

## ARTICLES

### Funding Restrictions and Separation of Powers

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*Congress's "power of the purse"—its authority to deny access to public funds—is one of its most essential constitutional authorities. A crucial check on executive overreaching, it may provide authority to stop presidents in their tracks. Yet Congress and the executive branch have*

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*developed widely divergent views on the scope of this authority. During the Obama Administration, sharp conflicts over this issue arose in areas of acute policy conflict, including climate change, prisoner transfers, proposed closure of detention facilities at the Guantanamo Naval Base, and federal marijuana enforcement. Many planned initiatives of the Trump Administration—from immigration enforcement, to renegotiation of trade deals, to military operations against Islamic terrorists or other foreign adversaries—could present analogous questions. Despite the issue’s contemporary salience, however, existing scholarship provides no satisfactory understanding of Congress’s power to control the other two branches through appropriations constraints.*

*This Article offers a systematic account of funding constraints as a separation-of-powers problem. Employing a methodology focused on text, structure, original intent, and the broad contours of historical practice, the Article argues that properly analyzing the problem requires disaggregating executive powers. Congress may not control some executive authorities, such as the veto, pardon, and appointment powers, through restricted or conditional appropriations. These powers are “resource-independent” because the president may exercise them personally, and because allowing Congress to control or materially influence their exercise would elide separation-of-powers distinctions essential to the constitutional structure. In contrast, certain other executive powers, most importantly war powers and law enforcement, are “resource-dependent”—they exist only insofar as Congress provides resources for their exercise. As to such powers, Congress properly holds near-plenary authority to restrict or condition use of available resources.*

*Hard cases arise in two areas: selective support of resource-independent powers and funding constraints on conduct of diplomacy. In these areas, an antimanipulation principle, modeled loosely on analogous federalism cases, provides the appropriate framework for balancing congressional and executive authority: conditions should be invalid only in narrow circumstances when the condition would unduly manipulate judgments that are properly the president’s alone.*

*Under this framework, the separation of powers shields presidents from congressional control with respect to powers that exist principally to provide a check on Congress. At the same time, the framework preserves a vital congressional check on the most normatively important executive powers—namely, those that involve bringing the government’s coercive and destructive capacities to bear through law enforcement and warfare.*

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## INTRODUCTION

Congress’s “power of the purse”—its authority to deny access to public funds—is one of its most essential constitutional authorities. A central mechanism through which English parliaments clawed liberty from reluctant monarchs, it remains a crucial check on executive overreaching. It may provide power to stop a president in his tracks. And yet, two centuries after the founding, the scope of this congressional power and its relationship with constitutional executive authorities remains both contested and inadequately theorized.

The executive branch, in both Republican and Democratic administrations, routinely disregards funding limits that infringe upon asserted executive authorities.<sup>1</sup> For its part, Congress asserts the opposite view by routinely enacting such appropriations restrictions. During the Obama Administration, the issue arose repeatedly in areas of acute policy conflict, including climate change, prisoner transfers, proposed closure of detention facilities at the Guantanamo Naval Base, and federal marijuana enforcement.<sup>2</sup> President Trump’s first signing statement staked out a broad view of his powers,<sup>3</sup> and many of his administration’s planned initiatives—including enhanced immigration and drug enforcement, renegotiation of trade deals, and military operations against Islamic terrorists or other foreign adversaries—could present the issue in acute form. Questions about the power of the purse, indeed, have arisen repeatedly across American history, but as our politics grow more polarized and erratic, and interbranch relations more conflictual, the problem seems poised to grow worse. Developing a grounded account of executive and congressional authority with respect to funding conditions could scarcely be more urgent.

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1. For examples, see *infra* Section I.B.2.

2. For description of these and other examples, see *infra* Section I.B.

3. Presidential Statement on Signing the Consolidated Appropriations Act 2017, 2017 DAILY COMP. PRES. DOC. 312 (May 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/05/05/statement-president-donald-j-trump-signing-hr-244-law> [https://perma.cc/G8EU-JRX6] [hereinafter Trump Statement on 2017 Consolidated Appropriations Act].

This Article offers a systematic analysis of funding constraints as a separation-of-powers problem.<sup>4</sup> Employing an interpretive methodology focused on text, structure, original intent, and the broad contours of historical practice, I dispute both Congress's bromides about a plenary power of the purse and the executive branch's frequent claim that Congress holds no greater power with respect to appropriations than it does in passing ordinary legislation. In fact, the Constitution is best understood to protect some minimum degree of discretion in the exercise of constitutional executive authorities, but determining the scope of such preclusive discretion requires disaggregating executive authorities and attending to the nature of congressional authority over resources with respect to different areas of executive responsibility.

Some executive powers, I argue, are *resource-independent*. The president may exercise these powers without regard to any direct conditions or limits Congress imposes upon them. Paradigmatic examples in this category are the president's powers to veto legislation, appoint and remove officers, grant clemency to criminal offenders, and exercise supervisory command over the military. These authorities are in principle personal and costless: the president could exercise them even if Congress provided no public resources beyond the president's salary. What is more, in most cases such powers exist at least in part to provide either a check on Congress or a constitutionally required degree of presidential control over executive functions. Allowing Congress to control these powers, whether through funding restrictions or by other means, would thus elide key separation-of-powers limits on Congress itself. As the Attorney General once put it, such funding controls would "require operation of the Government in a way forbidden by the Constitution."<sup>5</sup> Accordingly, presidents may disregard appropriations provisions that purport to prevent particular exercises of these powers or that condition availability of funds on these powers being exercised in a particular way.

At the other extreme, some executive powers are *resource-dependent*. These powers may be exercised only insofar as Congress provides resources for their exercise—and Congress accordingly holds near-complete discretion to impose whatever limits and conditions it chooses with respect to use of those resources. The two key powers in this category are law enforcement and use of military force. Presidents, to be sure, hold the constitutional responsibility to "take Care that the

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4. See *infra* Section I.B.3 for discussion of prior scholarship. The two leading articles to date are J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162; and Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

5. Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933).

Laws be faithfully executed,” and Article II makes the president Commander in Chief of the military. Yet neither of these powers properly entails authority to disregard substantive limits on available resources for their exercise. For compelling textual, structural, historical, and normative reasons, Congress may deny funds for specific anticipated military operations or activities, limit the location or disposition of particular forces, bar funds for specific law enforcement activities, or even prevent particular prosecutions. To be concrete, then, Congress could deny the president resources to conduct any military strike against a specified country or indeed any use of nuclear weapons at all without advance legislative approval, and by the same token it could deny resources to conduct mass deportations, a marijuana dragnet, or other law enforcement efforts. Presidents hold no valid constitutional authority to disregard such limits on their authority.

Between these two poles, hard cases arise in two areas. The first involves selective support for the president’s resource-independent powers. If Congress appropriates funds for presidential advisers and other support staff (as of course it routinely does), to what degree may it limit use of these resources? Could Congress, for example, provide advisers to vet pardons for bankers but not drug dealers, or to formulate resource-extraction legislation but not measures to reduce climate change? The second hard case involves conduct of diplomacy. Although diplomacy in practice is resource-intensive and might best be classified as a resource-dependent power as a matter of first principles, presidents have long claimed authority to exercise plenary control over the nation’s diplomatic communications with foreign sovereigns. Given this entrenched practice, the key question becomes how far either the president or Congress may go. Can Congress preclude use of publicly paid diplomats for communications with particular foreign sovereigns or international bodies (as indeed it has routinely attempted to do), or may presidents disregard such limits and employ State Department officials and other federal personnel as they see fit?

Categorical answers to these questions are elusive, for the simple reason that they involve balancing congressional and executive authority—Congress’s discretion over resources on the one hand, and the president’s authority to make certain judgments independent of Congress on the other. In this context, accordingly, an *antimanipulation principle* should determine the extent of Congress’s appropriations power over the executive branch. Under this principle, while Congress holds broad authority to structure the executive branch by limiting advisers and diplomats to particular topics or activities, Congress nonetheless may not impose narrow outcome-based limitations on its support for key advisers or diplomats, nor may it deny

the president access to the officials best positioned, by virtue of their other responsibilities, to provide relevant guidance or support on a particular narrow matter. Such limitations are invalid because they risk manipulating particular narrow judgments that properly belong to the president alone, and because they do so in a manner that clouds both congressional and executive responsibility for resulting policies. As I explain below, this antimanipulation principle not only tracks important (but largely unrecognized) features of historical practice,<sup>6</sup> but also draws support by analogy from the anticoercion inquiry the Supreme Court has applied in related federalism contexts.<sup>7</sup>

While some past accounts have suggested that the president's authority to defy funding constraints is greater overseas than at home,<sup>8</sup> my analysis identifies a different boundary—the boundary marked by resource-dependence, rather than the water's edge. Because the Constitution guarantees to presidents certain minimum authorities that enable the system of checks and balances to function, Congress cannot leverage its appropriations power to collapse these separation-of-powers limits on Congress itself. For example, to the extent the Constitution requires direct presidential supervision of the military, or grants presidential authority to issue pardons with certain consequences, giving effect to funding restrictions that bring about different results cannot be consistent with the Constitution. Yet this logic does not carry over to all executive authorities. In particular, because warmaking and law enforcement are powers the president can exercise only insofar as Congress provides resources for doing so, the Constitution will rarely provide valid grounds for defying limits on those resources' use. Distinguishing between resource-independent powers and resource-dependent powers thus yields the normatively compelling result that the government's coercive and destructive capacities—its powers to kill, maim, deport, and imprison—remain subject to control not only by the president, but also by the people's representatives in Congress. (For charts depicting my key conclusions, see Figures 1 and 2 below in Sections III.A and IV.A, respectively.)

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6. See *infra* Sections III.C, IV.E.3.

7. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–88 (2012) (“Congress has no authority to order the States to regulate according to its instructions . . . [because] the States must have a genuine choice . . .”).

8. See, e.g., *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Supp. Op. O.L.C. 303, 310 (1969) (opinion by future Chief Justice William Rehnquist drawing this distinction); H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 143 (2002) (distinguishing between funding conditions affecting foreign affairs and those “[i]n the domestic sphere”).

Some might also dismiss appropriations battles as simple matters of politics or convention rather than law. Yet neither courts nor the executive branch have analyzed them as such.<sup>9</sup> At any rate, even if in the past political self-restraint might have kept us from reaching bare questions of legality, the bitter politics of our moment are steadily shredding such buffers of convention, causing legal disputes over separation of powers to arise with increasing frequency. To facilitate analysis of future questions regarding appropriations authority, I hope to show here that a relatively conventional approach to constitutional interpretation—centered on text and structure, but also taking account of the broad contours of past precedent and practice—can in fact yield a principled and normatively satisfactory framework.

As a final preliminary caveat, I should note that because this Article aims to provide a general overview, my analysis necessarily paints with a broad brush. I cannot account for every historical example; nor can I resolve every disputed question about Article II's meaning.<sup>10</sup> I do hope, however, to develop a theory that not only makes sense of the Constitution's basic text and structure, but also accounts for deep working assumptions reflected in entrenched constitutional practice. In analyzing past practice, I therefore concentrate less on narrow precedents than on deeply embedded assumptions—those akin to what Thomas Merrill (commenting on Henry Monaghan) has called “type II constitutional common law,” meaning principles developed through “evolved practice” that are so entrenched as to now be “binding on all governmental branches.”<sup>11</sup> As I will explain, such embedded working assumptions about constitutional meaning—the deep currents

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9. See, e.g., *United States v. Lovett*, 328 U.S. 303, 313 (1946) (“We therefore cannot conclude . . . that since Congress under the Constitution has complete control over appropriations, a challenge to [an appropriations provision’s] constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.”); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. \_\_ (2009) (ms. at 1) (finding that by “purporting to bar the State Department from using [certain] funds . . . [the Foreign Appropriations Act] unconstitutionally infringes on the President’s authority to conduct the Nation’s diplomacy”).

10. I strive throughout to remain as agnostic as possible about the actual content of executive authorities, so as to concentrate on questions regarding how those authorities (however defined) related to Congress’s distinct authority over appropriations. I also hold aside questions about executive privilege and executive control of information; I focus instead on more primary questions about exercise of government power.

11. Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 453 (2010) (discussing Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993)). Another classic exemplar of my basic approach here is Edward Corwin, whose insights loom large over many aspects of the analysis. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE & POWERS, 1787–1984* (5th rev. ed. 1984); see also H. JEFFERSON POWELL, *TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 191–93* (2016) (identifying a “mainstream” approach to constitutional interpretation and distinguishing it from competing recent theories).



beneath surface froth—resolve key textual ambiguities about Congress’s appropriations power while nonetheless providing critical purchase on more immediate trends.<sup>12</sup>

My argument proceeds as follows. Part I provides background on Congress’s power of the purse, identifies the puzzle this power generates with respect to executive power, and discusses limitations in past scholarly accounts. Part II helps frame the puzzle’s solution by highlighting the deep working assumption that congressional appropriations are ultimately matters of discretion, even if Congress conventionally exercises its power to support the executive branch. Part III analyzes resource-independent powers. After defining the category, this Part addresses ways in which Congress may and may not limit those powers’ exercise through limited or conditional appropriations. Part IV turns to resource-independent powers. Following general background discussion, it addresses questions regarding war powers, law enforcement, and diplomacy in turn. A brief conclusion then summarizes my analysis and reflects on why maintaining principled limits on executive authority to disregard appropriations constraints is essential in our troubled era of partisan animosity and political disruption.

## I. FRAMING THE PROBLEM

### *A. Congress’s Power of the Purse and the Puzzle It Generates*

What is Congress’s “power of the purse”? This pithy phrase captures the vital constitutional principle—once described by Edward Corwin as “the most important single curb” on presidential authority<sup>13</sup>—that the people’s representatives in Congress control both public revenue and public expenditure.

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12. My categorization of executive powers might draw some support from Justice Jackson’s famous three-part framework from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). Jackson distinguished between executive powers exercised with congressional support, powers exercised with neither affirmative congressional approval nor affirmative prohibition, and powers exercised in defiance of congressional restraints (his famous “lowest ebb” category of executive power). On some level, all the examples addressed here fall at Jackson’s lowest ebb—all involve funding restrictions imposed by Congress and potentially defied by the president. At the same time, my ultimate categorization roughly tracks Jackson’s taxonomy. On my account, resource-dependent powers require congressional support, resource-independent powers do not, and certain hard cases, particularly diplomacy and presidential advising, fall in an intermediate grey area of contestation. Jackson’s framework nevertheless does not form a centerpiece of my analysis, for the simple reason that it offers no helpful guidance in determining which executive authorities belong in which category. For general criticism of Jackson’s approach, see Michael W. McConnell, *The President Who Would Not Be King* (Jan. 2018) (unpublished manuscript) (on file with author).

13. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 134 (13th ed. 1975).

On the revenue side, the Constitution expressly grants Congress authority to “lay and collect Taxes, Duties, Imposts and Excises” and “to borrow Money on the credit of the United States.”<sup>14</sup> The Constitution also directs that all revenue-raising legislation must originate in the House of Representatives,<sup>15</sup> the house of Congress closest to the people (at least in the Framers’ imagination). On the expenditure side, Congress holds express authority “to pay the Debts and provide for the common Defense and general Welfare of the United States,” to “raise and support Armies,” and to “provide and maintain a Navy,”<sup>16</sup> although no army appropriation may exceed two years in duration<sup>17</sup> and Congress must provide for a regular accounting of public expenditures.<sup>18</sup> These powers, moreover, are exclusive. The Appropriations Clause, Congress’s bedrock power-of-the-purse provision, directs: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>19</sup>

By the Constitution’s plain terms, then, money can flow neither in nor out of the public purse without advance congressional approval.<sup>20</sup> The Constitution thus ensures that Congress, with its distributed representation and resulting capacity for bargained trade-offs, holds ultimate authority over both collection and distribution of public resources.<sup>21</sup>

Historically, the appropriations power has served another purpose too: it has provided an ongoing check on the other branches. This function implicates a deep constitutional history. From medieval times, the English Parliament’s assent was required to grant extraordinary revenues to the King.<sup>22</sup> Though largely notional and uncontroversial in the Middle Ages, this authority gained greater significance as parliament became less pliable and the fiscal demands of warfare and other functions outstripped the Crown’s capacity to “live

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14. U.S. CONST. art. I, § 8.

15. *Id.* art. I, § 7, cl. 1.

16. *Id.* art. I, § 8.

17. *Id.*

18. *Id.* art. I, § 9, cl. 7.

19. *Id.*

20. *See, e.g.,* *Reeside v. Walker*, 52 U.S. 272, 291 (1850) (interpreting the Appropriations Clause to require that “[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned”).

21. For discussion of risks associated with giving executive agencies control over their own funding, see Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555 (2017); and Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677 (2017).

22. JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 45–46 (2017).

of his own” from personal revenues.<sup>23</sup> Accordingly, from the tumultuous seventeenth-century Civil Wars to the Glorious Revolution of 1688 and the development of the fiscal-military state in the eighteenth century, the English Crown’s dependence on parliamentary appropriations provided a central mechanism for degrading royal authority and enforcing legal constraints on executive power.<sup>24</sup> In the colonies, likewise, local legislative control over taxes and appropriations provided an important means of restraining otherwise unaccountable royal governors.<sup>25</sup> Indeed, royal efforts to cut governors loose from local purse strings provided one important impetus for the Revolution.<sup>26</sup>

Today, Congress’s power of the purse remains a vital mechanism of accountability for the executive branch. By virtue of broad statutory delegations and accreted executive practice, modern presidents hold vast powers of initiative: they may often regulate (or deregulate), set enforcement priorities, conduct foreign policy, and even launch military campaigns as they see fit. Even when Congress disapproves of such actions, it holds limited capacity to undo them through ordinary substantive legislation. The president, after all, may veto any such legislation, and normally the president’s copartisans in Congress can be counted on to prevent the two-thirds majority required in both houses for a veto override.<sup>27</sup>

Congress’s appropriations power potentially reverses this dynamic. Through the ingenious practice, begun with the very first Congress, of appropriating funds only one year at a time, Congress has ensured that presidents must always come back every year seeking

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23. *Id.* at 46–47.

24. For general accounts of this history, see, for example, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 1–17 (1994); and CHAFETZ, *supra* note 22, at 45–53. See also JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783, at 144–46 (1988) (describing how English parliaments after the Glorious Revolution of 1688 ensured the Crown’s “fiscal dependency” so as to guarantee continuing parliamentary control over government policy).

25. See, e.g., BANKS & RAVEN-HANSEN, *supra* note 24, at 18–26 (discussing colonial assemblies’ assertions of financial control over royal governors); JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776, at 7–8 (1963) (describing assemblies’ efforts “in imitation of the seventeenth-century House of Commons to impose their sole authority over every phase of raising and distributing public revenue”).

26. GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 32 (2002) (“Revenue from the Townshend duties [controversial new taxes resisted by colonists in the buildup to the Revolution] was earmarked for the salaries of royal officials in the colonies so that they would be independent of the colonial legislatures.”).

27. For general discussion of the dynamics discussed in this paragraph, see WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003); and Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

money just to keep the government's lights on.<sup>28</sup> Key federal statutes, moreover, back up Congress's constitutional authority. Under the so-called Miscellaneous Receipts Act, all funds received by the federal government generally must be deposited in the Treasury.<sup>29</sup> A second statute, the Purpose Act, specifies that appropriations are available only for the specific "objects for which [they] were made."<sup>30</sup> Finally, the Anti-Deficiency Act generally makes it unlawful—indeed, sometimes criminal—for any federal official to expend or even obligate funds without a prior appropriation adequate for the expenditure.<sup>31</sup>

As a result of this legal structure, the president's ability to advance his own agenda is constantly beholden to Congress's willingness to fund it, and Congress accordingly holds ongoing leverage over executive policy.<sup>32</sup> What is more, while recent presidents, particularly Clinton and Obama, succeeded in laying blame for appropriations lapses (popularly known as "shutdowns") on their congressional adversaries, Josh Chafetz has correctly observed that this dynamic is contingent.<sup>33</sup> Under other circumstances, the president might well incur serious political costs for precipitating a funding shutdown with presidential vetoes.

The appropriations process is frequently ugly and political, full of horse-trades, special-interest giveaways, and massive omnibus bills assembled in secret. It is often rushed; it avoids open vetting of proposals by committees with substantive expertise; and it gives chairs and ranking members of appropriations committees and subcommittees

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28. Congress derived its practice of annual appropriations from prior practice in the English parliament and colonial legislatures. For discussion of this history and the structural importance of annual appropriations, see CHAFETZ, *supra* note 22, at 52–53, 61–66, 68–70. See also EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 122 (reprt. 1906) ("[B]y the close of the colonial era, the general rule consisted in making detailed appropriations for short periods of time.").

29. 31 U.S.C. § 3302 (2012).

30. 31 U.S.C. § 1301(a) (2012); see also 31 U.S.C. § 1301(d) (providing that a law may be understood to appropriate funds or allow their obligation "only if the law specifically states that an appropriation is made or that such a contract may be made"); 1 U.S. GEN. ACCOUNTING OFFICE, OFFICE OF GEN. COUNSEL, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 4-6 to 4-7 (3d ed. 2004) (characterizing the Purpose Act as "prohibit[ing] charging authorized items to the wrong appropriation" or "unauthorized items to any appropriation," because "[a]nything less would render congressional control [of appropriations] largely meaningless").

31. 31 U.S.C. §§ 1341–42, 1350. The U.S. Justice Department's Office of Legal Counsel has described the Anti-Deficiency Act as "one of several means by which Congress has sought to enforce" requirements of the Appropriations Clause. Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 33 (2001). For further discussion of the Act and its history, see *infra* Section IV.B.

32. See HOWELL, *supra* note 27, at 121–22 (noting that dependence on appropriations may reduce the president's "powers of unilateral action").

33. CHAFETZ, *supra* note 22, at 69–72.

disproportionate influence.<sup>34</sup> To paraphrase Bismarck's famous metaphor, appropriations legislation is sausagemaking at its finest—and best not observed up close. Nevertheless, in a world of broad delegations and expansive executive authority, Congress's power of the purse is the single feature of our system that most effectively guarantees an ongoing political constraint on the president's authority to set policy unilaterally. One might say that if it did not exist we would have had to invent it.<sup>35</sup>

When it comes to constitutional executive authorities, however, Congress's power of the purse generates an important separation-of-powers puzzle. While our Constitution assigns Congress the power of appropriation, it also assigns the president specific powers and responsibilities. Among them are the obligation to “take Care that the Laws be faithfully executed,” the power to appoint “officers of the United States,” and the prerogatives to serve as “Commander in Chief,” “make treaties” (with Senate approval), and grant “Pardons and Reprieves.”<sup>36</sup> All these powers and responsibilities require resources to be discharged effectively. How do they fit together with Congress's power of the purse? Can Congress use its authority over funding to control the president's exercise of his own powers? Or do funding constraints on executive action sometimes constitute unconstitutional conditions that the president may disregard?

### *B. The Puzzle's Undertheorization*

The executive branch has developed its own particular answer to the puzzle: it has claimed authority to disregard funding constraints on presumed executive prerogatives.<sup>37</sup> If uncabined, this theory of

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34. For these reasons, Neal Devins argued three decades ago that appropriations provisions were poor vehicles for substantive policymaking. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 457–58 (discussing “institutional reasons” why “the appropriations process may not be conducive to sound substantive policymaking”). For more recent critical accounts of the appropriations process, see, for example, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84–90 (2006) (discussing dynamics of appropriations riders and noting they may often “fly below the political radar, placed in the bill by a few connected members of Congress”); and Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 635–37 (2006) (discussing opportunities to force through unpopular measures in appropriations riders).

35. For some general figures on use of appropriations riders, see Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 768 (2010) (counting, on average, roughly three hundred provisions banning enforcement of specified regulations each year between 1993 and 2002).

36. U.S. CONST. art. II, §§ 2–3.

37. See, e.g., Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. \_\_\_ (2009) (ms. at 1) (concluding that the State Department “may disregard”

executive power threatens to undo the very constraints the appropriations process places upon presidents. And we have reason to fear presidents will be aggressive in asserting it. Although the question of funding control over the executive branch has arisen repeatedly across American history, presidents may well have particularly strong incentives to defy such restrictions in our current era of partisan distrust, legislative paralysis, and presidential administration. At the least, questions about presidential spending authority arose repeatedly in areas of acute policy conflict during the Obama presidency,<sup>38</sup> and President Trump's first signing statement claimed constitutional authority to disregard multiple provisions in a funding statute.<sup>39</sup> The Framers nonetheless seem not to have held any clear view on this question, nor does past scholarship provide any convincing framework for answering it.

### 1. Ambiguity at the Founding

To begin with the Framers, the Constitution's drafters and ratifiers seem not to have squarely resolved, or even adequately considered, the problem of funding constraints on the U.S. president. To be sure, in keeping with the deep constitutional history highlighted earlier, the Framers recognized legislative control over appropriations as a vital check on the other branches. In Federalist No. 58, James Madison even called Congress's power of the purse "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."<sup>40</sup> "[T]he purse," Madison elaborated, was

that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its

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unconstitutional limitation on appropriations for certain diplomatic activities); Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution."); Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469–70 (1860) (explaining that the president would be "entirely justified in treating this condition (if it be a condition) [in an appropriations statute] as if the paper on which it is written were blank"). For additional examples, see *infra* Section I.B.2.

38. See *infra* Section I.B.2.

39. Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3.

40. THE FEDERALIST NO. 58, at 297–98 (James Madison) (Ian Shapiro ed., 2009). In this passage, Madison, in fact, associated the purse not just with Congress, but, more specifically, with the House of Representatives, which he noted "cannot only refuse, but they alone can propose, the supplies requisite for the support of government." *Id.*; see also U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.<sup>41</sup>

Unsurprisingly, the choice to vest appropriations control in Congress occasioned significant debate at neither the constitutional convention itself nor the subsequent state ratifying conventions.<sup>42</sup>

And yet the very centrality of appropriations control to Anglo-American constitutional thinking may have blinded the Framers to the difficulty of mapping these expectations onto the new constitutional system they were establishing.<sup>43</sup> In England, with its unwritten constitution developed organically through ordinary legislation over time, parliamentary control of appropriations served as a means of leverage to degrade royal authority over time. Parliament, in other words, could alter the constitutional framework by extracting constitutional concessions from the Crown in exchange for grants of assistance—in particular grants of assistance for the expensive military adventures that kings persistently insisted on waging.<sup>44</sup> To the extent the U.S. Constitution aims instead to fix in place a system of separated

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41. THE FEDERALIST NO. 58, *supra* note 40, at 297–98 (James Madison).

42. *See, e.g.*, BANKS & RAVEN-HANSEN, *supra* note 24, at 29 (“There is no record of any debate about the Appropriations Clause . . .”); Sidak, *supra* note 4, at 1171–73 (discussing the clause’s drafting history and concluding it “provides little insight”).

43. As Gerhard Casper observed in his study of appropriations practice in the early Republic, “[t]he unquestioned rule was that of legislative supremacy [over appropriations],” but “in the postrevolutionary American context [the rule was] not necessarily obvious.” GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 74 (1997). The delegates at the Constitutional Convention did debate (and eliminate) a proposal to require origination of all appropriations in the House of Representatives. Sidak, *supra* note 4, at 1171–72; *cf.* U.S. CONST. art. I, § 7, cl. 1 (final adopted version of the Origination Clause) (providing that “[a]ll Bills for raising Revenue,” rather than appropriations, “shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills”). Although some delegates expressed concern that the House might abuse its origination power to extract substantive concessions from the Senate, the delegates seem not to have questioned Congress’s overall authority over appropriations, much less to have considered in depth the relationship between appropriations and constitutional executive authorities in general. *See* Sidak, *supra* note 4, at 1172 (arguing that the debates provide no affirmative support for the view that the Framers meant “to give Congress in effect a veto over the Executive in its performance of any of its constitutionally assigned functions,” but acknowledging that “[t]his history from the Constitutional Convention provides little insight into the meaning of the appropriations clause”); *see also* BANKS & RAVEN-HANSEN, *supra* note 24, at 27–29 (discussing debates at the Constitutional Convention over Senate power to amend money bills and observing that “no one during the debates suggested prohibiting . . . riders” on appropriations bills altogether); GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 555–56 (new ed. 1998) (also discussing debates over origination of “money bills” at the Constitutional Convention). For general discussion of the Origination Clause and its history, including debates at the Constitutional Convention, *see* Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 666–72 (2014).

44. *See* BREWER, *supra* note 24 (linking the development of limited domestic government in England to parliamentary control over military resources); CHAFETZ, *supra* note 22, at 45–52 (describing this evolution).

powers, such leveraged adjustment of congressional and executive powers could itself defy the constitutional framework. In short, although the Framers evidently presumed that Congress's appropriations power would function as a check on the executive—or at the very least as a means of stopping a would-be tyrant in his tracks—they seem not to have had any clear understanding of how far Congress could go in curbing the executive.<sup>45</sup>

In a telling indication of this blind spot, Alexander Hamilton in Federalist No. 73 discussed presidential compensation at length without ever seeming to consider the parallel problem of funding for the executive branch as a whole. As Hamilton observed, the Constitution specifically prohibits any increase or decrease in compensation during a president's term.<sup>46</sup> Observing that in general “a power over a man's support is a power over his will” and indifference to financial inducements is a “stern virtue” that grows in “few soils,” Hamilton extolled this salary guarantee as a key protection for executive “vigor” and independence.<sup>47</sup> “The legislature,” Hamilton wrote,

with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.<sup>48</sup>

Yet for all his concern to prevent “intimidation or seduction of the Executive by the terrors or allurements of the pecuniary arrangements of the legislative body,”<sup>49</sup> Hamilton seemed not to consider whether discretionary control over other executive branch officials' salaries could have comparable effects on presidential independence.

