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Limitations in Appropriations Measures: An Overview of Procedural Issues

James V. Saturno

Specialist on Congress and the Legislative Process

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Summary

Both the House and Senate have internal rules encouraging the separation of money and policy decisions. These rules bar legislative provisions from being included in general appropriations measures under most circumstances. Limitations within appropriations measures are provisions that negatively restrict the amount, purpose, or availability of funds without changing existing law. The effect of these provisions is to limit the actions for which funds may be used through the capping or outright denial of funds. Limitations are distinct from legislative provisions, which have the effect of either making new law or changing existing law. This distinction has been developed and refined over time based on various rulings establishing what type of language is allowable.

The procedural contexts within the House and Senate for the consideration of limitations on the floor differ in three significant ways. First, although legislative provisions are generally not allowed under the rules of the House, the rules of the Senate do allow exceptions under some circumstances. Second, House Rule XXI designates a particular process for the consideration of limitation amendments, but the Senate has no specific procedures relating to such provisions. Third, although House Rule XXII bans legislative language within conference reports, Senate rules contain no such prohibition.

There are two forms in which limitations regularly occur. The first form places a total ban on the use of funds by stipulating that none of the funds in the account or bill can be used for a certain purpose. The second form, sometimes referred to as a “not to exceed” limitation, provides that the use of funds is not to exceed a specific amount or percentage of total funds for a certain account, item, activity, agency, or bill but does not change existing law. Limitations that prohibit the use of funds for certain purposes have been used to prevent federal funding for specific activities, a class of recipients, or to prohibit funding for earmarks. “Not to exceed” limitations have been used to establish funding ceilings for certain activities or total funding amounts. Both types of limitations also have been used to restrict the availability of funds for transfer.

Limitations and legislative provisions are distinguished both by structure and substance. With respect to structure, a limitation must be phrased as a negative funding prohibition. For substance, a limitation must not effectively waive current law, alter agency discretion, impose new duties upon the official or agency, or provide funding based upon a contingency. Additionally, whether the recipient of the funds can be considered “federal” and, in the House, if the subject matter of the limitation involves taxes or tariffs, can determine the admissibility of this type of provision.

When a limitation provision has been the subject of a point of order, the burden of proof is on its proponent to demonstrate that the restrictions exist within current law or that the new provision does not effectively change agency discretion or impose new duties.

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Introduction

Both the House and Senate have internal rules encouraging the separation of money and policy decisions. These rules stem from the principle that the process through which the activities of government are chosen should be distinct from the process through which those activities are funded. For activities funded through the annual appropriations process (referred to as discretionary spending),¹ Congress differentiates between authorizations and the appropriations. Authorizations comprise substantive law establishing government entities, activities, or programs,² while appropriations provide budget authority to fund government agencies or programs by allowing them to obligate funds.

Under the rules of the House and Senate, legislative provisions and appropriations for purposes not authorized by law typically may not be included in appropriations measures. These rules were formally established in both chambers during the mid-1800s to address concerns with delays in enacting appropriations due to the inclusion of extraneous legislative matters that tended to provoke controversy.³ As currently provided in House Rule XXI, the House bars legislative provisions from being reported in general appropriations bills;⁴ amendments to general appropriations bills containing language that would add to or alter existing law are also prohibited.⁵ Clause 5 of House Rule XXII also prohibits the inclusion of legislative language in conference reports that accompany appropriations acts.⁶ Senate Rule XVI⁷ additionally restricts legislative language not contained within existing law from being added via amendment⁸ to a general appropriations bill,⁹ unless it is determined to be germane to a legislative provision previously added by the House.¹⁰ These rules are enforced on the House and Senate floor through

¹ Discretionary spending is provided for through the annual appropriation process. For further information on how discretionary spending differs from direct spending, see CRS Report 98-721, *Introduction to the Federal Budget Process*, coordinated by James V. Saturno.

² For further information on the distinction between authorizations and appropriations generally, see CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, by Jessica Tollestrup and Brian T. Yeh

³ Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907-1908) (hereafter *Hinds' Precedents*), vol. 4, §3578.

⁴ In the House, general appropriations bills are the annual appropriations acts (or any combination thereof) and any supplemental appropriations acts that cover more than one agency. Continuing resolutions are not considered to be general appropriations bills. See William Holmes Brown, Charles W. Johnson, and John V. Sullivan, *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, 112th Cong., 1st sess. (Washington: GPO, 2011), (hereafter *House Practice*), chapter 4, §3.

⁵ In the House, this prohibition also includes motions to recommit general appropriations measures with instructions containing legislative language (see Rules of the House of Representatives, in *House Manual, One Hundred Fourteenth Congress*, H.Doc. 113-181, 113th Cong., 2nd sess., [compiled by] Thomas J. Wickham, Parliamentarian (Washington: GPO, 2015) (hereafter *House Manual*), §1044).

⁶ Rules of the House of Representatives, in *House Manual*, §§1076-1077.

⁷ Standing Rules of the Senate, in *Senate Manual*, S.Doc. 113-1, 113th Cong., 1st sess., [compiled by] the Senate Committee on Rules and Administration (Washington: GPO 2014), pp. 14-16.

⁸ In the Senate, this prohibition covers all Senate amendments to House bills, including committee amendments, floor amendments, and amendments between the houses.

⁹ In the Senate, general appropriations bills are the annual appropriations acts (or any combination thereof) and any supplemental or continuing appropriations acts that cover more than one agency or purpose. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), [Hereafter *Riddick's Senate Procedure*], pp. 159.

¹⁰ In these instances, the Senate votes on whether a provision is germane in relation to an appropriate definition of germaneness (see *Riddick's Senate Procedure*, pp. 161-171). This is discussed in further detail below.

points of order, but if legislative provisions are enacted as a part of an appropriations measure, they have the full force of the law.

Although House and Senate rules restrict legislating on appropriations, policy matters may be included through limitation provisions. Limitations within appropriations measures are provisions that negatively restrict the amount, purpose, or availability of funds without changing existing law. The effect of these provisions is to limit the actions for which funds may be used through the capping or outright denial of funds for specific purposes. Proper limitations are distinct from legislative provisions because they do not have the effect of either making new law or changing existing law. As a result, limitation provisions, which define the purposes for which budget authority may not be used without also affecting a recipient's discretion under other laws, have frequently been included within the text of appropriations bills reported by the committee or added by amendments on the floor. The allowability of limitations under the rules of the House and Senate is based upon the principle that although Congress may authorize an activity, it is under no obligation to fund that activity. Congress can therefore choose to specify those purposes for which funds are not to be used, even if that purpose has been previously authorized.¹¹

The distinction between legislative provisions and funding limitations has been developed and refined over time based on various rulings that establish what types of provisions are allowable. Early debates over the permissibility of limitation provisions centered on the question of “[whether] the proposed limitation might be construed by the executive or administrative officer as a modification of statute [or] a change in existing law.”¹² So, although a House floor amendment to the FY1910 fortifications appropriations bill stipulating “that all material purchased under the foregoing provision of this act shall be of American manufacture” was ruled by the chair to be out of order, that same amendment, rephrased by unanimous consent as, “*Provided*, That no money appropriated by this act shall be expended except for goods of American manufacture,” was allowed because it no longer contained an affirmative direction to the recipient of the funds.¹³

In more recent years, as the precedents regarding limitations have become more nuanced, parliamentary determinations of legislative language have stemmed from a number of principles related to the imposition of new duties upon the recipient of funds, changes in agency discretion, or whether the provision mandates action contrary to law. The goal of this report is to clarify aspects of the legislative process concerning the inclusion of limitations in appropriations measures under the rules of the House and Senate.

This report begins by explaining the contrasting procedural contexts that influence the consideration of limitation provisions in appropriations measures on the House and Senate floor. Next, it defines the two forms of limitations that have been allowed under House and Senate precedents, with examples of previous purposes that have been allowed. This report then proceeds to identify the variety of substantive challenges that exist in structuring a limitation provision so that it does not constitute legislative language and thereby violate House and Senate rules. Finally, this report concludes by discussing the effect of points of order during floor consideration and the burden of proof that exists for proponents of limitation provisions to successfully overcome procedural objections.

