap-
propriation bills implicitly to repeal statutory programs. The doctrine dis-
favoring repeals by implication "applies with full vigor when . . . the
subsequent legislation is an appropriations measure . . . ." Repeal is
an acceptable conclusion, however, when Congress explicitly relates the
appropriation proviso to a program previously authorized by law.
Moreover, when Congress chooses to appropriate less than the amount
called for in substantive legislation, courts are "bound to follow Congress' last word on the matter even in an appropriation law."

In *TVA v. Hill*, the Supreme Court rejected the proposition that a congressional decision to continue appropriating funds for the Tellico Dam constituted an implied repeal of the Endangered Species Act of 1973 at least as the statute applied to the dam. Although statements found in various reports by the House and Senate Appropriations Committees were offered in support of the position that the funding statutes took precedence over the authorizing legislation, the Court was "unwilling to assume that these latter committee statements constituted advice to ignore the provisions of a duly enacted law . . . ." The doctrine disfavor-

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<td>213. See Givens, supra note 211, at 62.</td>
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<td>216. See United States v. Langston, 118 U.S. 389, 393 (1886).</td>
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<td>220. 437 U.S. at 189.</td>
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gress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.221

The Court’s language, sweeping in nature and unconditional in tone, is not fully supported by the record. Depending on the circumstances, appropriation bills may repeal authorizations, in whole or in part. The record of court decisions on the Hyde Amendment, an anti-abortion measure, suggests that the federal judiciary is still unsettled on the question of repeal by implication.222

H. Nonstatutory Controls

The committee reports that accompany appropriation bills regularly contain language to "tie down some of the [appropriations] committee’s most important expectations or desires and to formalize discontent over previous expectations or understandings that have not been fulfilled."223 Often this language stands alone, without reference to the contents of the bill itself. Nevertheless, such language can become an effective nonstatutory control over a federal agency that is the subject of the appropriation.

Nonstatutory controls are convenient in the sense that the Appropriations Committees can revise their instructions to agencies without having to pass new legislation. The agencies, however, are not necessarily bound

221. Id. at 190-91. (Emphasis in original). Accord, Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972). For a current judicial disagreement on the doctrine of repeal by implication, compare Preterm, Inc. v. Dukakis, 591 F.2d 121, 131-34 (1st Cir. 1979) (an amendment to an appropriation bill substantively alters existing statute) with id. at 134-38 (Bowens, J., dissenting) (Congress did not intend to make a substantive change in the law but meant only to limit the use of federal funds).
222. See text accompanying notes 145-52 supra.
223. M. KIRST, GOVERNMENT WITHOUT PASSING LAWS 6 (1969). Representative John Dingell proposed in 1974 that House Rule XXI be amended to prohibit the addition of directives or limitations in the committee reports accompanying appropriation bills "unless such directive or limitation is set forth in the accompanying bill." 120 CONG. REC. 34416-18 (1974). After Chairman George Mahon of the Appropriations Committee objected to the language on the ground that it would impose an "intolerable burden," Representative Dingell withdrew that portion of his amendment. Id.
by directives and limitations that appear in committee reports. The ultimate effectiveness of this form of congressional control largely depends upon the willingness of agency officials to abide by committee report language.

Language placed in a conference report on a defense appropriation bill mandating that the Navy follow a certain policy in selecting a particular aircraft design illustrates the tenuous nature of nonstatutory controls. The instruction did not appear in the appropriation bill. When the Navy subsequently failed to follow the conference report language, a contractor asked the GAO to regard the contract awarded by the Navy as void. In a decision announced in 1975, the GAO concluded that

when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies.

Agencies ignore nonstatutory controls and expressions of intent “at the peril of strained relations with the Congress.” The executive branch has only a practical duty to abide by such expressions. Hence, this duty “must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.”

Congress sometimes sends contradictory signals, adopting one policy in an authorization bill while stating something else when it appropriates. In TVA v. Hill, the Supreme Court declined to give preference to the latter action, in large part because the policy in this case appeared only in committee reports. Hence, the Court stated that “[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress, particularly not in the circumstances presented by this case.”

IV. HOUSE-SENATE DIFFERENCES

The Constitution provides that “[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” Are the words "raising

226. Id. at 325.
227. Id. at 325-26. See also FISHER, supra note 200, at 33-36.
229. Id. at 191.
Revenue" to be construed narrowly, to restrict the prerogative of the House to tax measures, or does the prerogative include the power to originate appropriation measures as well?

