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FUNDING "NON-TRADITIONAL" MILITARY OPERATIONS: THE ALLURING MYTH OF A PRESIDENTIAL POWER OF THE PURSE

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Every [military] undertaking must be, at least ought to be, regulated by the state of our Finances . . . ; without this disappointment, disgrace, and increase of debt will follow on our part; exultation and renewed hope, on that of the enemy.[2]

•***December 1995:*** 20,000 U.S. troops join a 60,000-person NATO-led implementation force (IFOR) in Bosnia to enforce the terms of peace accords negotiated at Dayton, Ohio, the previous month.[3] The military annex to the peace accords provides that a two-lane, all-weather road will be built through a Bosnian-controlled corridor between the Bosnian capital of Sarajevo and the Bosnian city of Gorazde.[4] Existing roads between Sarajevo and Gorazde run through Bosnian Serb-held territory and are

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2. George Washington, Minutes of Sundry Matters to Become the Subject of Conference with a Comm. of Congress (Jan. 8, 1779), *in* 13 THE WRITINGS OF GEORGE WASHINGTON 487 (John C. Fitzpatrick ed., 1936).

3. John Pomfret, *United Nations Hands Over Its Bosnia Duties to NATO Forces*, WASH. POST, Dec. 21, 1995, at A35; *NATO Orders Troops to Bosnia*, CHI. SUN-TIMES, Dec. 16, 1995, at 14.

unacceptable to the Bosnian government.[5] The peace accords do not specify who is responsible for building the road, and NATO asks U.S. military forces to help with the construction, even though the road will be in the French IFOR sector.[6] The first critical issue faced by military planners is determining what funding authority (if any) the United States can use to assist the construction effort.

•***September 1994:*** The United States commits troops to Haiti as part of a multi-national force to restore the country's democratically elected government.[7] Upon entering Haiti, U.S. officials find Haiti's government—including its judiciary—in disarray.[8] The State Department asks the Department of Defense (DOD) to assist in rebuilding Haiti's judicial system.[9] Military planners must first decide whether a proper source of funds exists for such a mission.

•***August 1994:*** Thousands of Cuban refugees are detained at the U.S. Naval Base at Guantanamo Bay when the Clinton Administration reverses the United States' long-standing liberal immigration policy for Cuban asylum seekers.[10] At Guantanamo, the Cubans join thousands of Haitian migrants already in detention.[11] United States military personnel are tasked with caring for the migrants.[12] In addition to other fiscal chal-

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4. GENERAL FRAMEWORK FOR PEACE IN BOSNIA & HERZEGOVINA, annex 1-A, AGREEMENT OF THE MILITARY ASPECTS OF THE PEACE SETTLEMENT, art. IV, ¶ 2(c) (Nov. 21, 1995); *see also* John Pomfret, *U.S.-Led NATO Forces Face Risky Mission*, WASH. POST, Nov. 28, 1995, at A1.

5. George Jahn, *The Town of Gorazde*, BOSTON GLOBE, Oct. 10, 1996, at A-6; *NATO Chief to Seek U.S. Help on Bosnia Road Project in French Sector*, INSIDE THE PENTAGON, Mar. 14, 1996.

6. *NATO Chief to Seek U.S. Help on Bosnia Road Project in French Sector*, INSIDE THE PENTAGON, Mar. 14, 1996.

7. Douglas Farah, *U.S. Troops Find Haiti Calm, Military Cooperative*, WASH. POST, Sept. 20, 1994, at A1; The United Nations had previously authorized the intervention. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 23, U.N. Doc. S/RES/940 (1994).

8. Eric Schmitt, *Judge Who Is a General Repairs Haitian Judicial System*, N.Y. TIMES, Aug. 27, 1995, sec. 1, at 1.

9. Letter from Mark L. Schneider, Asst. Adm'r for Latin America & the Caribbean, U.S. Agency for Int'l Dev., to Walter B. Slocombe, Undersecretary of Defense for Policy, Dep't of Defense (Jan. 11, 1995) (copy on file with author).

10. Jonathan Wachs, *The Need to Define The International Legal Status of Cubans Detained at Guantanamo*, 11 AM. U. J. INT'L L. & POL'Y 79, 83 (1996); Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIGR. L.J. 479, 493 (1995).

11. Jones, *supra* note 10, at 488; *Intercepted Cubans Crowd Guantanamo*, CHI. TRIB., Aug. 28, 1994, at 15.

lenges[13] and keeping the peace in the migrant camps, military planners must find a lawful source of DOD funds from which to provide migrants with comfort items and recreational equipment, ranging from shoes to volleyballs.

I. Introduction

A. The Growing U.S. Involvement in "Non-Traditional" Operations

Since the end of the Cold War, the United States increasingly has committed its armed forces to so-called "non-traditional" missions, engaging in manifold operations "other than conventional battlefield warfare."[14] From major undertakings, such as Somalia, Haiti, and Bosnia, to minor engagements, such as the placement of military-to-military contact teams in Eastern Europe, such operations have become a "dominant claimant on military resources."[15] Indeed, these non-combat activities have become integral components of the strategy of peacetime engagement.[16]

Several factors explain this growing involvement of America's military in non-combat operations:

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12. John F. Harris, *At Guantanamo, Military Mission Is in Retreat; As Cuban Detainees Pour in, Refugee Accommodations Become Base's All-Consuming Goal*, WASH. POST, Aug. 25, 1994, at A21.

13. *See* Thomas W. Lippman, *Money for Relief Is a Question Mark*, CHI. SUN-TIMES, Aug. 28, 1994, at 3.

14. JENNIFER M. TAW & JOHN E. PETERS, OPERATIONS OTHER THAN WAR: IMPLICATIONS FOR THE U.S. ARMY 2 (1995); Collin G. Shackelford, Jr., *Military Operations Other Than War*, SWORDS & PLOWSHARES, Winter-Spring 1994, at 18; William Rosenau, *Non-Traditional Missions & the Future of the U.S. Military*, 18 FLETCHER F. WORLD AFF. 31, 32 (1994) ("Congress, the military services, and civilian national security officials have come to view non-traditional missions as increasingly important activities for the armed forces."); General John M. Shalikashvili, Remarks for the CARE 50th Anniversary Symposium (May 10, 1996), *in* 1 ARMY SPEECH FILE SERVICE 15, 16 (1997) (since Desert Storm, the military has conducted nearly forty operations).

15. CARL H. GROTH, JR. & DIANE T. BERLINER, PEACETIME MILITARY ENGAGEMENT: A FRAMEWORK FOR POLICY CRITERIA 1-1 (1993).

16. NATIONAL SECURITY STRATEGY OF ENGAGEMENT & ENLARGEMENT 11-12 (1996); NATIONAL MILITARY STRATEGY OF THE UNITED STATES 8-12 (1995). *See also* ARMY VISION 2010, at 9 (1997) ("The frequency of demands for land forces will increase as the Army is called upon to support peacetime engagement activities . . . ."); U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, at 13-1 (14 June 1993) [hereinafter FM 100-5] ("The Army's primary focus is to fight and win the nation's wars. However, Army forces and soldiers operate around the world in an environment that may not involve combat.").

First, since the end of the Cold War, ethnic, religious, cultural, and social antagonisms—which the superpowers had successfully suppressed—have suddenly exploded to the surface in a series of conflicts, frequently accompanied by enormous human suffering. According to General Shalikashvili,

> Today, some three dozen ethnic, tribal or religious-based conflicts dot the globe. Our hopes for a new world order have been drowned in a seemingly endless disorder. Far from being the end of history, the end of the Cold War marked the rebirth of instability in many countries. The instability, in turn, has bred calamity, and calamity, in turn, has bred human tragedy.[17]

Second, the end of the superpower rivalry has both accommodated international intervention in such conflicts,[18] and enabled the United States to commit forces to the operations on a scale that would have been unthinkable during the height of the Cold War.[19] "U.S. strategic interests are being defined more broadly than ever, to include not only the desire to foster democracy, but to secure 'peace,' human rights, and relief from suffering."[20] As a result, the U.S. military is no longer simply viewed as an instrument of deterrence; it is also deemed "a force for constructive change at home and abroad."[21]

Consequently, "non-traditional" operations, such as humanitarian assistance and disaster relief, have become the routine rather than the exception.[22] And while the United States has tried to develop a rational policy for engaging in such operations, notably Presidential Decision

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17. Shalikashvili, *supra* note 14, at 16. *See also* Nick Olmsted, *Humanitarian Intervention?*, NAVAL INST. PROCEEDINGS, May 1995, at 96; GROTH & BERLINER, *supra* note 15, at 1-1.

18. James Terry, *The Criteria for Intervention: An Evaluation of U.S. Military Policy in U.N. Operations*, 31 TEX. INT'L L.J. 101, 103 (1996); Rosenau, *supra* note 14, at 33.

19. Shalikashvili, *supra* note 14, at 16.

20. TAW & PETERS, *supra* note 14, at 2; *see also supra* note 16 and accompanying text.

21. Admiral Paul David Miller, *In the Absence of War: Employing America's Military Capabilities in the 1990s*, 18 FLETCHER F. WORLD AFF. 5, 12 (1994); *see also* William J. Perry, Address at George Washington University (Aug. 5, 1996), *in* 1 ARMY SPEECH FILE SERVICE 7 (1997). The new emphasis on non-combat missions has not been without its critics, who view it as weakening the armed forces and jeopardizing their ability to deter and to fight wars. *See, e.g.*, Colonel Charles J. Dunlap, Jr., *The Last American Warrior: Non-Traditional Missions & the Decline of the U.S. Armed Forces*, 18 FLETCHER F. WORLD AFF. 5, 12 (1994); Seth Cropsey, *Searching for Nontraditional Roles: Trade-off or Sell-out?*, NAVAL INST. PROCEEDINGS, Aug. 1993, at 77.

Directive 25 (PDD-25), which establishes criteria for committing forces to peace operations,[23] it has not been wholly immune from the so-called "CNN Effect," which impels intervention in conflicts where human misery and suffering receive widespread press coverage and resulting citizen outcry.[24]

Third, armed forces—particularly the U.S. military—possess capabilities that make them uniquely suited to responding to humanitarian crises. These include "robust transportation; command, control, communications, and intelligence hardware; and a general capacity to operate independently in a wide variety of environments."[25] Thus, when disaster strikes, civic leaders traditionally turn to military establishments.[26]

Finally, evolving notions of "humanitarian intervention" to halt human rights abuses or to restore democratic governments have undermined traditional concepts of national sovereignty, making military intrusions into the internal affairs of nations more palatable.[27]

> In practice, there are cases of internal repression in which states responsible for violations of human rights invoke sovereignty to shield their actions, and there are situations of highly destructive but essentially self-contained civil conflict. Under these circumstances some argue that in a world in which sovereignty is rapidly eroding, a state's failure to protect internationally guaranteed human rights should now constitute grounds for intervention, regardless of whether international peace is threat-

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22. *See, e.g.*, General Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF., Winter-Spring 1992-93, at 32; General John R. Galvin, *Final Thoughts: Non-Traditional Roles for the U.S. Military, in* NON-COMBAT ROLES FOR THE U.S. MILITARY IN THE POST-COLD WAR ERA 115 (James R. Graham ed., 1993) [hereinafter NON-COMBAT ROLES].

23. James Terry, *The Evolving U.S. Policy for Peace Operations*, 19 SO. ILL. L. REV. 119, 123 (1994); Olmsted, *supra* note 17, at 99.

24. Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 890-91 (1995) (attributing 1994 U.S. intervention in Rwanda to "CNN Effect").

25. Shackelford, *supra* note 14, at 19; *see also* Rosenau, *supra* note 14, at 33.

26. Leon Gordenker & Thomas G. Weiss, *Introduction: The Use of Soldiers & Peacekeepers in Coping With Disasters, in* SOLDIERS, PEACEKEEPERS, & DISASTERS 1, 2 (Leon Gordenker et al. eds., 1991) [hereinafter SOLDIERS, PEACEKEEPERS]; Thomas G. Weiss & Kurt M. Campbell, *Military Humanitarianism*, 33 SURVIVAL 451, 452 (1991).

27. *See* Ruth E. Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia, & Haiti*, 31 TEX. INT'L L. REV. 43, 46-48 (1996); Stanley Hoffman, *Out of the Cold: Humanitarian Intervention in the 1990's*, 16 HARV. INT'L REV. 8 (1993); Olmsted, *supra* note 17, at 97.

> ened. More radical arguments assert the existence of an emerging norm of democratic governance, further justifying intervention by linking the existence of democratic regimes to reduced probabilities of war.[28]

While these newly emerging concepts of humanitarian intervention are not without their critics,[29] their growing acceptance makes U.S. military involvement in such missions increasingly likely.

The military's traditional role of preparing for and fighting the nation's wars will undoubtedly continue to define defense budgets and funding mechanisms;[30] however, America's military also will find itself increasingly absorbed in operations unrelated to its core missions.

B. Funding "Non-Traditional" Military Operations

All non-combat operations are "non-traditional" in that "they diverge from a widely shared assumption about the central purpose of the military"—to apply violence.[31] Admittedly, in this sense the term "non-traditional" is somewhat of a misnomer. "There are almost no conceivable

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28. Kimberly Stanton, *Pitfalls of Intervention: Sovereignty as a Foundation for Human Rights*, 16 HARV. INT'L REV. 14, 15 (1993). *See, e.g.*, Tyagi, *supra* note 24, at 884:

> But an unrestricted reliance on sovereign consent cannot be allowed to arrest the growth of new international human law. It would be unfair to say that in the absence of consent of the host state the international community has no right to intervene to prevent apartheid, genocide, ecoside, starvation, deaths, or practices that shock the conscience of the international community.

See also Richard Falk, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 MICH. J. INT'L L. 491, 511-12 (1996); Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 330 (1995); Hoffman, *supra* note 27, at 62; Samuel Lewis, *Enhancing Stability: Peacemaking & Peacekeeping*, *in* NON-COMBAT ROLES, *supra* note 22, at 34-37, 38-39.

29. *See, e.g.*, Adam Roberts, *The Road to Hell . . . A Critique of Humanitarian Intervention*, 16 HARV. INT'L REV. 10 (1993).

30. *See* Samuel P. Huntington, *Keynote: Non-Traditional Roles for the U.S. Military*, *in* NON-COMBAT ROLES, *supra* note 22, at 6-7:

> Throughout our history . . . [the] non-military uses of the armed forces have never served as the justification for the maintenance of the armed forces. The overall size, composition, organization, recruitment, equipment, and training of the armed forces have been justified by the needs of national security and the military missions, the combat missions, which the armed forces may have to perform.

31. Rosenau, *supra* note 14, at 31.

roles for the American military in this new phase of national security that the American military have not performed in some earlier phase."[32]

For purposes of this article, however, "non-traditional" operations are those missions (or parts of missions) that—absent special statutory authority—are beyond the scope of traditional appropriations for the training and operations of the U.S. military;[33] that is, they are operations that may not ordinarily be funded out of the operations and maintenance accounts (O&M) of DOD and the military services.[34] Generally, they are operations entailing assistance to or peacetime engagement with other nations and

32. Huntington, *supra* note 30, at 5. *See also* Rosenau, *supra* note 14, at 39 ("[P]rior to World War II, . . . the military was employed to carry out a variety of challenging, often highly political tasks that no other institutions in American society were capable of performing."); RUSSELL F. WEIGLEY, THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY & POLICY 81 (1973) (describing how the U.S. Military Academy initially justified its existence by emphasizing civil engineering, rather than "strategic thought," so that Army officers "could do useful work in peace"); GROTH & BERLINER, *supra* note 15, at 1-1 ("so-called non-traditional missions have been undertaken by the U.S. Military for many years"); Frederick C. Cunz, *Dilemmas of Military Involvement in Humanitarian Relief, in* SOLDIERS, PEACEKEEPERS, *supra* note 26, at 1, 2 (noting the earliest recorded instances in which military personnel were employed to provide humanitarian assistance predate Alexander the Great); *cf.* Jim Miller, *Operations Other Than War: A Historical Perspective*, MILITARY POLICE, Aug. 1994, at 4-5 (recounting 20th century instances of U.S. military involvement in domestic humanitarian operations).

33. In this regard, "non-traditional" operations are not co-extensive with military operations other than war (MOOTW); however, many operations described as MOOTW are "non-traditional." *See, e.g.*, NATIONAL MILITARY STRATEGY OF THE UNITED STATES 8-12 (1995); THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR, ch. 3 (16 June 1995); FM 100-5, *supra* note 16, at 13-4 to 13-8. Some MOOTW missions, such as strikes and raids, are combat operations and properly funded from O&M accounts.

34. The major appropriations provided in the DOD's annual appropriations acts are Military Personnel (salaries); *see, e.g.*, DOD Appropriations Act for 1997, Pub. L. No. 104-208, Title I (1996) (part of the Omnibus Appropriations Act for 1997); Research, Development, Test, & Evaluation, *see, e.g., id.* Title IV; Procurement, *see, e.g., id.* Title III; and Operations & Maintenance, *see, e.g., id.* Title II. Congress appropriates for military construction by separate act. *See, e.g.*, Military Construction Appropriations Act for 1997, Pub. L. No. 104-196 (1996).

Operations and Maintenance funds are intended for such objects as training, exercises, deployments, and operating and maintaining installations. The Department of Defense's appropriations acts (which permit specific sums of money to be taken from the Treasury) and authorization acts (which allow money to be appropriated) describe O&M funds as available for expenses, not otherwise provided for, necessary for the operations and maintenance of the armed forces and other DOD activities and agencies. *See, e.g., id.*; National Defense Authorization Act for 1997, Pub. L. No. 104-201, § 301, 110 Stat. 2475 (1996).

their militaries. Included are such activities as humanitarian assistance, foreign disaster relief, combined exercises, military-to-military contacts, foreign military education and training, and support of coalition partners during multilateral operations. One of the "most perplexing issues" faced in planning such operations is determining how to pay for them.[35]

While Congress controls federal spending through a variety of statutory mechanisms,[36] three central principles govern the expenditure of appropriations: first, the expenditure must be for a lawful purpose;[37] second, the obligation of funds must occur within the time limits applicable to the appropriation;[38] and third, the expenditure must be within the amounts appropriated.[39]

The primary focus in determining funding options for "non-traditional" operations is the first central principle, which is embodied in the purpose statute. First enacted in 1809,[40] the purpose statute confines the expenditure of public funds to the object or objects for which they were appropriated.[41] The statute states simply that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[42] The statute is a key means by which Congress exercises its constitutional control over the federal purse.[43]

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35. Terry, *supra* note 23, at 128.

36. Fran W. Walterhouse, *Using Humanitarian Activities as a Force Multiplier & as a Means of Promoting Stability in Developing Countries*, ARMY LAW., Jan. 1993, at 16, 19-20.

37. 31 U.S.C. § 1301(a) (1994).

38. *Id.* § 1502(a).

39. *Id.* § 1341(a)(1)(A).

40. Act of March 3, 1809, 2 Stat. 535; *see also* 1 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-2 (2d ed. 1991) [hereinafter 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW]. An earlier version of the purpose statute appeared in 1797 as part of a measure for naval appropriations. Sponsored by Albert Gallatin, it provided that "sums shall be solely applied to the objects for which they are respectively appropriated." 1 Stat. 508-09 (1797); *see also* 6 ANNALS OF CONG. 2349 (1797). The provision was rejected the following year. *See* Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 17 n.19 (1976).

41. 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 40, at 4-2.

42. 31 U.S.C. § 1301(a).

43. U.S. CONST. art. I, § 9, cl. 7: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ." *See also* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1353 (1988) (quoting R. BERGER, EXECUTIVE PRIVILEGE 113 (1974)) ("[l]egislative supremacy over the public fisc implies 'the right to specify how appropriated moneys shall be spent' . . . .") [hereinafter Stith, *Congress' Power of the Purse*].

When Congress makes a lump-sum appropriation, the agency may use the funds in the manner it deems proper, provided the use comports with the general purpose of the appropriation.[44] Moreover, where the "appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object . . . ."[45] The expenditures must bear, however, a logical relationship to the appropriation charged.[46]

Thus, an agency may not expend its appropriations in a manner not contemplated by Congress.[47] This means that, unless otherwise authorized by statute, neither DOD nor the military services may use their Operations and Maintenance (O&M) accounts to pay for activities unrelated to the operation or maintenance of the armed forces. The problem posed by "non-traditional" missions is that they are, in significant part, unrelated to the actual cost of operating and maintaining the U.S. military. While costs associated with U.S. military participation in the operations may be payable as ordinary O&M expenses (*e.g.*, transportation and food for U.S. forces), absent special statutory authority, other mission-essential costs generally may not (*e.g.*, humanitarian supplies, support to coalition militaries).[48]

How, then, does DOD fund such operations? Under what authority may it pay the costs of "non-traditional" missions? Over the last fifty years, acting under its constitutionally derived power over appropriations,[49] Congress has enacted a potpourri of statutory authorities for "non-

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44. 65 Comp. Gen. 800, 804 (1986).

45. 63 Comp. Gen. 110, 112 (1983); 6 Comp. Gen. 619, 621 (1927).

46. 63 Comp. Gen. 422, 427-28 (1984).

47. *See generally* 1 PRINCIPLES OF FEDERAL APPROPRIATIONS, *supra* note 40, at 4-2. Violation of the Purpose Statute does not necessarily trigger adverse consequences, provided other funds are available for the expenditure. Where, however, no other funds are authorized for the purpose in question (or those funds authorized have been exhausted), the expenditure constitutes a violation of the Anti-Deficiency Act, 31 U.S.C. § 1341 (1994), which carries criminal penalties. 31 U.S.C. § 1350. *See* 63 Comp. Gen. 422, 424 (1984).

48. *See generally* THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.1, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN INTERNAL DEFENSE, at A-02 (26 June 1996). This is not to suggest that funding U.S. participation costs in "non-traditional" operations is without fiscal obstacles. Challenges abound, the most prominent of which is finding sufficient funds to pay costs not anticipated during the budgeting process. The DOD is often required to seek supplemental appropriations to defray operation costs. *See, e.g.*, National Defense Authorization Act for 1997, Pub. L. No. 104-201, § 1004, 110 Stat. 2632 (1996) (authorizing emergency supplemental appropriations for fiscal year 1996); Omnibus Consolidated Recissions & Appropriations Act of 1996, Pub. L. No. 104-134, chs. 6 & 7 (making emergency supplemental appropriations to DOD).

traditional" operations, which are scattered through titles 10 and 22 of the United States Code and in various DOD and foreign operations authorization and appropriations acts.[50]

This crazy quilt of authorities does not, however, always furnish a basis for funding the "non-traditional" operations U.S. forces are called on to perform. The armed forces are increasingly asked to accomplish missions beyond the scope of existing funding authorities. Several examples are described at the beginning of this article. For this reason, perhaps the

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49. *See supra* note 43. To the extent the U.S. role in an operation entails the donation, lease, or sale of U.S. military supplies and equipment, Congress also acts under its constitutional authority to dispose of federal property. U.S. CONST. art. IV, § 3, cl. 2: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

50. By way of illustration, DOD has permanent statutory authority (assuming sufficient appropriations exist) to provide humanitarian and civic assistance (HCA) in conjunction with military operations, 10 U.S.C. § 401; to transport humanitarian supplies either on a space-available or a fully funded basis, *id*. §§ 402, 2551; to furnish foreign disaster relief where necessary to prevent the loss of lives, *id.* § 404; to detail military personnel to western hemisphere governments to assist in military matters, *id*. § 712; to pay the travel and other expenses of Latin American officers and students to promote Latin American cooperation, *id*. § 1050; to pay travel expenses of defense personnel of developing countries to attend bilateral or multilateral conferences, *id*. § 1051; to pay the incremental expenses of developing countries participating in combined military exercises with U.S. forces or engaging in training with U.S. special forces, *id*. §§ 2010-2011; and to provide excess nonlethal equipment for humanitarian relief, *id*. § 2547. The Department of Defense also has limited contingency funds to meet unforeseen needs, such as the Chairman of the Joint Chiefs of Staff's "CINC" Initiative Fund, 10 U.S.C. § 166a, which, among other things, allows the Chairman to provide combatant commands funds to carry out certain non-traditional operations.

The Foreign Assistance Act of 1961 (FAA) gives the President authority to transfer excess defense articles to countries eligible for military assistance, FAA § 516, 22 U.S.C. § 2321j (1994); to "drawdown" DOD stocks and services for such things as unforeseen emergencies requiring immediate military assistance, *e.g.*, FAA § 506(a)(1), 22 U.S.C. § 2318(a)(1); to detail military personnel for non-combat assistance to foreign governments and international organizations, FAA §§ 627-28, 22 U.S.C. §§ 2387-88; and to provide military support to foreign countries and international organizations on a reimbursable basis. FAA § 607, 22 U.S.C. § 2357. Under the Arms Export Control Act (AECA), the United States may sell defense supplies and services, AECA §§ 21-22, 22 U.S.C. § 2761-62 (1994), or lease defense equipment to certain foreign governments and international organizations. AECA §§ 61-62, 22 U.S.C. §§ 2796-96a.

The United Nations Participation Act (UNPA) allows the President to authorize support to U.N. operations not involving the employment of the armed forces under article VII of the U.N. Charter. This support includes the detail of up to 1000 military personnel and the provision of supplies, services, and equipment (preferably on a reimbursable basis). UNPA § 7, 22 U.S.C. § 287d-1 (1994); *see also* Exec. Order No. 10,206, 16 Fed. Reg. 529 (1951).

most difficult and time-consuming task confronting DOD lawyers involved in the planning and execution of military operations ("operational lawyers") is discerning a lawful (*i.e.*, congressionally sanctioned) source of funds to accomplish the mission. Over the course of such operations, DOD lawyers may find congressional funding authority lacking for any one of several reasons. For example, given the proliferation of "non-traditional" operations and the novel roles U.S. forces are increasingly called upon to play, Congress may fail to envision a particular mission and to authorize or appropriate the funds required.[51] Another example is that Congress may envision and authorize a particular mission, but not appropriate any money to accomplish it.[52] Finally, Congress may envision a particular mission, but explicitly proscribe the expenditure of funds to accomplish it, usually because it opposes the particular operation.[53]

What if no funding authority exists to perform a presidentially directed mission? What if Congress refuses to provide a statutory authority or declines to appropriate funds under an existing authority? What if it expressly proscribes the expenditure of appropriations for a particular mission? If the mission is deemed essential to national security, does the Pres-

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51. *See, e.g.*, Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Authority*, 81 IOWA L. REV. 79, 86 (1995) [hereinafter Raven-Hansen & Banks, *From Vietnam to Desert Storm*]. Examples are the construction of the Gorazde Road and care for the Cuban and Haitian migrants noted at the beginning of this article.

52. For example, in 1995, Congress enacted permanent statutory authority for the military-to-military contact program, but did not appropriate funds to carry out the contacts. *See* National Defense Authorization Act for 1995, Pub. L. No. 103-337, § 1316(a)(1), 108 Stat. 2663, 2898 (1994) (codified at 10 U.S.C. § 168). Before 1995, Congress funded the military-to-military contact program through DOD appropriations. *See* H.R. CONF. REP. NO. 103-339, at 68-69 (1993) ($10 million approved in DOD Appropriations Act for 1994). In 1995, Congress refused DOD's request for program money in the Defense Appropriations Act, *see, e.g.*, S. REP. NO. 103-321, at 79 (1994), opting to use the Foreign Operations Appropriations Act instead, *see* Pub. L. No. 103-306, 108 Stat. 1608, 1620 (1994); H.R. CONF. REP. NO. 103-524, at 94 (1994) ($12 million appropriation). Congress did not fund the program at all after 1995.

53. *See, e.g.*, the 1984 Boland Amendment cutting off all aid to the "Contra" rebels in Nicaragua, DOD Appropriations Act for 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1904, 1935 (1984) (part of Continuing Appropriations Act for 1985); Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, § 801, 98 Stat. 3298, 3304 (1984); the 1993 Byrd Amendment, DOD Appropriations Act for 1994, Pub. L. No. 103-139, § 8151, 107 Stat. 1418, 1475 (1993); and the 1994 Kempthorne Amendment, DOD Appropriations Act for 1995, Pub. L. No. 103-335, § 8135, 108 Stat. 2599, 2653 (1994), imposing funding restrictions on the use of U.S. troops in Somalia. *See also* Raven-Hansen & Banks, *From Vietnam to Desert Storm*, *supra* note 51, at 114.

ident have the inherent authority to direct expenditure of the necessary funds?

Basic high school civics teaches that the answer is "no." The traditionally accepted maxim is that Congress alone controls the "power of the purse," and that only Congress may permit the expenditure of money from the Treasury.[54] Thus, absent Congress' consent, the President may not spend public funds.

In recent years, however, a number of commentators have questioned the exclusivity of Congress' power over the purse. Their arguments range from an asserted constitutional inability of Congress to delimit presidential discretion in foreign and military affairs through the appropriations process—either by riders on appropriations[55] or by refusing to appropriate funds[56]—to the more radical contention that the President has an independent constitutional authority to spend money, particularly for military operations.[57]

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54. *E.g.*, ROLLIN BENNETT POSEY, AMERICAN GOVERNMENT 82 (1965) ("Congress has sole power to determine the funds available each year for expenditure by the executive agencies."); JAMES MACGREGOR BURNS & JACK WALTER PELTASON, GOVERNMENT BY THE PEOPLE: THE DYNAMICS OF AMERICAN NATIONAL GOVERNMENT 464 (6th ed. 1966) ("[B]y far the greatest weapon of Congress in maintaining control over the executive branch is its power to appropriate money.").

55. *See, e.g.*, J. Terry Emerson, *Making War Without Declaration*, 17. J. LEGIS. 23, 32-33 (1990); Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST'L L.Q. 457, 475 (1992); John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 146 (1988); Robert F. Turner, *The Constitution & The Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUS. J. INT'L L. 83, 120 (1988); Don Wallace, Jr., *The President's Exclusive Foreign Affairs Powers Over Foreign Aid*, DUKE L.J. 293, 324 (1970); Panel Discussion, *The Appropriations Power & the Necessary & Proper Clause*, 68 WASH. U. L.Q. 623, 626-31, 642-43 (1990) (William Barr) [hereinafter Panel Discussion, *The Appropriations Power*]. *See also* National Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671, 683-85 (D.D.C. 1988), *vacated*, 490 U.S. 153 (1990) (overturning appropriations rider that restricted President's discretion to regulate access to and disclosure of national security information).

56. Symposium, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 200-01 (1988) (Orrin Hatch) [hereinafter Symposium, *Executive Power*]; Connie Ferguson Bryan, Note, *Limiting the Use of Funds Appropriated for Executive Functions: Is the 1984 Boland Amendment Constitutional?*, 13 OKLA. CITY L. REV. 569, 596-605 (1988); Frank G. Colella, Note, *Beyond Institutional Competence: Congressional Efforts to Legislate United States Foreign Policy Toward Nicaragua—The Boland Amendments*, 54 BROOK. L. REV. 131, 162 (1988) [hereinafter Note, *Beyond Institutional Competence*].

To operational lawyers, the proposition that presidential spending authority exists independent of Congress is particularly alluring. During military operations, intense pressure exists to find fiscal tools—any fiscal tools—to accomplish the mission. The notion that either congressional inaction or congressionally prescribed prohibitions may be disregarded is indeed seductive. If the proposition is sustainable, it would greatly simplify the operational lawyer's job, ensuring that, at least in situations the President deems essential to national security, funding authority will always be available.

The arguments of those who assert such authority have gradually filtered into the legal offices of the national security establishment. As a result, DOD operational lawyers and their agency counterparts on the other side of the Potomac have engaged in discussions over whether the President has the inherent power to spend money in the absence of an appropriation or in spite of an express limitation on spending authority.

Of course, it is one thing to advocate such a power in the pristine environment of the law review or the law school, and another to advise civilian and military decision-makers to rely on such authority for military operations. And while operational lawyers may have considered the proposition, they have not (in my experience) relied (at least entirely) on an independent presidential spending authority.

In preparing this article, I had hoped to identify a sound legal basis for advising military decision-makers to rely on an inherent presidential authority—at least when the President finds an operation essential to national security. Much to my chagrin, however, neither the Constitution nor the nation's experience supports such a conclusion. Congress' power to appropriate—while not plenary—is certainly exclusive.

This article examines arguments propounded in support of an independent presidential spending power, exploring whether they are sustainable in light of the Constitution's text, the intent of the Constitution's Founders, the body of custom developed under the Constitution, and the

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57. David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public & Private Liberty*, 57 BROOK. L. REV. 1083, 1156-58 (1992); J. Gregory Sidak, *The President's Power of the Purse*, DUKE L.J. 1162 (1989); Panel Discussion, *The Appropriations Power, supra* note 55, at 653 (Geoffrey Miller); *cf.* James D. Humphrey II, Note, *Foreign Affairs and "The First Crisis of the 21st Century": Congressional & Executive Authority & The Stabilization Plan for Mexico*, 17 MICH. J. INT'L L. 181, 204-08 (1995) (defending presidential commitment of U.S. funds for Mexican "bail-out").

decisions of the courts. It concludes that these arguments are incorrect: the President does not possess an independent power of the purse.

Finally, the article considers the President's options when no statutory funding authority exists to sustain an operation and concludes that his choices are four-fold: (1) the President can seek congressional sanction for the operation; (2) the President can abandon the operation; (3) the President can direct the use of a reimbursable funding mechanism; or (4) if national security interests are sufficiently critical, the President can spend money in the absence of an appropriation and hope either that Congress ratifies the action or that he has adequate capital to withstand the resulting political maelstrom.

II. Arguments for an Independent Presidential Spending Authority

Arguments posited to support an independent presidential spending authority generally fall into two broad categories. First, there is the argument that Congress may not unduly fetter the President's constitutional activities (usually foreign or military affairs) by imposing restrictions on appropriations or by refusing to appropriate the funds necessary to carry out the activities. Some who assert this position (but not all) also contend that when Congress—through the appropriations process—interferes with the President's constitutional responsibilities, the President may lawfully expend the funds necessary to fulfill those responsibilities despite either the restrictions imposed or the absence of appropriations. Second, there is the even bolder argument that, apart from anything Congress may or may not do to obstruct the President's constitutional activities, the President has an autonomous, constitutionally based authority to expend public moneys. In other words, presidential spending authority is not dependent upon the "constitutional misconduct" of Congress—it exists wholly independent of Congress.

As to the first argument, a number of commentators contend that Congress may not use its appropriations power to prevent the President from performing constitutionally mandated responsibilities, either by restrictive conditions on appropriations or by failing to appropriate at all. Just as Congress may not use its appropriations power to enact bills of attainder[58] or to intrude upon the President's power to grant pardons,[59] "the appropri-

58. United States v. Lovett, 328 U.S. 303 (1946).

59. *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (unconstitutional exercise of Congress' authority over Court of Claims to deprive President of pardon power).

ations power cannot be invoked to legitimate a violation of a constitutional principle such as the doctrine of separation of powers."[60] Defining the President's constitutional power over the nation's foreign and military affairs broadly, these scholars seemingly deem suspect any congressional attempt to circumscribe, through the appropriations process, presidential discretion over foreign policy or the employment of the armed forces.[61]

To be sure, the views advanced are not monolithic. Some perceive Congress' "power of the purse" to be narrower than others.[62] Moreover, some commentators distinguish between a failure to appropriate funds for a particular object and the imposition of conditions on appropriations made.[63]

Finally, several who are critical of Congress' attempt to dominate executive discretion through the appropriations process admittedly do not suggest a presidential spending authority independent of Congress. Even though they claim that Congress may not restrict the President's exercise of his constitutional prerogatives through the appropriations process, they do not necessarily advocate presidential spending in the absence of appropriations or in violation of restrictions on appropriations, even when essential for the President to fulfill his constitutional responsibilities.[64] The assertion of such independent authority is, however, certainly explicit or implicit in the arguments of many of these commentators.[65] To the extent presidents assert the power to disregard unconstitutional laws, these arguments certainly serve as a predicate for presidential spending without congressional sanction.[66]

Regarding the second argument, a few commentators have boldly advocated the existence of a presidential authority to spend without congressional approbation, regardless of whether Congress has acted unconstitutionally. Denying that Congress' power of the purse is exclusive, they discern an independent presidential spending power from the Constitution.

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60. Moore, *supra* note 55, at 146; *see also* Emerson, *supra* note 55, at 33; Panel Discussion, *The Appropriations Power*, *supra* note 55, at 642 (Geoffrey Miller).

61. *See, e.g.*, Emerson, *supra* note 55, at 32-33; Bryan, *supra* note 56, at 597; Moore, *supra* note 55, at 146; Turner, *supra* note 55, at 120; Symposium, *Executive Power*, *supra* note 56, at 200-01 (Orrin Hatch); Panel Discussion, *The Appropriations Power*, *supra* note 55, at 630 (William Barr).

62. *Compare* LeBoeuf, *supra* note 55, at 485 (arguing Boland amendments constitutional), *with* Note, *Beyond Institutional Competence*, *supra* note 56, at 164 (arguing versions of the Boland amendment unconstitutional).

63. *See* LeBoeuf, *supra* note 55, at 475; Wallace, *supra* note 55, at 326.

Most notable is Gregory Sidak, who argues that the term "Appropriations made by Law" in the appropriations clause extends beyond laws simply enacted by Congress, but also encompasses appropriations made by the President under article II.[67] To Sidak, "Appropriations made by Law" is not limited to legislation; the term only requires "legal authorization" for the expenditure of funds—"that is, [the expenditure] must be constrained by *the rule of law, however defined.*"[68]

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64. *See, e.g.*, Bryan, *supra* note 56, at 605; Moore, *supra* note 55, at 152-53 (advocating court challenges to unconstitutionally restrictive appropriations). In this regard, even the most ardent supporters of Congress' appropriations power admit possible limits on Congress' power to use appropriations to intrude upon "the independent constitutional activities" of the President. *See, e.g.*, Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 921-22 (1994) (discussing possible congressional restrictions on the presidential authority to rescue Americans) [hereinafter Raven-Hansen & Banks, *Pulling the Purse Strings*]; Stith, *Congress' Power of the Purse*, *supra* note 43, at 1350-51 ("Congress is obligated to provide public funds for constitutionally mandated activities—both obligations imposed upon the government generally and independent constitutional activities of the President."). But they do not espouse a presidential authority to spend money in the absence of an appropriation. Raven-Hansen & Banks, *From Vietnam to Desert Storm*, *supra* note 51, at 132 ("[T]wo constitutional wrongs do not make a right."); Stith, *Congress' Power of the Purse*, *supra* note 43, at 1351-52 ("[E]ven 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.").

65. *See, e.g.*, Emerson, *supra* note 55, at 33 (asserting that Congress may not use its appropriations power to restrict military operations); Turner, *supra* note 55, at 120 (defending presidential action in the face of the Boland amendments); Wallace, *supra* note 55, at 493 (advocating refusal of President—on a sparing basis—to abide by unconstitutional appropriations conditions); Panel Discussion, *The Appropriations Power*, *supra* note 55, at 654-56 (William Barr) (apparently asserting presidential authority to spend in spite of limits placed on appropriations); *id.* at 643, 653 (Geoffrey Miller) (stating President may expend funds even in the absence of appropriations).

66. *See* LeBoeuf, *supra* note 55, at 493 (President should refuse to abide by funding limitations deemed unconstitutional); *see generally* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 267-72 (1994); Wallace, *supra* note 55, at 493 (discussing presidential authority to refuse to execute unconstitutional statutes).

67. Sidak, *supra* note 57, at 1185: "The incurring of a charge against the Treasury in the course of performing each of those article II duties is lawful Executive action regardless of whether Congress has appropriated adequate funds for that purpose."

68. *Id.* at 1170-71 (emphasis added); *see also* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 344 n.263 (1995) (asserting *Bivens* awards should be payable without congressional action because they constitute "an appropriation made under the Constitution").

Sidak contends that "[t]he assignment to the President of enumerated duties and prerogatives in article II implicitly confer[s] on the President the ability to have the funding necessary for him to carry out those duties and prerogatives."[69] In other words, the President cannot be made to rely just on those appropriations Congress offers. He writes:

> The Constitution itself must give the President the ability to fund the exercise of his enumerated prerogatives, for otherwise the recurring statement in article II that the President "shall have Power" to perform certain explicit responsibilities would become meaningless whenever Congress refused him the necessary appropriation of funds.[70]

Thus, Sidak concludes that the President must be permitted to spend "enough unappropriated funds to produce the minimally necessary level of public output required by the faithful performance of his article II duties or the reasonable exercise of his article II prerogatives."[71]

Another apparent proponent of an independent presidential spending authority is David Lewittes. While admitting Congress' power to raise and support armies,[72] Lewittes asserts that once Congress has collected money through its power to tax and has raised an Army, the President has absolute discretion in deciding how to use the forces at his disposal unfettered by congressional controls (including financial).

