Case Note

Low Riding

Jackson v. District of Columbia, 89 F. Supp. 2d 48 (D.D.C. 2000), *aff'd*, 2000 WL 1013583 (D.C. Cir. July 19, 2000) (order granting motion for summary affirmance).

Jackson and his co-plaintiffs were members of avowed religious faiths that forbade adult men to cut their hair or shave their beards.[1] They sought declaratory and injunctive relief to prevent the defendants—the District of Columbia, the Director of D.C. Corrections, and the Federal Bureau of Prisons—from subjecting them (or anyone else) to a grooming policy.[2] The plaintiffs asserted that the grooming policy, which prohibited beards and dreadlocks and required inmates to keep their head hair shorter than one inch in length,[3] violated their rights under the Religious Freedom Restoration Act[4] and the Free Exercise Clause of the First Amendment.[5]

Defendants filed a motion to dismiss,[6] arguing in part that the plaintiffs had failed to exhaust administrative remedies before filing suit in federal court, as required by the Prison Litigation Reform Act (PLRA).[7] The plaintiffs responded, in part, that because pursuit of administrative remedies would have been futile, they need not have exhausted such remedies before the commencement of federal litigation.[8] The court agreed that exhaustion of remedies "would be futile, in the sense that plaintiffs would not have

1. Jackson v. District of Columbia, 89 F. Supp. 2d 48, 65 (D.D.C. 2000).
2. *Id.* at 50.
3. *Id.*
4. 42 U.S.C. § 2000bb (1994). The *Jackson* court assumed that the Religious Freedom Restoration Act still applies to the federal government notwithstanding the holding of *Boerne v. City of Flores*, 521 U.S. 507 (1997). *Jackson*, 89 F. Supp. 2d at 50 n.70.
5. U.S. CONST. amend. I.
6. *Jackson*, 89 F. Supp. 2d at 50.
7. Pub. L. No. 104-134, tit. VIII, 110 Stat. 1231-66 (1996).
8. *Jackson*, 89 F. Supp. 2d at 61 ("[P]laintiffs have argued that the court should find their exhaustion obviated by its futility in this case.").

secured a religious exemption to the grooming policy even if they had strictly complied with Virginia Corrections' inmate-grievance protocol."[9]

Still, the D.C. district court granted the defendants' motion, ruling in part that there was no futility exception in the PLRA.[10] The court concentrated on the legislative history of the PLRA, which was adopted by Congress in 1996,[11] and concluded that Congress intended no futility exception.[12] In *Jackson* and similar cases, government defendants have argued that "the legislative evolution [of the PLRA] irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process."[13]

This Case Note argues that courts cannot make sense of Congress's intent when substantive legislation is adopted by appropriations rider. The legislative history of the PLRA, a prime example of a piece of substantive legislation passed as a rider, is too clouded for a court to determine easily what Congress intended concerning exhaustion and futility. Moreover, the bill to which the PLRA was attached was the final compromise in an unprecedented budget battle, a battle in which, for the first time in recent American history, partisan rancor led the federal government to shut its doors. The Republican Party, widely viewed as the obstinate participant in that budget dispute, faced strong political pressure to pass the bill at all costs, even if specific provisions did not reflect congressional intent. Based on the lack of clear legislative intent and the context of government shutdowns, the Supreme Court should declare a new principle of statutory interpretation based on the central lesson of *Jackson*: that, in the nascent era of government shutdowns, appropriations riders should be narrowly construed in order to avoid misinterpreting congressional intent.[14]

I

A number of circuit courts across the country have wrestled with the issue of exhaustion under the PLRA and have reached varying

9. *Id.* at 61.

10. *Id.*

11. *Id.* (identifying "legislative intent as the lynchpin to all exhaustion determinations").

12. *Id.* ("[T]o apply [a futility] exception[] . . . would . . . flout Congress' intent.").

13. Petition for a Writ of Certiorari at 7, Garcia v. Jones, 208 F.3d 221 (9th Cir.), *cert. denied*, 121 S. Ct. 440 (2000) (No. 99-1730). In *Jackson*, the court found that "[t]he legislative history of the PLRA supports the court's reading of Section 1997e(a)." *Jackson*, 89 F. Supp. 2d at 62.