Although both houses have adopted rules to restrict unauthorized appropriations, Senate rules are less severe than House rules. For example, Senate Rule XVI, paragraph 1, permits an unauthorized appropriation when moved by a standing or select committee, including the Appropriations Committee.\textsuperscript{231} No such latitude exists in the House. Moreover, while the Senate may legislate in an appropriation bill through the use of nongermane motions and suspension of the rules, the House may adopt a rule specifically waiving the restriction against legislation in an appropriation bill.\textsuperscript{232} Finally, the House has adopted a special procedure for handling conference reports to protect itself against Senate amendments that violate its rules.

\textit{A. Originating Appropriations}

As recently as 1962, the House and the Senate were locked in a major dispute over the power to originate appropriation bills. It had long been the custom in resolving differences between the House and the Senate to hold conferences on the Senate side of the Capitol with a Member of the Senate acting as presiding officer. Early in 1962, the House Appropriations Committee asked that the custom be changed to permit one-half of the conferences to meet on the House side of the Capitol. The Senate agreed on the condition that it be allowed to originate half the appropriation bills. An impasse soon threatened action on the regular appropriation bills. When the Senate passed a continuing resolution to supply funds for the Department of Agriculture, the House passed a resolution charging that the Senate's action "contravenes the first clause of the seventh section of the first article of the Constitution and is an infringement of the privileges of this House . . . ."\textsuperscript{233} Three days later, the Senate issued a resolution of its own, contending that "acquiescence of the Senate in permitting the House to first consider appropriation bills cannot change the clear language of the Constitution nor affect the Senate's coequal power to originate any bill not expressly 'raising revenue' . . . ."\textsuperscript{234}

The debates at the Constitutional Convention support the Senate's posi-
tion, but this theoretical possibility of originating appropriation bills in the Senate is overshadowed by matters of convenience and practicality. As the legislative body with fewer members, the Senate is generally more comfortable letting the House do the detailed work in initiating appropriation bills and retaining for itself the task of addressing agency appeals through various amendments. These appeals, in fact, sometimes come from Members of the House.

The record at the Constitutional Convention can be briefly stated. During the early months, the delegates considered a proposal that would have reserved to the House the privilege of originating all bills for raising or appropriating money. On July 5, 1787, for example, a committee report proposed that “all bills for raising or appropriating money, and for fixing the Salaries of the Officers of the Governt. of the U. States shall originate in the 1st branch of the Legislature . . . .” This section reappeared, in substantially the same form, in July and August, until a motion to strike the section carried on August 8. The version eventually adopted in September simply stated that “[a]ll Bills for raising Revenue shall originate in the House of Representatives.”

There is little doubt that the delegates explicitly rejected the idea of giving the House sole authority to originate appropriations. On June 13, Eldridge Gerry moved to “restrain the Senatorial branch from originating money bills.” His motion was rejected by seven states with only three in favor. Action on July 5 and July 6 also failed to produce a majority in favor of granting the House the exclusive privilege of originating revenue and appropriation bills. On August 8 the delegates again decided to strike a section giving the House authority to originate all bills for raising or appropriating money by a vote of seven to four.

On August 13, again by a vote of seven to four, the delegates rejected a proposal granting the House the exclusive right to originate money bills. A related measure, prohibiting any money from being drawn from the Treasury except in pursuance of appropriations originating in the House,

236. II FARRAND, supra note 235, at 224-25.
237. Id. at 634.
239. II FARRAND, supra note 235, at 280.
was rejected decisively by a vote of ten to one.\textsuperscript{240} Delegate Hugh Williamson remarked the following day that "[w]e have now got a House of Lords which is to originate money-bills."\textsuperscript{241}

In light of these votes, it is reasonable to conclude that the language "raising revenue" was adopted to show that the right of the House to originate bills was restricted to revenue bills alone and did not extend to appropriation bills. On several occasions the delegates had the opportunity to adopt a provision granting the House the exclusive right to originate appropriation bills. On each occasion the provision was rejected. Moreover, George Mason of Virginia offered the following as one of his reasons for refusing to sign the Constitution: "The Senate have the power of altering all money bills, and of originating appropriations of money . . . ."\textsuperscript{242}

