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INTRODUCTION

In its latest review of the civil rights record of the 96th Congress, the United States Commission on Civil Rights voiced concern over increasing use of amendments that limit or cut funds for established civil rights programs. As the Commission stated, "Congress has permitted amendments designed to weaken civil rights laws to be added to appropriation bills usually without Committee hearings and with only minimal floor debate."[1] This use of "limitation amendments" is rapidly increasing. From 1963 to 1980, the number of appropriation amendments offered on the House floor increased from forty-seven to one hundred sixty-five.[2] Furthermore, the percentage of limitation amendments that have been adopted has grown from forty-one percent to seventy-five percent.[3]

Many Members of Congress are alarmed at both the use and success of this practice. During the 96th Congress countless hours were spent debating riders that sought to limit funding for federal agencies and thereby to change federal policy, predominantly in the area of civil rights.[4] The impropriety of using limitation amendments to reduce the impact of substantive law is apparent from a reading of the provisions of House Rule XXI.[5] Provision One of the rule states that no appropriation amendment will be reported or will be in order, if it has not previously been authorized by law.[6] The second provision of House Rule XXI prohibits debate on the House floor regarding unauthorized amendments.[7]

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1. U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS AND RIGHTS: REVIEW OF CIVIL RIGHTS OF 96TH CONGRESS 1 (1980) [hereinafter cited as REVIEW].
2. 38 CONG. Q. 3252 (1980).
3. *Id.*
4. A prime example was the attempt to limit funding for Medicaid abortions by attaching a rider to the appropriation bill for Department of Health, Education, and Welfare in 1977. 33 CONG. Q. ALMANAC 296 (1977); *see* text accompanying notes 16-18 *supra*.
5. W. BROWN, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, 96TH CONG. 525 (1979) [hereinafter cited as W. BROWN].
6. *Id.*
7. *Id.*

Unfortunately, legislators who comprehend the significance of Rule XXI[8] are sharpening their drafting skills in order to circumvent its provisions. The Rule refers to positive appropriations. Careful drafting of an amendment that on its face merely limits funding for a particular agency falls outside the scope of the Rule. Yet, limitation amendments enact major policy changes without recourse to normal legislative challenges. Their impact upon enactment is equal to the impact of positive amendments that clearly require authorization. This article explores the significant increase in the use of limitation amendments to appropriation bills that affect substantive policy on civil rights.

A realistic interpretation of Rule XXI bars the use of limitation amendments. The use of these amendments not only subverts the proper consideration of policy issues in committee, but presents a significant threat to the status of civil rights mandated by court decisions and executive orders. This article will analyze the effect of the limitation mechanism on the House's consideration of policy issues and illustrate the negative impact of the limitation amendment on civil rights in the 96th Congress. Finally, the article will suggest action to curb this practice and thereby to protect civil rights.

LIMITATION AMENDMENTS AND ABUSES OF THE LEGISLATIVE PROCESS

Proper Role of Committees in Legislative Study

The roles of authorization and appropriation committees are fundamentally different. The authorization committees develop programs and authorize ceilings for expenditures. The appropriation committees apportion public funds among programs that have been authorized.[9] For example, each year the House considers an appropriation bill for the Department of Health and Human Services. That bill sets ceilings for the funding of various programs within the Department's jurisdiction. During debate on the Department's appropriation bill in 1980, the Ashbrook Amendment[10] was offered to prohibit expenditures for the enforcement of employment regulations. By retrenching funds for employment quotas, the Ashbrook Amendment substantively repealed an established federal employment policy.[11]

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8. *Id.*
9. M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 460 (3rd ed. 1977).
10. Sec. 309. None of the funds appropriated by this Act shall be expended to enforce such part or parts of the regulations promulgated to carry out the provisions of Title IX of the Education Amendments of 1972, Public Law 92-318, which have been found by three United States circuit courts of appeal to exceed the statutory authority under which they were promulgated, and by one United States circuit court of appeals not to exceed such authority, during any part of the fiscal year ending September 30, 1981, in which the conflict in these decisions shall not have been resolved in favor of the validity of the challenged part or parts of the regulations.
126 CONG. REC. H8,000 (daily ed. Aug. 27, 1980).
11. *See* text accompanying note 38 *infra*.

This amendment was in effect substantive legislation. The House Parliamentarian should have referred it to the appropriate authorization committee for study and recommendation, before it was considered during floor discussion of the bill.