In fact, as discussed further below, the ink on the Constitution was barely dry before the scope of congressional appropriations power emerged as a point of contention. One member of Congress captured the essential nature of the problem. In England, Representative William Vans Murray observed on the House floor in 1796, “supplies and grievances have been for centuries a measure of compromise and the mode by which the Commons have accumulated powers and checks against a throne”; hence, “we see the powers of the Commons growing

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45. This question may also largely disappear (or at least present itself in different forms) in modern parliamentary systems, which may often lack any prescribed constitutional separation between the legislature and executive.

46. U.S. CONST. art. II, § 1, cl. 7.

47. THE FEDERALIST NO. 73, *supra* note 40, at 370 (Alexander Hamilton).

48. *Id.*

49. *Id.*



by absorption from the prerogative of the Crown.”<sup>50</sup> In the United States, in contrast, “we see in the powers of this House [of Representatives], not the spoils of contest, not the trophies of repeated victory over the other branches of the Government, but a specific quantum of trust placed in our hands to be exercised for the people agreeably to the Constitution.”<sup>51</sup>

Though Murray’s specific position in this debate lost the day (as we shall see<sup>52</sup>), his broader point captures the essential puzzle the Framers left open. In our system, unlike Britain’s, “we find certain definite portions of power accurately meted out by the people in a written instrument to the respective branches of Government.”<sup>53</sup> To the extent that is true, use of funding denials to cut back on legitimate prerogatives of other branches might well distort the constitutional scheme rather than give effect to it.

## 2. Current High Stakes

At any rate, presidents have claimed authority since at least 1860 to disregard some funding constraints on their executive authorities.<sup>54</sup> In one example, President Andrew Johnson questioned the constitutionality of appropriations riders requiring approval of all military orders by the Army’s top general (then Ulysses Grant).<sup>55</sup> In another, President Woodrow Wilson objected, apparently on constitutional grounds, to an appropriations rider barring use of Justice Department funds for particular prosecutions.<sup>56</sup> In modern times, Congress helped force an end to the Vietnam War by halting appropriations, but President Ford nonetheless ordered use of military

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50. 5 ANNALS OF CONG. 684, 699 (1796) (statement of Rep. William Vans Murray). For background on Murray, then a Federalist congressman from Maryland, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 675–76 (1993).

51. 5 ANNALS OF CONG. at 699.

52. See *infra* Part II.

53. 5 ANNALS OF CONG. at 698.

54. Memorial of Captain Meigs, 9 Op. Att’y Gen. 462, 468–69 (1860); see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 158* (2008) (identifying rider at issue in this case as Congress’s first effort to limit presidential control over the executive branch through appropriations).

55. President Andrew Johnson, Message to the House of Representatives (Mar. 2, 1867), in 8 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 3670 (James D. Richardson ed., 1897) [hereinafter *COMPILATION MPP*]; see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1023–24 (2008) (discussing President Johnson’s “constitutional doubts” about this provision).

56. President Woodrow Wilson, Statement on Signing the Sundry Civil Bill (June 23, 1913), in 27 *THE PAPERS OF WOODROW WILSON* 558 (Arthur S. Link ed., 1978) (calling the provision “unjustifiable in character and principle”).

force during the war's messy conclusion in violation of these restrictions.<sup>57</sup> During the Carter Administration, Congress attempted to halt an initiative to pardon Vietnam-era draft evaders by denying federal funding to implement it.<sup>58</sup> In the 1980s, the so-called Boland Amendment barred any use of federal funds to support the Contras, an anti-Communist rebel force in Nicaragua. In the notorious Iran-Contra scandal, however, Reagan Administration officials developed ingenious means of circumventing this restriction.<sup>59</sup>

Several examples from just the past few years illustrate how congressional and executive views on this issue have diverged—and how acute the resulting difficulties have become:

- *Guantanamo Prisoner Transfers*: Congress obstructed President Obama's stated desire to close the Guantanamo Bay detention facility through funding restrictions. These restrictions precluded either transferring detainees to foreign custody without making certain prior determinations and providing substantial advance notice to Congress, or transferring them at all to the United States proper.<sup>60</sup> Although President Obama, in compliance with the riders, brought no Guantanamo detainees to the United States and generally complied with the conditions for overseas transfers, he asserted repeatedly in signing statements that “[u]nder certain circumstances” these provisions “would violate

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57. See *infra* Section IV.C.1. For discussion of appropriations measures relating to the Vietnam conflict, see BANKS & RAVEN-HANSEN, *supra* note 24, at 119–22, 154–57; Barron & Lederman, *supra* note 55, at 1064–70, 1071–74; and Louis Fisher, *Presidential Independence & the Power of the Purse*, 3 U.C. DAVIS J. INT'L L. & POL'Y 107 (1997).

58. For a description of this conflict, see CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE 111–12 (1998).

59. For general background on the Iran-Contra controversy, see, for example, BANKS & RAVEN-HANSEN, *supra* note 24, at 137–44; HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 366–73 (2015); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 240–45 (6th ed., rev. 2014); and HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 11–37 (1990).

60. See, e.g., Consolidated Appropriations Act 2014, Pub. L. No. 113-76, §§ 8110–11, 128 Stat. 5, 131. Similar provisions appeared in annual defense authorization bills. See, e.g., Carl Levin & Howard P. Buck McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 1032–33, 128 Stat. 3292, 3491–92 (2014). Although distinguishing between legal authorization and monetary appropriations is generally a key principle of appropriations law, see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, at 1–4 (4th ed., 2016 rev.), annual defense authorization bills effectively make available military resources on an annual basis, much as defense appropriations bills do. They thus may raise analogous concerns to those addressed here.

constitutional separation of powers principles.”<sup>61</sup> In addition, as part of a secret deal to release a U.S. soldier held by the Taliban, the Administration transferred several prisoners overseas without providing the required advance notice, an action the Government Accountability Office decried as unlawful.<sup>62</sup> Echoing President Obama, President Trump’s first signing statement indicated that restrictions on Guantanamo prisoner transfers could infringe upon his “constitutional authority as Commander in Chief.”<sup>63</sup>

- *Conduct of Diplomacy*: Congress routinely bars use of funds, either across the board or for particular offices, for certain diplomatic purposes. Recurrent riders, for example, have conditioned State Department funding on the United States not sending official representatives to United Nations (“UN”) bodies chaired by certain state sponsors of terrorism.<sup>64</sup> Another rider first enacted in 2011 prohibited any funds for the National Aeronautics and Space Administration (“NASA”) or the White House Office of Science and Technology Policy (“OSTP”) from

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61. Presidential Statement on Signing the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, 2014 DAILY COMP. PRES. DOC. 945 (Dec. 19, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/19/statement-president-hr-3979> [<https://perma.cc/CTK9-CMD7>] [hereinafter Obama Statement on Signing 2015 NDAA]. In a key passage, Obama asserted:

The executive branch must have the flexibility, with regard to those detainees who remain, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy. Under certain circumstances, the provisions concerning detainee transfers in both bills [the Fiscal Year 2015 defense authorization and appropriations statutes] would violate constitutional separation of powers principles. In the event that the restrictions on the transfer of detainees operate in a manner that violates constitutional separation of powers principles, my administration will implement them in a manner that avoids the constitutional conflict.

*Id.*; see also, e.g., Statement on Signing the National Defense Authorization Act for Fiscal Year 2016, 2015 DAILY COMP. PRES. DOC. 843 (Nov. 25, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/23/statement-president-signing-national-defense-authorization-act-fiscal> [<https://perma.cc/TD7Z-C5KQ>] (reiterating similar objection).

62. See U.S. Gov’t Accountability Office, B-326013, Department of Defense—Compliance with Statutory Notification Requirement (Aug. 21, 2014), <http://www.gao.gov/assets/670/665390.pdf> [<https://perma.cc/3QSK-5WVR>] [hereinafter GAO Letter on Department of Defense Compliance] (discussing transfer and deeming it unlawful).

63. Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3.

64. See, e.g., Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. \_\_ (2009) (ms. at 2–3) (collecting statutes).

being used for certain diplomatic activities with China,<sup>65</sup> even though the United States had long designated the head of OSTP as the U.S. point of contact for a scientific cooperation agreement.<sup>66</sup> Presidents of both parties have objected to such limitations and at times disregarded them.<sup>67</sup>

- *White House Advisers*: Congress attempted to influence President Obama's agenda through restrictions on personnel within the White House itself. Beginning in 2011, Congress forbid use of funds appropriated for the Executive Office of the President to pay salaries for several specified positions, most notably the "Assistant to the President for Energy and Climate Change," colloquially known as the "Climate Change Czar."<sup>68</sup> Although President Obama evidently complied with the provision's literal terms by shifting covered personnel and functions to other White House positions,<sup>69</sup> he claimed authority in a signing statement to disregard it. "Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the

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65. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 531, 129 Stat. 2242, 2330 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 532, 128 Stat. 2130, 2216 (2014); Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 535, 127 Stat. 198, 277; Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 539, 125 Stat. 552, 639 (2011); Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1340, 125 Stat. 38, 123.

66. Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. \_\_ (2011) (ms. at 1–2).

67. President Trump's first signing statement reiterated this view. See Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3 (objecting to provisions that "could, in certain circumstances, interfere with the exercise of my constitutional authorities to negotiate international agreements"). For executive branch opinions defending the practice of disregarding such congressional limitations, see, for example, 35 Op. O.L.C. \_\_ (ms. at 36); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. \_\_ (2009) (ms. at 12); Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 52 (1990). For examples of actual executive defiance, see *infra* note 350.

68. Consolidated Appropriations Act, 2016, § 622, 129 Stat. at 2468; Consolidated and Further Continuing Appropriations Act, 2015, § 622, 128 Stat. at 2377; Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 621, 128 Stat. 5, 228; Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 626, 125 Stat. 786, 927 (2011); Department of Defense and Full-Year Continuing Appropriations Act, 2011, § 2262, 125 Stat. at 198.

69. Robin Bravender, *Budget Deal Axes "Czars" Already Gone*, POLITICO (Apr. 12, 2011, 9:36 AM), <http://www.politico.com/story/2011/04/budget-deal-axes-czars-already-gone-053001> (last updated Apr. 13, 2011, 9:52 AM) [<https://perma.cc/T8UF-YAH6>].

appropriate senior advisers,” Obama asserted, “violate the separation of powers by undermining the President’s ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed.”<sup>70</sup> Addressing a similar provision, President Trump’s first signing statement reiterated President Obama’s objection nearly verbatim.<sup>71</sup>

- *Marijuana Enforcement*: Another recurrent rider has barred use of Justice Department funds “to prevent [certain listed states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>72</sup> Although this rider to some degree codified the Obama Administration’s own stated enforcement policy with respect to federal marijuana crimes,<sup>73</sup> the Justice Department adopted a narrow interpretation of the rider.<sup>74</sup> It also pursued prosecution or civil forfeiture in cases arguably within the rider’s terms.<sup>75</sup> The Ninth Circuit recently rejected this interpretation and upheld judicial authority to enforce the rider’s terms against the government by barring particular prosecutions.<sup>76</sup> President Trump

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70. President Barack Obama, Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 1 PUB. PAPERS 386 (Apr. 15, 2011).

71. Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3.

72. Consolidated Appropriations Act, 2016, § 542, 129 Stat. at 2332–33; *see also, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, § 538, 128 Stat. at 2310 (including a similar restriction); TSA Office of Inspection Accountability Act of 2015, Pub. L. No. 114-53, § 103, 129 Stat. 502, 506 (2015) (extending force of § 538 with respect to continuing appropriations).

73. Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys 1–2 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/3CFH-WLXF>]; Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys 2 (Feb. 14, 2014), <http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf> [<https://perma.cc/34XB-6D4R>].

74. *See* Memorandum from Patty Merkamp Stemler, Chief, Appellate Section, Criminal Div., U.S. Dep’t of Justice, to All Fed. Prosecutors 1–2 (Feb. 27, 2015), <https://www.scribd.com/doc/273620932/Depart-of-Justice-Says-Medical-Marijuana-Law-Doesn-t-Impact-Prosecutions> [<https://perma.cc/7RZR-EHRM>] (narrowly interpreting appropriations rider to allow continued enforcement against private individuals or entities as opposed to state personnel).

75. *See, e.g.*, United States v. Gentile, No. 1:12-CR-0360-DAD-BAM, 2016 WL 3549252, at \*1–2 (E.D. Cal. June 30, 2016) (prosecution charging defendant with marijuana conspiracy); United States v. Chavez, No. 2:15-CR-210-KJN, 2016 WL 916324, at \*1–2 (E.D. Cal. Mar. 10, 2016) (prosecution charging defendant with marijuana possession); United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039, 1047 (N.D. Cal. 2015) (suit pursuing permanent injunction against marijuana business in California).

76. United States v. McIntosh, 833 F.3d 1163, 1178–79 (9th Cir. 2016).

nevertheless indicated in his first signing statement that the provision could infringe upon his constitutional authority to enforce federal laws.<sup>77</sup>

These examples illustrate how potent Congress's control over appropriations may be as a means of controlling the executive branch. Yet by the same token the examples illustrate why an uncabined unconstitutional-conditions theory is worrisome in executive hands. Through historic practice, presidents have claimed authority to trump (as it were) funding constraints on their own action. But the Constitution's provisions on executive power in Article II are notoriously ambiguous in key respects. If presidents may claim unfettered authority to disregard appropriations restrictions on those powers' exercise, then through unchecked, self-serving interpretations they might recreate just the same sort of limitless prerogative that Representative Murray associated with the kings of old—yet without even an effective power of the purse to check it.<sup>78</sup>

### 3. Limitations of Past Scholarship

Developing a grounded account of funding constraints on the executive is thus imperative, yet the question has received insufficient attention outside Congress and the executive branch. In general, the problem of “unconstitutional conditions” on government funding is among the most difficult in constitutional law. In a constitutional system organized around negative liberties and other restraints on government power, the problem of resources—the money necessary to make those liberties and restraints effective—is a persistent blind spot in constitutional theory.<sup>79</sup> The separation-of-powers question addressed here is no exception.

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77. Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3 (indicating that the President “will treat this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed”).

78. 5 ANNALS OF CONG. 699–700 (1796).

79. For a recent argument that unrecognized unconstitutional-conditions problems are pervasive in constitutional law, see Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61 (2013). For a sampling of other key treatments, see, for example, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 41 (2001); Richard A. Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995); and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

Relevant judicial authority is sparse and contradictory. The Supreme Court has held both that appropriations restrictions may be unconstitutional on the same grounds as ordinary legislation<sup>80</sup> and that funding denials may check the other branches in ways ordinary legislation cannot.<sup>81</sup> As for scholarship, what little work addresses the question has been dominated by two conflicting articles formulated in the wake of Iran-Contra, each with opposite limitations.<sup>82</sup>

On the one hand, Kate Stith argued in a landmark 1988 article that executive officials may never expend funds, nor indeed engage in any activity, without a prior supporting appropriation.<sup>83</sup> On Stith's account, "all monies received from whatever source by any part of the government are public funds"; no public funds may be expended without legislative authorization; and no government activity is possible without public funds.<sup>84</sup> As Stith recognized, this framework would render the president entirely dependent on Congress, even when exercising textually assigned executive functions such as the pardon

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80. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 316 (1946) (observing, in decision invalidating appropriations rider as unconstitutional bill of attainder, that "[t]he fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal"); *United States v. Klein*, 80 U.S. 128, 147–48 (1871) (invalidating appropriations provision that "impair[ed]" the effect of a presidential pardon).

81. *See, e.g.*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) ("The [Appropriations Clause] . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."); *Reeside v. Walker*, 52 U.S. 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.").

82. Apart from the two key Reagan-era articles highlighted here, a number of classic works have grappled briefly with appropriations controls over the president. *See, e.g.*, CORWIN, *supra* note 11, at 149–61; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 113–15, 118–21 (2d ed. 1996); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 70–74, 170–73 (1976). I draw from these scholars' work throughout my analysis.

83. Stith, *supra* note 4.

84. *Id.* at 1345. Stith interpreted the Constitution to establish two interlocking principles, the "Principle of the Public Fisc" and the "Principle of Appropriations Control," according to which all funds received by the federal government are public funds and no such funds may be expended without legislative authorization. *Id.* at 1345 (emphasis removed). Together, Stith's two principles enforce a requirement that all federal government activity—that is, "all actions undertaken by and in the name of the United States government," *id.* at 1348—may occur only with prior legislative authorization. *Id.* at 1345 ("Agencies and officials of the federal government may not spend monies from any source, private or public, without legislative permission to do so."); *id.* at 1357 ("[T]here may be no spending in the name of the United States except pursuant to legislative appropriation.").

power or the authority to negotiate treaties.<sup>85</sup> Stith handled this difficulty by intuiting a congressional obligation to fund such executive responsibilities. “Congress itself,” she wrote, “would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties.”<sup>86</sup> She further acknowledged that “[i]n the areas of foreign affairs and federal prosecution, it is generally conceded that Congress cannot closely circumscribe agency powers and the strategies of government policy, much less the particulars of government action.”<sup>87</sup> Despite recognizing these limits, however, Stith’s framework left the executive powerless to enforce them. “Spending in the absence of appropriations,” she argued, “is ultra vires.”<sup>88</sup>

Stith’s leading contemporary critic, Gregory Sidak, reached opposite conclusions.<sup>89</sup> Implicitly defending the Reagan Administration’s Iran-Contra maneuvers against Stith’s charge of unconstitutionality, Sidak suggested that constitutional authority for executive action sufficed to establish an “appropriation by law” and permit expenditure of treasury funds.<sup>90</sup> Accordingly, while Stith left the president at the mercy of all congressional funding constraints, Sidak advocated a wide-ranging “implied power to incur claims against the treasury to the extent minimally necessary to perform his duties and exercise his prerogatives under article II.”<sup>91</sup> Sidak, moreover, left it largely up to the president to judge “minim[al] necess[ity],”<sup>92</sup> and his analysis suggested that presidents could make even quite substantial

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85. *Id.* at 1351–52.

86. *Id.* at 1351.

87. *Id.* at 1383.

88. *Id.* at 1351, 1362 n.89. Stith did indicate that “where an emergency exists, the President might decide that principles more fundamental than the Constitution’s appropriations requirement justify spending,” but she argued that “[t]he constitutional processes for resolving such situations . . . are political.” *Id.* at 1351–52. On the key question addressed here, Stith asserted: “Even where the President believes that Congress has transgressed the Constitution by failing to provide funds for a particular activity, the President has no constitutional authority to draw funds from the Treasury to finance the activity.” *Id.* at 1351.

89. Sidak, *supra* note 4. Though Sidak’s account was the most comprehensive, several other contemporaries defended the view of executive power underlying the Reagan Administration’s defiance of the Boland Amendments. *See, e.g.*, Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUS. J. INT’L L. 83 (1988) (arguing that separation-of-powers principles justified the Administration’s actions). In addition, some earlier scholarship anticipated these views by asserting broad presidential authority over foreign aid. *See* Don Wallace, Jr., *The President’s Exclusive Foreign Affairs Powers over Foreign Aid: Part I*, 1970 DUKE L.J. 293; Don Wallace, Jr., *The President’s Exclusive Foreign Affairs Powers over Foreign Aid: Part II*, 1970 DUKE L.J. 453. For my discussion of this issue, see *infra* Section IV.E.1.

90. Sidak, *supra* note 4, at 1168–70, 1191, 1194–95.

91. *Id.* at 1194.

92. *Id.* at 1199, 1201.



military and law enforcement expenditures in defiance of statutory appropriations limits.<sup>93</sup> Sidak also interpreted the phrase “by Law” in the Appropriations Clause to include executive authorization, when in fact the Constitution generally employs this phrase as a term of art for Acts of Congress.<sup>94</sup>

More recently, some general accounts of separation of powers have briefly analyzed appropriations authority,<sup>95</sup> and Josh Chafetz has highlighted the potential scope of Congress’s appropriations power.<sup>96</sup> Two leading scholars of foreign relations law have taken opposite views on conditional appropriations for conduct of diplomacy;<sup>97</sup> an impressive book addressed fiscal practice in connection with the Cold War national security state;<sup>98</sup> and several articles have addressed questions surrounding denial of appropriations for enforcing particular laws or regulations.<sup>99</sup> Commentators have also analyzed many specific examples addressed here.<sup>100</sup> Yet the scope of congressional authority to

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93. See *id.* at 1188 (“[A] President who acts to discharge his article II duties when Congress has failed or refused to provide him appropriations for that purpose does not violate the appropriations clause.”); *id.* at 1197–99 (discussing national defense and law enforcement examples and concluding that the choice of spending level “must be a matter of political discretion left to the President in the first instance and non-reviewable by the Judiciary”).

94. See BANKS & RAVEN-HANSEN, *supra* note 24, at 167 (advancing this view and identifying other “flaws” in Sidak’s theory). The Supremacy Clause’s reference to “the Laws of the United States which shall be made in Pursuance [to the Constitution],” U.S. CONST. art VI, cl. 2, has been understood to include administrative action, but such action occurs pursuant to statutory authorization, not in defiance of it. For a general discussion of administrative action’s preemptive effect under the Supremacy Clause, see David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL’Y 267, 268–69 (2015).

95. See, e.g., FISHER, *supra* note 59, at 240–45; HENKIN, *supra* note 82, at 113–15, 119–21; KOH, *supra* note 59, at 129–31; HAROLD J. KRENT, PRESIDENTIAL POWERS 77–83 (2005); David J. Barron & Martin S. Lederman, *The Commander in Chief Power at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 733–34, 738–40 (2008).

96. CHAFETZ, *supra* note 22, at 45–78.

97. Compare MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 108–14, 417 n.61 (2007) (arguing such conditions are generally permissible), with POWELL, *supra* note 8, at 141–44 (arguing they may violate separation of powers).

98. See BANKS & RAVEN-HANSEN, *supra* note 24, at 160–61 (discussing constitutionality of appropriations restrictions in the national security context).

99. See, e.g., Devins, *supra* note 34; Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457 (1992); MacDonald, *supra* note 35. Some other recent works have called attention to the importance of budgetary constraints in administrative law. See Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1729–35 (2016) (discussing appropriations law and implementation of the Affordable Care Act); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016) (addressing mechanisms of agency policy control through the White House budget process); Sohoni, *supra* note 21 (analyzing risks associated with agency-initiated spending).

100. See, e.g., Celidon Pitt, Note, *Fair Trade: The President’s Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban*, 83 FORDHAM L. REV. 2837 (2015) (addressing prisoner exchanges); Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL’Y 219 (2010) (exploring increasing use of administrative “czars”); Marshall

condition executive appropriations has awaited systematic reexamination, even as the bipartisan executive practice of disregarding such funding constraints has gathered strength and our increasingly polarized and erratic politics have given the question new urgency.

## II. FRAMING THE SOLUTION: WHY FUNDING IS DISCRETIONARY

A better account of when and whether funding constraints are permissible must recognize that even if Congress holds no affirmative duty to provide funds in the first place, separation-of-powers principles may limit Congress's authority to provide funds with strings attached. For reasons addressed in Parts III and IV, the scope of any irreducible executive discretion over spending must vary by context. Some powers are resource-independent and thus matters of plenary presidential discretion, while others are resource-dependent, giving the president far narrower scope to defy statutory appropriations limits. Even resource-independent powers, moreover, are subject to important limiting principles that prior accounts have failed to articulate.

Correctly framing the analysis, however, requires first eliminating one possible means of reconciling the appropriations power with executive authority: the theory (suggested by Stith) that Congress holds some affirmative duty to fund executive functions at adequate levels.<sup>101</sup> While this view was debated early in the country's history and has resurfaced from time to time since then, the great weight of historical practice contradicts it. As a matter of deeply embedded constitutional practice, then, the view that Congress holds some legal duty to fund the president's priorities—let alone a judicially enforceable legal duty to do so—is off the table. The problem as it arises today is instead one of unconstitutional conditions: whether Congress's power to provide no funds at all entails power to provide funding with strings—and relatedly when, if ever, the president may take the money but cut the strings for separation-of-powers reasons.

In the early Republic, leading figures in fact argued to the contrary that Congress held an affirmative obligation to fund executive initiatives (whether it approved of them or not). In particular, in

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Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 TEX. L. REV. 575 (1990) (discussing oversight of the CIA); L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221 (2000) (analyzing congressional appropriations power over compensation for executive branch officials); Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501 (2002) (analyzing separation-of-powers issues regarding compensation for public officials).

101. See Stith, *supra* note 4, at 1350–51.

debates over whether to appropriate funds to implement the controversial “Jay Treaty” with Great Britain negotiated by the Washington Administration, some members of Congress insisted that the House was duty-bound to back the agreement, while others argued that the House’s constitutional role in passing appropriations legislation gave it independent authority to question the treaty’s merits, even after the president and Senate approved it.<sup>102</sup> As one example, Representative Murray (who was quoted earlier<sup>103</sup>) deduced an obligation to fund the treaty from the fixed character of executive authorities under our Constitution. Unlike in England, he observed, “[h]ere, an appropriation is less a grant of money than an act of duty, to which the Constitution, that is the will of the nation, obliges us.”<sup>104</sup> In private correspondence, Alexander Hamilton likewise maintained that while the House might properly debate “the mode of raising and appropriating the money,” the House “cannot deliberate whether they will appropriate and pay the money” in the first place.<sup>105</sup> Even decades later, leading Federalist attorney William Rawle asserted in his treatise that “[i]t is incumbent on congress to furnish” “all pecuniary supplies required to support the exercise of the treaty making power.”<sup>106</sup>

The House, however, ultimately approved resolutions rejecting any such notion of constitutional duty. First, in the so-called Livingston Resolution, the House requested documents and correspondence from the executive branch regarding the treaty negotiations. Insofar as this demand for information presumed a right to exercise independent judgment over the merits of implementing the treaty, the resolution’s approval by a wide margin properly “suggest[s] that a substantial majority agreed that the House had discretion in implementing the

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102. For general accounts of this controversy and resulting constitutional debates in Congress, see, for example, GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 197–99 (2009); and DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 211–17 (1997).

103. See *supra* notes 50–51 and accompanying text.

104. 5 ANNALS OF CONG. 699 (1796) (statement of Rep. William Vans Murray). Other members of Congress pressed the same view. See, e.g., *id.* at 1017 (statement of Rep. Zephaniah Swift) (“Notwithstanding the power given to the Legislature to make all appropriations of money; yet, in all cases where the national faith is plighted, a contract is made, or a debt contracted, it becomes an absolute duty to make the necessary appropriation to carry it into effect . . .”).

105. Letter from Alexander Hamilton to William Loughton Smith (Mar. 10, 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON 72 (Harold C. Syrett ed., 1974). President Washington’s refusal to provide documents to the House regarding treaty negotiations implied the same view, as he asserted no legitimate role for the House in considering the treaty’s merits.

106. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 73 (William S. Hein & Co., Inc. 2003) (2d ed. 1829). Rawle acknowledged that “there is no express direction to this effect” in the Constitution, but argued that “common sense” supported inferring this congressional duty. *Id.* at 74.

treaty.”<sup>107</sup> What is more, after President Washington claimed a privilege not to produce the documents—and even though the House ultimately voted on the merits to implement the treaty—the House passed another resolution asserting:

when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.<sup>108</sup>

The House’s votes thus reflected the view, expressed forcefully by President Jefferson’s future Treasury Secretary Albert Gallatin among others, that “the specific Legislative powers delegated to Congress were limitations on the undefined power of making Treaties vested in the President and Senate,” and “the general power of granting money, also vested in Congress, would at all events be used, if necessary, as a check upon, and as controlling the exercise of, the powers claimed by the President and Senate.”<sup>109</sup> In correspondence with Hamilton, even the future Federalist Chief Justice John Marshall advocated “admit[ting] the discretionary power of the representative on the subject of appropriations,” notwithstanding the binding contractual character of the treaty itself.<sup>110</sup>

This debate resurfaced during at least one other key juncture in American history. During the waning days of Reconstruction, President Rutherford Hayes argued in a series of veto messages that effecting substantive legal changes through appropriations bills violated the separation of powers.<sup>111</sup> Hayes acknowledged that such riders had already become a “common practice” employed by “[a]ll parties when in

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107. CURRIE, *supra* note 102, at 214.

108. 5 ANNALS OF CONG. at 771–72; *see also id.* at 781–84 (recording vote).

109. *Id.* at 466 (statement by Rep. Gallatin); *see also* CURRIE, *supra* note 102, at 215–16 (endorsing this view).

110. Letter from John Marshall to Alexander Hamilton (Apr. 25, 1796), *in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 105, at 137–38.