In 1881, after the Senate had passed a bill authorizing the appropriation of funds, the House instructed its Committee on the Judiciary to inquire into the Senate's right to originate bills appropriating money. An extensive analysis of British precedents and the debates at the Philadelphia Convention led the committee to conclude that "the Senate had the constitutional power to originate the bill referred, and that the power to originate bills appropriating money from the Treasury of the United States is not exclusive in the House of Representatives."\textsuperscript{243} Subsequently, in 1885, the House declined to investigate the Senate's power to originate appropriations bills.\textsuperscript{244} Although there continues to be a theoretical dispute, nevertheless, "there has been no deviation from the practice that the general appropriation bills (as distinguished from special bills appropriating for single, specific purposes) originate in the House of Representatives."\textsuperscript{245}

\textit{B. Germaneness}

Under Senate Rule XVI, paragraph 4, germaneness of amendments is required in the case of general appropriation bills.\textsuperscript{246} If the Senate Committee on Appropriations reports a substitute for House language in a general appropriation bill and a point of order is raised that it is general legislation, a question of germaneness that is raised by a Senator before the Chair rules will take precedence over the point of order and must be deter-

\textsuperscript{240} Id.
\textsuperscript{241} Id. at III, 287.
\textsuperscript{242} 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 484 (J. Eliot ed. 1937).
\textsuperscript{243} H.R. REP. NO. 147, 46th Cong., 3d Sess. 10 (1881).
\textsuperscript{244} IV HINDS, supra note 14, at § 1501.
\textsuperscript{245} Id. at § 1500. See also DESCHLER'S PROCEDE, supra note 52, at 331.
\textsuperscript{246} SENATE RULES, supra note 1, at 16.
mined by the Senate without debate. If the Senate finds the amendment to be germane, "the point of order that it is legislation will not then lie . . . ." Moreover, if the House opens the door by including legislation in a general appropriation bill, the Senate "has an inherent right to amend such proposed legislation, and to perfect that language, notwithstanding its rules."

Senator Thomas Eagleton relied on these precedents in 1973 when fashioning language to restrict military operations in Southeast Asia. The House had already voted to end American combat activity in Cambodia and Laos by adding language to a supplemental appropriation bill. After Senator Eagleton perfected his amendment to prohibit the use of funds in the supplemental bill as well as funds previously appropriated under other acts, he learned that the Nixon Administration intended to attack his amendment on parliamentary grounds.

Senator Roman Hruska made a point of order, claiming that Eagleton's language constituted legislation on an appropriations bill. Some of the Senators interpreted the House amendment as an appropriation "limitation" that would restrict funds in that particular bill but regarded the Eagleton amendment as "legislation" since it covered funds made available in other appropriation bills. The Senate parliamentarian had informed Eagleton's staff that a point of order raised under Rule XVI would be sustained. However, Senator Eagleton knew that if he raised a question of germaneness and won that vote, it would obviate a ruling from the Chair on Rule XVI would be sustained. However, Senator Eagleton knew that if he raised a question of germaneness and won that vote, it would obviate a ruling from the Chair on Rule XVI.

Once the question of germaneness is raised, "the Chair does not rule on the point of order, but submits the question of germaneness to the Senate for decision under the unanimous consent agreement." By a vote of fifty-five to twenty-one, the Senate declared the Eagleton amendment germane to the House-passed language.

Raising the issue of germaneness, however, does not always preclude an attack under a point of order motion. Once a Senator has raised a point of order...

248. *Id.* at 116 (footnote omitted).
249. *Id.* at 114 (footnotes omitted).
251. *Id.* at 162.
256. *Id.* at 17140. For a more recent use of a germaneness motion to add legislation to an appropriation bill, see the amendment proposed by Senator Stennis to a supplemental appropriation bill for fiscal 1979. *125 Cong. Rec.* S8506-11 (daily ed. June 26, 1979).
order that language in an appropriation bill contains legislation, and another Senator raises the question of germaneness, it is possible to return to the point of order through the following sequence. A Senator may move to lay the question of germaneness on the table. Adoption of such a motion would effectively neutralize the germaneness question and return the Senate to the original point of order.257

C. Suspension of the Rules

Pursuant to House Rule XXVII, Members of the House of Representatives may, by a two-thirds vote, suspend the regular procedural rules for any bill.258 Although this procedure is commonly reserved for minor and noncontroversial measures, the House used it for some important bills in the mid-1970's. It is not used, however, to legislate in an appropriation bill. To further reinforce this policy, in 1979 the Democratic Caucus excluded from suspension of the rules any bill that may make or authorize appropriations in excess of one hundred million dollars.259