> Once tax dollars are collected and soldiers are raised—except insofar as there is a constitutional limitation for the use of standing armies for a period of two years and a constitutionally delegated authority to Congress to make rules for the government and regulation of the armed forces—Congress' control over the men and money ceases and is placed fully in the hands of the President.[73]

Lewittes argues that Congress has no constitutional authority to spend money; its "power of the purse" embodies only the authority to levy

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69. Sidak, *supra* note 57, 1187.

70. *Id.* at 1188-89.

71. *Id.* at 1197-98. "Minimally necessary level" is not inevitably equivalent to a minor expenditure of funds. For example, Sidak suggests that President Reagan might have been capable of deploying his Strategic Defense Initiative, a system costing billions of dollars, under this authority. *Id.* at 1197.

72. Lewittes, *supra* note 57, at 1156-57.

taxes.[74] He contends that Congress may not use this power of taxation to impede the President's war powers. "Congress has a duty to make certain that the United States has sufficient funds to provide for the common defense . . . . It cannot, by failing to collect taxes necessary for national security, obstruct the President's obligation to defend the nation."[75]

Whatever the ultimate boundaries of the spending authority under Lewittes' hypothesis, it is clear that the President would be able to expend funds for any "non-traditional" operations deemed essential to national security regardless of the absence of congressional funding authority.

III. The Exclusive Congressional "Power of the Purse"

Although a tempting proposition to an operational lawyer, the notion of an independent presidential spending authority is inconsistent with the text of the Constitution, the intent of the Constitution's Framers, and the country's experience under the Constitution. While a theme for academic debate, it is certainly not a proposition to be relied on in finding funding options for military operations, particularly when expenditures in the absence of appropriations generally constitute violations of the Anti-Deficiency Act, a criminal statute.[76]

The Constitution's text confers upon Congress exclusive power over the federal purse. Indeed, nothing in the text remotely suggests that Congress shares this power with either the executive or judicial branches of government. To the extent the text leaves any room for doubt, however, its "legislative history" does not. Those who drafted and ratified the Constitution clearly understood that, among the three branches of government, Congress alone would exercise the power of the purse. The historical context in which the Founding Fathers worked—particularly the previous century and a half of British, colonial, and state governmental experience—

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73. *Id.* at 1158 (footnote omitted); *see also* Emerson, *supra* note 55, at 32:
> [O]nce Congress has decided how many personnel should be enlisted or what arms should be procured, the President may station those troops and position those weapons in such parts of the world as he determines essential to the national defense . . . without any geographical or time limitations imposed by Congress.

74. Lewittes, *supra* note 57, at 1156-57 n.313.

75. *Id.* at 1158.

76. 31 U.S.C. §§ 1341, 1350 (1994). *See supra* note 47; *infra* notes 504-07, and accompanying text.

and the Founders' contemporaneous statements and debates lead to no other conclusion.

Finally, although presidents have, at times, spent money not appropriated by Congress, in the more than two centuries since the Constitution's ratification, presidents, Congress, and the courts have steadfastly acknowledged the exclusivity of Congress' appropriations authority. Practice under the Constitution has been compatible with both the text and the Founders' intent. Even on those relatively rare occasions that presidents have spent funds without prior congressional approbation, they have always returned to Congress—hat in hand—seeking an appropriation to cover their expenditures.

A. The Constitutional Text

In considering the notion of an independent presidential spending authority, the natural starting point is the Constitution's text.[77] Those who espouse an independent presidential spending authority find no support for the proposition in the words of the Constitution itself. The Constitution does not grant Congress plenary power over the nation's purse, in the sense that Congress' appropriations authority is unrestricted. It does bestow upon Congress, however, an authority over appropriations that is exclusive of the coordinate branches of the government.[78]

1. Congress

The Constitution's only express boundaries on Congress' appropriations power are the prohibitions against diminishing the salaries of federal judges[79] and the President,[80] and the requirement that appropriations for the Army be limited to two years.[81] The appropriations power is also subject to other restrictions found in the Constitution, such as the bill of attain-

77. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 370 (1995) (Thomas, J., concurring); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551 (1994); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 31 (1972).

78. *See* Panel Discussion, *The Appropriations Power*, *supra* note 55, at 646 (Kate Stith). Congress' power is subject to presidential veto. U.S. CONST. art. I, § 7, cl. 2. It is exclusive in the sense only Congress may authorize expenditures.

79. U.S. CONST. art. III, § 1.

80. U.S. CONST. art. II, § 1, cl. 7; *see* Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse Strings Restrictions*, 60 MINN. L. REV. 1, 30 (1975).

81. U.S. CONST. art. I, § 8, cl. 12.

der clause[82] and the first amendment's free speech[83] and establishment[84] clauses. These constitutional limitations on the appropriations power, however, only circumscribe congressional discretion over the expenditure of public funds. They do not shift spending authority to a coordinate branch of government.

Nor does the remainder of the constitutional text provide a foundation for an independent presidential spending power. The principal constitutional provision is the appropriations clause itself, which states: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[85] While the clause is not a source of congressional power—Congress' power to spend is found elsewhere in the Constitution[86]—it does, as Professor Stith points out, "affirmatively obligate Congress to exercise the power already in its possession."[87]

The appropriations clause conditions the expenditure of public funds on "Appropriations made by Law," connoting that legislation is a prerequisite to federal spending. Sidak's assertion that "Appropriations made by Law" means that expenditures need only be constrained by "the rule of law" cannot be squared with the plain language of the text. In every other instance in which the Constitution alludes to the making of laws, it does so in the context of legislative action,[88] and nothing in the Constitution implies that appropriations are any different. The Constitution requires that Congress approve appropriations using the same constitutional procedures followed in enacting any other statute. [89]

Enacting laws is, of course, a legislative power,[90] and the Constitution vests the legislative power in Congress alone.[91] "[T]he President possesse[s] no independent law-making power."[92] By its commonly understood terms, then, the appropriations clause means that the President may not spend public funds for any purpose (including national security) unless Congress first passes a law permitting the expenditure.[93] The clause belies

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82. *Id.* art. I, § 9, cl. 3; *see* United States v. Lovett, 328 U.S. 303 (1946).

83. Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1984).

84. Flast v. Cohen, 392 U.S. 83 (1968).

85. U.S. CONST. art. I, § 9, cl. 7.

86. *See* LOUIS HENKIN, FOREIGN AFFAIRS & THE CONSTITUTION 77 n.48 (1972); Stith, *Congress' Power of the Purse*, *supra* note 43, at 1348.

87. Stith, *Congress' Power of the Purse*, *supra* note 43, at 1348; *see also* Office of Personnel Mgt. v. Richmond, 496 U.S. 414, 435 (1990) (Stevens, J., concurring).

the notion that the President may spend money without Congress' approval.

The Constitution also provides Congress with authority to spend money—that is, the power to permit and regulate, by statute, the expenditure of public funds. As noted above, Congress' spending power is not derived from the appropriations clause; rather, it is found elsewhere in the Constitution.[94] In fact, while few dispute the existence of such congressional authority,[95] disagreement does exist about the power's constitutional underpinnings.

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88. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 ("Congress may at any time by law make or alter . . . Regulations [enacted by the states for the selection of Senators]."); *Id.* art. I, § 7, cl. 2 (describing how a bill becomes a law); *id.* art. I, § 8, cl. 18 ("Congress shall have the Power [t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."); *id.* art. II, § 9, cl. 3 ("No . . . ex post facto law shall be passed."); *id.* art. II, § 1, cl. 6 ("Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President . . . ."); *id.* art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."); *id.* art. III, § 2, cl. 3 (for crimes not committed within any state, "the Trial shall be at such Place or Places as the Congress may by Law have directed"). *See also id.* art. VI, cl. 2, which makes the Constitution, "and the Laws of the United States made in Pursuance thereof," and treaties "the supreme Law of the Land . . . ."

89. Kenneth W. Dam, *The American Fiscal Constitution,* 44 U. CHI. L. REV. 271, 278 (1977) ("The funds that oil the machinery of the executive branch are . . . made available through the same constitutional procedure followed in enacting other statutes"); *see also* Gerhard Casper, *Appropriations of Power,* 13 U. ARK. LITTLE ROCK L.J. 1, 2-3 (1990); Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power,* 21 GA. L. REV. 1, 3 (1986).

90. U.S. CONST. art. I, § 7, cl. 2.

91. U.S. CONST. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 630 (1952) (Douglas, J., concurring) (under the Constitution, Congress alone has legislative power); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, & FOREIGN AFFAIRS 18 (1990) ("The Constitution gives Congress 'all legislative power herein granted' . . . . No legislative power is given to any other branch of the federal government.") [hereinafter HENKIN, CONSTITUTIONALISM, DEMOCRACY & FOREIGN AFFAIRS]; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary,* 105 HARV. L. REV. 1155, 1158 n.12 (1992) ("It is clear that Congress alone possesses the federal legislative power . . . .").

92. Henry P. Monaghan, *The Protective Power of the Presidency,* 93 COLUM. L. REV. 1, 15 (1993); *but cf.* Joel L. Fleishman & Arthur H. Aufses, *Law & Order: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 11 (1976) (suggesting constitutional basis for "presidential legislation" or executive orders).

The conventional wisdom is that the spending power flows from the general welfare clause of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[96] In *United States v. Butler*,[97] the Supreme Court held Congress' spending authority is necessarily coupled with the power to tax:

> The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation (Art. I, § 9, cl. 7). They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and expend money.[98]

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93. *See, e.g.*, Office of Personnel Mgt. v. Richmond, 496 U.S. 414, 424 (1990) ("Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by statute."); United States v. MacCollom, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."); 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."); Knote v. United States, 95 U.S. 149, 154 (1877) (The President "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress."); Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850) ("It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation made by Congress."); Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978) ("[T]he Constitution expressly provides only one method—congressional enactment—for the appropriation of money.").

94. *See supra* note 86 and accompanying text.

95. *But see* Lewittes, *supra* note 57, at 1156-57 n.313.

96. U.S. CONST. art. I, § 8, cl. 1.

97. 297 U.S. 1 (1936).

98. *Id.* at 65; *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 9 n.5 (1981); Buckley v. Valeo, 424 U.S. 1, 90 (1976) (per curiam); Helvering v. Davis, 301 U.S. 619, 640 (1937); State v. Skinner, 884 F.2d 445, 447 (9th Cir. 1989); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 461 (1992).

Interpreted as being co-extensive with the Constitution's general welfare clause, the scope of Congress' spending power is potentially vast:[99] an appropriation will pass constitutional muster, even if not used to secure an object listed in one of Congress' enumerated powers (*e.g.*, regulation of commerce, establishment of post offices and post roads),[100] if the expenditure provides for the general welfare or common defense. Albeit consistent with the constitutional text, this expansive construction of the spending power was not preordained. The scope of the power was the subject of sharp debate from the time of the Constitution's ratification,[101] and was not finally resolved (by the Supreme Court at least) until the 1936 *Butler* decision. Since then, however, Congress has used the power to secure ends it could not otherwise achieve through coercive legislation relying on one of its enumerated powers.[102]

Although a distinct minority, some perceive that Congress' authority to approve the expenditure of public funds flows from other constitutional provisions. For example, Professor Stith views the necessary and proper clause as being the source of congressional spending authority.[103] Professor David Engdahl offers the fascinating proposition that Congress' spending authority flows from the property clause,[104] which, among other things, grants Congress the power to "dispose of . . . Property belonging to the United States . . . ."[105] The relative merits of the hypotheses about the general source of Congress' spending power are beyond the scope of this article; the key is that the Constitution gives to Congress the power to spend.

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99. Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548, 580 (1922-23): "We must conclude that into the 'dread field' of money expenditure the court may not 'thrust its sickle'; that so far as this power goes, the 'general welfare' is what Congress finds it to be."

100. *See* U.S. CONST. art. I, § 8.

101. *See* Roger Pilon, *Freedom, Responsibility, & The Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 522-32 (1993); *see also* Albert J. Rosenthal, *Conditional Federal Spending & The Constitution*, 39 STAN. L. REV. 1103, 1111-12 (1987). As early as the ratification debates, opponents of the Constitution recognized the potential breadth of the clause:

> I would ask those who reason thus, to define what ideas are included under the terms, to provide for the common defense and general welfare? Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by everyone? No one will pretend they will. It will then be a matter of opinion, what tends to be the general welfare; and the Congress will be the only judges in the matter.

"Brutus," *Essay*, NEW-YORK JOURNAL (Dec. 27, 1787), *in* THE ANTIFEDERALIST PAPERS 86, 89 (Morton Borden ed., 1965).

Finally, Congress' spending authority also appears (at least implicitly) in several of its enumerated powers. For example, Congress has the powers to "raise and support Armies"[106] and to "provide and maintain a Navy,"[107] which enable Congress to appropriate funds required for the armed forces.

The constitutional text provides Congress an impressive array of powers over the public purse. Congress has the authority to direct the expenditure of public funds, whether from the general welfare clause, the necessary and proper clause, the property clause, or its enumerated powers (such as the army and navy clauses). Congress' spending power is bracketed by key housekeeping provisions that secure the integrity of the appro-

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102. This is especially true with respect to the states. Congress has used its spending power to induce desired state action by offering states money and placing conditions on their receipt of funds. The states have a choice of accepting the funds along with the conditions or refusing the money altogether. Importantly, the conditions imposed need not serve one of Congress' other enumerated powers—the spending must only be for the "general welfare." *See, e.g.*, New York v. United States, 505 U.S. 144, 158 (1992); South Dakota v. Dole, 483 U.S. 203, 206 (1987); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947); *see generally* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 99, 102 ("Congress may . . . spend federal funds for any purpose that can be thought to contribute to the general welfare, even though none of Congress' delegated legislative powers encompasses the subject of the expenditure."); Rosenthal, *supra* note 101, at 1109 ("[T]he spending power . . . is an independent grant of power to Congress, available for, but not restricted to, the implementation of its other powers."); Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment & the Spending Power*, 57 U. COLO. L. REV. 793, 793-94 (1986) ("It is also a truism . . . that the power granted to Congress to spend for the general welfare extends beyond purposes explicitly mentioned elsewhere in the constitutional text.").

103. *See, e.g.*, Stith, *Congress' Power of the Purse*, *supra* note 43, at 1348 ("Congress' power to appropriate originates in article I, section 8. The concept of 'necessary and proper' legislation to carry out 'all . . . Powers vested by this Constitution in the Government of the United States' includes the power to spend public funds on authorized federal activities."); *see also* Calabresi & Prakash, *supra* note 77, at 591. This was also Madison's view. *See* Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 493 (Max Farrand ed., 1911) [hereinafter FARRAND]. Of course, if spending authority derives solely from the necessary and proper clause, Congress could only appropriate for objects essential to carrying out its enumerated powers or powers constitutionally vested in the other branches. It would not have the "free-wielding" authority to spend enjoyed under the "general welfare" clause.

104. David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 223 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 50-52 (1994).

105. U.S. CONST. art. IV, § 3, cl. 2; *see supra* note 49.

106. *Id.* art. I, § 8, cl. 12. The Constitution temporally limits appropriations for the Army to two years.

107. *Id.* art. I, § 8, cl. 13.

priations process, the most important being the appropriations clause, which ensures public funds are not spent except as statutorily directed by Congress through the exercise of its spending power.[108]

2. The President

By contrast, with respect to a presidential spending power, the constitutional text is absolutely silent. Nothing on the face of the document confers upon the President the power to appropriate money from the Treasury.

The Constitution arguably bestows broad powers on the President, particularly in the area of foreign and military affairs. He is the commander in chief of the Army and Navy, and of the militia (National Guard) when called into federal service;[109] he makes treaties, subject to the advice and consent of the Senate;[110] he appoints ambassadors, consuls, and other public ministers, subject to the advice and consent of the Senate;[111] he receives ambassadors and other public ministers;[112] and he faithfully executes the laws.[113] Missing from the catalogue of presidential powers, however, is the authority to spend money to carry out these constitutional activities. The Constitution does not provide the President a "necessary and proper" clause, entitling him to take all actions required to fulfill his constitutional responsibilities. Indeed, the Constitution vests that responsibility in Congress.[114]

Only article II's vesting clause counsels caution in writing off too quickly the possibility of an autonomous presidential spending authority, and this is because the clause's meaning is not entirely clear.[115] The vesting clause states that "[t]he executive Power shall be vested in a President of the United States."[116] There has been considerable debate over whether

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108. Another is the requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* art. I, § 9, cl. 7.

109. *Id.* art. II, § 2, cl. 1.

110. *Id.* art. II, § 2, cl. 2.

111. *Id.*

112. *Id.* art. II, § 3.

113. *Id.*

114. *Id.* art. I, § 8, cl. 18 (giving Congress the power to make all laws "necessary and proper for carrying into Execution . . . *all other Powers vested by the Constitution* in the Government of the United States, or in any Department or Officer thereof" (emphasis added)).

115. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE & POWERS 3-4 (5th rev. ed. 1984).

116. *Id.* art. I, § 7, cl. 1.

the clause affords the President any substantive powers or whether it is merely descriptive of his office.[117] Regardless of the merits of that debate, however, the question at hand is whether (assuming the clause has substance) the "executive Power" includes the power to appropriate and spend public funds. Intuitively, the answer, of course, is no. Not only does the rest of the constitutional text fail to support such a conclusion, the notion that the power of the purse resides in the executive branch is incompatible with centuries of combined British and American experience. To the extent the clause is ambiguous, however, it remains for the next section to examine whether the Framers intended the nation's executive power to include the power to spend.

The concept that the President enjoys an independent power to direct the expenditure of public funds is contrary to the text of the Constitution. Without exception, the Constitution's spending provisions empower Congress, not the President, with this authority, and the appropriations clause unmistakably prohibits the President from drawing money from the Treasury for any purpose without prior congressional approval.

B. The Founders' Understanding of the Power of the Purse

The constitutional text leaves little room for doubting the exclusivity of Congress' power over the nation's purse. To the extent questions remain, however, the Founding Fathers' understanding of the spending power—as gleaned from their statements and debates as well as the historical context in which they worked—confirms this conclusion.

Over reliance on the intent or understanding of those who drafted and ratified the Constitution is, of course, treacherous. Such intent is generally difficult to discern,[118] and its relevance to the ultimate document is quite often enigmatic.[119] Even the Framers themselves could not agree about the intended meaning of the constitutional text.[120] These difficulties notwithstanding, the Founders' writings, especially when considered in light of

117. For example, c*ompare* Calabresi & Rhodes, *supra* note 91, at 1196-1200 (arguing "vesting" clause is a substantive grant of presidential power), *with* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788-92 (1996) (questioning substantive nature of "vesting" clause).

118. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring): "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

119. *See* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 44-45 (1990).

their personal experience and the historical influences upon them, can shed light on the meaning of the Constitution's text. This is particularly true with respect to the spending power, since the Founders uniformly recognized congressional primacy over the nation's purse.

1. Historical Influences

Those who drafted and ratified the Constitution did not work in a vacuum. While they may have been driven in part by self-interest, the Founders were also unquestionably influenced by their personal political experiences—both before and after the Revolution—and by their knowledge of history, chiefly British and American.[121]

a. The British Experience

While the Founding Fathers considered the historical experience of a number of nations, they were affected principally by Great Britain.[122] "The Americans who drafted and adopted the Constitution were overwhelmingly British by origin and were exposed continuously to British institutions and government."[123] Other than their own experience with colonial and state governments and under the Continental Congress and Articles of Confederation,[124] the Founders took most of their lessons from the British experience.[125]

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120. LEONARD W. LEVY, ORIGINAL INTENT & THE CONSTITUTION'S FRAMERS ix (1988). An early example is the "Pacificus-Helvidius" letters between Alexander Hamilton and James Madison. The letters were triggered by President Washington's 1793 neutrality proclamation in the war between France and Great Britain. At issue was Washington's authority to declare and enforce neutrality without Congress' approval. CORWIN, *supra* note 115, at 208-11; ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 111-15 (1976); Bruce Stein, Note, *The Framers Intent & the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 466-71 (1982). Many Americans, including James Madison and Thomas Jefferson, believed the country's 1778 alliance with France was still in effect and obligated the United States to come to France's aid. CORWIN, *supra* note 115, at 209; SOFAER, *supra* at 112-13; Stein, *supra* at 468, 478; 15 PAPERS OF JAMES MADISON 64-65 (Thomas A. Mason et al. eds., 1985). In response to the resulting public outcry, Hamilton justified the proclamation in a series of newspaper articles under the name "Pacificus." He asserted that the Constitution bestowed upon the President extensive authority over foreign affairs. *See, e.g.*, Pacificus No. 1 (June 29, 1793), *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33-43 (Harold C. Syrett ed., 1969). Responding at the urging of Jefferson and writing under the name "Helvidius," Madison took a more circumscribed view of presidential power and argued for a dominant congressional role in foreign affairs. *See, e.g.,*, Helvidius No. 1 (Aug. 24, 1793), *in* 15 PAPERS OF JAMES MADISON 64-65 (Thomas A. Mason et al. eds., 1985). Importantly, both Hamilton and Madison were members of the Constitutional Convention, yet were unable to agree about fundamental divisions of constitutional power.

The evolution of British representative democracy and the power of the purse are inextricably intertwined. English monarchs traditionally used Parliament as a means of raising revenues, usually to finance their military adventures. Over the centuries, British Parliaments began to use this revenue-raising authority to exact legislative concessions from the Crown, threatening to withhold funds if their demands were not met. Parliamentary insistence on a voice in governing the nation inevitably lead to struggle with the monarchy, which was not eager to surrender its royal prerogatives. The struggle came to a head during the reign of the Stuart kings

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121. *See* 1 WILLIAM M. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 13 (1974); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS 52 (1981). The admonitions of Professor John Phillip Reid regarding reliance on history are illuminating: "History and precedent should not be confused. History is evidence, and precedent is authority; to mix the two can produce misleading distortions." JOHN PHILLIP REID, THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 135 (1987). History can, however, "provide[] evidence of precedent and is one of the sources from which precedent is drawn, a source in which precedent and custom blend. History can also clarify precedent by illustrating the roots of legal doctrine that precedent supports." *Id.*; *see also* Baldwin v. New York, 399 U.S. 117, 124 (1970) (Harlan, J., concurring & dissenting) ("History continues to be a wellspring of constitutional interpretation."); Gompers v. United States, 233 U.S. 604, 610 (1914) (Holmes, J.) ("[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking their words and a dictionary, but by considering their origin and the line of their growth.").

122. REVELEY, *supra* note 121, at 53.

123. SOFAER, *supra* note 120, at 6; *see also* United States v. Mandujano, 425 U.S. 564, 571 (1976) (most Framers were trained in English law and traditions).

124. SOFAER, *supra* note 120, at 15.

125. *Ex parte* Grossman, 267 U.S. 87 (1925) (Taft, C.J.) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); Smith v. Alabama, 124 U.S. 465, 468 (1888) ("The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history."); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CAL. L. REV. 170, 197 (1996) ("The English Constitution provides the starting point, for the Framers were Englishmen who consistently referred to the system of their former nation when they designed their own government."); *see also* ELIAS HUZAR, THE PURSE & THE SWORD 22 (1950); REVELEY, *supra* note 121, at 53; Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Revising the Royal Prerogative*, 21 HASTINGS CONST'L L.Q. 865, 872 (1994); *but cf.* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 11 (1994); SOFAER, *supra* note 120, at 6 (noting hazards of relying too heavily on British historical experience in divining Framers' intent because of unsteady course of parliamentary power and the possible inaccuracy of the Framers' understanding of British history).

in the 17th century. By the end of the century, the nation had suffered a protracted civil war, one king had lost his head, another had been deposed in a bloodless coup, and the supremacy of Parliament had been established. By the time of the American Revolution, Parliament's dominance over the British public fisc was complete.[126]

(1) Early History: Magna Carta to the Tudors

The origins of parliamentary control of the purse and the concomitant limitations on the monarchy's authority to raise and expend revenues are obscured by the mists of time. Some trace the beginnings of limited monarchical control over the purse to the Magna Carta.[127] Included in the Charter was a limitation on the king's authority to raise revenues without the consent of the "common council":

> No scutage or aid shall be imposed in our kingdom except by the common council of our kingdom, except for the ransoming of our person, for making our oldest son a knight, and for marrying our oldest daughter, and for these purposes it shall be only a reasonable aid; in the same way it shall be done concerning the aids of the city of London.[128]

Of course, the barons who forced King John to accede to the Charter at Runnymeade Meadow in the summer of 1215 and who comprised the "common council" were not Parliament—the first Parliament would not meet for another half century.[129] Moreover, the original Charter lasted only sixty-six days. Pope Innocent III decreed that the confrontation leading to the Charter "violated the fundamental precept of feudal loyalty to a paramount lord," and since King John was a vassal of the Holy See, it was also a "rebellion against the Church itself."[130] Consequently, Innocent declared the document "vile and wicked," and forbade, upon pain of excommunication, its enforcement.[131]

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126. *See, e.g.*, 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND, 329-30 (Wm. S. Hein & Co. 1989) (5th ed. 1846); 10 SIR WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 584-88 (1938).

127. *See, e.g.*, ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW 45-46 (1908); *see generally* BANKS & RAVEN-HANSEN, *supra* note 125, at 12.

128. Magna Carta ch. 12, *cited in*, WILLIAM F. SWINDLER, MAGNA CARTA: LEGEND & LEGACY 270 (1965).

129. *Id.* at 271

130. *Id.* at 101.

131. *Id.*

The Magna Carta was reissued and reconfirmed on several subsequent occasions, first by John's son, Henry III,[132] but the provision limiting monarchical levies was not included in later versions.[133] Probably the most important legacy of the Magna Carta is its legend, rather than its contents, which dealt mainly with the parochial concerns of the barons who impelled its issuance.[134] "[T]aken for granted and seldom studied" by the 14th century, the Magna Carta was revived in later centuries as "a rallying-point for those who suspected kings of placing themselves above the law."[135]

By the reign of King Edward I at the end of the 13th century, parliamentary government began to take root. Edward recognized the need for larger assemblies to raise necessary tax revenues for war.[136] In 1297, Parliament demanded that Edward confirm the great charters in return for the substantial taxes needed to carry out military programs in Scotland and Flanders.[137] The Charter of Confirmation, sealed on 25 November 1297, affirmed the exclusive right of Parliament to authorize or refuse taxes.[138]

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132. *Id.* at 104-35; SIR GEORGE CLARK, ENGLISH HISTORY 113 (1971).

133. SWINDLER, *supra* note 128, at 271.

134. Most of the Magna Carta's provisions dealt with the grievances of the barons in their capacity as feudal lords. CLARK, *supra* note 132, at 113 (1971). "[I]t was a thoroughly practical document, spelling out the fundamental safeguards of everyday life among landholders." SWINDLER, *supra* note 128, at 87.

135. CLARK, *supra* note 132, at 113 (1971); *see also* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEADE: MAGNA CARTA & CONSTITUTION 9 (1968); REID, *supra* note 121, at 137-38; SWINDLER, *supra* note 128, at 176, 185-86, 195, 206-07. Those who raised the mantra of the Magna Carta in the 17th century struggles with the Stuart kings often did violence to the Charter's text. Most notable is Sir Edward Coke, who incorrectly linked the Charter with the writ of habeas corpus. DANIEL JOHN MEADOR, HABEAS CORPUS & MAGNA CARTA 4-5 (1966); *see also* J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 66 (1955); WILLIAM SHARP MCKECHNIE, MAGNA CARTA 132-34 (1914) (noting salutary effects of "misinterpretation"); SWINDLER, *supra* note 128, at 172-76. In this regard, Professor Howard describes the British Constitution as having an

> organic evolving quality, in which major "liberty" documents like the Magna Carta, the Petition of Right, and the Bill of Rights are not so much statutory enactments as they are restatements or declarations of fundamental rights and principles. They evolved in the context of various constitutional disputes, especially those between Parliament and the Stuart kings. *In evolving they often took on new meaning*.

A.E. Dick Howard, *The Indeterminacy of the Constitution*, 31 WAKE FOREST L. REV. 383, 393 (1996) (emphasis added).

136. CLARK, *supra* note 132, at 128-29.

137. SWINDLER, *supra* note 128, at 132.

Edward I did not, however, surrender all of his sources of revenue. The Confirmation excluded "ancient aids and prises due and accustomed"[139]—revenues traditionally due the king without consent.[140] Thus, provided the king could live within his means, he did not need Parliament.[141] The king's revenues usually fell short, however, in times of war.[142]

It was not until the middle of the 14th century that Parliament authorized its first specific appropriation, to be used for war in Scotland, France, and Gascoign.[143] In the beginning of the 15th century, the Commons asserted the right to consider all revenue bills before the Lords, although it was not able to secure its claim for another two hundred years.[144]

When called, Parliament sometimes petitioned the king to address certain demands in consideration for needed revenue, and during the reign of Henry VI "submitted for his assent documents in the exact form of the enactments which they required."[145] By 1485, Parliament was a necessary party to the enactment of statutes, and the preambles to Acts from that time onward reflected the assent of the Commons and the Lords.[146] Still, the king initiated most legislation and occasionally amended bills after they had passed through Parliament. Parliament did not play a major role in governing the nation, its major function being imposing taxes on the king's subjects.[147] By the reign of the Tudors, "[p]arliamentary action was rather the medicine of the constitution than its daily food."[148] In the matter of finance, however, the Commons was becoming supreme.[149]

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138. 25 Edw. 1, c. 5, 6 (1297), *cited in*, Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U. L. REV. 5, 6 (1970) [hereinafter Note, *The Intentions of the Framers*]; *see also* BANKS & RAVEN-HANSEN, *supra* note 125, at 12; REID, *supra* note 121, at 138. The Parliament of 1295 ("the Model Parliament") split into different "houses," including "the commons," whose name derives from the fact "they were the 'communities of communities,' the representatives of the county courts and boroughs." CLARK, *supra* note 132, at 130-31.

139. 25 Edw. 1 c. 5, 6 (1297).

140. BANKS & RAVEN-HANSEN, *supra* note 125, at 12.

141. *Id.*

142. *Id.*

143. *Id.*; Note, *The Intentions of the Framers, supra* note 138, at 6.

144. Note, *The Intentions of the Framers, supra* note 138, at 7; *see also* 2 HALLAM, *supra* note 126, at 247-51.

145. CLARK, *supra* note 132, at 163-64.

146. SIR DAVID LINDSAY KIER, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN 43 (6th ed. 1960).

147. *Id.*; *see generally* May, *supra* note 125, at 869-70.

148. KIER, *supra* note 146, at 38.

(2) The Tudors

Parliament matured as an institution under the Tudors; however, religious—rather than financial—issues were the principal catalyst. The monarchy turned to Parliament in its confrontation with the Roman Catholic Church. Working with Parliament, Henry VIII divorced his wife, Catherine, in the face of papal objection. As friction with Rome intensified, Henry VIII, with Parliament's help, destroyed Rome's authority over the English church, installing himself at its head.[150] Parliament continued to support claims of monarchical supremacy over the Church during the reign of Henry VIII's son, Edward VI, who "chose Parliament as the instrument of his action."[151]

On Edward's death, Catherine's daughter Mary, a Catholic, ascended the throne and attempted to restore the position of the Church. She recognized that "[o]nly in Parliament could the revolution be undone."[152] While Mary's Parliament's acceded to some of her demands, it refused to enact her program in its entirety. For example, Parliament repealed Edward VI's ecclesiastical legislation, but it refused to reinstate papal authority, restore ecclesiastical property, or revive ecclesiastical jurisdiction.[153] Importantly, by its involvement in the nation's religious struggles, Parliament gained invaluable experience in the business of state, and was converted into a body "capable of asserting a necessary, and ultimately a dominant, place in the constitution."[154]

Although religious issues were largely responsible for Parliament's increasing role in British government during the 16th century, Parliament's control of the purse always loomed in the background. With rising prices and dwindling income, the Crown was rapidly approaching the day it would have to depend on Parliament for financial sustenance,[155] and the "loss of financial independence endangered the very foundation of personal rule . . . ."[156]

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149. *See id*. at 44; Note, *The Intentions of the Framers*, *supra* note 138, at 7.

150. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 269 (Univ. of Chicago Press 1979) (1765); KIER, *supra* note 146, at 162-63. This Parliament—known as the "Reformation Parliament"—sat in intervals from 1529 to 1536, "the longest duration yet recorded." KIER, *supra* note 146, at 58.

151. KIER, *supra* note 146, at 72.

152. *Id.* at 75.

153. *Id.* at 76.

154. *Id*. at 136; *see also* GOUGH, *supra* note 135, at 67.

155. KIER, *supra* note 146, at 146; BANKS & RAVEN-HANSEN, *supra* note 125, at 13.

(3) The Stuarts

The causes of the 17th century struggle between Parliament and the Crown were multifaceted, but problems connected with royal revenue were at the root of the difficulties.[157] Parliament's power of the purse was the instrument by which it brought the monarchy to its knees, establishing for Britain a representative democracy.

James I's problems with Parliament arose early in his reign. Crowned in 1603, he met his first Parliament in 1604 seeking needed revenue.[158] Parliament not only refused James the money demanded, it also attacked revenues the Crown derived from non-parliamentary sources, further imperiling the King's fiscal position.[159]

To bolster his financial situation, James tried to exploit every type of revenue "to which any claim might be asserted[,]" such as the imposition of fines for encroaching on royal forests or for violating proclamations against building in London and rental income from Crown properties.[160] Most profitable, however, were the duties on imports that James imposed in 1606 as a matter of royal prerogative.[161] These duties were upheld by the Court of the Exchequer in *Bates Case* in 1606,[162] emboldening the King to increase this form of revenue, making it an important element in the fiscal system.[163] While a successful source of revenue, the import duties further exacerbated tensions between Parliament and the Crown. Parliament naturally disliked anything that enabled the king to raise funds

156. KIER, *supra* note 146, at 146.

157. *See* KIER, *supra* note 146, at 180; BANKS & RAVEN-HANSEN, *supra* note 125, at 13.

158. CLARK, *supra* note 132, at 259.

159. *Id.* at 261-62; KIER, *supra* note 146, at 181.

160. KIER, *supra* note 146, at 181.

161. *Id.*; BANKS & RAVEN-HANSEN, *supra* note 125, at 13.

162. KIER, *supra* note 146, at 181-82. In the case, Chief Baron Fleming distinguished the import duty from a tax on a subject, for which parliamentary consent was required. He held that the duty was imposed upon the "goods of the Venetians" who sold them, and not "within the land, but only upon those which shall after be imported . . . ." J.P. KENYON, THE STUART CONSTITUTION 55 (2d ed. 1986). The court deemed the king's authority to impose the duty to be absolute:

> [W]hereas it is said that if the king may impose, he may impose any quantity what he pleases, true that this is to be referred to the wisdom of the king. who guideth all under God by his wisdom, and this is not to be disputed by a subject . . . .

Id.

163. CLARK, *supra* note 132, at 261; KIER, *supra* note 146, at 182.

without its consent,[164] but its attempts to debate the impositions were met with royal hostility, and in 1610, James I dissolved his first Parliament.[165]

Between 1610 and 1614, James' financial situation deteriorated,[166] and in 1614 he convened his second Parliament.[167] James had no more luck with his second Parliament than with his first. Instead of granting the revenue the King requested, Parliament debated a bill against impositions.[168] Seeing little likelihood of getting the money he required from Parliament, James I quickly dissolved his second Parliament.[169]

Thereafter, James attempted to rely on his own resources rather than Parliament and, for a time, generally succeeded by reforming the royal household and public expenditures and by raising revenue through such means as customs duties and the sale of monopolies.[170] Once called, however, Parliament was certain to be provoked by the manner in which James I sustained the government; thus, "the Crown's new position . . . was secure only if the meeting of Parliament were indefinitely delayed."[171] James' highly precarious situation could not survive the "greatest risk of any political system—the risk of war."[172]

The threat of war came from continental Europe in 1621 when James I became entangled in the politics surrounding the Thirty Years War.[173] He called Parliament to provide an extraordinary grant of supply to conduct necessary military and diplomatic efforts. Instead, Parliament used the occasion to pay off old scores, including the King's resort to "unparliamentary taxation."[174] Parliament also expanded the scope of the debate, venturing into areas that had been the exclusive province of the Crown. In

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164. CLARK, *supra* note 132, at 261.

165. KENYON, *supra* note 162, at 26.

166. KIER, *supra* note 146, at 183 (noting James made every effort to improve his finances, including the sale of the newly invented title of baronet); *see generally* HUGH TREVOR-ROPER, THE AGE OF EXPANSION 219 (1968).

167. CLARK, *supra* note 132, at 269; KIER, *supra* note 146, at 183; KENYON, *supra* note 162, at 26.

168. CLARK, *supra* note 132, at 269; KENYON, *supra* note 162, at 26.

169. CLARK, *supra* note 132, at 269. Kier indicates that this constituted the last opportunity for "amicably readjusting the financial relations of Crown and Parliament under peace-time conditions." KIER, *supra* note 146, at 183.

170. KIER, *supra* note 146, at 183-84; *see also* Yoo, *supra* note 125, at 210.

171. KIER, *supra* note 146, at 184.

172. *Id.*

173. *Id.* at 185; KENYON, *supra* note 162, at 26.

174. KIER, *supra* note 146, at 186.

bitter exchanges with the King, Parliament asserted for the first time freedom of speech within the House—infuriating James, who tore out the offending parts of the House Journals—and challenged the Crown's discretion in other areas, including the conduct of foreign policy.[175] Without getting the revenue he needed, James again dissolved Parliament.

James' last Parliament, called in 1624, was equally unaccommodating. Although he offered concessions, inviting Parliament to provide foreign policy advice, Parliament still refused to grant all of the revenue requested.[176] Thus, James (and later his son, Charles I) was forced to resort to various extra-parliamentary means to raise the money required, including demands on maritime districts for ship-money, sales of Crown lands, and forced loans.[177]

Parliament's struggle with the Crown came to a climax under the rule of Charles I, who proved even more inept at handling the Commons than his father. Managing to blunder into a war with two implacable enemies, Spain and France,[178] Charles convened his first Parliament in 1628. Parliament insisted, however, on redress before supply,[179] ultimately presenting the King with the Petition of Right, which, among other things, squarely addressed the King's resort to taxation without Parliament's consent:

> They do therefore humbly pray your most excellent Majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge without common consent by act of parliament, and that none be called to make answer or take such oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusal thereof.[180]

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175. Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 529, 547 (1974); *see also* BANKS & RAVEN-HANSEN, *supra* note 125, at 13; KIER, *supra* note 146, at 186; KENYON, *supra* note 162, at 26; Yoo, *supra* note 125, at 210.

176. KIER, *supra* note 146, at 188; KENYON, *supra* note 162, at 27.

177. KIER, *supra* note 146, at 190.

178. BANKS & RAVEN-HANSEN, *supra* note 125, at 13; WESTERN CIVILIZATION 918 (William L. Langer et al. eds., 1968).

179. KIER, *supra* note 146, at 192.

180. Petition of Right (1628), *in* KENYON, *supra* note 162, at 70; *see also* REID, *supra* note 121, at 139-40.

Needing revenues to pursue the war, Charles I assented to the Petition.[181] The war soon ended, however, and Charles dissolved Parliament not to reconvene another for eleven years.[182]

Charles was determined to rule without Parliament. To finance his government, he turned to various (now familiar) extra-parliamentary means, including import duties; sales of forest rights, royal properties, and monopolies; fees from compulsory knighthoods; and ship-money.[183]

Of all forms of monarchical taxation, ship-money was the *cause celebre*. Ship-money was originally levied on seaport towns to support the naval forces that protected the towns' maritime interests. Charles extended the tax to inland counties.[184] A wealthy inland landlord, John Hampden, challenged the tax, refusing to pay it. As in *Bates Case*, the Court of the Exchequer, upheld the authority of the Crown to impose the tax under his prerogatives for national defense.[185] In ruling for the Crown, one judge, Sir John Finch, used language uncomfortably similar to that used by advocates of an independent presidential spending power, asserting that Parliament could not, through its power of the purse, prevent the king from exercising his regal responsibilities:

> The power of laying this charge is, by the policy and fundamental laws of this kingdom, solely invested in the King . . . . Acts of Parliament may take away flowers and ornaments of the crown .

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181. BANKS & RAVEN-HANSEN, *supra* note 125, at 13; KIER, *supra* note 146, at 192.