111. *See, e.g.*, President Rutherford B. Hayes, Veto Message (Apr. 29, 1879), *in* 10 COMPILATION MPP, *supra* note 55, at 4475, 4484 (arguing that including provisions in funding bill to repeal certain unrelated statutes was “a dangerous violation of the spirit and meaning of the Constitution”); President Rutherford B. Hayes, Veto Message (May 29, 1879), *in* 10 COMPILATION MPP, *supra* note 55, at 4488, 4489 (reiterating constitutional objection “to the practice of tacking general legislation to appropriation bills, especially when the object is to deprive a coordinate branch of the Government of its right to the free exercise of its own discretion and judgment touching such general legislation”); President Rutherford B. Hayes, Veto Message (May 4, 1880), *in* 10 COMPILATION MPP, *supra* note 55, at 4543, 4544 (objecting again to “the questionable and . . . the dangerous practice of tacking upon appropriation bills general and permanent legislation,” in part because this practice “invites attacks upon the independence and constitutional powers of the Executive by providing an easy and effective way of constraining Executive discretion”).

power.”<sup>112</sup> He nevertheless decried the practice for giving the House of Representatives, which alone may originate revenue bills, undue authority “to withhold appropriations upon which the existence of the Government may depend unless the Senate and the President shall give their assent to any legislation which the House may see fit to attach to appropriation bills.”<sup>113</sup> “To say,” Hayes wrote, “that a majority of either or both of the Houses of Congress may insist upon the approval of a bill under the penalty of stopping all of the operations of the Government for want of the necessary supplies is to deny to the Executive that share of the legislative power which is plainly conferred by” Article II’s veto provisions.<sup>114</sup> Accordingly, in Hayes’s view, “[t]he enactment of this bill into a law will establish a precedent which will tend to destroy the equal independence of the several branches of the Government,” thus “plac[ing] not merely the Senate and the Executive, but the judiciary also, under the coercive dictation of the House.”<sup>115</sup>

In decrying use of appropriations leverage to alter substantive policy, Hayes presumed some congressional obligation to fund executive and judicial operations at necessary levels in the first place. Yet even Hayes acknowledged Congress’s ultimate authority to deny funding if it wished. Some appropriations in fact lapsed on two occasions during his administration, as they nearly did during that of his predecessor, Ulysses Grant.<sup>116</sup> Though both presidents urged Congress to provide needed funds without delay, both also acknowledged that Congress’s failure to provide funds could halt government operations.<sup>117</sup>

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112. President Rutherford B. Hayes, Veto Message (Apr. 29, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4475, 4480.

113. *Id.* at 4482. As discussed below in Section IV.D.2, Hayes also objected to provisions denying funds to enforce federal laws that remained on the books.

114. *Id.* at 4483. Hayes concludes this sentence by referring to the “share of the legislative power which is plainly conferred by the second section of the seventh article of the Constitution.” Since Article VII has no second section and addresses ratification rather than legislative authority, it seems likely he meant to refer to the veto provisions in the second clause of section seven of Article I.

115. *Id.* For general background on these debates, see ARI HOOGENBOOM, RUTHERFORD B. HAYES: WARRIOR AND PRESIDENT 392–413 (1995); and BROOKS D. SIMPSON, THE RECONSTRUCTION PRESIDENTS 220–23 (1998).

116. See CHAFETZ, *supra* note 22, at 68 (discussing lapse in funding for federal marshals during Hayes Administration); HOOGENBOOM, *supra* note 115, at 352, 402 (discussing separate lapses in funding for the army and the marshals during the Hayes Administration); President Ulysses Grant, Special Message (June 17, 1876), in 10 COMPILATION MPP, *supra* note 55, at 4322 (urging Congress to avoid funding lapse); Act of June 30, 1876, ch. 157, 19 Stat. 65 (providing temporarily for government expenditures).

117. See *infra* Section IV.D.2; see also President Rutherford B. Hayes, Third Annual Message (Dec. 1, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4509, 4525 (noting that while some federal marshals had “continued the performance of their duties without compensation from the Government” following an appropriations lapse, in some instances “the proper execution of the process of the United States failed by reason of the absence of the requisite appropriation”);

One of Hayes's and Grant's key allies in Congress, future President James Garfield, expressly articulated this balance. Despite arguing that Congress had the "duty" to fund executive enforcement of statutes, he nevertheless acknowledged Congress's "power" to deny such appropriations:

Now you have the power to withhold appropriations, but have you the right? Your power and your duty put together constitute your right in the best sense of the word. Of course you are your own judges of duty. But we are all here, Mr. Chairman, under the solemn obligation of an oath. We are all sworn before the Searcher of all hearts that we will well and faithfully perform the duties of Representatives under the Constitution. And the Constitution makes it our duty to appropriate the necessary means to enforce the laws. . . . I hold that to appropriate the money required by the law is my duty, and my vote shall be for the appropriation under the laws as they are, and not coupled with acts which nullify or obstruct the laws.<sup>118</sup>

Today, at any rate, whether characterized as a constitutional "right" or merely a "power," presumed congressional discretion over funding underlies not only the Anti-Deficiency Act ("ADA"), but also routine congressional debates over funding levels for a variety of executive initiatives. Congress in fact passed the ADA (and tightened it over time) to eliminate the previously routine practice of "coercive deficiencies."<sup>119</sup> Before the ADA, executive agencies regularly overspent their appropriations so as to impose a moral obligation on Congress to make whole hapless constituents who acted in reliance on expected government remuneration.<sup>120</sup> By criminalizing this practice, Congress firmly asserted its view that public expenditure requires advance legislative authorization, which Congress may or may not provide in its

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President Rutherford B. Hayes, Special Message (June 30, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4474, 4475 ("Under the laws prohibiting public officers from involving the Government in contract liabilities beyond actual appropriations, it is apparent that the means at the disposal of the executive department for executing the laws through the regular ministerial officers will after to-day be left inadequate."); President Rutherford B. Hayes, Special Session Message (Mar. 19, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4472 (calling special session because of Congress's failure to make appropriations); Grant, Special Message (June 17, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4322, 4323 (observing that without extension of appropriations, government departments would be "[p]recluded from expending money not appropriated" and "would have to suspend the service so far as the appropriations for it should have failed to be made").

118. 9 CONG. REC. 1894-95 (1879).

119. For a general history of the ADA and Congress's long battle with the problem of coercive deficiencies, see LUCIUS WILMERDING, JR., *THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES* 144-47 (1943). Both the Comptroller General and the Justice Department have understood preventing this practice to be the ADA's central purpose. *See, e.g.*, Project Stormfury—Australia—Indemnification for Damages, 59 Comp. Gen. 369-72 (1980); Employment of Retired Army Officer as Superintendent of Indian School, 30 Op. Att'y Gen. 51 (1913).

120. *See* WILMERDING, *supra* note 119, at 137-53.

discretion.<sup>121</sup> For that matter, even before the ADA, most seem to have assumed that the coercion effected by coercive deficiencies was moral and political rather than legal—that Congress, in other words, could decline if it wished to appropriate funds that executive officials promised.<sup>122</sup>

More generally, Congress today routinely declines to fund initiatives and agencies at levels presidents request, even in areas of arguable executive prerogative such as foreign affairs. As just one example, in keeping with the post–Jay Treaty Livingston Resolution, Congress in recent years has often declined to fund treaty commitments such as dues obligations to international organizations.<sup>123</sup> Such shortfalls may cause presidents (and the nation at large) great embarrassment, but few seriously contend that Congress lacks authority to make this choice.<sup>124</sup>

As appropriations battles during the Obama and Clinton Administrations grew more heated and lapses in appropriations more common, some faulted Congress for failing to “do its job” and fund the government.<sup>125</sup> Such objections resonate with historic arguments by Hamilton, Rawle, and Hayes that Congress holds some constitutionally grounded obligation to exercise its appropriations power in a manner that respects other branches’ prerogatives. It might even be said that failing to fund the government for partisan gain violates a “convention”

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121. For an illustration of the contemporary understanding, see Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 8–11 (1988), which describes the need for a specific funding source for government operations.

122. See, e.g., Support of the Army, 15 Op. O.L.C. 209, 211 (1877) (noting that notionally voluntary contribution of supplies for the military would place the government “under the strongest moral obligation to use every proper and reasonable effort that the donors or lenders should be reimbursed by Congress”).

123. See, e.g., HENKIN, *supra* note 82, at 121 (discussing failure to fund U.S. obligations to the United Nations).

124. Among leading modern scholars, Louis Henkin, like Stith, embraced Hamilton’s view that Congress has a duty to fund some executive policies. Rather like Garfield, however, neither Stith nor Henkin appeared to believe a congressional failure to appropriate is justiciable or otherwise constitutionally enforceable. *Id.*; Stith, *supra* note 4, at 1351. More recently, as this Article was entering final edits, Gillian Metzger has argued that the president’s duty of faithful execution establishes an obligation on Congress’s part to provide sufficient resources for administrative functions, but she too indicates that this congressional duty “is unlikely to be judicially enforceable.” Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 87–90 (2017). For a response to Metzger based on the argument developed here, see Zachary Price, *Against Cutting the President’s Purse Strings*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Jan. 6, 2018), <http://yalejreg.com/nc/against-cutting-the-presidents-purse-strings-by-zach-price/> [<https://perma.cc/RS66-LKTE>].

125. Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html> [<http://perma.cc/H7R2-MJ3E>] (reporting President Obama’s comment that “[y]ou don’t get to extract a ransom for doing your job”).

of government, in the sense (discussed in recent scholarship) of a practice followed out of a sense of obligation despite absence of any real legal imperative.<sup>126</sup> Yet even if Congress by convention normally seeks to avert shutdowns, by the same token recent appropriations shortfalls demonstrate general acceptance of Congress's ultimate discretionary control over appropriations.<sup>127</sup> In Garfield's formulation, denial of appropriations is thus a clear congressional power, even if not also a right.

To sum up, then, as a formal constitutional matter, Congress could, if it wished, "reduce the president's staff to one secretary for answering social correspondence, and . . . put the White House up at auction."<sup>128</sup> Likewise, with respect to the judiciary, "Congress could presumably eliminate the salaries of judicial clerks and secretaries or even (most cruelly of all) cut the Supreme Court's air conditioning budget."<sup>129</sup>

This presumed overall discretion over funding provides essential context for debates over congressional authority to provide funding subject to conditions. In combination with the practice of annual appropriations, Congress's ultimate discretion over funding gives Congress vital ongoing leverage over the executive branch. Yet it also explains the particular form in which separation-of-powers questions about Congress's appropriations power arise: as disputes over whether Congress's notionally greater power to deny funding altogether entails the supposedly lesser power to regulate in fine detail how funds it provides may be used. We can now turn, finally, to answering that question.

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126. For discussion of "conventions" and their relevance to separation of powers, see David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 27–35 (2014); and Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–94 (2013).

127. For executive acknowledgment of this point, see, for example, Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. — (2011) (ms. at 10) (recognizing that "Congress may restrict the implementation of previously negotiated agreements"); Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller, 41 Op. Att'y Gen. 507, 526 (1960) (observing that under the Appropriations Clause, "Congress could refuse to appropriate any funds at all to implement legislation, however essential the appropriation might be for the country's welfare," but "[t]he remedy in such a case would be political").

128. Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15 (1974); see also CHAFETZ, *supra* note 22, at 66 (endorsing Black's view).

129. CHAFETZ, *supra* note 22, at 66; see also Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 331 (2007) ("Congress probably has the power to cut the federal courts' budget for paying law clerks and secretaries."); Vermeule, *supra* note 100, at 531 (observing that Congress could "curtail the judiciary's physical facilities and fringe benefits as it pleases").



### III. RESOURCE-INDEPENDENT EXECUTIVE POWERS

To what extent can Congress control the executive branch through restricted or conditional appropriations? Since at least 1860, executive branch lawyers have claimed some authority to disregard funding limits.<sup>130</sup> But their reasoning has been loose, leaving the outer bounds of this claimed authority undefined.

This Part explores and (partially) defends the executive branch view with respect to key executive authorities identified here as *resource-independent*. Certain constitutional executive authorities—including most importantly the powers to veto legislation, grant clemency, appoint and remove officers, and issue lawful commands to the military—exist either as checks on other branches or as means of supervisory control over the executive branch that the president leads. These same powers, moreover, are at least theoretically costless: presidents in principle could exercise them personally without assistance, keeping no counsel and using only their own salary or other personal resources. Accordingly, as a matter of basic constitutional structure, presidents are not dependent on congressional resources to exercise these powers, and in consequence neither are they properly beholden to congressional judgments about how those powers should be exercised.

Accepting this structural logic nevertheless does not require giving it expansive scope. In particular, contrary to some presidents' claims, presidential authority to disregard some direct funding conditions does not necessarily entail authority to call on the government's full resources for advice and assistance, nor does it mean that executive branch interpretations of ambiguous executive authorities should always prevail. Here, after first defining the category of resource-independent powers and addressing the structural invalidity of direct restraints and conditions on such powers, I turn to questions regarding selective support and Article II's ambiguity.

#### *A. Defining the Category*

The key examples of executive powers I classify as resource-independent are the veto, clemency, appointment, removal, and supervisory military command. Other examples include the authority to demand written opinions from department heads, the power to

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130. See Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468–69 (1860) (indicating that “Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution” and that an appropriations condition attempting to do so would therefore be “void” and “have no effect whatever”).

convene or adjourn Congress in some circumstances, and the authority to recommend legislation. (For a rough taxonomy of executive powers that anticipates further analysis in Part IV, see Figure 1 below.) At least three characteristics generally define these powers as resource-independent.

The first, and most important, characteristic is that these powers—in theory, at least—are costless. That is to say, the resource-independent powers are powers that the president, in principle, could exercise personally, using only his salary and perhaps access to a computer and office supplies. In a celebrated essay on the presidential veto, Charles Black asked, “To what state could Congress, without violating the Constitution, reduce the President?”<sup>131</sup> Black answered:

I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer the mail; that is where one appropriation bill could put him, at the beginning of a new term. I saw this man as negotiating closely with the Senate, and from a position of weakness, on every appointment, and as conducting diplomatic relations with those countries where Congress would pay for an embassy. But he was still vetoing bills.<sup>132</sup>

Black’s observations capture the veto’s fundamental independence from public resources provided for its support. Yet a humbled president such as Black imagined would be doing other things too. From his desk, with no more than pen and paper, or perhaps laptop and cell phone, he could issue pardons and commutations, send nominees to the Senate (however weak the prospects of confirmation), sign commissions for appointees, fire executive officers who displeased him, and even issue otherwise lawful orders to military officers in the field. For that matter, such a president could demand opinions from cabinet secretaries, peruse the responses, order Congress adjourned or convened, and try her hand at drafting proposed legislation. As a practical matter, then, these are powers Congress cannot take away by stripping appropriations—for the simple reason that their exercise requires no appropriations.

This insight makes sense of Alexander Hamilton’s expectation in the *Federalist* that salary protection alone would guarantee the president’s institutional independence. In the minimal formal sense reflected by these powers’ costlessness, Hamilton was correct. Of course, under modern conditions, how well or even competently the president could exercise these powers without advice and assistance is a serious question. What is more, Hamilton’s account overlooks the president’s political vulnerability to funding denials that obstruct

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131. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 89 (1976).

132. *Id.*

asserted presidential priorities, whether or not the denials directly impact the president's constitutional functions. For both these reasons, these powers' costlessness is likely to be fictional in practice—a problem to which I will return shortly. Nevertheless, it is at least formally true that these powers require no public support beyond the president's salary, and this characteristic distinguishes them fundamentally from other authorities, such as war powers and law enforcement, that the president cannot even theoretically perform on his own.

A second, related feature of resource-independent powers is that the president need not rely entirely on public appropriations to obtain advice and assistance in exercising them. Presidents have long claimed authority to seek counsel from anyone they choose, whether within the government or outside of it.<sup>133</sup> Congress's authority under the Necessary and Proper Clause to structure the government may well permit statutory restrictions on any formal private staff to assist the president with official functions.<sup>134</sup> The Constitution's Appointments Clause, moreover, would preclude assignment to private parties of ongoing actual authority to make decisions or take actions in the government's name.<sup>135</sup> Within those bounds, however, the separation of powers likely supports some presidential authority to seek and obtain private guidance. Indeed, even apart from any such Article II authority, citizens' First Amendment right to petition the government should enable them to offer the president their views on proper discharge of those authorities he may exercise personally.

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133. See, e.g., Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3 (asserting presidential “prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities”); EDWARD S. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS 74 (Richard Loss ed., 1976) (discussing examples from Presidents Theodore Roosevelt and Herbert Hoover); see also *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 466 (1989) (noting “formidable constitutional difficulties” that would arise from limiting the president’s access to outside advice on nominations); *id.* at 488 (Kennedy, J., concurring) (indicating that applying disclosure requirements to outside group providing advice on judicial nominees would constitute “a direct and real interference with the President’s exclusive responsibility to nominate federal judges”); *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (“In making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside.”).

134. U.S. CONST. art. I, § 8, cl. 18. Applying this logic, OLC recently explained that under statutes governing White House appointments:

A President wanting a relative’s advice on governmental matters . . . has a choice: to seek that advice on an unofficial, ad hoc basis without conferring the status and imposing the responsibilities that accompany formal White House positions; or to appoint his relative to the White House under title 3 and subject him to substantial restrictions against conflicts of interest.

Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, 41 O.L.C. \_\_ (2017) (ms. at 14).

135. See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (interpreting the Appointments Clause to cover “any appointee exercising significant authority pursuant to the laws of the United States”).

A final important feature of the powers I classify as resource-independent relates to their structural function within the constitutional scheme. Although a completely tidy account of these powers' purposes may well be impossible (and would go beyond the scope of this Article), the powers identified above as resource-independent generally may be understood either as checks on the legislative branch or as guarantees of presidential control over the executive branch. As examples of checks, the president's veto and clemency powers seem intended at least in part to counterbalance Congress's authority to enact new laws and establish new federal crimes. Allowing Congress to eliminate or control these authorities would thus elide essential limits on Congress's own authority, rendering the president subservient to Congress in exercising powers designed to check Congress itself.

Other resource-independent powers instead guarantee a specified degree of presidential control over subordinate executive officials. The president may demand opinions in writing from executive officers, serves as "Commander in Chief" of the military, and (subject to Senate advice and consent) appoints ambassadors and other officers of the United States, including not only executive officials but also judges. To the extent the Constitution mandates these features of government organization, Congress's own legislative authority cannot validly override them. They are conditions the Constitution imposes on any executive apparatus Congress creates.

While it may be only a happy coincidence that resource-independent powers serve such checking and control purposes, it is nonetheless striking that all the powers identified above as resource-independent advance one or the other of these goals to some degree. In addition to the president's veto and pardon powers, the power to convene and adjourn Congress (within parameters prescribed in Article II) is in some sense a check on Congress's ability to do as it wishes. With respect to executive officers, the president's appointment power provides a key means of supervisory control over the executive branch. With respect to judges and other nonexecutive officers, it might better be considered a check on Congress, but in any event it constitutes a clear, textually assigned prerogative of the president under Article II. To the extent Article II gives the president an implied constitutional authority to remove executive officers, this power, too, constitutes a means of supervisory control over the executive branch. The one outlier may be the authority to recommend legislation, which does not directly check any power of Congress or enable supervisory control. But even this power provides a check of sorts on Congress's authority to set its own agenda (and indeed seems to have been included in the

Constitution to preclude arguments that such impositions on Congress are improper<sup>136</sup>).

Because these powers may be exercised personally by the president, because he is not dependent on public resources for their exercise, and because they exist to check Congress itself or limit the executive branch's institutional design, legislative efforts to control these authorities through appropriations restrictions present a problem of unconstitutional conditions. Much like legislation requiring waiver of free speech rights as a condition of public assistance, or federal legislation requiring state legislation as a condition of federal support, conditional support for resource-independent executive powers raises the question whether Congress's power to provide no resources at all entails the power to provide resources with strings attached. The proper answer to this question, however, depends on the nature of the funding condition and its impact on executive authority.

FIGURE 1: TAXONOMY OF EXECUTIVE POWERS

<u>Resource-Independent</u>		<u>Resource-Dependent</u>
<u>Checking Powers</u> Veto Pardon Convene/Adjourn Recommend Laws	<u>Supervisory Powers</u> Appointment Removal Demand Opinions Military Command (superintendence)	<u>Clear Examples</u> Military Command (use of force) Law Enforcement
<u>Foreign Relations Powers</u> Recognition of foreign sovereigns Reception of foreign diplomats		<u>Contested Example</u> Conduct of Diplomacy - making treaties - negotiating generally

### *B. Direct Restrictions*

We can begin with the easiest case: funding conditions or restraints that directly limit the president's exercise of resource-independent powers are per se invalid and may properly be disregarded by the executive branch (and courts).

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136. Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 40 Op. O.L.C. \_\_ (2016) (ms. at 4–5) (discussing the Clause's drafting history).

## 1. Direct Restrictions' Structural Invalidity

This category of direct restrictions includes two types of laws: (1) riders placed in appropriations bills that limit executive constitutional authorities, and (2) provisions conditioning the availability of appropriations on particular executive action. Both types of provisions effectively condition the availability of funds on acceptance of statutory constraints on the president's constitutional authority. Such provisions have been rare historically with respect to resource-independent powers—itsself, perhaps, an indication of their invalidity. But there are at least a few examples. During the troubled administration of President Andrew Johnson, for instance, Congress passed an appropriations rider requiring that all military commands be issued through “the General of the Army” (who was Ulysses Grant) and that this General could not be removed or assigned to other duties “without previous approval of the Senate”—limitations President Johnson (like many scholars since then) considered clearly unconstitutional.<sup>137</sup> More recently, during President Carter's administration, Congress blocked funding to effectuate certain pardons for Vietnam-era selective-service violators.<sup>138</sup> And in a recurrent provision, made permanent in 2007, Congress has conditioned funding for recess appointees' salaries on the president not selecting an appointee who was previously nominated for the position but rejected by the Senate.<sup>139</sup>

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137. Army Appropriations Act, ch. 170, § 2, 14 Stat. 485, 486–87 (1867); Barron & Lederman, *supra* note 55, at 984–86. Although most scholars appear to agree with President Johnson that these provisions were unconstitutional, *see, e.g.*, Barron & Lederman, *supra* note 55, at 986–88, substantial authority supports allowing Congress to vest particular responsibilities in particular offices, at least in the civil context. *See generally* Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705 (2007) (discussing this principle with respect to administrative law). Holding aside the limitations on presidential removal authority, it is not entirely clear to me why Congress's general authority over offices could not justify requiring issuance of all military commands through the army's top general (whoever that happened to be at a given time).

138. MAY, *supra* note 58, at 111–12.

139. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. D, tit. VII, § 709, 121 Stat. 1844, 2021 (2007), *reprinted in* 5 U.S.C.A. pt. III.D., ch. 55 note; *see also* President George W. Bush, Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act 2006, 41 WEEKLY COMP. PRES. DOC. 1800 (Nov. 30, 2005) (“The executive branch shall construe [a similar provision in an earlier bill] in a manner consistent with the President's constitutional authority to make recess appointments.”). Insofar as this provision conditions executive funding on the president not selecting an otherwise-eligible individual for a recess appointment, it directly infringes the president's recess appointment power. This provision, which directly targets the choice of appointee, might be distinguished from more general salary statutes through which Congress has asserted its views on the Recess Appointment Clause's proper overall scope. *See generally* Michael B. Rappaport, *Why Non-Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL'Y 889, 925–30, 944–49, 956–57 (2015) (discussing such statutes and their history).

Why are such restrictions and conditions unconstitutional? For the simple reason that honoring them would create a governmental structure different from the one the Constitution prescribes. As noted earlier, to the extent the Constitution requires direct presidential command of the military, or presidential authority to issue pardons with certain effects, giving effect to funding conditions that bring about different results cannot be consistent with the Constitution. The starkest example would involve the veto: Congress surely could not grant executive funding on condition that the president not exercise the veto, for this funding condition would eliminate a central, prescribed constraint on Congress's legislative power itself. To be sure, Congress (or particular congressional leaders) may be able to extract and enforce informal political bargains with these same effects. I will return to that issue below. But as a formal legal matter, direct funding conditions of this type cannot be binding, because it would defy the basic logic of separation of powers—the very reasons for separating executive and legislative authority—if Congress could abrogate these limits on its own authority as a condition of funding executive operations.

A judicial analogy may help illustrate this point. Whatever else it entails, the “judicial power” vested in the Supreme Court by Article III seems at a minimum to include authority to decide discrete cases within the Court's jurisdiction according to the Justices' best view of the law.<sup>140</sup> In principle, this power, like resource-independent executive authorities, is personal and costless; just as presidents could issue pardons, nominations, or military commands without help from Congress, judges in theory could decide cases using only the personal salary guaranteed to them by the Constitution. But precisely because the Constitution defines the Justices' office as entailing this resource-independent authority, conditioning other judicial resources—funds for, say, law clerks, court buildings, and staff—on the Justices ruling or not ruling in a particular way should equally offend separation of powers. Insofar as such conditions actually influence the Justices, they jeopardize the very institutional autonomy that the Constitution aims to provide by separating judicial from legislative power. On the other hand, even if the conditions fail to actually influence the Court's decisions, the conditions nonetheless place the Justices in a Catch 22 that degrades their institutional independence: either the Justices rule as Congress desired and compromise their own perceived autonomy and

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140. See, e.g., *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016) (“Congress could not enact a statute directing that, in ‘Smith v. Jones,’ ‘Smith wins.’”); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 439 (1992) (analyzing whether a statute violated Article III because it “failed to supply new law, but directed results under old law”).

legitimacy, or they rule against Congress's wishes and compromise their own branch's funding.

Precisely the same logic applies to resource-independent presidential powers. Like the judicial power to decide cases according to judges' best view of the law, constitutional powers that the president may exercise personally, without need for appropriated resources and as a check or constraint on Congress's own authority, are powers that call for independent personal judgment. Allowing Congress to restrict or condition funding with respect to these powers would thus compromise the very institutional autonomy the Constitution aims to provide by vesting those powers in the president in the first place. For that reason, moreover, loss of funding cannot be justified as simply a cost Congress may impose on exercising the president's power in a particular way. As in the judicial example, putting a president to this choice would itself compromise the autonomy of her office by forcing her to choose between degrading her own perceived independence and compromising the capacity of her own branch of government. Accordingly, presidential autonomy of judgment in exercising resource-independent powers is, no less than judicial autonomy of judgment with respect to legal cases, a condition the Constitution imposes on any funds Congress provides, not a power Congress may control through funding conditions of its own.

This view, at any rate, has long been asserted by the executive branch itself in explaining its objections to certain funding constraints. In 1860, for example, in the very first executive branch legal opinion addressing such conditions, Attorney General Jeremiah Black concluded that Congress could not condition military funding on a requirement that particular duties be performed by a particular military officer.<sup>141</sup> Whether or not the opinion's view of the Commander-in-Chief power was correct,<sup>142</sup> Black employed structural separation-of-powers logic to explain the condition's incompatibility with Article II. As his opinion explained, because "Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution," an appropriations condition attempting to do so would be "void" and "have no effect whatever."<sup>143</sup>

Attorney General William Mitchell employed the same structural logic in a 1933 opinion. "Congress," he wrote,

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141. Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468–69 (1860).

142. Again, it is not clear to me that Congress lacks authority to vest particular duties in particular military officers. See *supra* note 137.

143. 9 Op. Att'y Gen. at 468–69.



holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, *provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution.*<sup>144</sup>

Mitchell went on:

Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such practice were permissible, Congress could subvert the Constitution. It might make appropriations on condition that the executive department abrogate its functions.<sup>145</sup>

Mitchell thus asserted that a legislative veto provision in proposed funding legislation would be “void” if enacted.<sup>146</sup> By Mitchell’s logic, if the Constitution precludes vesting such authority in a House of Congress, then it likewise prevents Congress from achieving that result through conditional appropriations. Whatever bargains Congress may force on the executive branch through appropriations, it cannot compel the executive branch to give up its own constitutionally prescribed power to check Congress or control government operations. Such authorities are not the president’s to bargain away even if he wishes, so even if a president signs legislation imposing such limits, the conditions cannot be binding.

By this logic, furthermore, it should again make no difference whether the conditions are in fact effective—that is, whether the sums at stake are sufficient to actually coerce the president’s judgment. It is

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144. *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att’y Gen. 56, 61 (1933) (emphasis added); *see also* *Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att’y Gen. 507, 526 (1960) (“[I]t seems . . . plain that Congress may not use its power over appropriations to attain indirectly an object which it could not have accomplished directly.”).

145. 37 Op. Att’y Gen. at 61; *see also, e.g.*, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. \_\_ (2011) (ms. at 6) (“Congress may not . . . ‘use the appropriations power to control a Presidential power that is beyond its direct control.’”); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. \_\_ (2009) (ms. at 10) (indicating that Congress may not accomplish unconstitutional ends with the spending power); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 266 (1996) (“Broad as the spending power of the legislative branch undoubtedly is, it is clear that Congress may not deploy it to accomplish unconstitutional ends. Thus, . . . Congress may not use the spending power to infringe on the President’s constitutional authority.”); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5–6 (1981) (“Manifestly, Congress could not deprive the President of [the pardon] power by purporting to deny him the minimum obligatory authority sufficient to carry this power into effect.”); *Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att’y Gen. 230, 233 (1955) (“[Congress] may . . . impose conditions with respect to the use of [an] appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution.”).

146. 37 Op. Att’y Gen. at 66. Half a century later, the Supreme Court deemed legislative veto provisions invalid in *INS v. Chadha*, 462 U.S. 919, 956–58 (1983).

true that in some other contexts, most notably federal conditions on funding grants to states, the Supreme Court has required such a showing before deeming the condition invalid.<sup>147</sup> But such analogies are inapposite here. Conditioning even a dollar of funding on some prescribed exercise of a resource-independent executive authority violates separation of powers, because Congress lacks authority to create an executive apparatus in which such funding conditions are operative. The violation, in other words, is a matter of structure rather than effect. To employ a helpful distinction Mitchell Berman has drawn, the condition here is coercive in the sense of being wrongful rather than overbearing: the point is not that we may “excuse the coerced [here the president] for doing the thing the coercer [Congress] demanded,” but rather that we may “levy blame upon the coercer” for acting on an unconstitutional design.<sup>148</sup> In short, because direct funding conditions on resource-independent executive powers make the presidency into a different office from the one the Constitution defines, they are inconsistent with separation of powers and may be disregarded without consideration of their actual likely effect in practice.