¹¹ Lewis Deschler, *Deschler's Precedents of the U.S. House of Representatives*, 94th Cong., 1st sess., H.Doc. 94-661 (Washington: GPO, 1977-1991), [Hereafter *Deschler's Precedents*], vol. 8, chapter 26, §64.

¹² *Hinds' Precedents*, vol. 4, §3978.

¹³ Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* (Washington: GPO, 1935-1941), [Hereafter *Cannon's Precedents*], vol. 7, §1702.

Note on the Use of Precedents

Although many of the examples of both proper and improper limitations used in this report are from older precedents, they nevertheless remain applicable to House and Senate rules in this area. Precedents regarding limitations are also considerably more numerous in the House than the Senate. One reason for this is that, unlike the House, the Senate has no specific rules governing the consideration of limitations beyond those that prohibit legislative language in appropriations acts. In addition, the Senate occasionally allows legislative language to be inserted in an appropriations act if it is determined by a majority of Senators to be germane to legislative language already included by the House in the bill.¹⁴ The Senate has previously relied, in at least one instance, on House precedents for defining an acceptable limitation, which resulted in the chair upholding a point of order against a limitation as being legislative in nature.¹⁵ Additionally, the parliamentarian's discussion of what constitutes a proper limitation contained in *Riddick's Senate Procedure* occasionally uses House precedents to clarify the types of provisions that have been allowed as limitations.¹⁶ This report will therefore rely primarily on precedents from the House to help define and illustrate proper limitation provisions. Areas where the House and Senate diverge in their understanding of, or approach to, what constitutes a limitation will be noted as they occur.

This report should be read with several caveats in mind. First, it does not take account of every ruling that has been made and does not address every contingency that might arise.¹⁷ Second, unanimous consent agreements in the Senate and special rules in the House can be used to set aside each chamber's respective rules and customary procedures relating to both limitations and legislation on appropriations measures. Third, the House and Senate parliamentarians are the advisers to the presiding officers on what constitutes a proper limitation within the appropriations context. Although this report may provide useful background information, it should not be considered a substitute for consultation with the parliamentarian and his or her associates on specific procedural problems and opportunities.

Limitations and the Floor Process

The rules of the House and Senate with respect to limitations are enforced during floor consideration of general appropriations measures. Although these rules generally encourage the separation between policy and money decisions in the area of appropriations, the procedural approach of each chamber differs in three significant ways with respect to the consideration of limitations and the exclusion of legislative provisions. The first area of contrast is the extent to which legislative provisions are allowed as committee or floor amendments. The second area of contrast is whether chamber rules designate a separate set of procedures for the consideration of limitation amendments. The third area of contrast relates to the allowability of legislative provisions within conference reports.

¹⁴ For more information on the defense of germaneness for legislative language included in appropriations measures, see *Riddick's Senate Procedure*, pp. 161-171.

¹⁵ Senate debate, *Congressional Record*, vol. 102, part 10 (July 24, 1956), p. 14172, as cited in *Riddick's Senate Procedure*, p. 206.

¹⁶ See, for example, footnotes 172 & 173 in *Riddick's Senate Procedure*, p.183.

¹⁷ The rules of the House and Senate are not self-enforcing, so that if a point of order is not raised against a legislative provision, it could conceivably be considered and adopted. This would not, however, establish a parliamentary precedent.

House Floor Process

In the House, the annual appropriations bills are originated by the Committee on Appropriations. House Rule XIII, clause 5 provides for consideration of appropriations measures, allowing an appropriations bill to be brought directly to the floor once it has been reported by the Appropriations Committee. For at least the last two decades, however, most appropriations measures have been brought to the floor pursuant to a special rule that waives all points of order (with some exceptions). These measures are then considered in the Committee of the Whole¹⁸ under the five-minute rule for amendment, unless otherwise specified by a special rule or unanimous consent.¹⁹

Clause 2 of House Rule XXI provides some restrictions on the content of appropriations measures and amendments to appropriations measures that are enforced during floor consideration.²⁰ With respect to legislative provisions, clause 2(b) of this rule bars the reporting of legislative provisions (except for the purpose of rescission or retrenchment)²¹ in a general appropriations bill, making such provisions subject to a point of order during floor consideration.²² Under clause 2(c), amendments to general appropriations bills that contain legislative language are also not in order.²³ Effectively, this means that legislative language contained in a general appropriations bill that is considered on the floor can be stricken by a point of order without causing the bill to be recommitted.²⁴ In addition, an amendment containing legislative language, even if it is structured as a limitation, is not allowed during floor consideration. A point of order may be raised against such an amendment and, if sustained, the amendment would fall. These points of order, however, are not self-enforcing and must be made by a Member during floor consideration to trigger a ruling from the chair.

Clauses 2(c) and 2(d) of Rule XXI²⁵ also stipulate a separate set of procedures for the consideration of limitation amendments. During consideration in the Committee of the Whole, the bill is read by paragraph and amendments may be offered to the paragraph currently under consideration, unless specified otherwise by a special rule or by unanimous consent. Limitations that are not contained in existing law, however, are not in order while the bill is being read for amendment. Once all sections of the bill have been read, an amendment containing a new limitation can be offered, but the majority leader (or a designee) may preempt this by offering a

¹⁸ Rule XVII, clause 3 requires that appropriations bills be considered within the Committee of the Whole, which is where the House traditionally considers amendments. For further information, see CRS Report RL32200, *Debate, Motions, and Other Actions in the Committee of the Whole*, by Bill Heniff Jr. and Elizabeth Rybicki.

¹⁹ For more information on House practice related to committee origination and floor consideration of appropriations measures, see CRS Report R42388, *The Congressional Appropriations Process: An Introduction*, by Jessica Tollestrup and James V. Saturno.

²⁰ Other House rules that guide floor proceedings are also often relevant during the consideration of appropriations legislation.

²¹ Rescission is the cancellation of previously enacted budget authority before it expires. The “Holman Rule” related to retrenchment applies when the legislative language in question achieves a reduction in expenditures. See Rules of the House of Representatives, in *House Manual*, §1062 for a further explanation of how this principle operates.

²² House Rule XXI, clause 2(b), in *House Manual*, §1038.

²³ House Rule XXI, clause 2(c), in *House Manual*, §1039.

²⁴ It is more typical that measures, rather than specific provisions, are subject to a point of order so that, if successful, the point of order would cause the measure to be recommitted to its committee of origin. For further information, see CRS Report 98-307, *Points of Order, Rulings, and Appeals in the House of Representatives*, by Valerie Heitshusen.

²⁵ House Rule XXI, clause 2(c) and 2(d), in *House Manual*, §§1039-1040.

motion to rise and report, which has precedence over motions to amend the bill.²⁶ If successful, the motion to rise and report ends further consideration of amendments because it causes the Committee of the Whole to cease consideration of the bill and report its work to the House. The effect of this rule is that the offering and consideration of limitation amendments are restricted if the motion to rise and report is successful.

Special rules governing the consideration of appropriations measures also have a potential effect on limitation amendments.²⁷ Such special rules can waive points of order against provisions contained in the bill or any potential floor amendments based upon clause 2(c) and 2(d) of Rule XXI.²⁸ Open rules, which generally allow amendments to be offered during floor consideration in the Committee of the Whole, effectively permit any limitation conforming to the rules of the House to be offered once the bill has been read for amendment. Limitation amendments can also be included in the amendments made in order by a structured rule, which would allow only specified amendments to be offered.²⁹ Finally, “self-executing” provisions within special rules can provide for the adoption of a limitation amendment automatically upon the passage of a special rule;³⁰ provisions integrated in this way are not subject to points of order.³¹

With respect to conference reports, clause 5(b) of Rule XXII³² additionally prohibits House conferees from agreeing to Senate amendments that constitute legislation on appropriations in violation of clause 2 of Rule XXI. Unless special rules waive points of order stemming from clause 5(b) of Rule XXII, conference reports containing legislative language would be subject to points of order on the House floor.