182. *Id.* In dissolving Parliament, Charles I warned his subjects not to "get carried away" with the Petition of Right, reminding them they still owed obedience to the Crown:

> Yet let no man hereby take the boldness to abuse that liberty, turning it into licenciousness; nor misinterpret the Petition [of Right] by perverting it to a lawless liberty, wantonly or forwardly, under that or any other colour, to resist lawful and necessary authority. For as we will maintain our subjects in their just liberties, so we do and will expect that they yield as much submission and duty to our royal prerogatives, and as ready obedience to our authority and commandments, as hath been promised to the greatest of our predecessors.

His Majesty's Declaration to all his Loving Subjects, of Causes which moved him to Dissolve the last Parliament (Mar. 10, 1629), *in* KENYON, *supra* note 162, at 73.

183. BANKS & RAVEN-HANSEN, *supra* note 125, at 14.

184. *Id*.; CLARK, *supra* note 132, at 282; KIER, *supra* note 146, at 202; PUTNEY, *supra* note 127, at 61; Yoo, *supra* note 125, at 210.

185. Case of Ship-Money Between the King & John Hampden (Hampden's Case), *in* 3 HOWELL'S STATE TRIALS 825, 1224-27 (T.C. Hansard, London, 1809) [hereinafter 3 STATE TRIALS]; *see also* CLARK, *supra* note 132, at 282-83; KIER, *supra* note 146, at 206. Hampden's ship-tax assessment was 20 shillings. 3 STATE TRIALS at 856.

> . . but not the crown itself; they cannot bar succession . . . . No act of parliament can bar a king of his regality, as that no lands should hold him; or bar him of the allegiance of his subjects . . . : therefore acts of parliament to take away his royal power in the defence of his kingdom are void . . . ; they are void acts of parliament, to bind the king not to command the subjects, their persons and goods, and I say their money too: for no acts of parliament make any difference.[186]

Hampden's Case was to prove to be a Pyrrhic victory for the King because it produced an inevitable backlash once Parliament reconvened.[187]

For Charles I, as for his father, war proved to be the insurmountable barrier to extra-parliamentary rule. In 1640, triggered by religious discord, Scotland rebelled and its army invaded England, forcing Charles to call parliament to raise needed supplies.[188] On 3 April 1640, Parliament met and immediately made known that it considered the "Scottish invasion . . . less important than the invasion of English liberties in the name of Prerogative."[189] Parliament saw the Scottish war and Charles' need for money as an opportunity to rectify grievances building during the past eleven years of extra-parliamentary rule.

In a speech to the Commons on 17 April 1640, John Pym, the House's leader, outlined Parliament's grievances. Dividing the grievances in three parts, Pym spoke out against wrongs committed by the Crown against the privileges and liberties of Parliament; wrongs in matters concerning religion; and wrongs in connection with unlawful taxation. Pym condemned in detail extra-parliamentary taxation, including import duties; sales of knighthoods, monopolies, and public nuisances; ship-money; and military charges and impositions upon counties.[190] Parliament refused all supply until its grievances were addressed.[191] The King dissolved Parliament on

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186. 3 STATE TRIALS, *supra* note 185, at 1224, 1235.

187. *Id.* at 1254-55; *see also* KIER, *supra* note 146, at 206: "Their decision perhaps did the King more harm than good, opening up as it did a prospect of unlimited prerogative taxation on a plea of emergency which could never be rebutted."

188. BANKS & RAVEN-HANSEN, *supra* note 125, at 14; KIER, *supra* note 146, at 207; PUTNEY, *supra* note 127, at 62.

189. KIER, *supra* note 146, at 210; *see also* PUTNEY, *supra* note 127, at 63.

190. Pym's speech on Grievances (Apr. 17, 1640), *in* KENYON, *supra* note 162, at 183-87. Capping the list of grievances was the demand that Parliament ought to be called once a year. *Id.* at 188.

191. BANKS & RAVEN-HANSEN, *supra* note 125, at 14; CLARK, *supra* note 132, at 287; KIER, *supra* note 146, at 210.

5 May 1640, three weeks after it had convened, thus ending the so-called "Short Parliament."[192]

Charles' efforts to fight Scotland without parliamentary supply proved disastrous. His sources of revenue had virtually "dried up," and "[t]he army was unprovided, mutinous, and unreliable."[193] The Scottish invasion progressed with no effective force to stop it.[194] Charles had no choice but to call Parliament again.

In November 1640, the famous "Long Parliament" convened. Because Charles desperately needed revenue to deal with the Scots, Parliament clearly had the upper hand,[195] and it used it. "During its first session (1640-41) the Long Parliament dismantled . . . the personal rule of Charles I . . . ."[196] Using its power of the purse as leverage, Parliament impeached two of the King's advisors together with Sir John Finch and other judges in *Hampden's Case*.[197] It enacted the Triennial Act, which required that Parliament be summoned at least once every three years and circumscribed the king's authority to prorogue or dissolve Parliament without the consent of both houses.[198] Parliament also turned to the King's extra-parliamentary taxation, prohibiting ship-money and customs duties without parliamentary grant, and reversing the Court of the Exchequer's holding in *Hampden's Case*.[199] Charles had no choice but to accept all of the "measures thrust upon him by a unanimous opposition."[200] As Professors Banks and Raven-Hansen state: "capitalizing on national-security driven demands for money, Parliament forced Charles to sell prerogative rights in exchange for money grants."[201]

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192. BANKS & RAVEN-HANSEN, *supra* note 125, at 14; CLARK, *supra* note 132, at 287; KIER, *supra* note 146, at 210.

193. CLARK, *supra* note 132, at 288; *see also* BANKS & RAVEN-HANSEN, *supra* note 125, at 14.

194. CLARK, *supra* note 132, at 288.

195. KIER, *supra* note 146, at 212.

196. TREVOR-ROPER, *supra* note 166, at 236.

197. 3 STATE TRIALS at 1262, 1299; KIER, *supra* note 146, at 213; Bestor, *supra* note 175, at 548.

198. 16 Car. I, c. 1 (1641), *in* KENYON, *supra* note 162, at 197-200.

199. BANKS & RAVEN-HANSEN, *supra* note 125, at 14; CLARK, *supra* note 132, at 288; KIER, *supra* note 146, at 214.

200. KIER, *supra* note 146, at 214.

201. BANKS & RAVEN-HANSEN, *supra* note 125, at 14; *see also* SOFAER, *supra* note 120, at 7; REVELEY, *supra* note 121, at 53.

Increasingly emboldened, the parliamentary majority eventually pushed the King too far. In late 1641, a sharply divided Parliament enacted the "Grand Remonstrance" on the state of the kingdom, demanding a parliamentary role in the selection of the King's ministers and in affairs of the Church, demands to which the Crown would not accede.[202] Charles responded in early 1642 with articles of impeachment against five leaders of the Commons, including John Pym.[203] On 4 January 1642, Charles appeared at Westminster, with a posse in tow, to arrest the members. Forewarned about the King's intentions, the members had earlier fled to London.[204]

From that point, events spiraled out of control. Amidst rising tension and civil disorder, Charles fled London on 10 January. Parliament demanded control of the militia out of fear "the armed forces might be used to intimidate the Commons."[205] When the King refused to surrender control of the armed forces, Parliament enacted the Militia Ordinance authorizing an army under parliamentary control.[206] The country erupted into civil war between the Crown and Parliament, resulting in Charles' military defeat in 1646 and his execution for treason on 30 January 1649.[207]

(4) Commonwealth, Restoration, the "Glorious Revolution," & Beyond

By 1649, the parliamentary army held real power in England.[208] Under the leadership of Oliver Cromwell, it established a military dictatorship and puritan oligarchy.[209] The "Long Parliament" continued to sit, but

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202. The Grand Remonstrance (1641), *in* KENYON, *supra* note 162, at 207-17; *see also id*. at 181; CLARK, *supra* note 132, at 291; GOUGH, *supra* note 135, at 77.

203. *See* The impeachment of Five Members (Jan. 3, 1642), *in* KENYON, *supra* note 162, at 217-18. Among other things, Charles accused the members of "traitorously endeavor[ing] to subvert the law and government of the kingdom . . . ," of making "foul aspersions" upon the king and his government, of alienating the affections of the king's subjects, of attempting to cause the army to mutiny, of inviting a foreign power to invade England, and of levying war against the king.

204. CLARK, *supra* note 132, at 292; KENYON, *supra* note 162, at 182.

205. Bestor, *supra* note 175, at 549.

206. Militia Ordinance (Mar. 5, 1642), *in* KENYON, *supra* note 162, at 219-20. By the Ordinance, Parliament appointed the lieutenants of the army, ordered them to suppress the rebellions and insurrections in the kingdom, and to answer to Parliament alone. Though the causes of the civil war were varied, "the precipitant of actual hostilities was the conflict over command of the militia." Bestor, *supra* note 175, at 549-50 n.64.

207. CLARK, *supra* note 132, at 303; KIER, *supra* note 146, at 222.

208. KIER, *supra* note 146, at 222.

209. *Id.*

in 1648, acting under Cromwell's orders, the Army expelled a number of the King's supporters, and the remaining remnant was called the "Rump."[210] The Rump promptly abolished the monarchy and the House of Lords and declared England a Commonwealth.[211] In 1653, Cromwell dissolved the "Long Parliament," thirteen years after it first convened.[212]

After Cromwell's death in 1658, the Commonwealth was unable to sustain itself for long.[213] On 4 April 1660, acting on suggestions conveyed from one of Cromwell's generals, Charles II (son of the late King) issued the Declaration of Breda, which, subject to the approval of a free Parliament, declared a general pardon, freedom of conscience and conversation in matters of religion, and safeguards for property.[214] On these terms, a new Parliament assembled on 25 April 1660, and Charles II entered London on 29 May.[215]

Charles II ascended the throne with Parliament's consent and subject to the gains made by the Long Parliament through 1641.[216] Parliament "possessed an indisputable sovereignty in legislation and taxation."[217] And while the Crown initially controlled the expenditure of revenue,[218] its grasp on appropriations was growing tenuous. The revolutionary Long Parliament had exercised this power and many of its members who sat in the parliaments of Charles II no longer viewed the authority as sacrosanct.[219] Indeed, the performance of English forces in the war against the Netherlands "awakened doubts as to the wisdom of entrusting the Crown with control of large sums,"[220] and led to the enactment of an early form of purpose statute, the Commission for Public Accounts, by which the

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210. *Id.*; CLARK, *supra* note 132, at 303.

211. CLARK, *supra* note 132, at 304.

212. *Id.* at 308; KIER, *supra* note 146, at 225; TREVOR-ROPER, *supra* note 166, at 236.

213. KENYON, *supra* note 162, at 305; KIER, *supra* note 146, at 228.

214. Declaration of Breda (Apr. 4, 1660), *in* KENYON, *supra* note 162, at 331-32. The general, George Monck, commander of the Army of Scotland, was an advocate of constitutional government. He and his army had earlier marched south, reconvened the Long Parliament, and forced it to readmit its expelled members and consent to its own dissolution. *Id*. at 305.

215. *Id.* at 305.

216. BANKS & RAVEN-HANSEN, *supra* note 125, at 15; KENYON, *supra* note 162, at 360; KIER, *supra* note 146, at 231.

217. KIER, *supra* note 146, at 231.

218. *Id.* at 236.

219. *Id.* at 233.

220. *Id.* at 249.

Commons insisted on the appropriation of supply and the accounting of expenditures.[221]

Charles II died in 1685, having governed without Parliament since 1681.[222] Charles' brother, James II, succeeded to the throne. James quickly provoked confrontation with Parliament.[223] The fact that he and his wife were Catholics did not help his cause. When he could not obtain requested revenue from Parliament without conditions, he prorogued and then dissolved the body, never calling it again.[224]

Tensions mounted, primarily over religious issues, such as James' attempt to place Catholics in high offices and his ordered arrest of Anglican bishops, including the Archbishop of Canterbury, for refusing to read a Declaration of Indulgences in their churches.[225] James' actions set in motion a reaction that would cost him the throne.[226]

In June 1688, seven peers offered the Crown to James' nephew, William of Orange.[227] William collected a small army, landed in England, and by Christmas, James was in France and William firmly in charge of the British government. James' overthrow—the "Glorious Revolution"—had been quick and practically bloodless.[228]

Since no Parliament then existed (William, still being a foreign prince, was unable to call one), an informal assembly of peers, members of the Commons of Charles II's parliaments, and London authorities sent out writs summoning a convention. The convention offered William, and his wife Mary, the throne.[229] Thus, when William and Mary assumed the

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221. 19 & 20 Car. II, c. 1 (1666), *in* KENYON, *supra* note 162, at 366-70; BANKS & RAVEN-HANSEN, *supra* note 125, at 15; KIER, *supra* note 146, at 229. *See also* 18 & 19 Car. II, c. 13 (1666), *in* KENYON, *supra* note 162, at 366 (prohibiting diversion of funds appropriated for salaries and wages of military personnel); Yoo, *supra* note 125, at 212 ("Instead of voting lump sums to the Crown, Parliament began to appropriate funds specifically for the army and to forbid the transfer of money from other accounts for military purposes.").

222. CLARK, *supra* note 132, at 326; KIER, *supra* note 146, at 261.

223. 2 HALLAM, *supra* note 126, at 274-76.

224. *Id.* at 276.

225. CLARK, *supra* note 132, at 327; 2 HALLAM, *supra* note 126, at 293-94; KIER, *supra* note 146, at 264-66.

226. SOFAER, *supra* note 120, at 7.

227. KIER, *supra* note 146, at 267.

228. CLARK, *supra* note 132, at 328.

229. 1 BLACKSTONE, *supra* note 150, at 147-49, 209; 2 HALLAM, *supra* note 126, at 293-94; KIER, *supra* note 146, at 269.

throne, they did so without any constitutional standing but that conferred upon them by the Convention.[230] The whole basis for the monarchy had transformed—William and Mary owed their Crown to the people and not to some divine right.[231]

The new King and Queen promptly consented to the Bill of Rights of 1689.[232] A key grievance expressed in the statute was that James II had levied "money for and to the use of the Crowne by [pretence] of prerogative for other time and in other manner than the same was granted by Parlyment."[233] To rectify the Crown's usurpation of parliamentary authority, the Bill of Rights reserved to Parliament alone the power of the purse. A precursor to the Constitution's appropriations clause, the statute provided that "levying money for or to the use of the Crowne by [pretence] of prerogative without grant of Parlyment for longer time or in other manner than the same is or shall be granted is illegal."[234]

Other enactments similarly solidified Parliament's hold on finances. The first annual Mutiny Act (1689) prohibited the maintenance of a standing army in peacetime without periodic parliamentary renewal (usually annual).[235] "Thereafter, the decision to raise a standing army required statutory authority."[236] Consequently, the monarch had to allow parliaments

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230. KIER, *supra* note 146, at 269.

231. HALLAM, *supra* note 126, at 305:

> Our new line of sovereigns scarcely ventured to hear of their hereditary right, and dreaded the cup of flattery that was drugged with poison. This was the greatest change that affected our monarchy by the fall of the house of Stuart. The laws were not so materially altered as the spirit and sentiment of the people . . . . The fundamental maxims of the constitution, both as they regard the king and the subject, may seem nearly the same; but the disposition with which they were received and interpreted was entirely different.

Together with the Act of Settlement of 1701, "the rights of the actual monarch, of the reigning family, were made to emanate from the parliament and the people." *Id.* at 306-07; *see also* 1 BLACKSTONE, *supra* note 150, at 210-11. A new coronation oath pledging to "govern according to the statutes in Parliament agreed upon" was also prescribed. CLARK, *supra* note 132, at 328.

232. CLARK, *supra* note 132, at 329; *see also* Yoo, *supra* note 125, at 213 (The Bill of Rights was imposed on William and Mary "as the price for their throne.").

233. 1 W. & M. c. 30 (1689).

234. *Id.* The Bill of Rights also prohibited the raising or keeping of a standing army in the kingdom in peacetime without the consent of Parliament. *Id. See* Bestor, *supra* note 175, at 554.

235. 1 W. & M. c. 5 (1689); *see* KIER, *supra* note 146, at 268.

236. Yoo, *supra* note 125, at 213.

to convene lest authority for their armies would lapse.[237] In addition, Parliament increasingly scrutinized military expenditures; "[e]stimates of probable expenditure were regularly laid before them, and the supply granted was strictly appropriated to each particular service."[238]

Parliament also breathed new vitality into the Commission for Public Accounts.[239] While giving the Crown some flexibility, particularly in time of war,[240] Parliament generally insisted on a controlling voice over the expenditure of revenue:

> The great and fundamental principle, as it has long been justly considered, that the money voted by parliament is appropriated, and can only be applied, to certain specified heads of expenditures, was introduced . . . in the reign of Charles II . . . . [F]rom the Revolution it has been the invariable usage. The lords of the treasury, by a clause annually repeated in the appropriations act of every session, are forbidden, under severe penalties, to order by their warrants any money in the exchequer, so appropriated, from being issued for any other service . . . . This has given the house of commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly exist without its concurrence.[241]

Through the reigns of Anne and the Hanoverian kings and up to the American Revolution, Parliament, notably the House of Commons, used its power over appropriations to assume a preeminent role in British government. By means of its control over finance, the Commons "asserted its power to inquire into all details of administration, and into the conduct of the King's ministers . . . ."[242] By the time the Framers began to draft the United States Constitution, the primacy of Parliament in the British Constitution had become secure. Importantly, the power of the purse was the foundation of its dominance.

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237. BANKS & RAVEN-HANSEN, *supra* note 125, at 16; *see also* KIER, *supra* note 146, at 278: "The combined effect of the Bill of Rights and the Mutiny Act made it impossible for the Crown to maintain in time of peace a standing army unauthorised by Parliament."

238. 2 HALLAM, *supra* note 126, at 329.

239. *See supra* note 221, and accompanying text.

240. BANKS & RAVEN-HANSEN, *supra* note 125, at 16.

241. 2 HALLAM, *supra* note 126, at 329-30.

242. 10 HOLDSWORTH, *supra* note 126, at 34.

The House of Commons in the eighteenth century was the predominant partner in the constitution. It had gained this position, and held it, first by reason of its exclusive control over finance, and, secondly, by reason of its representative character. Its exclusive control over finance enabled it to criticize all the acts of the executive government, to stop projects of which it disapproved, to force the executive to adopt policies of which it approved, and to supervise the methods adopted to carry them out . . . . [O]n matters which stirred the nation, the House of Commons was able to exercise a decisive influence on the executive government.[243]

Control over the public purse was the cornerstone of British representative democracy. It served as the instrument for parliamentary supremacy, compelling monarchs to surrender their royal prerogatives in exchange for the revenue required to sustain their administrations, particularly their military adventures. It was also an end in itself, ensuring that taxes would not be raised except with the consent of the taxpayers; later, taxpayers would also have a voice in how their money was spent.

Significantly, the Framers gave close attention to Britain's historical experience, particularly the lessons of the 17th century.[244] These lessons would be reflected in the constitutional provisions giving Congress, rather than the President, the power over the nation's purse.

b. Colonial Experience

The conflicts between Parliament and the Crown over the power of the purse and, ultimately, predominance in the government, were replayed in the American colonies in struggles between the royal governors and provincial assemblies. The colonists believed that, as Englishmen, "they had a right to share in making laws and laying taxes through agents of their own election."[245] Legislatures throughout the colonies assumed the power to tax. Through their control of revenues, the legislatures were able to wrest concessions from the royal governors at the expense of the governors' prerogatives, including the authority to designate how tax moneys would be spent. By the middle of the 17th century, the power of the purse enabled legislatures to dominate colonial government.

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243. *Id.* at 584-85. "As against the King and his government . . . the financial control of the House of Commons was complete. It was this control which enabled the House to supervise the whole field of executive government." *Id.* at 588.

244. JACK N. RAKOVE, ORIGINAL MEANINGS 20 (1996) [hereinafter RAKOVE, ORIGINAL MEANINGS]; REVELEY, *supra* note 121, at 54.

245. LEONARD WOODS LABAREE, ROYAL GOVERNMENT IN AMERICA 174 (1930).

British authorities intended the royal governor to be the focal point of colonial administration and government.[246] The royal governor's authority was "vice-regal" in character, in that he was the agent or representative of the British monarch.[247] He governed according to the commission and instructions received from the Crown.[248]

Since the governor's ability to wield absolute power was not in accord "with the old English tradition that legislation and taxation should be guarded by a representative body[,]" it could not long survive after the initial footholds had been secured in America.[249] In 1619, the first representative assembly—the House of Burgesses—was formed in Virginia, and thereafter legislative assemblies arose in the other colonies.[250] Colonial governments were traditionally tripartite systems, administered by the royal governor; a non-elective council, which advised the governor, acted as an upper legislative house, and served as the highest appellate court in the province; and a locally elected assembly, which was the lower house.[251]

Friction between the elective assemblies and the royal administration was inevitable. At the root was disagreement over the very legal foundation of the representative bodies. To the British government, colonial legislatures were creatures of royal prerogative and owed their existence to the grace of the Crown.[252] To the colonists, the legislative assemblies existed as a matter of their fundamental rights as Englishmen to have a voice in their governance, particularly the imposition of taxes.[253] The colonists' view carried, of course, profound consequences, for once they asserted that their elected assemblies existed by virtue of rights derived independent of the Crown, the argument that the king could not legally circumscribe the assemblies' legislative authority was not far behind.[254]

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246. JACK P. GREENE, THE QUEST FOR POWER 1 (1963).

247. EVARTS BOUTELL GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 92 (Russell & Russell 1966) (1898).

248. *Id*. at 93-94. The royal commission, which set out the governor's authority, was generally published when the governor assumed office. The instructions told the governor how he was to exercise his power and were not usually published. *Id*. Taken together, the commissions and instructions "may be regarded as the constitution of the province." *Id.* at 95.

249. *Id.* at 36.

250. *Id.* at 36-40.

251. LABAREE, *supra* note 245, at 134, 159.

252. J. GREENE, *supra* note 246, at 15; LABAREE, *supra* note 245, at 174-75.

253. J. GREENE, *supra* note 246, at 14; LABAREE, *supra* note 245, at 174-75.

254. *See* LABAREE, *supra* note 245, at 177.

With regard to revenue, the official British position was that only Parliament could impose taxes in the colonies; however, because Parliament did not undertake to tax the colonies directly until 1764, the authority fell to the colonial legislatures.[255] Given their own constitutional struggles of the 17th century, the British authorities "were most reluctant to allow any legislation or taxation in the colonies without an assembly."[256] Had Parliament imposed taxes earlier—before the colonial legislatures fully took root—it might have possibly averted the provincial assemblies' financial supremacy.[257] In any event, by 1764, the opportunity to tax the colonies from England had long passed, and when Parliament attempted to impose taxes, it triggered bitter opposition that ultimately led to the American Revolution.[258]

The colonial legislatures' most important possession was their power to tax,[259] and by the end of the Seven Years' War, their control over money bills was exclusive.[260] Like the Crown, provincial governors could not sustain their administrations without tax revenues and were financially dependent on the assemblies.[261] Colonial legislatures exploited this financial dependence to enhance their powers at the expense of the governors' prerogatives by withholding needed revenues unless the governors acceded to the conditions attached to them.[262]

The colonial legislatures were not content with just raising revenues; they also wanted to decide how the revenues would be spent. This was contrary to the Crown's concept of their role: it envisioned the local assemblies would simply grant money, and the royal governors alone

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255. J. GREENE, *supra* note 246, at 51; LABAREE, *supra* note 245, at 269; *see also* REID, *supra* note 121, at 141-42 (noting consent-to-tax doctrine was integral part of governance of early colonies).

256. LABAREE, *supra* note 245, at 175.

257. *Id.* at 296; *but see* J.P. REID, *supra* note 121, at 142-44 (indicating even early colonists would have resisted direct parliamentary taxation).

258. REID, *supra* note 121, at 105, 144-46. Colonists viewed Parliament's attempts to tax them as involving not only the principle of taxation without representation, but also as an attack upon the financial supremacy their legislatures had won by years of struggle. LABAREE, *supra* note 245, at 296.

259. J. GREENE, *supra* note 246, at 51.

260. *Id*. at 70. The governors' councils never seriously tried to initiate such measures and met with little success in attempting to amend them. LABAREE, *supra* note 245, at 135.

261. LABAREE, *supra* note 245, at 272.

262. J. GREENE, *supra* note 246, at 49.

would decide how to spend it.[263] The Crown's notion that the power to spend would reside in the executive was never realized.

> A scheme which reduced the elective body to a mere money-granting agency could meet with no more permanent success among Englishmen on one side of the Atlantic than among those on the other. Consequently, the assemblies began to make the same encroachments upon the executive control of finance in the colonies that the seventeenth century House of Commons made in England.[264]

By the outbreak of the American Revolution, colonial legislatures exercised the same authority over finances that the Commons did in Britain. They alone were responsible for raising revenues and for making appropriations.[265] Moreover, perceiving their role as the "constitutional guardian of the people's money," a majority of colonial legislatures even assumed control over the appointment of the provincial treasurers.[266] In such cases, the royal governor played almost no role in provincial finance.[267]

Through their control of the colonial fisc, the assemblies extended their authority over other areas of colonial administration, both civil and military.[268] Royal governors had no choice but to accept legislatively imposed conditions on appropriations or do without needed revenue.[269] In a number of cases, assemblies even held governors' salaries hostage to their demands, further diminishing the governors' authority.[270]

The Founders took notice of how the colonial legislatures had used the power of the purse to bring royal provinces under republican control.

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263. *Id.* at 87-88; LABAREE, *supra* note 246, at 274.

264. LABAREE, *supra* note 245, at 275; *see also* Paul R.Q. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 842 (1987) ("[T]he colonial legislatures learned that they could control disbursements as well as revenues by stipulating in tax bills the purposes for which the money they granted would be used.").

265. LABAREE, *supra* note 245, at 308; *see also* J. GREENE, *supra* note 246, at 106.

266. E. GREENE, *supra* note 247, at 182.

267. *Id.* at 185.

268. J. GREENE, *supra* note 246, at 51; E. GREENE, *supra* note 247, at 188-89; LABAREE, *supra* note 245, at 308-10.

269. *Id.*

270. *See* E. GREENE, *supra* note 247, at 173-74, which cites a number of examples. The Framers' were clearly cognizant of this practice, proscribing the diminution of presidential and judicial salaries during their tenure. U.S. CONST. art. II, § 1, cl. 7; art. III, § 1.

> The responsibility of the royal governor to the home government had placed him in much the same relationship to the local assemblies as that in which the Stuart kings had been to the Commons. It had therefore seemed necessary to the colonists to utilize every agency, and especially the control over purse strings, to force concessions from the executive branch . . . . In these struggles the popular assemblies were the bulwark of popular liberties; the executive departments the instrumentalities of British control. This attitude of mind could not fail profoundly to affect the original American concept of republican executive power.[271]

The Founders' "original" concept of executive power would eventually be tempered by their experiences under the Articles of Confederation and their post-Independence state constitutions.[272] However, the concept that control over the public fisc—both taxation and appropriation—was a legislative power had become firmly entrenched. Over the course of the previous two centuries, Americans and Englishmen alike had used the legislative power of the purse to forge representative democracies. These historical experiences unquestionably shaped the Founders' views,[273] and ultimately led to the Constitution's provisions granting Congress exclusive power to tax and spend.

These experiences also formed the environment for the appropriations clause. By 1776, both the British and colonial governments conditioned the expenditure of tax revenue on the approval of the elected houses of their legislatures.[274] Neither the Crown nor the royal governors could spend revenues without legislative approval. The appropriations clause incorporates this hard-won practice in the Constitution. Viewed in its his-

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271. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789, at 26-27 (1923) (footnote omitted).

272. *Id.* at 52, 74.

273. E. JAMES FERGUSON, THE POWER OF THE PURSE xiv-xv (1961):

> Public finance was a more controversial subject in the eighteenth century than it is now . . . . [Eighteenth century Americans] reserved for economic factors a higher role in shaping the general institutions of society. The power of the purse was to them the determinant of sovereignty and upon its location and extent depended the power of government, the existence of civil rights, and the integrity of representative institutions. Their basic premise was that popular control of taxation was also an instrument with which to enlarge the sphere of private liberty against the authority of the state.

274. *See, e.g.*, A.V. DICEY, LAW OF THE CONSTITUTION 313 (1920) ("Not a penny of revenue can be legally expended except under the authority of some Act of Parliament.").

torical context, the clause was intended to make congressional approval a prerequisite to the expenditure of public funds.

c. Experience Under the Articles of Confederation & Early State Constitutions

With the Revolution and the break from England, Americans translated their antipathy towards the executive branch—which they identified with the royal governors and the king—into positive constitutional enactments. With few exceptions, early state constitutions either made executive departments subservient to the legislatures or effectively eliminated them altogether. Under these charters, the legislatures quite naturally controlled the fiscal levers of government. Americans soon discovered, however, that an unrestrained legislature could be as tyrannical as an unrestrained executive and began to restore executive power. As they did, Americans implanted safeguards in their constitutions—generally in the form of appropriations clauses—to ensure the power of the purse remained within the legislative sphere.

The Articles of Confederation similarly rejected a formal executive, conferring upon the Continental Congress both the legislative and executive powers of the Confederation. While the absence of an executive department proved administratively inconvenient, the fundamental defect of the Confederation was its lack of effective political power. The Confederation was at the mercy of thirteen—nearly autonomous—states; it relied on them for its support, but they could, with impunity, refuse to furnish it.

The Continental Congress never acquired a power to tax and was wholly dependent on the states for its financial subsistence, including (until 1783) the conduct of the War for Independence. State contributions were perpetually inadequate, contributing in large measure to the ineffectiveness and virtual collapse of the Confederation. The Founders' response to the Confederation's fiscal feebleness was to bestow upon Congress a strong power of the purse, by furnishing it with independent constitutional authority to raise and appropriate revenue.

(1) Articles of Confederation

The Articles of Confederation do not offer much of an object lesson in the centuries-old struggle between legislative and executive departments for control of the public fisc, as the Articles had no executive and virtually lacked a power of the purse.[275] First proposed by Benjamin Fran-

klin on 21 July 1775,[276] the Continental Congress approved the Articles of Confederation on 15 November 1777,[277] sending them to the states for ratification.[278] The letter transmitting the Articles prophesied the pitfalls inherent in a confederation of loosely attached states. Apologizing for the delay in completing the Articles, Congress noted the obstacles involved in devising a constitution that would accommodate "the opinions and wishes of the delegates of so many states, differing in habits, produce, commerce, and internal police."[279] Congress urged the states to consider the Articles immediately and dispassionately with an understanding "of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities."[280] In spite of Congress' call to consider the Articles "without delay,"[281] over three years passed before the last state (Maryland) ratified the Articles in February 1781.[282] The Articles formally took effect on 1 March 1781.[283]

The Articles established Congress as the single branch of national government. Comprised of members appointed by and representing the state legislatures,[284] Congress exercised the legislative, executive, and judicial functions of government. The Articles did not establish a formal executive. While they did provide for a president,[285] he was merely a presiding officer who exercised no executive or administrative powers.[286]

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275. *See generally* Flaherty, *supra* note 117, at 1771.

276. 2 JOURNALS OF THE CONTINENTAL CONGRESS 195 (July 21, 1775) (GPO 1905). Franklin's draft, which established a "United Colonies of North America," bestowed upon the Continental Congress (*inter alia*) the power to determine war and peace, to send and receive ambassadors, to enter into alliances, to resolve disputes between colonies, and to create new colonies. Expenses were to be defrayed out of the "common Treasury," supplied by each colony in proportion to the number of males between 16 and 20. Congress lacked the power to tax; colonies would levy taxes according to their own laws.

277. 9 JOURNALS OF THE CONTINENTAL CONGRESS 907 (Nov. 15, 1777) (GPO 1907). For a description of the drafting process, *see* Eric M. Freedman, *Why Constitutional Lawyers & Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 797-800 (1993).

278. 9 JOURNALS, *supra* note 277, at 932-34 (Nov. 17, 1777).

279. *Id.* at 933.

280. *Id.*

281. *Id.* at 934.

282. 19 JOURNALS OF THE CONTINENTAL CONGRESS 138-40 (Mar. 1, 1781) (GPO 1912). Maryland withheld ratification until other states had ceded their claims to western lands. JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS 156, 286-88 (1979) [hereinafter RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS].

283. 19 JOURNALS, *supra* note 282, at 213-14.

The Articles empowered Congress to appoint "committees and civil officers as may be necessary for managing the general affairs of the United States . . . ."[287] Congressional committees did not administer the government well. The system strained Congress, which had to discharge both legislative and executive duties, and it produced delays inevitable from such a "double burden."[288] To rectify these problems, in 1781, Congress created executive departments, including the Secretary for Foreign Affairs, the Superintendent of Finance, and the Secretary of War, to administer the government.[289] These departments were not, however, part of a separate executive branch; instead, they were "mere appendages of the legislature."[290]

While the Continental Congress' inability to perform executive functions successfully was a factor contributing to the call for a new constitution,[291] it was not the Confederation's major shortfall. Its fundamental weakness was a lack of political power. States retained their "sovereignty, freedom and independence and every power, jurisdiction and right" to the extent they were not expressly delegated to the United States "in Congress assembled."[292] The Articles described the Confederation as simply a "firm league of friendship."[293] While the "locus of sovereignty" under Confederation has been hotly debated,[294] it is clear the states controlled the balance of political power. As Merrill Jensen noted in his study of the Articles of Confederation, "the fundamental difference between the Articles of Confederation and the Constitution of 1787 lies in the apportionment of power between the states and the federal government. In the first, the bal-

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284. 1 FARRAND, *supra* note 103, at 133 (June 6, 1787) (Remarks of George Mason) ("Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals.") (emphasis in the original); *see also* Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 892-93 (1990).

285. ARTS. OF CONFED. art. IX, cl. 5.

286. LOUIS FISHER, PRESIDENT AND CONGRESS 6 (1972) [hereinafter FISHER, PRESIDENT & CONGRESS]. In judicial matters, Congress served as "the last resort on appeal in all disputes" between two or more states (ARTS. OF CONFED. art. IX, cl. 2) and was empowered to appoint "courts for the trial of piracies and felonies committed on the high seas and . . . for receiving and determining finally appeals in all cases of captures." *Id*. art. IX, cl. 3.

287. ARTS. OF CONFED. art. IX, cl. 5.

288. FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 5, 11; *see also* Calabresi & Prakash, *supra* note 77, at 601; Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers & the President's Administrative Powers*, 102 YALE L.J. 991, 993-94 (1993).

289. 19 JOURNALS, *supra* note 282, at 42-43 (Jan. 10, 1781); *id*. at 126-28 (Feb. 7, 1781); *see also* FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 12; SOFAER, *supra* note 120, at 23-24; Calabresi & Prakash, *supra* note 77, at 601-02.

290. RICHARD M. PIOUS, THE AMERICAN PRESIDENCY 21 (1979).

ance of power was given to the states, and in the second, to the central government."[295]

The greatest obstacle to an effective national government was the virtual independence of the states. Writing to James Madison in late 1786, George Washington lamented that "[t]hirteen Sovereignties pulling against each other, and all tugging at the federal head will soon bring ruin on the whole . . . ."[296] In detailing the defects of the American political system in preparation for the Constitutional Convention, James Madison listed the states' failure to comply with constitutional requirements and their encroachment on federal authority as the first two vices of the Confederation.[297]

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291. James Madison and Thomas Jefferson, for example, both advocated a tripartite system of government, with separate legislative, executive, and judicial departments as an antidote for the inefficiency of the Continental Congress. *See* Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 PAPERS OF JAMES MADISON 317-18 (Robert Rutland et al. eds., 1975) (stating Congress frequently mismanaged the powers granted it because of "the want of such distribution" into separate departments); Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), *in* 11 PAPERS OF THOMAS JEFFERSON 678-79 (Julian P. Boyd ed., 1954) (favoring three distinct branches of government). Alexander Hamilton viewed a strong executive as the cure for the "want of method and energy" in congressional administration of government. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 11 PAPERS OF ALEXANDER HAMILTON 400, 404-05 (Harold C. Syrett ed., 1961). *See generally* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe & Kurland*, 84 NW. U. L. REV. 437, 470 (1990); Calabresi & Prakash, *supra* note 77, at 602-03 (independent chief executive response to inadequacies of congressional control of administration).

292. ARTS. OF CONFED. art. II.

293. *Id.* art. III; *see also* MAX FARRAND, THE FATHERS OF THE CONSTITUTION 52 (1921) [hereinafter FARRAND, FATHERS OF THE CONSTITUTION].

294. Clinton, *supra* note 284, at 892. For example, John Adams perceived Congress to be a "diplomatic assembly" rather than a legislature. Thomas Jefferson disagreed, asserting that the states and Congress shared sovereignty. *See* Letter from Thomas Jefferson to John Adams (Feb. 3, 1787), *in* 11 PAPERS OF THOMAS JEFFERSON 176-77 (Julian P. Boyd ed., 1954). An early decision of the Supreme Court in *Penhallow v. Doane's Administrator*, 3 U.S. (3 Dall.) 54 (1795), supported Jefferson's point of view, holding the Continental Congress—even before ratification of the Articles of Confederation—had the authority to constitute appellate tribunals in prize cases. The Court stated that, with regard to foreign states, the Continental Congress alone was sovereign. *Id.* at 80-81. *See also* 1 FARRAND, *supra* note 103, at 323-24 (June 19, 1787) (Remarks of Rufus King) (states not sovereign entities because they do not possess the "peculiar features of sovereignty," such as the powers to make war or peace or to deal with foreign nations); RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 28 (citing *Rutgers v. Waddington*).

295. MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 109 (1940).

296. Letter from George Washington to James Madison (Nov. 5, 1786), *in* 29 WRITINGS OF GEORGE WASHINGTON 50, 52 (John C. Fitzpatrick ed., 1939).

The Confederation's weakness was most evident in its inability to obtain the resources required for government operations. The absence of this authority was intentional. "Popular control of taxation was deemed the very foundation of representative government and the only protection of the rights of citizens[,]" and state control of revenues was viewed as a necessary curb on the authority of the national government.[298] Thus, the Confederation depended upon the states for its subsistence.

The Articles provided that the "charges of war" and other expenses of the central government were to be defrayed out of a common treasury to be "supplied by the several States, in proportion to the value of all land within each State . . . ."[299] Nothing, however, could compel the states to comply with the requisitions. "[T]he Articles conferred on Congress the privilege of asking for everything, while reserving to each state the prerogative of granting nothing."[300]

The revenue problem began early, before the ratification of the Articles, manifesting itself in Congress' inability to supply the Continental Army.[301] Congress ultimately turned over supply of the army to the states.[302] Efforts in 1781 to equip Congress with the authority to raise revenues directly went down to defeat when one state, Rhode Island, withheld its consent.[303] A similar attempt in 1783, which was linked to the so-called "Newburgh Conspiracy," in which the army presented a strongly worded and vaguely threatening remonstrance to Congress demanding immediate pay,[304] was unsuccessful when New York withheld its consent.[305]

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297. Vices of the Political system of the U. States (Apr. 1787), *in* 9 PAPERS OF JAMES MADISON 348 (Robert Rutland et al. eds., 1975); *see also* 1 FARRAND, *supra* note 103, at 256 (June 16, 1787) (Remarks of Edmund Randolph) (referring to Continental Congress as a "mere diplomatic body" that was "always obsequious to the views of the States, who are always encroaching on the authority of the U. States"); *id*. at 316-17 (June 19, 1787) (Remarks of James Madison) (providing examples of state encroachments on federal authority).

298. FERGUSON, *supra* note 273, at 111.

299. ARTS. OF CONFED. art. VIII.

300. FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 14 (quoting Robert Morris); *see also* Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1964-65 (1993).

301. E. WAYNE CARP, TO STARVE THE ARMY AT PLEASURE 14 (1984).

302. *Id.* at 221.

303. FARRAND, FATHERS OF THE CONSTITUTION, *supra* note 293, at 86; FERGUSON, *supra* note 273, at 153; Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 489-90 (1995). Virginia later revoked its ratification. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 282, at 316; Ackerman & Katyal, *supra*, at 490.