Key Supreme Court decisions reinforce this view. In *United States v. Lovett*, the Court held that Congress could not impose an unconstitutional bill of attainder by means of an appropriations statute, any more than it could do so through ordinary legislation.<sup>149</sup> The statute in question denied appropriations for named federal employees’ salaries, thus effectively barring them from future federal employment—an action the Court viewed as punishment without trial in violation of the Bill of Attainder Clause.<sup>150</sup> As the Court explained, “[t]he fact that the punishment is inflicted through the instrumentality of an Act specifically cutting the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.”<sup>151</sup>

Likewise, in the important (if famously opaque) Reconstruction-era decision *United States v. Klein*, the Court disregarded a condition on appropriations for certain judgments because the Court understood the condition to deny effect to presidential pardons.<sup>152</sup> As the Court

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147. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012) (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.”).

148. Berman, *supra* note 79, at 41.

149. 328 U.S. 303, 313 (1946).

150. *Id.*

151. *Id.* at 316.

152. 80 U.S. 128, 147–48 (1871).

explained, “it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.”<sup>153</sup> Whatever else it means, *Klein* thus indicates that an unconstitutional limitation on the pardon power is no less invalid by virtue of being imposed as a funding constraint.

Even some key individual rights decisions follow the same logic. In *Legal Services Corp. v. Velazquez*, the Court held that Congress could not condition funding for indigent legal services on the funded lawyers’ refusal to advance certain legal arguments.<sup>154</sup> In the Court’s view, the condition infringed both the First Amendment and separation of powers by imposing a “serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.”<sup>155</sup> In terms of the structural logic developed here, the condition in *Velazquez* attempted to create attorneys who were not attorneys (because they could not fully represent their clients’ interests), and courts that were not courts (because their decisionmaking was artificially impaired by limitations on arguments presented to them).<sup>156</sup> As such, the condition violated structural limits on Congress’s appropriations power, much as the conditions in *Lovett* and *Klein* did in the separation-of-powers context.

Federalism coercion cases do not contradict these principles because they address a fundamentally different problem. The Supreme Court in fact said as much in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.* (“MWA”), a 1991 decision addressing whether Congress could conditionally exercise its authority to dispose of federal property so as to create an entity that defied separation-of-powers requirements.<sup>157</sup> As the Court explained there, the federalism decisions reflect the premise “that, absent coercion, a sovereign State has both the incentive and the ability to protect its own rights and powers, and therefore may cede such rights

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153. *Id.* at 148.

154. 531 U.S. 533, 537 (2001).

155. *Id.* at 544.

156. *Id.* at 544–46. *Velazquez* is notoriously hard to square with *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld funding constraints limiting government-funded doctors’ advice about abortions. *See id.* at 193 (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”). Whether or not the cases are ultimately reconcilable, *Velazquez* appears more relevant here insofar as the Court there understood legal services not merely as a form of private speech activity, but rather as a constitutional function with implications for the judiciary’s performance of its own constitutional role. *See* 531 U.S. at 546 (“The restriction imposed by the statute here threatens severe impairment of the judicial function.”).

157. 501 U.S. 252, 270–71 (1991).

and powers.”<sup>158</sup> In contrast, separation-of-powers limits of the sort addressed here—powers designed to check or limit Congress’s own authority—aim “to protect not the states but ‘the whole people from improvident laws.’”<sup>159</sup>

These observations highlight a key difference between separation of powers and federalism. Separation-of-powers limits, *MWAA* appears to suggest, involve an affirmative allocation of power within the federal government, such that allowing Congress to override the allocation through funding constraints would give Congress power to alter the prescribed constitutional structure. Spending-related federalism cases instead focus on preserving a meaningful residuum of state authority beyond the limited enumerated powers delegated to Congress. Given that federal and state authority often overlap, moreover, allowing states to accept noncoercive conditional federal funding grants may well advance rather than inhibit federalism values—particularly if the likely alternative is a direct federal spending program that cuts out state authority altogether. For all these reasons, federalism cases inevitably involve questions of degree—judging how far is too far—rather than any hard structural limit on federal power.

Of course, one might quibble with the Court’s coercion inquiry in the federalism context, and it is certainly possible that some federalism limits have the same hard-edged character as the resource-independent presidential authorities I address here. (It seems doubtful, for example, that Congress could condition federal funding to any degree on state authorities that themselves check or control federal authority, most notably state authority to select federal presidential electors<sup>160</sup> or send two Senators to Congress.<sup>161</sup>) Whatever the correct federalism analysis, the key point here is that direct funding constraints on other branches’ resource-independent authorities violate the constitutional separation of powers. Congress could not condition judicial funding on resolution of particular cases in a particular manner; such direct legislative manipulation of judicial decisionmaking would violate both due process and separation of powers.<sup>162</sup> By the same token, Congress cannot impose direct funding conditions on executive constitutional powers that do not require congressional resources for their exercise and that the Constitution assigns to the president as a constraint on Congress itself. As the executive branch has long

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158. *Id.* at 271.

159. *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

160. U.S. CONST. art. II, § 1, cl. 2.

161. *Id.* art. I, § 3, cl. 1; *id.* amend. XVII.

162. *Cf.* *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016) (“Congress could not enact a statute directing that, in ‘*Smith v. Jones*,’ ‘*Smith wins*.’”).

maintained, such funding conditions violate the basic structural logic of separation of powers and are per se invalid.

## 2. Why Explicit Legislation Differs from Informal Bargains

While this formal structural logic suffices to support executive disregard for direct constraints on resource-independent powers, some additional functional considerations reinforce this conclusion.

Unconstitutional conditions problems always present the puzzle why the power to provide no funds at all fails to include the power to provide funds with strings attached. Though sometimes framed as a question about whether the greater power to deny funds includes the lesser power to provide funds conditionally, here, at least, this framing seems flawed: manipulating a coequal branch with appropriations conditions may well be the greater power, as compared to providing no funds at all (and bearing the political costs of doing so).

At any rate, the puzzle in this context takes a particular form. Given Congress's discretionary control over appropriations, Congress (or particular congressional leaders) may assert considerable leverage over presidents by threatening spending to which they are politically committed. Modern presidents are in fact highly vulnerable to this form of leverage. In the public mind and the judgment of history, presidential success or failure today turns primarily on achievement of a policy agenda.<sup>163</sup> Yet congressional funding decisions may powerfully shape presidential capacity to deliver on policy promises. A cash-strapped Environmental Protection Agency ("EPA") may have little capacity to address climate change; nor could a barebones enforcement operation deliver a promised immigration dragnet or narcotics crackdown. Competitive, politically motivated presidents are thus vulnerable to congressional funding decisions that impact their ability to deliver promises, secure preferred policies, and achieve desired legacy objectives.<sup>164</sup> Even worse, insofar as the president's priorities are not Congress's own, congressional leaders may themselves incur no political cost for failing to support the president's agenda. As a result of these dynamics, presidents might well choose not to veto particular legislation, to appoint (or not appoint) a particular department head, or

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163. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 956–57 (2005) (“[M]odern presidents face a set of constituency-driven political incentives that require activist governance. . . . With Congress largely absent from the scene and media coverage fixated on presidential personality, the public’s opinion of the President, in turn, is closely tied to the perceived successes and failures of government generally.”).

164. Moe & Howell, *supra* note 27, at 136 (“Broadly speaking, . . . it is fair to say that most presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders.”).

to grant (or deny) a particular clemency request as part of an informal political bargain to secure funding for other presidential priorities.

Even if that is true, however, there are important functional reasons to treat enacted legislative conditions differently from such informal political bargains. For one thing, such explicit conditions are amenable to legal analysis and remediation in a way that informal political bargains are not. Much as a court would do in a comparable case, the executive branch can assess the condition's validity on its face and then perform a severance analysis to determine whether Congress would still have chosen to provide the funds had it known the condition would be disregarded. Remedying the violation thus requires no commandeering of unappropriated funds—a far graver violation of Congress's appropriations power.<sup>165</sup> The president need only judge that he may spend money Congress has appropriated without regard to the invalid condition.

In addition, in the case of an explicit funding condition, as opposed to an implicit political bargain, Congress's unconstitutional objective of controlling executive judgments is plain on the face of the statute. No inference from legislative history, no weighing of competing and overlapping legislative goals, is required; the legislation speaks for itself. As David Pozen has observed, courts have often been reluctant to define operative separation-of-powers doctrines in terms of subjective motivation, even if charges of constitutional “bad faith” are a pervasive feature of the Constitution's political enforcement.<sup>166</sup> But here the legislation is sufficiently plain that Congress's bad intent, such as it is, is objectively ascertainable from the face of the law.<sup>167</sup>

At any rate, and more importantly, allowing presidents to disregard conditions on resource-independent powers ultimately places the political burden of undermining executive independence where it belongs—on Congress, the branch seeking to usurp a rival branch's powers. Were presidents bound by all funding conditions, they could defend their independence of judgment only by vetoing all appropriations bills with conditions targeting their constitutional authorities. But a veto likely heightens the risk that the public will blame the president rather than Congress for any hardship resulting

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165. Cf. Dorf, *supra* note 129 (discussing issues surrounding judicially mandated spending).

166. Pozen, *supra* note 126, at 886–87. I have argued that looking beyond the face of a policy to presidential statements is generally improper in evaluating an administrative policy's legality. See Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1615 (2016).

167. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 543 (2016) (discussing possibility that “a statute exhibits an unconstitutional intent or purpose on its face”).

from a shutdown—a risk the president may be unwilling to take if nothing beyond an abstract presidential prerogative is at stake.

The modern practice of omnibus, kitchen-sink appropriations compounds this problem.<sup>168</sup> Even if the president's constitutional position is sound, vetoing multibillion-dollar legislation tangibly affecting millions of Americans to preserve an abstract executive authority would require a "stern virtue" indeed—or perhaps an obtuseness wholly inappropriate to the presidency.<sup>169</sup> Of course, the president alternatively could accept the legislation but nonetheless trigger a denial of funds by exercising his authority in the proscribed manner. But then the same problem of clouded accountability would reappear in different guise. Triggering the funding condition would risk centering blame on the president rather than Congress for any resulting funding cutoff. The president, after all, could have preserved the funds, and thus forestalled any resulting hardship to the public, simply by exercising the constitutional authority as Congress desired.

Allowing the president to disregard funding conditions shifts these political costs (such as they are) back onto Congress. If the president may rightfully disregard conditions on resource-independent powers, then Congress can control those powers only by engaging in political bargaining with the president. In other words, to extract a commitment to exercise such powers in some particular way, or for that matter to retaliate against a particular exercise of them, congressional leaders must threaten to withhold funding for important executive priorities altogether (whether or not Congress shares those priorities), even at the risk of prompting a presidential veto and a resulting government shutdown. Making good on such threats may then require Congress, rather than the president, to bear responsibility for any resulting hardship to the public. Accordingly, notwithstanding Congress's ultimate discretion over executive-branch funding, compelling Congress to exercise that authority in a generalized rather than targeted fashion may leverage the political costs of funding denials to protect, rather than undermine, the president's independence of judgment with respect to resource-independent executive authorities.

In sum, for functional as well as formal reasons, the now-entrenched executive practice of disregarding direct funding conditions on resource-independent powers is sound. Of course, this analysis presumes good faith: if presidents disregard funding conditions based on self-serving and unsupportable constitutional positions, then the

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168. For data and analysis on the rise of omnibus legislating, see GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* (2001).

169. See *THE FEDERALIST* NO. 73, *supra* note 40 (Alexander Hamilton).

practice could become extraordinarily dangerous—a problem discussed below in Section III.D. Before turning to that question, however, we should first address distinct problems raised by Congress’s adoption of indirect restrictions—restrictions that do not directly target executive authorities, but instead seek to influence their exercise by supporting them selectively.

### C. Indirect Restrictions

Funding restraints that target executive authorities indirectly rather than directly require a distinct and considerably more difficult analysis. The recent proviso denying funds for a White House “Climate Change Czar” (among other positions) is a key example in this category.<sup>170</sup> Through this condition, Congress imposed no direct constraint on the president’s exercise of any constitutional or statutory authority. Yet the provision was not pointless. By selectively denying funds for this position (and certain others), Congress presumably aimed to create friction with respect to presidential supervision of certain areas of executive policy that would not exist with respect to other areas. Another more common type of provision in this category interferes with the president’s authority to recommend to Congress “such Measures as he shall judge necessary and expedient.”<sup>171</sup> Appropriations legislation has often conditioned resources for particular agencies on the agency preparing (or not preparing) legislative recommendations with particular features.<sup>172</sup> Presumably, again, Congress’s goal in doing so is to shape the proposals the administration as a whole ultimately presents to Congress.

The executive branch has claimed authority to disregard such indirect funding restraints on executive authority, no less than direct ones.<sup>173</sup> Executive statements and legal opinions, however, have often

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170. *See supra* Section I.B.2.

171. U.S. CONST. art. II, § 3. Though framed as an obligation (the president “shall from time to time . . . recommend to [Congress’s] Consideration such Measures”), the executive branch has interpreted the Recommendations Clause to provide affirmative authority to recommend legislation (and indeed to recommend *only* legislation the president supports). *See* Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 40 Op. O.L.C. \_\_ (2016) (ms. at 3).

172. *See, e.g.*, Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, § 8010(b), 120 Stat. 1257, 1274 (2006); Agriculture, Rural Development, Food & Drug Administration, & Related Agencies Act, 2001, Pub. L. No. 106-387, § 730, 114 Stat. 1549, 1581 (2000); Department of Agriculture & Related Agencies Appropriations Act, 1967, Pub. L. No. 89-556, tit. I, 80 Stat. 689, 690 (1966).

173. *See, e.g.*, President Barack Obama, Statement, *supra* note 70, at 386–87; President George W. Bush, Statement on Signing the Department of Defense Appropriations Act, 2007, 2 PUB. PAPERS 1733 (Sept. 29, 2006); President William J. Clinton, Statement on Signing the



failed to grapple with key differences between direct and indirect funding restraints: the executive branch has simply presumed that restraints on support and advice from within the executive branch are no different from restraints on the president himself.<sup>174</sup> Yet the two types of laws are not equivalent. Direct restraints on executive authority present the question whether Congress may control the president's own action through its appropriations power. Provisions like the Climate Change Czar rider and legislation-drafting bans present the distinct question whether Congress may indirectly shape the exercise of resource-independent powers through selective or conditional support for those powers' exercise. Even if Congress (as I have argued) cannot directly condition funds on the president not supervising executive officers with particular goals, or not recommending certain legislation, Congress might nonetheless hold authority to influence those powers' exercise by funding advice and support with respect to some goals but not others—for a climate change czar, say, but not an energy-independence adviser, or for recommending legislation to cut taxes but not increase them.

Given Congress's general authority to structure the executive branch, any constitutional limit on such indirect restraints must be exceedingly narrow. While direct restraints (as argued earlier) violate the Constitution's basic structural requirements, indirect restraints instead involve balancing rival centers of power—the president's choice over how to exercise his own powers, on the one hand, and Congress's choice over whether to empower the president or reduce him to Charles Black's enfeebled apartment-dweller, on the other.

Here, then, in contrast to the direct conditions addressed earlier, the Supreme Court's federalism cases *do* provide a rough analogy: the analysis necessarily turns not on straightforward application of structural principles, but instead on judging when legislative action goes too far in manipulating executive judgments. Here, however, in contrast to the unsatisfactory “gun to the head” coercion standard articulated in federalism cases,<sup>175</sup> structural principles informed by past practice support a somewhat harder-edged *antimanipulation principle* for policing when Congress has gone too far in seeking

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Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, 3 PUB. PAPERS 2359, 2361 (Oct. 28, 2000); President Lyndon B. Johnson, Statement by the President Upon Signing the Department of Agriculture and Related Agencies Bill, 2 PUB. PAPERS 980, 981 (Sept. 8, 1966).

174. See Application of the Recommendations Clause, 40 Op. O.L.C. \_\_ (ms. at 6) (discussing examples without drawing this distinction).

175. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012).

influence over resource-independent executive powers.<sup>176</sup> I elaborate this point here by first explaining how indirect conditions may shape executive conduct and then addressing, in turn, limitations on close White House advisers and limitations on other executive branch personnel.

### 1. Why Indirect Conditions Have Bite

A first step in coming to grips with indirect conditions is to consider more carefully why and how selective support for executive functions could influence presidential decisionmaking. This question brings us back to American constitutionalism's general inattention to resources. Much as individual liberties in principle exist independent of resources available for their exercise, so too are the powers I have identified as resource-independent theoretically costless—they could be exercised personally by the president without any resources beyond the president's own salary. The resource-independence, moreover, helps define their character as built-in features of the office that Congress cannot abrogate. Nevertheless, just as individual resources may powerfully shape expressive opportunities, so too, under modern conditions, at least, Congress's control over executive resources may give it considerable leverage over even resource-independent powers.

To take the simplest example, the president in principle could read each bill Congress passes and decide on his own whether to sign it or return it to Congress. In that formal sense, as noted earlier, even Charles Black's hamstrung president would retain his full veto power. In reality, however, given the manifold demands on a modern president's time, just reading the hundred- or thousand-page bills that Congress routinely passes is probably beyond even the most capable president's capacity. Furthermore, even if the president did read every bill personally, he would likely have trouble making much sense of them without expert guidance on the legal and policy context in which the new law would operate. In practice, forming an intelligent judgment

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176. In the federalism context, courts have further required that any condition be "germane" to the purposes for which spending is provided. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 208 (1987). No such requirement is appropriate in the separation-of-powers context. On the one hand, for reasons addressed earlier, direct conditions on resource-independent authorities will always be invalid, even if the funding *is* germane. On the other hand, Congress is free to impose even nongermane conditions on the resource-dependent powers discussed below: if the only way to stop a war or halt an oppressive law enforcement campaign is to shut down the government entirely (including unrelated agencies), Congress's authority to exercise such leverage is a necessary consequence of its near-total discretion over military and law enforcement resources. As to the category of conditions discussed here—indirect conditions on resource-independent powers—the conditions at issue will always be germane because their potentially coercive impact relates to their impact on the precise executive authorities at issue.

about the political and policy implications of new legislation requires access to trusted advice and support.

The veto is hardly unique in this respect. These same problems apply equally to other executive powers. Surely, as Justice White once observed, Congress could not defeat the pardon power by denying the president pen and paper for its exercise.<sup>177</sup> The per se invalidity of direct funding restraints assures that result. But the president requires more than pen and paper to wield his clemency powers effectively—he requires help and support from trusted advisers who can vet applications and identify worthy individuals. The same is true for supervisory control over the executive branch by virtue of presidential removal authority, or issuance of lawful military orders as Commander in Chief.<sup>178</sup> All these examples thus raise the question, presented squarely by the climate change and legislation-drafting riders, of what right the president holds to demand assistance from either White House staff or other executive branch personnel in performing resource-independent functions.

## 2. Constraints on White House Personnel

Notwithstanding their potential significance, any presidential authority to disregard indirect funding restraints must be narrow. After all, even apart from its appropriations power, Congress generally holds authority to create particular offices and vest them with particular powers (though key positions are then presumptively subject to Senate advice and consent under the Appointments Clause).<sup>179</sup> Congress also may enact “all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>180</sup>

Given these authorities, most congressional limits on White House personnel will likely be proper, as will congressional decisions to set aggregate funding levels for particular broadly defined functions. To draw another judicial analogy, just as Congress could provide funds for

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177. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (questioning whether “Congress could impair the President’s pardon power by denying him appropriations for pen and paper”).

178. *See In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) (“The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.”).

179. *See Strauss*, *supra* note 137, at 696–97 (arguing that the president often only has authority “to oversee the agencies’ decision processes,” not to directly exercise those agencies’ authorities).

180. U.S. CONST. art. I, § 8, cl. 18.

one, four, or fifteen law clerks to support each judge, Congress might provide a substantial budget for internal White House advisers or no budget at all. Likewise, much as it might offer judges greater support for death penalty cases or complex litigation than for run-of-the-mill civil suits, Congress could provide more lavish funding for the White House National Security Staff than for White House communications personnel, or for pardon vetting as opposed to social visits.

For that matter, virtually any affirmative provision of support, however narrowly focused, would likely be valid. By way of illustration, suppose that Congress, instead of banning any specific climate change position for President Obama, provided specific funding for a climate change adviser to whisper sea-level statistics in President Trump's ear. Congress presumably could not force the President to hear advice he does not wish to receive, but, by the same token, making extra resources available for advice on particular subjects should not prevent the President from consulting with others or making up his own mind based on different advice.<sup>181</sup> As further examples, suppose that Congress provided resources earmarked for vetting pardon applications for nonviolent drug offenders, or specifically to assist in drafting tax-cut legislation. To the extent these funding priorities aligned with the president's, they would serve only to enhance his resource-independent powers to pardon and recommend legislation. To the extent the president's priorities were different, the president could still make up his mind independently, spurning this staff's advice and leaving them to scribble ineffectually in their offices or hobnob by the water cooler. Precisely because resource-independent powers are resource-independent, and thus capable of performance by the president on his own using whatever guidance he can find, affording him advice and support he does not desire should never be considered unconstitutionally constraining.

Funding restraints on White House personnel could conceivably cross a constitutional line only if they have the opposite effect—the effect not of enhancing some presidential capacities relative to others, but instead of materially obstructing the president from making a judgment he would otherwise choose to make. What sort of law might have such manipulative effect? The only realistic example would likely be an appropriation that provided general funding for close personal advisers but nonetheless precluded their use to achieve specific narrow outcomes desired by the president. Suppose, for example, that Congress provided White House appropriations that denied any use of immediate presidential staff to approve certain types of cases for clemency,

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181. See *supra* Section III.A.

recommend legislation with certain goals, or coordinate administrative actions advancing some specific policy (such as climate change mitigation). Such limitations could materially obstruct the president's preferred course of action, and might well also obscure whether the president or Congress was responsible for the decision in question.

Another case analogy may be helpful. In *Legal Services Corp. v. Velazquez*, recall, the Supreme Court struck down on First Amendment grounds a provision barring publicly funded counsel from advancing certain legal arguments.<sup>182</sup> Much as that restriction amounted to funding lawyers who were not true lawyers (and by extension courts that were not true courts),<sup>183</sup> imposing narrow exclusions on general support for presidential functions could amount to providing advisers who are not really advisers. Just as the client in *Velazquez* might still go elsewhere for help with the restricted arguments, the president could still go elsewhere for help with the restricted activities. But both conditions are manipulative in the sense that they cut off the most natural source of help, given Congress's baseline decision to fund lawyers or advisers in the first place.<sup>184</sup> Placing such targeted obstacles in the way of specific presidential goals could thus offend separation of powers—much as it could offend judicial independence, to offer yet another analogy, to provide general funding for judicial law clerks but bar them from helping with opinions narrowing or overturning *Roe v. Wade* or *Citizens United* (or whatever case Congress wished to entrench).<sup>185</sup>

Congress, to my knowledge, has never attempted a restriction on White House funding that transgressed this particular boundary, though it arguably came close in the climate change rider. In his signing statement on the climate change provision, President Obama objected

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182. 531 U.S. 533, 536–37 (2001).

183. *Id.*

184. *Cf. id.* at 546:

It is no answer to say the restriction on speech is harmless because . . . [the government-funded] attorneys can withdraw. This misses the point. The statute is an attempt to draw lines around the . . . program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.

185. *Cf. Dorf, supra* note 129, at 331 (“Congress probably has the power to cut the federal courts’ budget for paying law clerks and secretaries, but a serious constitutional question (whether or not justiciable) would be raised were Congress to cut such funding in retaliation for an unpopular judicial decision.”). The boundary between affirmative support and negative restraint may of course be difficult to draw at the margins. Earmarking support for numerous functions might amount in the aggregate to providing general support with narrow exceptions. The distinction nonetheless seems helpful if we presume, as seems likely, that Congress will continue to provide general authority for presidents to place trusted close advisers on the public payroll. *See* 3 U.S.C. § 105 (2012).

to the provision insofar as it would “significantly impede the President’s ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers.” Such impediments, President Obama asserted, would “violate the separation of powers by undermining the President’s ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed.”<sup>186</sup> President Obama nevertheless complied with the provision,<sup>187</sup> and he was correct to do so. Far from materially obstructing the president’s exercise of supervisory powers over the executive branch, the rider left the president free to employ other advisers to accomplish the same goals. The president, moreover, appeared to have no trouble at all pursuing desired objectives. After all, President Obama’s EPA promulgated ambitious regulations aimed at curbing climate change, and the President himself claimed political credit for doing so.<sup>188</sup>

In any future fights over similar provisions, executive branch lawyers, courts, and commentators should look to Obama’s actual practice—his deeds rather than words—in assessing the legality of defiance. As President Obama implicitly recognized, separation of powers gives presidents no license to disregard funding limits that create at most some additional administrative friction in coordinating executive policies that the president nonetheless retains ample means to pursue.

### 3. Constraints on Other Executive Branch Personnel

A last question to consider here involves access to personnel located outside the White House in particular executive agencies. Can presidents repurpose such personnel to assist with their resource-independent functions? In other words, could the president treat the entire administrative apparatus of the government as available for assistance with such tasks, without regard to purposes for which those funds were originally provided? As we shall see, the question is important in part because presidents have claimed precisely this

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186. President Barack Obama, Statement, *supra* note 70, at 387. President Trump later objected to the same provision (carried forward in an omnibus continuing resolution) in similar terms, though it seems unlikely he would have wanted to employ the proscribed positions in any event. Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3.

187. See *supra* Section I.B.2.

188. See Adam Firestone, *Don’t Throw Dirt on Its Grave Just yet: The Clean Power Plan*, GEO. ENVTL. L. REV. ONLINE (Feb. 15, 2017), <https://gehr.org/2017/02/15/dont-throw-dirt-on-its-grave-just-yet-the-clean-power-plan/> [<https://perma.cc/46QU-CR5G>] (discussing the Obama Administration’s Clean Power Plan).

authority with respect to conduct of diplomacy.<sup>189</sup> Yet presidents have claimed the same authority to employ personnel as they see fit in other areas too; the Recommendations Clause objections mentioned earlier are one common example.<sup>190</sup>

On this issue, the Constitution in fact provides some specific guidance. Under Article II's Opinions Clause, the president "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."<sup>191</sup> This provision, like other resource-independent powers addressed earlier, properly constitutes a structural feature of separation of powers that Congress cannot override through conditional appropriations. Just as Congress cannot condition executive funding on abrogation of the veto or appointment power, so too can it not bar use of appropriated funds to provide advice to the president in accordance with the Opinions Clause. Any such condition would "require operation of the Government in a way forbidden by the Constitution,"<sup>192</sup> something Congress cannot do under the structural logic of separation of powers developed earlier.<sup>193</sup>

Nevertheless, the Opinions Clause does not fully resolve the issue. In effect, protecting access to advice from department heads only replicates at a lower level of the bureaucracy the same question of staff support that arises with respect to White House personnel. Even if it cannot deny the president the personal guidance of department heads on matters relating to their duties, Congress might nonetheless deny those heads any support from their own staff. But can it do so even if the staff are effectively assisting the president with a veto decision, pardon request, or legislative recommendation?

Once again, given Congress's substantial authority to structure the executive branch and assign particular duties to particular offices, any constitutional limit on such funding restraints must be exceedingly narrow. Nevertheless, the antimanipulation principle identified above with respect to White House advisers might suggest a related limit here. Despite Congress's broad authority to limit use of resources by particular government offices, Congress might nonetheless infringe

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189. Presidents have sought such advice from government personnel in other areas, too. One important historical example is President Franklin Roosevelt's formation of an informal "Negro Cabinet" of inferior officers within the government who could advise him on race relations. REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 37 (2015). Presidents today routinely form interagency working groups by executive order.

190. See *supra* notes 172–173 and accompanying text.

191. U.S. CONST. art. II, § 2, cl. 1.

192. *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 61 (1933) (emphasis added) (objecting to congressional committee veto).

193. See *supra* Section III.B.

upon presidential authority if funding constraints barred the president from seeking even *de minimis* assistance from officials within the executive bureaucracy who are best positioned, by virtue of their other responsibilities, to provide advice on a particular narrow matter. Denying any use of Justice Department resources to advise the president on pardon requests, for example, might impermissibly impair the president's resource-independent pardon authority if it meant the president could not seek guidance from prosecutors best positioned to provide perspective on a particular applicant's case. It might also, once again, cloud public accountability with respect to whether Congress or the president bears primary responsibility for the president's ultimate action (or inaction).

Here, furthermore, analogous principles regarding appointment of officers could help demarcate the bounds of proper presidential defiance of funding constraints. In the Appointments Clause context, long-standing doctrine holds that while Congress may add duties to an existing office, any such additional duties must be germane to the office's existing functions and cannot fundamentally alter the office's character.<sup>194</sup> Under this interpretation, adding nongermane or exceptionally significant duties violates the Appointment Clause because it deprives the president or his department heads of their constitutional authority to appoint individuals performing such duties. Instead, by adding the duties to the existing office, Congress in effect appoints the individual who performs them.