Senate Floor Process

Senate Rule XVI contains general provisions dealing with legislation on appropriations but gives no specific direction regarding limitations, other than that they cannot be subject to a contingency.³³ Although points of order generally lie against legislative language contained within general appropriations measures, these types of provisions are allowed as amendments when they are determined to be germane to legislative language passed by the House and already

²⁶ Clause 2(d) was originally added to Rule XXI at the beginning of the 98th Congress. When this paragraph was amended during the 104th and 105th Congresses, the preferential motion to rise and report (which had typically been used by the floor manager) was specifically vested with the majority leader or a designee (see Rules of the House of Representatives, in *House Manual*, §1043).

²⁷ See CRS Report 98-354, *How Special Rules Regulate Calling up Measures for Consideration in the House*, by Richard S. Beth, and CRS Report 98-612, *Special Rules and Options for Regulating the Amending Process*, by Megan S. Lynch, for further information on special rules.

²⁸ See, for example, H.Res. 609 (111th Cong.), Providing for consideration of the bill (H.R. 2997) making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2010, and for other purposes. Such protection for a conference report and any amendments from the Senate containing legislative language can also be provided by special rules that waive clause 2(c) of Rule XXI.

²⁹ See, for example, H.Res. 1569 (111th Cong.), Providing for consideration of the bill (H.R. 5850) making appropriations for the Departments of Transportation, and Housing and Urban Development, and related agencies for the fiscal year ending September 30, 2011, and for other purposes.

³⁰ See, for example, H.Res. 434 (111th Cong.), Providing for consideration of the bill (H.R. 2346) making supplemental appropriations for the fiscal year ending September 30, 2009, and for other purposes.

³¹ See Rules of the House of Representatives, in *House Manual*, §1044.

³² See House Rule XXII, clause 5(b), in *House Manual*, §§1076-1077 for an explanation of the evolution of House practice in this regard.

³³ Senate Rule XVI, paragraphs 2 and 3.

contained within the appropriations bill.³⁴ If a germaneness defense is raised before the chair rules on the original point of order, the presiding officer instead makes an initial determination as to whether there exists “any House language which is arguabl[y] legislative to which the amendment at issue conceivably could be germane.”³⁵ If the bill is determined to contain such language, the question is put to the Senate for an immediate vote. If a majority of the Senators vote affirmatively that the amendment is germane, the point of order falls and the amendment containing legislation is eligible for floor consideration. Because a successful germaneness defense based upon House legislative language is not difficult to accomplish, the effect of this rule can be that the distinction between a proper limitation and a legislative provision is not one that the Senate needs to make under some circumstances.³⁶

The Senate approach to limitations during floor consideration of appropriations measures also contrasts with that of the House in that there are no procedures specific to the offering or consideration of limitation amendments on the floor. Like other amendments, limitation amendments may be offered at any point, and to any section of the bill, during the consideration of appropriations measures when amendments are in order, unless a specific procedural arrangement, such as a unanimous consent agreement, precludes it.

In the Senate, there is no rule barring legislative language in conference reports, and the inclusion of such language is not a valid basis for a point of order.

Forms of Limitations and Previous Purposes³⁷

There are two forms in which limitations are regularly proposed. The first form places a total ban on the use of funds for a certain purpose by stipulating that none of the funds in the account or bill can be used for such purpose. This type of limitation has been allowed under House and Senate rules, even when the funds have been authorized by law for that particular activity.³⁸ The second form, sometimes referred to as a “not to exceed” limitation,³⁹ provides that the use of funds is not to exceed a specific amount or percentage of total funds. According to *House Practice*, “A negative restriction on the use of funds above a certain amount in an appropriation bill is in order as a limitation. As long as a limitation on the use of funds restricts the expenditure of federal funds carried in the bill without changing existing law, the limitation is in order.”⁴⁰

Although the rules of the House and Senate encourage money and policy decisions to remain separate, proper limitations in appropriations measures can affect policy by stipulating for what purposes federal funds cannot be used or by placing a maximum limit on spending in certain areas.⁴¹ Limitations have been previously allowed that prohibit funding for specific activities, a

³⁴ *Riddick’s Senate Procedure*, pp. 150-151. See CRS Report 98-853, *The Amending Process in the Senate*, by Christopher M. Davis, for a general explanation of Senate amending procedures and germaneness.

³⁵ *Riddick’s Senate Procedure*, p. 167.

³⁶ See *Riddick’s Senate Procedure*, pp. 161-171 for an extensive discussion of what constitutes allowable legislative language.

³⁷ All examples of limitations contained within this section are either amendments to regular appropriations acts or provisions reported by the appropriations committee. Unless otherwise noted, all were challenged on the floor as being legislative in nature and ruled in order by the presiding officer.

³⁸ *House Practice*, chapter 4, §52, p. 124.

³⁹ *House Practice*, chapter 4, §51, p. 123.

⁴⁰ *Ibid.*

⁴¹ *Cannon’s Precedents*, vol. 7, §1694, as cited in *Deschler’s Precedents*, vol. 8, chapter 26, §22.22.

class of recipients, and earmarks. “Not to exceed” limitations that establish funding ceilings for certain activities or total funding amounts have also previously been determined by the presiding officer to be in order, as have limitations that restrict the availability of funds for transfer.⁴²

Limitations as Funding Prohibitions

Limitations that prohibit federal funding for certain activities and restrict the types of recipients that can be eligible to receive federal government funds have previously been allowed under House and Senate rules.

Activities

Although an appropriations provision that directs an agency to create or change a rule is legislative, it has been previously ruled in order to prohibit funding for the promulgation of a specific rule, as long as such rule is precisely described in the text of the limitation. The example below was a House floor amendment to the FY1944 Independent Offices Appropriations Act.⁴³

No part of this appropriation shall be used to promulgate or enforce any rule or regulation known as the proposed rule or regulation F-9 and F-10, and providing in substance (1) the engineers’ reports shall be mandatory, (2) require the disclosure of the cost of purchase prices, and (3) an abridgement of the right to appoint an agent, all with reference to the sale of oil and gas royalties and lease under the jurisdiction of the Oil and Gas Division of the Securities and Exchange Commission.

Similarly, a provision may be ruled in order if it is to prevent funds from being spent to carry out a regulation. For example, the below House amendment to the FY1980 Treasury, Postal Service, and General Government Appropriations Act prohibited funds from being spent to carry out an IRS tax proceeding.⁴⁴

None of the funds appropriated by this title may be used to carry out the proposed revenue procedure 4830-01-M of the Internal Revenue Service entitled “Proposed Revenue Procedure on Private Tax-Exempt Schools” (44 F.R. 9451 through 9455, February 13, 1979, F.R. Document 79-4801), or the proposed revenue procedure 4830-01 of the Internal Revenue Service entitled “Proposed Revenue Procedure on Private Tax-Exempt Schools” (43 F.R. 37296 through 37298, August 22, 1978, F.R. Document 78-23515); or parts thereof...

Besides prohibiting funds for agency rulemaking, limitations have also been used to prevent funds from being spent on other types of specified activities. The example below was a House amendment to the FY1974 Department of Housing and Urban Development Space, Science, and Veterans Appropriations Act, which prevented funding for any stage of development or construction of a particular piece of technology.⁴⁵

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

⁴² A transfer of funds occurs when the budget authority contained in one account is either partially or completely moved to another account.

⁴³ *Deschler’s Precedents*, vol. 8, chapter 26, §79.7.

⁴⁴ *Deschler’s Precedents*, vol. 8, chapter 26, §64.28.

⁴⁵ *Deschler’s Precedents*, vol. 8, chapter 26, §64.1.