With the end of the war, support for the Confederation reached its nadir. The impetus to enhance the federal government's power to raise revenues dissipated, and states became even more disinclined to satisfy requisitions.[306] By 1786, a congressional committee reported that the amount of revenue the Confederation received was insufficient for even the "bare maintenance of the federal government on the most economical establishment, and in time of profound peace."[307] A year later, James Madison observed:

> [T]he present System neither has nor deserves advocates; and if some very strong props are not applied will quickly tumble to the ground. No money is paid into the public Treasury; no respect is paid to the federal authority. Not a single State complies with the requisitions, several pass them over in silence, and some positively reject them. The payments ever since the peace have been decreasing, and of late fall short even of the pittance necessary for the Civil list of the Confederacy. It is not possible that a Government can last long under these circumstances.[308]

The precariousness of the federal government's financial predicament was exemplified in 1786 by Congress' inability to provide promised military support to Massachusetts to suppress a rebellion in its western counties. The insurrection was spawned when the state, attempting to satisfy debts, imposed an onerous tax burden on its citizens. Many were unable to pay, leading the state to execute against their property.[309] The state's

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304. *See* 24 JOURNALS OF THE CONTINENTAL CONGRESS 291-93 (Dec. 1782) (GPO 1922):
> Our distresses are now brought to a point. We have borne all that men can bear—our property is expended—our private resources are at an end, and our friends are wearied out and disgusted with our incessant applications. We, therefore, most seriously and earnestly beg, that a supply of money be forwarded to the army as soon as possible. The uneasiness of the soldiers, for want of pay, is great and dangerous; any further experiments on their patience may have fatal effects.

305. FARRAND, FATHERS OF THE CONSTITUTION, *supra* note 293, at 87-88; FERGUSON, *supra* note 273, at 156-58, 161; RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS, *supra* note 282, at 313, 317-19, 338; Ackerman & Katyal, *supra* note 303, at 489.

306. *See* WILLIAM PETERS, A MORE PERFECT UNION 6 (1987).

307. 30 JOURNALS OF THE CONTINENTAL CONGRESS 74 (Feb. 15, 1786) (GPO 1934). The committee warned that "the crisis has arrived" when the American people had to decide whether to support the Confederation or "hazard" its existence. *Id.* at 75.

308. Letter from James Madison to Edmund Pendleton (Feb. 24, 1787), *in* 9 PAPERS OF JAMES MADISON 294-95 (Robert Rutland ed., 1975).

309. 3 EDWARD CHANNING, A HISTORY OF THE UNITED STATES 483-95 (1937); FERGUSON, *supra* note 273, at 245-46.

action triggered unrest, which erupted into violence when a force of armed citizens under Captain Daniel Shays tried to intimidate local courts to prevent them from acting against the tax debtors and threatened the federal arsenal at Springfield.[310]

In October 1786, Congress authorized raising troops to help Massachusetts suppress the insurrection.[311] By February 1787, only one state—Virginia—had honored the requisition needed to sustain the force. This prompted Charles Pinckney to move to stop the enlistments because Congress could not pay the troops, thereby creating a potentially more dangerous situation.[312] Although Pinckney's motion failed,[313] the rebellion ended before effective federal assistance could be rendered.[314]

Scholars disagree about the actual impact Shays' Rebellion had in impelling the Constitutional Convention.[315] It probably served as a catalyst for change.[316] It certainly was exploited by proponents of a strong national government.[317] Most significantly, the Rebellion illustrated the Confederation's financial impotence.

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310. 3 CHANNING, *supra* note 309, at 485; FERGUSON, *supra* note 273, at 247.

311. 31 JOURNALS OF THE CONTINENTAL CONGRESS 895-96 (Oct. 21, 1786) (GPO 1934). In raising the troops, Congress acted under the pretext of mounting an expedition against hostile Indians. *Id*.; *see also* FARRAND, FATHERS OF THE CONSTITUTION, *supra* note 293, at 95; SOFAER, *supra* note 120, at 24-25.

312. Notes on Debates in Congress (Feb. 19, 1787), *in* 9 PAPERS OF JAMES MADISON 276 (Robert Rutland ed., 1975):

> Mr. Pickney in support of his motion entered on the Journal, for stopping the enlistment of Troops, argued that we had reason to suppose the insurrection in Massts., the real tho' not ostensible object of this measure, to be already crushed: — that the Requisition of 500,000 dollrs. for supporting the troops had been complied with by one State only viz Virginia, and that but in part: — that it would be absurd to proceed in the raising of men who could neither be paid cloathed nor fed, and that such a folly was the more to be shunned, as the consequences could not be foreseen, of embodying and arming men under circumstances which would be more likely to render terror than the support of Government. We had, he observed, been so lucky in one instance, meaning the disbanding of the army on the peace, to get rid of the armed force without satisfying their just claims; but that it would not be prudent to hazard the repetition of this experiment.

See also 32 JOURNALS OF THE CONTINENTAL CONGRESS 62-63 (Feb. 19, 1787) (GPO 1934).

313. 32 JOURNALS, *supra* note 312, at 64 (Feb. 19, 1787) (GPO 1934); Notes on Debates in Congress (Feb. 19, 1787), *in* 9 PAPERS OF JAMES MADISON 279 (Robert Rutland ed., 1975).

314. FARRAND, FATHERS OF THE CONSTITUTION, *supra* note 293, at 94-95.

315. *See* Ackerman & Katyal, *supra* note 303, at 498.

When the Framers convened in Philadelphia in May 1787, they were unquestionably influenced by the fiscal infirmity of the Confederation, recognizing that the national government could not subsist on the whims of the states.[318] Thus, they provided the federal government, acting through Congress, a strong power of the purse.

(2) Early State Constitutions

While experience under the Articles of Confederation galvanized support for a strong national government that could subsist independently of the states, experience under early state constitutions inspired a system of separate legislative, executive, and judicial powers that included sufficient checks and balances to ensure one department did not dominate the other two.[319]

With the initial exception of New York, state constitutions drafted after independence "included almost every conceivable provision for reducing the executive to a position of complete subordination."[320] Americans soon realized, however, "that legislatures could be tyrannical, too," and ensured that the national constitution included checks on the poten-

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316. FARRAND, FATHERS OF THE CONSTITUTION, *supra* note 293, at 95-96; ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 141 (1936); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 32 (1928); Clinton, *supra* note 284, at 897; Raven-Hansen & Banks, *Pulling the Purse Strings*, *supra* note 64, at 893.

317. FERGUSON, *supra* note 273, at 249.

318. *See* MCLAUGHLIN, *supra* note 316, at 147; Prakash, *supra* note 300, at 1965.

319. *See* FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 17; GOLDSMITH, *supra* note 121, at 15-16; THACH, *supra* note 271, at 49; Flaherty, *supra* note 117, at 1763-69. In this regard, early state constitutions served as models for the federal Constitution. RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 30-31:

> By far the greatest influence that the experience of the states had on the deliberations of 1787 lay . . . in the area of constitutional theory itself. For when the framers set about designing the new national government, the crucial lessons they applied were drawn from their observation of the state constitutions written since independence. It was in the drafting of these charters, rather than the Articles of Confederation, that the revolutionaries had expressed their original notions of republican government. . . . The states had served, in effect, as the great political laboratory upon whose experiments the framers of 1787 drew to revise the theory of republican government.

See also Willi Paul Adams, *The State Constitutions as Analogy and Precedent*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, & RESPONSIBILITIES 3 (A.E. Dick Howard ed., 1992); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influence on American Constitutionalism*, 62 TEMP. L. REV. 541, 541-43 (1989).

tially overbearing legislative branch.[321] They also altered their state charters to enhance the independence and powers of the executive and judicial departments.[322]

Importantly, while fortifying executive autonomy and authority, drafters of later state constitutions steadfastly viewed the power of the purse to be legislative in character. In no instance did they afford governors a power to spend state funds without prior legislative authority. Furthermore, in most cases, they took affirmative steps to secure legislative control over state treasuries, usually via appropriations clauses, or by legislative appointment of state treasurers, or both. Late eighteenth century Americans unquestionably understood that the powers to tax and spend were legislative, not executive, powers.[323]

On 10 May 1776, the Second Continental Congress recommended to the

> respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have hitherto been established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in part, and America in general.[324]

Between 1776 and 1787, all but two of the thirteen states enacted new constitutions.[325] Two states—New Hampshire and South Carolina—ratified two constitutions during the period, and four states (including South

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320. THACH, *supra* note 271, at 28; *see also* GOLDSMITH, *supra* note 121, at 15; RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 250-52; Gordon S. Wood, *State Constitution Making in the American Revolution*, 24 RUTGERS L.J. 911, 914-15 (1993).

321. REVELEY, *supra* note 121, at 57-58; *see also* RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 250. By 1787, many of the Constitution's framers mistrusted the legislative department at least as much as they did the executive. *See* FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 18; THACH, *supra* note 271, at 52.

322. GOLDSMITH, *supra* note 121, at 15; RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 252-53.

323. Indeed, over the course of the last 221 years, all but a handful of states have incorporated appropriations clauses in their constitutions. Without apparent exception, the states have uniformly interpreted these provisions to proscribe governors from expending public funds absent legislative approval. *See infra* notes 675-88 and accompanying text.

324. 4 JOURNALS OF THE CONTINENTAL CONGRESS 342 (May 10, 1776) (GPO 1906). Congress ordered the resolution published on 15 May 1776. *Id.* at 358.

Carolina) adopted new constitutions within five years of ratification of the United States Constitution.

The drafters of these state constitutions undoubtedly believed in a system of separated powers. They were heavily influenced by Montesquieu,[326] who had several decades earlier expounded as essential to political liberty the division of government into three distinct departments: the legislative; the executive "in respect to things dependent on the law of nations"; and the executive "in regard to matters that depend on the civil law," which he characterized as the "judiciary power."[327] Montesquieu perceived political liberty as "a tranquillity of the mind" that each person has about his own safety, and that "in order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another."[328] Montesquieu believed that combining any of the three powers in any one man or body necessarily jeopardized political liberty by making people apprehensive about the actions of those exercising the power.[329]

Several early state constitutions explicitly professed adherence to the principle of separated powers. For example, the Maryland Declaration of Rights of 1776 ordained that "the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each

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325. Connecticut's constitution of 1776 made the 1662 Charter of Charles II the civil constitution of the state, "under the sole authority of the people thereof, independent of any King or Prince whatever." The constitution declared Connecticut a "free, sovereign, and independent State." CONN. CONST. of 1776, ¶ 1. Connecticut did not adopt a new constitution until 1818. *See* 1 FEDERAL & STATE CONSTITUTIONS 536 (Francis Newton Thorpe ed., 1909); THE FEDERALIST NO. 47 at 142 (James Madison) (Roy P. Fairchild ed., 1961). Rhode Island continued to be governed under the 1663 Charter of Rhode Island and Providence Plantations until 1842. *See* 6 FEDERAL & STATE CONSTITUTIONS 3222 (Francis Newton Thorpe ed., 1909); THE FEDERALIST NO. 47 at 142 (James Madison) (Roy P. Fairchild ed., 1961); Luther v. Borden, 48 U.S. (7 How.) 1, 35 (1849).

326. Bernard Schwartz, *Curioser and Curioser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 588 (1990) (observing that in England, despite Montesquieu, separation of powers was only a political theory, but "[i]n the United States, it was elevated to the level of constitutional doctrine as soon as full separation from the mother country made a new governmental structure necessary"); *see also* FRANCIS D. WORMUTH & EDWIN D. FIRMAGE, TO CHAIN THE DOG OF WAR 8 (2d ed. 1989); RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 252; Flaherty, *supra* note 117, at 1764.

327. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., 1949).

328. *Id.* Montesquieu did not equate political liberty with the right of people to act in any manner they please; instead, "[l]iberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty because all his fellow-citizens would have the same power." *Id.* at 150.

other."[330] The Georgia Constitution of 1777 decreed that the three departments of government "shall be separate and distinct so that neither shall exercise the powers properly belonging to the other."[331]

While professing adherence to the principle of separated powers, most early state constitutions did not contain the checks and balances necessary to preclude legislative usurpation of executive authority.[332] The first state constitutions either dispensed with true executives or established executives beholden to the state legislatures for their offices.[333] Moreover,

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329. For example: "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Id*. at 151-52. *See* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions & Practices*, 30 WM. & MARY L. REV. 211, 214 (1989) (Montesquieu advanced a "functional concept" of separation of powers: "separation is a necessary, if not a sufficient, condition of liberty. Its absence promotes tyranny.") [hereinafter Casper, *Separation of Powers*].

330. MD. CONST. of 1776, Decl. of Rts., art. VI.

331. GA. CONST. of 1777, art. I; *see also* N.H. CONST. of 1784, part I (Bill of Rights), art. XXXVII; N.C. CONST. of 1776, Decl. of Rts., art. IV; VA. CONST. of 1776, Bill of Rts., § 5.

332. 1 FARRAND, *supra* note 103, at 26-27 (May 29, 1787) (remarks of Edmund Randolph) ("Our chief danger arises from the democratic parts of our constitution. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallows up the other branches. None of the constitutions have provided a sufficient check against democracy."); 2 *id*. at 73-74 (July 21, 1787) (remarks of James Madison) ("Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex."); *see also* Williams, *supra* note 319, at 583 (observing that the "Pennsylvania Constitutionalists were acutely aware of the separation, and the differences among, governmental powers. It was the not yet fully understood concept of checks and balances which they associated with monarchical government that they rejected"); Wood, *supra* note 320, at 917 (noting that the drafters of the state constitutions invoked Montesquieu not to limit the legislatures, "but rather to isolate the legislatures and the judiciaries from the kind of executive manipulation and 'corruption' of members of Parliament that characterized the English constitution").

333. DEL. CONST. of 1776, art. VII ("president or chief magistrate" chosen for three-year term by house of assembly and council); MD. CONST. of 1776, art. XXV (governor chosen annually by house of representatives and senate); N.H. CONST. of 1776 (no executive department); N.J. CONST. of 1776, art. VII (governor chosen annually by general assembly and legislative council); N.C. CONST. of 1776, art. XV (house of commons and senate select governor annually); PA. CONST. of 1776, § 19 (president and vice president chosen annually by joint vote of council and house of representatives); S.C. CONST. of 1776, art. III (general assembly selects legislative council; legislative council and general assembly jointly choose president and vice president annually); VA. CONST. of 1776, ¶ 6 (governor chosen annually by house of delegates and senate). *See also* Adams, *supra* note 319, at 6-8; Casper, *Separation of Powers*, *supra* note 329, at 216-17; Wood, *supra* note 320, at 915-16.

while most state constitutions typically stated that the state's executive authority was vested in the governor,[334] the governor's authority was often quite limited. Most state charters, including those establishing popularly elected executives, conditioned executive discretion on the advice and consent of an executive or privy council, which was either selected by the legislatures or popularly elected.[335] Only New York established a popularly elected governor not subject to the advice and guidance of an executive council.[336] In addition, a number of charters reserved to the legislatures the authority to appoint officials—including military and naval officers—who executed the laws of the state.[337]

Early state constitutions clearly contemplated that legislatures would exercise the power of the purse. In spite of their already enfeebled governors, a number of state charters included provisions ensuring the powers to raise and expend revenue remained insulated from the executive. Several

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334. GA. CONST. of 1777, art. XIX; MD. CONST. of 1776, art. XXXIII; MASS. CONST. of 1780, part II, ch. 2, § 1, art. I; N.Y. CONST. of 1777, art. XVII; PA. CONST. of 1776, § 3; S.C. CONST. of 1776, art. XXX; S.C. CONST of 1778, art. XI; VA. CONST. of 1776, ¶ 6.

335. DEL. CONST. of 1776, arts. VIII, IX (governor exercises power subject to advice and consent of four-member legislatively selected privy council); GA. CONST. of 1777, art. XIX (governor exercises executive power with advice of executive council); MD. CONST. of 1776, arts. XXVI, XXXIII (governor exercises executive power subject to advice and consent of legislatively selected council); MASS. CONST. of 1780, part II, ch. 2, § 3, arts. I, II (legislatively selected council assists governor perform executive functions); N.H. CONST. of 1784, part II (Council) (council drawn from the legislature advises state president); N.J. CONST. of 1776, art. VIII (privy council derived from members of popularly elected council provided to advise governor); N.C. CONST. of 1776, arts. XVI, XVIII, XIX (legislatively selected council of state provided to advise governor); PA. CONST. of 1776, § 3 (supreme executive power vested in president and popularly elected executive council); S.C. CONST. of 1776, art. IV (legislatively selected privy council advises president); VA. CONST. of 1776, ¶¶ 6, 8 (legislatively selected council of state advises governor). *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 252; Adams, *supra* note 319, at 6-8; Casper, *Separation of Powers*, *supra* note 329, at 217; Wood, *supra* note 320, at 916.

336. N.Y. CONST. of 1777, art. XVII ("supreme executive power and authority" vested in governor popularly elected to three-year term). *See generally* GOLDSMITH, *supra* note 121, at 16-17; SOFAER, *supra* note 120, at 17, 19.

337. DEL. CONST. of 1776, art. XVI; MASS. CONST. of 1780, part II, ch. 2, § 4, art. I; N.H. CONST. of 1776, ¶¶ 5, 9, 10, 11; N.H. CONST. of 1784, part II (president and council select military officers; legislature appoints other officials); N.J. CONST. of 1776, art. X; N.C. CONST. of 1776, art. XIV; S.C. CONST. of 1776, art. XXIII; S.C. CONST. of 1778, art. XXX; VA. CONST. of 1776, ¶ 12. In New York, the legislature appointed the state treasurer, N.Y. CONST. of 1777, art. XXII, and the governor appointed military officers. *Id*. art. XXIV. The constitution established a council consisting of senators and the governor to select state officials not otherwise provided. *Id*. art. XXIII. *See generally* RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 252; Casper, *Separation of Powers*, *supra* note 329, at 217; Wood, *supra* note 320, at 916.

state constitutions expressly forbade the raising of revenues except with the legislative consent;[338] some required money bills to originate in the lower legislative assembly.[339] With regard to expenditures, a few states (including New York) gave the legislatures authority to appoint state treasurers, thereby ensuring the state treasury would remain responsive to the legislative branch.[340]

Finally, states began to include appropriations clauses in their constitutions, explicitly forbidding the expenditure of funds from state treasuries except as permitted by the legislatures. For example, the Delaware Constitution of 1776 provided that the state "president or chief magistrate" could only draw from the treasury such "sums of money as shall be appropriated by the general assembly . . . ."[341] The Massachusetts Constitution of 1780 similarly limited the expenditure of state funds:

> No moneys shall be issued out of the treasury of this commonwealth and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defense and support of the commonwealth, and for the protection and preservation of the inhabitants thereof, *agreeably to the acts and resolves of the general court*.[342]

Likewise, North Carolina only permitted its governor to "draw for and apply such sums of money *as shall be voted by the general assembly,* for the contingencies of government, and be accountable to them for the same."[343]

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338. For example, Maryland's 1776 Declaration of Rights decreed "[t]hat no aid, charge, tax, fee, or fees, ought to be set, rated, or levied, under any pretence, without consent of the Legislature." MD. CONST. of 1776, Decl. Of Rts., art. XII. *See also* MASS. CONST. of 1780, part I (Decl. of Rts.), art. XXIII; N.H. CONST. of 1784, part I (Bill of Rts.), art. XXVIII; PA. CONST. of 1776, § 41.

339. DEL. CONST. of 1776, art. VI; MD. CONST. of 1776, art. X; MASS. CONST. of 1780, part. II, ch. 1, § 3, art. VII; N.H. CONST. of 1776, ¶ 6; N.H. CONST. of 1784, part II (House of Reps.), ¶ 8; N.J. CONST. of 1776, art. VI; S.C. CONST. of 1776, art. VII; VA. CONST. of 1776, ¶ 5.

340. MD. CONST. of 1776, art. XIII; MASS. CONST. of 1780, part II, ch. 2, § 4, art. 1; N.H. CONST. of 1784, part II (Secretary, Treasurer, Commissary-General); N.J. CONST. of 1776, art. XII; N.Y. CONST. of 1777, art. XXII; N.C. CONST. of 1776, art. XXII; VA. CONST. of 1776, ¶ 17.

341. DEL. CONST. of 1776, art. VII. Delaware's 1792 constitution also included an appropriations clause. DEL. CONST. of 1792, art. II, § 15 ("No money shall be drawn from the treasury but in consequence of appropriations made by law . . . .").

Not long after independence, states with weak executive departments began to discover that unrestrained legislatures could be equally as oppressive as unchecked executives. While their constitutions gave "lip service" to the concept of separation of powers, their legislatures easily overrode these "paper barriers" to encroach upon both executive and judicial authority.[344] For example, Louis Fisher recounts a 1784 study of Pennsylvania legislative abuses, which described how the state assembly invaded the rights of property, caused entry into homes without warrants, deprived citizens of trial by jury, and restrained the writ of habeas corpus.[345] Pennsylvania's experience was not unique. "Time and time again [state] legislatures interfered with the governors' legitimate powers, rejected judicial decisions, disregarded individual liberties and property rights, and in general violated the fundamental principles that led people to create their constitutions in the first place."[346]

The Founders' unsatisfactory experience with unfettered legislative power not only influenced the framing of the United States Constitution,[347] it also resulted in new state charters that attempted to restore the balance between the branches of government.[348] Restricting gubernatorial access to state treasuries was seemingly superfluous when state governors either did not exist or were politically powerless; however, as states began to strengthen their executive departments, they recognized also a need to pre-

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342. MASS. CONST. of 1780, part II, ch. 2, § 1, art. XI (emphasis added). The constitution designated the state legislature as the "General Court." *Id*. part II, ch. 1, § 1, art. I. Massachusetts' courts later construed this provision to mean that the power to appropriate money is exclusively legislative in nature. *See, e.g.*, Opinion of the Justices, 302 Mass. 605, 612, 19 N.E.2d 807, 813 (1939); Opinion of the Justices, 95 Mass. (13 Allen) 593, 594 (1866). The constitution also gave the legislature the power to raise taxes,

> to be issued and disposed of by warrant, under the hand of the governor of this commonwealth, for the time being, with the advice and consent of the council, for public service, in the necessary defense and support of the government of said commonwealth, and the protection and preservation of the subjects thereof, *according to such acts as are or shall be in force within the same.*

MASS. CONST. of 1780, part II, ch. 1, § 1, art. IV (emphasis added).

343. N.C. CONST. of 1776, art. XIX (emphasis added).

344. *See supra* note 332 and accompanying text; *see also* FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 17; Flaherty, *supra* note 117, at 1765.

345. FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 19.

346. Wood, *supra* note 320, at 922; *see also* REVELEY, *supra* note 121, at 57; SOFAER, *supra* note 120, at 18-19; Flaherty, *supra* note 117, at 1763.

347. *See supra* note 319.

348. RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 252-53; Flaherty, *supra* note 117, at 1768.

serve legislative dominance over public finance. Therefore, at the same time states enhanced executive authority, they reinforced their legislatures' hold on the state fisc, principally by proscribing the expenditure of funds except as directed by legislative enactment.

In its constitutions of 1789 and 1798, Georgia gradually increased the autonomy of its executive,[349] but in 1798, also included a constitutional provision prohibiting the withdrawal of money from the treasury or the public funds of the state "except by appropriations made by law."[350]

Pennsylvania enacted a new constitution in 1790, creating a popularly elected governor who held the state's executive power.[351] The new constitution also provided that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law."[352] Similarly, by its constitution of 1784, New Hampshire established a bona fide executive,[353] and simultaneously restricted access to the state treasury by directing that:

> No monies shall be issued out of the treasury of this state, and disposed of . . . but by warrant under the hand of the president for the time being, with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, *agreeably to the acts and resolves of the general court*.[354]

South Carolina revamped its charter in 1778 and again in 1790, strengthening the governor's authority.[355] Both charters included the pro-

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349. For example, the governors' term of office was increased from one to two years, and the executive council was eliminated. *Compare* GA. CONST. of 1777, arts. XIX-XXIII, *with* GA. CONST. of 1789, art. II, § 1; GA. CONST. of 1798, art. II, § 1. Georgia did not establish a popularly elected governor until 1824. *Id*. art. II, § 2 (1824).

350. GA. CONST. of 1798, art. I, § 24.

351. PA. CONST. of 1790, art. II, §§ 1, 2.

352. *Id.* art. I, § 21.

353. N.H. CONST. of 1784, (Executive Power—President) ¶¶ 1, 2, 7, 8, 9.

354. *Id.* (emphasis added) (Executive Power—President) ¶ 14. Like Massachusetts (*see supra* note 342), New Hampshire courts later interpreted this provision to prohibit the governor from spending state funds absent "some existing act or resolve of the legislature authorizing such payment." Opinion of the Justices, 75 N.H. 624, 626, 75 A. 99 (1910).

355. For example, the 1778 constitution increased the governor's term of office from one to two years (S.C. CONST. of 1778, art. VI) and the 1790 constitution eliminated the legislatively selected privy council. S.C. CONST. of 1790, art. II, § 1. South Carolina's 1865 constitution made the governor an elective office. S.C. CONST. of 1865, art. II, § 2.

scription that "no money [shall] be drawn out of the public treasury but by the legislative authority of the State."[356]

By the turn of the eighteenth century, more than half the states had incorporated appropriations clauses into their constitutions.[357] The other states did not revise their charters until the nineteenth century,[358] and when they did, all but Rhode Island included appropriations clauses.[359] Similarly, the first new states admitted after ratification—Kentucky and Vermont[360]—inserted appropriations clauses in their state charters.[361]

When the Constitution's Framers convened in Philadelphia in May 1787, they were heirs of a legacy of legislative dominance over public finance. Centuries of British and colonial history and the Framers' own experience under their state constitutions served as the backdrop to the Constitutional Convention. By 1787, the power of the purse was uniformly recognized as legislative, not executive, in character. Even when Americans realized a need for strong executives to balance legislative power, they made certain the power to raise and expend revenue remained exclusively within the legislative sphere.[362] It is hardly surprising, therefore, that with little debate, the Framers provided Congress exclusive control over the federal fisc. Indeed, it would have been startling had they done anything else.

2. The Constitutional Convention

The Constitutional Convention met in Philadelphia in May 1787, with the Confederation and Continental Congress bereft of supporters,

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356. S.C. CONST. of 1778, art. XVI; S.C. CONST. of 1790, art. I, § 17.

357. DEL. CONST. of 1792, art. II, § 15; GA. CONST. of 1798, art. I § 24; MASS. CONST. of 1780, part II, ch. 2, § 1, art. XI; N.H. CONST. of 1784, (Executive Power- President) ¶ 14; N.C. CONST. of 1776, art. XIX; PA. CONST. of 1790, art. II, § 21; S.C. CONST. of 1790, art. I, § 17.

358. Except Massachusetts, which continues to be governed by its 1780 charter. *See* Loring v. Young, 239 Mass. 349, 132 N.E. 65 (1921).

359. CONN. CONST. of 1818, art. IV, § 17; MD. CONST. of 1864, art. III, § 32; N.J. CONST. of 1844, art. IV, § 6, ¶ 2; N.Y. CONST. of 1846, art. VII, § 8; N.C. CONST. of 1868, art. XIV, § 3; VA. CONST. of 1830, art. IV, § 26. *See infra* notes 670-74, and accompanying text.

360. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress*, 61 U. CHI. L. REV. 775, 837-39 (1994) [hereinafter Currie, *The First Congress*].

361. KY. CONST. of 1792, art. VIII, § 3; VT. CONST. of 1793, ch. II, § 17.

362. *See* Casper, *supra* note 89, at 8: "On the whole, the fiscal provisions of the state constitutions confirm our understanding that during the founding period money matters were primarily thought of as a legislative prerogative."

resources, and respect. In a March 1787 letter to Thomas Jefferson, James Madison related the desperate hopes placed on the Convention:

> What may be the result of this political experiment cannot be foreseen. The difficulties which present themselves are on one side almost sufficient to dismay the most sanguine, whilst on the other side the most timid are compelled to encounter them by the mortal diseases of the existing Constitution. These diseases need not be pointed out to you, who so well understand them. Suffice it to say, that they are at present marked by symptoms which are truly alarming, which have tainted the faith of the most orthodox republicans, and which challenge from the votaries of liberty every concession in favor of stable Government not infringing fundamental principles, as the only security against an opposite extreme of our present situation.[363]

Although the Convention convened with the Continental Congress' blessing,[364] a number of states committed delegates to the Convention even before the Continental Congress acted.[365] And while the Convention's congressional charter was quite narrow—to amend the existing Articles of Confederation[366]—the Convention, in fact, devised an entirely new structure of national government.[367]

As discussed, a principal defect of the Articles of Confederation was the absence of an effective national power of the purse. The Continental

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363. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 PAPERS OF JAMES MADISON 317-18 (Robert Rutland et al. eds., 1975).

364. *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS 73-74 (Feb. 21, 1787) (GPO 1936). The Continental Congress was responding to a September 1786 report of commissioners from an abortive convention in Annapolis, Maryland, to consider national commerce and trade reforms. When delegates from only five states appeared, the Annapolis convention decided too few states were represented and adjourned. In doing so, however, it urged that a convention of states with a much broader mission convene in Philadelphia the following May "to take into consideration the situation of the United States [and] to devise such further provisions as shall appear to be necessary to render the constitution of the Federal Government adequate to the exigencies of the Union . . . ." 31 JOURNALS OF THE CONTINENTAL CONGRESS 678, 680 (Sept. 30, 1786) (GPO 1934).

365. WARREN, *supra* note 316, at 40-41.

366. The Continental Congress directed that the Convention meet for "the *sole and express purpose* of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union." 32 JOURNALS, *supra* note 364, at 74 (emphasis added).

Congress could not raise revenue directly; instead, it had to rely on requisitions to the states. In practice, the states had absolute discretion to determine whether they would satisfy requisitions, refusing to honor them more often than not.

The Framers generally accepted the concept that the national government should have authority to obtain revenue directly (without relying on the states).[368] However, the means by which revenue should be raised was the subject of heated debate, centered principally on whether the House of Representatives alone—to the exclusion of the Senate—should exercise the power. Significantly, from the beginning of the Convention, delegates considered the authority to appropriate revenues in conjunction with the mechanism by which revenues would be raised, clearly indicating that they deemed the power to spend money intertwined with the power to raise money. Since the power to tax belonged exclusively to representative assemblies, the Framers obviously perceived the expenditure of funds similarly legislative in character.

This is hardly surprising. Since the reign of Charles II, Parliament asserted the power to direct the expenditure of the revenues it authorized, an assertion that grew in momentum and force following the "Glorious Revolution" and passage of the English Bill of Rights. Colonial assemblies—asserting the rights of Englishmen—likewise acquired dominion over provincial expenditures as a product of their power to tax. The delegates' state legislatures also held both the powers to raise and expend tax revenues.

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367. That the Convention exceeded its congressional charter caused some delegates consternation. *E.g.*, 1 FARRAND, *supra* note 103, at 177 (June 9, 1787) (Remarks of William Patterson):

> The Convention . . . was formed in pursuance of an Act of Congs . . . . That the amendment of the confederacy was the object of all the laws and commissions on the subject; that the articles of the confederation were therefore the proper basis of all the proceedings of the Convention. We ought to keep within its limits, or we should be charged by our constituents with usurpation.

The Convention also did not bother, as the Continental Congress had directed, to return to Congress for its approval upon completing its work. RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 102.

368. Even the conservative "New Jersey Plan," which advocated amending the existing Articles of Confederation, made provision for federal revenue independent of the states. 1 FARRAND, *supra* note 103, at 243.

The issue of control over the national fisc was initially enmeshed with the controversy over the method of representation in the Senate, which became the subject of the Convention's "Great Compromise" between large and small states. On 2 July 1787, the Convention reached an impasse over the formula for Senate representation.[369] The Convention had earlier voted for proportional representation in the House of Representatives.[370]

In an attempt to break the deadlock, the delegates appointed a Committee of Eleven (the "Grand Committee"), comprised of a delegate from each state.[371] On 5 July 1787, the Grand Committee issued its report, recommending—as part of the compromise giving states equal representation in the Senate—that both the power to raise and to appropriate money be reserved exclusively to the House of Representatives. Included was the first version of the appropriations clause considered by the Convention:

> That all Bills for raising or appropriating money and for fixing the salaries of the Officers of the Government of the United States, shall originate in the first Branch of the Legislature [House of Representatives], and shall not be altered or amended by the second Branch [Senate]—*and that no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated by the first Branch [House of Representatives]*.[372]

Thus, as originally conceived, the appropriations clause was designed to secure the House of Representatives' dominance over government finance, and to ensure that it alone could authorize the expenditure of public funds, even to the exclusion of the other branch of the legislative department—the Senate.[373]

On 24 July 1787, the Convention appointed a five-member Committee of Detail "to report a Constitution conformable to the Resolutions

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369. The Convention split five to five (with one deadlocked delegation) over whether the states should have an equal vote in the Senate. 1 FARRAND, *supra* note 103, at 510 (July 2, 1787); *see also* WARREN, *supra* note 316, at 261-64.

370. *See* 1 FARRAND, *supra* note 103, at 195 (June 11, 1787); *id*. at 462 (June 29, 1787); *see also* WARREN, *supra* note 316, at 254-55.

371. 1 FARRAND, *supra* note 103, at 510, 516 (July 2, 1787).

372. *Id*. at 524 (July 5, 1787) (emphasis added). The Convention agreed to the committee's report on 16 July 1787. 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 259 (Gaillard Hunt & James Brown Scott eds., 1987) [hereinafter DEBATES IN THE FEDERAL CONVENTION].

passed by the Convention . . . ."[374] The Committee of Detail received no "policy-making authority"; its draft document simply reflected decisions already reached by the Convention.[375] On 6 August 1787, the committee reported its draft constitution to the Convention. With respect to the powers of taxation and appropriation, the Committee of Detail changed the style, but not the substance, of the Grand Committee's provision:

> All Bills for raising or appropriating money, and for fixing the salaries of the Officers of the Government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. *No money shall be drawn from the public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives*.[376]

The question of whether money bills should originate in the House garnered discussion, but was ultimately accepted.[377] By contrast, the question of whether the Senate should have a role in government finance was the subject of heated argument, notably between large and small states.[378] On 13 August, the Convention rejected the provision precluding Senate participation in bills to raise and appropriate money.[379]

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373. Some large-state delegates viewed exclusive House control over taxes and expenditures as the "price" of conceding equal state representation in the Senate. *Id*. at 388, 392 (Aug. 13, 1787) (Remarks of Edmund Randolph & James Madison). *See also* Marie T. Farrelly, Note, *Special Assessments & the Origination Clause: A Tax on Crooks?*, 58 FORDHAM L. REV. 447, 449-50 (1989). Several commentators have also suggested that the House of Representatives' authority over money bills was a "trade-off" for the Senate's exclusive power to ratify treaties and confirm appointments. J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165, 171 (1987); Thomas L. Jipping, Note, *TEFRA & the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 648-49 (1986).

374. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 317 (Aug. 24, 1787). The Convention agreed to establish the Committee the previous day. *Id*. at 311 (Aug. 23, 1787).

375. Clinton, *supra* note 284, at 906.

376. 2 FARRAND, *supra* note 103, at 178 (emphasis added).

377. 1 *id*. at 526-29 (July 5, 1787), 543-47 (July 6, 1787); *see also* WARREN, *supra* note 316, at 274-77. It passed on 6 July 1787 by a five-to-three margin. 1 FARRAND, *supra* note 103, at 539, 547. Over half the states had similar provisions in their constitutions. *See supra* note 339, and accompanying text.

378. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 388-95; *see supra* note 373.

379. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 395.

On 31 August 1787, the Convention selected a new committee of eleven to consider "parts of the Constitution as have been postponed, and such parts of Reports as have not been acted on" (including the yet to be resolved issue of Senate participation in money bills).[380] The committee of eleven issued its report on 5 September 1787, recommending the Senate be empowered to alter or amend tax bills originated in the House, and to participate fully in spending bills. The committee continued to link the appropriations clause to Congress' authority to raise revenue, but recast the provision to reflect the proposed Senate role:

> [A]ll Bills for raising revenue shall originate in the House of representatives and shall be subject to alterations and amendments by the Senate: *No money shall be drawn from the Treasury but in consequence of appropriations made by law.*[381]

The recast provision abandoned the reference to the House's exclusive role in framing appropriations bills. The Senate became a full partner in originating, amending, and enacting bills to spend public funds. This necessitated a shift in the focus of the appropriations clause, which now recognized that joint action of both houses of Congress was required before money could be drawn from the treasury rather than simply the action of the House. The Convention acceded to the new provision on 8 September.[382]

Also on 8 September 1787, the Convention established a Committee of Style "to revise the stile and arrange the articles which have been agreed to by the House."[383] The Committee of Style reported on 12 September 1787. For the first time, the appropriations clause was split from the origination clause and inserted in article I, section 9, taking its present form: "No money shall be drawn from the treasury, but in consequence of appropriations made by law."[384]

Importantly, while Convention delegates expressed disagreement over the relative roles of the House of Representatives and Senate in public finance, they never wavered from the understanding that both taxation and appropriation would fall within the exclusive domain of Congress. The

380. *Id.* at 502.
381. 2 FARRAND, *supra* note 103, at 505 (emphasis added).
382. *Id.* at 545.
383. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 538.
384. *Id.* at 549.

only question was whether the House would exercise the power of the purse to the exclusion of the Senate.

Gregory Sidak suggests that "the scant discussion of the appropriations clause at the Constitutional Convention does more to cast doubt than to remove it when determining whether the Framers intended Congress to have the exclusive ability to approve the disbursement of public monies."[385] This contention lacks merit for several reasons.

First, Sidak overlooks the fact that the appropriations clause was an integral part the delegates' extensive debate over which house of Congress would exercise control over bills to raise and appropriate revenue. The Framers considered the clause in the context of allocating the constitutional power to tax and spend. That the delegates did not discuss the appropriations clause in connection with an autonomous presidential power to expend public funds is understandable: the thought likely never occurred to them.

In constructing the appropriations clause, the Framers did not write on a "clean slate." The lessons of British and colonial history as well as their own experience under colonial and state charters guided their work. By 1787, the exclusivity of legislative control of the purse was accepted doctrine on both sides of the Atlantic. Appropriations clauses were not novel; the English Bill of Rights, enacted nearly a century earlier, contained such a provision,[386] as did the constitutions of several states.[387] The notion that the executive department should share the power of the purse would have been alien to the Convention delegates, if not downright outlandish.

Second, this conclusion is even more compelling when one considers that the Framers contemplated the power to spend in association with the power to tax; even the most ardent supporters of an independent presidential spending power do not dispute that the latter is exclusively legislative in character.[388] The Framers obviously perceived the spending and taxing

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385. Sidak, *supra* note 57, at 1171; *see also* James D. Humphrey II, Note, *supra* note 57, at 206 ("[O]ne need only consult the debates of the founders to see that Congress' spending control is not absolute in every circumstance, and that disputes about executive spending in emergencies are not new.").

386. 1 W. & M. c. 30 (1689).

387. DEL. CONST. of 1776, art. VII; MASS. CONST. of 1780, part II, ch. 2, § 1, art. XI; N.H. CONST. of 1784, (Executive Power- President) ¶ 14; N.C. CONST. of 1776, art. XIX; S.C. CONST. of 1778, art. XVI.

388. *See, e.g.*, Lewittes, *supra* note 57, at 1156-57.

powers to be two sides of the same coin, and in allocating powers among the coordinate departments, they did not separate taxing and spending. Indeed, not until the Committee on Style (which was tasked only to "stile and arrange" the articles already agreed to by the Convention[389]) rearranged the Constitution in the final days of the Convention was the appropriations clause detached from the origination clause.

Third, the Framers also considered the appropriations clause in the context of the legislative process. The origination clause, to which the appropriations clause was attached for most of the Convention, referred to bills for raising revenue or appropriating money, and the debate centered on the Senate's role in the process of enacting those bills into law.[390] In penning the term "appropriations made by law," the Framers must have similarly envisioned legislation passed either by the House alone (early in the Convention) or jointly by the House and Senate (in the final version).[391]

Fourth, it is utterly inconceivable that the Framers would have intended the President to share the power of the purse without at least one delegate making mention of the fact during the deliberations. The Framers were certainly not reticent about such matters, as their clash over the Senate's participation in money bills illustrates. Given the centrality of public finance in eighteenth-century political thought—the view that the power of the purse was tied directly to the "existence of civil rights and the integrity of representative institutions"[392]—one would expect at least a modicum of discussion.

In this regard, the historical record of the Convention is wholly devoid of any indication the Framers meant to confer upon the President authority to expend funds without the prior congressional approval. As observed above, only the Constitution's vesting clause could possibly serve as a textual source of presidential spending authority.[393] Unfortu-

389. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 538.

390. *See* Michael B. Rappaport, *The President's Veto & the Constitution*, 87 NW. U. L. REV. 735, 746 -47 (1993).

391. *See supra* notes 88-93 and accompanying text.