House Rule XXI[12] should determine the fate of such an amendment to an appropriation bill. The second provision of the Rule states:

> No appropriation 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. Nor shall any provision in any such bill or amendment thereto changing existing law be 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 the 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: Provided, That it shall be in order further to amend such bill upon the report of the committee or any joint commission authorized by law or the House Members of any such commission having jurisdiction of the subject matter of such amendment, which amendment being germane to the subject matter of the bill shall retrench expenditures.[13]

The limitation amendment acts to bypass established deliberative procedure. A change in regulations is a policy question which is properly considered by the authorizing committee. Manipulation of the committee process leads to the breakdown of the entire deliberative process. As a result, Congress is unable to legislate in the most effective manner.

The Authorization Process

The authorizing committee is the body responsible for establishing substantive policy. These committees hold extensive hearings on each funding request, at which time the secretary of the department testifies as the prime witness justifying the allocation. This process gives committee members the opportunity to review all programs that fall within the purview of the particular authorization bill. It also allows the committee to review in detail the performance of the agencies, a traditional Congressional function. In an era of accusations of governmental waste, the importance of this "oversight function" cannot be minimized. Ideally, after completion of hearings, the committee presents Congress with a report analyzing funding requests and departmental objectives. This record is the principal resource used in making voting decisions on the authorizing legislation. More importantly, it serves as a tool for the appropriation committee's deliberations on the actual funding level for the department.

12. *See* W. BROWN, *supra* note 5, at 525.
13. *Id.*

Richard F. Fenno, Jr., wrote in *The Power of the Purse*[14] that "(t)he Appropriations Committee . . . is responsible for substantive policy in a defined area. But they can and do alter and initiate policy in their own way." Fenno's comment illustrates his recognition that the appropriation mechanism has encroached upon areas of public policy reserved for authorizing committees.[15] Recognition must not imply acquiescence, however. There are inherent dangers involved in subversion of the deliberative process, not only for Congress as an institution but also for particular groups within society.

Any policy change initiated in the appropriation committee lacks the serious study given by an authorizing committee. The appropriation committee lacks special knowledge of and familiarity with the particular issue or relevant legislation. It is a particularly ineffective forum in which to decide civil rights policy for the United States. Members of the proper authorizing committee are not afforded the opportunity to evaluate the appropriation "riders," nor is the committee record made available on the House floor.

Legislating in Haste

The use of limitation amendments causes practical and ethical problems for Congress in the discharge of its duty to provide funds for operation of the federal government. Frequently, copies of the amendment or "rider" are not available when Congress is scheduled to vote, nor are Congressional staff aides provided with adequate time to review appropriation amendments and prepare background material for meaningful debate or reflective voting.

Yet, Congressional debate on limitation amendments consumes valuable floor time and delays passage of funding bills. For example, the Hyde Amendment[16] to deny funding for Medicaid abortions kept appropriations for the former Department of Health, Education, and Welfare embroiled in unnecessary debate for two months into fiscal year 1977.[17] Limitation amendments were also used to restrain rescission of tax-exempt status for "white flight" private schools during consideration of funding for the Internal Revenue Service[18] and to prevent the Justice Department from providing legal services to defend, support, or protect the lifestyle of gay Americans.[19]

An anti-civil rights amendment to an appropriation bill also presents a paradox in voting decisions. Introduction of these amend-

14. R. FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 689 (1966).
15. 38 CONG. Q., *supra* note 2, at 3252.
16. Hyde Amend. of 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926 (amending Title XIX, Social Security Act, 42 U.S.C. § 1396 *et seq.*).
17. 33 CONG. Q. ALMANAC, *supra* note 4, at 296.
18. 126 CONG. REC. H7,289 (daily ed. Aug. 20, 1980). The Internal Revenue Service is a division of the Department of Treasury. It receives funding from the Treasury and Postal Service Appropriations.
19. 126 CONG. REC. H6,252 (daily ed. July 22, 1980).

ments on the House floor is possible only if the existing rules of Congress are circumvented. Yet, these riders are either accepted or rejected on the floor because the funding measures to which they are attached are indispensable to the continued operation of the federal government. Despite the inequity of changing civil rights policy without a proper hearing, capitulation is necessary in order to assure government funding for essential services to the nation.