In the Senate, any rule may be suspended by a two-thirds vote at any time after a day's notice in writing. In contrast to the House, this procedure is used "primarily to make it in order to offer amendments, legislative in nature, to appropriation bills, which otherwise under Rule XVI would be out of order."260 Once an amendment has been offered to a general appropriation bill, and ruled out of order under Rule XVI, paragraph 4, two steps are required to adopt the amendment. First, a motion to suspend the rule must be agreed to affirmatively by a two-thirds vote. Thereafter, the amendment can be submitted for consideration and agreed to by a majority vote.261

D. Specific Waivers

In the House, appropriation bills frequently reach the floor accompanied by a rule waiving points of order that would otherwise lie under House Rule XXI, clause 2.262 If the House adopts a resolution waiving

258. House Rules, supra note 1, at 623-34.
259. Preamble and Rules Adopted by the Democratic Caucus 7 (Revised April 2, 1979). An exception to this guideline can be made where the Speaker requests the Democratic Steering and Policy Committee to review a request for a bill in excess of $100 million and the Committee authorizes the Speaker to schedule the bill for consideration under suspension of the rules.
260. Senate Procedure, supra note 1, at 799.
261. Id. at 802.
262. House Rules, supra note 1, at 562-63. Appropriation bills may come directly to
points of order, such waiver only extends to provisions in the appropriation bill, not to amendments offered from the floor. Legislative language in a general appropriation bill, permissible because of a waiver, may be perfected by a germaneness amendment. The amendment, however, may not include additional legislation. When an unauthorized appropriation is allowed to remain in a general appropriation bill, pursuant to a waiver, an amendment merely changing the amount and not adding legislative language is in order.

In contrast with the practice of the House, the Senate does not adopt "rules" waiving points of order against legislation in an appropriation bill. Instead, the Senate adopts unanimous-consent agreements limiting debate on amendments and dividing the time between specific Members of the majority and minority parties. Unanimous consent agreements are not used to legislate in an appropriation bill.

E. Conference Reports

Members of the House have long objected to nongermane Senate amendments to their bills. When a bill passed both houses and a compromise version was agreed to in conference committee, Members of the House often had to choose between accepting the nongermane Senate amendments or losing the entire bill. Representative William Colmer voiced this objection in 1970: "I have chafed for years about the other body violating the rules of this House by placing entirely foreign, extraneous, and nongermane matters in House-passed bills."

To restrict this Senate practice, House Rule XX, clause 2, seeks to prevent Senate amendments to general appropriation bills that would violate House Rule XXI, clause 2, if the amendment had originated in the House. Such amendments, and Senate amendments providing for an appropriation in a bill other than a general appropriation bill, must be agreed to by the House managers unless specific authority to accept the amendment is first given by the House through a separate vote on each such amendment. It is customary after a conference on a general appropriation bill for the House
first to dispose of Senate amendments not in violation of House Rule XXI, clause 2, after which the remaining amendments are taken up in order and disposed of directly in the House by separate motion.\textsuperscript{270} If some of the amendments reported in technical disagreement relate to housekeeping items of the Senate, they may be considered en bloc by unanimous consent.\textsuperscript{271}

V. **EFFECTS OF THE CONGRESSIONAL BUDGET ACT OF 1974**

Passage of the Congressional Budget Act of 1974\textsuperscript{272} promised some fundamental changes to the authorization-appropriation process. The Appropriations Committees sought this legislation to protect their jurisdiction, especially from inroads by backdoor legislation and entitlements. The Congressional Budget Act also imposed new requirements on the reporting and enactment of authorization and appropriation bills. In the implementation of the statute, the existing authorization and appropriation committees have criticized the new Budget Committees for devoting excessive attention to program details.

A. **Backdoors and Entitlement Legislation**

The Joint Study Committee on Budget Control, established in 1972 to recommend changes in the congressional budget process, reported that the splintering of the appropriation process had been a substantial factor in Congress' loss of overall budgetary control.\textsuperscript{273} In the budget for fiscal year 1974, only forty-four percent of the spending estimate was associated with items to be considered in appropriation bills.\textsuperscript{274} The remainder consisted of permanent appropriations or actions by the authorization committees involving borrowing authority, contract authority, and entitlement authority.\textsuperscript{275} The latter represented payment levels already established by legislation and thus constituting a binding obligation on the part of the federal government. Although appropriations were required to finance the programs, there was little or no discretion available to the Appropriations Committees. In fact, for entitlements in the form of public assistance,
black-lung benefits, and veterans' benefit payments, court action could be initiated to require payment.\(^{276}\)