392. FERGUSON, *supra* note 273, at xiv-xv; *see also* 1 FARRAND, *supra* note 103, at 342 (June 20, 1787) (Remarks of Roger Sherman) ("money matters [are] the most important of all . . . ."); 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 390-91 (Aug. 13, 1787) (Remarks of James Wilson) ("War, Commerce, & Revenue were the great objects of Gen. Government. All of them are connected with money.").

393. *See supra* notes 115-17 and accompanying text.

nately, the clause was inserted without debate,[394] and has become what Charles Thach described as the "joker" in the constitutional deck.[395] For the Framers to have intended—without comment—for the vesting clause to include a presidential appropriations authority, the term "executive power" (which is what is "vested") must necessarily have been viewed in the eighteenth century as including the authority to appropriate funds. Of course, that simply was not the case.[396]

Fifth, the Convention delegates did, in fact, express their understanding that Congress alone would control the purse, voicing concerns about possible presidential encroachments on the spending power and the danger that the power might be exercised elsewhere than in the representative assembly. For example, in contemplating a possible presidential veto, Benjamin Franklin voiced the fear that the president might use the power to extort money from the treasury.[397] George Mason warned against placing the "purse and the sword" in the same hands.[398]

In advocating a Senate role in money bills, James Wilson remarked that,

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394. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 461 (Aug. 24, 1787); *see also* WARREN, *supra* note 316, at 525-26.

395. THACH, *supra* note 271, at 138.

396. *See* Monaghan, *supra* note 92, at 22-23 (Whatever "residuum" of executive authority is included in the vesting clause is what remained of executive power "after the [Constitution's] enormous reallocation of former Crown powers to Congress or the Senate."). The only check on Congress' appropriations power given the President is the veto. U.S. CONST. art. I, § 7, cl. 2; *see* Wolfson, *supra* note 264, at 844.

397. 1 FARRAND, *supra* note 103, at 99 (June 4, 1787) (Remarks of Benjamin Franklin):

> He had had some experience of this check in the Executive on the Legislature, under the proprietary Government of Pena. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter . . . . He was afraid, if a negative should be demanded, till at last eno' would be gotten to influence & bribe the Legislature into a compleat subjection to the will of the Executive.

398. *Id.* at 144 (June 6, 1787) (Remarks of George Mason). Mason was concerned about the legislature exercising both powers at once since the Convention had not yet agreed upon the executive's authority. *See also id*. at 346 (June 20, 1787) (Remarks of James Madison).

> [w]ith regard to the purse strings, it was to be observed that the purse was to have two strings, one of which was in the hands of the H. of Rep., the other in those of the Senate. Both houses must concur in untying, and of what importance could it be which untied first, which last.[399]

Wilson did not discern a "third string," to be controlled independently of Congress by the President, but obviously believed Congress alone could permit access to the treasury.

Elbridge Gerry, who opposed giving the Senate a role in the fiscal process, argued: "Taxation and representation are strongly associated in the minds of the people, and they will not agree that any but their *immediate representatives* shall meddle with their purses."[400] Similarly, John Dickinson urged the delegates to consider the lessons of British history before surrendering the power of the purse to a non-representative body: "Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution . . . . And has not experience verified the utility of restraining money bills to the *immediate representatives* of the people."[401]

Madison moved to empower the Senate to enter treaties of peace without presidential approval, fearing the President, who "would necessarily derive so much power and importance from a state of war," might be tempted "to impede a treaty of peace."[402] Responding to Madison's motion, Nathaniel Gorham "thought the precaution unnecessary as *the means of carrying on the war would not be in the hands of the President, but of the Legislature*."[403] The following day, opposing a two-thirds requirement in the Senate for peace treaties, Gouverneur Morris argued that congressional control over peace was preferable to the more traditional, but "disagreeable mode, of *negativing the supplies for the war.*"[404]

As the Convention debates reflect, the Framers presupposed legislative control of the purse. They perceived such control as essential to rep-

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399. 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 372, at 390 (Aug. 13, 1787).

400. *Id.* at 391 (Aug. 13, 1787) (emphasis added).

401. *Id*. at 393-94 (Aug. 13, 1787) (emphasis added). Dickinson believed, however, that the Senate should have the power to amend money bills, as was the case in a number of states. *Id*.

402. *Id*. at 530 (Sept. 7, 1787).

403. *Id*. (emphasis added).

404. *Id*. at 533 (Sept. 8, 1787) (emphasis added).

resentative democracy and as an important check on the President, particularly his power to engage the nation in war.[405]

Finally, the suggestion is made by Sidak and others that the Framers would not have given the President broad constitutional responsibilities and then permitted Congress to hold the exercise of those responsibilities hostage by refusing to appropriate the funds necessary to carry them out. Gregory Sidak puts it most persuasively, writing:

> The Framers would not have assigned to the President such responsibilities as the making of treaties, the commanding of the armed forces, and the faithful execution of the laws if they expected Congress could selectively veto the execution of these functions by defunding them. There must exist an implied power for the President to obligate the Treasury, at least for the minimum amount necessary for him to perform the duties and exercise the prerogatives that article II imposes on his office.[406]

As sympathetic as one might be to this view, it is clear from the records of the Convention and the historical setting in which the Framers worked that this is exactly what the Framers intended. Indeed, this view carries implications Convention delegates would have not only rejected, but found patently abhorrent. To have conceded a presidential authority to spend money—independent of congressional authorization—the Framers would have effectively relinquished any congressional check on the President (except impeachment).[407]

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405. *See* Yoo, *supra* note 125, at 268.

406. Sidak, *supra* note 57, at 1253; *see also id.* at 1172 ("[O]ne interpretation of the appropriations clause that finds no historical support in the 1787 proceedings . . . is one claiming that the ability to authorize the disbursement of public funds was a power granted exclusively to Congress, so as to give Congress in effect a veto over the Executive in its performance of any of its constitutionally assigned functions."); LeBoeuf, *supra* note 55, at 475 n.126 ("Since Congress cannot repeal the Constitution, it cannot accomplish the same end by failing to appropriate funds necessary to enforce the Constitution."); Bryan, *supra* note 56, at 597 ("Surely, Congress cannot limit, condition, or withhold an appropriation to regulate and control independent executive functions."); *cf.* Panel Discussion, *The Appropriations Power*, *supra* note 55, at 653 (Geoffrey Miller) (President can spend money in absence of appropriation if required to carry out constitutional responsibilities.).

407. *See* Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers & Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311, 1330 (1996) ("Congress would be helpless to . . . limit executive discretion if the President had an independent authority to appropriate funds.").

Sidak, for example, would limit such presidential authority to the "minimum amount" required to fulfill constitutional responsibilities; however, the President alone would seemingly judge what constitutes the "minimum amount,"[408] effectively negating congressional input into presidential activities. Moreover, the federal government's resources are finite, and Congress must decide how to allocate scarce resources among competing programs, both domestic and foreign. By drawing money from the Treasury without congressional approval, the President essentially would dictate national spending priorities, compelling Congress either to abandon programs it might have deemed a higher priority or to raise taxes or the national debt to meet the increased funding requirements.

Further, once such implied presidential spending authority is acknowledged, nothing logically confines its application to expenditures related to foreign affairs or national security. For example, acting under the "Take Care" clause,[409] the President might deem congressional appropriations for the environment, welfare, or education insufficient to fulfill constitutional requirements or statutory directives, thereby impelling expenditures on his own authority.[410]

And what if the Treasury did not have sufficient funds to satisfy the expenses the President believed necessary? If Congress cannot "veto" the President's constitutional activities by refusing appropriations, how can it logically do so simply by refusing to raise taxes sufficient to fund those activities? Does the President have the authority to levy the taxes or incur the debt required to fulfill his "minimum" responsibilities?

Charles I and his judges believed the executive had such authority,[411] but Charles was beheaded and his judges were impeached defending the principle. As heirs of both British and American notions of representative democracy, built on the foundation of exclusive legislative control of tax-

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408. "Minimum," in Sidak's view, is not necessarily equivalent to "cheap." He might, for example, find procurement of President Reagan's proposed anti-ballistic missile defense system—a program costing billions of dollars—to be encompassed by the President's implied spending authority. Sidak, *supra* note 57, at 1197; *see also supra* note 71.

409. U.S. CONST. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed.").

410. *Cf.* Susan Rose-Ackerman, *Judicial Review & the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 192 (1992) (proposing judicial review of substantive legislation where appropriations are inadequate to accomplish stated congressional objectives).

411. *See supra* note 186 and accompanying text.

ation, the Framers would have unquestionably repudiated such a concept out of hand.[412]

3. The Ratification Debates

The conclusion that the Framers intended Congress alone to exercise the power of the purse becomes even more apparent when one considers the ratification debates. Conducted from 1787 to 1789,[413] James Madison later judged the ratification debates to be more important than the Convention for defining the provisions of the Constitution: "If we were to look . . . for the meaning of [the Constitution] beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution."[414]

Two arguments lodged by the Anti-Federalists were central to Congress' control over appropriations,[415] and the Federalist responses to them further elucidate the Founders' intent to make Congress' control exclusive.

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412. Confronting an analogous argument—that Congress was constitutionally constrained to provide funds for the President's diplomatic establishment—Albert Gallatin responded:

> The doctrine is as novel as it is absurd . . . . [A]lthough there is no clause which directs that Congress shall be bound to appropriate money in order to carry into effect any of the Executive powers, some gentlemen, recurring to the metaphysical subtleties, and abandoning the literal and plain sense of the Constitution, say that . . . we . . . are under a moral obligation in this instance to grant the money. It is evident that where the Constitution has lodged the power, there exists the right of acting, and the right of discretion.

7 ANNALS OF CONG. 1121-22 (Mar. 1, 1798).

413. Clinton, *supra* note 284, at 910. By the time the First Congress met in 1789, eleven states were members of the Union. Currie, *The First Congress*, *supra* note 361, at 833-34. Of the original thirteen states, North Carolina and Rhode Island had not yet ratified the Constitution. In November 1789, North Carolina, which had earlier withheld ratification, entered the Union. RAKOVE, ORIGINAL MEANINGS, *supra* note 244, at 128. Rhode Island ratified the document in March 1790. *Id.*

414. 5 ANNALS OF CONGRESS 776 (Apr. 6, 1796):

> [W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracle guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and vitality were breathed into it by the voice of the people speaking through the several State Conventions.

415. This is not to suggest the Anti-Federalists spoke with one voice; they were not a monolithic group. *See* Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 64 (1989).

First, the Anti-Federalists asserted that the establishment of a strong national government, which held both the powers of the purse and of the sword, would invite tyranny capable of oppressing the states.[416] For example, Goudy from North Carolina asserted during the state convention:

> The subject of our consideration therefore is, whether it be proper to give any man, or set of men, an unlimited power over our purse, without any kind of control. The purse-strings are given up by this clause. The sword is also given up by this system. Is there no danger in giving up both? . . . When the powers of the purse and the sword are given up, we dare not think for ourselves. In case of war, the last man and the last penny would be extorted from us. That the Constitution has a tendency to destroy state governments, must be clear to every man of common understanding.[417]

In a similar vein, contending the Constitution created a national government without "a single federal feature in it," Patrick Henry argued in the Virginia convention that,

> the sword and the purse included every thing of consequence. And shall we trust them out of our hands without checks and barriers? The sword and purse are essentially necessary for the gov-

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416. At the core of the Anti-Federalists' politics was a close and active relationship between the citizen and his government . . . . Because [these] political values could be realized only in a relatively small community, the Constitution made the fundamental mistake in shifting the locus of power from the states, where genuine republican power was possible, to a central government, where it was not.

Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 343, 345 (1982) (book review); *see also* Wilson Carey McWilliams, *The Anti-Federalists, Representation, & Party*, 84 NW. U. L. REV. 12, 26 (1989) ("Anti-Federalists insisted that representation be rooted in small communities and local forums . . . ."); H. Jefferson Powell, *The Original Understanding of the Original Intent*, 98 HARV. L. REV. 885, 905 (1985) (Anti-Federalists viewed "sweeping language" of the Constitution as leading "inexorably to the effective consolidation of the states into a single body politic with a single, omnipotent government."); Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 93 (1989) (Anti-Federalists believed "[a] centralized government . . . would destroy effective liberty and self-rule, which was necessarily local.").

417. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93 (Jonathan Elliot ed., 1888) (Ayer Co. 1987) [hereinafter ELLIOT'S DEBATES].

> ernment. Every essential requisite must be in Congress. Where are the purse and sword of Virginia? They must go to Congress. What has become of your country? The Virginian government is but a name . . . . Where are your checks? The most essential objects of government are to be administered by Congress. How, then, can the state governments be any check upon them?[418]

Second, Anti-Federalists assailed the creation of an executive, particularly one that would command the armed forces.[419] For example, in his now-famous speech to the Virginia convention, Patrick Henry declared:

> Your President may easily become king . . . . Where are the checks in this government? . . .
>
> If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design; and, sir, will the American spirit solely relieve you when this happens? I would rather infinitely—and I am sure most of this Convention is of the same opinion—have a king, lords, and commons, than a government so replete with insupportable evils. If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master . . . .[420]

In Pennsylvania, the Anti-Federalist "Philadelphiensis" similarly equated the President to a monarch because of his command of the nation's military forces:

> Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kinds too; a king elected to command a standing army? Thus our laws are to

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418. 3 *Id.* at 395-96; *see also* 2 *id.* at 375 (Remarks of Mr. Lansing) ("[W]herever the revenues and the military force are, there will rest the power: the members or the head will prevail, as one or the other possesses these advantages."); 2 *id.* at 376-77 (Remarks of M. Smith) (powers should be divided between state and central governments).

419. *See* Yoo, *supra* note 125, at 273.

420. 3 ELLIOT'S DEBATES, *supra* note 417, at 59.

> be administered by this *tyrant*; for the whole, or at least the most important part of the executive department is in his hands.[421]

Miller of North Carolina challenged vesting the President with command of the armed forces, arguing Congress should direct the military instead. He thought that,

> his influence would be too great in the country, and particularly over the military, by being commander-in-chief of the army, navy, and militia . . . . He considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army.[422]

The Federalists responded to the Anti-Federalist attack by stressing legislative supremacy in the new government, particularly congressional control over the public fisc.[423] James Madison answered the claim that the Constitution invited tyranny by putting both the purse and the sword in the hands of the national government by reminding Virginia convention delegates that placing both powers in the hands of the same government did not violate the "maxim" of separated powers. Instead, the "maxim" only required that the purse and the sword not be held by the same person or body. The Constitution, he assured, sufficiently separated the powers by

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421. Philadelphiensis, *Essay IX*, PHILADELPHIA FREEMAN'S JOURNAL (Feb. 16, 1788), *in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 57, 58 (John R. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY]; *see also* An Old Whig, *Essay V*, PHILADELPHIA INDEP. GAZETTEER (Nov. 1, 1787), *in* 13 *id*. at 538 (President to become king by virtue of his powers); Cato, *Essay IV,* N.Y. JOURNAL (Nov. 8, 1787), *in* 14 *id.* at 7, 10-11 (arguing President more powerful than a king); Letter from William Dickson to Robert Dickson (Nov. 30, 1787), *in* 14 *id.* at 311, 312 (easy for President to become king with investment of "Sole command of Armies and no Rival to Circumvent him"); Curtiopolis, *Essay,* N.Y. DAILY ADVERTISER (Jan. 18, 1788), *in* 15 *id*. at 399, 401 (in criticizing military authority of President, stated: "should he hereafter be a Jew, our dear posterity may be ordered to rebuild Jerusalem"); Tamony, *Essay,* VIRGINIA INDEP. CHRON. (Jan. 9, 1788), *in* 15 *id.* at 322, 323-24 (commander-in-chief power will make the President a king); Luther Martin, *Genuine Information IX*, BALTIMORE MD. GAZETTE (Jan. 29, 1788), *in* 15 *id*. at 494, 498 (President can become king through command of army, navy, and militia); Extract of Letter from William Pierce to St. George Tucker (Sept. 28, 1787), *reprinted in* GAZETTE OF ST. OF GA. (Mar. 20, 1788), *in* 16 *id*. at 442, 445 ("most solid objection" to the new Constitution is the authority given to the President, which is as great as possessed by the King of England).

422. 4 ELLIOT'S DEBATES, *supra* note 417, at 114.

423. *See* PIOUS, *supra* note 290, at 39; SOFAER, *supra* note 120, at 41; Yoo, *supra* note 125, at 279-80; *see also* Major Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 128-29 (1993) (describing debates over the "purse" and the "sword").

ensuring they were not in the hands of the same governmental department. Significantly, he stressed that, as in Great Britain, the legislature alone held the constitutional power of the purse:

> [T]he honorable gentleman [Patrick Henry] has laid much stress on the maxim, that the purse and sword ought not to be put in the same hands, with a view of pointing out the impropriety of vesting this power in the general government. But it is totally inapplicable to this question. What is the meaning of this maxim? Does it mean that the sword and purse ought not to be trusted in the hands of the same government? This cannot be the meaning; for there never was, and I can say there never will be, an efficient government, in which both are not vested. The only rational meaning is, that the sword and purse are not to be given to the same member. Apply it to the British government, . . . [t]he sword is in the hands of the British king; the purse in the hands of Parliament. It is so in America, as far as any analogy can exist . . . . *The purse is in the hands of the representatives of the people. They have the appropriation of all moneys.*[424]

Federalists likewise emphasized Congress' control of the purse as the principal check on the President, particularly in his role as commander-in-chief. For example, George Nicholas opened the Virginia convention with an obvious reference to the appropriations clause, telling delegates that Congress' "consent is necessary to all acts or resolutions for the appropriation of public money."[425] Attempting to alleviate fears of the executive, Nicholas traced the history of Parliament to establish the importance of the power of the purse in limiting executive authority:

> The House of Commons have succeeded also by withholding supplies; they can, by this power, put a stop to the operations of government, which they have been able to direct as they pleased. This power has enabled them to triumph over all obstacles; it is so important that it will in the end swallow up all others. Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence, let it have what other powers it may. *Our representatives, in this*

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424. 3 ELLIOT'S DEBATES, *supra* note 417, at 393 (emphasis added). In New York, Alexander Hamilton replied in a like manner: "[W]here the purse is lodged in one branch, and the sword in another, there can be no danger . . . . These distinctions between the purse and the sword have no application to the system, but only to its separate branches." 2 *id.* at 349.

425. 3 *id.* at 15.

> *case, will be perfectly independent, being vested with this power fully.*[426]

Also trying to reassure the Virginia delegates about the Constitution's constraints on the executive, Edmund Randolph stated that the President "can handle no part of the public money except what is given him by law."[427] Clearly, neither Nicholas nor Randolph were concerned about the President's reliance on Congress for the funds needed to carry out his constitutional responsibilities. Indeed, presidential dependence on Congress for financial support was central to their defense of the Constitution.

In North Carolina, Richard Dobbs Spaight answered delegate Miller's fear of executive despotism flowing from the President's command authority by observing that "it is true that the command of the army and navy was given to the President; but that Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President—*that they alone had the means of supporting armies* . . . ."[428] During the South Carolina debates, Charles Pinckney defended Article II of the Constitution by downplaying the President's power, noting: "He is the commander-in-chief of the land and naval forces, *but he can neither raise nor support forces by his own authority.*"[429] T. Dawes of Massachusetts similarly met arguments against the possibility of standing armies under the Constitution by observing the legislature alone could raise and support them.[430]

Outside the state conventions, the Federalists advanced similar positions. For example, in an early defense of the presidency, Tench Coxe, writing as "An American Citizen," emphasized the relative weakness of the new executive, including that "[h]e shall have no power *over the treasures of the state*."[431] In a later essay, Coxe delineated the power of the House of Representatives, observing that under the Constitution, "[w]ithout their consent *no monies can be obtained, no armies raised, no*

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426. *Id.* at 17 (emphasis added).

427. *Id.* at 201.

428. 4 *id.* at 114 (emphasis added).

429. *Id.* at 258 (emphasis added).

430. 2 *id.* at 97-98.

431. An American Citizen, *Essay I: On the Federal Government*, PHILADELPHIA INDEP. GAZETTEER (Sept. 26, 1787), *in* 13 DOCUMENTARY HISTORY, *supra* note 421, at 247, 251 (emphasis in the original); *see also* An Impartial Citizen, PETERSBURG VA. GAZETTE (Jan. 10, 1788), *in* 8 *id.* at 293, 295 ("Nor can [the President] appropriate the public money to any use but what is expressly appropriated by law.").

navies provided."[432] The Federalist Cassius answered assertions about the inadequacy of the House of Representatives' power by claiming: "How can it be said that they want power, when no act, however, trivial, can take place without their assent, and not *one shilling* of the public money can be touched without their approbation?"[433]

In *The Federalist Nos. 24* and *26*, Alexander Hamilton addressed fears of a standing army by pointing to the constitutional necessity of legislative appropriations to raise an army, remarking that Congress could not lawfully vest the executive with permanent funds for this purpose.[434] Likewise, Hamilton remarked in *The Federalist No. 78* that the executive "holds the sword of the community[,]" but "[t]he legislature commands the purse . . . ."[435]

James Madison defended the ability of the House of Representatives to fend off encroachments by the other branches, comparing it to the House of Commons and highlighting its constitutional authority to refuse absolutely to provide the supplies required by other government departments:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—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 activity and importance, and gradually reducing, as far as it seems to have wished, all the overgrown

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432. An American Citizen, *Essay III: On the Federal Government*, PHILADELPHIA INDEP. GAZETTEER (Sept. 29, 1787), *in* 13 *id*. at 272, 273 (emphasis in the original); *see also An American: To Richard Henry Lee* (draft), Tench Coxe Papers, Series III, Essays, Addresses, & Resource Materials: Writings on Political Subjects, *in* 15 *id*. at 173, 174 ("[president] cannot originate either bills for raising revenue nor for any other purpose . . . ."); The State Soldier, *Essay I*, VIRGINIA INDEP. CHRON. (Jan. 16, 1788), *in* 8 *id*. at 303, 306 (Congress has absolute discretion to provide appropriations for support of a standing army).

433. Cassius, *Essay I*, VIRGINIA INDEP. CHRON. (Apr. 2, 1788), *in* 9 *id*. at 641, 645 (emphasis in the original).

434. THE FEDERALIST NO. 24, at 158 (Clinton Rossiter ed., 1961); *id*. NO. 26 at 171 (Alexander Hamilton); *see also* Letter from Edmund Pendelton to James Madison (Oct. 8, 1787), *in* 10 PAPERS OF JAMES MADISON 188-89 (Robert Rutland et al. eds., 1977) ("President is to be Commander-in-Chief of the Army and Navy, but Congress are to raise and provide for them . . . ."); Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 421, at 193, 203 ("remember that in the United States a standing army cannot be raised or kept up without the *consent* of the *people*, by their representatives in Congress . . . .") (emphasis in the original).

435. THE FEDERALIST NO. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

> prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as 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.[436]

Like the record of the Constitutional Convention, the ratification debates demonstrate the Founders meant for Congress alone to exercise the power of the purse. Further, that the Founders could have intended the President to share in the authority to draw funds from the treasury without generating an outcry from the Anti-Federalists is simply unimaginable. The Anti-Federalists were highly concerned about the President assuming monarchical powers and becoming a despot.[437] They also were not reluctant to voice their objections to the Constitution in the strongest terms, including the document's provisions governing control of the nation's purse strings.[438] Surely had the Anti-Federalists supposed the Constitution permitted the President to appropriate money without Congress' approval—a power long denied the British king—they would have reacted like sharks sensing blood.[439]

Nothing in the Federalists' public utterances supports the conclusion that they envisioned the President exercising independent spending authority. Their comments uniformly reflect their belief that Congress alone would control the nation's purse. Their defense of the Constitution was based on this very principle.

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436. THE FEDERALIST NO. 58, at 359 (James Madison), (Clinton Rossiter ed., 1961); *see also* James McHenry, Address to the Maryland State House of Delegates (Nov. 29, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 421, at 279, 283-84 (describing effect of appropriations clause).

437. *See supra* notes 420-21 and accompanying text.

438. For example, Anti-Federalists criticized the Senate's role in the fiscal process because senators were not representatives of the people. *See, e.g.*, George Mason, *Essay*, CENTINEL (Nov. 21, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 421, at 149, 150; Cincinnatus, *Essay IV: To James Wilson, Esq.*, N.Y. JOURNAL (Nov. 22, 1787), *in* 14 *id*. at 186, 188 (criticizing fact that Senate exercises power that House of Lords cannot, because this power "has been guarded by the representatives of the people there, with the most strenuous solicitude as one of the vital principles of democratic liberty").

439. *See* Suzette Hemberger, *Dead Stepfathers*, 84 NW. U. L. REV. 220, 223 (1989) (describing "urgency and vehemence with which the Anti-Federalists pressed their case").

C. Custom: The Spending Power in Practice

> *[B]efore 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.*[440]

> The President of the United States cannot spend a nickel. Only *Congress can authorize the spending of money.*[441]

1. The Significance of Custom

Writing in *Youngstown Sheet & Tube Co. v. Sawyer*,[442] Justice Felix Frankfurter observed:

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[443]

Thus, custom—or long-standing practice—serves as a reference in discerning the meaning of the constitutional text. The Supreme Court has long acknowledged the usefulness of custom in interpreting the Constitution. In the 1803 case of *Stuart v. Laird*,[444] the Court answered a challenge

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440. Alexander Hamilton, *Explanation* (Nov. 11, 1795), *in* 19 THE PAPERS OF ALEXANDER HAMILTON 400, 404 (Harold C. Syrett ed., 1973) (emphasis added).

441. Ronald Reagan, *Televised Press Conference*, N.Y. TIMES, Oct. 22, 1987, at 8, *quoted in*, REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 100-433, at 412 (1987) (emphasis added) [hereinafter IRAN-CONTRA AFFAIR REPORT].

442. 343 U.S. 579 (1952).

443. *Id.* at 610-11 (Frankfurter, J., concurring); *see also* ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 8 (1982) ("[T]he Constitution is only an outline of government. Its lacunae may be filled by governmental practices which take place within its word boundaries.").

444. 5 U.S. (1 Cranch) 299 (1803).

to the use of Supreme Court justices as circuit justices by refusing to overturn a practice that had started with the Judiciary Act of 1789[445] and had been acquiesced in ever since.[446]

Thereafter, the Court has not been reluctant to rely on custom or usage as a tool of constitutional interpretation, particularly in adjudicating the boundaries of executive and legislative power. Since both the President and Congress are capable of protecting their own constitutional turf, the Court has generally acceded to the long-standing arrangements reached by the two coordinate departments of government. This deference is exemplified by *United States v. Midwest Oil Co*.[447] At issue was the President's authority to withdraw public lands that Congress, by general statute, had opened to public acquisition. Noting that presidents had, by executive order, reserved federal lands from the public without congressional objection over the previous eighty years, the Court refused to disturb the practice:

> [G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of the investigation.[448]

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445. Act of Sept. 24, 1789, 1 Stat. 74-75.

446. *Stuart v. Laird*, 5 U.S. at 309:

> To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under [the Constitution] for a period of several years, commencing with the organization of the judicial system, affords an irrefutable answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now be disturbed.

447. 236 U.S. 459 (1914).

448. *Id*. at 472-73; *see also* Dames & Moore v. Regan, 453 U.S. 654, 688 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936); The Pocket Veto Case, 279 U.S. 644, 689 (1929); *Ex parte* Grossman, 267 U.S. 87, 118-19 (1925); Field v. Clark, 143 U.S. 649, 691 (1892); The Laura, 114 U.S. 411, 416 (1885); American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 443 (D.C. Cir. 1981); CORWIN, *supra* note 115, at 142-43.

The Court has been especially solicitous of practices having their origin in the first executive administration and Congress after ratification. The construction placed upon the Constitution by "men who were contemporary with its formation" has been accorded considerable weight because many of the nation's early leaders, both in the executive department and in Congress, were members of the constitutional and ratification conventions.[449] Thus, practices begun "virtually coincident with the birth of the Nation suggest[] that the Framers intended to permit such acts."[450]

Of course, custom has its limits. Foremost, of course, is "[t]hat an unconstitutional action [that] has been taken before surely does not render that same action any less unconstitutional at a later date."[451] The spending power is a case in point. The Constitution vests, in unmistakable language, exclusive authority to appropriate public funds in Congress. In such circumstances, presidential spending in the absence of congressional approval is not precedent, it is simply usurpation of congressional authority.[452]

In addition, custom must be predicated on objective discernible criteria. With respect to questions relating to boundaries of presidential power, isolated actions or mere declarations of authority by the executive are insufficient to establish a usage upon which the Court will rely; rather, the Court requires a long-standing practice about which Congress has knowledge and in which it acquiesces.[453] In this regard, Professor Michael Glennon provides a useful three-part test in applying custom to separation of

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449. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884); *see also* Mistretta v. United States, 488 U.S. 361, 398 (1989); Bowsher v. Synar, 478 U.S. 714, 723-24 (1986); Powell v. McCormack, 395 U.S. 486, 547 (1969); Myers v. United States, 272 U.S. 52, 136 (1926); SOFAER, *supra* note 120, at 61; Currie, *The First Congress*, *supra* note 361, at 857-58.

450. GLENNON, *supra* note 119, at 67.

451. Powell v. McCormack, 395 U.S. 486, 546-47 (1969); *see also* Immigration & Naturalization Serv. v. Chada, 462 U.S. 919, 944-45 (1983); The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 677 (1868). In *Midwest Oil*, the Court recognized that long-standing practice was not determinative of constitutional construction, but held simply that it raised a presumption of validity. 236 U.S. at 473-74.

452. *Cf.* JOHN HART ELY, WAR AND RESPONSIBILITY 10 (1993); Berger, *supra* note 77, at 55-60 (usurpation of Congress' war power); *see also* Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign & Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 476 (1976) ("[U]nconstitutional practices cannot become legitimate by the mere lapse of time.").

453. *See Midwest Oil*, 236 U.S. at 474; *Pocket Veto Case*, 279 U.S. at 690; *American Int'l Group, Inc.*, 657 F.2d at 443; *see also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 70 (1990).

powers issues: (1) "the custom in question must consist of acts; mere assertions of executive or legislative authority to act are insufficient"; (2) "the other branch must have notice of its occurrence"; and (3) "that branch must have acquiesced in the custom; a custom . . . must have been intended by both political branches to represent a juridical norm."[454]

Using Professor Glennon's formulation as a guide, proponents of an independent presidential spending authority find little solace in historical practice. While Congress and the President have frequently clashed at the fringes of the appropriations power, no President has ever directly challenged Congress' appropriations authority by asserting a constitutional prerogative to spend public funds.[455] Moreover, while presidents have, during times of national emergency, spent money without prior congressional approval, they have never claimed their actions were lawful or that they possessed the constitutional authority to spend funds independent of Congress. Instead, on each occasion, they have returned to Congress to seek approval for the expenditures made.[456]

2. General Practice

Except for the qualified veto, presidents did not exercise a formal role in the formulation of appropriations and spending priorities until well into the twentieth century.[457] Early congresses viewed the Secretary of the Treasury as an arm of the legislative department in regard to their taxing and spending powers, and depended upon the Secretary to determine the sums required for the administration and defense of the nation.[458] In 1795, after Alexander Hamilton's resignation, executive department secretaries began transmitting their spending estimates directly to Congress, "bypassing both the Treasury and the President, a decentralization that lasted more than a century."[459]

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454. GLENNON, *supra* note 119, at 67; *see also* Michael J. Glennon, *The Gulf War & the Constitution*, FOREIGN AFFS., Spring 1991, at 84, 89-90; Humphrey, *supra* note 57, at 208-09.

455. *See* Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 286 ANNALS AM. ACAD. POL. & SOC. SCI. 145 (1953). Of course, it is also highly unlikely that Congress would acquiesce in such an assertion if it were ever made.

456. *See* Lucius Wilmerding, Jr., *The President & the Law*, 67 POL. SCI. Q. 321, 322-23 (1952) [hereinafter Wilmerding, *The President & the Law*].

457. Neal Devins, *Budget Reform & the Balance of Powers*, 31 WM. & MARY L. REV. 993, 999 (1990).

458. FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 86-88; Casper, *supra* note 89, at 9-10.

With the enactment of the Budget and Accounting Act of 1921,[460] the President finally assumed a formal role in the formulation of federal budgets. The Act required that he submit a proposed budget, including tax and spending legislation, to Congress annually.[461] The Act also established the Bureau of the Budget (now the Office of Management and Budget (OMB)) to assist the President in his responsibilities.[462] The President's new statutory role did not, however, give him an executive power of the purse; Congress alone still determined funding levels and the objects for which expenditures could be made.[463]

Moreover, when, as a result of his new responsibilities, the President became overly dominant in the budget debate—essentially setting the framework for spending priorities[464]—Congress enacted the Budget and Impoundment Act of 1974[465] to level the playing field and preserve its prerogatives over the nation's purse strings. The Act gave Congress the tools to reestablish control over the budget, particularly by creating the House and Senate budget committees and the Congressional Budget Office, both of which enabled Congress to plan fiscal policy.[466]

Even with the statutory authority to propose spending priorities, Presidents have acceded to Congress' power to dispose of their proposals. Moreover, Congress has not acquiesced in an overly powerful presidential voice in the appropriations process, protecting its prerogative through the

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459. PIOUS, *supra* note 290, at 257; *see also* 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 40, at 1-9; Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 602 (1988) [hereinafter Stith, *Rewriting the Fiscal Constitution*].

460. Ch. 18, 42 Stat. 20. For a discussion of the events leading up to the Act, *see* FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 97-103.

461. Budget & Accounting Act of 1921, ch. 18, § 201, 42 Stat. 20; *see also* 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 40, at 1-9; Stith, *Rewriting the Fiscal Constitution*, *supra* note 459, at 602.

462. Budget & Accounting Act of 1921, ch. 18, § 207, 42 Stat. 22; *see also* PIOUS, *supra* note 290, at 257-58; 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 40, at 1-9 to 1-10.

463. "There is no question both from the text of the Act and the legislative history that the budget is nothing more than a proposal to Congress for the Congress to act upon as it pleases." Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 73 (D.D.C. 1973) (footnote omitted); *see also* Devins, *supra* note 457, at 999-1000.

464. *Id.*; 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 40, at 1-10.

465. Pub. L. No. 93-344, 88 Stat. 299 (codified as amended in various sections of 2 U.S.C. and 31 U.S.C.).

466. Mikva, *supra* note 89, at 7.

enactment of statutory mechanisms needed to secure its centrality in the process.

Friction has also perennially existed between the legislative and executive departments over the manner in which Congress exercises its appropriations authority and the manner in which the executive department spends appropriated funds. For instance, early spending legislation spawned controversy over the appropriate degree of specificity in appropriations acts. The first appropriations acts were very general,[467] prompting some members of Congress to protest about a usurpation of their spending authority.[468] Later acts became more detailed,[469] triggering complaints from the executive department about being hamstrung by legislative minutiae.[470] Congress also often complained about the executive practice of shifting funds from one appropriation to another.[471] These are disputes, however, at the edge of congressional power; none reach the core

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467. The first appropriations act was remarkably short, providing:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying pensions to invalids.

Act of Sept. 29, 1789, 1 Stat. 95. (emphasis in original).

468. For example, Senator William Maclay of Pennsylvania complained that:

> a general appropriation of above a half a million dollars—the particulars not mentioned—the estimates on which it is founded may be mislaid or changed; in fact, it is giving to the Secretary [of the Treasury] the money for him to account for as he pleases. This is certainly all wrong. The estimate should have formed part of the bill, or should have been recited in it.

The Journal of William Maclay 215-16 (1927), *quoted in* LUCIUS WILMERDING, THE SPENDING POWER 21 (1943) [hereinafter WILMERDING, THE SPENDING POWER]; *see also* FISHER, PRESIDENT & CONGRESS, *supra* note 286, at 97-103.

469. *See* CORWIN, *supra* note 115, at 150.

470. Letter from Oliver Wolcott, Jr., to Alexander Hamilton (Apr. 5, 1798), *in* 21 THE PAPERS OF ALEXANDER HAMILTON 396, 397 (Harold C. Syrett ed., 1974): "The management of the Treasury becomes more and more difficult. The Legislature will not pass laws in gross. Their appropriations are minute; Gallatin, to whom they yield, is evidently intending to break down this department, by charging it with impractical detail."

issue of Congress' exclusive control over expenditures. Further, they generally demonstrate Congress' unwillingness to surrender any of its appropriations authority to the executive.

On occasion, presidents have vetoed or otherwise objected to appropriations containing various conditions or riders that presidents have perceived as infringing upon their constitutional prerogatives. Importantly, presidential objections in such cases are directed towards the offending condition or rider—which are usually peripheral to the authority to expend funds—rather than the appropriation itself. Presidents have not traditionally ignored express prohibitions on the expenditure of money contained in appropriations acts, and where offending riders and appropriations are inseparable, presidents have refused to expend the money appropriated. Unconstitutional conditions on appropriations have not served as "Get Out of Jail Free" cards, enabling presidents to expend money with impunity, irrespective of legislative restrictions.

For example, President Buchanan protested an 1860 appropriation for the completion of the Washington Aqueduct because the act directed that the money be spent under the superintendence of Captain (later Major General) Montgomery C. Meigs of the Army.[472] Buchanan believed the designation of Meigs interfered with his "clear right . . . to command the Army and to order its officers to any duty he might deem most expedient for the public interest."[473] Perceiving that Congress had not intended to

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471. For example, in 1793, Congressman Giles attempted to censure Alexander Hamilton for mixing the sums appropriated to satisfy debts owed to France and Holland:

> The application of appropriations is the most sacred and important trust the Legislature can confer. If they may be made to bend to the will or projecting policy of a Financier, there is an end of all security and confidence . . . . [W]here money is appropriated solely to a special purpose, as in the case of the loans, he who executes the law has no degree of power over the appropriation.

3 ANNALS OF CONG. 920-921 (1793). Giles' resolutions were ultimately defeated. *Id.* at 963; *see also* WILMERDING, THE SPENDING POWER, *supra* note 468, at 24-26; David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 650-53 (1996). In 1797, Albert Gallatin objected to the Secretary of War's expenditure of funds inconsistent with the estimates provided by his department, 6 ANNALS OF CONG. 2039 (1979), ultimately leading to the first, albeit short-lived, purpose statute. *See supra* note 40. Congressman Claiborne similarly took exception in 1801 to commingling of appropriations by the Secretary of State, successfully calling for an investigation of the expenditures. 11 ANNALS OF CONG. 324 (1801). In 1817, John C. Calhoun assailed the Secretary of War's use of appropriations for objects not contemplated by Congress: "We have the sole power to raise and apply money. It is the sinew of our strength. Not a cent of money ought to be applied, but by our direction and under our control." 30 ANNALS OF CONG. 958 (1817).

stop the project in the absence of Meigs, Buchanan interpreted the statute as only expressing a preference for the officer and not conditioning the project's completion upon his presence.[474]

In 1876, President Grant objected to language in an act appropriating money for the consular and diplomatic service requiring the closure of certain diplomatic and consular offices. Grant believed the statute's directive infringed upon his constitutional prerogatives to make treaties and to appoint ambassadors and other public ministers and consuls.[475] The President acknowledged, however, Congress' authority to terminate the salaries and expenses of the diplomats and consuls he appointed:

> It is within the power of Congress to grant or withhold appropriation of money for the payment of salaries and expenses of the foreign representatives of the Government . . . .
>
> . . . In calling attention to the passage which I have indicated I assume that the intention of the provision is only to exercise the constitutional prerogative of Congress over the expenditures of the Government and to fix a time at which the compensation of certain diplomatic and consular officers shall cease . . . .[476]

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472. Meigs had begun to work on the project in late 1852. HARRY C. WAYS, THE WASHINGTON AQUEDUCT 5 (1995). He gained many friends in Congress over the years, in part because of his work on the Capitol extension (notably the dome). *Id*. at 33; RUSSELL F. WEIGLEY, QUARTERMASTER GENERAL OF THE ARMY 69-73, 102 (1959) [hereinafter WEIGLEY, QUARTERMASTER GENERAL]. This was not the last time Congress demonstrated such confidence in Meigs. An 1882 appropriation for the construction of the Pension Office Building (now the National Building Museum) provided the building was to be built under Meigs' supervision. Act of Aug. 7, 1882, ch. 433, 22 Stat. 324. Secretary of War Robert Todd Lincoln duly appointed Meigs to manage the project. WAY, *supra* at 39.