14. This Case Note does not take a position on the underlying merits of prisoner litigation and the PLRA. Arguably, the federal docket is clogged with such litigation and the PLRA was a much-needed reform. It is possible to argue that the manner in which the PLRA was adopted was suspect without questioning the constitutionality of, or necessity for, a free-standing PLRA (adopted as a bill independent of the appropriations process).

conclusions.[15] To answer the question of whether Congress intended a futility exception when it adopted the PLRA, the *Jackson* court looked at two pieces of evidence. First, the court noted that the words "plain, speedy, and effective" were deleted by the PLRA.[16] Second, the court quoted at length the statement of a single legislator, Representative Lobiondo,[17] to

15. *See, e.g.*, Booth v. Churner, 206 F.3d 289 (3d Cir.) (exhaustion required), *cert. granted*, 121 S. Ct. 377 (2000); Nyhuis v. Reno, 204 F.3d 65, 65 (3d Cir. 2000) (holding that the futility exception did not survive the passage of the PLRA); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 538 (7th Cir. 1999) (exhaustion required); Werdell v. Asher, 162 F.3d 887, 891 (5th Cir. 1998) (exhaustion required); Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) (exhaustion required); Whitley v. Hunt, 158 F.3d 882, 885-87 (5th Cir. 1998) (exhaustion required); Jenkins v. Morton, 148 F.3d 257, 259 (3d Cir. 1998) (exhaustion not required); Garret v. Hawk, 127 F.3d 1263, 1266 (10th Cir. 1997) (exhaustion required).

The dispute in *Jackson* and these cases originated, of course, in Congress's adoption of the PLRA in 1996. The PLRA was approved by the House as part of H.R. 3019 on March 11, 1996, and signed into law by the President on April 26, 1996. It first began to take shape more than a year before that, as part of H.R. 3, introduced by Representative McCollum on January 4, 1995. The PLRA was later incorporated into H.R. 554 (introduced on January 18, 1995), H.R. 667 (introduced on January 25, 1995, and adopted by the House on February 10, 1995), H.R. 695 (introduced on January 26, 1995), H.R. 2076, S. 400 (introduced on February 14, 1995), S. 1594 (introduced on March 6, 1994), S. 866 (introduced on May 25, 1995), S. 1275 (introduced on September 26, 1995; this version included most of the PLRA provisions but did not alter the preexisting exhaustion language), S. 1279 (introduced on September 27, 1995), and S. 1495 (introduced on December 21, 1995). While all of these bills included the same basic reforms, there was an important change (for the purposes of this case) between S. 866 and S. 1279. Prior to and including S. 866, the bills did not delete the language "plain, speedy, and effective" from § 1997e. Beginning with S. 1279, those qualifiers were deleted. S. 1275, which fell between S. 866 and S. 1279, did not address the exhaustion provision of § 1997e in any way.

As amended by section 803(d) of the PLRA, the *United States Code* reads in relevant part: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a) (West Supp. 2000).

Prior to the adoption of the PLRA, § 1997e read in relevant part:

> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective remedies as are available.
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> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e(a) (1994).

16. *Jackson*, 89 F. Supp. 2d at 62 ("[T]he court assumes this change to the statute's wording was made for a reason. Here, the reason is fairly clear: Congress did not want the federal courts to sit as a super-department of corrections and review the effectiveness of prison administrative remedies or the speed with which they lead to a final resolution." (footnote omitted)).

17. Representative Lobiondo stated: "The new administrative exhaustion language in H.R. 2076 will *require that all cases* brought by Federal inmates *contesting any aspect of their incarceration* be submitted to administrative remedy process *before proceeding to court*." *Jackson*, 89 F. Supp. 2d at 63 (emphasis in court's opinion) (quoting 141 CONG. REC. H14078-02, H14105 (daily ed. Dec. 6, 1995)).

support its argument that Congress intended exhaustion to be a mandatory requirement lacking a futility exception.[18]