Although Title IV of the Congressional Budget Act\(^ {277}\) prohibited new backdoor spending in the form of contract authority and borrowing authority, the problems associated with entitlement legislation remain and appear to have eroded further the jurisdiction of the Appropriations Committees. The House Committee on Appropriations reported in 1979 that entitlement programs — involving primarily payments for individuals — had escalated in the past decade to the point where they constituted over seventy-five percent of the uncontrollable outlays and fifty-five percent of the total gross budget outlays.\(^ {278}\) Ten years previously, however, they had constituted sixty-four percent of the uncontrollable outlays and only forty percent of the total budget.\(^ {279}\) The Committee took special notice of escalator clauses in legislative provisions providing automatic increases as the various inflation indexes increase. According to the House Committee, approximately fifty-eight percent of the budget authority for fiscal 1980 involves programs that are adjusted automatically by price indexes.\(^ {280}\)

The Senate Committee on Appropriations also has expressed concern about the proliferation of entitlements and escalator clauses.\(^ {281}\) Senator Joseph Biden introduced legislation in 1979 to amend the Congressional Budget Act by terminating certain entitlement authority, prohibiting new entitlement authority, terminating certain permanent appropriations, and prohibiting new permanent appropriations.\(^ {282}\) His measure sought to bring so-called uncontrollable spending under legislative control by requiring all future financial commitments to be approved in an appropriation bill.\(^ {283}\)

Senator Edmund Muskie's opposition to the 1979 HUD-Independent Agencies appropriation bill underscores the threat of entitlements to the new budget process. As chairman of the Budget Committee, Muskie contended that authorization committees had failed to report legislation that would achieve savings in entitlement programs. He insisted, however, that the Appropriations Committees had the power to compensate for these

\(^{276}\) \textit{Id.} at 11.


\(^{279}\) \textit{Id.}

\(^{280}\) \textit{Id.} at 6. Such programs include food stamps, school lunch programs, veterans and survivors pensions, civil service retirement, railroad retirement, social security, supplemental security income, black-lung benefits, aid to older Americans, and child nutrition programs.

\(^{281}\) S. REP. NO. 224, 96th Cong., 1st Sess. 4-5 (1979).


\(^{283}\) \textit{Id.}
failings by including legislative language in appropriation bills. Although Muskie voiced general opposition to such action because it invaded the prerogatives of authorizing committees, he concluded that "no other course of action is available if authorizing committees refuse to carry out their responsibilities to enforce the Congressional Budget." 284

B. Timetable

Congress has attempted to expedite the authorization process by mandating, as part of the 1974 Budget Act, a deadline of May 15 for the reporting of all bills and resolutions authorizing new budget authority. 285 When Congress fails to enact authorizing legislation on time, the Appropriations Committees must choose among several courses of action: (1) fund the program in the regular appropriation bill, with the possibility that Members may raise parliamentary objections on the floor; (2) seek waivers of the rule to permit funding of unauthorized programs; or (3) defer action until a supplemental bill is offered. Whatever the decision, the regular appropriation bills must be passed by early September to enable Congress to complete action on the second budget resolution by September 15. 286

Scheduling delays have increased in recent years, partly because of the growth of annual authorization bills. Many programs that were once covered by permanent or multi-year authorizations now require authorization each year, making it more likely that authorizations will not be enacted by the time the Appropriations Committees report their bills. 287 Among the more recent additions to the requirement for annual authorizations are the United States intelligence agencies, the Department of Energy, and the Department of Justice. 288

Adoption of "sunset" legislation, requiring periodic reauthorization of programs that are now permanently authorized, would place a greater strain on authorization committees. Any inability to act in a timely fashion would lead to an even greater number of parliamentary challenges, waivers of rules, or the introduction of supplemental bills.

1. Subcommittee Practices

The appropriations subcommittees differ widely in their treatment of

286. Id.
287. Schick, supra note 33, at 19-25.
unauthorized programs. For the Department of Interior appropriation bill, programs are funded if the House has either passed an authorization bill or a committee has reported it; a public law is not required. The same position is adopted by House Appropriations with respect to the Department of Energy appropriation bill. As noted in its 1979 report, authorizing bills for the Department of Energy, the Nuclear Regulatory Commission, the nonhighway portion of the Appalachian Regional Development program, the Water Resources Council, and additional monetary authorization for the Colorado River Basin Salinity Control projects were in various stages of the legislative process by the time House Appropriations reported its bill. The Committee recommended that “the consideration of appropriations necessary for these programs proceed in order that timely funding may be provided for the next fiscal year.” The rule accompanying the bill waived the provision of Rule XXI, clause 2. Representative Anthony Beilenson explained:

The Rules Committee was not happy to have to provide these waivers, but we really see no other way out, because under the existing requirements of the Budget Act, these appropriation bills, of course, do have to be acted upon by the entire Congress and signed into law by the President by mid-September.