473. 5 COMPILATION OF THE MESSAGES & PAPERS OF THE PRESIDENTS 597, 598 (James D. Richardson ed., GPO, 1897) [hereinafter RICHARDSON]; *see also* WEIGLEY, QUARTERMASTER GENERAL, *supra* note 472, at 104-05.

474. 5 RICHARDSON, *supra* note 473, at 598-99. On 18 September 1860, Meigs was relieved from the project and sent to command Fort Jefferson, Florida, in the Dry Tortugas (WAY, *supra* note 472, at 38) but by 21 February 1861—after Lincoln took office—Meigs was back at work on the Aqueduct. *Id*.; WEIGLEY, QUARTERMASTER GENERAL, *supra* note 473, at 129. On 13 June 1861, Meigs received a promotion to Brigadier General and was appointed Quartermaster General of the Army. WEIGLEY, QUARTERMASTER GENERAL, *supra* note 473, at 165.

475. 7 RICHARDSON, *supra* note 473, at 377.

476. *Id*. at 377-78.

In a 1933 opinion to the President, the Attorney General considered a provision of a bill prohibiting refunds of illegally or erroneously collected taxes in excess of $20,000 without the approval of a joint congressional committee. The Attorney General deemed the provision an unconstitutional usurpation of executive authority. Because the authority to spend the money appropriated was intertwined with the need for joint committee approval, the Attorney General opined that, absent another source of funds, the executive could not issue tax refunds in excess of $20,000:

> If this bill is spread upon the statute books through receiving your approval or being passed over a veto, not only would the proviso respecting the power of the joint committee to authorize refunds be void, but the deficiency appropriation for payment of refunds would fall with it . . . . In my opinion the appropriation for tax refunds and the proviso attached to it must stand or fall together. Who can say that Congress would have made this appropriation without this proviso? I have no basis for this assumption. If the Congress makes an appropriation attaching to it an invalid condition, we would hardly be justified in rejecting the condition as void and treating the appropriation as available. The safe course is to treat the two as inseparable.
>
> The result is that if this bill should take the form of a statute the Secretary of the Treasury would be confronted with the fact that the appropriation for tax refunds, as well as the proviso attached to it, and would not be available for the payment of refunds, with the result that if no prior appropriations are available, payment of all refunds of any amount would stop until further appropriations for that purpose were made by the Congress.[477]

To similar effect is a 1990 Office of Legal Counsel opinion reviewing a rider to an appropriation for international conferences that proscribed the expenditure of funds for any United States delegation to the Conference on Security and Cooperation in Europe without including members of Congress. The Office of Legal Counsel viewed the rider as unconstitutionally encroaching on the President's foreign affairs authority. Rather than simply opining that the President had the authority to expend the appropriation in spite of the rider, Legal Counsel took pains to demonstrate that the provision's legislative history indicated that Congress would have approved the appropriation even without the condition.[478]

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477. 37 Op. Att'y. Gen. 56, 66 (1933).

These opinions are entirely consistent with the views expressed by the executive department over the last two centuries. As one early Attorney General stated:

> The constitution declares that "no money shall be drawn from the treasury but in consequence of appropriations made by law," . . . . This I consider as an explicit inhibition upon the President and all others to draw from the treasury any portion of the public money, until Congress shall have directed it to be done; and the expression in the clause of the constitution just quoted . . . clearly indicates that Congress shall also declare the uses to which the money to be drawn from the treasury is to be applied. The President, therefore, has no power, under the constitution, over the public treasure, except to apply it in the execution of the laws . . . . Whenever he applies it without the directions of Congress expressed in some legislative act, or against such directions, he assumes upon himself power not conferred by the constitution.[479]

Administrations have, thus, recognized the need for congressionally approved funding for such diverse activities as raising and supporting the armed forces,[480] fulfilling contracts,[481] compensating executive appointees,[482] and satisfying the terms of treaties.[483] Significantly, presidents have even acquiesced in funding restrictions delimiting their discretion over national security and the employment of military force, perhaps best exemplified by the congressionally ordered cut-off of funds for the Vietnam War.[484] Defense Department appropriations acts are replete with similar, albeit less spectacular, restrictions on the use military appropriations, to which presidents have also historically complied.[485] Where the conditions imposed are particularly egregious, presidents may veto the legislation,[486] but they have not asserted the authority to expend money in spite of them.

Unlike some modern academicians, presidents have not claimed that Congress cannot constitutionally restrict appropriations either by specifying the purposes for which the money is to be spent or by prohibiting

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478. 14 Op. Off. Legal Counsel 38, 47-48 (1990).
479. 3 Op. Att'y Gen. 442, 442-43 (1839).
480. 27 Op. Att'y. Gen. 259, 260 (1909); 15 Op. Att'y. Gen. 209, 211-12 (1877).
481. 30 Op. Att'y. Gen. 332, 333 (1915).
482. 4 Op. Att'y. Gen. 248, 249 (1843).
483. 6 Op. Att'y Gen. 440, 443 (1854).

expenditures for particular objects.[487] Indeed, while they may chafe at such restrictions, presidents have historically acceded to them.

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484. *See, e.g.*, Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 30, 87 Stat. 732 ("No funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operations by the United States in or over Vietnam, Laos, or Cambodia."); DOD Authorization Act for Fiscal Year 1974, Pub. L. No. 93-155, § 806, 87 Stat. 615 (1973) ("Notwithstanding any other provision of law, upon enactment of this Act, no funds heretofore or hereafter appropriated may be obligated or expended to finance the involvement of United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia, unless specifically authorized hereafter by the Congress."); DOD Appropriations Act for Fiscal Year 1975, Pub. L. No. 93-437, § 839, 88 Stat. 1231 (1974) ("None of the funds herein appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.").

> Though strongly objecting on policy grounds, the Nixon Administration never challenged the constitutional power of Congress to cut off funds for the war. Similarly, in 1975, when President Ford sent in Marines to rescue the container ship *Mayaguez* from the Cambodian military, his Administration never argued that those funding limitations were unconstitutional, only that they were inapplicable.

GLENNON, *supra* note 119, at 289; *see also* LOUIS FISHER, PRESIDENTIAL WAR POWER 135-38 (1995) [hereinafter FISHER, PRESIDENTIAL WAR POWER]; Abraham D. Sofaer, *Separation of Powers & the Use of Force*, *in* THE FETTERED PRESIDENCY 17 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989).

485. A recent example is Congress' reaction to the Clinton Administration's use in late 1994 of $5 million of DOD appropriations to furnish fuel oil to North Korea as part of a deal to eliminate North Korea's nuclear weapons program. *See* R. Jeffrey Smith, *U.S. Tickets Funds for N. Korea Nuclear Pact*, WASH. POST, Dec. 1, 1994, at A-1; *U.S. Delivers Fuel Oil to North Korea*, ENERGY ECONOMIST, Dec. 22, 1994, at 32. The Defense Department paid for the fuel oil using its Emergency and Extraordinary (E&E) expense authority, 10 U.S.C. § 127 (1994), which afforded the Secretary of Defense broad discretion over the funds appropriated under the statute ($23,768,000 in fiscal year 1995). *See* DOD Appropriations Act for Fiscal Year 1995, Pub. L. No. 103-335, 108 Stat. 2603 (1994). By April 1995, Congress prohibited—via a supplemental appropriations act—the use of Defense Department funds for assistance to North Korea to implement the nuclear weapons agreement. DOD Supplemental Appropriations Act of 1995, Pub. L. No. 104-6, § 109, 109 Stat. 81. Congress also forbade the Secretary of Defense from spending E&E funds in excess of $1,000,000 for any single transaction without first notifying the armed services committees. *Id.* § 110. Later DOD appropriations acts similarly prohibited using DOD funds for assistance to North Korea. DOD Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-61, § 8088, 109 Stat. 668 (1995); DOD Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, § 8074 (1996). Congress later codified (as part of 10 U.S.C. § 127) the restrictions on the use of the E&E funds. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 915, 110 Stat. 413 (requiring congressional notification for expenditures in excess of $500,000).

3. Deficiency Expenditures

Two executive practices do strike at the heart of Congress' appropriations authority and merit separate consideration: expenditures by executive departments in excess of appropriations, and emergency expenditures by presidents in the absence of appropriations. Congress has expressly forbidden the former, and presidents have not asserted an independent spending authority based on the latter; thus, neither practice adds a gloss to the meaning of the Constitution's appropriations provisions such that Congress' exclusive authority to approve the expenditures is placed in doubt.

a. Coercive Deficiencies & The Anti-Deficiency Act

During the nation's first century, executive agencies often ignored congressionally prescribed funding limits, spending their appropriations at "whatever rate seemed proper to them."[488] The agencies would thereby create "coercive deficiencies" in appropriations accounts, imposing "a moral and political, if not [a] legal, obligation upon Congress to enact supplemental appropriations in order to avoid or reimburse deficiencies in various line-item accounts."[489]

Congress certainly took notice and animadverted against the practice. For instance, in 1798, Albert Gallatin condemned a $50,000 deficiency incurred by the War Department, stating: "The Secretary of War was not justified in expending more in these contingencies than was appropriated (except in case of necessity), otherwise the Secretary of War, and not Congress, regulated the expenditure of money."[490] In 1808, the Chairman of the Committee of Ways and Means, John Randolph, refused to make good an unauthorized expenditure of $51,000 for construction of the south wing of the Capitol.[491] After further inquiry and a plea by President Jefferson, Congress eventually approved the necessary appropriation over Randolph's objection.[492]

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486. For example, in 1879, President Rutherford B. Hayes vetoed an Army appropriations act that included a prohibition against the employment of federal forces to enforce the newly enacted Fifteenth Amendment and the voting-rights legislation enacted pursuant thereto. 7 RICHARDSON, *supra* note 473, at 523. President Hayes fully recognized that his veto would, for the time being, cut off money for the Army. *Id*. at 530-31.

487. *See* GLENNON, *supra* note 119, at 291.

488. WILMERDING, THE SPENDING POWER, *supra* note 468, at 65.

489. Stith, *Rewriting the Fiscal Constitution*, *supra* note 459, at 610.

490. 8 ANNALS OF CONG. 1317 (1798).

491. 18 ANNALS OF CONG. 1973 (1808).

In 1819, Henry Clay decried the executive agencies' growing habit of ignoring spending limitations:

> Are we to lose our rightful control over the public purse? It is daily wrested from us, under high-sounding terms, which are calculated to deceive us, in such manner as appears for approbation rather than censure and practice. So extended was the practice, . . . that there is scarcely an officer, from the youngest menial in the service of the Government upwards, that does not take upon himself to act *upon his responsibility*.[493]

John Sherman blasted the deficiencies incurred by the executive department in the years following the Mexican War, declaring:

> [T]he Executive is gradually sapping the foundation of the Government and destroying the constitutional power of the House. Instead of a representative Republic, we are degenerating into a bureaucracy governed by red tape and subaltern clerks.
>
> . . . We have the undoubted power over supplies, and yet the President so acts as to leave us no discretion. He created the necessity for expenditures . . . .[494]

Ultimately, Congress' anger turned to action. In 1870, Congress attempted to foreclose coercive deficiencies statutorily by enacting the Anti-Deficiency Act. It forbade any executive department from spending funds or involving the government in contracts in excess of appropriations:

> That it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.[495]

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492. WILMERDING, THE SPENDING POWER, *supra* note 468, at 68-71.

493. 35 ANNALS OF CONG. 816 (1819) (emphasis in the original).

494. CONG. GLOBE, 35th Cong., 1st Sess. 2433 (1858).

495. Act of July 12, 1870, ch. 251, 16 Stat. 251. Earlier statutes had also forbidden contracts and purchases, in excess of appropriations, except as authorized by law, without much apparent effect. *See, e.g.*, Act of May 1, 1820, ch. 52, 3 Stat. 568; Act of Mar. 2, 1861, ch. 84, 12 Stat. 220.

The statute did not, however, deter the deficiencies, as executive agencies continued to expend their appropriations before the end of the fiscal year expecting Congress to furnish the sums needed to carry them through the end of the year.[496] Lucius Wilmerding described the practice as so pervasive that "in some instances it became habitual for the departments to estimate and for Congress to appropriate on what might be called the installment plan."[497]

By 1905, Congress had finally had enough. It amended the Anti-Deficiency Act by prohibiting all "obligations" (not just contracts) in the absence of adequate appropriations, by requiring agencies to apportion their appropriations over the fiscal year to ensure sufficient funding for the entire year, and by prescribing criminal penalties for violations of the Act.[498] Faced with more deficiencies,[499] Congress again strengthened the Act the following year, limiting waivers of apportionments to "extraordinary emergencies or unusual circumstances that could not be anticipated at the time the apportionments were made."[500] Senator Hemenway, one of the Act's sponsors, stated that the intent of the amendments was to re-establish Congress' control over appropriations:

> The Departments of Government have grown into the habit of ignoring the acts of Congress. The Appropriations Committees would sit for weeks and work out what they believed the different Departments ought to expend along various lines, and the Departments would pay no attention to the acts of Congress, but simply use any sum of money they saw fit to use, and come back to Congress in the way of deficiencies and say, "Why, here, the money is expended. What can we do?" As a general rule Congress would appropriate and make good the deficiency, the tendency being simply to ignore the Congress of the United States and turn this Government over to the different Departments to run at their own good will.

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496. Robert N. Nutt & Gary L. Hopkins, *The Anti-Deficiency Act (Revised Statute 3679) & Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 58 (1978); *see also* WILMERDING, THE SPENDING POWER, *supra* note 468, at 140 ("Soon it could be said that the [executive] departments had become the appropriating authorities and that Congress had sunk to be the mere register of their determinations. Only in theory did Congress remain supreme.").

497. WILMERDING, THE SPENDING POWER, *supra* note 468, at 142.

498. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257.

499. 40 CONG. REC. 9785 (1906).

500. Act of Feb. 27, 1906, ch. 510, 34 Stat. 49.

> . . . I think it is time that Congress should look to it that the Departments of the Government shall not control matters of appropriation, but that Congress shall control them.[501]

While even the strengthened Act did not eliminate all deficiencies,[502] it did signal the Congress' determination to end the executive practice of coercive deficiencies.[503] The Anti-Deficiency Act strictly prohibits making or authorizing expenditures or obligations exceeding available appropriations and involving the government in contracts or obligations for the payment of money before appropriations are made, unless otherwise authorized by law.[504] The Act prescribes administrative and criminal sanctions for violations.[505] It also requires agencies to apportion funds to ensure expenditures will not exceed appropriations,[506] and similarly provides penalties for exceeding apportionments.[507]

Thus, the executive department practice of spending in excess of appropriations has never assumed the mantle of custom. Although it usually covered the deficiencies, Congress never acquiesced in the practice, proscribing the conduct in 1870 and criminalizing it in 1905. Further, had executive agencies supposed the President had the authority to expend money independent of Congress, there would have been no need to seek

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501. 40 CONG. REC. 9786 (1906). A co-sponsor, Senator Hale, likewise stated:

> I hope that in time the Departments will take notice that it is Congress which provides the money; that it is the discretion of Congress that settles the amount of money, and that no Secretary and no understrapper in a Department has any business to beset Congress and importune for more appropriations than Congress has given.

Id.

502. *See, e.g.*, 68 CONG. REC. 2977-81 (1927) (deficiency caused by use of Department of Agriculture funds intended to fight hoof-and-mouth disease to buy Florida farmers seed following hurricane); *see also* WILMERDING, THE SPENDING POWER, *supra* note 468, at 145.

503. *See* 42 Comp. Gen. 272, 275 (1962); Karen L. Manos, *The Antideficiency Act Without an M Account: Reasserting Constitutional Control*, 23 PUB. CONT. L.J. 337, 339 (1994).

504. 31 U.S.C. § 1341(a)(1) (1994).

505. *Id.* §§ 1349, 1350. Government officials or employees violating the Act may receive "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." They are also subject to imprisonment (two years) and fines ($5000). The Act also requires an immediate report to Congress of every violation. *Id.* § 1351.

506. *Id.* §§ 1512-15.

507. *Id.* §§ 1517-19. The sanctions for spending or obligating in excess of apportionments are the same as those imposed for exceeding appropriations. *See supra* note 505.

congressional approval of funds to cover their deficiencies. In short, coercive deficiencies were the product of administrative indolence rather than executive assertions of an independent presidential spending authority.

One aspect of the Anti-Deficiency Act deserves further scrutiny, namely the manner in which the executive has interpreted the Act's application during lapses in appropriations. Appropriations measures are not always enacted before the end of a fiscal year and the lapse of the prior year's appropriations, resulting in a "funding gap."[508] Recent years have seen such lapses occur with increasing regularity. For instance, in 1981, 1982, 1983, 1984, 1986, 1987, and 1990, the government endured funding gaps ranging from several hours to three days.[509] In late 1995 and early 1996, a budget deadlock between the President and Congress produced a particularly severe appropriations gap, lasting for several weeks and causing the partial shutdown of the federal government.[510]

The Attorney General has issued two key opinions to guide the executive department through the funding gaps: a 16 January 1981 opinion by Attorney General Benjamin Civiletti,[511] and a 16 August 1995, opinion by Assistant Attorney General Walter Dellinger.[512] The opinions focus on the provision of the Anti-Deficiency Act permitting expenditures or obligations in excess or in anticipation of appropriations otherwise "authorized by law."[513]

For the most part, the opinions are unremarkable. They provide that appropriations lapses will not interrupt government activities funded by multi-year or indefinite appropriations,[514] activities expressly authorized continued obligation or contract authority by statute,[515] and activities "authorized by necessary implication from the specific duties imposed on agencies by statute."[516]

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508. 43 Op. Att'y Gen. 224, 226-27 (1980).

509. Memorandum from Walter Dellinger, Asst. Att'y Gen., Office of Legal Counsel, to Alice Rivlin, Director, Office of Management & Budget, at 2 (Aug. 16, 1995) [hereinafter Dellinger Memorandum].

510. *See, e.g.*, Ann Devroy & Eric Pianin, *Government Shuts Again After Talks Collapse*, WASH. POST, Dec. 16, 1995, at A-1; Ann Devroy & Eric Pianin, *Federal Agencies Prepare for Shutdown*, WASH. POST, Nov. 14, 1995, at A-1.

511. 5 Op. Off. Legal Counsel 1 (1981) [hereinafter 1981 Opinion].

512. Dellinger Memorandum, *supra* note 509.

513. 31 U.S.C. § 1341(a)(1) (1994).

514. 1981 Opinion, *supra* note 511, at 5; Dellinger Memorandum, *supra* note 509, at 3-4.

More problematic is the opinions' suggestion that an appropriations lapse and the Anti-Deficiency Act cannot deprive the President "of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's power."[517] In this regard, the 1981 Opinion, in particular, is enigmatic. Although acknowledging the President "cannot legislate his own obligational authorities,"[518] the 1981 Opinion also asserts that the Anti-Deficiency Act cannot prevent the President from obligating the funds required to carry out his constitutional responsibilities, seemingly suggesting the President derives such obligational authority from his own constitutional powers rather than acts of Congress.[519] While refusing to "catalogue" the types of responsibilities contemplated, the Attorney General cites as illustrative the President's pardon power and "his conduct of foreign relations essential to the national security."[520]

Not only is the opinion internally inconsistent—proffering the notion of a presidential obligational authority in one sentence and denying it in another[521]—it also raises serious constitutional issues about the President's role in the spending process. First, it assumes, an independent presidential obligational authority based on the circular logic that if the President has constitutional responsibilities he must necessarily have the obligational authority to carry out those responsibilities.[522] The opinion does not, however, identify the doctrinal source of such authority.

Of course, neither the President's pardon power nor his foreign affairs responsibilities carries an authority to obligate the treasury. With regard to pardons, while Congress may not use its control of the purse strings to interfere with the President's authority to issue pardons,[523] it may withhold the funds needed to make recipients of pardons financially whole.[524] Nor does the President derive any constitutional authority to obligate funds

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515. 1981 Opinion, *supra* note 511, at 6; Dellinger Memorandum, *supra* note 509, at 4. An example is the "Feed & Forage" Act, which permits, even in the absence of an appropriation, contracts or purchases necessary for the current year for the clothing, subsistence, forage, fuel, quarters, transportation, and medical care of the armed forces. 41 U.S.C. § 11 (1994); *see also* 15 Op. Att'y Gen. 124 (1876).

516. 1981 Opinion, *supra* note 511, at 6; Dellinger Memorandum, *supra* note 509, at 4. An example is the work required to ensure the flow of Social Security checks, benefits which are derived from an indefinite appropriation.

517. 1981 Opinion, *supra* note 511, at 6; *see also* Dellinger Memorandum, *supra* note 509, at 4.

518. 1981 Opinion, *supra* note 511, at 6.

from his responsibility to carry out the nation's foreign policy; rather, Congress alone enjoys this power.[525]

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519. *Id.* at 6-7. For instance, the opinion states:

> [T]he question must consequently arise, upon a Government-wide lapse in appropriations, whether the Anti-Deficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers . . . .
>
> . . . [T]he Anti-Deficiency Act is not the only source of law or the only exercise of authority for an initiative that obligates funds in advance of appropriations. *The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President* . . . .
>
> . . . In sum, I construe the "authorized by law" exception . . . as exempting from the prohibition . . . not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, *but also those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers*.

Id. (emphasis added); *see also* L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending Bill*, 18 PEPP. L. REV. 43, 54 (1990); Sidak, *supra* note 57, at 1189 (characterizing the 1981 Opinion as supporting an inherent presidential authority to appropriate money). The 1995 memorandum seemingly backs away from this view of presidential power. Citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the memorandum states that "[t]his power should be called upon cautiously, as the courts have received such executive branch assertions skeptically." Dellinger Memorandum, *supra* note 509, at 5 n.4.

520. 1981 Opinion, *supra* note 511, at 6-7 & n.10.

521. The 1981 Opinion is also inconsistent with an opinion issued by the Attorney General only a year earlier. Addressing the legal effect of a funding gap on the government, the Attorney General took a "hard line" against any obligation of funds by agencies except as authorized by statute:

> [O]n a lapse in appropriations, federal agencies may incur no obligations that cannot be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations be enacted.

43 Op. Att'y Gen. 224, 229 (1980); *see also* Alan L. Feld, *Shutting Down the Government*, 69 B.U.L. REV. 971, 985 (1989) ("The failure to appropriate funds unambiguously ends agency authority to create government obligations. It does not create a lacuna to be filled by interpretation.").

522. Feld, *supra* note 521, at 985. The General Accounting Office defines the phrase "authorized by law" to require explicit statutory authority to incur obligations in excess or in advance of appropriations. 2 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-53 (2d ed. 1992) [hereinafter 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW]. The authority must be more than just authority to undertake an activity, since "everything government officials do should be authorized by law." *Id*.

523. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

Second, the 1981 Opinion juxtaposes the Anti-Deficiency Act with the President's constitutional responsibilities, but fails to mention the appropriations clause in the equation. Perhaps the Opinion means to distinguish the term "obligational authority" from the actual expenditure of money. To the extent the Attorney General contemplates presidential obligations that impose legal liabilities on the Government,[526] however, the distinction is meaningless. If presidential obligational authority does something less than bind the treasury, it is no authority at all. The Opinion may also intend to differentiate between obligations in anticipation of appropriations during a funding hiatus and obligations in the complete absence of appropriations. If the President has a constitutionally based obligational authority, however, it should not matter whether or not Congress is expected to appropriate funds.[527]

In any event, to the extent the 1981 Opinion asserts that, in the absence of statutory approbation, the President has the constitutional authority to obligate federal funds (and that there is a constitutional imperative for Congress to satisfy the obligations made), the opinion is flatly incorrect. Constitutionally, the President is only guaranteed an undiminished salary.[528] If, for whatever reason, Congress does not appropriate the funds needed to carry out the President's responsibilities, he may constitutionally obligate only those funds otherwise authorized by those laws enacted by Congress.

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524. Knote v. United States, 95 U.S. 149 (1877); The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1873); Hart's Case, 16 Ct. Cl. 459 (1880), *aff'd*, 118 U.S. 62 (1886); *see also* Feld, *supra* note 521, at 983-84.

525. *See* Nobleman, *supra* note 455, at 145:

> Whether the Founding Fathers intended to vest control over foreign relations in the President or in the Congress has been the subject of controversy since the birth of the Republic. Whatever their intentions may have been, when they wrote into the Constitution the clause "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," they gave to the Congress a means of exercising control concerning which there can be no doubt.

526. 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 522, at 7-3.

527. 43 Op. Att'y Gen. 224, 228 (1980):

> There is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive branch to carry out Congress' unambiguous mandate.

528. U.S. CONST. art. II, § 1, cl. 7.

b. Emergency Expenditures

Presidents have occasionally spent public funds without an appropriation during serious emergencies that could not await congressional action (usually because Congress was not in session). In such cases, presidents have not assumed the authority to appropriate funds without Congress; instead, they have recognized the extra-constitutional nature of their expenditures, returning to Congress for the appropriations required to cover their spending. Several examples illustrate the practice.

On 7 August 1794, George Washington responded to a request from Associate Justice James Wilson to put down an insurrection in western Pennsylvania—triggered by a federal excise tax on whiskey[529]—by ordering the insurgents to disperse and giving notice of his intent to call up the militia if they did not do so by 1 September.[530] The insurgents ignored Washington's proclamation,[531] and the President requisitioned 15,000 troops from the governors of Pennsylvania, Maryland, New Jersey, and Virginia.[532]

Accompanied by Alexander Hamilton, Washington met the assembling Pennsylvania and New Jersey militia at Carlisle, Pennsylvania, where he assumed personal command and helped organize and prepare the troops for immediate movement on the insurgents.[533] Washington led his forces to Bedford, Pennsylvania, where they joined the Virginians and Marylanders under "Light Horse" Harry Lee, the governor of Virginia.[534]

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529. FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 67-263, at 26-27 (2d Sess. 1922) [hereinafter FEDERAL AID IN DOMESTIC DISTURBANCES]. The region's farmers, having no near market for their grain, converted much of their grain into whiskey, and "the still was the necessary appendage of every farm." *Id.* at 26. Thus, the farmers did not look kindly upon the whiskey excise tax and stoutly resisted its payment by assaulting tax collectors and engaging in general lawlessness. *Id.* at 27.

530. 1 RICHARDSON, *supra* note 473, at 158-60.

531. "It is averred by some writers that the insurgents looked upon the proclamation with contempt, regarding it as a piece of bravado unworthy of their notice . . . . Suffice it to say it was received with derision and . . . the outrages continued without abatement." FEDERAL AID IN DOMESTIC DISTURBANCES, *supra* note 529, at 29.

532. *Id.*; *see also* Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, which authorized the President to federalize the militia on notification by an associate justice of the incidence of disobedience too powerful to be suppressed by the ordinary course of judicial proceedings or the powers vested in the U.S. marshals. *See also* FISHER, PRESIDENTIAL WAR POWER, *supra* note 484, at 16.

533. WEIGLEY, *supra* note 32, at 101; FEDERAL AID IN DOMESTIC DISTURBANCES, *supra* note 529, at 30-31.

534. *Id.*

Washington turned command over to Lee with detailed instructions for suppressing the insurrection, which—when faced with overwhelming force—quickly dissolved.[535]

Congress, which was not in session, had not anticipated the President's call-up of the militia and had not appropriated funds for such a purpose. To pay for the expedition, Washington used money that had been appropriated for the army, expecting Congress to provide the necessary funds when it returned.[536] Albert Gallatin later criticized Washington's failure to call a special session of Congress to obtain the funds required for the operation:

> Although the President of the United States was authorized to call out the militia in order to suppress insurrections, no money was appropriated for that service. When the western insurrection took place, until Congress had covered the expenditures of the expedition on the 31st of December 1794, the expenses were defrayed out of moneys appropriated for the military establishment . . . . But, as the militia called out to suppress an insurrection make no part of the military establishment, the expenses attending such a call were not amongst the various objects enumerated in the law making appropriations for the military establishment . . . . The moneys drawn out of the Treasury on that occasion were paid out of a fund appropriated for other and distinct purposes; they were not drawn agreeable to the Constitution, in consequence of any appropriations made by law.[537]

In any event, the President told Congress what he had done, and "Congress commended him and appropriated the money to cover the cost of the expedition."[538] Importantly, Washington did not assume the authority to expend funds without Congress' approval, immediately seeking the requisite appropriation as soon as Congress returned to session.

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535. FEDERAL AID IN DOMESTIC DISTURBANCES, *supra* note 529, at 31-33.

536. David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1, 26 (1996) [hereinafter Currie, *The Third Congress*].

537. Albert Gallatin, *A Sketch of the Finances of the United States* (1796), *in* 3 THE WRITINGS OF ALBERT GALLATIN 117-18 (Henry Adams ed., J.B. Lippincott & Co. 1879) [hereinafter WRITINGS OF ALBERT GALLATIN].

538. Currie, *The Third Congress*, *supra* note 536, at 26, *citing* Act of Feb. 27, 1795, 1 Stat. 423.

Ironically, it was Thomas Jefferson—with Albert Gallatin as his Secretary of the Treasury—who first spent significant sums of money in the complete absence of an appropriation. On 22 June 1807, the British warship *H.M.S. Leopard* attacked the American frigate *Chesapeake* as it left port at Hampton Roads, Virginia.[539] Anticipating a possible war with England and with Congress in recess, Jefferson ordered certain military purchases even though no appropriations had been made for that purpose.[540] When Congress reconvened in late October, President Jefferson recounted the events of the summer and sought ex post facto approval of the expenditures he had made:

> The moment our peace was threatened I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us, and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done if then assembled. Expenses, also unprovided for, arose out of the necessity of calling all our gunboats into actual service for the defense of our harbors; all of which accounts will be laid before you.[541]

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539. 1 RICHARDSON, *supra* note 473, at 414. The British vessel attempted to search the *Chesapeake* for deserters from the British navy. When the *Chesapeake's* captain refused to permit the search, the *Leopard* fired three broadsides, killing 3 Americans and wounding 18. Thereafter, British seamen boarded the *Chesapeake* and removed four sailors who had purportedly deserted from British warships. After attempting unsuccessfully to surrender to the British, the *Chesapeake* returned to Hampton Roads. H.F. PULLER, THE *Shannon* and the *Chesapeake* 9-12 (1970). This was not the last indignity the *Chesapeake* was to suffer. On 1 June 1813, the *Chesapeake* was defeated and captured in an engagement with the British warship *H.M.S. Shannon* off Boston Harbor. *Id*. at 52-63.

540. WILMERDING, THE SPENDING POWER, *supra* note 468, at 9. Congress had adjourned on 3 March 1807. HENRY ADAMS, THE LIFE OF ALBERT GALLATIN 357 (J.B. Lippincott & Co. 1879). Although Gallatin favored calling Congress into session, Jefferson declined because of the "unhealthiness" of Washington during the summer. *Id.* at 358; *see also* RAYMOND WALTERS, JR., ALBERT GALLATIN: JEFFERSONIAN FINANCIER & DIPLOMAT 195-96 (1957). Jefferson also ordered the dispatch of a vessel to America's "China trade" to warn of possible war. Letter from Albert Gallatin to Thomas Jefferson (Sept. 2, 1807), *in* 1 WRITINGS OF ALBERT GALLATIN, *supra* note 537, at 356-57. Gallatin financed the mission by directing the collector of Baltimore to make the necessary advances, "relying on the sanction of Congress if our existing appropriations were not sufficient . . . ." *Id*.

When Congress returned to session, it ultimately enacted an appropriation to cover Jefferson's expenditures,[542] but not before heated debate over the propriety of the President's actions. John Randolph used the opportunity to tweak the Administration, particularly Gallatin, who had objected to similar expenditures by Washington during the Whiskey Rebellion of 1794. Randolph quoted at length from Gallatin's *A Sketch of the Finances of the United States*, in which Gallatin criticized Washington for spending money not appropriated by Congress,[543] and chastised the Administration for failing to call Congress into session:

> Mr. R. allowed that the crisis which occasioned the extraordinary expenses in question was an imminent one. It was so critical, that Congress ought to have immediately convened, in order that they might have given authority by law for these extraordinary expenses, and for adopting such measures as national feeling and honor called for.[544]

Other members of Congress were also critical of the President's expenditures,[545] and even Jefferson's supporters acknowledged that the House was under no obligation to appropriate the funds requested.[546] Jefferson did not pretend that he had acted lawfully or that he had an inherent right to draw money from the treasury, nor did he assert that Congress was bound to provide the requested appropriation.[547] Rather, judging the emer-

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541. 1 RICHARDSON, *supra* note 473, at 416.

542. Act of Dec. 18, 1807, 2 Stat. 451.

543. 17 ANNALS OF CONG. 835 (1807); *see supra* note 537 and accompanying text.

544. *Id*. at 823. Randolph also stated that "[h]e felt extremely reluctant to vote large sums for support of our degraded and disgraced Navy, for expenses, too, that had been illegally incurred." *Id*.

545. *Id*. at 819-20 (remarks of Congressman Quincy) (expressing puzzlement over the source of funds used to pay for the supplies and materiel); *id*. at 847-48 (remarks of Congressman Gardener) (stating it could not be doubted the President had violated the Constitution, but he would vote for the appropriation, "not as a precedent, or to encourage any Department in the unauthorized use of the public treasure, but because he thought the measure proper").

546. *Id*. at 823 (remarks of Congressman Fisk) ("[I]t simply rested with the House to say whether this appropriation should be made or withheld."); *id*. (remarks of Congressman G.W. Campbell) ("The question now was, whether the House would sanction these expenditures or not."); *id*. at 826 (remarks of Congressman Smilie) ("If [the members] believed that the conduct of the Executive had not been correct, they would not vote for the appropriations."); *id*. at 827 (remarks of Congressman Dana) ("The . . . question was on the particular subject: should they advocate the expenditures for these particular purposes, supposing they had perfect information on the subject.").

gency to warrant immediate expenditures, the President acted outside the Constitution, gambling that Congress would later bless his actions.[548] Writing several years later, Jefferson explained that on great occasions government officers sometimes have to violate the law to protect the nation, but that they do so at their own risk:

> It is incumbent on those only who accept great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.[549]

Thus, Jefferson's emergency expenditure without an appropriation does not represent an assertion of a constitutionally based presidential spending authority. Neither Jefferson nor Congress viewed the episode in such a manner.[550]

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547. *Id*. at 847 (remarks of Congressman Cook): "It was merely a question of expediency with the House whether they would sanction the measures which had been adopted; the President had not bound them to do it, and they were at liberty to act as they chose."

548. *See* Gerhard Casper, *Executive-Congressional Separation of Powers During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473, 488 (1995); Jules Lobel, *Emergency Power & the Decline of Liberalism*, 98 YALE L.J. 1385, 1392-93 (1989).

549. Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), *in* 12 THE WRITINGS OF THOMAS JEFFERSON 418, 421-22 (Albert Ellery Bergh ed., 1905).

550. *See* Wilmerding, *The President & The Law*, *supra* note 456, at 328-29:

> Jefferson knew that the law of necessity was not law in the ordinary acceptation of that term. He did not subscribe to the exploded notion of the tendency of acts for the public good being sufficient to make them legal. And so he was careful to point out that a man who takes upon himself the responsibility for an act outside the written law must get an acquittance from Congress or suffer whatever consequences may follow from a deliberate and open breach of the law.

See also Raven-Hansen & Banks, *From Vietnam to Desert Storm*, *supra* note 51, at 131. Jefferson clearly appreciated the limits of his authority. When faced with a potential conflict with Spain in 1805, he turned to Congress for instructions, recognizing that "the course to be pursued will require the command of the means which it belongs to Congress exclusively to yield or deny." 1 RICHARDSON, *supra* note 473, at 388, 390; *see also* GLENNON, *supra* note 119, at 287.

At the outbreak of the Civil War, President Lincoln "authorized and directed his Secretary of the Treasury to advance, without requiring security, $2,000,000 of public money" to three private citizens to be used "in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defense and support of the Government . . . ."[551] Responding to a congressional censure of his former Secretary of War, Simon Cameron, for similar deeds, Lincoln told Congress in May 1862:

> There was no adequate and effective organization for the public defense. Congress had indefinitely adjourned. There was no time to convene them. 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.
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> . . . .
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> . . . I believe that by these and other similar measures taken in that crisis, *some of which were without any authority of law*, the government was saved from overthrow. I am not aware that a dollar of the public funds thus confided *without authority of law* to unofficial persons was either lost or wasted, although apprehensions of such misdirection occurred to me as objections to those extraordinary proceedings, and were necessarily overruled.[552]

Confronting an unprecedented national crisis, Lincoln took a series of actions wholly without constitutional sanction—from blatantly disregarding court orders[553] to enlarging the size of the armed forces.[554] In meeting the emergency, however, Lincoln never claimed his actions were lawful.[555]

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551. 6 RICHARDSON, *supra* note 473, at 77, 78.

552. *Id.* (emphasis added); *see also* CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 231-32 (1939): "The President dug into the Treasury for millions of dollars—without due and requisite authority of Congress."

553. *Ex parte* Merryman, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.).

> Lincoln ignored one law and constitutional provision after another. He assembled the militia, enlarged the Army and Navy beyond their authorized strength, called out the volunteers for three years' service, spent public money without congressional appropriation, suspended *habeas corpus*, arrested people "represented" as involved in "disloyal" practices and instituted a naval blockade of the Confederacy—measures which, he later told Congress, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity; trusting then as now that Congress would readily ratify them."[556]

Lincoln spent public funds without an appropriation because he believed the exigencies of the growing rebellion dictated no other course. And when Congress convened, Lincoln laid before it what he had done and sought the appropriations necessary to cover his expenditures. Although Lincoln unquestionably viewed his actions as necessary, he did not assert they were constitutional, freely acknowledging—particularly with regard to his expenditures—that he had acted without legal authority.[557]

In 1926, following a devastating hurricane which occurred while Congress was not in session, President Coolidge directed his Secretary of Agriculture to assist the farmers in storm-stricken areas of Florida by purchasing seed, fertilizer, and other items. The Secretary of Agriculture made advances to the Florida farmers using $253,000 appropriated for the eradication of hoof-and-mouth disease.[558] Coolidge later sought congressional sanction for his actions. The President's actions, albeit ratified, were subject to harsh criticism from members of the House. Congressman Byrnes noted the complete absence of legal authority for the expenditures:

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554. Jill Elaine Hasday, *Civil War as a Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 129, 130. In fact, Lincoln effectively implemented emergency rule during the first eleven weeks of the Civil War without Congress. *Id.*; J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 51-52 (rev. ed. 1963).

555. *See* FISHER, PRESIDENTIAL WAR POWER, *supra* note 484, at 38.

556. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 58 (1973).

557. RANDALL, *supra* note 554, at 36-37 n.14; *but see* Symposium, *Executive Power*, *supra* note 56 (Eugene V. Rostow) ("In my view, the emergency prerogative powers Lincoln exercised should be considered constitutional because they were necessary, in his judgment, under the circumstances.").

558. WILMERDING, THE SPENDING POWER, *supra* note 468, at 17-18.

> [I]t seems that, acting under the authority of the President of the United States, the Secretary of Agriculture, without the slightest authority of law, took from the appropriations for the foot-and-mouth disease and loaned it to farmers in Florida for the purpose of buying seed. There was not the slightest authority of law for doing that. The money was appropriated by Congress for a specific purpose. Merely because there was a million or more dollars in that fund did not authorize the President or the Secretary of Agriculture to use that fund for purposes other than those provided by Congress.[559]

Congressman Garrett observed that the President was calling upon Congress "to ratify an illegal act [applause] done in the name of an emergency, with the doer of it himself declaring what was the emergency . . . . This is a proposition which profoundly touches the elemental functions of government, the matter of keeping separate the legislative and the executive branches of government."[560]

As in the case of Washington, Jefferson, and Lincoln, President Coolidge and his supporters did not claim the expenditures were lawful (otherwise it would have been unnecessary to seek congressional sanction); instead, they stressed the severity of the emergency and the humanitarian nature of the spending.[561]

Nothing in the historical record reflects a pattern of practice demonstrating a presidential power of the purse. Presidents have neither asserted such a power nor attempted to exercise it. Nor has Congress given any indication it would acquiesce in such a practice; it has jealously guarded the nation's fisc, criticizing and statutorily thwarting perceived executive encroachments on its prerogatives. Thus, custom does not support the notion of a presidential power of the purse.

D. The Appropriations Power in the Courts

Neither federal nor state courts have construed constitutional appropriations clauses as affording executives the power to spend public funds outside the laws enacted by the legislative departments. Courts have uni-

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559. 68 CONG. REC. 2978 (1927).

560. *Id.* at 2979.