LIMITATION AMENDMENTS: SPECIFIC APPROPRIATION LEGISLATION IN THE 96TH CONGRESS

The Walker Amendment: Labor, Education, and Human Services Appropriations[20]

During the second session of the 96th Congress, Representative Robert S. Walker offered an amendment prohibiting expenditures of funds for the issuance, implementation, or enforcement of regulations that establish school quotas based on race, creed, color, or sex. This amendment affected appropriations for the Department of Labor, the Department of Education, and the Department of Health and Human Services.[21] Its passage would have greatly hampered the Department of Labor's effort to implement Executive Order No. 11,246,[22] assuring women and minorities equal employment. Further, it would have categorically prohibited quota systems, placing Congress in conflict with executive and judicial application of this option to alleviate past discrimination.[23]

The Supreme Court has provided relief for past civil rights violations. In *Swann v. Charlotte-Mecklenburg Board of Education*,[24] the Court sanctioned the use of "mathematical ratios" as a "convenient starting point" in formulating a desegregation remedy in primary schools. Lower courts have also used quotas to assure that desegregation plans work effectively. In *Adams v. Califano*,[25] the United States District Court for the District of Columbia ordered the Department of Health, Education, and Welfare to revoke approval of plans to desegregate public higher education systems in six states, because the plans evidenced no progress in minority admissions.[26]

Opponents of quotas, goals, ratios, or any numerical requirement interpret *Regents of the University of California v. Bakke*[27] as a reinforcement of their position. A cursory reading of *Bakke* produces that

20. 126 CONG. REC. H7,988 (daily ed. Aug. 27, 1980).
21. *Id.*
22. Exec. Order No. 11,246, 3 C.F.R. § 169 (1974).
23. *Id.*
24. 402 U.S. 1 (1970).
25. 430 F. Supp. 118 (D.D.C. 1977).
26. Congressional Research Service, Library of Congress, Legal Analysis of Riders Attached to Various Appropriations Bills Pending in the 96th Congress as They Relate to Civil Rights Enforcement 4 (Nov. 13, 1980).
27. 438 U.S. 265 (1978).

result, because the Supreme Court held that a voluntarily adopted quota system for admission of students to a state-supported medical school denied the white male plaintiff equal protection under the Fifteenth Amendment. It is important to note that the Court considered alternative theories: the constitutional argument and the claim under Title VI of the Civil Rights Act of 1964. As a result, there was no majority holding in *Bakke*.[28] In announcing the opinion of the Court, however, Justice Powell implied that minority admissions programs which fall short of an absolute quota would be within the law.

Thus far, courts have taken a position favoring careful application of percentage goals in minority hiring and admissions.[29] In *United Steelworkers of America v. Weber*,[30] the Supreme Court, citing Title VII of the Civil Rights Act of 1964,[31] validated the use of private, voluntary affirmative action plans adopted by employers and unions to eliminate "conspicuous racial imbalance." The holding in *Weber* signals the Supreme Court's acceptance of affirmative action programs to remedy past discrimination.

Collins Amendment: Department of Justice Appropriations

Representative James M. Collins offered an amendment to the Justice Department's appropriation bill, limiting the Department's support for school busing. The amendment specifically forbade suits by the Department "to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home."[32]

Three federal statutes grant the Department authority to seek judicial relief for unlawful segregation in public schools. Title IV of the 1964 Civil Rights Act[33] empowers the United States Attorney General to institute civil desegregation actions against public schools and colleges. Title VI[34] of the same act grants the Department authority to enforce its prohibition of discrimination in any program or activity receiving federal financial assistance. Finally, the Equal Educational Opportunities Act of 1974,[35] which prohibits deliberate segregation by

28. In *Bakke, id.*, the Court assessed the strict quota admissions program at the medical school of the University of California at Davis for constitutionality under the equal protection clause of the Fourteenth Amendment and validity under Title VI of the Civil Rights Act of 1964. Justices Stewart, Rehnquist, Stevens, and Chief Justice-Burger found the strict racial quota invalid under Title VI. Justices Brennan, White, Marshall, and Blackmun held the program both valid and constitutional. Justice Powell determined that Title VI of the Civil Rights Act, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1976 & Supp. II 1978), prohibited only racial classifications that violated the equal protection clause and found the program violative of the equal protection clause because of the existence of less restrictive alternatives.
29. *See, e.g.*, U.S. v. City of Miami, 614 F.2d 1322 (5th Cir. 1980).
30. 443 U.S. 193 (1979).
31. 42 U.S.C. § 2000e-2(a)-(d) (1976 Supp. II 1978).
32. *See generally* REVIEW, *supra* note 1, at 5.
33. 42 U.S.C. § 2000c-6.
34. 42 U.S.C. § 2000d.
35. 20 U.S.C. §§ 1228, 1608, 1701-1710, 1712-1718, 1720-1721, 1751-1758 (1976).

an educational agency, provides for civil actions by the Attorney General on behalf of any individual denied equal educational opportunity under the Act.[36] The Supreme Court, in *McDaniel v. Barresi*,[37] has also specifically upheld school desegregation plans, stating that "any other approach would freeze the status quo that is the very target of desegregation processes."