The court read far too much into the deletion of the "plain, speedy, and effective" language and Representative Lobiondo's statement. That Lobiondo was unopposed on the floor of Congress might suggest that his statement captures Congress's intent.[19] The fact is, Congress did not get the chance to consider thoroughly the PLRA, Lobiondo's statement, or the deletion of the words "plain, speedy, and effective" because the bill was included as a rider on an appropriations bill (initially attached to H.R. 2076, then to H.R. 3019, both omnibus budget bills). Several legislators pointed this out during the floor debates on H.R. 2076, an appropriations bill to which Congress attached the PLRA (President Clinton vetoed H.R. 2076 on December 25, 1995).[20] Academic commentators have also noted the abbreviated nature of legislative debate on the PLRA.[21] In the context of the

18. Generally speaking, the views of the authors, sponsors, or supporters of a bill should not be used to determine congressional intent. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.12 (6th ed. 2000). Courts could appropriately make an exception to the general rule that the floor statements of a bill's authors or sponsors should not be viewed as conclusive of congressional intent if those views are clearly communicated to the legislative body. *See id.* § 48.12. Such an exception is not warranted in this case. Representative Lobiondo made his statement during a wide-ranging debate on a comprehensive budget bill. *See infra* notes 19-27 and accompanying text. Moreover, Lobiondo spoke with regard to H.R. 2076, which was vetoed, not H.R. 3019, which became law. The relevant text of the two bills was identical, but it is unlikely that when voting on H.R. 3019 in the spring of 1996, legislators recalled a single statement that Representative Lobiondo had made during the previous December with regard to a different bill.

19. Indeed, in other related cases the government has made such an argument. *See* Petition for a Writ of Certiorari at 7, Garcia v. Jones, 208 F.3d 221 (9th Cir.), *cert. denied*, 121 S. Ct. 440 (2000) (No. 99-1730) (arguing that Representative Lobiondo's statement indicates congressional intent because it was the "single" statement on the issue and because it was "unopposed").

20. *See, e.g.*, 141 CONG. REC. H14078-02, H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Conyers) ("This conference report improperly includes substantive legislative provisions regarding prison litigation reform. . . . None of these provisions belong in an appropriations bill. These are matters clearly within the jurisdiction of the Judiciary Committee and I am distressed that the Judiciary Committee's jurisdiction has been subverted in this way."). During the Senate debates on H.R. 3019, Senator Kennedy expressed the following view:

> [T]he effort to enact this proposal as part of omnibus appropriations bill [wa]s inappropriate. Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.

142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy).

21. *See, e.g.*, Eugene Kuzinski, Note, *The End of the Prison Law Firm?: Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 375 n.79 (1998) ("[T]he PLRA was not subject to very intense scrutiny or debate in Congress."). Professor Herman of the Brooklyn Law School argued:

> The legislative process leading to the passage of the PLRA was characterized by . . . [a] lack of any real debate. . . . Its provisions, which amend a number of different sections of the United States Code, bear many signs of . . . haste . . . . Even the title could have used editing: [E]ntitled The Prison Litigation Reform Act of 1995, it was actually passed in 1996.

rushed passage of one bill, and the lack of debate, the single statement of an individual legislator should not control the interpretation of the statute. In addition to not debating the PLRA in detail, legislators may not even have noticed its provisions, hidden as they were in a very large, omnibus bill. Congress debated a variety of issues in considering the appropriations bill to which the PLRA was attached, and legislators had much to address besides the PLRA's exhaustion language.[22]

II

The traditional rule of statutory interpretation would not call upon a court to view the PLRA differently because it was passed as an appropriations rider.[23] This rule may have been appropriate in the past, but two major changes in the nature of the legislative process now caution against retaining this approach. The first is the proliferation of substantive riders on appropriations bills.[24] In the past, legislators added riders to appropriations bills, but by and large these riders concentrated on the appropriations process itself or, at the very least, were "limitations riders,"[25] which affected substantive policy by setting a limit on how much could be spent. The PLRA, in contrast, was divorced from appropriations.[26] Nor is the PLRA alone in this respect: The last half-century has seen an explosion of substantive law passed through appropriations riders.[27]

The second important development that suggests the old rule of statutory interpretation may need modification is that America has entered an unprecedented era of government shutdowns. The political climate of 1996—when the PLRA was adopted—may explain why Congress failed to

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Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) (citations omitted).

22. *Cf.* Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 476 (1997) (discussing how, after substantive environmental law was changed by a rider to an appropriations bill, "many members were surprised to discover the actual impact of the rider").