561. *See id.* (remarks of Congressman Wood) (money expended under "the law of humanity"); *id.* (remarks of Congressman Drane) ("The money was used to save human lives from starvation.").

formly held that the power to appropriate is exclusively legislative in character. While federal courts have recognized boundaries surrounding Congress' appropriations authority—namely that Congress cannot exercise its authority in contravention of specific constitutional limitations—they have not held that Congress may not use its power of the purse to foreclose presidential activities, including those relating to foreign policy and national defense. Practice in the state courts has paralleled the federal experience. Working with similar appropriations provisions, the states have uniformly recognized that their constitutional spending schemes mandate exclusive legislative control over state finances.

1. Federal Courts

a. Congress' Exclusive Appropriations Authority

The federal courts have consistently interpreted the appropriations clause as conferring on Congress—and Congress alone—the power of the purse. Writing in his *Commentaries on the Constitution*, Justice Joseph Story noted that the meaning of the clause in this regard was manifest:

> The object [of the appropriations clause] is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity in the disbursement of public money. As all the taxes raised from the people, as well as the revenue from the other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.[562]

Story's understanding of the appropriations clause is consistent with the views taken by the federal courts. An early illustration is *Reeside v. Walker*,[563] in which the petitioners sought mandamus against the Secretary of the Treasury to recover money assertedly owed as a consequence of a successfully litigated set-off claim against the United States. The Supreme

562. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 486 (Carolina Academic Press 1987) (1833).

563. 52 U.S. (11 How.) 272 (1850).

Court held that, absent an appropriation, not even the President had the authority to satisfy the claim:

> No officer, however high, *not even the President*, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them . . . . The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation made by Congress . . . .
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> *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*.[564]

To similar effect is *Hart's Case*,[565] involving the impact of a post-Civil War presidential pardon on a money claim against the United States. At issue was a statute barring reliance on presidential pardons as a basis for claims against the government by persons who had assisted the Confederacy.[566] The claimant was the beneficiary of such a pardon and sued the United States for the price of supplies sold to the government before the War. Denying the claim, the Court of Claims held that "[t]he absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."[567]

Thus, federal courts have consistently construed the appropriations clause to require an act of Congress for money to be drawn from the Treasury.[568] The mere absence of a statutory prohibition against a particular expenditure is not sufficient; rather, the Constitution mandates affirmative action by Congress via a statutory enactment.[569] In short, the appropriations clause bars both the executive[570] and judicial[571] departments from spending public funds without congressional approval. Moreover, because Congress alone may permit expenditures of public funds, courts have generally held that the coordinate departments are subject to any conditions or

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564. *Id*. at 291 (emphasis added); *see also* Glidden Co. v. Zdanok, 370 U.S. 530, 569-70 (1962).

565. 16 Ct. Cl. 459 (1880), *aff'd*, 118 U.S. 62 (1886).

566. *Id*. at 481, *citing* Act of Mar. 2, 1867, 14 Stat. 571.

567. *Id*. at 484. Affirming the judgment, the Supreme Court declared that no presidential pardon could ever authorize payments out of a general appropriation "of a debt which a law of Congress had said should not be paid out of it." Congress alone must decide whether to satisfy the claim. Hart v. United States, 118 U.S. 62, 67 (1886).

restrictions Congress imposes in connection with its appropriation of funds.[572]

Furthermore, the federal courts have not discerned an executive power of the purse emerging from the President's constitutional responsibilities. For instance, courts have held that presidents may not—by exer-

568. "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by statute." Office of Personnel Mgt. v. Richmond, 496 U.S. 414, 424 (1990); *see also* Knote v. United States, 95 U.S. 149, 164 (1877); City of Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1428 (D.C. Cir. 1994); Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978); Haskins Bros. & Co. v. Morgenthau, 85 F.2d 677, 681 (D.C. Cir.), *cert. denied*, 299 U.S. 588 (1936); Stitzel-Weller Distillery v. Wickard, 118 F.2d 19, 22 (D.C. Cir. 1941); Cummings v. Hardee, 102 F.2d 622, 627 (D.C. Cir.), *cert. denied*, 307 U.S. 637 (1939); Cloutier v. Morgenthau, 88 F.2d 846, 847 (D.C. Cir. 1937); American Nat'l Bank & Trust Co. v. United States, 23 Cl. Ct. 542, 546 (1991).

569. United States v. MacCollom, 426 U.S. 317, 321 (1976) (plurality decision): "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

570. "The provision of the Constitution . . . that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law' was intended as a restriction upon the disbursing authority of the Executive department . . . ." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); *see also Richmond*, 496 U.S. at 425, 428; United States v. Guthrie, 58 U.S. (17 How.) 284, 299 (1854) ("The secretary of the treasury is inhibited from directing the payment of moneys not specifically appropriated by law."); Holder v. Office of Personnel Mgt., 47 F.3d 412, 414 (Fed. Cir. 1995) ("Government agents cannot bind the Government to make monetary payments contrary to statutory rules."); National Ass'n of Reg'l Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977) ("Government agencies may only enter into obligations to pay money if they have been granted such authority by Congress."); *cf.* Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), requiring government officials receiving money to place it in the Treasury, is derived from the appropriations clause and is intended to prevent the executive from spending unappropriated funds.); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1510 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985) (Absent congressional authorization, the executive cannot take private property because "it usurps Congress' constitutionally granted powers of lawmaking and appropriation.").

571. Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850); Glidden Co. v. Zdanok, 370 U.S. 530, 569-70 (1962); United Serv. Auto. Ass'n v. United States, 105 F.3d 185, 188 (4th Cir. 1997); *City of Houston*, 24 F.3d at 1428; Maryland Dep't of Human Resources v. Dep't of Agric., 976 F.2d 1462, 1482 (4th Cir. 1992); Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184-85 (D.C. Cir. 1992); Walker v. Dep't of Hous. & Urban Dev., 912 F.2d 819, 829-30 (5th Cir. 1990); *Costle*, 564 F.2d at 590 n.16; *Stitzel-Weller Distillery*, 118 F.2d at 22; Hughes Aircraft Co. v. United States, 534 F.2d 889, 906 (Ct. Cl. 1976); Hetfield v. United States, 78 Ct. Cl. 419, 422 (1933); Major Collin's Case, 15 Ct. Cl. 22, 35 (1879); Doe v. Mathews, 420 F. Supp. 865, 871 (D.N.J. 1976); Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946).

cising their power to grant pardons[573] or to enter into executive agreements[574]—bind the United States to expend public funds. As the Supreme Court in *Office of Personnel Management v. Richmond* noted: "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."[575]

b. Checking National Security Initiatives Through the Power of the Purse

Admittedly, Congress' power of the purse is not boundless; "Congress' exclusive power of appropriation does not trump the rest of the Constitution."[576] In *United States v. Lovett*,[577] for example, Congress attempted, via an appropriations rider, to block the salaries of three named government employees suspected of being communist sympathizers.[578] The Supreme Court held the rider constituted an unlawful bill of attainder because it "accomplished the punishment of the named individuals without a judicial trial."[579] In like decisions, the Court has held that Congress may not exercise its appropriations authority so as to violate other positive constitutional restrictions, such as the compensation clause,[580] and the first amendment's free speech[581] and establishment clauses.[582]

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572. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980); The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 682 (1868); Hart's Case, 16 Ct. Cl. 459 (1880), *aff'd*, 118 U.S. 62 (1886); *Doe*, 420 F. Supp. at 870-71; *Spaulding*, 60 F. Supp. at 988; *see generally* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992); Mount Graham Coalition v. Thomas, 89 F.3d 554 (9th Cir. 1996) (binding effect of appropriations riders); *but see* National Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671, 683-85 (D.D.C. 1988), *vacated*, 490 U.S. 153 (1990) (overturning appropriations rider restricting President's discretion to regulate access to and disclosure of national security information).

573. *Knote*, 95 U.S. at 164; The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1873); *Hart's Case*, 16 Ct. Cl. at 482-85; *In re* North, 62 F.3d 1434, 1435 (D.C. Cir. 1994).

574. *Edwards*, 580 F.2d at 1058.

575. *Richmond*, 496 U.S. at 425.

576. Panel Discussion, *The Appropriations Power*, *supra* note 55, at 646 (Kate Stith); *see also* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 221-23 (1985) (hereinafter FISHER, CONSTITUTIONAL CONFLICTS); 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW , *supra* note 40, at 1-5.

577. 328 U.S. 306 (1946).

578. *Id.* at 305 n.1, *citing* Urgent Deficiency Appropriations Act of 1943, § 304, 57 Stat. 431, 450.

579. *Id.* at 316.

580. United States v. Will, 449 U.S. 200 (1980).

581. Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1984).

From these explicit restrictions on Congress' powers, a number of commentators propound the thesis that Congress' appropriations authority is similarly limited by the constitutional doctrine of separation of powers. In other words, Congress "may not use the appropriations power to impair the President's ability to perform duties or exercise prerogatives the Constitution imposes on him" either by restrictions attached to appropriations acts or by a failure to appropriate adequate funds.[583] Included in the catalogue of presidential powers immune from circumscription by Congress' power of the purse are the executive's authority over foreign affairs and national defense.[584] Those who advocate such a thesis have constructed a "house of cards", but their thesis is fundamentally flawed.

First, by analogizing specific, explicit constitutional limits on Congress' authority (such as the bill of attainder clause) to the ill-defined concept of separation of powers, the thesis necessarily assumes the President—wholly independent of Congress—has plenary discretion over the nation's foreign and defense policies in which Congress may not meddle.[585] Neither the constitutional text nor the federal courts' interpretation of it, however, supports such a conclusion.

On its face, the Constitution grants Congress, not the president, the "dominant role" in formulating foreign and military policy.[586] Article I bestows upon Congress the powers to collect taxes "for the common Defence"; "to regulate commerce with foreign nations"; "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"; "to declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water"; "to raise and support Armies"; "to provide and maintain a Navy"; "to make

582. Flast v. Cohen, 392 U.S. 83 (1968).

583. Sidak, *supra* note 57, at 1206-07; *see also* Emerson, *supra* note 55, at 33; LeBoeuf, *supra* note 55, at 475 n.126; Moore, *supra* note 55, at 146; Panel Discussion, *The Appropriations Power*, *supra* note 55, at 631, 642 (William Barr, Geoffrey Miller); Bryan, *supra* note 56, at 596-97.

584. *See* HENKIN, *supra* note 86, at 113; HENKIN, CONSTITUTIONALISM, DEMOCRACY & FOREIGN AFFAIRS, *supra* note 91, at 31-32; Moore, *supra* note 55, at 146; Sidak, *supra* note 57, at 1185; Bryan, *supra* note 56, at 602; *cf.* Lewittes, *supra* note 57, at 1158 (arguing Congress has the duty to raise the necessary revenues to fund presidential defense initiatives).

585. *See* Emerson, *supra* note 55, at 33; Moore, *supra* note 55, at 146; Lewittes, *supra* note 57, at 1158; Sidak, *supra* note 57, at 1206-07; Symposium, *Executive Power*, *supra* note 56, at 200-01 (Orrin Hatch).

586. KOH, *supra* note 453, at 75; *see also* FISHER, PRESIDENTIAL WAR POWER, *supra* note 484, at 6; GLENNON, *supra* note 119, at 72; HENKIN, *supra* note 86, at 67.

rules for the Government and Regulation of the land and naval Forces"; "to provide for calling forth the Militia"; "to provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States"; and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof."[587]

The President's powers are seemingly skimpy by contrast.[588] He is empowered to make treaties, subject to the advice and consent of the Senate; to appoint ambassadors and other public ministers and consuls, subject to the advice and consent of the Senate; to receive ambassadors and other public ministers and consuls; and to execute faithfully the laws of the United States. The President is also the commander in chief of the Army and Navy and the Militia (National Guard) when called into the service of the United States.[589]

Given Congress' broad textual authority over foreign policy and national defense and the paucity of enumerated presidential powers, it is difficult to discern when or how Congress can ever step over the line separating the branches, other than by a direct assault on the President's core powers (for example, by attempting to appoint someone other than the President to command United States military forces).[590] Nothing in the

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587. U.S. CONST. art. I, § 8.

588. *See, e.g.*, REVELEY, *supra* note 121, at 29: "If we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution and then look at war-powers practice since 1789, he would marvel at how much Presidents have spun out of so little."

589. U.S. CONST. art. II, § 2.

590. *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (Congress may not interfere with presidential authority to issue pardons.). The obvious defect in an analogy between specific constitutional limitations on Congress and the amorphous separation of powers concept is noted in Raven-Hansen & Banks, *Pulling the Purse Strings, supra* note 64, at 888:

> *Lovett* and its progeny . . . involved explicit constitutional prohibitions. But the only relevant textually explicit prohibitions pertaining to national security appropriations (when neither individual nor state rights are involved) are the Appropriations Clause and the two-year limit on appropriations for the Army, the former directly and the latter at least indirectly restraining the *Executive*. Although the Constitution also makes numerous express assignments of affirmative national security powers, these are chiefly to Congress.

(emphasis in the original; footnotes omitted).

text remotely suggests Congress is bound to provide financial support to the President's foreign policy and military adventures; indeed, the Constitution unquestionably contemplates, through such provisions as the war clause, that Congress be given a significant voice in the decision-making process.[591]

Nor have the federal courts so broadly defined the President's foreign and military affairs prerogatives vis-à-vis Congress. In this judicial arena, Congress is unbeaten.

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591. *See, e.g.*, Fleming v. Page, 50 U.S. (9 How.) 608, 618 (1850) ("wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belongs to the English Crown"); Thomasson v. Perry, 80 F.3d 915, 923 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996) ("There is nothing timid or half-hearted about [the] constitutional allocation of authority. Rather, the Constitution states fully and directly that the governance of military affairs is a shared responsibility of Congress and the President."); ELY, *supra* note 452, at 10 ("In language and recorded purpose the War Clause made an unmistakable point that needed no further gloss: Acts of war must be authorized by Congress."); FISHER, PRESIDENTIAL WAR POWER, *supra* note 484, at 9 ("The framers empowered the President to be Commander in Chief, but that title must be understood in the context of military responsibilities Congress authorizes."); GLENNON, *supra* note 119, at 85 ("[I]t is for Congress to determine the policy reasons for which armed forces will be used. The President is precluded from doing so."); HENKIN, *supra* note 86, at 80 ("The Founders considered the power of war too important to entrust it to the President alone . . . ."); HENKIN, CONSTITUTIONALISM, DEMOCRACY & FOREIGN AFFAIRS, *supra* note 91, at 31 ("History supports few limitations on the power of Congress in foreign affairs other than the Bill of Rights, and history gives no support for any presidential authority to flout congressional legislation . . . ."); KOH, *supra* note 453, at 76 (Founders rejected "the English model of a king who possessed both the power to declare war and the authority to command troops."); SCHLESINGER, *supra* note 556, at 3 ("The Founders were determined to deny the American President what Blackstone had assigned to the British King—'the sole prerogative of making war and peace'."); Berger, *supra* note 77, at 82 ("[T]he Constitution conferred virtually all of the war-making powers upon Congress, leaving the President only the power 'to repel sudden attacks' on the United States."); Bestor, *supra* note 175, at 535 (Constitution intended to "require the joint participation—the co-operation and concurrence—of the several branches in the making and carrying out of any genuinely critical decision"); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 700 (1972) ("[T]he grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries . . . that the new Congress would have nearly complete authority over the commencement of war."); Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 33 (1995) ("[U]nder our Constitution, Congress, not the President, has the ultimate power over war.") [hereinafter Sofaer, *The Power Over War*]; William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 9 (1972) ("[T]he lodgement of the power to declare war in Congress forbids the sustained use of armed force abroad in the absence of prior, affirmative, explicit authorization by Congress.").

> In no case touching on foreign relations has the Supreme Court invalidated an act of Congress because it impinged upon the President's sole power under the Constitution. In two hundred years of dispute between the President and Congress over war and peace, commitment and neutrality, trade embargoes and arms sales, Congress has never lost before the High Court.[592]

Early court decisions defined presidential power over foreign policy and defense narrowly, generally confining presidential discretion to the terms of positive statutory enactments. The quintessential example is *Little v. Barreme*,[593] which involved a congressional enactment meant to restrict American commerce and navigation with France. The statute authorized the President to order the Navy to seize American ships going *to* French ports.[594] The President, through the Secretary of the Navy, ordered U.S. naval vessels to seize all suspected American ships going *to* or *from* French ports. Following his orders, the commander of the U.S. frigate *Boston*, Captain George Little, captured a suspected American ship—the *Flying Fish*—going *from* a French port near the island of Hispaniola.[595]

In a lawsuit brought by the owners of the *Flying Fish*, the Circuit Court for the District of Massachusetts ordered the captured vessel returned and awarded damages against Captain Little in the sum of $8504. The court held that even if the *Flying Fish* was an American vessel, since it had been captured going from, rather than *to*, a French port, Little had exceeded his authority under the statute.[596]

Little appealed the judgment claiming he merely followed the President's orders.[597] While sympathizing with Little's plight, the Supreme Court refused to overturn the damages award, holding that the President was without authority to exceed the limits on captures imposed by the statute: "[T]he legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound *to* a French port."[598] That presidential discretion in execut-

592. GLENNON, *supra* note 119, at 13; *see also* HENKIN, *supra* note 86, at 72.
593. 6 U.S. (2 Cranch) 170 (1804).
594. Act of Feb. 9, 1799, § 5, 1 Stat. 613, 615.
595. The captured vessel was, in fact, Danish. *Id.* at 176.
596. *Little*, 6 U.S. at 175-76.
597. *Id.* at 175.
598. *Id.* at 177-78.

ing the nation's foreign and military policy was at issue was simply irrelevant.[599]

In a similar vein, in *United States v. Smith*,[600] Colonel William Smith engaged in actions to overthrow Spanish rule in the province of Caracas and was duly indicted for violating a statute prohibiting military expeditions against nations with which the United States was at peace.[601] Smith offered to prove that his actions were approved by the executive department and subpoenaed the Secretary of State, Secretary of the Navy, and two other officers to appear at his trial. When they refused to appear, Smith moved to compel their attendance, proffering their expected testimony by affidavit.[602] Sitting on circuit in New York, Justice William Patterson denied Smith's motion, holding the testimony sought would be irrelevant since the President was without authority to sanction a violation of the statute:

> Supposing then that every syllable of the affidavit is true, of what avail can it be on the present occasion? Of what use or benefit can it be to the defendant in a court of law? Does it speak by way of justification? The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic. Will it be pretended that the President could rightfully grant a dispensation and license to any of our citizens to carry on a war against a nation with whom the United States are at peace?[603]

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599. *Id.* at 179; *see also* The Apollon, 22 U.S. (9 Wheat.) 362 (1824) (In the absence of statutory authority, executive officers are not permitted to seize vessels suspected of evading customs laws.). According to Professor Wilmerding, Congress later reimbursed Captain Little for the "damages, interest, and charges" assessed against him. Wilmerding, *The President & the Law*, *supra* note 456, at 324 n.6. Under current law, Captain Little would have likely been personally immune from liability under the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4653 (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679).

600. 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

601. Act of June 5, 1794, § 5, 1 Stat. 384.

602. *Smith*, 27 F. Cas. at 1229.

603. *Id.* at 1230.

Both *Little* and *Smith* are consistent with other early decisions judging the legality of executive action in foreign and military affairs by the statutory framework established by Congress.[604] Later court decisions tended to view presidential discretion over foreign policy and national defense in broader terms, but never at the expense of congressional authority. For example, *Durand v. Hollins*[605] involved a lawsuit against the captain of the naval vessel *Cyane* in his individual capacity for damages arising out of an

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604. Silas v. Talbott, 5 U.S. (1 Cranch) 1, 28 (1801) ("The whole powers of war [are], by the constitution of the United States, vested in Congress . . . ."); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 45 (1800) (Congress empowered to authorize limited war). This deference to congressional enactments is particularly true with respect to maritime prize cases. *See* The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 528 (1814) ("The right of capture is entirely derived from the law . . . . It is a limited right, which is subject to all the restraints the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed."); Brown v. United States, 12 U.S. (8 Cranch) 110, 129 (1814) ("[T]he power of confiscating property is in the legislature.").

Early administrations acknowledged Congress' central role in foreign affairs and national security, often refusing to take action without congressional approbation. During the nation's "quasi-war" with France in 1798, after Congress authorized the arming, equipping, and employing of ships to protect U.S. commerce but before it authorized the naval war with France, the Secretary of War issued to the commander of U.S. naval forces rules of engagement limited to purely defensive operations, stating, "as Congress possess exclusively the Power to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water, and as neither has yet been done, your Operations must accordingly be partial & limited." 1 OFFICE OF NAVAL RECORDS, NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES & FRANCE 77 (1935); *see also* REVELEY, *supra* note 121, at 278; Sofaer, *The Power Over War*, *supra* note 591, at 50-51. In an 1805 message to Congress, President Jefferson described Spanish incursions into the Louisiana territory recently purchased from France, stating he had instructed the armed forces to protect U.S. citizens and patrol the borders, but that "Congress alone is constitutionally invested with the power of changing our condition from peace to war." Thus, he awaited Congress' authority "for using force in any degree which could be avoided." 1 RICHARDSON, *supra* note 473, at 388, 389. In 1825, asserting that it was within the "constitutional competency of the Executive" to decide whether the United States should be represented at a meeting of American states assembled in Panama, President John Quincy Adams nevertheless acknowledged that he required "the sanction of both Houses to the appropriation, without which [U.S. participation] can not be carried into effect." 2 RICHARDSON, *supra* note 473, at 318. In his 1831 State of the Union Address, President Andrew Jackson informed Congress about Argentine threats to U.S. vessels engaged in fishing and commerce in and around the Falkland Islands, noting he had taken measures to protect the ships, but submitted the matter to Congress "to the end that they may clothe the Executive with such authority and means as they may deem necessary for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in those seas." 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 344, 352 (Arthur M. Schlesinger ed., 1966). *See generally* WORMUTH & FIRMAGE, *supra* note 326, at 28; THOMAS & THOMAS, *supra* note 443, at 31-35.

605. 8 F. Cas. 112 (C.C.S.D.N.Y. 1860) (No. 4,186).

1854 bombardment of Greytown, Nicaragua, because of a purported affront to an American diplomat.[606]

The court, speaking through Circuit Justice Nelson, found for Hollins, expounding a broad presidential authority to protect American lives and property abroad. Importantly, the court deemed the military actions to have been consistent with general statutes establishing the Departments of Foreign Affairs and Navy,[607] and had no occasion to address how the case might have turned had Congress prohibited such activity.[608]

In the *Prize Cases*,[609] the Supreme Court upheld President Lincoln's blockade at the onset of the Civil War absent a declaration of war, holding the Confederacy's actions created a state of war that "[t]he President was bound to meet . . . in the shape it presented itself, without waiting for Congress to baptize it with a name . . . ."[610] The Court also noted that Congress ultimately ratified the President's actions "at the extraordinary session of the Legislature of 1861."[611] The Court was never confronted with a claim that Congress was without authority in the matter.[612]

The most sweeping judicial declaration of presidential authority over foreign relations is Justice George Sutherland's opinion in *United States v. Curtiss-Wright Export Corp*.[613] The case itself dealt with a rather straightforward issue of the permissible scope of delegation of legislative authority. In response to the Chaco War between Paraguay and Bolivia, Congress passed and the President signed a joint resolution authorizing the President to prohibit arms sales to the combatants if he found that such a prohibition would "contribute to the reestablishment of peace between the countries."[614] The statute provided criminal penalties for violating a presidentially issued embargo.[615]

Pursuant to the resolution, President Franklin Roosevelt issued an embargo proclamation.[616] Curtiss-Wright and others were subsequently

606. A bottle was thrown at him. GLENNON, *supra* note 119, at 74.
607. *Durand*, 8 F. Cas. at 112.
608. *See* GLENNON, *supra* note 119, at 75.
609. 67 U.S. (2 Black) 635, 669 (1862).
610. *Id*. at 669.
611. *Id*. at 670.
612. *See* SCHLESINGER, *supra* note 556, at 64-65.
613. 299 U.S. 304 (1936).
614. *Id*. at 312.
615. *Id*. at 312, *citing* Act of May 28, 1934, ch. 365, 48 Stat. 811.

indicted for conspiring to sell arms to Bolivia in violation of the joint resolution and presidential proclamation.[617] The defendants demurred to the indictment, asserting, inter alia, that Congress had unconstitutionally delegated its legislative authority to impose the embargo to the President.[618]

The Court had before it the narrow question of whether Congress had exceeded its authority by delegating to the President responsibility for determining whether an arms embargo would help re-establish peace between Bolivia and Paraguay. A year earlier, the Court had deemed delegations of legislative authority in domestic matters unconstitutional.[619] Justice Sutherland's opinion differentiated between international and domestic affairs, holding Congress had greater flexibility to delegate power outside U.S. boundaries, including enactment of the joint resolution in question.[620]

Although this determination resolved the issue at bar, Sutherland launched into an expansive exposition of presidential authority over international affairs, opining (in obvious dicta) that the President possessed foreign policy powers not dependent upon legislation:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[621]

Sutherland's opinion, which has been characterized as "a muddled law review article wedged with considerable difficulty between the pages

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616. *Id.* at 312-13.

617. *Id.* at 311.

618. *Id.* at 314.

619. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

620. *Curtiss-Wright*, 299 U.S. at 329 ("It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries . . . .").

of the United States Reports,"[622] is the subject of intense academic criticism.[623] Significantly, nothing in the case's narrow holding suggests that Congress may not, through legislation in general (or appropriations in particular), circumscribe the President's discretion over foreign policy or national defense. As Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*:

> [*Curtiss-Wright*] recognized internal and external affairs as being separate categories, and held that the strict limitation does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, *but not that he might act contrary to an Act of Congress*.[624]

Curtiss-Wright's progeny does not dictate a different result. A few examples are illustrative. In *C.&S. Air Lines, Inc. v. Waterman Steamship Co.*,[625] the Supreme Court held that presidential determinations on applications for certificates for overseas and foreign air transportation under the Civil Aeronautics Act were not subject to judicial review. Since the President derived his authority from a comprehensive legislative scheme for

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621. *Id.* at 319-20. Because Curtiss-Wright and its co-defendants were charged with a crime, it is difficult to imagine how President Roosevelt could have possibly acted without legislative sanction in this case. Since early in our history, the Supreme Court has held that federal court criminal jurisdiction derives solely from statute. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812); United States v. Dawson, 56 U.S. (15 How.) 467, 476 (1853).

622. Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright, 13 YALE J. INT'L L. 5, 13 (1988).

623. *See, e.g.*, *id.*; FISHER, PRESIDENTIAL WAR POWER, *supra* note 484, at 58; KOH, *supra* note 453, at 94; Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577, 589-95 (1980); David Cole, *Youngstown v. Curtiss-Wright*, 99 YALE L.J. 2063, 2081-82 (1990) (book review); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 490 (1946); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1 (1973); Stein, Note, *supra* note 120, at 583-89; *see also* IRAN-CONTRA AFFAIR REPORT, *supra* note 441, at 388-90.

624. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring); *see also* Banco Nacional de Cuba v. Farr, 383 F.2d 167, 182 (2d Cir. 1967) (rejecting argument that *Curtiss-Wright* precluded Congress' passage of Hickenlooper Amendment, which barred federal courts from refusing to consider, on the ground of the federal act of state doctrine, claims predicated upon a foreign state's expropriation of property); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 212-13 (2d ed. 1988) (Congress retains power to limit executive action in foreign policy within its enumerated constitutional grants of power.).

625. 333 U.S. 103 (1948).

regulating air carriers, by which Congress gave the President plenary discretion to award overseas and foreign air transportation certificates, Congress' authority to impede presidential action was not in question.

At issue in *Dames & Moore v. Regan*,[626] was President Carter's measures taken under the Executive Agreement with Iran to resolve the Iranian hostage crisis. In various executive orders and regulations, the President "nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal."[627] The Court found statutory authority for the nullification of attachments on Iranian assets and the order directing the assets transfer to Iran;[628] however, it could not find similar authority for the suspension of claims against Iran.[629] Nevertheless, the Court upheld the President's actions, holding they were consistent with "the general tenor of Congress' legislation in this area."[630] Importantly, the Court did not hold that the President could have taken action in contravention of statute: "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."[631]

Thus, neither the text of the Constitution nor the federal judiciary's interpretation of it support the proposition that Congress has no role to play in international or military affairs, or that Congress may not, by legislation, circumscribe executive discretion in these areas. To the contrary, while Congress may not prevent the President from exercising his constitutional duties, it may influence or even dictate how the President discharges those duties.

Second, presupposing the existence of an exclusive presidential authority over foreign and military policy, the thesis also necessarily assumes that Congress is barred by the concept of separation of powers from using the purse to frustrate presidential foreign and military prerogatives.[632]

The argument that Congress may not check the President's foreign policy and war powers through its control of the purse strings echoes the

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626. 453 U.S. 654 (1981).

627. *Id.* at 660.

628. The Court held the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06, authorized such actions. *Dames & Moore,* 453 U.S. at 675.

629. *Dames & Moore,* 453 U.S. at 675

630. *Id.* at 678.

claims of the Stuart monarchs and their judges, who similarly claimed Parliament could not impede royal prerogatives by withholding needed revenue.[633] To suppose Congress cannot limit presidential foreign and defense policy initiatives through its appropriations authority is to turn our constitutional scheme on its head; congressional restraints on executive prerogatives through the power of the purse are the cornerstone of British and American representative democracy and—as understood by the Founders—a fundamental precept in the constitutional scheme.

Moreover, Congress has historically rejected the contention that it is obligated to provide financial support for the President's foreign and military policy initiatives. The issue came to a head early in the nation's history when the House of Representatives balked at furnishing the money necessary to carry out the Treaty of Amity, Commerce, and Navigation between Great Britain and the United States (Jay Treaty).

The Jay Treaty was signed in London on 19 November 1794, and ratified by the United States on 14 August 1795.[634] Although President Washington proclaimed the treaty on 29 February 1796,[635] not all of the

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631. *Id*. at 680. The Court highlighted the limited character of the decision and its dependence on apparent congressional approval:

> Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities . . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say the President lacks the power to settle such claims.

Id. at 688. For a criticism of *Dames & Moore's* reliance on congressional acquiescence rather than positive legislation, see Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After* Dames & Moore v. Regan: *Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982). Other Supreme Court cases have similarly upheld executive department practices that are consistent with broad statutory charters and in which Congress does not object. *See* Regan v. Wald, 468 U.S. 222 (1984); Haig v. Agee, 453 U.S. 280 (1981); Zemel v. Rusk, 381 U.S. 1 (1965). Conversely, when Congress enacts legislation the President is bound by it even if it touches foreign or military policy. The Court has long recognized, for example, that Congress may abrogate treaties or executive agreements by subsequently enacted statutes. *See, e.g.*, La Abra Mining Co. v. United States, 175 U.S. 423 (1899); Fong Yue Ting v. United States, 149 U.S. 698, 721 (1893); The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); Head Money Cases, 112 U.S. 580, 599 (1884). Thus, if it can muster a veto-proof majority, Congress can change the nation's international commitments wholly independently of the President.

632. *See supra* notes 583-85.

633. *See supra* note 186 and accompanying text.

treaty's provisions could be put into effect until Congress voted appropriations for various commissions established by its terms.[636]

Some in the administration and in Congress believed that Congress, and the House of Representatives in particular, was constitutionally constrained to provide the funds necessary to execute the treaty. For example, Alexander Hamilton believed that if the House was able to refuse the requisite appropriation, it would be capable of frustrating treaties made in accordance with the Constitution. In a letter to Rufus King, Hamilton stated:

> The Treaty Power binding the *Will* of the nation must within its constitutional limits be paramount to the Legislative power which is that Will; or at least the last *law* being a Treaty must repeal an antecedent contradictory law . . . .
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> . . . .
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> . . . that claiming that a right of assent is sanction for the House of Representatives, destroys the Treaty making Power & negatives two Propositions in the Constitution *to wit* I that The President with the Senate are competent to make Treaties. II That a Treaty is Law.[637]

By letter to George Washington two weeks later, Hamilton sent a proposed reply to a House request for documents about the treaty, which asserted that until the treaty was repealed through the full legislative process, the House had to furnish the requisite means to execute the treaty:

> [T]he House of Representatives have no moral power to refuse the execution of a treaty, which is not contrary to the constitution, because it pledges the public faith, and have no legal power

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634. 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 245 (Hunter Miller ed., 1931) [hereinafter MILLER].

635. *Id.* at 245, 274.

636. *See* Jay Treaty, arts. 5, 6, 7, *in id.* at 249-53, establishing commissions to resolve (1) a boundary dispute regarding the St. Croix River, (2) outstanding debts owed British merchants, and (3) damages to U.S. citizens and merchants for "irregular or illegal Captures or Condemnations of their vessels." Article 8 of the treaty required that the United States and Great Britain jointly defray the expenses of the commissions. *Id.* at 253.

637. Letter from Alexander Hamilton to Rufus King (Mar. 16, 1796), *in* 20 PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1974) (emphasis in the original).

> to refuse its execution because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority.[638]

The majority of members of the House of Representatives were not, however, prepared to be "rolled" by the administration, and demanded a voice in the treaty process insofar as legislation, such as an appropriation, was necessary to carry it into effect. For example, George Nicholas observed that, while Britain's king held that nation's treaty power, the House of Commons controlled the funds required to execute treaties. Nicholas declared that the House of Representatives similarly had the discretion to determine whether to enact appropriations measures needed to carry a treaty into effect: "The President and Senate possessed the Treaty-making power; for they possessed it with qualifications, in matters of money; and unless the House chose to grant the money, it was so far no Treaty."[639]

Congressman Heath likewise noted that the power of appropriations belonged to the House, "and that the money of the people should not be voted out of their pockets without giving them the utmost satisfaction, for passing laws to this effect."[640] Albert Gallatin thought that "[t]he power of granting money should be exercised as a check on the Treaty-making power."[641]

To exercise its legislative authority, on 24 March 1796, the House formally sought copies of the President's instructions to Secretary Jay together with other relevant documents about the treaty.[642] On 30 March, President Washington flatly refused to comply with the House's request, stating that, because the House of Representatives played no role in the treaty-making process, the requested documents were not relevant to any matter under the cognizance of the House.[643]

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638. Enclosure to a Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), *in id*. at 85, 98.

639. 5 ANNALS OF CONG. 446 (Mar. 7, 1796).

640. *Id*. at 448.

641. *Id*. at 474 (Mar. 9, 1796).

642. The Resolution stated:

> *Resolved*, That the President of the United States be requested to lay before this House a copy of the instructions to the Minister of the United States, who negotiated the Treaty with the King of Great Britain, communicated by his Message of the first of March, together with the correspondence and other documents relative to the said Treaty.

Id. at 426 (Mar. 7, 1796). The resolution passed on 24 March 1796. *Id*. at 759.

The House of Representatives was not, however, to be deterred. On 7 April, it enacted, by a large majority, a resolution that staked a substantive role for the House in legislation needed to execute a treaty:

> *Resolved*, That, it being declared by the second section of the second article of the Constitution, 'that the President shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senate concur,' the House of Representatives do not claim any agency in making Treaties; but, that 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 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 inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.[644]

Having proclaimed its position, on 30 April 1796, by a vote of fifty-one to forty-eight, the House passed the appropriations required to carry the Jay Treaty into effect.[645]

The position taken by the House of Representatives in April 1796 has prevailed.[646] This is exemplified today by Congress' continuing refusal to appropriate the money needed to satisfy dues assessed against the United States under the United Nations Charter, although the United States is bound by treaty to pay the dues.[647] Since the late 1970s, Congress has threatened to withhold or has actually withheld payment of U.N. assessments against the United States.[648] In spite of Clinton Administration denunciations and pleas,[649] Congress has refused the appropriations

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643. 1 RICHARDSON, *supra* note 473, at 194 (Mar. 30, 1796).

644. 5 ANNALS OF CONG. 771 (Apr. 6, 1796). The resolution passed by a vote of 54 to 37. *Id.* at 782.

645. *Id.* at 1291. *See* Act of May 6, 1796, ch. XVII, 1 Stat. 459.

646. CORWIN, *supra* note 115, at 206; HENKIN, *supra* note 86, at 109, 114; Nobleman, *supra* note 455, at 153.

647. U.N. CHARTER arts. 17-19; *see* Emilio J. Cardenas, *Financing the United Nations' Activities: A Matter of Commitment*, U. ILL. L. REV. 147, 151-52 (1995).

648. *See* John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 82-83 (1992); Jose E. Alvarez, *Legal Remedies and the United Nations' A La Carte Problem*, 12 MICH. J. INT'L L. 229, 234 (1991).

required to bring the United States' account current.[650] In addition, the Clinton Administration has fully acknowledged legislative supremacy in this matter by informing the Secretary General of the United Nations that he must reach an accommodation with Congress before receiving the requested U.S. contributions.[651]

The federal courts have not disturbed this division of authority between the President and Congress. No federal court has ever held that Congress is obligated to fund the President's foreign or military policy initiatives or that a congressional withholding of funds was unconstitutional. In fact, courts have consistently recognized Congress' authority to withhold appropriations, even when needed to satisfy court-imposed judgments.[652]

While the courts may very well prevent Congress from obstructing presidents from performing their core responsibilities, they have never been inclined to dictate to Congress the appropriations required to fulfill presidential policy initiatives. As Justice Jackson put it in *Youngstown*: "While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army and navy to command."[653]

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649. *See* Address by President William J. Clinton before a Joint Session of Congress (State of the Union), *in* 33 WEEKLY COMP. PRES. DOC. 136, 143 (Feb. 10, 1997); Madeleine K. Albright, *International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement*, 18 FORDHAM INT'L L.J. 1595, 1599 (1995); Art Pine, *Congress' Refusal to Pay U.S. Dues Could Be a Costly Move*, L.A. TIMES, Feb. 21, 1997, at A-5; Thomas W. Lippman, *Albright Urges U.S. to Pay Up at U.N.*, WASH. POST, Feb. 12, 1997, at A-20.

650. Betsy Pisik, *Congress Drives a Hard Bargain on American U.N. Debt*, WASH. TIMES, Apr. 9, 1997, at A-1; John M. Goshko, *U.S. Envoy Richardson Lobbies Ex-Colleagues*, WASH. POST, Mar. 23, 1997, at A-31. Although other nations are similarly delinquent, the United States accounts for three-quarters of the arrears on the regular budget and one-half of what is owed for peacekeeping. Jessica Mathews, *Delinquency Diplomacy*, WASH. POST, Mar. 10, 1997, at A-17.

651. John M. Goshko, *U.N. Reform Pits U.S. and Third World*, WASH. POST, Mar. 10, 1997, at A-1. Other recent examples of direct congressional interference with presidential foreign and military policy initiatives include Congress' cut-off of funds for the Vietnam War (*see supra* note 484) and its prohibition against aid to the Contra rebels in Nicaragua. *See supra* note 53.

652. Glidden v. Zdanok, 370 U.S. 530, 570 (1962) (citing 1933 study noting instances of Congress' refusal to pass appropriations to satisfy Court of Claims judgments); *see also supra* note 571; Paulsen, *supra* note 66, at 305-06: "[T]he courts may not order Congress to appropriate funds, either to pay a money judgment against the United States or as a remedy for some other constitutional violation. They can award a judgment, but they cannot constitutionally require Congress to pay up."

c. Presidential Appropriations Authority

Some commentators assert that the President may draw needed revenue from the Treasury to carry out his responsibilities if Congress affirmatively attempts to frustrate his policies or simply does not furnish him the financial means to pursue national security interests.[654] However, no federal court has come close to suggesting the President may appropriate money on his own constitutional authority.[655]

The absence of judicial precedent in support of such an assertion is, of course, hardly surprising. Such a ruling would fly in the face of the express terms of the appropriations clause and the centuries-old tradition of legislative supremacy over the public fisc. Moreover, while judicial invalidation of an indiscreet appropriations rider restricting executive flexibility in national security affairs is certainly comprehensible,[656] the means by which a federal court might fashion relief in the event Congress simply refused to appropriate funds is much more difficult to fathom.[657]

In such a case, a court would seemingly have a couple of options. First, it could attempt to direct Congress to enact the requisite appropriations measures. Such an order, however, would be almost certainly unenforceable.[658] How could a federal court coerce Congress into enacting such legislation? Attempt to hold the institution in contempt if it refuses?

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653. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 630 (1952) (Jackson, J., concurring); *see also* Lichter v. United States, 334 U.S. 742 (1948); CORWIN, *supra* note 115, at 252 ("If Congress cannot be persuaded to back presidential policy by bringing these powers to its support, then—the idea of a presidential *coup d'etat* being dismissed—the policy fails, and that is all there is to it."). Absent violation of an explicit constitutional provision, the federal courts are generally unwilling to intrude into or permit challenges to congressional spending decisions. *See, e.g.*, Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937); Frothingham v. Mellon, 262 U.S. 447 (1923); Wilson v. Shaw, 204 U.S. 24 (1907).