Another example of a limitation that prohibited funding for a certain activity was the below House amendment to the FY1981 Treasury and Postal Service Appropriations Act, which sought to prevent federal funds from being spent on any health plan for federal employees that included abortion coverage after a certain deadline.⁴⁶

No funds appropriated by this Act shall be available to pay for an abortion or the administrative expenses in connection with any health plan under the Federal Employees Health Benefit Program which provides any benefits or coverage for abortions under such negotiated plans after the last day of the contracts currently in force.

Class of Recipients

An 1896 House precedent on limitations stipulates, “While it is not in order to legislate as to qualifications of the recipients of an appropriation, the House may specify that no part of the appropriation shall go to recipients lacking certain qualifications.”⁴⁷ Although it has not been in order for these types of limitations to create new law or contradict current law,⁴⁸ the ability to prohibit funds for certain types of individuals or recipients has been previously used in a variety of ways. The example below was a Senate amendment to the FY1955 State, Judiciary, and Commerce Appropriations Act.⁴⁹

No part of any appropriation contained in this act shall be used to pay the salary or wages of any officer or employee of the Bureau of Inspections, Consular and Security Affairs of the Department of State who, for the purpose of the act of August 2, 1939, as amended (5 U.S.C. 1181), shall not be included within the construction of the term “officer” or “employee.”

The ability to prohibit funds for certain recipients has also been interpreted to allow limitations that prohibit funds for recipients that have certain characteristics. For example, the below House amendment to the FY1973 Labor, and Health, Education, and Welfare Appropriations Act proscribed funds for government suppliers that exceed certain compensation limitations for their own employees.⁵⁰

No part of the funds appropriated by this Act shall be used to purchase goods or services from a supplier which compensates any officer or employee at a rate in excess of level II of the Executive Schedule under section 5313 of title 5, United States Code.

Finally, limitations on certain recipients have also been used to restrict funds for the payment of salaries of government and nongovernment employees that undertake certain actions. The below example was a House amendment to the FY1943 Legislative Branch Appropriations Act.⁵¹

Provided further, That no part of this appropriation shall be used to pay the salary of any person who shall perform any service or authorize any expenditure in connection with the printing and binding of part 2 of the annual report of the Secretary of Agriculture (known as the Year Book of Agriculture) for 1942.

⁴⁶ *Deschler's Precedents*, vol. 8, chapter 26, §74.5.

⁴⁷ *Hinds' Precedents*, vol. 4, §3941.

⁴⁸ *Deschler's Precedents*, vol. 8, chapter 26, §52.18.

⁴⁹ Senate debate, *Congressional Record*, vol. 100, part 6 (June 14, 1954), p. 8149, as cited in *Riddick's Senate Procedure*, p. 182.

⁵⁰ *Deschler's Precedents*, vol. 8, chapter 26, §54.2.

⁵¹ *Deschler's Precedents*, vol. 8, chapter 26, §64.7.

Limitations and Earmarks⁵²

Limitations have been used in attempts to cancel congressionally directed spending items (generally referred to as earmarks)⁵³ within an appropriations act or the accompanying report language.⁵⁴ For example, during the 109th Congress, the Appropriations Committee report⁵⁵ for the FY2007 Agriculture appropriations bill⁵⁶ contained a provision that stipulated, “The Committee provides \$229,000 for dairy education in Iowa.” In response to this, an amendment was offered on the floor of the House that proposed to insert at the end of the bill the provision, “None of the funds made available by this Act may be used to fund dairy education in Iowa.”⁵⁷ Had this amendment become law as part of the appropriations act, it would have prevented the \$229,000 in funds set aside in the committee report from being spent on that particular activity, without lowering the overall level of funding in the act or account itself.

Limitation provisions have, however, been drafted to reduce the level of funds within the bill as well. For example, the Senate committee report⁵⁸ that accompanied the FY2007 Agriculture appropriations bill⁵⁹ contained a provision stating, “The Committee recommends \$100,000 to establish a farm-raised catfish grading system.” In response, an amendment was filed, but not offered, during Senate floor consideration that proposed to insert the language, “Notwithstanding any other provision of this Act, none of the funds appropriated or otherwise made available in this Act may be available for a catfish grading system, and the total amount made available in this Act is reduced by \$100,000.”⁶⁰ Had this entire amendment⁶¹ been adopted, it would have simultaneously prevented the expenditure of funds set aside in the committee report for that particular activity and lowered the amount of budget authority in the act by \$100,000.

Limitations as Funding Ceilings

It has generally been in order to restrict the availability of funds with a “not to exceed” limitation.⁶² These types of limitations have been used to cap funds for certain accounts, items, activities, titles, or agencies or to place ceilings on total expenditures.

⁵² The first example contained in this section was an amendment proposed on the House floor; it was not the subject of a point of order and was rejected. The second example was an amendment filed in the Senate but never considered on the floor. Although it is impossible to determine without a ruling of the presiding officer whether either of these examples are proper limitations, they are nevertheless illustrative of attempts to effect funding for earmarks.

⁵³ Clause 9 of House Rule XXI and Senate Rule XLIV provide similar, though not identical, definitions of earmarks. For additional information, see CRS Report RS22866, *Earmark Disclosure Rules in the House: Member and Committee Requirements*, by Megan S. Lynch and CRS Report RS22867, *Earmark Disclosure Rules in the Senate: Member and Committee Requirements*, by Megan S. Lynch.

⁵⁴ This same principle applies to conference reports and any accompanying joint explanatory statement.

⁵⁵ H.Rept. 109-463.

⁵⁶ H.R. 5384 (109th Cong.).

⁵⁷ H.Amdt. 904, House debate, *Congressional Record*, vol. 152, part 7 (May 23, 2006), p. H3104.

⁵⁸ S.Rept. 109-266.

⁵⁹ H.R. 5384 (109th Cong.).

⁶⁰ S.Amdt. 5198, Senate debate, *Congressional Record*, December 5, 2006, p. S11201.

⁶¹ Under Senate Rule 15, paragraph 3, amendments constructed in this manner could be divided at the request of a Senator, unless a unanimous consent agreement prohibits such a division.

⁶² *House Practice*, chapter 4, §51, p. 123.

Specific Accounts, Items, or Activities

Limitations have been used to restrict the availability of funds in a bill to not more than a total amount for a certain purpose. The example below, which is a House amendment to an Interior appropriations bill for FY1943, sought to limit the amount of funds in the bill that could be spent on a specific set of activities related to the reproduction and procurement of certain types of journal articles.⁶³

Notwithstanding any other provisions carried in this bill for printing and binding the total amount to be expended for printing, binding, duplicating, mimeographing, lithographing, or reproduction in any form or by any other device, and including the purchase of reprints of scientific and technical articles published in periodicals and journals shall not exceed for every such purpose included in this bill the sum of \$450,000, and that the amounts estimated therefore and not expended within this limitation shall be recovered into the Treasury of the United States.

Limitations have also been used to place ceilings on the amount of funds that can be spent on items or services obtained in a certain manner or from a specific source. The example below is a House amendment to a FY1972 Defense appropriations bill, which sought to limit the amount of funds that could be spent on a service obtained in a specific location.⁶⁴

Of the funds made available by this Act for the alteration, overhaul and repair of naval vessels, not more than \$646,704,000 shall be available for the performance of such works in Navy shipyards.

Finally, this type of limitation has been used to stipulate the maximum amount of funds that can be spent on a purpose specifically authorized by law, even if that amount is lower than the level of funds previously authorized. For example, the House amendment below to the FY1938 Agriculture appropriations bill identified an amount of budget authority not to be exceeded for the procurement of passenger-carrying vehicles stipulated by the Federal Highway Act.⁶⁵

That not to exceed \$45,000 of the funds provided for carrying out the provisions of the Federal Highway Act of November 9, 1921 (U.S.C., title 23, secs. 21 and 23), shall be available for the purchase of motor-propelled passenger-carrying vehicles necessary for carrying out the provisions of said act, including the replacement of not to exceed one such vehicle for use in the administrative work of the Bureau of Public Roads in the District of Columbia.