Failure to fund such legislatively mandated controls involves substantive policy change; it is also a deprivation of Congressionally guaranteed protection for civil rights. Furthermore, it is an unwarranted collateral attack on judicial decisions upholding civil rights legislation.

Ashbrook Amendment: The Department of Education Appropriations

An amendment authored by Representative John M. Ashbrook sought to deny funding for enforcement of the Department of Education's regulations requiring state and local educational agencies to develop programs for students with limited proficiency in English.[38] The amendment cut funds specifically appropriated for bilingual education.

In *Lau v. Nichols*,[39] a class of non-English speaking students challenged the lack of adequate supplemental language instruction as a violation of equal educational opportunity under both the 1964 Civil Rights Act[40] and the Fourteenth Amendment.[41] The Supreme Court held that proof of discriminatory effect alone was sufficient to establish a prima facie violation of Title VI of the Act. In the majority opinion Justice Douglas stated, "[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[42] The Court did not attempt to fashion remedies, but relied on local officials to devise a reasonable solution.

Regulations for the Department of Health, Education, and Welfare were promulgated to guide local school districts as they sought to comply with the *Lau* decision.[43] Denial of funding for these regulations would have further delayed the institution of bilingual education for limited English speaking students. During House discussion, propo-

36. 20 U.S.C. § 1706 (1976).
37. 402 U.S. 39, 41 (1974).
38. 126 CONG. REC., *supra* note 10, at H7,965.
39. 414 U.S. 563 (1974).
40. 42 U.S.C. § 2000d.
41. U.S. CONST. amend. XIV, § 1.
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.
42. 414 U.S. at 566.
43. *See* note 25 *supra*, at 12-14.

nents of the Ashbrook Amendment only briefly mentioned *Lau v. Nichols*.[44]

SUGGESTED REMEDIES AND SOLUTIONS

House Procedure and Rule XXI

Louis Deschler, perhaps the most knowledgeable and respected House Parliamentarian, interpreted Rule XXI to preclude any discussion effecting a substantive change in existing law during debate on appropriation bills.[45] This view governed House procedure for many years; the Congressional Record is replete with instances where the Parliamentarian sustained it.[46] The Deschler interpretation should be followed to prohibit limitation amendments to appropriation bills that portend any alteration in substantive policy.

However, certain structural problems, inherent within a political body such as the House, militate against effective operation of Rule XXI. Both political parties argue that the primary consideration in reviewing and interpreting House rules is "the public interest." Yet, political and parochial interests result in divergent views of "public interest." Interpretation of Rule XXI[47] is often dependent upon the political interest of the party in power. Party politics is not the only reason that reform of House Rules is difficult, however. In many instances, politics involves personalities, and reform depends upon the willingness of individuals to compromise in favor of the public good. As David P. Price has noted,[48] fault does not lie with the rules of Congress or its seniority system, but with its individual members who seek to protect their selfish, parochial interests.

Members of Congress supporting fundamentalist or conservative issues often experience frustration with the Congressional committee system. In the 96th Congress, for example, legislation prohibiting busing and abortion was often referred to committees controlled by liberals where it could be "bottled up." According to Representative James M. Collins, "For [twenty-five] years Congress has been controlled by liberal Democrats and [no conservative can] get any type of freedom from regulation out of their committees. The only recourse [conservatives] have is to go to the appropriations bill."[49] Until the House Rules provide the Congressional minority with an alternative to the introduction and debate of policy issues on the floor, the discouraging practice of introducing limitation amendments will continue.

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44. 126 CONG. REC., *supra* note 10, at H7,967.
45. L. Deschler, Deschler's Procedure in the United States House of Representatives 435 (1979) (available at U.S. Gov't Printing Office).
46. W. BROWN, *supra* note 5, at 534-536.
47. *Id.* at 525.
48. D. PRICE, WHO MAKES THE LAWS? CREATIVITY AND POWER IN SENATE COMMITTEES 11 (1972).
49. 38 CONG. Q., *supra* note 2, at 3252.

The Courts

The "political question" doctrine, set forth by the Supreme Court in *Baker v. Carr*,[50] precludes judicial intervention into matters that the Constitution textually commits to a coordinate branch of the government. Article I of the Constitution states that "each house may determine the Rules of its Proceedings." Therefore, under the Constitution, the courts may not inquire into the Congressional appropriation process, because the procedural method of allocating funds is a function reserved for the legislative branch. The Court applied this doctrine in *Powell v. McCormack*,[51] ruling, on constitutional grounds, that judicial interpretation of House Rules governing qualifications of members is improper. The Court disregarded previous rulings regarding the House's refusal to seat members that were based on non-constitutional grounds. Since this distinction is not apparent in the Constitution's "rules clause," courts are unwilling to review Congressional procedure.