23. *See, e.g.*, Bowles v. Sunshine Packing Corp., 5 F.R.D. 282, 286 (W.D. Pa. 1946) ("It has been well established that provisions of substantive law may be amended or suspended by riders in an Appropriation Act, and that the regularly constituted Federal Courts will interpret such riders.").

24. *See* Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress To Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 458-62 (1992) (describing the history and growth of the use of appropriations riders); Zellmer, *supra* note 22, at 457 ("The technique of appending substantive provisions to appropriations bills has become a favorite tool of the legislative trade in recent years.").

25. LeBoeuf, *supra* note 24, at 460 ("Throughout history Congress has used limitation riders to advance a bewildering array of policy objectives.").

26. *Id.* at 457.

27. Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 460-63; LeBoeuf, *supra* note 24, at 460 (noting that 341 riders were proposed between 1963 and 1977).

consider the bill thoroughly. Congress passed the PLRA as part of the omnibus budget bill that finally resolved the historic government-shutdown crisis of the winter of 1995-1996.[28] Congress faced strong political pressure to pass the budget package at all costs,[29] even if the riders attached to the bill did not clearly express or even reflect congressional intent.

When legislators vote on appropriations bills, particularly in the high-stakes government-shutdown political game, they no doubt do so for many reasons other than the intention to amend substantive law. All legislative votes potentially arise from compromise rather than reasoned consideration of a vote's policy merits. Yet in the case of riders, as *Jackson* shows, the odds are so high that votes do not indicate true legislative intent as to justify a new rule that substantive riders to appropriations bills should be narrowly construed so as to minimize their impact on preexisting law.[30]

III

While other commentators have called for modifications of existing judicial deference to appropriations riders,[31] this Case Note provides a more pressing argument for such modification. Amending environmental laws by rider poses policy problems,[32] but because of its First Amendment and civil rights implications, the enactment of the PLRA by rider is far more serious. In other PLRA cases, prisoners have made allegations that, if true, would raise serious civil rights concerns: for example, that they were kicked, spit on, beaten, and called various epithets.[33] The difference between making a

28. *See* Statement by President William J. Clinton on Signing H.R. 3019, 32 WEEKLY COMP. PRES. DOC. 726 (Apr. 26, 1996) ("Rather than move quickly to reach a compromise such as the one achieved with this legislation, the Congress shut the government down twice and then I had to sign a record thirteen continuing resolutions funding the government.").

29. As one pundit explained, "Newt and his allies made a number of miscalculations. . . . They misjudged the public's reaction to the shutdown: it redounded against the recalcitrant Republicans, not the reasonable sounding fellow in the White House." Richard Stengel, *What Clinton Is Doing Right*, TIME, Feb. 5, 1996, at 28. For an exceptional account of the high-stakes budget crisis of the winter of 1995-1996, consult DICK MORRIS, BEHIND THE OVAL OFFICE: WINNING THE PRESIDENCY IN THE NINETIES 158-89 (1997). As Morris explained, "The budget battle left the Republican party humiliated and drastically weakened." *Id.* at 188. While Congress has not forced a government shutdown since, the threat of another government shutdown is realistic, and that threat has effects that reverberate into the tail end of every appropriations process. Fearful of the political effects of another shutdown, legislators may vote for omnibus bills without giving any consideration to the inclusion of substantive riders.

30. LeBoeuf, *supra* note 24, at 474 ("[S]ubstantive policy changes contained in appropriations riders are objectionable because they often don't receive adequate consideration. . . . Riders are usually introduced during floor debate on the bill in question, and voted on at a time when few if any [legislators] have given them the attention appropriate to questions of policy.").

31. *E.g.*, Zellmer, *supra* note 22. Because environmental problems are so complex, considering them in committee may be especially important (perhaps more important than a cut-and-dried civil rights issue). *Id.* at 505.

32. For a discussion of these problems, see *id.*

33. *See, e.g.*, Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999).

mistake interpreting an environmental statute and making a mistake interpreting a statute with religious or civil rights implications has to do with the respective effects on the political power of the party disadvantaged by a court's holding. If a court wrongly interprets legislative intent with respect to an environmental matter for, say, the benefit of the polluter, that does not affect the political clout of conservationists, who can return to the legislature and demand clarification of legislative intent.[34] In contrast, an adverse judgment against a civil rights plaintiff might have lasting psychological and political consequences. If a court errs on the side of undermining a civil right, then the aggrieved party's ability to use civic action to seek legislative clarification may be undermined.