A parallel doctrine should limit presidential addition of duties to existing offices. Insofar as presidents hold preclusive authority to exercise particular resource-independent powers and gain advice regarding their performance, they should likewise hold preclusive authority to assign responsibility for advice regarding those powers to subordinate personnel within the executive branch. But this presidential assignment power must be limited, just as Congress's power of office-alteration is limited. If Congress cannot fundamentally alter the character of offices without infringing on presidential appointment powers, then by the same token the president cannot fundamentally alter the character of official responsibilities without

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194. See, e.g., *Shoemaker v. United States*, 147 U.S. 282, 301 (1893) (holding that no new appointment is required when a statute confers "additional duties, germane to the offices already held by [the officers]"); see also *Weiss v. United States*, 510 U.S. 163, 196 (1994) (Scalia, J., concurring in the judgment) ("'[G]ermaneness' is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause—i.e., the President, the Courts of Law, and Heads of Departments."); The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 157–59 (1996) (elaborating on the *Shoemaker* germaneness analysis).



infringing on Congress's power to define offices and structure the executive branch. Presidents, then, may seek guidance regarding their resource-independent functions from subordinate executive branch personnel, but only insofar as the assistance the president requests is either de minimis or germane to the office's existing functions and, further, does not fundamentally alter the office or impair its functions.

This understanding could make sense of the executive branch's otherwise-perplexing Recommendations Clause objections. Presidents, as noted, have routinely raised Recommendations Clause objections to provisions restricting particular agencies' formulation of legislative proposals.<sup>195</sup> Such objections are mistaken insofar as they equate agency resources with the president's own authorities. Yet the executive view might nonetheless be justified insofar as the restrictions in question effectively deprived the president of access to the personnel best positioned, by virtue of their other responsibilities, to advise the president about legislative recommendations on some particular topic. On this theory, for example, a provision forbidding use of any EPA resources to help formulate legislative proposals to strengthen EPA-enforced environmental laws, or still worse to help formulate EPA's own budget recommendations, might impermissibly obstruct the president's authority to recommend such legislation as he considers appropriate. The problem with such appropriations restrictions is not that they directly impair any resource-independent authority of the president, but rather that they could materially alter the president's own independent judgment about what legislation (if any) to recommend.

So understood, executive objections to such provisions need not imply that presidents hold preclusive authority to call on the entire capacity of the executive branch to assist them with whatever presidential functions they deem appropriate. Given Congress's broad authority to structure the executive branch and allocate resources within it, any such view would be untenable.

#### *D. The Problem of Article II's Ambiguity*

Presidents, then, may ignore direct funding constraints on their resource-independent powers, and they may further disregard some selective funding arrangements that risk manipulating their judgments and clouding proper accountability for particular exercises of resource-independent presidential powers. In elaborating this framework so far, however, my analysis has begged an important question: How do we

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195. See *supra* note 173.

determine whether the president's claimed power is valid—and can we trust the executive branch to make such determinations credibly?

While the executive authorities I have emphasized so far (the veto, appointment, and clemency) are relatively unambiguous in at least their core applications, Article II in general is notoriously unclear. To list just a few important examples: the Constitution fails to address explicitly the scope of presidential removal authority over executive officers; it leaves the precise boundary between the president's authority as Commander in Chief and Congress's power to "declare war" to political contestation; and it assigns certain diplomatic authorities to the president without specifying the full extent of presidential authority over foreign policy. These ambiguities open the door for even conscientious presidents to adopt self-serving, expansive views of their own powers—views that may then support disregarding funding constraints imposed by Congress to control those powers. Indeed, scholars and judges have worried that, given the president's superior power of initiative and Congress's collective-action problems in responding, such expansive presidential positions may tend to prevail in practice over competing interpretations.<sup>196</sup>

Resolving all disputes about the content of Article II powers would go well beyond this Article's scope; my aim here is only to provide a framework for assessing when otherwise valid claims of executive authority may justify disregarding funding constraints.<sup>197</sup> Ultimately, no system of separated powers can survive if the executive branch—the branch of government with guns and handcuffs—fails to value legal compliance and incurs no political cost for adopting legally indefensible positions. Nevertheless, in this particular context, at least three constraints should help discipline overbroad assertions of executive authority as a basis for disregarding funding constraints.

First, as emphasized at the outset, Congress holds ultimate discretion over whether to provide funds at all for executive functions and priorities. This ultimate control over public resources gives

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196. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2605 (2014) (Scalia, J., concurring) ("In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch."); Moe & Howell, *supra* note 27, at 145 (discussing structural incentives for presidents to "behave imperialistically"). For an argument that congressional silence in the face of executive action should carry little weight in constitutional interpretation, see Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211, 1212 (2013).

197. For some noteworthy recent attempts to sort out the proper bounds of executive power in general, see, for example, KRENT, *supra* note 95; SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015); and McConnell, *supra* note 12.

Congress powerful leverage to discipline executive action—if Congress chooses to exercise it. To be sure, allowing presidents to disregard funding constraints heightens the political burden on Congress in resisting executive action. Indeed, as I argued earlier, shifting political costs in this manner helps protect separation of powers when executive claims are valid.<sup>198</sup> Yet history suggests Congress nonetheless has the wherewithal to resist when the executive branch oversteps proper bounds. In several examples addressed already—including the recent Climate Change Czar rider and the requirement that President Johnson’s orders go through General Grant—presidents ultimately complied with appropriations restrictions despite voicing constitutional objections.<sup>199</sup> I will highlight other such examples below. At the same time, moreover, the vice of overbroad assertion may run the other way too. At least when the executive branch has given clear indication of its intent to disregard a funding limitation on constitutional grounds, Congress’s choice nonetheless to enact the provision cannot always be taken at face value. It could amount to mere grandstanding in support of positions it knows would be unpopular if implemented, but for which it knows the president will spare it accountability.

Given this risk of overclaiming on both sides, assessments of practice in this context should generally focus on outcomes—what the government ultimately did—rather than self-serving initial assertions by either branch.<sup>200</sup> With that focus, however, historic examples suggest that Congress’s power of the purse can be effective in shaping executive behavior, notwithstanding the executive branch’s superior institutional capacity to articulate and defend broad views of its power.<sup>201</sup>

In addition to Congress, courts may provide a second key constraint on executive action. Appropriations restrictions on executive

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198. See *supra* Section III.B.2.

199. For Obama’s compliance on climate change, see *supra* Section I.B.2. On Johnson’s compliance with the army appropriations rider, see MAY, *supra* note 58, at 91.

200. Curtis Bradley has recently discussed how “differing justifications for [relying on practice in constitutional interpretation] yield potentially different answers” to whether “the only relevant consideration is [governmental institutions’] actual behavior.” Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 70 (2017). Bradley argues that a justification rooted in “Burkean consequentialism” could support this view, while other possible justifications may not. *Id.* at 70–72. While full consideration of this important point goes beyond the scope of this Article, Burkean aversion to disruption of entrenched practical understandings is likely the most compelling justification for reliance on practice here. In any event, my point is simply that focusing on outcomes rather than assertions may discipline reliance on practice in contexts, like those considered here, where the two political branches hold divergent asserted views and Congress’s leverage over appropriations may enable it to impose its preferences, despite contrary executive assertions.

201. For discussion of some examples, see HOWELL, *supra* note 27, at 120–26; and Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT’L L. 517, 518 (2013).

authority may sometimes present nonjusticiable controversies. But that will not always be true. In *Lovett*, for example, government employees deprived of their salaries could sue to challenge the funding constraint imposing this deprivation.<sup>202</sup> Similarly, in a recent decision, *United States v. McIntosh*, the Ninth Circuit held that individual defendants could invoke current appropriations limits on marijuana enforcement as a defense to federal prosecution.<sup>203</sup> Rejecting arguments that the appropriations rider's meaning and implications were nonjusticiable, the court held: "When Congress has enacted a legislative restriction like [this rider] that expressly prohibits [the Justice Department] from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds."<sup>204</sup>

As *McIntosh* illustrates, legislative appropriations restrictions may sometimes enable courts to enforce otherwise nonjusticiable limits on executive power. For institutional reasons, courts have been reluctant to police some limits on executive authority. War powers is the paradigm case. Whatever limits the Constitution places on presidential use of military force, courts have often treated those limits as nonjusticiable "political questions" or held that litigants lacked standing to enforce them.<sup>205</sup> I have argued that analogous institutional considerations explain courts' general reluctance to intrude on executive enforcement policies.<sup>206</sup> Lacking principled guideposts for assessing executive conduct, and fearful of assuming responsibility for weighty matters of personal or national security, courts have largely left enforcement of limits on these authorities to the political process.

*McIntosh* demonstrates, however, that articulating specific funding constraints in appropriations legislation may resolve this institutional difficulty and enable a broader judicial role. Under the Ninth Circuit's reasoning, defendants in future enforcement suits should likewise hold standing to enforce congressional limits on

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202. *United States v. Lovett*, 328 U.S. 303, 313 (1950).

203. 833 F.3d 1163, 1179 (9th Cir. 2016).

204. *Id.* at 1172–73.

205. *See, e.g., Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015) ("[A] question is 'political' and thus nonjusticiable when its adjudication would inject the courts into a controversy which is best suited for resolution by the political branches."); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) ("It is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action."); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46–52 (D.D.C. 2010) ("Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the[se] types of complex policy judgments . . . the Court finds that the political question doctrine bars resolution of this case.").

206. Price, *supra* note 166.

available enforcement resources.<sup>207</sup> By the same token, individual service personnel, if not also other parties, might seek to enjoin spending in pursuit of military objectives or activities that Congress has specifically banned.<sup>208</sup> For that matter, courts might litigate defiance of congressional funding limits in the context of a future prosecution for violating the Anti-Deficiency Act.<sup>209</sup> In all these contexts, courts would not confront general questions about ultimate limits on executive power. Instead, they could consider the more focused and manageable question whether the executive branch defied specific limits for which Congress, rather than the courts, would ultimately be politically accountable.

These examples bring us to a final important constraint. The analysis developed so far applies only to resource-independent powers—powers that could in theory be exercised personally by the president. Those powers may be consequential, particularly when magnified by the support of advisers and assistants within the White House and beyond. Yet they do not entail direct application of the government’s coercive and destructive capacities. It is one thing for a president to claim authority to appoint a particular White House adviser or grant a particular pardon despite statutory funding constraints on doing so. It would be quite another thing for a president to order military strikes or arrests in violation of specific limits on available public resources. These forms of executive action, to which I now turn, require an entirely different analysis, one that should preclude almost any assertion of authority to defy appropriations limits.

#### IV. RESOURCE-DEPENDENT EXECUTIVE POWERS

Moving beyond powers I have identified so far as resource-independent, we arrive finally at the big-ticket items in the executive toolkit: war powers, law enforcement, and foreign policy. Funding conditions are most common, and most consequential, in these areas, and by the same token any executive practice of disregarding such conditions is most worrisome. Yet how the power of the purse relates to

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207. 833 F.3d at 1179.

208. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000) (Silberman, J., concurring) (addressing the possibility that “military personnel might be able to challenge a President’s arguably unlawful use of force”); *id.* at 37 (Tatel, J., concurring) (disputing the assertion that war’s legality would be nonjusticiable if raised by party with standing); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) (entertaining challenge to authorization for Vietnam War by service personnel but dismissing suit as political question).

209. *See* *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. 33, 54 (2001) (canvassing judicial case law and concluding that the ADA forbids exceeding any specified funding limitation in agency appropriations).

these executive authorities has remained undertheorized. The groundwork laid so far exposes why these executive authorities require a distinct analysis.

### *A. Defining the Category*

While resource-independent powers, rather like judicial decisionmaking, entail an exercise of judgment that is at least theoretically costless, the same is not true of war powers, law enforcement, or diplomacy. In principle, the president could ride out on horseback, machine gun or handcuffs in hand, to defend the nation or enforce its laws. He might use his own cell phone or private jet to engage in personal diplomacy. But such efforts would not get far. Effective warmaking requires weapons and armies; law enforcement requires police and prosecutors; and diplomacy requires, well, diplomats. These are powers, then, where congressional control over resources should have real bite, as a simple matter of text and structure.

What is more, as compared to resource-independent powers like the veto, clemency, and appointments, the normative case for an appropriations constraint on executive action here is far stronger. Whereas powers addressed earlier serve functionally to check congressional authority or guarantee institutional control over the executive branch, establishing a separate branch with authority to pursue legal violations, deploy military force, and engage in diplomatic negotiation might serve principally to enable more effective achievement of congressional policy objectives, and not to impose an independent constraint on Congress's own powers. At any rate, unlike resource-independent powers, which involve an isolated exercise of personal judgment by the president, these powers involve outward projection of affirmative government power. As such, these powers themselves may require some external congressional check, particularly under modern conditions of pervasive delegation and substantial standing government capacity.<sup>210</sup> After all, these authorities determine who is killed or maimed by the U.S. military, which suspects are arrested and imprisoned by the U.S. government, and what positions the United States takes in diplomatic exchanges. Even apart from textual and structural reasons to recognize greater congressional appropriations control, such important matters of national destiny should require congressional as well as executive buy-in.

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210. See *supra* Section I.A.

Here, then, a different framework is required. The question ultimately is what irreducible degree of discretion the Constitution guarantees the executive in deploying resources provided by Congress. With respect to war powers and law enforcement, this irreducible discretion should be exiguous. Insofar as enabling adaptation of general policies to particular circumstances is a key functional reason for separating legislative and executive power, presuming some irreducible executive authority to address unforeseen exigencies with available resources may be a natural entailment of separation of powers. On the other hand, however, the normative and historical case for preserving a congressional check on executive use of these powers—the means of governmental coercion and destruction—is exceptionally powerful. Accordingly, congressional authority to curtail executive discretion with respect to use of military force and law enforcement through funding conditions should be near total.

To continue elaborating unconstitutional-conditions analogies, the executive role with respect to these powers more closely resembles government speech than either an impermissible condition on private freedom or a coercive condition on federal funding for states.<sup>211</sup> Like an employee speaking for the government, the core executive function with respect to war powers and law enforcement is to carry out Congress's program using resources Congress has provided. As a result, when constrained by statutory funding directives, presidents will generally have no sound basis to complain either about burdens on their rightful powers or coercion of some independent judgment guaranteed to them by the Constitution.

Diplomacy then presents a difficult intermediate case. Presidents have effectively treated diplomacy as a personal, resource-independent authority, and they have some basis for doing so: particularly in our era of cell phones, video conferencing, and rapid air travel, presidents can and do communicate directly with foreign leaders on behalf of the United States. Yet this personal capacity is even more illusory than in the case of resource-independent authorities like the appointment power and veto. Effectively representing the United States around the world and negotiating agreements to protect our interests requires resources and staff, and with such resource-dependence should come some congressional control over how such resources are deployed. Some intermediate framework is therefore necessary. Drawing off my earlier analysis of selective support for

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211. *See, e.g.,* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”).

resource-independent powers, I attempt here to sketch possible limits on presidential discretion over diplomatic resources, as well as some hard boundaries to what forms of foreign policy action should fall within the president's presumed power over diplomacy in the first place. (For a chart summarizing these conclusions, see Figure 2 below.)

The analysis below begins by addressing some historic examples often invoked to support broad executive power of initiative today. These examples, I argue, reflect an outdated approach to the fiscal constitution that Congress has validly abolished. With this underbrush cleared, the analysis proceeds to address war powers, law enforcement, and diplomacy in turn.

FIGURE 2: TAXONOMY OF FUNDING RESTRICTIONS

<u>Type of Power</u>	<u>Type of Restriction</u>	<u>Legal Framework</u>	<u>Case Law Analogue</u>
<b>Resource-Independent</b>	Direct	Invalid	Improper entity ( <i>MWAA</i> )
	Indirect (selective support)	Antimanipulation	Federalism ( <i>Velasquez/ NFIB v. Sebelius</i> )
Diplomacy	Restricted or conditional support		
<b>Resource-Dependent</b>			Valid

### *B. Congressional Repudiation of Presidential Heroism*

At a high level of abstraction, presuming discretion in the exercise of coercive or destructive governmental capacities reflects a basic functional distinction between legislative and executive power: as the branch of government that never sleeps, the executive often must address evolving or unforeseen circumstances using tools provided in advance by general legislation. With respect to funding questions, this distinction has led to recurrent debates throughout American history about the degree of flexibility executive officials should presume in applying the strict letter of appropriations laws. Alexander Hamilton argued in 1795, for example, that “[t]he business of administration requires accommodation to so great a variety of circumstances, that a



rigid construction would in countless instances arrest the wheels of Government.”<sup>212</sup> In contrast, President Jefferson and his Treasury Secretary Albert Gallatin advocated tighter legislative control.<sup>213</sup> Even Gallatin acknowledged, however, that “it is impossible for the Legislature to foresee, in all its details, the necessary application of moneys, and a reasonable discretion should be allowed to the proper executive department.”<sup>214</sup> Although a statute now requires specific construction of appropriations statutes,<sup>215</sup> recent debates over the Guantanamo prisoner swap,<sup>216</sup> or for that matter spending for subsidies under the Affordable Care Act,<sup>217</sup> show that this basic problem of administrative flexibility and statutory construction remains very much with us.

As concerns the particular focus of this Article, however, the key historical examples involve presidential actions undertaken without any supporting appropriation. In fact, such towering figures as Presidents Washington and Lincoln undertook significant military or law enforcement operations without any appropriation to support their activity. But while these examples formed a centerpiece of Sidak’s argument for broad executive spending authority,<sup>218</sup> they in fact carry no such implication. On the contrary, in key examples, both presidents sought (and received) after-the-fact congressional ratification, thus at least implicitly acknowledging Congress’s ultimate control over resources for such executive functions. Since their tenure, moreover, Congress has tightened legislative controls on such anticipatory expenditures, while at the same time greatly expanding the

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212. Alexander Hamilton, Explanation (Nov. 11, 1795), *in* 19 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 105, at 405.

213. Gallatin complained in 1796 about the degree of flexibility Hamilton exercised in shifting funds between different accounts. He wrote: “It deprives the Legislature from any control, not only over the distribution of the moneys amongst the several heads of service, but even over the total sum to be expended.” ALBERT GALLATIN, A SKETCH OF THE FINANCES OF THE UNITED STATES (1796), *reprinted in* 3 THE WRITINGS OF ALBERT GALLATIN 69, 116–17 (Henry Adams ed., Philadelphia, J.B. Lippincott 1879). President Jefferson’s annual message to Congress in December 1801 advocated “appropriating specific sums to every specific purpose susceptible of definition,” and “disallowing all applications of money varying from the appropriation in object, or transcending it in amount; by reducing the undefined field of contingencies, and thereby circumscribing discretionary powers over money.” President Thomas Jefferson, First Annual Message (Dec. 8, 1801), *in* 1 COMPILATION MPP, *supra* note 55, at 314, 317.

214. GALLATIN, *supra* note 213, at 117. For a perceptive account of debates over appropriations flexibility in the early Republic, see CASPER, *supra* note 43, at 70–96.

215. 31 U.S.C. § 1301(d) (2012) (“A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.”).

216. *See supra* Section I.B.2.

217. *See* Bagley, *supra* note 99, at 1729–35.

218. Sidak, *supra* note 4, at 1177–83, 1189–92.

government's standing bureaucratic and military capacity. Under such conditions, presidents have no basis for presuming the degree of spending discretion claimed by Washington and Lincoln, much less for defying specific express funding restrictions imposed by Congress.

President Washington expended funds in arguable violation of appropriations limits to suppress the so-called Whiskey Rebellion, a tax revolt in western Pennsylvania that the Washington Administration perceived as a major challenge to federal authority.<sup>219</sup> Washington called forth a large militia force to restore law and order, yet at the time Congress was not in session and no militia appropriation was available; the Administration instead provisionally diverted funds for the regular military.<sup>220</sup> After successfully suppressing the rebellion, Washington sought congressional ratification of his action,<sup>221</sup> which Congress gladly provided.<sup>222</sup>

Gallatin, elected to Congress from a district at the rebellion's epicenter, nevertheless excoriated the Administration's defiance of appropriations limits. "It might be a defect in the law authorizing the expense not to have provided the means," Gallatin wrote in 1796, "but that defect should have been remedied by the only competent authority, by convening Congress."<sup>223</sup> Siding with Washington over Gallatin, Sidak argued that Washington's example supports executive authority to expend funds for law enforcement or national defense without specific congressional approval.<sup>224</sup> But that view is unpersuasive. Even Hamilton, President Washington's Treasury Secretary at the time, acknowledged that "before money can legally issue from the Treasury for any purpose, there must be a law authorising an expenditure and designating the object and the fund."<sup>225</sup> Hamilton simply argued that executive officials should treat funding limits flexibly in addressing

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219. For a general account of this event, see THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986). For my own analysis of President Washington's action as an instance of law enforcement authority, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 736–39 (2014).

220. See CASPER, *supra* note 43, at 87; Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 16 (1976).

221. See 4 ANNALS OF CONG. 787, 792 (1794) (reprinting message from President Washington indicating that an "estimate of the necessary appropriations, including expenditures into which we have been driven by the insurrection, will be submitted to Congress").

222. CURRIE, *supra* note 102, at 189.

223. GALLATIN, *supra* note 213, at 118. For background on Gallatin and his 1796 report on federal finances, see NICHOLAS DUNGAN, *GALLATIN: AMERICA'S SWISS FOUNDING FATHER* 58–62 (2010).

224. See Sidak, *supra* note 4, at 1179–80 (arguing that the Washington Administration "claimed, in an expansive manner, that the President had the authority to spend public funds even when Congress had not clearly appropriated money for that purpose beforehand").

225. Hamilton, *supra* note 212.

unforeseen circumstances.<sup>226</sup> What is more, by seeking congressional ratification and after-the-fact appropriation, Washington implicitly acknowledged Congress's ultimate authority over public resources.

Far from suggesting wide-ranging inherent executive authority over resources, Washington's example thus reflects what Gerhard Casper called "fiscal heroism"—"mak[ing] the sacrifice of risking one's career so that one may act 'responsibly.'"<sup>227</sup> Washington, moreover, was hardly the only early president to adopt this posture. Even Thomas Jefferson, despite generally seeking to implement Gallatin's vision of strict legislative control, followed Washington's example on at least one occasion. In 1807, following a British attack on the U.S. naval vessel *Chesapeake*, Jefferson authorized military expenditures in excess of appropriations, for fear that "await[ing] a previous and special sanction by law would have lost occasions which might not be retrieved."<sup>228</sup> "I trust," Jefferson implored, "that the Legislature, feeling the same anxiety for the safety of our country . . . will approve, when done, what they would have seen so important to be done if then assembled."<sup>229</sup> In the name of national security, Jefferson thus took action on his own initiative to expand the Republic's arsenal. But like Washington, he implicitly acknowledged the illegality of his action by seeking after-the-fact congressional ratification.<sup>230</sup>

Lincoln's example largely fits the same pattern. Facing an extensive rebellion with Congress out of session, Lincoln authorized treasury expenditures for military preparations without any supporting appropriation.<sup>231</sup> But Lincoln disavowed any notion that his actions could support executive spending authority under other circumstances. Lincoln at times advanced a defense of necessity for his actions, arguing that the necessity of saving the Constitution as a whole justified violating isolated provisions of it.<sup>232</sup> At times he implied that his

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226. See *supra* text accompanying note 212.

227. CASPER, *supra* note 43, at 93–95. Lucius Wilmerding, Jr., the leading historian of pre-World War II funding disputes, similarly argued that early executive officials presumed an obligation occasionally to "boldly . . . set aside the requirements of the Legislature, trusting to the good sense of Congress, when all the facts of the case should have been explained, to acquit them of all blame." WILMERDING, *supra* note 119, at 4.

228. President Thomas Jefferson, Seventh Annual Message (Oct. 27, 1807), in 1 COMPILATION MPP, *supra* note 55, at 413, 416.

229. *Id.*

230. For discussion of this example and its ironies, see CASPER, *supra* note 43, at 93–96; see also BRUFF, *supra* note 59, at 75 (discussing Jefferson's expenditures and Congress's subsequent assent); SOFAER, *supra* note 82, at 172–73 (same).

231. BRUFF, *supra* note 59, at 132.

232. See President Abraham Lincoln, Special Session Message (July 4, 1861), in 7 COMPILATION MPP, *supra* note 55, at 3221, 3226 ("[I]t cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be

authority might expand under the circumstances to enable him to meet the rebellion effectively.<sup>233</sup> But as to the appropriations violation, at least, Lincoln also sought to cure his violation by throwing himself on the mercy of Congress.<sup>234</sup> Congress obliged.<sup>235</sup>

Lincoln did also authorize certain other expenditures that he did not disclose promptly to Congress. These secret expenditures involved outfitting certain naval vessels, transporting certain troops and munitions, and forwarding some \$2 million in Treasury funds to specified individuals for urgent military requisitions.<sup>236</sup> Lincoln revealed his role in authorizing these expenditures only after Congress censured his former Secretary of War for participating in them. Even then, however, as David Barron and Marty Lederman have emphasized, Lincoln claimed no preclusive executive authority for his action.<sup>237</sup> On the contrary, as with his other unauthorized expenditures, Lincoln confessed the expenditures' illegality, pointed to the exigency of the circumstances as justification, and took personal responsibility for his conduct.<sup>238</sup>

These key historic examples, then, need not imply wide-ranging executive authority to meet every perceived emergency without congressional support. On the contrary, they may well suggest only a default executive power of initiative—an authority to address unforeseen circumstances, absent specific congressional approval or disapproval, subject to ultimate congressional ratification or censure.

From that point of view, moreover, these high-profile cases are only particular manifestations of a more mundane problem Congress confronted throughout the nineteenth-century: the so-called “coercive deficiency.” Even when barred by law from doing so, executive officials of all sorts often outran their appropriations. They entered contracts or

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called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.”)

233. President Abraham Lincoln, Special Message to Congress (May 26, 1862), in 8 COMPILATION MPP, *supra* note 55, at 3278, 3279:

There was no time to convene [Congress]. It became necessary for me to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the Government fall at once into ruin or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age and for posterity.

234. See BRUFF, *supra* note 59, at 132 (noting Lincoln was “counting on later congressional ratification” and “following the precedent of Jefferson’s reaction to the attack on the *Chesapeake*”).

235. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326 (“[A]pprov[ing] and in all respects legaliz[ing] and mak[ing] valid [Lincoln’s prior actions], to the same intent and with the same effect as if they had been issued and done under the previous express authority of the Congress . . .”).

236. Barron & Lederman, *supra* note 55, at 1002.

237. *Id.* at 1003.

238. *Id.*

other obligations in the expectation that Congress would choose to make good on the promise rather than stiff a constituent or harm U.S. credit.<sup>239</sup> Congressional appropriators railed against this practice. As early as 1806, Representative John Randolph complained: “You have fixed limits [in the appropriation], but the expenditure exceeds the appropriations; and those who disburse the money, are like the saucy boy who knows that his grandfather will gratify him, and over-runs the sum allowed him at pleasure.”<sup>240</sup>

Yet Congress ultimately brought the coercive deficiency to heel. In a series of escalating statutes, between 1820 and 1905, Congress imposed increasingly strict limits on unappropriated expenditures. The coup de grace came in the Anti-Deficiency Act of 1905, which made expenditure in excess or violation of appropriations limits not only illegal but also in some cases criminal.<sup>241</sup> Today, then, actions like Lincoln’s or Jefferson’s would transgress not only Congress’s constitutional authority over appropriations, but also more specific statutory prohibitions through which Congress has sought to buttress that authority. Executive officials cannot simply act in anticipation of congressional approval. They must risk criminal sanctions (from a future administration if not the current one) in defying appropriations limits—except insofar as those limits are themselves unconstitutional.<sup>242</sup>

At the same time, a second change further heightens the stakes for appropriations control. As compared to Jefferson’s day or even Lincoln’s, the federal government today holds vastly increased bureaucratic and military capacity. As discussed further below, this feature of modern government (coupled with standing ADA exceptions for measures to protect lives and property<sup>243</sup>) would greatly weaken any claim that emergency circumstances required expenditure outside of prescribed limits.<sup>244</sup> This practical context undermines any claim that

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239. WILMERDING, *supra* note 119 (recounting the long history of Congress’s struggle with this practice).

240. 15 ANNALS OF CONG. 1063 (1806).

241. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. For discussion of the 1905 Act’s effect, see WILMERDING, *supra* note 119, at 144–53.

242. Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 35 (2001).

243. 31 U.S.C. § 1342 (2012).

244. See *infra* Section IV.D.2. In his monumental study of historical appropriations practice, Wilmerding sought to distinguish ordinary coercive deficiencies from the sort of bold military expenditures undertaken by Washington, Jefferson, and Lincoln for reasons of national security. In Wilmerding’s view, although Congress eventually established through legislation the principle that “executive departments are under an absolute obligation to observe the laws making specific appropriations of money,” this principle necessarily excludes cases of genuine military or law enforcement necessity. WILMERDING, *supra* note 119, at 19. Wilmerding wrote: “The high officers

the level of interpretive discretion envisioned by Hamilton, as opposed to Gallatin, should prevail with respect to modern appropriations statutes.<sup>245</sup> On the contrary, the scale of modern government makes appropriations control all the more important. To the extent presidents may ignore appropriations limits, they retain authority to employ a vast standing apparatus for warmaking, law enforcement, or diplomacy. The boundary between executive authority and appropriations control may therefore be more important today than it has ever before been.

In sum, the modern context limits the relevance of historic examples invoked by Sidak and other proponents of broad executive power. In the ADA, Congress has shrunk executive power over resources down to its constitutional minimum, even as it has greatly expanded the overall capacity of the federal government. This context, once again, explains why current battles over executive powers of resource allocation today take the form that they do, as fights over the constitutional validity of appropriations restrictions. Yet it also necessitates more careful consideration of the precise nature and extent of each such form of executive authority—of what irreducible degree of discretion the Constitution should be understood to preserve.