On the other hand, the Labor-HEW subcommittee of the House Appropriations Committee deferred consideration of $17.6 billion in 1978 because authorizing legislation had not been enacted before the committee reported the regular appropriation bill. The funds were omitted because it was likely that many of the programs, already the subject of adverse publicity, would be revamped through new legislation. Similarly, in 1979, the subcommittee deferred consideration of $889,795,000 in budget requests for a number of programs that lacked authorization.

In the case of the State-Justice appropriation bill, the House Appropriations subcommittee obtained a rule in 1978 to protect it from parliamentary challenges but requested that it not be brought before the House. As a result, many sections were struck from the bill because they consti-

291. Id.
tuted an appropriation unauthorized by law.\textsuperscript{297}

Although some appropriation subcommittees include unauthorized funds in a bill, on the assumption that authorizing legislation under consideration will be enacted in time, such funds may be deleted if the authorization bill is not enacted by the time both houses go to conference. Chairman Gunn McKay of the appropriations subcommittee on military construction remarked in 1979: “As the committee has done in prior times, when we go to conference we drop it out if it has not been authorized.”\textsuperscript{298}

2. Advance Authorizations

The deletion of unauthorized programs from the Labor-HEW appropriation bill and the series of successful challenges to unauthorized programs in the State-Justice appropriation bill focused attention on the problem of late authorizations. In fact, it appears that these actions were taken to publicize this problem. After a point of order had been sustained in the State-Justice bill on the ground that it contained an unauthorized appropriation, the ranking minority member of the House Appropriations Committee made this observation:

These points of order are perfectly proper. The gentleman from California (Mr. Rousselot) is exercising his right, but we had better understand . . . what we are doing. Not only on this appropriation bill but on other appropriations bills where the authorizing committees have not finished their work, we are allowing the other body to write our appropriations bills.

That does not seem to me to be the orderly procedure. We have held months of hearings on our bill, as other subcommittees have. We are going to bring them here now without rules and the bills will be subject to points of order on all of these matters that are not authorized.

Mr. Chairman, if there is a clear signal here, it ought to be, as I said before when we were in general debate, that the time has come for advanced authorization because if we do not have advanced authorization, we do damages to the orderly procedure of this House.\textsuperscript{299}

In the context of the debate, “advance authorization” meant a shift from annual authorization to a multi-year cycle. As Representative Paul Findley noted:

\textsuperscript{297} Id.
Mr. Chairman, I think another problem we face is this: The subject in question came from the Committee on International Relations, a 1-year authorization for State Department operations. I have long argued that we should not have so many 1-year authorizations. We ought to have 2- and 3-year authorizations, and thus reduce somewhat the load that we face on the floor. I think, if we did that, we would have less of a log jam. 300

Representative Dante Fascell added: “Our committee, which has jurisdiction on the authorizing side of the State Department, will consider in the next fiscal year the question of 2-year authorizations to avoid this kind of thing.” 301

A two-year authorization would relieve the timetable for the second year, when the Appropriations Committees could report their bills without waiting for the substantive committees to act. But authorization and appropriation committees would still have to enact bills the first year. Complete relief would come only by enacting all authorization bills a year in advance of the time when Congress considers appropriations. Even with this reform, advance authorizations and two-year authorizations are likely to produce a greater number of supplemental authorizations and appropriations, as Congress tries to respond to unanticipated developments.

3. Congressional Actions in 1979

During 1979, Congress adopted a number of different approaches to the authorization cycle. The House Committee on Foreign Affairs recommended a change from annual authorization to a two-year authorization for the Department of State, the International Communication Agency, and the Board of International Broadcasting. The Chairman of the Committee, Clement Zablocki, explained:

By providing a 2-year authorization for U.S. foreign affairs agencies, H.R. 3363 conforms to one of the most important elements of the Congressional Budget process — dual-year authorization cycles. As envisioned in section 607 of the Congressional Budget Act, dual-year authorizations of U.S. Government Agencies and programs would assist both the Congress and the executive branch in developing a long-range perspective on Federal Budget planning as well as better enable congressional committees to fulfill their legislative oversight responsibilities. 302

The relationship between authorizations and the congressional budget

300. Id. at H5521 (remarks of Rep. Findley).
301. Id. (remarks of Rep. Fascell).
process was explored more fully by the Chairman of the House Committee on the Budget, Robert Giaimo:

The 2-year authorization feature is in keeping with needed improvements in the authorization and appropriations cycle. This is precisely the kind of improvement envisioned in the Budget Act and has been encouraged repeatedly in the past 5 years by the committee and its budget process task force.