Funding Ceilings on Total Expenditures

Limitations have also been used to place a ceiling on the total dollar amount that can be expended under the budget authority provided by a particular appropriations act. The example below was a House amendment to the FY1954 Mutual Security Administration appropriations bill.⁶⁶

Money appropriated in this bill shall be available for expenditure in the fiscal year ending June 30, 1954, only to the extent that expenditures thereof shall not result in total aggregate net expenditures of all agencies provided for herein beyond the total of \$5,500,000,000.

⁶³ *Deschler's Precedents*, vol. 8, chapter 26, §80.4.

⁶⁴ *Deschler's Precedents*, vol. 8, chapter 26, §51.9.

⁶⁵ *Deschler's Precedents*, vol. 8, chapter 26, §67.36.

⁶⁶ *Deschler's Precedents*, vol. 8, chapter 26, §80.2.

A limitation provision may also place a ceiling on the total amount made available as a percentage of the amount appropriated by an appropriations act. The below example of this type of limitation was a Senate amendment to the FY1950 Treasury and Post Office Appropriations Act.⁶⁷

Provided further, That not to exceed 95 percent of the aggregate of the funds provided by appropriations made by this act for the fiscal year ending June 30, 1950 shall be expended or obligated by the department, agency or corporation to which such appropriations are made.

Transfer Authority

“Not to exceed” limitations have also been used to restrict transfer authority. This is illustrated below by a House amendment to the FY1951 Labor and Federal Security Agency appropriations bill.⁶⁸

Not to exceed 5 percent of any appropriation in this title may be transferred to any other such appropriation, but no such appropriation shall be increased by more than 5 percent by any such transfer...

More general bans on transfers have also been accomplished by limitation provisions. The example below of this type of limitation was a House amendment to the FY1974 Treasury, Postal Service, and General Government Appropriations Act.⁶⁹

Provided further, That none of the funds available under this heading shall be available for transfer to any other account nor for the funding of any activities other than those specifically authorized under this heading.

Distinguishing Between Limitations and Legislative Provisions

The precedents of the House and Senate distinguish between the limitations and legislative provisions based upon both structure and substance. For a limitation to be allowed under the House and Senate rules, it must first be phrased as a negative prohibition and not as an affirmative direction. Second, it can only prohibit *funding* for activities, not the activities themselves. The below House amendment to the FY1965 Defense Appropriations Act is an example of a proper limitation in these respects, and was determined by the chair to be in order.⁷⁰

None of the funds appropriated herein shall be available for paying the cost of a conventional powerplant for CVA-67.

However, even though a limitation may be disqualified because of improper structure, the more salient standard by which its admissibility is evaluated is its substance.⁷¹ This is because, even with proper structure, a limitation can still be legislative in effect and therefore be prohibited

⁶⁷ Senate debate, *Congressional Record*, vol. 95, part 5 (May 11, 1949), p. 6036, as cited in *Riddick's Senate Procedure*, p. 182.

⁶⁸ *Deschler's Precedents*, vol. 8, chapter 26, §29.6.

⁶⁹ *Deschler's Precedents*, vol. 8, chapter 26, §64.20.

⁷⁰ *Deschler's Precedents*, vol. 8, chapter 26, §64.6.

⁷¹ *Cannon's Precedents*, vol. 7, §1691.

under the rules. A number of precedents⁷² have identified certain principles by which a provision can be evaluated as to whether it is legislative, and therefore not allowed under the rules, or merely affects an agency's funding and is therefore a proper limitation. In total, these attempts can be distilled down to several broad concepts involving the scope of the provision, whether it waives current law and agency discretion, whether it imposes new duties upon a government official or agency, and whether the funding is provided based upon a contingency. In addition, whether or not the recipient of the funds can be considered "federal" and, in the House, if the subject matter of the limitation involves taxes or tariffs, are also factors that can have an impact on its admissibility.

Scope

A proper limitation under the rules must only apply to the funds contained in the pending measure and only operate for the duration of the period for which the appropriation is available for obligation. If the scope of a limitation provision extends outside of the bill, it is categorically legislative in nature because it would have the effect of changing existing law.⁷³

Limitations cannot apply to other appropriations measures. During consideration of a FY1972 supplemental appropriations bill in the House, the amendment below was the subject of a point of order.

Provided, That none of the funds available for administrative or nonadministrative expenses of the Federal Home Loan Bank Board shall be used to finance the relocation of all or any part of the Federal Home Loan Bank from Greensboro, North Carolina, nor for the supervision, direction or operation of any district bank for the fourth district other than at such location.

The point of order against this amendment was ultimately sustained because it sought to restrict funds contained in any appropriations bill that provided funds for the Federal Home Loan Bank Board, not only the pending measure.⁷⁴

Limitations in appropriations bills also may not extend outside the scope of the bill to limit an authorization act or non-appropriated funding. When the FY1971 Foreign Assistance Appropriations Act was considered in the House, the amendment below was objected to as being legislative in nature.

No economic assistance shall be furnished under the Foreign Assistance Act of 1961, as amended, to any country which sells, furnishes, or permits any ships under its economic assistance to Cuba, so long as it is governed by the Castro regime, or to North Vietnam.

The chair sustained the point of order because this provision could have been construed as a limitation on the Foreign Assistance Act and not merely the funds provided in the foreign assistance appropriations bill.⁷⁵

⁷² Most notably, see House debate, *Congressional Record*, vol. 64, part 2 (January 8, 1923), pp. 1422-23, as cited in *Deschler's Precedents*, vol. 8, chapter 26, §64.

⁷³ In addition, a limitation on the federal funds for a project, activity, or agency that would eventually be comingled with nonfederal funds is in order, even if the federal and nonfederal funds would have to be accounted for separately to carry out the limitation (*House Manual*, §1053).

⁷⁴ *Deschler's Precedents*, vol. 8, chapter 26, §64.3.

⁷⁵ *Deschler's Precedents*, vol. 8, chapter 26, §64.4.

A limitation is also not allowed if it applies either to funds already appropriated or to funds in future fiscal years. The example below was a House amendment to the FY1920 Army appropriations bill.⁷⁶

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

This amendment was determined by the chair to be legislative because it retroactively applied to funds from previous fiscal years. A similar violation of the scope principle occurred during the House consideration of the FY1937 Interior appropriations bill with the amendment below.

That hereafter, no part of any appropriation for these Indian schools shall be available for the salary of any person teaching or advocating the legislative program of the American Liberty League.

The point of order on this amendment was sustained by the chair for two reasons. First, the word “hereafter” would make the provision permanent legislation because it would have applied to funds after the current fiscal year. Second, the amendment’s scope included “any appropriation,” not simply the funds contained in the bill itself.⁷⁷

Current Law

Limitations cannot waive actions that are mandated by law, and provisions structured like limitations containing funding prohibitions notwithstanding existing law are often suspect. The amendment below, which was offered during House consideration of the FY1938 District of Columbia Appropriations Act, is an example of such a provision.

Provided, that this appropriation shall not be available for the payment of advertising in newspapers published outside of the District of Columbia, notwithstanding the requirement for such advertising provided by existing law.

This amendment was determined to be out of order by the chair, because the effect of the provision would have been provide a waiver for an activity required by existing law.⁷⁸

Agency Discretion

Although a limitation can impose a restriction on funds for part of the purpose for which they have been authorized, it cannot change the degree of authority or discretion that an agency possesses under current law. According to *House Practice*, “(A) point of order lies against language enlarging or granting new discretionary authority, as well as language curtailing executive discretion.”⁷⁹ This concept is additionally explained in the passage below from *Deschler’s Precedents*:

If the authorizing law permits the official to pursue courses A, B, C, and D, and the appropriations measure provides funds permitting the official to pursue A, B, and C, the measure is a proper limitation.... But if the appropriation has the effect of permitting or

⁷⁶ *Hinds’ Precedents*, vol. 1, §1495.