### *C. War Powers*

The first key resource-dependent executive authority is war powers. Although modern presidents have claimed substantial power of initiative with respect to use of military force, the proper scope of executive discretion to defy specific appropriations limits is properly quite narrow. Using just her own guaranteed salary, a president might perhaps ride out, pistol in hand, to personally confront the nation's enemies. More realistically, presidents might retain some narrow residual authority to address genuinely unforeseen exigencies without regard to congressional funding limits. But presidents should not

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of the government, and a fortiori the President, have a right, indeed a duty, to do what they conceive to be indispensably necessary for the public good, provided always that they submit their action to Congress to sanction the proceeding." *Id.* In light of developments since he wrote in 1943, Wilmerding's distinction is unpersuasive. Subsequent developments—including improvements in communication and transportation as well as the development of a permanent federal law enforcement apparatus and national security state—greatly weaken any continuing authority to take significant military or law enforcement action without a supporting appropriation based on executive officials' perception of "indispensable necessity." *Id.* The irreducible minimum of discretion with respect to appropriations limits should be far narrower today, and require a far more severe exigency, than Wilmerding's analysis suggested.

245. *Cf.* Bagley, *supra* note 99, at 1735 (discussing dangers of "embolden[ing] the next President to further slip the reins of legislative control" through loose interpretation of appropriations statutes).

otherwise presume general authority to deploy military forces in defiance of appropriations restrictions.

### 1. Text, Structure, and History

Why is congressional control so strong in this area? To begin with, maintaining legislative control over war finance—preventing union of “purse and sword,” in the classic phrasing of the time—was a particular concern of the Framers.<sup>246</sup> Nor did the Framers leave it to doubt that only public resources could be employed for military adventures. The very terms of the relevant Article II provision, the Commander in Chief Clause, presume presidential dependence on externally provided resources: the president cannot serve as “Commander in Chief” unless there is something to command, and the Constitution leaves no doubt about which branch provides those military resources.

With respect to military expenditure, indeed, the Constitution buttresses the Appropriations Clause’s general rule of funding control by specifically assigning to Congress authority over raising armies and establishing navies. It also specifically bars permanent military funding by limiting army appropriations to two years. What is more, although privateers—private ships equipped to raid enemy vessels—formed an essential component of U.S. naval defense in the early Republic, the Constitution specifically grants Congress, not the president, authority to license such private violence on the government’s behalf.<sup>247</sup> Overall, then, the Constitution’s plain terms betray considerable anxiety to ensure that the people’s representatives in Congress retain sole control over the military resources available to the president as Commander in Chief.

Background historical practice, furthermore, supports legislative authority to impose quite detailed restrictions on appropriated funds. Even before the Revolution, colonial legislatures routinely imposed extraordinarily detailed restrictions on funding for

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246. For discussion of this concern’s salience in debates over ratification, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 115–16 (2005), which discusses the Framers’ goal of maintaining legislative checks on use of military force; and BANKS & RAVEN-HANSEN, *supra* note 24, at 29–32.

247. Only Congress can grant the “letters of marque and reprisal” that license privateers. U.S. CONST. art. I, § 8. For discussion of privateering’s importance in the early Republic, see NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 318–20 (2013); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 *YALE J.L. & HUMAN.* 1, 15–22 (2007).

military activities.<sup>248</sup> As William Banks and Peter Raven-Hansen summarize, “[t]he colonial assemblies effectively usurped the governors’ military powers by specifying the purposes for which military appropriations could be spent, including the number, distribution, organization, pay, place and period of service, and supply of the officers and men to be raised.”<sup>249</sup> In the early Republic, Congress carried this practice forward by frequently imposing “quite niggling restrictions on the organization, action, and composition of the armed forces.”<sup>250</sup>

It is true, as these examples themselves illustrate, that the Framers’ intuitive model of military funding was likely quite different from our own. Given the widespread fear of standing armies and general aversion to providing for them, many Framers likely envisioned the president coming to Congress, as English Kings and colonial governors had done, to affirmatively request support from the people for some planned military adventure. To the extent that is true, the expectation broke down early on. In fact, even the arch-antimonarchist President Jefferson apparently authorized military action against the Barbary “pirates” without express legislative approval to do so.<sup>251</sup> In combination with examples set by Washington and Adams, this early practice strongly supports an understanding that the executive function in foreign affairs entails some authority to exercise independent judgment regarding use of force in response to evolving international circumstances, at least insofar as Congress has imposed no specific restriction on doing so and appears likely to ratify the contemplated

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248. GREENE, *supra* note 28, at 189 (“[I]n granting military supplies [colonial assemblies] prescribed in detail the purposes for which [the supplies] were to be expended, dictating the course of military operations and the disposition of troops.”); *see also* PERCY S. FLIPPIN, *THE ROYAL GOVERNMENT IN VIRGINIA* 211 (1966) (discussing the House of Burgesses’s control over military expenditures in colonial Virginia); GREENE, *supra* note 25, at 297 (discussing how legislatures in the southern colonies “not only appropriated all military funds specifically but also subjected them to certain limitations by determining the number of men to be employed, their rate of pay, and their place and period of service”). Colonial legislatures were following the example of England’s Parliament, which likewise asserted detailed control over military expenditures. *See* BREWER, *supra* note 24, at 43–44; PAUL EINZIG, *THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT’S FINANCIAL CONTROL* 141–48 (1959).

249. BANKS & RAVEN-HANSEN, *supra* note 24, at 21.

250. Barron & Lederman, *supra* note 55, at 958.

251. Following a military engagement between the U.S. schooner *Enterprise* and a Tripolitan vessel, President Jefferson claimed the U.S. ship had acted only defensively and sought legislative authorization for offensive action. In fact, however, the Administration’s earlier orders had contemplated offensive action. For discussion of this incident, *see, for example*, CASPER, *supra* note 43, at 107–11; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 123–29 (2001); Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 2d 169 (1999).



action.<sup>252</sup> At any rate, since World War II if not before, presidents have routinely presumed such authority, and Congress has by and large acquiesced.<sup>253</sup>

The key point here, however, is that presuming front-end initiative absent specific restraints precludes neither back-end congressional authority to terminate an operation by denying funds, nor even front-end authority to deny resources for possible initiatives looming on the horizon. In a world of annual appropriations, presumed presidential initiative, and extensive permanent military capacity, the proper analogue to the spending initiative claimed by Lincoln, Washington, and other early presidents is at most an authority to address genuinely unexpected developments that Congress could not reasonably have anticipated at the time it imposed particular funding restraints. The Constitution may protect presidential discretion to defend national interests when a dangerous world presents novel exigencies; it does not permit defiance of congressional restrictions imposed with full awareness of relevant circumstances.<sup>254</sup>

Significant, if not entirely uniform, practice reinforces this view. President Truman asserted authority to disregard funding restrictions on placing U.S. forces in specified regions, yet he ultimately had no occasion to act on this view because Congress failed to enact such constraints.<sup>255</sup> During the Vietnam War, President Nixon bombed Cambodia in the face of congressional restrictions on expanding the conflict, but his action apparently complied with the strict letter of then-imposed appropriations limits.<sup>256</sup> Later, Congress helped end the Vietnam War in part through appropriations restrictions.<sup>257</sup>

More recently, President George H.W. Bush reasserted Truman's view that presidents hold preclusive authority to determine

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252. The argument for this understanding of early practice is in POWELL, *supra* note 8, at 92–93.

253. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 461–68 (2012) (assessing competing interpretations of war powers practice). For empirical examination of congressional influence over executive military action, see WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007).

254. Cf. Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45, 50 (2014) (defining extremely narrow circumstances in which an extralegal “republican prerogative” could be consistent with our constitutional tradition).

255. Barron & Lederman, *supra* note 55, at 1060–62.

256. *Id.* at 1067–70.

257. *Id.*; see also DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* 343–44 (2016) (arguing funding cutoffs relating to Vietnam conflict “showed just how much control Congress exerted”).

force levels at overseas locations.<sup>258</sup> Bush, for example, objected to provisions in annual defense authorization acts barring use of funds to maintain troop deployments above specified levels in Japan or European NATO countries.<sup>259</sup> The Bush Administration appears nevertheless to have complied substantially, if not completely, with these and other similar limitations in subsequent years.<sup>260</sup> President

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258. See Barron & Lederman, *supra* note 55, at 1086–88 (discussing Bush’s assertion of “a remarkably strong notion of a substantive Commander in Chief preclusive power” in a series of signing statements regarding troop deployments).

259. See, e.g., Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 26 WEEKLY COMP. PRES. DOCS. 1766, 1767 (Nov. 5, 1990) (asserting that provisions limiting force levels “might be construed to impinge on the President’s authority as Commander in Chief and as the head of the executive branch” and that “I shall construe these provisions as necessary to fulfill my constitutional responsibilities”); see also National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 406, 1455(b), 104 Stat. 1485 (1990) (barring use of authorized funds to exceed specified force levels in Japan and European NATO countries).

260. For example, one such provision barred use of authorized funds “to support an end strength level of members of the Armed Forces of the United States assigned to permanent duty ashore in European member nations of NATO at any level exceeding a permanent ceiling of 261,855.” Pub. L. No. 98-525, § 1002, *as amended by* Pub. L. No. 101-510, § 406, 104 Stat. at 1546. The statute, however, allowed the president to maintain a permanent force level of up to 311,855 “if the President determin[e] that the national security interests of the United States require such authorization” and the president so notified Congress. *Id.* § 406(b). The same statute precluded use of authorized funds “to support an end strength level of all personnel of the Armed Forces of the United States stationed in Japan at any level in excess of 50,000.” *Id.* § 1455(a).

As of September 30, 1991, the Department of Defense reported maintaining 44,566 active duty personnel in Japan, well under the statutory limit. *Active Duty Military Personnel Strengths by Regional Area and by Country (309A)*, DEF. MANPOWER DATA CTR. (Sept. 30, 1991), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) [<https://perma.cc/857N-U75V>]. The Department reported that 264,903 active duty personnel were based in NATO countries as of that date, a number exceeding the statutory ceiling though not the limit allowed with a waiver. If Greenland and Iceland are not counted as “European member nations of NATO,” however, this total drops below the statutory limit to 261,531. Beginning in fiscal year 1995, the statutory ceiling in fact expressly excluded troops based in Iceland, Greenland, and the Azores, although of course this change could suggest the provision was previously understood to include those locations. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1303(b), 108 Stat. 2663, 2890–91 (1994); see also H.R. REP. NO. 103-701, at 762 (1994) (Conf. Rep.) (characterizing this exclusion as “intended to assist the Command in managing its personnel level to the appropriate fiscal year 1996 level”). In any event, the reported number of active duty forces in all NATO countries dropped precipitously to 187,378 (well under the statutory limit) the following fiscal year. *Active Duty Military Personnel Strengths by Regional Area and by Country (309A)*, DEF. MANPOWER DATA CTR. (Sept. 30, 1992), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) [<https://perma.cc/857N-U75V>]. In later years, the Defense Department appears to have complied with prescribed limits even as Congress lowered the ceiling to “approximately 100,000” in European NATO-member states. 22 U.S.C. § 1928 note (2012) (Improvements to NATO Conventional Capability).

President Bush also objected to a provision barring transfer of forces from a base in Spain to a particular location in Italy, but nonetheless complied by transferring the units in question to a different air base in Italy. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 2851, 105 Stat. 1290, 1558 (1991); Statement on Signing the National Defense Authorization Act for Fiscal Years 1992 and 1993, 27 WEEKLY COMP. PRES. DOC. 1769 (Dec. 5, 1991); MARK L. GILLEM, AMERICA TOWN: BUILDING THE OUTPOSTS OF EMPIRE 174–80 (2007).

Clinton, in contrast, made no objection to several statutes limiting use of military force abroad.<sup>261</sup> While he did object on constitutional grounds to a statute barring use of funds for a military deployment in Haiti after a specified date,<sup>262</sup> Clinton himself had already decided to end this deployment.<sup>263</sup> In addition, in the Kosovo conflict, President Clinton exceeded the standing sixty-day time limit for military engagements in the War Powers Resolution (“WPR”),<sup>264</sup> but ironically he did so with the support of congressional appropriations rather than in defiance of them.<sup>265</sup> The Obama Administration likewise adopted a strained reading of the WPR to justify prolonged use of force in Libya,<sup>266</sup> and the President later (rather debatably) interpreted prior authorizations for military force to permit military action against the Islamic State in the Levant.<sup>267</sup> Again, however, Congress never attempted to deny funds for these operations.

In short, across the sweep of U.S. history, presidents appear to have substantially complied with appropriations limits on use or deployment of military forces, even in cases where they initially raised objections to legislative restrictions. In fact, in their encyclopedic survey of presidential responses to legislative restrictions on military force through 2008, David Barron and Marty Lederman identify only one clear violation of a specific appropriations restriction. In 1975, during the Vietnam War’s untidy conclusion, President Ford authorized use of U.S. forces to aid in rescuing certain U.S. nationals and foreign allies in Vietnam and Cambodia, notwithstanding strict statutory prohibitions on use of appropriated funds to involve U.S. forces in “combat activities”

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261. Barron & Lederman, *supra* note 55, at 1089–90 (discussing examples).

262. Statement on Signing the National Defense Authorization Act for Fiscal Year 2000, 35 WEEKLY COMP. PRES. DOCS. 1927, 1928–29 (Oct. 5, 1999) (indicating that the President would “interpret this provision consistent with my constitutional responsibilities as President and Commander in Chief”); *see also* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1232(a), 113 Stat. 512, 788 (1999).

263. Barron & Lederman, *supra* note 55, at 1094.

264. 50 U.S.C. § 1544(b) (2012).

265. OLC justified the President’s action on this theory. *See* Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000). For a much older instance of analogous reasoning (albeit long before the WPR’s enactment), *see* Existence of War with the Seminoles, 3 Op. Att’y Gen. 307, 307 (1838):

Several appropriations for the same object have been made by law, so that, although no formal declaration of war has been made, (probably because deemed unnecessary,) the war, on our part, has been waged by authority of the legislative department, to whom the power of making war has been given by the constitution.

266. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 14 (2011) (statement of Harold Hongju Koh, Legal Adviser, Department of State).

267. *See* Smith v. Obama, 217 F. Supp. 3d 283, 285–87 (D.D.C. 2016) (discussing legal justifications for operation).

or “hostilities” in Southeast Asia.<sup>268</sup> This example, however, arguably involved precisely the sort of narrow unforeseen exigency that could justify limited use of military force notwithstanding a funding ban. By all accounts, Ford needed to act quickly to save lives of U.S. personnel and key foreign allies,<sup>269</sup> and it seems doubtful that Congress would have barred such action altogether had it anticipated it. Indeed, Ford himself had convened a special session of Congress to amend the restrictions at issue, and while Congress was still searching for precise language when he acted unilaterally, it appeared receptive to his general objectives.<sup>270</sup>

## 2. Governing Principles and Contemporary Applications

### *a. Negative Restraints*

Where, then, do these structural principles, informed by past practice, leave us today? With respect to negative restraints—prohibitions on deploying military forces in particular places or for particular purposes—Congress retains near-plenary authority to control use of military force through time-limited appropriations restrictions. As text, structure, and original understanding suggest, and as subsequent practice largely confirms, Congress may specifically preclude use of military force in specified contexts or for specified purposes, even if in the absence of such restrictions the president would hold broader presumptive power of initiative to address perceived military threats. By the same token, Congress may also bar deployment or basing of troops in particular locations, whether within the United States or overseas, as indeed it has done repeatedly across American history.<sup>271</sup>

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268. Barron & Lederman, *supra* note 55, at 1072–73.

269. President Ford claimed, based on legislative history, that applicable funding restrictions did not apply to rescues of U.S. nationals. *Id.* at 1073. Some authority, moreover, supports preclusive presidential authority to protect U.S. lives and property. *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. 36, 79 (1872); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186); *see generally* Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 712–23 (2016). No such justification was available, however, for use of military resources to rescue non-Americans. Barron & Lederman, *supra* note 55, at 1073.

270. Barron & Lederman, *supra* note 55, at 1073.

271. *See supra* Section IV.C.1; *see also* Barron & Lederman, *supra* note 55, at 1048–51, 1062–63, 1063 n.497 (discussing pre–World War II restrictions on foreign deployment of draftees and reservists and later restrictions on closure of military facilities). For historic executive branch opinions supporting this view, *see* Appropriations—Marine Corp—Service on Battle Ships, etc., 27 Op. Att’y Gen. 259, 260 (1909):

Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a marine corps, it has power to create a marine corps, make appropriation for its pay,

During the Obama Administration, the most significant appropriations questions in this category involved military detentions. Congress, as noted, thwarted President Obama's stated goal of closing the Guantanamo Bay detention facility by barring use of military funds to transfer prisoners out of U.S. custody without making prescribed advance certifications to Congress. In keeping with the framework developed here, the Administration generally abided by these restrictions, despite the President's assertion in signing statements that "[u]nder certain circumstances" the rider "would violate constitutional separation of powers principles."<sup>272</sup>

A controversial exception involved releasing five prisoners in exchange for a U.S. soldier held by the Taliban in Afghanistan.<sup>273</sup> In this instance, the Administration ignored the certification requirement for overseas exchanges, offering only a strained (and to many observers unpersuasive) statutory argument for doing so.<sup>274</sup> Under the constitutional framework advanced here, this action might have been justified if it involved a genuine need for urgent action that Congress could not reasonably have anticipated when it enacted the prohibition. That argument was implausible, however, given Congress's evident awareness that Guantanamo detainees could be traded for foreign prisoners. Nor could the Administration plausibly claim any avoidance rationale or other constitutional basis for construing such limitations narrowly: given the extent of congressional authority over military resources, even quite specific constraints entail no valid infringement of executive authority that may justify avoidance.<sup>275</sup> At any rate, even if Obama's Guantanamo transfer was valid, this isolated example should not suggest any broad executive authority to defy appropriations limits on use of military resources.

Congress's authority to impose negative restraints on military resources advances the central normative purpose for congressional control over appropriations: it gives Congress, the branch with the most

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but provide that such appropriation shall not be available unless the marine corps be employed in some designated way[.];

Brevets' Pay and Rations, 2 Op. Att'y Gen. 223, 232 (1829) (characterizing the "right to designate posts or stations among which the army should be distributed[ ] as a necessary incident to" the president's Commander-in-Chief power, but acknowledging that Congress could "supersede[ ]" this default authority by "assum[ing] the power").

272. Obama Statement on Signing 2015 NDAA, *supra* note 61.

273. For critical discussion of this incident, see GAO Letter on Department of Defense Compliance, *supra* note 62.

274. For an account of the arguments, see Pitt, *supra* note 100, at 2875–77.

275. For thoughtful exploration of when implausible statutory arguments may be preferable in rule of law terms to preclusive constitutional arguments, see Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231, 1249 (2016).

distributed representation of the nation at large, ultimate say over the purposes to which the nation's blood and treasure are put. What is more, by requiring ongoing agreement between the president and Congress to sustain military action—or military deployments likely to lead to military action—such congressional control over resources ensures that broader deliberation and societal consensus support any military action that could put the nation's safety or position in the world at risk. Isolated violations of this principle, such as through Ford's action in Vietnam or Obama's Guantanamo transfer, should obscure neither its centrality to separation of powers nor its deep entrenchment in the broader pattern of historic practice.

*b. Affirmative Requirements*

Affirmative funding requirements—mandated expenditures, deployments, or military actions—present more difficult questions.

With respect to mere expenditures (for specified troop levels or weapons systems, for example), Article II again provides no sound justification for defying congressional mandates. Such spending requirements are laws, like any other appropriations measure, that the president must faithfully execute. Even if the Commander in Chief Clause requires presidential superintendence over weapons' or troops' use once in place, it provides no authority to adjust the level of resources provided to the military at the outset; that authority instead lies at the core of Congress's resource-allocation authority under the Appropriations Clause.

Historically, it is true, presidents did claim limited authority to “impound” funds for weapons or troops they later judged unnecessary.<sup>276</sup> President Jefferson, for example, returned appropriated funds to the Treasury when he determined that naval vessels Congress had authorized were no longer needed. When President Nixon employed this authority aggressively to cut funding for domestic programs, however, Congress responded by passing the Impoundment Control Act.<sup>277</sup> That law now limits executive authority to cancel either military or domestic spending mandated by Congress.<sup>278</sup> Nixon's own Assistant Attorney General for the Office of Legal Counsel, future Chief Justice William Rehnquist, correctly rejected arguments that Article II gave the president inherent wide-ranging impoundment

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276. For discussion of historic impoundment, see Barron & Lederman, *supra* note 55, at 1062–63, 1063 nn.495–97.

277. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 621–91 (1974)).

278. 2 U.S.C. §§ 683, 684, 687 (2012).

authority.<sup>279</sup> Around the same time, the Supreme Court held that mandated expenditures could bind executive officials.<sup>280</sup> Historic examples of impoundment should thus be understood to reflect a repudiated historical gloss on appropriations statutes, not a preclusive executive prerogative with enduring effect.<sup>281</sup>

This same logic should equally support congressional authority to mandate particular force dispositions through time-barred appropriations mandates, even if it could not otherwise impose such requirements as a matter of ordinary legislation. Such mandates, too, would be laws the president must faithfully execute, and in general they would operate at the level of overall strategy (a natural legislative function) rather than battlefield tactics (the natural executive function in military affairs). As we have seen, congressional control over resources generally enables legislative allocation of limited resources to particular priorities: by controlling appropriations levels Congress assures that scarce public resources are deployed according to a hierarchy of goals approved on an ongoing basis by the people's representatives. From this point of view, mandated troop deployment is simply a particularly strong assertion of priorities, one the president may properly be required to accept as a condition of obtaining military

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279. See Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools, 1 Supp. Op. O.L.C. 303, 310 (1969) (calling it “extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a congressional directive to spend”). Rehnquist did indicate that the “situation would be . . . very different” if “a congressional directive to spend were to interfere with the President’s authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander in Chief of the Armed Forces and his authority over foreign affairs . . .” *Id.* at 310–11. Rehnquist did not elaborate in the opinion on what sorts of spending mandates would create such interference. In later testimony, Rehnquist acknowledged that Congress could prohibit basing troops in a particular hemisphere but argued that narrow tactical decisions, such as whether to attack a certain hill or (rather oddly) whether all soldiers in a regiment should wear “blue uniforms” must remain matters of presidential discretion. See *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 243–53 (1971). For discussion of Rehnquist’s testimony, see Barron & Lederman, *supra* note 55, at 1067–70.

280. *Train v. City of New York*, 420 U.S. 35, 41 (1975).

281. Roy Brownell II has argued that practice supports a continuing constitutional authority of military impoundment, but he identifies only a handful of ambiguous examples (from the Carter and George H.W. Bush Administrations) of significant military impoundments in arguable violation of the Impoundment Control Act’s terms. See Roy E. Brownell II, *The Constitutional Status of the President’s Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 53–55 (2001); see also BANKS & RAVEN-HANSEN, *supra* note 24, at 83–85 (discussing one example). Other surveys have found substantial compliance with the statute. See, e.g., CHAFETZ, *supra* note 22, at 65; Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 495 (2009); Charles Tiefer, *Can Congress Make a President Step Up a War?*, 71 LA. L. REV. 391, 445–46 (2011); Wm. Bradford Middlekauff, Note, *Twisting the President’s Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209, 218–19, 218 nn.52–53 (1990).

resources for other potential purposes.<sup>282</sup> As a matter of practice, furthermore, although mandated overseas deployment would appear novel,<sup>283</sup> past presidents' apparent acceptance of negative deployment constraints supports Congress's authority to direct general disposition of forces.<sup>284</sup> What is more, despite occasional constitutional objections, past presidents appear to have acquiesced in domestic basing requirements.<sup>285</sup>

As a normative matter, to be sure, Congress here would not be acting as a check but rather as a spur to action. Even so, the usual impediments to legislative action would still ensure that adequate deliberation and consensus underlies the policy. The president, after all, would retain his usual veto over misguided legislation, and a presidential obligation to abide by the condition should guarantee appropriate seriousness on the part of legislators debating it. To be concrete, then, were the current Congress to mandate consensual deployment of troops in specified NATO countries or other allied nations, whether to reinforce treaty commitments or to serve as tripwires assuring a robust U.S. response to any invasion, the president would hold no sound constitutional justification for disregarding the funding condition and failing to locate troops as Congress directed.<sup>286</sup>

Mandating actual use of military force, in contrast, would likely go too far. Here, the problem is not so much that the legislation would violate limits on congressional appropriations power, but rather that the president's own resource-independent power of military command likely entails some irreducible authority over whether to launch particular tactical strikes. Even this limit, however, is likely more apparent than real, as Congress could readily force a reluctant president's hand through other actions within its unambiguous powers. Congress, for example, could declare war, or enact legislation otherwise

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282. *See supra* Section I.A.

283. *But cf.* Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151(b)(2)(B)(ii), 107 Stat. 1418, 1476-77 (1993) (directing that U.S. forces "should remain deployed in or around Somalia until such time as all American service personnel missing in action in Somalia are accounted for, and all American service personnel held prisoner in Somalia are released").

284. *See supra* Section IV.C.1.

285. *See, e.g.*, *Dalton v. Specter*, 511 U.S. 462, 465 (1994) (discussing statutory constraints on domestic base closures); Statement by the President upon Signing the Military Construction Authorization Bill, 2 PUB. PAPERS 1008, 1008 (Sept. 12, 1966) (signing bill containing waiting period for base closures while observing that "my responsibilities as President and Commander in Chief will require me to seek prompt revision of the restriction if future circumstances prove it to be inimical to the national interest"); CALABRESI & YOO, *supra* note 54, at 341 (describing President Johnson's compliance with mandates to keep certain military facilities open).

286. Deployment without the host country's consent could present questions of international law that might override Congress's mandate.



placing the nation on a war footing. Such action might well place the president in a position where failing to act militarily would irresponsibly endanger the nation's interests.<sup>287</sup> The very possibility that Congress could thus effectively force the nation into war reinforces the inference that, in general, mandating deployments as conditions on time-limited appropriations may properly fall within Congress's authority.<sup>288</sup>

In the post-War period, if not before, Congress has largely preferred to leave the choice of military objectives to the executive branch, while presidents have been happy to take this responsibility on themselves. Yet this status quo is not constitutionally required; it instead reflects longstanding congressional acquiescence to presidential initiatives and a resulting *de facto* delegation of presidential discretion. As the guardian of public resources, with ultimate power over the purse, Congress holds final responsibility for choosing to enable presidential adventurism rather than restricting it. Should Congress come to fear or distrust how presidents will use the power it has conferred, it retains power to claw back this discretion by imposing specific limits and conditions on military resources it places at presidential disposal.

#### *D. Law Enforcement*

Law enforcement is another area of near-plenary congressional control through appropriations limits. Here, too, the president's personal resources will get him nowhere. Even were he to go door to door himself making arrests or show up in court to personally conduct a prosecution, the president could hardly take the smallest bite out of crime. The president's authority over law enforcement is thus profoundly resource-dependent. Just as with war powers, moreover, compelling textual, structural, historical, and normative considerations preclude resort to private resources for this purpose, and the president's dependence on public resources again properly entails subservience to any limits or conditions placed on those resources. At least outside of an extreme exigency unlikely to arise under modern conditions, presidents hold no constitutional authority to direct enforcement of federal laws in defiance of specific legislative constraints on public resources available for that purpose.

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287. Indeed, the president might well hold a constitutional obligation to effectively prosecute a congressionally declared war. PRAKASH, *supra* note 197, at 160–61.

288. See also Tiefer, *supra* note 281, at 416–17 (arguing that Congress may mandate general military programs, but not specific military incursions, through appropriations riders).

## 1. The Structural Case for Appropriations Control

Once again, the constitutional structure, by its plain terms, dictates this conclusion. To be sure, the Constitution obligates the president to “take Care that the Laws be faithfully executed.”<sup>289</sup> But just as the Commander in Chief Clause comes into play only if Congress provides some military to command, the Take Care Clause’s indirect formulation—requiring the president to ensure faithful execution, not to execute the law himself—presumes presidential dependence on enforcement resources otherwise made available by Congress.

What is more, appropriations limits are themselves laws the president must execute. As such, funding constraints on law enforcement must bind the president, even if those constraints limit enforcement of underlying substantive prohibitions. After all, even apart from its control over appropriations, Congress holds authority to create offices, vest them with particular authorities and functions, and enact laws necessary and proper to carrying out those offices’ functions. Congress may thus render particular federal laws subject to exclusive official enforcement, or indeed exclusive enforcement by particular officers, and it has done so in some instances since the beginning of the Republic.<sup>290</sup> In fact, on some accounts, Congress has no choice about the matter, at least with respect to criminal prosecutions, because due process requires public prosecution.<sup>291</sup> Just as establishing an office subject to Senate confirmation carries the inevitable consequence that future Senates will have some control over appointments, limiting enforcement of particular laws to public officials carries the inevitable consequence that Congress will have continuing control, through future appropriations levels, over how those laws are enforced.

Apart from text, structure, and history, normative considerations reinforce these conclusions. Law enforcement is the governmental power to arrest, imprison, deport, and execute individuals based on asserted legal violations. Given this power’s grave implications, its exercise should be subject to robust ongoing control by the people’s representatives (as well as judicial due process constraints), and not just quadrennial electoral accountability through presidential elections. Indeed, the liberty-protective function of

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289. U.S. CONST. art. II, § 3.