The conference report on the Budget Act, I would point out, referred to the need "for allowing adequate time for committee preparation and floor debate on each budget decision," and said it would "be necessary to authorize programs a year or more in advance of the period for which appropriations are to be made."\(^\text{303}\)

When this bill was considered on the Senate side, Senator Harry F. Byrd, Jr., offered an amendment to confine authorizations to a single year. The chairman of the Senate Committee on Foreign Relations, Frank Church, recalled that Congress had originally insisted on annual authorizations for the State Department to make it more responsive to Congress but that a two-year cycle now seemed the more appropriate instrument for efficient management.\(^\text{304}\) However, since the question of authorizing for one year or two years had been closely divided when it was taken up in the Foreign Relations Committee and since the House had already voted in favor of a two-year period, Senator Church accepted the Byrd amendment: "That would put the matter in conference, where the conferees could discuss the proper course to follow."\(^\text{305}\) Ultimately Congress decided on a two-year authorization.\(^\text{306}\)

On the question of military assistance, the House Committee on Foreign Affairs also recommended a shift from annual authorization to a two-year cycle, primarily to satisfy the timetable for the congressional budget process and to increase the amount of committee oversight.\(^\text{307}\) An amendment by Representative Gerry Studds to delete the second-year authorization was initially adopted by a vote of 201 to 179 in the Committee of the Whole, but the House later rejected the Studds amendment by voice vote.\(^\text{308}\) As to foreign assistance, the recommendation of the House Committee on Foreign Affairs to move from an annual authorization to a two-
year cycle was defeated in the House by a vote of 239 to 157. The arguments favoring an annual review centered on the inadequacy of administration estimates for the second year, the need for the House to express itself each year on various foreign policy matters, and the desire of the Members to be responsive to constituency pressures.

The Senate Committee on Foreign Relations also deleted authorizations for the second year, citing these three reasons:

1. Uncertainty about the fiscal year 1981 budget is so great that the Committee was not prepared to make recommendations concerning these programs at this time.

2. Fiscal year 1981 programs are not fully justified in the Congressional Presentation Documents provided to the Committee. Therefore, the Committee was asked to authorize programs in the absence of adequate information as to how the funds would be spent.

3. The Committee intends to undertake a thorough review of all U.S. foreign assistance programs before it considers fiscal year 1981 funding levels.

The problem of inadequate executive justification also led the Senate Committee on Environment and Public Works, in 1979, to reject a two-year authorization for the Nuclear Regulatory Commission. Detailed budget proposals had been submitted only for fiscal year 1980. Without the benefit of "comprehensive budget justification for multi-year authorizations," the committee said it would continue to support annual authorizations. When the House Committee on Science and Technology reported the Federal Fire Prevention Control Act in 1979, it recommended authorization for one year only, not for two years as requested by the President. The committee noted that the United States Fire Administration is in a "state of great flux" with reorganization into the Federal Emergency Management Agency.

310. Id. at H2002-05.
313. Id.
315. Id. at 6. See also Representative Fuqua's proposal for a two-year authorization for federal research and development, 125 CONG. REC. H4621-22 (daily ed. June 15, 1979), and Senator Bumpers' resolution calling for a study on biennial authorizations, appropriations, and budget resolutions, 125 CONG. REC. S9524-26 (daily ed. July 16, 1979).
C. Program Details and the Budget Committees

The Budget Committees are not expected to devote much of their attention to the specifics of federal spending. Representative Richard Bolling, the House floor manager of the budget reform bill, stated that the budget resolution would not "get into particular programs, agencies, appropriations, or projects. To do so would destroy the utility of the congressional budget process as an instrument for making national economic policy."316

Nevertheless, the preparation of budget resolutions leads to some duplication of effort among the Budget Committees, the Appropriations Committees, and the authorization committees. As the committees try to protect their jurisdiction and prerogatives, conflict and friction result.