⁷⁷ *Deschler’s Precedents*, vol. 8, chapter 26, §64.21.

⁷⁸ *Deschler’s Precedents*, vol. 8, chapter 26, §42.6.

⁷⁹ *House Practice*, chapter 4, §53.

requiring the official to pursue courses A, B, and E, then the measure has changed existing law...⁸⁰

Expanding Discretion⁸¹

Limitations cannot expand the discretion previously provided in law to an official or agency to include actions not currently authorized, even if those actions are not explicitly prohibited by existing law. For example, the amendment below was offered during House consideration of the FY1950 Military Establishment Appropriations Act.

No part of the appropriations made in this act shall be available...and no moneys herein appropriated for the Naval Establishment or made available therefore shall be used or expended under contracts hereafter made for the repair, purchase, or acquirement, by or from any private contractor, of any naval vessel, machinery, article, or articles that at the time of the proposed repair, purchase, or acquirement can be repaired, manufactured, or produced in each or any of the Government naval shipyards or arsenals of the United States, when time and facilities permit and when in the judgment of the Secretary, such repair, purchase, acquirement, or production would not involve an appreciable increase in cost to the Government, except when the repair, purchase, or acquirement, by or from any private contractor, would, in the opinion of the Secretary, be advantageous to the national defense.

The point of order against this amendment was sustained because it would have provided the Secretary with authority not granted in current law to determine if repair, purchase, or production with a private contractor would be advantageous to national defense.⁸²

Duties and Determinations

Generally, while a proper limitation may impose some incidental duties on the government agency in the implementation of the restriction, a proper limitation cannot require a determination be made, or action taken, that is not required of the agency in existing law. This distinction is explained further in the passage below from *Deschler's Precedents*.

Of course, the application of any limitation on an appropriation bill places some minimal extra duties on federal officials, who, if nothing else, must determine whether a particular use of funds falls within that prohibited by the limitation. But when an amendment, while curtailing certain uses of funds carried in the bill, explicitly places new duties on officers of the government or implicitly requires them to make investigations, compile evidence, or make judgments and determinations not otherwise required of them by law, then it assumes the character of legislation and is subject to a point of order ruling.⁸³

Incidental Duties and Determinations Found in Existing Law

Minor duties required of the official or agency to carry out the limitation are permissible, as long as they do not rise to the level of new duties outlined in the paragraph above. The below House

⁸⁰ *Deschler's Precedents*, vol. 8, chapter 26, §51, p. 843.

⁸¹ In some instances, the presiding officer has ruled that provisions narrowing executive branch discretion are legislative and are therefore out of order on appropriations legislation. See *Deschler's Precedents*, vol. 8, chapter 26, § 22.4, 50.8, 51.2, and 51.11.

⁸² *Deschler's Precedents*, vol. 8, chapter 26, §22.4.

⁸³ *Deschler's Precedents*, vol. 8, chapter 26, §52, p. 879.

amendment to the FY1960 Defense appropriations bill is an example of a proper limitation in this respect.

None of the funds contained in this Title may be used to enter into a contract with any person, organization, company or concern which provides compensation to a retired or inactive military or naval general officer who has been an active member of the military forces of the United States within 5 years of the date of enactment of this act.

The point of order on this amendment was overruled because the duties that it sought to impose upon the executive branch in determining which of its contractors provide compensation to certain retired or inactive members of the military were determined by the chair to be incidental.⁸⁴

In addition to imposing incidental duties, the implementation of a limitation can be dependent upon the performance of substantive duties that are already required by existing law. The below House amendment to a FY1980 supplemental appropriations bill provides two examples of this type of limitation.

Provided further, That none of the funds appropriated in this paragraph and made available on October 1, 1980 shall be used to pay trade readjustment benefits under part I of subchapter B of chapter 2 of Title I of the Trade Act of 1974 for any week to any individual who is entitled to unemployment insurance benefits for such week;

Provided further, That none of the funds appropriated in this paragraph and made available on October 1, 1980 shall be used to pay trade readjustment benefits under part I of subchapter B of chapter 2 of title II of the Trade Act of 1974 to any individual in an amount for any week in excess of the weekly unemployment insurance benefits which he received or which he would have received if he applied for such insurance...

The point of order was overruled because the determinations that would need to be made by the agency to comply with this provision would be the same as those required by existing law.⁸⁵

New Duties and Determinations

Limitation provisions that require new determinations to be made by an agency or official not required by existing law are not proper limitations. An example of such a provision is the below House amendment to the FY1974 Departments of Labor and Health, Education, and Welfare Appropriations Act.

Provided further, That none of the funds contained herein shall be available to make any payment to a local educational agency under the Act of September 30, 1950, which is attributable to children described in section 3(b) of the title 1 whose parents are employed on Federal property outside the school district of such agency.

The chair sustained the point of order because it would have required a distinction be made between children whose parents work within certain school districts and children whose parents work outside such school districts. This would have required a new determination not required by current law to be made by the agency as to who comprised this new class of eligible program recipients.⁸⁶

⁸⁴ *Deschler's Precedents*, vol. 8, chapter 26, §71.2.

⁸⁵ *Deschler's Precedents*, vol. 8, chapter 26, §52.36.

⁸⁶ *Deschler's Precedents*, vol. 8, chapter 26, §52.18.

Limitation provisions that require the agency to perform new duties not required by existing law are also not allowed. The House amendment below to the FY1982 Labor and Health and Human Services appropriations bill is an example of this.

That none of the funds appropriated under this paragraph shall be used to fund any grant to any business, union, trade association, or other grantee which is not properly reviewed under the peer review procedures used in fiscal year 1980. Furthermore, none of the funds appropriated under this paragraph shall be used to provide grants to any business, union, trade association or other grantee that does not have an established and effective program for educating employers or employees about occupational hazards and disease.

The point of order against this amendment was sustained because it would have required the agency to establish a new procedure for determining what programs are “established and effective.”⁸⁷

Contingencies

Limitations subject to contingencies not existing in current law are generally not in order. In the Senate, Rule XVI, paragraphs 2 and 4, stipulate that limitations subject to contingencies not found in existing law are not in order in either committee or floor amendments to an appropriations bill. In the House, while no rule explicitly prohibits limitations based on contingencies,⁸⁸ a precedent from 1904 stipulates that “the language of limitation prescribing the conditions under which the appropriation may be used may not be such as, when fairly construed, would change existing law.”⁸⁹ A later precedent gives additional guidance that, “whenever a limitation is accompanied by the words ‘unless,’ ‘except,’ ‘until,’ ‘if,’ ‘however,’ there is grounds to view the so-called limitation with suspicion, and in case of doubt as to its ultimate effect, the doubt should be resolved on the conservative side.”⁹⁰

A significant reason why limitations subject to contingencies not existing in current law are typically not allowed is that they tend to have the effect of either altering agency discretion or imposing new duties that must be performed to receive the funds. In addition, limitations based on contingencies that require the recipient to act in violation of existing law to receive funds are essentially legislative.

Contingencies That Alter Agency Discretion

A limitation cannot require as a condition of receiving funds that an official or agency exercise new discretion not granted in existing law. An example of this is the below House amendment to a FY1909 Post Office appropriations bill.

Provided, that no part of this appropriation of \$90,000 shall be expended for straps unless letter carriers are permitted to use other straps than those supplied by the Government if they prefer them, and buy and pay for them out of their own money and at no expense to the government.

⁸⁷ *Deschler's Precedents*, vol. 8, chapter 26, §52.32.

⁸⁸ In part, Rule XXI, clause 2(c) states, “An amendment to a general appropriations bill shall not be in order if changing existing law, including an amendment making the availability of funds contingent on the receipt or possession of information not required by law for the period of the appropriation.” This prohibits limitations that would provide funding contingent upon future knowledge not required in existing law.

⁸⁹ *Hinds' Precedents*, vol. 4, §3976.