290. For discussion of historical enforcement arrangements, see Price, *supra* note 219, at 718–21, 725–27, 743–45.

291. See, e.g., *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 278 (2010) (Roberts, C.J., dissenting from denial of certiorari) (“Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another.”).

separation powers is at its apex in this context: requiring distinct legislative, executive, and judicial actions (or at least judicial review) before any punishment may be imposed ensures that multiple veto gates stand between the individual and punitive loss of freedom.<sup>292</sup> The president's veto, however, weakens Congress's ability to exercise its step in the process through substantive legislation: given sharp partisan divides in Congress, presidents bent on enforcement may generally count on copartisans in Congress to block any override of their vetoes. This dynamic is all the more troubling today, moreover, due to long-standing accretion of sporadically enforced laws, such as our current harsh and retributive immigration code, that likely fail to conform to current majority preferences. Such laws may persist over time in part because the very absence of enforcement interrupts political pressure on Congress to repeal them.<sup>293</sup> By the same token, however, such laws may enable presidents to pursue enforcement measures that likely do not enjoy support in either Congress or the public at large.<sup>294</sup>

The appropriations process affords a vital means of interrupting these troubling dynamics. By rendering the president dependent on funding choices that Congress makes year after year, one year at a time, congressional control over appropriations ensures that the president's enforcement choices are subject to some ongoing constraint. Much as the president could veto new substantive legislation of which he disapproves, Congress may effectively veto enforcement efforts of which it disapproves by refusing to appropriate any funds to support them. Appropriations control over enforcement thus maintains a productive tension between the two political branches over on-the-ground application of federal laws.

In short, while some have argued that riders barring enforcement of particular laws "prevent[ ] the President from fulfilling his or her constitutionally mandated duty to take care that the laws are faithfully executed,"<sup>295</sup> this view is wrong both formally and

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292. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014 (2006) (observing that separation of powers "requires not only that the executive and legislative branches agree to criminalize conduct but also includes the judiciary as a key check on the political branches").

293. For my own discussion of these dynamics, see Price, *supra* note 219, at 745–48.

294. Bill Stuntz famously characterized these political dynamics in criminal law as "pathological." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

295. LeBoeuf, *supra* note 99, at 475.

functionally.<sup>296</sup> It overlooks, first of all, that appropriations limits are themselves part of the law that presidents must execute. In functional terms, furthermore, this view would remove the most important ongoing constraint on executive authority to unilaterally determine existing federal law's on-the-ground impact. As David Barron and Todd Rakoff have observed, “[t]he modern world is thick with federal statutes,”<sup>297</sup> and in practice accreted prohibitions and delegations may add up to immense executive authority over how the law applies in practice.<sup>298</sup> In such an environment, if not also in others we might imagine, the ultimate purposes of separation of powers—protecting liberty and ensuring responsive government—are best served by maintaining a congressional check on executive policy through legislative control over law enforcement resources.

## 2. Lessons from History

In fact, even apart from modern conditions, the deep structure of separation-of-powers practice powerfully confirms this understanding. Even were it not textually compelled, congressional control over law enforcement resources is now every bit as entrenched in our lived constitutional structure as is the bedrock presumption of congressional funding discretion discussed earlier.<sup>299</sup>

At some points in the past, it is true, presidents asserted a preclusive authority to enforce laws without regard to appropriations constraints. In 1851, for example, President Millard Fillmore asserted that statutory limits on use of the militia “probably” could not prevent its use to enforce the Fugitive Slave Act, because the president’s “duty to see the laws faithfully executed is general and positive.”<sup>300</sup> Likewise, in 1879, as part of the same battle with Congress addressed earlier,<sup>301</sup> President Rutherford Hayes vetoed legislation that would have left certain disputed election laws in place while rendering them a “dead letter” during the fiscal year by preventing any expenditure for their

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296. See, e.g., Devins, *supra* note 34, at 472–73 (characterizing this theory as “based on the remarkable and unfounded proposition that article II provides the Executive plenary power to shape the implementation of substantive legislative authorizations”).

297. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 294 (2013).

298. See Moe & Howell, *supra* note 27, at 143 (“[I]t is crucial to recognize that the president is greatly empowered by the sheer proliferation of statutes over time.”).

299. See *supra* Part II.

300. President Millard Fillmore, Message to the Senate (Feb. 19, 1851), in 6 COMPILATION MPP, *supra* note 55, at 2637, 2641. Fillmore’s statement appeared in the context of a request to relax statutory restrictions on the militia. Congress did not oblige. See Barron & Lederman, *supra* note 55, at 990–91 (discussing congressional response).

301. See *supra* Part II.

enforcement.<sup>302</sup> Approving this bill, Hayes asserted, would have required him to “participate[ ] in the curtailment of his means of seeing that the law is faithfully executed, while the obligation of the law and of his constitutional duty remain[ed] unimpaired.”<sup>303</sup> In Hayes’s view, “[t]here are two lawful ways to overturn legislative enactments. One is their repeal; the other is the decision of a competent tribunal against their validity.”<sup>304</sup> Hayes felt compelled to veto the bill at issue because its “effect . . . is to deprive the executive department of the means to execute laws which are not repealed, which have not been declared invalid, and which it is therefore the duty of the executive and of every other department of Government to obey and to enforce.”<sup>305</sup>

These assertions may well reflect a stronger notion of executive enforcement obligation than is commonplace today. As Hayes’s statement reflects, the present-day assumption of heavily discretionary enforcement, calibrated in accordance with available resources, may be best understood as a function of legislative developments over time, and not as a function of underlying separation-of-powers imperatives.<sup>306</sup> Indeed, I have argued that even today presidents retain an important structural obligation to enforce federal laws even when they disagree with the policy those laws reflect.<sup>307</sup> Yet enforcement obligation does not imply resource-independence. Because appropriations limits are themselves laws the president must execute, funding constraints necessarily limit the scale, intensity, and focus of law enforcement efforts. Even in the nineteenth century, key authorities recognized this principle. As an 1843 Attorney General opinion observed, notwithstanding the president’s constitutional obligation to ensure faithful execution of the laws, “Congress may . . . indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy.”<sup>308</sup>

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302. President Rutherford B. Hayes, Veto Message (June 23, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4488, 4495.

303. *Id.*

304. *Id.* at 4496.

305. *Id.*

306. For my elaboration of this historical argument, see Price, *supra* note 219, at 716–48.

307. *Id.* at 748–68.

308. Executive Power of Appointment, 4 Op. Att’y Gen. 248, 248 (1843). In this opinion, the Attorney General concluded that the president could appoint agents or commissioners to investigate legal violations but could not pay them without an appropriation. *Id.* at 248–49; *see also, e.g.*, Power of the President in Executing the Laws, 9 Op. Att’y Gen. 516, 519 (1860) (“If . . . an act of Congress declares that a certain thing shall be done by a particular officer, it cannot be done by a different officer. The agency which the law furnishes for its own execution must be used to the exclusion of all others.”); Transfer of Specific Appropriations of House of Representatives to Contingent Fund, 3 Op. Att’y Gen. 442, 443 (1839) (“[N]o assumption of power could be more

As further evidence of this view, it is striking that President Hayes, despite asserting independent enforcement responsibility, ultimately accepted Congress's general authority to calibrate enforcement capacity through funding levels. When Congress failed to appropriate funds following his veto, Hayes complained that "the means at the disposal of the executive department for executing the laws through the regular ministerial officers will after to-day be left inadequate."<sup>309</sup> Likewise, although Hayes observed that "[t]he suspension of these necessary functions in the orderly administration of the first duties of government is inconsistent with the public interests, and at any moment may prove inconsistent with public safety," he nonetheless acknowledged the "necessity of making immediate appropriations" to remedy these dangers.<sup>310</sup> In short, despite repeatedly vetoing legislation that he felt violated his own constitutional enforcement obligations, Hayes accepted that a shortfall in appropriations could impair actual discharge of that obligation.<sup>311</sup>

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dangerous than that of expending more money upon an object than Congress had appropriated for it . . .").

309. President Rutherford B. Hayes, Special Message (June 30, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4474, 4475.

310. *Id.* Reflecting the same assumptions, Hayes had earlier called on Congress "to make adequate appropriations to enable the executive department to enforce the laws." President Rutherford B. Hayes, Second Annual Message (Dec. 2, 1878), in 10 COMPILATION MPP, *supra* note 55, at 4444, 4446. In the same message, calling attention to timber theft on public lands, he urged that "[t]he Department of Interior should . . . be enabled by sufficient appropriations to enforce the laws in that respect." *Id.* at 4456. In an earlier appropriations battle with Congress, President Ulysses Grant similarly recognized that a lapse in appropriations would cause federal departments to "suspend" their functions. President Ulysses Grant, Special Message (June 17, 1876), in 10 COMPILATION MPP, *supra* note 55, at 4322–23.

When Congress adjourned in March 1877 without appropriating army funds for the fiscal year beginning after June 30, Attorney General Charles Devens understood governing statutes to permit continued contracting for necessary supplies. He nevertheless deemed it impermissible to expend treasury funds to pay such contractual obligations, and he further advised against obtaining "voluntary contributions" to make up the shortfall. "The transaction," he observed, "would be subject to criticism as an attempt to do indirectly that which Congress should have provided for by positive appropriation. . . . In the absence of such appropriations, I do not think that funds should be sought elsewhere." Support of the Army, 15 Op. Att'y Gen. 209, 211 (1877).

311. See HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 158 (2001) (characterizing congressional Democrats' actions in 1879 as "forcing [Hayes] either to veto appropriations bills or bow to their will"). Hayes did note later that, despite a lapse in appropriations for federal marshals, some had "continued the performance of their duties without compensation from the Government, taking upon themselves the necessary incidental outlays, as well as rendering their own services." President Rutherford B. Hayes, Third Annual Message (Dec. 1, 1879), in 10 COMPILATION MPP, *supra* note 55, at 4509, 4525. Hayes indicated, however, that in some cases "the proper execution of the process of the United States failed by reason of the absence of the requisite appropriation." *Id.* Hayes also emphasized that the Attorney General had advised the marshals that "they would necessarily have to rely for their compensation upon the prospect of future legislation by Congress," and he urged Congress to make "sufficient" appropriations for election-related enforcement activities by the marshals in the coming year. *Id.* at 4525–26.

Indeed, resource shortfalls addled civil rights enforcement throughout Reconstruction. As Brooks Simpson observes, “[t]he Justice Department did not possess sufficient personnel or budgetary resources to prosecute the law effectively, and many military officers cared little to serve as federal police.”<sup>312</sup>

In any event, as Nicholas Parrillo has recently documented, the advent of salaried compensation in the late nineteenth century accelerated development of heavily discretionary forms of official enforcement. Assertions of preclusive executive enforcement authority have surfaced occasionally since then. Nevertheless, with one ambiguous exception,<sup>313</sup> I am aware of no significant example in which any president defied an enforcement funding restriction on this theory.<sup>314</sup> Today, Congress routinely charges executive agencies with

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312. SIMPSON, *supra* note 115, at 182. Simpson concludes that Hayes’s successful defense of executive prerogatives through his vetoes was ultimately pyrrhic for this reason. He writes, “It was unclear how Hayes’s stand on the riders issue had done anything to halt the erosion of black rights or of southern Republicanism, but at least he had resisted efforts to wipe off the books laws intended to protect black rights.” *Id.* at 226. For further background on this interbranch conflict and a more favorable assessment of Hayes, see HOOGENBOOM, *supra* note 115, at 392–413, 537–38.

313. Based on the dubious assumption that “[d]ecisions on deployment and redeployment of law enforcement officers in the execution of the laws are a part of the executive power vested in the President by Article II of the Constitution,” President George W. Bush objected in two signing statements to appropriations provisions requiring relocation of the “tactical [border enforcement] checkpoints” in the Tucson area “at least once every seven days.” Statement on Signing the Department of Homeland Security Appropriations Act, 2006, 2 PUB. PAPERS 1563, 1563 (Oct. 18, 2005); Statement on Signing the Department of Homeland Security Appropriations Act, 2005, 3 PUB. PAPERS 2575, 2575–76 (Oct. 18, 2004). GAO later found that the Administration failed to fully comply with these provisions, though border officials did often “shut down [immovable checkpoints] for a ‘short period in an endeavor to satisfy the [statutory] provision.’” U.S. Gov’t Accountability Office, B-308603, Presidential Signing Statements Accompanying Fiscal Year 2006 Appropriations Acts 35 (June 18, 2007). This instance of defiance (if it can even be characterized as such) seems not only doubtful on the merits but also irrelevant to the broader question here of congressional authority over substantive law enforcement. The rider to which Bush objected in this example did not involve any restriction on enforcement of substantive prohibitions, but instead a picayune and apparently impracticable micromanagement of enforcement tactics.

314. Presidents and executive branch lawyers have periodically resurrected the Hayes/Fillmore view, but in examples I have identified they did not act on their assertions. President Woodrow Wilson, for example, objected in 1913 to an appropriations rider that barred use of a particular Justice Department fund to prosecute labor unions, workers, or farmers, yet Wilson noted that the proviso limited only the use of this particular fund and not other available resources. President Woodrow Wilson, Statement on Signing the Sundry Civil Bill (June 23, 1913), in 27 THE PAPERS OF WOODROW WILSON, *supra* note 56, at 558. Although the Justice Department did pursue several such cases in 1914, Christopher May found “no evidence that the Wilson administration spent any of the restricted funds for this purpose.” MAY, *supra* note 58, at 88.

In his 1957 opinion regarding enforcement of desegregation decrees in Little Rock, Arkansas, Attorney General Herbert Brownell observed in passing, without support or analysis, that “there are . . . grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate.” President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att’y Gen. 313, 331 (1957). Brownell

implementing broad mandates with limited budgets, making extensive enforcement discretion a practical necessity. Key Supreme Court decisions have thus linked enforcement discretion to resource allocation, without even questioning whether Congress holds authority to moderate enforcement by limiting resources.<sup>315</sup> In effect, an expectation of discretion is today baked into the substantive structure of the laws; Congress legislates against a background expectation of discretion calibrated by resource constraints. However undesirable

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emphasized that this “consideration was not reached because of the express congressional authority for the action taken” by the federal government in Little Rock. *Id.*

President Lyndon Johnson objected (though apparently on policy rather than constitutional grounds) to an appropriations provision barring enforcement of certain export controls, yet his administration nevertheless complied with the provision. *See* Statement by the President Expressing Disapproval of Appropriations Act Provision Relating to Export Control of Hides, Skins, and Leather, 2 PUB. PAPERS 1351, 1351 (Nov. 8, 1966); CALABRESI & YOO, *supra* note 54, at 340–41.

President Carter complained in a 1977 signing statement that an appropriations rider barring the Department of Health, Education, and Welfare from seeking certain busing remedies for civil rights violations “may raise new and vexing constitutional questions.” Labor-HEW Continuing Appropriations Bill, 2 PUB. PAPERS 2087, 2088 (Dec. 9, 1977). Carter’s statement, however, did not specify whether those questions related to faithful execution or equal protection (or something else), *id.*, and in any event his administration not only abided by the restriction but also successfully defended it in court. *See* *Brown v. Califano*, 627 F.2d 1221, 1227–29, 1228 n.42 (D.C. Cir. 1980); MAY, *supra* note 58, at 91.

In a 1989 opinion, OLC relied in part on the president’s Take Care Clause duty to justify interpreting certain statutory restrictions on military law enforcement as applicable only in domestic contexts. The Office explained:

On foreign soil or the high seas—unlike in the domestic situation—military personnel may constitute the only means at the executive branch’s command to execute the laws. Giving extraterritorial effect to the Posse Comitatus Act thus could, in many circumstances, deprive the executive branch of any effective means to fulfill this constitutional duty.

Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 334 (1989). The Office, however, ultimately concluded only that any such statutory argument would raise “serious questions of constitutionality,” and it based its interpretation primarily on other considerations and acknowledged that “valid statutory constraints” could limit means available for law enforcement. *Id.* at 332–34.

Several years earlier, President Reagan objected in a signing statement to an appropriations provision that, by denying funds to pursue antitrust enforcement against municipalities, “attempted to prevent the Federal Trade Commission from carrying out the constitutional duty of executing the substantive antitrust laws.” Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985, 2 PUB. PAPERS 1210, 1210–11 (Aug. 30, 1984). Yet during the fiscal year covered by this rider, the Commission dropped two such complaints it had earlier filed (albeit for the stated reason that the defendant municipalities had resolved the issue) and it reported pursuing no other complaints within the meaning of the rider. 1985 FTC ANN. REP. 71 (indicating that two complaints filed against municipal defendants during fiscal year 1984 were withdrawn in fiscal year 1985 after both defendants enacted legal changes that resolved the Commission’s concerns).

315. *See, e.g.,* *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that “an agency decision not to enforce often involves a complicated balancing of a number of factors,” including not only “whether a violation has occurred” but also “whether agency resources are best spent on this violation or another”).



such legal structures may be as a normative matter—and I have elsewhere criticized them<sup>316</sup>—this background understanding, entrenched in long-standing practice, undercuts any claimed executive duty to faithfully execute the laws beyond congressional appropriations for doing so.

A president might be on stronger ground if enforcement were necessary to defend basic operations of the government against threatened calamity. As we have seen, both Washington and Lincoln undertook law enforcement operations to address such perceived exigencies without any specific appropriation to support doing so. Much as with war powers, however, Congress's subsequent establishment of a permanent enforcement bureaucracy weakens any such claim of inherent presidential authority to act outside of it today, let alone to defy specific appropriations restrictions on particular activities. Washington and Lincoln faced perceived law enforcement exigencies without available means to confront them. As we have seen, however, even they claimed no authority to command resources independently of Congress; on the contrary, they acknowledged the illegality of their action by seeking congressional forgiveness and ratification. Today, the Anti-Deficiency Act generally criminalizes anticipatory spending while expressly allowing obligation of funds to protect lives and property.<sup>317</sup> This statutory exemption, combined with the scale of the standing enforcement bureaucracy, makes it highly unlikely that a president could claim a genuine exigency of the sort that prompted Washington and Lincoln to muster increased enforcement resources on their own initiative.

### 3. Governing Principles and Contemporary Applications

#### *a. Negative Restraints*

How far, then, could Congress go in dictating executive enforcement priorities? Based on the principles elaborated so far, almost any negative constraint on enforcement resources should bind executive officials. By cutting off funding for particular enforcement options—whether with respect to entire statutes or regulations or with respect to more narrowly defined categories of offenders—Congress exercises the authority guaranteed by the Appropriations Clause to

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316. Price, *supra* note 219, at 746.

317. 31 U.S.C. § 1342 (2012). The Justice Department has construed this exception broadly to include such law enforcement activities as legal investigations by the FBI and safety inspections by administrative agencies. *See, e.g.*, Maintaining Essential Services in the District of Columbia in the Event Appropriations Cease, 12 Op. O.L.C. 290, 292–93 (1988).

impose ongoing constraints on application of existing substantive laws to particular violators. Importantly, such an appropriations cutoff does not change the underlying substantive law itself, so violators may generally remain subject to potential future enforcement.<sup>318</sup> Even so, congressional authority to deny funds in this fashion provides a crucial check on executive activities, one that is all the more important given the power of initiative that presidents have acquired through the ongoing accretion of delegated authorities and substantive statutory prohibitions.

Indeed, Congress's control over enforcement resources might even entail power to restrict executive actions that it could not control through general legislation. Evan Zoldan, for instance, has argued that congressional legislation must carry some degree of generality.<sup>319</sup> Congress, on this view, might hold legislative authority only to enact general prospective prohibitions, which the executive branch then enforces against particular violators based on its own independent judgment of who is guilty or innocent. To the extent that is true, Congress might well lack power to adopt general prohibitions while exempting particular named or specified individuals. On the account developed here, however, Congress nevertheless retains authority to cut off annual appropriations to support particular prosecutions or enforcement actions based on its own time-bound judgment that no such enforcement is warranted. Congress thus could deny funds, say, to investigate or prosecute a former presidential candidate for specific suspected violations, or to pursue other narrow categories of offenders if it so chose. If the appropriations power is an independent check on executive enforcement capacity, above and beyond the limits imposed by congressional authority to define offenses in the first place, then this check might properly extend even to such fine-grained judgments about what ongoing enforcement actions should be barred.

### *b. Affirmative Requirements*

As with war powers, affirmative funding conditions—mandated enforcement priorities or prosecutions—present more difficult questions. I have argued elsewhere that while Congress generally may restrict prosecutorial discretion, the executive branch holds an irreducible constitutional authority to decline prosecution in particular cases when the executive branch concludes that enforcement is

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318. Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 1014 (2017).

319. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 689–90 (2014).

factually unjustified.<sup>320</sup> To the extent that understanding of Article II is correct, the appropriations power provides no way around it. On the contrary, just as, in *Lovett*, imposing punishment through legislation was an invalid bill of attainder though accomplished through an appropriations rider,<sup>321</sup> so too here a case-specific prosecution mandate should violate separation of powers even if imposed as a condition on executive funding. Such a mandate would effectively collapse the executive function into the legislative, removing a key liberty-protective constraint on government action. It would be distinguishable, moreover, from a narrowly targeted funding denial precisely because it eliminates a constitutionally required constraint on prosecution, rather than simply restraining a previously conferred executive enforcement power.

More general enforcement mandates, in contrast, should bind executive officials. When an appropriations statute mandates that particular classes of violations be prioritized (as indeed statutes have done on occasion), or that a particular sum be expended investigating and prosecuting a particular type of violation, Congress has simply exercised its authority under the Appropriations Clause to determine general resource-allocation priorities and establish appropriate levels of public support for different government activities. Congress in fact routinely performs this function by setting overall budget levels for different agencies with responsibility for enforcing different statutes: it may fund, for example, the Food and Drug Administration more lavishly than the Environmental Protection Agency, or the Labor Department's Wage and Hour Division more generously than its Mine Safety and Health Administration.

To be sure, insofar as it mandates enforcement activity instead of curtailing it, such legislation does not directly advance the liberty-protective purposes of maintaining a legislative check on executive enforcement choices. Yet it may in fact serve those purposes indirectly: by channeling resources toward one area of enforcement, Congress may effectively limit enforcement in others. In any event, such legislative authority is equally essential to maintaining congressional control over general government spending levels. Even if one doubted that Congress could establish such general priorities through ordinary legislation, the Constitution should give Congress authority to do so through time-barred appropriations limits on the executive branch.

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320. Price, *supra* note 219, at 711–12.

321. *United States v. Lovett*, 328 U.S. 303, 313 (1950).

*c. Recent Controversies*

This framework permits straightforward resolution of several recent disputes. To begin with, the recent marijuana appropriations riders easily fall within congressional authority. Because the executive branch holds no freestanding inherent authority to enforce any particular federal statute, Congress holds clear authority to prevent enforcement of a given law, either across the board or in particular circumstances, by cutting off resources to enable such enforcement. President Trump's signing statement suggesting otherwise was mistaken.<sup>322</sup> By the same token, were President Trump to undertake the immigration dragnet he has threatened, Congress would hold clear authority to halt such action or impose different priorities through appropriations limits. Less dramatically but no less consequentially, Congress's periodic denial of resources to enforce disfavored administrative regulations are also valid. Insofar as they block implementation of a particular understanding of the law or set of regulatory obligations, such riders fall squarely within Congress's authority to control executive enforcement by limiting executive resources.

Again, none of these funding cutoffs (whether for marijuana, immigration, or regulatory action) change the underlying substantive law itself. As a general matter, the executive branch may remain free to resume enforcement, even with respect to past conduct, when funding is restored.<sup>323</sup> Even so, Congress's authority to deny funds in this fashion provides a crucial check on executive activities, a check that, once again, is all the more important today given the power of initiative that presidents have acquired through the ongoing accretion of delegated authorities and substantive statutory prohibitions.<sup>324</sup>

Funding restrictions preventing transfer of Guantanamo prisoners during the Obama years presented only slightly more difficult questions. In asserting in signing statements that “[u]nder certain circumstances” a provision barring detainee transfer to the United States “would violate constitutional separation of powers principles,” President Obama stated:

The executive branch must have the flexibility, with regard to those detainees who remain, to determine when and where to prosecute them, based on the facts and

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322. Trump Statement on 2017 Consolidated Appropriations Act, *supra* note 3.

323. For my own further discussion of this question and an argument that regulated parties should hold a reliance defense against future enforcement in some circumstances, see Price, *supra* note 318, at 1010–15.

324. See *supra* Section I.A.

circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy.<sup>325</sup>

While it might refer only to policy considerations, this statement could suggest that presidents hold an inherent, preclusive authority to bring criminals to justice in federal court. To the extent that is what President Obama meant, he was wrong. Congress's broad authority over enforcement resources entails power to deny funding for particular enforcement efforts or prosecutions. In this case, of course, doing so had the perverse effect of keeping suspects in military detention. As discussed earlier, moreover, separate (and equally valid) funding constraints prevented transfer of those prisoners out of military custody.<sup>326</sup> But the peculiar posture of the Guantanamo example should not obscure the essential character of the authority Congress exercised. In general, congressional control over enforcement resources is liberty-protective. It provides a check on overzealous law enforcement. In extremis, it could prevent an unhinged president's henchmen from taking unwarranted action. Asserting presidential authority to override such limits based on a presumed inherent executive authority to enforce the laws would be truly dangerous. President Obama's Attorney General was correct to repudiate this view.<sup>327</sup>

### *E. Diplomacy*

Funding restrictions on the president's diplomatic powers present the most challenging questions. The trouble stems partly from uncertainty about the proper content of the president's constitutional foreign affairs powers. Although presidents from the beginning have claimed particular responsibility for foreign affairs,<sup>328</sup> the Constitution's text scatters different elements of foreign relations power in different places while leaving two of the most important—recognition of foreign sovereigns and control of diplomatic communication—without any unambiguous textual home.<sup>329</sup> Edward

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325. Obama Statement on Signing 2015 NDAA, *supra* note 61.

326. *See supra* Section IV.C.2.a.

327. Julian Hattem, *Lynch: No Gitmo Transfers to US Without Change in Law*, HILL (Mar. 9, 2016, 10:31 AM), <http://thehill.com/policy/national-security/272351-attorney-general-lynch-no-gitmo-transfers-to-us-without-change-in> [<https://perma.cc/79CE-NVZ6>] (reporting testimony before the Senate Judiciary Committee that “[t]he law currently prohibits a transfer to U.S. soil, and the president would have to work with Congress”).

328. POWELL, *supra* note 8, at 36.

329. For recent thoughtful efforts to reconstruct the Framers' understanding, see PRAKASH, *supra* note 197, at 110–41; RAMSEY, *supra* note 97; and McConnell, *supra* note 12. On some accounts, the Vesting Clause assigns certain historic foreign affairs powers to the president as a component of the “executive Power” vested in the president. *See, e.g.*, PRAKASH, *supra* note 197, at 110–11; RAMSEY, *supra* note 97, at 73.

Corwin thus famously described the constitutional text as “an invitation to struggle for the privilege of directing American foreign policy.”<sup>330</sup> At any rate, on the particular question addressed here—congressional appropriations control over executive action—political struggle has yielded widely divergent congressional and executive views. While Congress routinely conditions appropriations on particular diplomatic constraints, the executive branch just as routinely claims authority to disregard those conditions.<sup>331</sup>

The framework developed throughout this Article can help chart a principled path through this thicket. Without attempting here to answer every substantive question regarding the proper content of executive authorities, we can nonetheless make progress on the question of appropriations control by considering the proper relationship to resources of foreign affairs powers that presidents have claimed authority to exercise. Doing so, however, requires further disaggregating those powers. In terms of the framework developed here, some powers, most notably the president’s claimed authority to recognize foreign sovereigns and personally receive their diplomats, are resource-independent. Like other such powers discussed earlier, these authorities may be exercised personally by presidents, and in consequence Congress lacks authority to directly control their exercise through appropriations limitations. At the other extreme, affirmative provision of foreign aid properly remains subject to plenary congressional control. In the middle, as a difficult intermediate case, falls actual conduct of diplomacy, meaning communication of official positions to foreign sovereigns on behalf of the United States. For reasons addressed below, an intermediate solution, modeled on principles developed earlier for indirect funding constraints on executive power, should govern further struggles over control of diplomacy.

### 1. Disaggregating Foreign Affairs Powers

To clear the ground for consideration of diplomacy *per se*, we can begin with some easier aspects of executive foreign relations authority. Too often, both courts and presidents have sloppily lumped foreign affairs powers together, presuming general presidential authority to act as the country’s “sole organ” overseas, without regard to limits imposed

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330. CORWIN, *supra* note 11, at 201.

331. *See supra* Section I.B.2.

by Congress.<sup>332</sup> Even accepting a broad view of executive authority over foreign relations, however, different aspects of that authority should relate differently to Congress's power of appropriation.

Within the framework developed here, at least two key aspects of foreign relations, reception of diplomats and recognition of foreign sovereigns, may be classified as resource-independent presidential authorities. By its plain terms, the Constitution provides that the president "shall receive Ambassadors and other public Ministers."<sup>333</sup> The president thus holds clear textual authority to meet representatives of foreign sovereigns on behalf of the United States. In addition, based in part on this clause (among other considerations), the Supreme Court recently held in *Zivotofsky ex rel. Zivotofsky v. Kerry* that the president holds exclusive authority to recognize foreign governments.<sup>334</sup> Still further, under *Zivotofsky*, this power apparently extends not only to recognition of a particular government or sovereign state, but also to determining whether particular territory (such as the city of Jerusalem in *Zivotofsky*) falls within a particular foreign state's borders.<sup>335</sup>

To the extent these exclusive presidential authorities are themselves valid (a question beyond the scope of this Article),<sup>336</sup> they are most naturally classified as resource-independent. Both are authorities the president may exercise personally, by choosing to meet with particular foreign representatives or recognize a particular foreign government. Admittedly, unlike other powers located in this category earlier, neither of these authorities clearly serves to check congressional authority or ensure institutional control over the executive branch. Yet both might be functionally justified by an analogous concern to avoid congressional delay and obfuscation with respect to key foreign relations choices that often require swift and decisive action by some accountable official.<sup>337</sup> At any rate, like the powers of clemency, veto, and appointment addressed earlier, these are

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332. The classic example is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

333. U.S. CONST. art. II, § 3.

334. 135 S. Ct. 2076, 2087 (2015).