Recourse to the judicial system to preclude Congressional use of funding mechanisms that erode civil rights programs is equally ineffective. First, the inevitable delays in civil rights litigation result in years of sacrifice and expense, before the matter is resolved. Second, the courts have been unwilling to construct remedies for plaintiffs denied access to federal programs because appropriation amendments have curtailed funding. A prime example is the Hyde Amendment[52] to the Department of Health and Human Services funding bill, which denied funds for certain medically necessary abortions under Title XIX of the Social Security Act. In *Harris v. McRae*,[53] the Supreme Court addressed a due process challenge to the Hyde Amendment's limitation on medicaid funding for abortions. Justice Stewart responded to arguments that denial of funding results in deprivation of a constitutional right to abortion established in *Roe v. Wade*.[54] He stated,

> [A]lthough the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls within the latter category. The financial constraints that restrict an indigent woman's ability to enjoy

50. 369 U.S. 186 (1962). The "political question" doctrine of justiciability is a function of the separation of powers. The *Baker* court, addressing a challenge to Congressional apportionment, identified six factors that described a political question, stating:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

Id. at 217.

51. 395 U.S. 486 (1969).
52. *See* note 15 *supra*.
53. 100 S. Ct. 2671 (1980).
54. 410 U.S. 113 (1973).

> the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.[55]

If a constitutional right does not imply a correlative right to government funding to permit the exercise of that right, the remedy must come from within Congress itself.

The Solutions

During a review of the bill referral process for newly proposed bills, the Select Committee on Committees received a letter coauthored by the chairmen and ranking minority members of seventeen House authorizing committees. This letter urged the Select Committee to adopt a resolution that would require the referral of all legislation in general appropriation bills to the relevant authorizing committee, with strict time limits for review.[56] Although the committee report did not make final recommendations in this area, it called upon the Rules Committee to take additional action.[57]

During the 95th Congress a House Democratic Study Group report made the following recommendations to protect civil rights programs throughout the appropriation process:

(1) Prohibit appropriation riders not approved by the proper House Committee.
(2) Require a two-thirds vote for the approval of appropriation riders.
(3) Allow the Rules Committee to make recommendations regarding riders on an *ad hoc* basis.[58]

These recommendations alone will not resolve the apparent dispute among members concerned about integrity of the legislative system and members frustrated in attempts to propose conservative legislation. The solution is simple. The Congressional leadership must do "just that"—it must lead. The leadership must encourage all committee chairmen to consider bills and amendments in an unbiased and timely fashion. When issues are "bottled up" in committee, the Speaker of the House must persuade the chairmen to move legislation onto the House floor. If the chairmen refuse, a mechanism must be created to allow the ranking majority and minority committee leaders to call measures for immediate committee vote. If the committee votes in favor of the measure, it would then move to the House floor, where a two-thirds vote would be necessary both to commence debate and to obtain final passage. Equity dictates that the will of Congress not be thwarted because one member is in a position to hold up legislation.

55. Harris v. McRae, 100 S. Ct. at 2688.
56. HOUSE SELECT COMM. ON COMM., 96TH CONG., 2D SESS., FINAL REPORT 385 (1980).
57. *Id.* at 386.
58. 38 CONG. Q., *supra* note 5, at 3254.

CONCLUSION

As we enter the 97th Congress, it is my hope that the practice of offering riders to appropriation bills is halted. House Rules have established procedures for enacting legislation. These procedures have served Congress well because they call for comprehensive hearings to be conducted by the appropriate committee. After hearings the committee creates a record that all House members may review regarding the merits or flaws of a proposal. Absent such careful study, House members are deprived of the opportunity to cast informed votes on issues of crucial importance.

Continued use of limitation amendments portends an ominous future, not only for the institution of Congress, but for the fate of civil rights in this nation. Even though none of the amendments discussed in this article was signed into law, their introduction indicates that there is a growing tide of retrenchment in the civil rights arena. Those Members of Congress committed to advancement of civil rights must work with the House leadership to advance Congressional reform as well. Gains made in civil rights policy must be protected. Our legislative process must retain its integrity. The challenge confronting Congress is an ambitious one, one in which victory must be achieved for the good of our nation.