It is widely acknowledged that the Budget Committees must examine some program details as part of their effort to establish overall limits on outlays and budget authority and to choose among competing spending priorities.317 Representative George Mahon, who was concerned about attempts by the House Budget Committee to invade the jurisdiction of his Appropriations Committee, admitted that it was "certainly appropriate for the [budget] committee to have an awareness of individual spending programs in order to arrive at its recommendations . . . ."318

The budget process presents many opportunities for the Budget Committees to examine program details. First, the authorization and appropriation committees supply program details in their spring reports to the Budget Committees.319 Second, the testimony at Budget Committee hearings often includes program details, even though the legislative history of the budget reform act suggests that the Budget Committee hearings should concern "economic conditions and national priorities at a high level of aggregation."320 Third, votes within the Budget Committees on amendments to the proposed budget resolutions affect the program interests of other committees. Finally, the Budget Committee reports offer another opportunity to discuss program details.

Senator Edmund Muskie, Chairman of the Senate Budget Committee, favors restricting the use of budget resolutions to the allocation of budget authority and outlays among different functional categories. The task of deciding how much should be spent on individual programs and activities, he has said, is the responsibility of the authorization and appropriation

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317. This was the position of the Joint Study Committee on Budget Control. See H.R Rep. No. 147, 93d Cong., 1st Sess. 8 (1973).
committees. Yet Muskie recognizes that the Budget Committee can easily “slip into discussion of individual programs or line items” in the budget because each Senator on the Committee has favorite programs and areas of special expertise. Moreover, the Senate Budget Committee might vote on individual programs “where the program is of such magnitude, generally in the hundreds of millions of dollars, as to constitute in itself a significant priority.”

In 1979, Chairman Jamie Whitten of the House Committee on Appropriations commented on two developments of the budget process that seemed to him anomalous: the emphasis on line items in the budget resolutions; and the treatment of the first budget resolution as binding rather than as a target. According to Whitten:

There was absolutely no intention in the creation of the Budget Act that it would disintegrate into the kind of line item debate we have seen here in the last few days.

And to make matters worse, the line items have absolutely no meaning. First of all, the first budget resolution provides overall targets — just targets and not ceilings. Ceilings are not established until the second budget resolution is adopted sometime in September.

VI. CONCLUSIONS

Far from being a simple two-step procedure, with one stage locking neatly into another, the authorization-appropriation process is an exceedingly complex operation. To begin with, House and Senate rules explicitly provide for a number of exceptions. Additionally, precedents in both houses supply other opportunities to depart from the formal procedure. Although these actions are exceptions to the rules prohibiting legislation in appropriations, it is evident that such rules are not self-enforcing. Members of Congress must be willing to raise a point of order, often at the cost of antagonizing members, committees, and floor leaders.

Not surprisingly, Members of both houses have often complained about the lack of clarity in parliamentary rulings concerning legislation in appropriation bills and appropriations in authorization bills. To many Members, the rulings are conflicting, ambiguous, and inconsistent. The

322. Id. at S5298 (daily ed. April 8, 1976) (remarks of Sen. Muskie).
323. Id. For additional material on the conflict between the Budget Committees and the Authorization and Appropriation Committees, see Fisher, Congressional Budget Reform: The First Two Years, 14 Harv. J. Legis. 413, 431-35 (1977).
attachment of riders to appropriation bills continues to create confusion and delays, and the timetable established by the Congressional Budget Act of 1974 compounds a situation that is already difficult.

Federal courts are similarly in doubt about the operation of House and Senate rules. Some members of the judiciary take the rules on authorization and appropriation at face value, concluding that Congress abides by the rules adopted for each chamber. Other judges consider the authorization-appropriation distinction as purely of internal congressional importance, without constitutional significance. Still others take a more realistic view of congressional operations and are willing to say, given the circumstances, that Congress may indeed legislate in an appropriation bill.

Although confusion and uncertainty on this scale is difficult to defend, efforts to clarify the legislative process and to define more precisely committee jurisdictions are rarely successful. Members of Congress appreciate the flexibility that permits some overlapping between the authorization and appropriation stages, particularly the opportunity to legislate on appropriation bills that pass through each chamber every year. Adoption of "sunset" legislation would not adequately relieve the problem, since reauthorization of affected programs — and the chance to legislate on authorization bills — would be scheduled to occur every decade or so. Outside the sunset context, there is a tendency to lengthen the authorization cycle of some bills from one year to two. The temptation will be strong, then, to continue incorporating "legislation" into the annual appropriation bills.