⁹⁰ House debate, *Congressional Record*, vol. 64, part 2 (January 8, 1923), p. 1423, as cited in *Deschler's Precedents*, vol. 8, chapter 26, §64.

The chair sustained the point of order because it would have effectively provided the postmaster general with the ability to allow letter carriers to choose their straps, which was not discretion granted to the postmaster by existing law.⁹¹

Limitations also cannot make the performance of an action not currently required by law a condition on the use of funds. The below House amendment to the FY1920 Army appropriations bill is an example of such a provision.

Provided, That no part of any appropriation herein shall be used unless all former civilian flying instructors who were dismissed on or about December 31, 1918 shall be reinstated on application to their former positions as from the date of such dismissal up to and including June 30, 1919.

The point of order on this amendment was sustained by the chair because it would have infringed on agency discretion provided in law regarding the hiring of flight instructors.⁹²

Contingencies Requiring New Duties and Determinations

A limitation that makes funds contingent upon an official or agency making a new determination not required by current law is not allowable. An example of this is the below House amendment to the FY1938 Agriculture Appropriations Act.

Provided further, That no part of the money herein appropriated shall be paid to any State unless and until, to the satisfaction of the Secretary of Agriculture, such State shall have provided by law or regulation modern means and devices to safeguard against accidents and the loss of life on highway projects within such state.

The chair sustained the point of order against this amendment because it would have conditioned the funds in the bill upon a determination of the Secretary as to what would be “modern means and devices,” which was a determination not required in existing law.⁹³

A limitation also cannot subject funds to a contingency that would require an official or agency to perform new duties not mandated in current law. The below House amendment to a FY1959 supplemental appropriations act is an example of this type of provision.

That no part of any appropriation made in this Act shall be used for land acquisition for any access road to the public airport in the vicinity of the District of Columbia authorized by the Act of September 7, 1950, until after the Administrator of the Federal Aviation Agency shall have consulted with the Board of Supervisors of Fairfax County, Virginia, on the location of such road and shall have had public hearings at a convenient location, or have afforded the opportunity for such hearings, for the purpose of enabling persons through or contiguous to whose property will pass, to express any objections they may have to the proposed location of such road.

The point of order against this amendment was sustained by the chair because it would have required the agency administrator to consult with the board of supervisors or hold hearings to receive funds, which was an action not mandated by existing law.⁹⁴

Another example of an improper limitation based upon the performance of new duties is the House amendment below to the FY1942 Interior appropriations bill.

⁹¹ *Cannon's Precedents*, vol. 7, §1629.

⁹² *Cannon's Precedents*, vol. 7, §1683.

⁹³ *Deschler's Precedents*, vol. 8, chapter 26, §50.2.

⁹⁴ *Deschler's Precedents*, vol. 8, chapter 26, §50.6.

Provided, That no part of the appropriation herein made shall be available until the agency charged with the administration of the funds shall be satisfied, and shall so certify to the Secretary of the Treasury that no person employed upon the work provided has been required as a condition precedent to employment to join or not to join or to pay any sum to any organization.

The point of order was sustained by the chair because it would have effectively created a new requirement not in existing law that the agency certify conditions related to employment to receive funds.⁹⁵

Contingencies Requiring Action in Violation of Existing Law

Finally, a limitation based on a contingency cannot mandate action in violation of existing law as a condition of receiving funds. An example of such a limitation is the below House amendment to the FY1968 Labor and Health, Education, and Welfare Appropriations Act.

Provided, That no part of this appropriation shall be made available to any local educational agency in any State from funds appropriated to carry out such title II for the fiscal year 1969 until there has been made available from this appropriation to each local educational agency in the State in whose schools the number of children counted under section 103(a)2 of such title II exceeds 25 per centum of the total enrollment in such schools an amount at least equal to it for the fiscal year 1968 from funds appropriated to carry out such title...

The point of order against this amendment was sustained by the chair because it would have required the utilization of an apportionment formula as a condition of receiving funds that was contrary to the formula mandated by existing law.⁹⁶

Federal Versus Nonfederal Recipients

Although the precedents cited above consistently indicate that a proper limitation cannot impose new duties upon federal officials, they are less clear with respect to nonfederal officials.⁹⁷ In many precedents regarding limitations that involve a mixture of state and federal officials, the focus of the parliamentary ruling is only on whether a new duty contained within the limitation is imposed on any federal officials. The House amendment below to the FY1950 Interior appropriations bill is an example of this ambiguity.

None of the funds herein appropriated may be used for the purchase of material for the beginning of any new construction of electrical generating equipment, transmission lines, or related facilities in any State unless approved by the governor, by the board, or commission of the respective States having jurisdiction over such matters.⁹⁸

The point of order against this amendment was sustained because it would have interfered with the discretion of the federal officials involved in the decision-making process with regard to projects that are part of a federal program. No mention in the ruling was made, however, of the effect of this limitation on state officials.

A further example of a limitation involving both federal and nonfederal officials is also illustrative of the type of ruling that often occurs in these instances. During House consideration

⁹⁵ *Deschler's Precedents*, vol. 8, chapter 26, §52.2.

⁹⁶ *Deschler's Precedents*, vol. 8, chapter 26, §36.3.

⁹⁷ See *Deschler's Precedents*, vol. 8, chapter 26, §53, pp. 934-936 for a discussion of this ambiguity.

⁹⁸ *Deschler's Precedents*, vol. 8, chapter 26, §53.3.

of the FY1978 Labor, and Health, Education, and Welfare appropriations bill, the below amendment was offered.

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.

The chair sustained the point of order against this amendment because some of the physicians affected by this provision would have been federal officials. There was no discussion in the ruling as to whether the imposition of the new duty to certify abortions on nonfederal physicians only would have been allowed.⁹⁹

House Practice provides some guidance when it states that, “Under the modern practice, it is not in order to make the availability of funds in a general appropriation bill contingent upon a substantive determinations by a state or local government official or agency that is not otherwise required by existing law.”¹⁰⁰ Moreover, it is in order to deny funds to a nonfederal recipient that is not in compliance with federal law; even when this denial is based upon a contingency, it does not categorically cause such a provision to be considered legislative.¹⁰¹

An additional issue that has been addressed in some rulings involving new duties and federal versus nonfederal recipients is whether the amendment violates current law with respect to the division between local, state, and federal officials or agencies in the administration of federal funds.¹⁰² The ruling of the chair on the below House amendment to the FY1972 Agriculture and Environmental and Consumer Protection Appropriations Act is illustrative of this type of rationale.

No part of the funds appropriated by this act shall be used for engineering or construction of any stream channelization measure under any program administered by the Secretary of Agriculture unless (1) such channelization is in a project a part of which was in the project construction stage before July 1, 1971; or (2) the Governor of the State in which the channelization is to be located certifies to the Secretary of Agriculture, after consideration of the environmental effects of such channelization, that such channelization is in the public interest.

The point of order against this amendment was sustained because the chair determined that it would confer new authority on a state official and would therefore be legislative.¹⁰³

Taxes and Tariffs

House rules regarding legislation containing a tax or tariff measure also affect the substance of limitations that are allowed. Added in the 98th Congress, clause 5(a) of House Rule XXI stipulates that legislation containing a tax or tariff measure that has not been reported by a committee with jurisdiction over such matters, or an amendment that contains a tax or tariff measure offered thereto, is subject to a point of order. An early ruling on the subject concerned a limitation contained within the text of the Treasury, Postal Service, and General Government Appropriations Act reported out of committee.

⁹⁹ *Deschler's Precedents*, vol. 8, chapter 26, §53.5.

¹⁰⁰ *House Practice*, chapter 4, §54, p. 129.

¹⁰¹ *Deschler's Precedents*, vol. 8, chapter 26, §53, p. 950, as cited in *House Practice*, chapter 4, §54, p. 129.

¹⁰² See *Deschler's Precedents*, vol. 8, chapter 26, §53, p. 935-936.

¹⁰³ *Deschler's Precedents*, vol. 8, chapter 26, §53.6.

