Appropriation Riders

Neal Devins

William & Mary Law School, nedevi@wm.edu
One of the most controversial and frequently used devices of appropriations-based policy-making is the rider. Appropriation riders, which are amendments tacked onto an appropriation bill, take one of two forms. Legislative riders are non-germane amendments that change existing law, impose additional duties on government, or require judgments and determinations not otherwise required by law. Congressional rules prohibit such riders in order to keep authorizations separate and apart from appropriations. Limitation riders, in contrast, are presumptively germane amendments to an appropriations bill that specifically prohibit the use of funds for designated activities.

The History of Riders. Congress's use of and presidential opposition to appropriation riders dates back to the 1830s. Indeed, by 1837, delays in the enactment of appropriation bills caused by the attachment of
legislative riders led the House to adopt a rule prohibiting the appropriation "for any expenditure not previously authorized by law." Legislative riders were still enacted, however. In 1879, President Rutherford B. Hayes attacked such riders as improperly interfering with executive prerogative. Through a series of veto messages, Hayes claimed that Congress effectively negated the President's veto power by attaching nongermane riders to appropriations. In language strikingly similar to both late twentieth-century attacks on continuing resolutions and justifications for the item veto, Hayes argued that the "executive will no longer be what the framers of the Constitution intended" because Congress's attachment of nongermane riders to necessary appropriation provisions made it impossible for the President to use the veto power without "stopping all of the operations of the Government."

The Constitution does not distinguish between Congress's power to appropriate funds and its other lawmaking powers. The Constitution, moreover, does not demand that all provisions in a bill be pertinent to the bill's purpose. Legislative riders therefore are not constitutionally foreclosed. House and Senate rules, however, prohibit such riders. Limitation riders, which are not affected by these rules, have also had an enormous impact and remain extremely controversial. Military activities in Southeast Asia, public funding of abortion, air bags for automobiles, tax-exemptions for discriminatory schools, religious activities in the public schools, and public funding of school desegregation are but some of the areas affected by limitation riders.

Congress has been attaching limitation riders to appropriation bills since the 1870s. Nineteenth-century riders involved war powers, federal supervision of elections, and extensions of the Constitution and revenue laws to territories. By the 1970s, limitation riders became one of Congress's principal policy-making tools. From 1971 to 1977, 225 limitation amendments (31 percent of all amendments) were offered to appropriations bills. By 1980, limitation riders accounted for over 40 percent of all amendments. These riders, moreover, frequently addressed volatile policy disputes. Fiscal year 1980 riders, for example, included restrictions on nondiscrimination enforcement by the Internal Revenue Service (IRS), the Department of Education, and the Department of Justice; Occupational Safety and Health Administration (OSHA) enforcement of safety standards in small businesses; Department of Housing and Urban Development financial assistance to student aliens; the distribution of government publications to Cuba, Iran, and the Soviet Union; and possible Department of Education efforts to prevent voluntary prayer in the public schools.

Limitation riders have also proved critically important during the Reagan and Bush presidencies. The Iran-Contra affair, for example, centered on the refusal of Reagan administration officials to comply with a limitation rider prohibiting federal assistance to the contra rebels in Nicaragua. Other 1980s and 1990s riders affected abortion funding, Federal Communications Commission (FCC) affirmative action guidelines, and communications between executive agencies and congressional oversight committees.

Debate over Riders. The controversial nature of limitation riders is not simply an outgrowth of the controversial subjects addressed by such riders. Limitation riders also affect congressional relations with both the courts and the executive. Critics of limitation riders, for example, claim that since most appropriations are enacted every year, agencies frequently do not know whether to view limitation riders as permanent changes or temporary measures. Also, courts do not know whether to view limitation riders as amendments to the underlying authorization bill. For example, does the annual reenactment (since 1977) of riders prohibiting Medicaid-supported abortions relieve the states of their abortion-related Medicaid cost-sharing responsibilities?

Critics also argue that Congress disrupts the balance of powers by using limitation riders to micromanage executive agencies. Specifically, these critics point to limitation riders prohibiting funding of regulatory initiatives, proposed reexaminations of agency policy, agency supervision of contacts between agency employees and members and committees of Congress and their staff, and White House review of agency orders. In 1990, pointing to such measures, Bush administration Attorney General Dick Thornburgh attacked such riders as "clearly eroding the President's constitutional responsibility to supervise the affairs of the executive branch as he sees fit." Some critics have extended this attack to argue that Congress cannot use its appropriations powers to prevent the President from performing the duties and exercising the prerogatives given him by Article II of the Constitution. Furthermore, since limitation riders are often attached to omnibus funding bills, critics also argue that the President cannot effectively use the veto power to check legislative interference.

Supporters of Congress's use of limitation riders, in contrast, argue that appropriations-based restrictions on agency action may be the only realistic way to stop the executive from launching administrative initiatives that Congress disfavors. Claiming that the appropria-
tions clause empowers Congress to control the level of executive-branch enforcement or execution of the law, supporters of Congress’s use of limitation riders also reject opponents’ constitutional objections. Indeed, for supporters, rather than a mechanism to oversee every detail of executive implementation, limitation riders enable Congress to defend against executive intrusions into Congress’s lawmakering powers. For example, in response to IRS efforts during the Carter administration to deny tax-exempt status to private schools with inadequate minority enrollments, Congress enacted limitation riders as a stopgap measure to allow the appropriate legislative committees a chance to evaluate the proposal. Similarly, after the FCC sought to reexamine its affirmative action guidelines during the Reagan administration, Congress sought to check this “unwarranted” initiative through a limitation rider first enacted in 1987. That Congress used limitation riders to check both Carter and Reagan initiatives demonstrates that this device is neither liberal nor conservative, Republican nor Democratic.

Congress’s use of limitation riders as a policy-making device extends well beyond appropriations-based oversight of the executive. Another controversial use of limitation riders concerns elected government responses to Supreme Court decisions. Unlike constitutional amendments and statutory challenges to Supreme Court decisions, funding restrictions do not seek to overturn Court decisions. Instead, elected government expresses its disagreement with the Court by refusing to appropriate funds that help effectuate Court rulings. For example, since fiscal year 1977, appropriations bills for the Department of Health and Human Services (formerly Department of Health, Education, and Welfare) have contained language prohibiting federal funding of abortion in almost all circumstances. These limitation riders have been supported, at various times and to varying degrees, by both the Congress and the White House. The Reagan and Bush administrations, for example, strongly backed these measures and vetoed appropriations bills that attempted to liberalize abortion funding.

The debate over the propriety of riders is likely to continue. Congress has strong incentive to use this power. Appropriation riders are easier to enact than substantive legislation. Riders too are an effective mechanism to check both the executive and the Supreme Court. That the benefits of Congress’s use of appropriation riders may strain the policy-making process does not matter. Congress is unlikely to abandon a policy tool that is as convenient as it is potent. Presidents too are unlikely to abandon appropriation riders as a mechanism to keep in check court rulings and government programs that they disfavor.

BIBLIOGRAPHY

NEAL DEVINS