335. *Id.* ("The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. . . . The formal act of recognition is an executive power that Congress may not qualify.")

336. For one critique of *Zivotofsky*, see Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112 (2015).

337. *Cf. Zivotofsky*, 135 S. Ct. at 2087 ("If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.")

authorities that even Charles Black's enfeebled apartment-dwelling president, stripped of government-provided comforts and privileges, could continue to exercise on his own.

To be sure, the notion that presidents could realistically exercise these powers on their own may once again be somewhat fictional. The lavish ceremonies of international diplomacy, the state dinners and twenty-gun salutes, have always required resources beyond most presidents' personal bank accounts. (Query, for example, how effective our hypothetical president would be engaging with the Chinese Premier or British Prime Minister over TV dinners around a kitchen table.) Nor in all likelihood could the president make informed and intelligent recognition decisions without guidance and support. As we saw earlier, however, these same problems attend other resource-independent authorities, even if the problem is particularly acute in this context. With respect to these aspects of diplomacy, as with other resource-independent authorities, the president is at least formally independent from Congress, and this formal independence should again preclude Congress from leveraging its control over other resources to dictate directly how the president exercises these powers.

This inference, indeed, may help explain (and limit) otherwise puzzling features of existing practice and precedent. In *Zivotofsky*, for example, the Court indicated that "[t]he President . . . could not build an American Embassy abroad without congressional appropriation of the necessary funds."<sup>338</sup> Nevertheless, the Court gave no indication that the law at issue—a provision allowing individuals born in Jerusalem to list "Israel" as their place of birth on U.S. passports—would have been any more valid had it been passed as a condition of State Department appropriations,<sup>339</sup> as indeed it was in at least one other iteration.<sup>340</sup> The recognition power's resource-independence helps explain why. Because the president can exercise the recognition power on his own, Congress may not condition the government's operation on that power being exercised in a particular way, any more than it could block implementation of President Carter's or President Andrew Johnson's controversial pardons through funding restrictions. In all these examples, as in others addressed earlier, giving effect to the funding constraints would "require operation of the Government in a way forbidden by the Constitution."<sup>341</sup>

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338. *Id.*

339. *Id.* at 2087–88.

340. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 404, 118 Stat. 86, 86.

341. Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933) (objecting to provision for congressional committee veto); *see also, e.g.*, Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller, 41 Op. Att'y Gen.



By the same token, this theory might justify on narrower grounds long-standing executive objections to embassy funding conditions that could effectively dictate recognition decisions. For example, while multiple administrations have asserted that requiring relocation of the U.S. embassy in Israel from Tel Aviv to Jerusalem would infringe upon presidential authority over diplomacy,<sup>342</sup> these objections might be better justified as asserting authority to disregard funding constraints that would directly override a presidential recognition decision.<sup>343</sup>

In any event, the formal resource-independence of the president's reception and recognition powers distinguishes it starkly from other foreign relations authorities. At the other extreme, the president cannot claim any valid authority to provide affirmative support to international bodies, foreign governments, or even achievement of concrete policy goals. Such spending in service of national foreign policy goals falls squarely within the ultimate authority over public resource allocation that the Appropriations Clause guarantees to Congress.<sup>344</sup>

This boundary, indeed, is one core lesson of the Iran-Contra scandal. Whether or not presidents have been correct to claim preclusive authority over actual diplomatic communication, Congress's fierce repudiation of Iran-Contra remains significant in drawing the line at actual provision of public resources.<sup>345</sup> In the spending component of the scandal, President Reagan's staff did not simply encourage support for the Contras by foreign governments and private individuals through talk. They themselves established and operated an

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507, 526 (1960) (“[I]t seems . . . plain that Congress may not use its power over appropriations to attain indirectly an object which it could not have accomplished directly.”).

342. See, e.g., Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. O.L.C. 123, 125–26 (1995) (objecting to such a requirement and identifying past objections).

343. See, e.g., Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189, 193 (1996) (characterizing conditions on diplomatic relations with Vietnam as violation of recognition power); 19 Op. O.L.C. at 124–25 (asserting that relocating U.S. embassy in Israel would infringe upon president's recognition power).

344. See *supra* Section I.A. Although he did not justify the distinction in the same terms employed here, Louis Henkin similarly noted in his classic treatise that presidents “have reluctantly accepted . . . [that] Congress can designate the recipients of U.S. largesse and impose other conditions upon it.” HENKIN, *supra* note 82, at 120–21. Henkin also argued, much as I do below, that Congress held authority to structure the overall foreign affairs establishment, *id.* at 121–23, but not to direct diplomatic officials to pursue particular policies, *id.* at 119. Like Stith, however, Henkin believed that Congress was legally obliged to fund international commitments, even if this obligation was often respected in the breach. *Id.* at 121.

345. See S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 413 (1987) (“The Constitutional plan did not prohibit the President from urging other countries to give money directly to the Contras. But the Constitution does prohibit receipt and expenditure of such funds by this Government absent an appropriation.” (footnote omitted)).

ostensibly private (but effectively public) entity for channeling such funds to a foreign armed group, in defiance of clear statutory prohibitions on use of public funds to advance this policy.<sup>346</sup> As Philipp Bobbitt and others amply demonstrated at the time, such action violates crucial limits on executive authority.<sup>347</sup> Iran-Contra's repudiation, moreover, appears to fit a broader pattern in executive practice. Although presidents have occasionally asserted authority to disregard spending restrictions on foreign aid, they appear to have backed down from such claims in practice.<sup>348</sup>

Attending to the formal relationship between powers and resources, then, may help identify some clear cases and thus prevent creeping expansion of presidential discretion over all aspects of foreign affairs. Nevertheless, the central aspect of foreign relations—conduct of diplomacy—defies easy categorization, for reasons I now address.

## 2. How to Characterize Diplomacy?

While the textual basis for this authority is debatable, presidents going back to George Washington have more or less successfully claimed exclusive authority over actual conduct of diplomacy—the official positions the United States takes in communication with foreign sovereigns.<sup>349</sup> What is more, on this

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346. *Id.* (describing creation and use of “nominally private” entity). The Iran-Contra scandal also involved other arguable legal violations, including indirect arms sales to Iran in violation of applicable statutes. BRUFF, *supra* note 59, at 370–71.

347. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 64–82 (1991); see also, e.g., BRUFF, *supra* note 59, at 372 (“The Iran-Contra operation created secret national policies that were supported by funds that had not been appropriated by Congress.”).

348. For example, Presidents Truman and Eisenhower claimed authority in signing statements to disregard provisions mandating assistance to specified foreign countries, yet they ultimately complied with these requirements. MAY, *supra* note 58, at 93–95; see also HENKIN, *supra* note 82, at 120–21 (concluding that “Presidents have reluctantly accepted” Congress’s authority over foreign aid spending). President Obama caused controversy by providing funds to a United Nations body in arguable violation of a standing prohibition on funding any UN agency or affiliate that “grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood” (as the Palestinian Authority, the group in question, evidently does not). Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 410, 108 Stat. 382 (1994). To the extent the statute could not fairly be construed to allow the expenditure, the Constitution provides no justification for disregarding this restriction. For discussion of this controversy and criticism of the Administration’s view, see *Two Recent Examples of Executive Undermining of Congress’s Spending and Foreign Commerce Powers: Hearing Before the Exec. Overreach Task Force of the H. Comm. on the Judiciary*, 114th Cong. 28–31 (2016) (statement of Eugene Kontorovich, Professor, Northwestern University School of Law).

349. Writing in 1957, Corwin observed that “there is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation’s intermediary in its dealings with other nations.” CORWIN, *supra* note 11, at 214 (emphasis omitted). For more recent executive branch opinions asserting this view, see, for example, Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the

question, presidents have put their money where their mouth is by openly defying congressional limits—even when those limits took the form of appropriations restrictions.<sup>350</sup> The executive branch has even gone so far as to claim preclusive authority to employ whomever it wants, whether inside or outside the government, to relay particular diplomatic messages.<sup>351</sup>

In practice, then, presidents have treated diplomacy as a resource-independent power—a power that Congress cannot directly control, even through conditions it imposes on resources for the State Department or other diplomatic functions. As a matter of first principles, this view is difficult to justify. To be sure, as with other resource-independent powers like the veto, clemency, and appointments, diplomacy is an authority the president can (and does)

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Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. \_\_ (2011); and Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. \_\_ (2009). For a discussion of early practice supporting this authority, see PRAKASH, *supra* note 197, at 120–22.

350. For examples of such defiance, see, for instance, *Earth Island Inst. v. Christopher*, 6 F.3d 648, 650 (9th Cir. 1993) (addressing claims that executive officials “did not initiate treaty negotiations with foreign governments to protect sea turtles, as required by [statute]”); 33 Op. O.L.C. \_\_ (ms. at 1, 10–11) (noting plans to violate funding restriction); Office of Sci. & Tech. Policy, *International S&T Cooperation*, WHITE HOUSE PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/administration/eop/ostp/sciencediplomacy> (last visited Jan. 5, 2018) [<https://perma.cc/LV8J-N868>] (describing diplomatic contacts by OSTP with China despite funding restriction on such activities); HENKIN, *supra* note 82, at 88, 118–19 (characterizing a 1913 appropriations rider barring unauthorized participation in international conferences as “a known dead letter” and observing that presidents have “often disregarded” diplomatic limitations); MAY, *supra* note 58, at 109–10 (discussing President Eisenhower’s completion of an executive agreement in defiance of a statutory restriction); Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 154–56 (1953) (discussing examples of defiance from 1913, 1916, 1921, and 1924).

The executive branch, of course, does not uniformly disregard such conditions. In a careful study of congressional instructions to U.S. representatives at the World Bank, Kristina Daugirdas found that, as of 2013, “[i]n Republican and Democratic administrations and during periods of both unified and divided government, the executive branch has voted consistently with Congress’s instructions.” Daugirdas, *supra* note 201, at 518–20. As Daugirdas observes, this finding highlights the potential importance of Congress’s appropriations power in controlling executive action, even in areas of formal executive authority. *Id.* at 533–34. She acknowledges, however, that “[t]he desire for funding matters.” *Id.* at 541. Because presidential administrations during the period she covers favored strong support for the bank, they may have held stronger incentives to comply than in cases of interbranch policy conflict. *Id.* at 540–41.

351. One notorious historical example of this practice was President Woodrow Wilson’s heavy reliance on a private emissary to communicate with European leaders. See BRUFF, *supra* note 59, at 209, 213. For a classic discussion of historical examples and defense of this practice, see Henry M. Wriston, *American Participation in International Conferences*, 20 AM. J. INT’L L. 33, 39 (1926) (“Congress may partially cripple a power which it is not competent to destroy by refusing appropriations. But Congress has no power whatever to limit the President in his choice of negotiators.”); see also HENRY M. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS (1929) (similar). For other examples and a more recent critique, see Ryan M. Scoville, *Ad Hoc Diplomats* (Marquette Law Sch. Legal Studies, Paper No. 17-08, 2017), <https://ssrn.com/abstract=2926010> [<https://perma.cc/FJN8-TQ2Q>].

exercise personally. Presidents may themselves communicate with foreign leaders or travel abroad to meet with them; they may even personally engage in negotiations, like Woodrow Wilson at Versailles or Franklin Roosevelt at Yalta. If it is true that the president holds preclusive authority to speak for the nation, then Congress surely could not restrict what the president says personally in such settings.

On a normative level, furthermore, congressional control seems less imperative than with respect to war powers and law enforcement. Diplomacy, after all, is only talk, and as Winston Churchill supposedly said, “better to jaw-jaw than to war-war.”<sup>352</sup> Because diplomacy lacks the coercive or destructive character of war powers and law enforcement, an ongoing constraint on executive action through conditional appropriations may be less important to the nation’s well-being and survival. In addition, under established practices, even if we no longer treat all binding international agreements as treaties requiring Senate ratification, giving binding legal effect (or at least domestic implementation) to an international agreement generally requires some form of either *ex ante* or *ex post* congressional approval.<sup>353</sup> In principle, then, Congress’s legislative authority may impose an ongoing constraint on diplomatic outcomes, even without use of conditional appropriations.

Nevertheless, for important formal and functional reasons, diplomacy might more naturally be characterized as resource-dependent. Support for other resource-independent powers typically takes the form of advice and assistance flowing in towards the president to facilitate a particular executive judgment (a judgment, for example, about whether to veto a particular bill, issue a particular pardon, appoint a particular officer, or even recognize a particular foreign government). In contrast, diplomacy, more like law enforcement and war powers, involves projecting power outward. Diplomatic resources thus magnify presidential authority more concretely than do resources for mere advice and assistance with respect to other presidential powers.

What is more, the notion that the president could personally conduct all necessary U.S. diplomacy is even more fictional than in the

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352. W.H. Lawrence, *Churchill Urges Patience in Coping with Red Dangers; Tells Congressional Group It Is ‘Better to Jaw-Jaw than to War-War,’* N.Y. TIMES, June 27, 1954, at 1.

353. See generally Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1713 (2017) (discussing different pathways to forming international agreements and concluding that the “clearest line” is that “the executive branch can enter into international commitments on its own but needs some kind of preexisting or subsequent action from the Senate or Congress in order for the terms of these commitments to be implemented through domestic law”).

case of other resource-independent powers. Isolated historical examples notwithstanding, the president's many other responsibilities surely preclude personal engagement in the protracted negotiations often required for effective diplomacy. In practice, such activity must be conducted through other official representatives of the United States, and official representatives require official resources—salaries and embassies, or at the very least dinners and hotel rooms.<sup>354</sup>

Finally, notwithstanding Congress's ultimate authority over formation and implementation of binding legal commitments, recent presidents have demonstrated in dramatic fashion just how consequential mere diplomatic communication, without more, may be. Simply by failing to reiterate the U.S. commitment to mutual-defense assurances in the NATO treaty, President Trump may have permanently altered U.S. security arrangements. For his part, President Obama demonstrated in rather dramatic fashion how much power diplomatic talk by itself may carry, at least under modern conditions, in shaping the international legal terrain. In two significant and controversial agreements, one regarding Iran's nuclear program and another involving climate change (from which President Trump has announced the United States will withdraw<sup>355</sup>), President Obama exercised preexisting domestic legal authorities over air pollution and sanctions waivers to establish significant international commitments.<sup>356</sup> In each case, Congress could have undone or blocked the deal by stripping the domestic legal authorities that made it possible, yet doing so would have required legislation that the President could have vetoed. These examples illustrate how, as with war powers and law enforcement, presidential initiative may create facts on the ground that Congress has limited practical capacity to undo—except through its own power of initiative with respect to appropriations.

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354. For discussion of the importance of diplomatic appointments in an era of premodern communications, see McConnell, *supra* note 12.

355. Remarks Announcing United States Withdrawal From the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 373 (June 1, 2017).

356. For a thorough discussion of legal questions presented by such agreements, see Galbraith, *supra* note 353. For some other analyses, see, for example, Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. & INT'L ENVTL. L. 142 (2016); Jack Goldsmith & Marty Lederman, *The Case for the President's Unilateral Authority to Conclude the Impending Iran Deal Is Easy Because It Will (Likely) Be a Nonbinding Agreement Under International Law*, JUST SECURITY (Mar. 11, 2015, 8:15 AM), <https://www.justsecurity.org/20963/case-presidents-unilateral-authority-conclude-impending-iran-deal-easy-likely-nonbinding-agreement-international-law/> [<https://perma.cc/WU2K-NZBW>]; and Michael Ramsey, *Is the Iran Deal Unconstitutional?*, ORIGINALISM BLOG (July 15, 2015, 6:02 AM), <http://originalismblog.typepad.com/the-originalism-blog/2015/07/is-the-iran-deal-unconstitutionalmichael-ramsey.html> [<https://perma.cc/Z862-WPAP>].

To the extent diplomacy is best characterized as a resource-dependent authority, principles developed earlier would suggest that congressional authority under the Appropriations Clause to set general resource-allocation priorities and modulate the government's overall bureaucratic capacity should entail power to control the diplomatic purposes to which the resources it provides are put.<sup>357</sup> As noted, however, with respect to diplomacy, in contrast to war powers and law enforcement, presidents have repeatedly claimed an effective authority to disregard congressional funding constraints.<sup>358</sup> In effect, then, despite the compelling structural reasons to view diplomacy as resource-dependent, presidents may well have moved diplomacy into the resource-independent column.

Even if that is true, however, this claimed presidential authority over diplomacy should not properly imply limitless authority to call on the federal government's bureaucratic resources for diplomatic purposes, nor even unrestricted access to support from diplomatic advisers. On the contrary, as we have seen, resource constraints may impose some check on even resource-independent powers. Here, insofar as an antimanipulation principle properly governs indirect constraints on paradigmatic resource-independent powers like the veto and clemency, the same principle might likewise govern the validity of funding limits on conduct of diplomacy.

### 3. An Antimanipulation Framework

If conduct of diplomacy is a resource-independent power, as presidents have effectively claimed it to be, then the president must retain ultimate independent discretion over the choice of diplomatic goals, just as he must retain ultimate independent discretion over vetoes or pardons. By the same token, however, principles developed above with respect to indirect conditions on resource-independent powers may help make sense of when funding constraints on diplomacy do, and do not, cross a constitutional line. As with conditions on advice and assistance for vetoes, pardons, and appointments, appropriations conditions on diplomacy are invalid if they appear likely to manipulate independent presidential judgments about particular narrow diplomatic objectives. At the same time, however, funding conditions that set overall levels of support for broader categories of diplomatic activity should be valid and enforceable.

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357. Michael Ramsey advocates this view as a matter of plain text and original understanding. RAMSEY, *supra* note 97, at 112, 417 n.61.

358. See *supra* notes 349–350 and accompanying text.

The easiest case for invalidity under this framework involves conditions that seek to control the specific viewpoint expressed by the diplomatic officer most naturally positioned to engage in the relevant diplomacy. If Congress, for example, provides funds for a special envoy to negotiate a particular treaty, or for that matter for the Ambassador or senior State Department official with general responsibility for the country in question, while precluding the envoy or ambassador or official from taking particular positions in those negotiations, the condition may be disregarded as an unconstitutional infringement on the president's presumed Article II authority over conduct of diplomacy. Much as in other examples addressed earlier, such a condition is not coercive in the strict sense that it altogether bars the president from asserting a contrary view. The president could always call the foreign leader in question himself, or he might employ a different official or relay his views through a private emissary. Yet the restriction may nevertheless materially obstruct the president's chosen diplomatic goals, and it may, once again, do so in a way that obscures whether responsibility for the resulting policy properly lies with Congress or the president. To be blunt, if the president cannot employ the personnel and resources most directly suited to accomplishing the diplomatic goal at hand, then his pursuit of that goal will likely be far less effective. Foreign leaders may well perceive use of incongruous substitute personnel as signaling lack of commitment, and in any event key contacts and expertise within the U.S. government will be closed off to advancing the president's objectives. For all these reasons, such limitations seem likely to impose a substantial practical impediment to the president's asserted exclusive control over conduct of diplomacy.

This view at least holds a long and distinguished pedigree. In one important early debate on diplomatic funding, Daniel Webster argued on the House floor that while Congress could deny funds for a planned delegation to an international convention, it could not provide funds subject to conditions dictating what the delegates would say.<sup>359</sup> “[W]e must make the appropriation without conditions,” Webster argued, “or refuse it.”<sup>360</sup> More recently, Louis Henkin (among others) has advocated a similar principle.<sup>361</sup>

Among recent controversies, furthermore, the Obama Administration's disregard of the OSTP riders might also be understood

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359. 9 ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856, at 94 (New York: D. Appleton & Co. 1858).

360. *Id.* at 95. For discussion of this and other historic debates, see Nobleman, *supra* note 350.

361. HENKIN, *supra* note 82, at 119 (“[S]hould Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation.”).

in these terms, although the Department of Justice's Office of Legal Counsel ("OLC") instead justified its view on the broader theory (rooted in past OLC opinions) that the president holds unfettered choice of diplomatic agents.<sup>362</sup> While the director of this particular White House office might seem an odd choice for diplomatic engagement, existing cooperation agreements (negotiated before any such rider was in place) designated this officer as the point of contact with China for purposes of negotiating further technology-related agreements.<sup>363</sup> In that context, the office's director might at least arguably constitute the most natural vehicle for conducting diplomacy on this particular narrow topic with China, with the consequence that stripping the director of this authority constitutes an unduly manipulative condition on congressional funding of the executive branch.

As a second type of invalid restriction, conditions precluding any communication at all with particular foreign governments or international bodies may likewise be invalid. To be effective, the president's asserted power over diplomacy must entail authority to obtain assistance from someone somewhere within the federal bureaucracy to relay the president's diplomatic positions to foreign counterparts. Without such authority, the president would be limited to personal communications of his own or perhaps communications relayed through private intermediaries. As compared to communication through official channels with the benefit of relevant expertise within the government, such means of diplomacy are again likely to be so far less effective as to make restrictions on their use unduly manipulative with respect to pursuit of the president's goals. Accordingly, to take another recent example, President Obama (like earlier administrations) stood on solid ground in disregarding funding conditions that barred sending any State Department representative to particular United Nations bodies.<sup>364</sup> Such conditions were invalid because they impermissibly denied the president any appropriate official means of engaging diplomatically with foreign bodies whose decisions may materially affect the president's chosen diplomatic goals.<sup>365</sup>

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362. See Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. \_\_ (2011) (ms. at 5).

363. *Id.* (ms. at 2) (describing designation of OSTP as the United States' Executive Agent).

364. Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. \_\_ (2009).

365. See *id.* Strictly speaking, the condition in question did not preclude sending representatives from other government departments (to the extent appropriations for that purpose were otherwise available), but OLC noted that delegations to UN bodies were normally led by State Department officials. *Id.* (ms. at 10).



On the other hand, Congress should hold authority to structure the overall diplomatic apparatus at a higher level of generality. Congress may fund certain embassies or other components within the State Department (the Bureau of Near Eastern Affairs, say) more generously than others.<sup>366</sup> While such choices may channel diplomatic initiative in particular directions, they do not carry the same direct impact on the president's choice of objectives that could render more narrowly focused restraints unduly manipulative. By the same token, although this power has been historically contested, Congress should hold authority to initiate diplomacy by requiring opening of particular embassies or consulates against the president's wishes, so long as Congress does not exercise a *de facto* recognition power or prescribe the particular diplomatic communications in which the government will engage.<sup>367</sup> As in other areas of executive authority, general funding limits and mandates fall within Congress's overall authority over resource allocation within the federal government. Such constraints should raise constitutional questions only if targeted far more narrowly at particular presidential diplomatic initiatives and objectives.

Finally, for much the same reason, Congress should also hold broad authority to limit use of nondiplomatic government personnel for diplomatic purposes. The executive branch has at times characterized the president's choice of diplomatic agents as entirely plenary.<sup>368</sup> As a default matter, such freedom of choice might well be justified. The president's presumed authority over foreign affairs might well support a default rule that presidents may employ whichever agents within the federal government they deem best for advancing their chosen

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366. For another defense of this view, see HENKIN, *supra* note 82, at 121–23.

367. For discussion of contrasting examples from President Ulysses Grant (who complied with such a restriction despite raising constitutional objections) and President Carter (who complied only partially), see MAY, *supra* note 58, at 93, 114–15. In another more recent example, President Reagan objected on constitutional grounds to provisions mandating reopening of foreign consulates, Statement on Signing a Bill Authorizing Fiscal Years 1982 and 1983 Appropriations for Certain Federal Agencies, 2 PUB. PAPERS 1072, 1072 (Aug. 24, 1983), but he nevertheless promptly complied with these mandates, with the one exception (later excused by Congress) where the host country apparently objected to reopening the U.S. consulate. Compare Department of State Authorization Act, Pub. L. No. 97-241, § 103, 96 Stat. 273 (1982) (conditioning Fiscal Year 1982–1983 funds for opening any new consulates on reopening of consulates in seven listed cities), with 1 GALE RESEARCH CO., COUNTRIES OF THE WORLD AND THEIR LEADERS YEARBOOK 1984, at 172, 174, 177–78, 188 (1984) (listing as open U.S. consulates in all required cities save Mandalay, Burma), and Department of State Authorization Act, Pub. L. No. 98-164, § 137, 97 Stat. 1017, 1030 (1983) (amending statute to impose condition only “to the extent such reopening is authorized by the foreign government involved”), and H.R. REP. NO. 98-563, at 65 (1983) (Conf. Rep.) (explaining that this amendment “clarified the authority of the Secretary of State to open new consulates, notwithstanding that the consulate in Mandalay, Burma has not been reopened”).

368. See, e.g., 33 Op. O.L.C. \_\_ (ms. at 5) (indicating that Congress “may not . . . place limits on the President's use of his preferred agents to engage in a category of important diplomatic relations”).

objectives. As with advising more generally, moreover, presidents must remain free to draw guidance from anyone within the government they choose, so long as the requested advice is either a de minimis imposition or germane to the office's functions and not unduly distracting.<sup>369</sup> Within those parameters, however, if Congress provides resources for particular government functions—law enforcement or nuclear security, for example—it must hold authority under the Necessary and Proper Clause, if not also the Appropriations Clause, to reserve personnel for those purposes and not for distracting diplomatic undertakings that the president chooses to pursue.

To summarize, then, the constitutional structure, at least as refracted through the lens of current practice, may well grant the president authority to disregard funding conditions that materially disrupt specific diplomatic initiatives. Yet Congress remains free to dictate more general funding levels for diplomatic activities, and by the same token it retains complete control over actual provision of resources to foreign governments and other beneficiaries of federal largesse. Executive disregard for funding restraints on diplomacy, furthermore, provides no support for developing a similar practice with respect to war powers and law enforcement. Because those powers implicate different formal and functional considerations, Congress's power of the purse must continue to afford broad control over how the coercive and destructive aspects of government power are exercised.

### CONCLUSION

While the constitutional separation of powers limits congressional authority to condition executive appropriations, accurately identifying these limits requires disaggregating executive powers and considering the proper relationship between authority and resources in each context. Certain executive powers—the veto, clemency, and appointment authorities being key examples—are resource-independent. Congress lacks power to control their exercise, whether through restricted appropriations or by other means, because the president may exercise these powers personally, and because these powers generally exist either to check Congress or to ensure presidential control over a distinct branch of government (or both). In contrast, Congress holds near-plenary authority to restrict use of military or law enforcement resources. While presidents have claimed substantial discretion over the deployment of such resources in the absence of specific restraints, Congress nonetheless retains broad

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369. See *supra* Section III.C.3.

power to impose such restraints if it chooses. Hard cases arise between these two poles, mainly with respect to presidential advisers and staff and the conduct of diplomacy. In both those areas, substantial practice, if not also more primary considerations, support some executive authority to defy congressional funding conditions, but this authority should properly be limited to circumstances in which the funding constraint in question appears likely to unduly manipulate a particular narrow judgment properly belonging to the president alone.

Throughout, I have attempted to defend this framework primarily with formal textual and structural arguments, buttressed by appeals to functional considerations and historic practice. Yet the framework's underlying normative appeal bears reiteration in closing. Separation of powers necessarily limits Congress's authority to control either the judiciary or the executive branch, whether through appropriations or by other means. Both those branches have specific constitutionally assigned functions that exist in part to check and restrain Congress. Yet the framework elaborated here preserves a vital legislative check on executive governance in contexts where it most matters. Congress retains substantial control over the structure and availability of resources for various purposes within the government, as well as ultimate control over actual national policy in nearly every key area, save perhaps actual conduct of diplomacy with foreign governments. Even more important, through congressional control of military and law enforcement resources, ultimate responsibility for the federal government's coercive and destructive capacities remains in the hands of the people's representatives in Congress, and not solely in those of the president. Even beyond these specific authorities, moreover, ultimate power to cut off funding altogether and shut down the government, though much maligned for its abuse in recent years, remains a last safeguard against unwarranted presidential action.

These limits provide guideposts for legal decisionmakers, whether in the executive branch, Congress, or the courts. Yet the framework should also inform public debates over when presidents have transgressed proper legal bounds. The unmistakable trend in separation-of-powers dynamics over recent decades has been towards increasing executive governance. These facts on the ground, however, need not—and should not—be understood to reflect constitutional imperatives. Here, as in other areas, they may better be understood as reflecting an accretion of implicit legislative delegations.<sup>370</sup> Much of the power the executive branch exercises, even in areas of perceived core executive responsibility such as war powers and law enforcement, is a

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370. See Price, *supra* note 219, at 742–48.

function of legislative choices over time rather than constitutional necessities. Legislative choices, unlike constitutional prerogatives, can be legislatively undone—if the legislature has the will to do so.

Though a source of frustration and obstruction for presidents in everyday political battles, Congress's power of the purse provides an essential ongoing political check on presidential action, as well as a potential failsafe against catastrophe. We cannot afford further erosion of this key remaining limit on executive power.