The Supreme Court should reject the traditional rule implicitly followed by the *Jackson* court. Instead, courts should narrowly construe the changes in prior law wrought by the PLRA, and, because the statute is not entirely unambiguous on its face, hold that the futility exception survived its passage. For caution's sake, a wise beginning would limit this new approach to cases in which federal civil rights laws are affected. Ideally, such a modification would begin to curb the excessive use of riders by Congress, and foster a more deliberative and considered democracy.[35]

Nevertheless, there are no obvious legal principles or constitutional or statutory provisions[36] on which a court could base such a change in approach to substantive legislation enacted by appropriations rider. While the PLRA's substantive appropriations riders violated the House and Senate rules in effect at the time the PLRA was enacted,[37] violations of such rules are not legally actionable.[38] It is within the power of the judiciary, however, to set its own rules of statutory interpretation. Refusing to interpret riders expansively does not make a substantive statement about any particular law. Indeed, it would violate the principle of separation of powers if Congress were to claim the right to prohibit courts from determining how to interpret legislation.[39]

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34. Indeed, an adverse finding might increase the clout of conservationists by giving them a rallying cry to raise more money from donors.

35. Professor Michael Rappaport has argued that the "modern tactic of legislating by massive Continuing Resolutions . . . makes a travesty of the ideal of a deliberative Congress." Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 743 n.21 (1993).

36. *See* LeBoeuf, *supra* note 24, at 462 ("[T]here is no . . . specific constitutional stricture regarding limitation riders on [appropriations] bills.").

37. *See* Zellmer, *supra* note 22, at 506.

38. *See id.* at 516 ("[T]here is no independent mechanism to enforce the rules of Congress; members are left to comply voluntarily.").

39. One might also fear that the courts' narrow construction of riders would violate separation-of-powers principles. But courts would not be mandating particular behavior by Congress. Rather, courts would be articulating a rule to guide their own interpretation of statutes. At most, courts would be establishing a background rule under which Congress would operate; background rules have a long history in statutory interpretation. Congress can deal with issues it really wants to by regular law, even if riders are disfavored. Moreover, appropriations riders pose

Are there dangers in asking courts to interpret narrowly substantive legislation passed by rider? One problem is that, while most rider-enacted legislation has come into effect rather recently, some substantive riders were enacted more than a few years ago. Private parties may have contracted based on existing court interpretations of such legislation, and the rule called for in this Case Note could create instability and economic damage by upsetting existing relations. All that would be needed to remedy such problems would be for Congress to reenact such legislation in a free-standing fashion.[40] Moreover, not all riders would be interpreted differently, since the proposed reform requires litigation in federal court.[41] Finally, these transition costs are short-term costs, and over the long run, the gains in judicial efficiency (as courts more consistently adjudicate statutes that are far clearer than those enacted by rider) will make up for the costs associated with reinterpreting a number of laws in a short time.

While the PLRA may have been a necessary and appropriate legislative enactment, the manner in which it was enacted leaves unresolved questions about whether it accurately reflects congressional intent. Because the elimination of the futility exception potentially implicates substantive civil rights laws, courts should narrowly construe the PLRA's modification of existing law. Broad construction of such riders may have been appropriate before the threat of government shutdowns raised the political stakes of the appropriations process. In the modern political landscape, that is no longer the case. It is not too much to ask the national legislature to follow its own rules and enact substantive law only through full and formal legislative processes.

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their own separation-of-powers problems, *see* LeBoeuf, *supra* note 24 (arguing that some appropriations riders undermine the executive and foreign-relations prerogatives of the President), the reduction of which could outweigh any damage brought about by reform.

40. Of course, the balance of power in today's Congress may differ from that in a Congress that enacted a particular piece of legislation. Thus, it might be difficult to replicate perfectly a statutory regime enacted in the past.

41. If legislation adopted by rider makes all affected parties perfectly happy, no one will challenge it and therefore no court will strike it down. Only where the rights of a party are significantly affected can one expect litigation.