None of the funds appropriated in this Act may be used by the United States Customs Service in the enforcement of any provision of law to the extent that such a provision would permit agricultural products to enter the United States from Caribbean basin countries (as defined in the Caribbean Basin Economic Recovery Act) duty free.¹⁰⁴

In this case, the chair upheld the point of order because the effect of this provision would be to cause additional duties on imports that were not required by existing law. A later ruling clarified that

a limitation otherwise in order under paragraph 2(c) of Rule XXI can still be construed as a “tax or tariff measure” where it can be conclusively shown that the imposition of the restriction on IRS funding for the fiscal year will effectively and inevitably either preclude the IRS from collecting revenues otherwise due and owing under provisions of the Internal Revenue Code or require collection of revenue not legally due and owing.¹⁰⁵

The addition of subsection (b) to clause 5 of Rule XXI at the beginning of the 108th Congress explicitly included limitation amendments on general appropriations bills that affect the administration of a tax or tariff under the purview of this clause.¹⁰⁶ That same year, a point of order under this new rule was made against an amendment to the FY2004 Transportation and Treasury Appropriations Act.

None of the funds appropriated by this act may be used to assess or collect any tax liability attributable to the inclusion in gross income of amounts paid (from funds referred to in subsection (b)) to any person as assistance on account of any property or business damaged by, and for economic revitalization directly related to, the terrorist attacks on the United States that occurred on September 11, 2001.¹⁰⁷

In interpreting the new rule, the chair determined that this amendment would impose a limitation on funds that would prevent the collection of revenue otherwise legally due and therefore upheld the point of order.

Burden of Proof

When a point of order is raised against a limitation provision contained within an appropriations bill or amendment, the burden of proof is on its proponent to demonstrate that it is a valid limitation that does not effectively change agency discretion or impose new duties in order for it to be allowed.¹⁰⁸ In some circumstances, if a provision or amendment containing a limitation is determined by the presiding officer to be legislative, it can potentially be revised to comply with chamber rules, unless prevented by a special rule or unanimous consent agreement.

¹⁰⁴ House debate, *Congressional Record*, vol. 129, part 16 (October 27, 1983), pp. H29610-H29612, as cited in *House Manual*, §1066.

¹⁰⁵ House debate, *Congressional Record*, vol. 132, part 13 (August 1, 1986), pp. H18650-H19651, as cited in *House Manual*, §1066.

¹⁰⁶ House Rule XXI, clause 2(b), in *House Manual*, §1066.

¹⁰⁷ House debate, *Congressional Record*, vol. 149, part 16 (September 9, 2003), pp. H21531-H21533, as cited in *House Manual*, §1066.

¹⁰⁸ The burden of proof for points of order stemming from House Rule XXI, clause 5(a) is somewhat lower than for other points of order against legislative provisions. In this case, the maker of the point of order must only demonstrate a “textual relationship between the amendment and the administration of the Internal Revenue or tariff laws” (House debate, *Congressional Record*, vol. 149, part 1 [January 7, 2003], p. H11). For a further explanation, see *House Manual*, §1066.

House

In the House, in the event of an objection, the proponent of a limitation amendment is responsible for demonstrating that it is not legislative in nature.¹⁰⁹ For example, the House amendment below to the FY1981 Defense Appropriations Act was objected to during consideration on the grounds that it imposed new duties on the Secretary of Defense.

Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations other than contracts made by the Defense Logistics Agency and such other contracts of the Department of Defense as may be determined by the Secretary of Defense pursuant to existing laws and regulations as not to be inappropriate therefore by reason of national security considerations.

The proponent of the amendment argued that this new provision would not require any new duties of the Secretary but was unable to cite any existing laws or regulations that required the Secretary to make such substantive determinations related to national security and the payment of price differentials. In the absence of the amendment's proponent being able to cite provisions of existing law that required the Secretary to make such determinations, the chair sustained the point of order.¹¹⁰

Likewise, if a limitation provision is challenged as being legislative in nature, evidence that the provision requires determinations already mandated by existing law can be a compelling reason for a point of order to be overruled. In the example below, a provision contained in the FY1977 Labor and Health, Education, and Welfare Appropriations Act reported from the committee, an objection was raised based upon the assertion that it creates a new duty for school administrators.

None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with title VI of the Civil Rights Act of 1964.

In defending this provision, the appropriations committee chair argued that the requirement that the student be bussed only to the school closest to the student's home placed no new duties on the school administrator because the Equal Educational Opportunity Act of 1974 (P.L. 93-380) already required that the school administrator make such a determination regarding the existence and location of comparable schools closest to student's homes. The committee chair also provided evidence that the Equal Educational Opportunity Act required that the school administrator make determinations regarding the appropriate grade level and type of education for each student. The presiding officer subsequently overruled the point of order.¹¹¹

In the face of a point of order, the proponent of a limitation may also be called upon to provide evidence that the provision does not interfere with discretion guaranteed under existing law to the official or agency. The below House amendment to the FY1921 Agriculture appropriations bill was challenged on the grounds that it would impermissibly narrow the discretion of the Secretary of Agriculture.

¹⁰⁹ Similarly, the appropriations committee bears the burden of proving that a provision, if challenged on the floor, is not legislative. See *Deschler's Precedents*, vol. 8, chapter 26, §25.27.

¹¹⁰ *Deschler's Precedents*, vol. 8, chapter 26, §22.25.

¹¹¹ *Deschler's Precedents*, vol. 8, chapter 26, §65.26.

Provided further, That no part of any appropriation in this act for the Forest Service shall be expended on any national forest in which the fees charged for grazing shall be at a rate less than 300 per cent of the existing rate.¹¹²

In this case, the point of order against the provision was sustained based on evidence provided by a member who objected that the Supreme Court had held that the Secretary of the Agriculture has discretion to make rules and regulations for the preservation of the forests and to set the amount of user fees to be assessed.

If the chair sustains a point of order against an amendment as being legislative in nature, a member may be able to offer a new (redrafted) amendment that is compliant with House rules, if not prevented by a special rule or unanimous consent agreement. An additional option, in some circumstances, is that the amendment's sponsor asks unanimous consent to modify such amendment during debate.¹¹³ Although obtaining unanimous consent for such a request may be difficult, if granted, it could allow the proponent an opportunity to revise the amendment so that it would conform to House rules.

Senate

In the Senate, paragraph 6 of Rule XVI mandates that points of order against restrictions on the expenditure of funds be “construed strictly and, in the case of doubt, in favor of the point of order.”¹¹⁴ This creates a procedural context similar to that of the House, where the presiding officer is constrained to uphold a point of order against a limitation in the absence of evidence that demonstrates that it is proper and not legislative.¹¹⁵ If the amendment's sponsor wishes to modify his or her amendment, this must occur before action has occurred or the presiding officer has ruled.¹¹⁶ A member could also offer a new (redrafted) amendment that was compliant with Senate rules, as long as there was no unanimous consent agreement governing consideration of the pending measure that precluded such action.

Author Contact Information

James V. Saturno
Specialist on Congress and the Legislative Process
jsaturno@crs.loc.gov, 7-2381

¹¹² *Cannon's Precedents*, vol. 7, §1685.

¹¹³ *Deschler's Precedents*, vol. 9, chapter 27, §21.1-3.

¹¹⁴ Senate Rule XVI, paragraph 6.

¹¹⁵ See, for example, Senate debate, *Congressional Record*, vol. 116, part 15 (June 22, 1970), pp. 20813-20815, as cited in *Riddick's Senate Procedure*, p. 182.

¹¹⁶ Action includes a disposition on the amendment, an amendment to the amendment successfully being agreed to, the ordering of the yeas and nays on the amendment, and entering into a unanimous consent agreement for a vote on the amendment. See *Riddick's Senate Procedure*, pp. 65, 186.

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This report was originally authored by Jessica Tollestrup, former Analyst on Congress and the Legislative Process. The listed author has produced the most recent update of the report and is available to respond to inquiries on the subject.