654. *See supra* note 57 and accompanying text.

655. The federal courts have construed the appropriations clause to be a restriction on the executive. *E.g.*, *Cincinnati Soap*, 301 U.S. 308. On the other hand, the courts have held that the executive is obligated to spend money appropriated by Congress. *E.g.*, Iowa *ex rel.* State Hwy. Comm'n v. Brinegar, 512 F.2d 722 (8th Cir. 1975); Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C. 1973); National Council of Community Health Care Ctrs., Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973); Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 73 (D.D.C. 1973); *see also* FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 576, at 236-37; Mikva, *supra* note 89, at 12-13.

656. *Cf.* United States v. Lovett, 328 U.S. 306 (1946) (holding unconstitutional appropriations rider that violated bill of attainder clause).

657. Some commentators have seemingly advocated such a role for the federal judiciary. *See supra* note 64.

Punish just those members who speak out or vote against the measure? Neither measure is conceivable nor constitutional.[659]

While the federal courts have, on occasion, issued orders directing state and local governments to raise taxes and spend funds,[660] the Congress is a co-equal department of government (thereby spawning separation of powers issues)[661] and a much more formidable adversary. Any attempt by a federal court to dictate how Congress should vote on a particular issue would be met with certain resistance and probable noncompliance,[662] particularly since the President would likely resort to the courts only if he had failed to secure desired funds from Congress. Worse, Congress might retaliate by attempting to curtail jurisdiction over such issues.[663]

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658. *See* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 685 (1995) (Congress not bound by Supreme Court judgment requiring it to appropriate money).

659. U.S. CONST. art. I, § 6, cl. 1 ("speech or debate" clause); Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) ("speech or debate" clause extends to "things generally done in a session of the House by one of its members in relation to the business before it," including voting); Steven N. Sherr, *Freedom & Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE L.J. 233, 237 (1991) (courts have consistently interpreted "speech or debate" clause as including voting within the scope of protected legislative activity); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1616 (1985) ("[T]he deliberative and communicative processes of acting upon proposed legislation represent the core of protected activity" under the clause.); *see also* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 750 (1978). The purpose of the "speech or debate" clause is to protect Congress against intimidation by an "unfriendly executive" and a "hostile judiciary." United States v. Johnson, 383 U.S. 169 (1966). No similar impediment prevents imposing contempt on local legislative bodies. *See* Spallone v. United States, 493 U.S. 265 (1990) (holding open possibility of contempt against city councilmen who failed to vote measures needed to implement consent decree); *see also* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 762 (1992).

660. Missouri v. Jenkins, 495 U.S. 33 (1990); Griffin v. County Sch. Bd., 377 U.S. 218 (1964); Robert A. Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (advocating mandatory injunctions as a means of dealing with legislative inaction when necessary to rectify continuing violations of constitutional rights).

661. Frug, *supra* note 659, at 750; *but see* Bulluck v. Washington, 468 F.2d 1096, 1119-21 (D.C. Cir. 1972) (Robinson, J., dissenting) (Congress may not constitutionally refuse to appropriate funds needed to eliminate *de facto* discrimination in District of Columbia schools).

662. Frug, *supra* note 659, at 791-92; *cf.* Mark J. Coleman, Note, Mandel v. Myers: *Judicial Encroachment on Legislative Spending Powers*, 70 CAL. L. REV. 932, 950-51 (1982) (recounting state legislative defiance of state court assessments of attorneys fees in litigation against the state).

A court might also issue a declaratory decree authorizing the President to draw needed money from the Treasury or simply issue a mandatory injunction directing the disbursement of the funds. How a court might reconcile such a decree with the plain language of the appropriations clause, however, is problematic, unless it construes the Supreme Court's declaration in *Cooper v. Aaron*—that the Court's interpretation of the Constitution "is the supreme law of the land"[664]—to mean that judicial edicts represent the positive legislation envisioned by the appropriations clause.[665]

Aside from being blatantly inconsistent with the text and prior understanding of the Constitution, judicial intrusion of this nature poses a myriad of other problems. For example, how would a court decide how much money is required to carry out the President's foreign and military policy initiatives? Would the court balance the President's petition for funds with competing priorities for the nation's scarce resources? If sufficient funds are not available, would the court raise the debt ceiling? Order an increase in taxes? Or perhaps direct the President to take the money from other, congressionally approved programs? Commentators have recognized, in other contexts, that the judiciary is not well-suited to decide these kinds of fiscal issues. Judicial involvement in such decisions is not only inherently undemocratic, but involve budgetary decisions that "are quintessentially legislative because they involve the reconciliation of competing national priorities, which courts are unsuited to make."[666]

While one may certainly imagine courts directing such relief, given centuries of practice and precedent to the contrary, the likelihood of such federal judicial intrusion into the appropriations process is remote.

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663. *Cf.* Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44; *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Paul M. Bator, *Finality in Criminal Law & Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465 n.49 (1963) (Supreme Court jurisdiction over habeas corpus cases from prisoners in state custody eliminated to prevent Court from passing on constitutionality of reconstruction legislation); *see generally* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("no question" of power of Congress to delimit jurisdiction of inferior federal courts); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (Congress can withdraw jurisdiction of inferior federal courts "at will."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("[T]he disposal of the judicial power belongs to Congress.").

664. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

665. *See supra* notes 88-93 and accompanying text; *see also* Paulsen, *supra* note 66, at 225 (assertion in *Cooper v. Aaron* that Supreme Court's decisions are the "supreme law of the land" and that other branches are bound by them is wrong).

2. State Courts

Even before the Constitutional Convention, the states had experience with appropriations clauses and the allocation of the power to expend public funds between governmental departments.[667] After ratification, all but a handful of states appended appropriations clauses to their state charters, and over the last 221 years, most have had the occasion to interpret the provisions in their courts.

Of course, the manner in which states construe their appropriations clauses and distribute state spending power (at least since ratification) is not directly relevant to the meaning of the Constitution's appropriations clause.[668] One would think, however, that if (as a number of commentators claim) an appropriations clause, properly interpreted, permits the executive to expend public funds independent of the legislative department, at least some states would have construed their constitutions in such a manner. In other words, of the forty-eight states that have, or that have had, appropriations clauses in their constitutions since 1776, at least one should have recognized an autonomous executive spending authority. This, however, is not the case. Without apparent exception, states have construed their constitutions so as to afford their legislatures exclusive dominion over the public fisc.

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666. Peter W. Rodino, Jr., *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 HASTINGS CONST'L L.Q. 785, 801 (1983); *see also* Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More)*, 106 YALE L.J. 1449, 1523-24 (1997); Frug, *supra* note 659, at 739-40; Lavinia L. Mears, *The Truth About the Balanced Budget Amendment*, 20 SETON HALL LEGIS. J. 592, 612 (1996); Linda A. Schwartzstein, *Bureaucracy Unfounded: The Lack of Effective Constraints in the Judicial Process*, 35 ST. LOUIS U.L.J. 597 (1991); Douglas J. Brocker, Note, *Taxation Without Representation: The Judicial Usurpation of the Power to Tax in* Missouri v. Jenkins, 69 N.C.L. REV. 741, 760-61 (1991); Note, *The Balanced Budget Amendment: An Inquiry Into Appropriateness*, 96 HARV. L. REV. 1600, 1610 (1983); Coleman, *supra* note 661, at 954-56. *See generally* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 322 (1941) ("[T]he rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.").

667. *See supra* note 387.

668. *See* Calabresi & Prakash, *supra* note 77, at 613.

As noted above, at the time the Constitution was ratified, several states had already incorporated appropriations clauses into their constitutions, and by the turn of the 18th century, more than half of the states had them.[669] Thereafter, nearly every state included appropriations clauses in their charters. Most of the state provisions were similar—with some variation—to the United States Constitution's appropriations clause;[670] other

669. *See supra* note 357 and accompanying text.

670. *See, e.g.*, ALA. CONST. of 1819, art. VI, § 7 ("No money shall be drawn from the treasury, but in consequence of an appropriation made by law . . . ."); ALA. CONST. of 1865, art. IV, § 37 ("No money shall be drawn from the treasury, but in pursuance of an appropriation made by law . . . ."); ALA. CONST. of 1867, art. IV, § 37 (same); ALA. CONST. of 1875, art. IV, § 33 ("No money shall be paid out of the treasury except upon appropriations made by law . . . ."); ARK. CONST. of 1836, art. VII, General Provisions, § 3 ("No money shall be drawn from the treasury, but in consequence of an appropriation made by law . . . ."); ARK. CONST. of 1864, art. VIII, § 4 (same); ARK. CONST. of 1868, art. X, § 8 ("No money shall be paid out of the treasury until the same shall have been appropriated by law."); ARK. CONST. of 1874, art. XVI, § 12 ("No money shall be paid out of the treasury until the same shall

have been appropriated by law, and then only in accordance with said appropriation."); CAL. CONST. of 1849, art. IV, § 23 ("No money shall be drawn from the treasury but in consequence of appropriations made by law . . . ."); COLO. CONST. of 1876, art. V, § 33 ("No money shall be paid out of the treasury except upon appropriations made by law . . . ."); DEL. CONST. of 1792, art. II, § 15 ("No money shall be drawn from the treasury but in consequence of appropriations made by law . . . ."); DEL. CONST. of 1831, art. II, § 15 (same); FLA. CONST. of 1838, art. VIII, § 3 ("No money shall be drawn from the treasury but in consequence of an appropriation made by law . . . ."); FLA. CONST. of 1865, art. VIII, § 3 (same); FLA. CONST. of 1868, art. XIII, § 4 ("No moneys shall be drawn from the treasury except in pursuance of appropriations made by law."); FLA. CONST. of 1885, art. IX, § 4 (same); GA. CONST. of 1798, art. I, § 24 ("No money shall be drawn out of the treasury or from the public funds of this State, except by appropriations made by law . . . ."); GA. CONST. of 1865, art. II, § 6, cl. 2 ("No money shall be drawn out of the treasury of this State, except by appropriation made by law . . . ."); GA. CONST. of 1877, art. III, § 7, ¶ 11 (same); IDAHO CONST. of 1889, art. VII, § 13 ("No money shall be drawn from the treasury, but in pursuance of appropriations made by law."); ILL. CONST. of 1816, art. II, § 20 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); ILL. CONST. of 1848, art. III, § 26 (same); ILL. CONST. of 1870, art. III, § 17 ("No money shall be drawn from the treasury except in pursuance of an appropriation made by law . . . ."); IND. CONST. of 1816, art. III, § 21 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law."); IOWA CONST. of 1846, art. III, § 24 ("No money shall be drawn from the treasury but in consequence of appropriations made by law"); KAN. CONST. of 1858, art. X, § 1 ("No money shall be drawn from the treasury, except in pursuance of an appropriation made by law."); KY. CONST. of 1792, art. VIII, § 2 ("No money shall be drawn from the treasury but in consequence of appropriations made by law . . . ."); KY. CONST. of 1799, art. VI, § 5 ("No money shall be drawn from the treasury, but in pursuance of appropriations made by law . . . ."); LA. CONST. of 1845, art. VI, § 93 ("No money shall be drawn from the treasury but in pursuance of specific appropriations made by law . . . ."); LA. CONST. of 1852, art. VI, § 94 (same); LA. CONST. of 1864, art. VII, § 96 (same); LA. CONST. of 1868, art. VI, § 104 (same); LA. CONST. of 1879, art. 43 (same); LA. CONST. of 1898, art. 45 (same); ME. CONST. of 1819, art. V, part 4th, § 4 ("No money shall be drawn from the treasury, but by warrant from the Governor and Council, and in consequence of appropriations made by law . . . ."); MD. CONST. of 1851, art. III, § 20 ("No money shall be drawn from the treasury of the State, except in accordance with an appropriation made by law . . . ."); MD. CONST. of 1864, art. III, § 32 ("No money shall be drawn from the treasury of the State by any order or resolution, nor except in accordance with an appropriation by law . . . ."); MICH. CONST. of 1835, art. XII, § 4 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); MICH. CONST. of 1850, art. XIV, § 5 ("No money shall be drawn from the treasury but in pursuance of appropriations made by law."); MINN. CONST. of 1857, art. IX, § 9 ("No money shall be drawn from the treasury of this State except in pursuance of an appropriation by law."); MISS. CONST. of 1817, art. VI, § 8 ("No money shall be drawn from the treasury, but in consequence of an appropriation made by law . . . ."); MISS. CONST. of 1832, art. VII, § 7 ("No money shall be drawn from the treasury but in consequence of an appropriation made by law . . . ."); MISS. CONST. of 1868, art. IV, § 26 ("No money shall be drawn from the treasury except on appropriations made by law."); MO. CONST. of 1820, art. III, § 31 ("No money shall be drawn from the treasury but in consequence of appropriations made by law . . . ."); MO. CONST. of 1865, art. IX, § 6 ("No money

shall be drawn from the treasury, but in consequence of appropriations made by law . . . ."); MO. CONST. of 1875, art. X, § 19 ("No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of appropriations made by law . . . ."); MONT. CONST. of 1889, art. XII, § 10 ("[N]o money shall be drawn from the treasury but in pursuance of specific appropriations made by law."); NEB. CONST. of 1867, Finance, § 1 ("No money shall be drawn from the treasury, except in pursuance of an appropriation made by law."); N.J. CONST. of 1844, art. IV, § 6, ¶ 2 ("No money shall be drawn from the treasury but for appropriations made by law."); N.Y. CONST. of 1846, art. VII, § 8 ("No moneys shall ever be paid out of the Treasury of this State, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . . ."); N.Y. CONST. of 1894, art. III, § 21 (same); N.C. CONST. of 1868, art. XIV, § 3 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); N.C. CONST. of 1876, art. XIV, § 3 (same); N.D. CONST. of 1889, art. XII, § 186 ("No money shall be paid out of the state treasury except upon appropriation by law . . . ."); OHIO CONST. of 1802, art. I, § 21 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); OKLA. CONST. of 1907, art. 5, § 55 ("No money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law . . . ."); OR. CONST. of 1857, art. IX, § 4 ("[N]o money shall be drawn from the treasury but in pursuance of appropriations made by law."); PA. CONST. of 1790, art. I, § 21 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); PA. CONST. of 1838, art. I, § 22 (same); S.C. CONST. of 1778, art. XVI ("[N]o money shall be drawn out of the public treasury but by the legislative authority of the State."); S.C. CONST. of 1790, art. I, § 17 (same); S.C. CONST. of 1865, art. I, § 24 (same); S.C. CONST. of 1868, art. II, § 22 ("No money shall be drawn from the treasury but in pursuance of an appropriation made by law . . . ."); S.C. CONST. of 1895, art. X, § 9 ("Money shall be drawn from the treasury only in pursuance of appropriations made by law."); S.D. CONST. of 1889, art. XII, § 1 ("No money shall be paid out of the treasury except upon appropriation by law . . . ."); TENN. CONST. of 1796, art. I, § 21 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); TENN. CONST. of 1834, art. II, § 24 (same); TEX. REPUBLIC CONST. of 1836, art. I, § 25 ("No money shall be drawn from the public treasury but in strict accordance with appropriations made by law . . . ."); TEX. CONST. of 1845, art. VII, § 8 ("No money shall be drawn from the public treasury but in strict accordance with appropriations made by law . . . ."); TEX. CONST. of 1866, art. VII, § 8 (same); TEX. CONST. of 1868, art. XII, § 6 ("No money shall be drawn from the public treasury but in pursuance of specific appropriation made by law . . . ."); VA. CONST. of 1850, art. IV, § 26 ("No money shall be drawn from the treasury but in pursuance of appropriations made by law . . . ."); VA. CONST. of 1864, art. IV, § 24 (same); VA. CONST. of 1870, art. XIII, § 186 ("No money shall be drawn from the State treasury except in pursuance of appropriations made by law . . . ."); WASH. CONST. of 1889, art. VIII, § 4 ("No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . . ."); W. VA. CONST. of 1861, art. VIII, § 4 ("No money shall be drawn from the treasury but in pursuance of an appropriation made by law . . . ."); WIS. CONST. of 1848, art. VIII, § 2 ("No money shall be drawn from the treasury, except in pursuance of an appropriation made by law"); WYO. CONST. of 1889, art. III, § 35 ("[M]oney shall be paid out of the treasury only on appropriations made by the legislature . . . ."), art. XVI, § 7 ("No money shall be paid out of the state treasury except upon appropriation by law . . . .").

states were more inventive.[671] Today, all but three state constitutions (Mississippi, Rhode Island, and Utah) include some form of appropriations clause. Most state provisions are similar to the federal Constitution's appropriations clause.[672] Several states have modernized the language of their constitutions to reflect unequivocal legislative control of the trea-

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671. *See, e.g.*, MASS. CONST. of 1780, part II, ch. II, § 1, art. XI:

> No monies shall be issued out of the treasury of this commonwealth , and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

N.H. CONST. of 1784, (Executive Power-President) ¶ 14 XI:

> No monies shall be issued out of the treasury of this state, and disposed of . . . but by warrant under the hand of the president for the time being, with the advice and consent of the council, for the necessary defence and support of the state; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

N.H. CONST. of 1792, Executive Power, § LVI:

> No moneys shall be issued out of the treasury of this State, and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the State; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

672. ALA. CONST. art. IV, § 72 ("No money shall be paid out of the treasury except upon appropriations made by law . . . ."); ALASKA CONST. art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law."); ARIZ. CONST. art. 9, § 5 ("[N]o money shall be paid out of the State Treasury, except in the manner provided by law."); ARK. CONST. art. V, § 29 ("No money shall be drawn from the treasury except in pursuance of specific appropriations made by law . . . ."); CAL. CONST. art. XVI, § 7 ("Money may be drawn from the Treasury only through an appropriation made by law . . . ."); COLO. CONST. art. V, § 33 ("No moneys in the state treasury shall be disbursed therefrom by the treasurer except upon appropriations made by law . . . ."); CONN. CONST. art. IV, § 22 ("The treasurer shall receive all monies belonging to the state, and disburse the same only as he may be directed by law."); FLA. CONST. art. VII, § 1C ("No money shall be drawn from the treasury except in pursuance of appropriations made by law."); GA. CONST. art. III, § 9, ¶ 1 ("No money shall be drawn from the treasury except by appropriation made by law."); HAW. CONST. art. VII, § 5 ("No public money shall be expended except pursuant to appropriation made by law."); IDAHO CONST. art. VII, § 13 ("No money shall be drawn from

the treasury but in pursuance of appropriations made by law."); IND. CONST. art. X, § 3 ("No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."); IOWA CONST. art. III, § 24 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); KAN. CONST. art. II, § 24 ("No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."); KY. CONST. § 230 ("No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law."); LA. CONST. art. VII, § 10 ("Except as otherwise provided by this constitution, money shall be drawn from the state treasury only pursuant to an appropriation made in accordance with the law."); ME. CONST. art. V, pt. 3, § 4 ("No money shall be drawn from the treasury except in consequence of appropriations or allocations authorized by law."); MD. CONST. art. III, § 32 ("No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by law . . . ."); MICH. CONST. art. IX, § 17 ("No money shall be paid out of the state treasury except in pursuance of appropriations made by law."); MINN. CONST. art. XI, § 1 ("No money shall be paid out of the treasury of this state except in pursuance of an appropriation made by law."); MO. CONST. art. IV, § 28 ("No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law . . . ."); MONT. CONST. art. VII, § 14 ("[N]o money shall be drawn from the treasury unless upon an appropriation made by law."); NEB. CONST. art. III, § 25 ("No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law . . . ."); NEV. CONST. art. IV, § 19 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); N.J. CONST. art. VIII, § 2 ¶ 2 ("No money shall be drawn from the State but for appropriations made by law."); N.Y. CONST. art. VII, § 7 ("No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation made by law . . . ."); N.C. CONST. art. V, § 7 ¶ 1 ("No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ."); OHIO CONST. art. II, § 22 ("No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law . . . ."); OKLA. CONST. art. V, § 55 ("No money shall ever be paid out of the state treasury, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation made by law . . . ."); OR. CONST. art. IX, § 4 ("No money shall be drawn from the treasury, but in pursuance of appropriations made by law . . . ."); PA. CONST. art. III, § 24 ("No monies shall be paid out of the Treasury, except on appropriations made by law . . . ."); S.C. CONST. art. X, § 8 ("Money shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law."); S.D. CONST. art. XII, § 1 ("No money shall be paid out of the treasury, except upon appropriations made by law . . . ."); TENN. CONST. art. II, § 24 ("No public money shall be expended except pursuant to appropriations made by law . . . ."); TEX. CONST. art. VIII, § 6 ("No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law . . . ."); VA. CONST. art. X, § 7 ("No money shall be paid out of the State treasury except in pursuance of appropriations made by law . . . ."); WASH. CONST. art. VIII, § 4 ("No money shall ever be paid out of this state treasury, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation made by law . . . ."); W. VA. CONST. art. X, § 3 ("No money shall be drawn from the treasury but in pursuance of an appropriation made by law . . . ."); WIS. CONST. art. VIII, § 2 ("No money shall be paid out of the treasury except in pursuance of an appropriation made by law."); WYO. CONST. art. XVI, § 7 ("No money shall be paid out of the state treasury except upon appropriation by law.").

sury[673] or have retained entirely unique clauses.[674]

With seeming uniformity, state courts have defined their constitutions' appropriations clauses to mean that legislatures alone possess the authority to spend public funds. The common understanding in the states is that legislative control of the purse is the keystone of representative democracy and essential to preventing executive despotism. For example, the California Supreme Court declared in *Humbert v. Dunn*:

> The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the constitution of the United States. Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government . . . . It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament . . . ; and the system worked so well in correcting the abuses complained of, our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union. To the legislative department of the government is

673. DEL. CONST. art. VIII, § 6(a) ("No money shall be drawn from the treasury but pursuant to an appropriation made by Act of the General Assembly."); ILL. CONST. art. VIII, § 2(b) ("The General Assembly by law shall make appropriations for all expenditures of public funds by the State."); N.M. CONST. art. IV, § 30 (Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature."); N.D. CONST. art. X, § 12 ("All public moneys . . . shall be paid out and disbursed only pursuant to appropriations first made by the legislature . . . ."); VT. CONST. ch. II, § 27 ("No money shall be drawn out of the Treasury, unless first appropriated by act of legislation.").

674. MASS. CONST. pt. 2, ch. 2 § 1, art. XI ("No monies shall be issued out of the treasury of this commonwealth , and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."); N.H. CONST. pt. 2, art. LVI ("No moneys shall be issued out of the treasury of this State, and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the State; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.").

> entrusted the power to say to what purposes the public funds shall be devoted in each fiscal year . . . .[675]

To similar effect is the decision of the Indiana Supreme Court in *Ristine v. State* ex rel. *Board of Commissioners*, in which the court, referring to the struggles in seventeenth century England over control of the purse, concluded:

> The system established was, that all the money in the treasury was to be specifically appropriated and specifically applied. This new and important principle, as English historians call it, thus practically established in that country, is adopted in this State as part of our fundamental law. "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." And the abuse to corrected by the establishment of the principle, was the exercise of official discretion in paying out the public money. The purpose to be accomplished, was the giving to the legislative power *alone* the right, and imposing upon it the duty, of designating periodically, the particular demands against the State, or other objects, to which the moneys in the treasury shall be, from time to time, applied, and the amount to each.[676]

The Nevada Supreme Court expressed the identical view of the power of the purse in *State* ex rel. *Davis v. Eggers*, stating:

> As the fruit of the English revolution in 1688, which sent the king to Versailles and changed the succession to the throne, [the appropriations clause] had its origin in the British Parliament when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations made by Parliament . . . . The provision that no moneys shall be drawn from the treasury but in consequence of appropriations made by law requires that their expenditure shall first be authorized by the legislature, which stands as a representative of the people.[677]

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675. 84 Cal. 57, 59, 24 P. 111, 111-12 (1890).
676. 20 Ind. 328, 336 (1863) (emphasis in the original).
677. 29 Nev. 469, 474-75, 91 P. 819, 820 (1907).

Nor have state courts hesitated to uphold legislative control of appropriations in the face of attempted encroachments by state governors. In *Colorado General Assembly v. Lamm*,[678] the governor—citing an emergency—claimed authority to transfer funds appropriated for one executive department to another.[679] In making this claim, the governor relied on arguments closely analogous to those asserted by proponents of an independent presidential spending authority. First, the governor asserted the authority to transfer funds between appropriations based upon his inherent constitutional authority to administer the executive branch of the state government.[680] Second, the governor contended that the state's appropriations clause[681] gave him authority to transfer funds between appropriations.[682]

The Colorado Supreme Court flatly rejected the governor's arguments, holding that the legislature's control over the expenditure of state money was exclusive:

> We conclude that the transfers between executive departments here undertaken impermissibly infringed upon the General Assembly's plenary power of appropriation, and, therefore, cannot be deemed to fall within the inherent authority of the Governor over the state budget. However accurate the perception of the executive branch that emergency conditions existed might have been, the means ultimately chosen in good faith to remedy those conditions were not within the inherent authority of the chief executive.[683]

Even in those states whose constitutions do not include an appropriations clause, state courts have been unwilling to find an inherent executive

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678. 700 P.2d 508 (Colo. 1985).

679. *Id.* at 508. The governor directed the transfer of about $2.5 million from the accounts of various departments to the Department of Corrections. *Id.* The governor deemed the transfers essential because the legislature was not in session and because the state had to comply with a federal court order and complete construction of a new maximum security facility. *Id.* at 711, *citing* Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979), *aff'd*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). The governor also directed, on his own authority, the expenditure of funds received by the state in a court settlement with Standard Oil of California. *Id.* at 513.

680. *Id.* at 519.

681. COLO. CONST. art. V, § 33: "No moneys in the state treasury shall be disbursed therefrom by the treasurer except upon appropriations made by law, or otherwise authorized by law . . . ."

682. *Colorado General Assembly*, 700 P.2d at 522.

683. *Id.* at 522-23.

authority to spend public moneys without prior legislative approbation. In *Colbert v. State*,[684] the Mississippi Supreme Court addressed the asserted authority of the governor to call in bonds before they were due. The governor claimed that the expenditure of state funds to satisfy the bonds fell within the power vested in him by the state constitution. Although Mississippi's 1890 constitution did not contain an appropriations clause,[685] the court refused to hold that the governor had the discretion to direct the expenditure of state funds without legislative approval, deeming such an assertion of authority to be wholly inconsistent with republican government:

> It is maintained on behalf of the state with great earnestness and force of reasoning that the discretion reserved to the state was an executive discretion, pertaining strictly to the executive department of the government, belonging by its very nature, to that particular magistracy, and not requiring any legislative grant to vest in the governor as chief executive. We cannot concur in this opinion. We have not so learned the law. The principle contended for is contrary to the genius of republican government. Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function; indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and not to be surrendered or abridged, save by the constitution itself, without disturbing the balance of the system and endangering the liberties of the people.[686]

The court refused to read the absence of an appropriations clause as overturning the fundamental precept of legislative control over the purse:

> We cannot be persuaded that the omission from the constitution of 1890 of [an appropriations clause] indicates a purpose upon the part of the great jurists and publicists who framed the instrument to abrogate this essential principle of constitutional govern-

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684. 86 Miss. 769, 39 So. 65 (1905).

685. *Id.* at 777. Mississippi's constitutions of 1817, 1832, and 1868 included appropriations clauses. MISS. CONST. of 1817, art. VI, § 8 ("No money shall be drawn from the treasury, but in consequence of an appropriation made by law . . . ."); MISS. CONST. of 1832, art. VII, § 7 ("No money shall be drawn from the treasury but in consequence of an appropriation made by law . . . ."); MISS. CONST. of 1868, art. IV, § 26 ("No money shall be drawn from the treasury except on appropriations made by law.").

686. *Colbert*, 86 Miss. at 775.

> ment . . . . [W]e are constrained to believe that the constitution regards the legislature as the sole repository of power to make appropriations of money to be paid out of the state treasury. We can no more infer the possibility of an appropriation by executive action of moneys for the payment of public debts than we could the levying of taxes by executive action for the same purpose. If the one may be inferred, the other may also, and thus the entire constitutional scheme for legislative control over the public revenues be subverted.[687]

These are not isolated examples: states have uniformly interpreted their constitutional schemes—particularly their appropriations clauses—to command exclusive legislative supremacy over the power of the state purse.[688] When considered in conjunction with the identical interpretation that federal courts have given the appropriations clause in the United States Constitution, the fact that not one state has construed its charter to permit an independent executive authority to expend public funds is powerful indicia that such a power simply does not exist—nor has ever existed—in American government.

IV. Presidential Options in the Absence of Appropriations

As seductive as the thought may be, when operational lawyers are without statutory appropriations authority for non-traditional military operations, reliance on an inherent presidential funding power is not an acceptable alternative. All expenditures must be predicated upon an explicit legislative foundation. The notion that a President may spend or obligate funds on his own inherent authority is pure myth.

What options, then, does the executive have when confronted with an essential mission and no congressional authority to pay for it? Aside from innovative applications of the existing statutory framework,[689] the most obvious alternatives are either entreaties to Congress for the required funding authority or abandonment of the operation.

The executive followed both paths in deciding upon a means of building the road from Sarajevo to Gorazde mandated by the Bosnia Peace Accords.[690] With regard to the armed forces' participation in building the road, after toying with and rejecting the notion of an independent presidential spending authority, U.S. military involvement was ultimately forsaken

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687. *Id.* at 778-79.

688. *See, e.g.*, Opinion of the Justices, 244 Ala. 386, 13 So.2d 674, 677 (1943) (legislative authority over appropriations cannot be delegated); Crane v. Frohmiller, 45 Ariz. 490, 496, 45 P.2d 955, 958 (1935) ("[L]egislature is supreme in matters relating to appropriations."); Dickinson v. Clibourn, 125 Ark. 101, 105, 187 S.W. 909, 910 (1916) (primary purpose of appropriations clause is to prevent the expenditure of public money absent legislative enactments); Myers v. English, 9 Cal. 341, 349 (1858) ("[T]he power to collect and appropriate revenue of the State is one peculiarly within the discretion of the Legislature."); People *ex rel.* Hegwer v. Goodykoontz, 22 Colo. 507, 511, 45 P. 414, 416 (1896) ([T]he object of the appropriations clause "is to prohibit the expenditures of public funds at the mere will and caprice of the crown or those having the funds in custody, without direct legislative sanction therefore . . . ."); State v. American Fed'n of State, County, & Mun. Employees, 298 A.2d 362, 367 (Del. Ch. 1972) (constitution forbids spending public funds without appropriation and the power to appropriate cannot be delegated); State *ex rel.* Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (1935) ([T]he appropriations clause gives to the legislature "the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government."); Gurnee, Jr., & Co. v. Speer, 68 Ga. 711, 712 (1882) (treasurer has no authority to expend public money without an appropriation); Epperson v. Howell, 28 Idaho 338, 343-44, 154 P. 621, 623 (1916) ("[N]o money may lawfully be paid from the treasury except pursuant to an act of the legislature expressly appropriating it to the specific purpose for what it is paid."); West Side Org. Health Serv. Corp. v. Thompson, 73 Ill. App. 3d 179, 191, 391 N.E.2d 392, 402 (1979), *rev'd on other grounds*, 79 Ill. 2d 503, 404 N.E. 2d 208 (1980) ("[T]he General Assembly is vested with the ultimate authority to determine both the level and allocation of public spending."); May v. Rice, 9 Ind. 546, 547 (1883) (state auditor has no authority to draw money from the treasury without an appropriation made by law); Graham v. Worthington, 259 Iowa 845, 857, 146 N.W.2d 626, 635 (1966) ("It is for the General Assembly to enact laws governing expenditure of state funds . . . ."); Martin v. Francis, 13 Kan. 220, 228 (1874) (Appropriations clause means "that no money that may rightfully be in the State treasury shall be drawn therefrom except in pursuance of an act of the legislature specifically authorizing the same be done . . . ."); Commonwealth *ex rel.* Armstrong v. Collins, 709 S.W.2d 437, 441 (Ky. 1986) (Purpose of the appropriations clause "is to prevent the expenditure of the State's money without the consent of the General Assembly."); Department of Health & Hosps. v. Teachers' Retirement Sys., 665 So.2d 748, 752 (La. App. 1995) (citing lapse of appropriations and unavailability thereafter without legislative sanction as basis for finding irreparable injury to enjoin transfer of funds back to the treasury); Weston v. Dane, 53 Me. 372 (1865) (treasurer cannot pay out state money without an appropriation made by law); Kelly v. Marylanders for Sports Sanity, 310 Md. 437, 453, 530 A.2d 245, 252 (1987) (power to expend public money vested solely in legislature); Opinion of the Justices to the Senate, 302 Mass. 605, 612, 19 N.E.2d 807, 813 (1939) ("The power to appropriate money of the Commonwealth is a legislative power. Under the Constitution it can be exercised only by the General Court and in the particular manner prescribed."); Musselman v. Governor, 448 Mich. 503, 522, 533 N.W.2d 237, 246 (1995) (only legislature has the authority to appropriate funds from the treasury); State *ex rel.* Chase v. Preus, 147 Minn. 125, 179 N.W. 725 (1920) (legislature must approve appropriation of state funds); State *ex rel.* Blakeman v. Hays, 49 Mo. 604, 605 (1872) (Treasurer can pay out state funds "only and as, the law-making power shall direct."); State *ex rel.* Journal Publ'g Co. v. Kenney, 9 Mont. 389, 396-97, 24 P. 96, 97 (1890) (tracing legislative control of purse to Magna Carta and English Bill of Rights, deems appropriations power exclusively legislative); State *ex rel.*

Pearson v. Cornell, 54 Neb. 647, 656, 75 N.W. 25, 28 (1898) ("The constitution forbids the drawing of a single dollar from the state treasury except when authorized to do so by specific appropriation."); Norcross v. Cole, 44 Nev. 88, 91-92, 189 P. 877, 877 (1920) ("Except as limited by the constitution, the legislature has plenary power in authorizing the expenditure of public funds for public purposes."); Opinion of the Justices, 75 N.H. 624, 626, 75 A. 99, 100 (1910) ("[I]t is clear that the governor has no authority to draw his warrant upon the treasury in a particular case, unless there is some existing act or resolve of the legislature authorizing such payment."); City of Camden v. Byrne, 82 N.J. 133, 148, 411 A.2d 462, 469 (1980) ("New Jersey courts have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government."); Gamble v. Velarde, 36 N.M. 262, 266, 13 P.2d 559, 562 (1932) (Appropriations clause "is to insure legislative control, and to exclude executive control, over appropriations."); People v. Tremaine, 252 N.Y. 27, 38, 168 N.E. 817, 820 (1929) ("It is . . . so well settled that the State Legislature is supreme in all matters of appropriations that the recital of the details of the strife for legislative supremacy would serve no useful purpose"); State v. Davis, 270 N.C. 1, 4, 153 S.E.2d 749, 758, *cert. denied*, 389 U.S. 828 (1967) (Appropriations clause "states in language no man can misunderstand that the legislative power is supreme over the public purse."); Campbell v. Towner County, 71 N.D. 616, 623, 3 N.W. 2d 822, 825 (1942) (legislature must appropriate funds for there to be disbursements by the treasurer); State v. Medbery, 7 Ohio St. 522, 528 (1857) ("The sole power of making appropriations of the public revenue is vested in the General Assembly."); Edwards v. Childers, 102 Okla. 158, 160, 228 P. 472, 474 (1924) (appropriations clause intended to curb executive, not legislative discretion); Brown v. Fleischner, 4 Or. 132, 136 (1871) (treasurer has no authority to pay warrant except upon appropriation made by law); Shapp v. Sloan, 480 Pa. 449, 468-69, 391 A.2d 595, 604 (1978) (governor has no authority to spend appropriation for one program on another); *In re* Advisory Opinion to the House of Representatives, 485 A.2d 550, 553 (R.I. 1984) (implying that the appropriations authority belongs exclusively to legislature, except as restricted by the federal or state constitution); Butler v. Ellerbe, 44 S.C. 256, 22 S.E. 425 (1895) (assumes legislative authority to appropriate); Cutting v. Taylor, 3 S.D. 11, 17, 51 N.W. 949, 951 (1892) ("With the legislature rests the right and the duty to provide for disbursing the public funds."); State *ex rel.* Weldon v. Thomason, 142 Tenn. 527, 534-35, 221 S.W. 491, 493 (1919) (legislature has plenary authority to appropriate funds and is not answerable to the coordinate branches of government); Terrell v. Middleton, 108 Tex. 14, 30-39, 191 S.W. 1138, 1148-49 (1917) (Hawkins, J., concurring) (legislative power over appropriations exclusive and cannot be delegated); City of Montpelier v. Gates, 106 Vt. 116, 121, 170 A. 473, 474 (1934) (Appropriations clause "is not and was not intended to be a restriction on the power of the Legislature over public revenue. It is the province of that body to cast the appropriation in a mold of its own making."); State *ex rel.* Peel v. Clausen, 94 Wash. 166, 173, 162 P. 1, 4 (1917) ("It is well understood that [appropriations clauses]—and they are common to most, if not all, of our written constitutions—are mandatory, and that no moneys can be paid out without the sanction of the legislative body."); Mellon-Stuart Co. v. Hall, 178 W. Va. 291, 296 n.8, 359 S.E.2d 124, 129 n.8 (1987) ("[T]he legislature alone is empowered to appropriate State funds."); State *ex rel.* Bd. of Regents v. Zimmerman, 183 Wis. 132, 139, 197 N.W. 823, 826 (1924) ("So long as the legislature keeps within the limits of the state and federal constitutions and the treaties of the land its power to appropriate public money is almost unbounded."); State *ex rel.* Henderson v. Burdick, 4 Wyo. 272, 276, 33 P. 125, 126 (1893) (citing appropriations clause, deems phrase "appropriations made by law" equivalent to "appropriations made by the Legislature").

as unachievable under existing funding authorities.[691] In the meantime, the Department of State secured congressional authorization for funding a basic surface road.[692] The cost of the permanent paved road was left to international donors.[693]

Failing to acquire congressional funding for an operation, the executive may also turn to reimbursable funding authorities, which permit DOD to provide needed military support by shifting funding responsibility either to other federal agencies[694] or to the international community.[695] The latter

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689. Two of the examples at the beginning of the article are illustrative. *See supra* notes 7-13 and accompanying text. With regard to rebuilding the Haitian judiciary, civil affairs personnel—who are statutorily designated special operations forces (10 U.S.C. § 167(j)(5))—conducted the mission under 10 U.S.C. § 2011, which authorizes DOD O&M funding for special operations force training of a friendly nation's security forces, which DOD deemed to include a country's judiciary. *See generally* Memorandum from Walter B. Slocombe, Under Secretary of Defense for Policy, to Asst. Adm'r for Latin America and the Caribbean, U.S. Agency for Int'l Dev., subject: Judicial Mentors Program-Haiti (Feb. 19, 1995) (copy on file with author). The Department of Defense furnished tennis shoes, recreational equipment, and other comfort items to refugees at Guantanamo using the Chairman of the Joint Chiefs of Staff's CINC Initiative Fund, 10 U.S.C. § 166a, which is the Chairman's contingency account for the emergent requirements (such as contingency operations) of the commanders of the unified commands (10 U.S.C. §§ 161-66). The purchase of the recreational and comfort items was essential to preserving peace in the refugee camps and, consequently, to the security and safety of U.S. forces running the facilities.

690. *See supra* notes 3-6 and accompanying text.

691. Except for U.S. participation as part of an overall NATO mission to survey the route to ensure NATO protection for future construction efforts. *See* Message from Secretary of Defense to Commander in Chief, European Command, subject: Public Affairs Guidance—U.S. Engineers to B-H for Survey of Gorazde Road (May 3, 1996).

692. *See generally* Christopher Bellamy, *Long Winding Road that Opens Up an Isolated Enclave*, THE INDEPENDENT (LONDON), Oct. 8, 1996, at 12 (1996 WL 13494862).

693. *Gorazde Awaits Peace Dividend—And Highway Heaven*, AGENCE FRANCE-PRESSE, June 23, 1996 (1996 WL 3876693); Tom Squitieri, *Muslim Enclave Looks for Peace in Serb Territory*, USA TODAY, Jan. 25, 1996, at 7A.

694. Illustrative statutory mechanisms are the Economy Act, 31 U.S.C. § 1535, which permits one federal agency to place an order for goods and services with another federal agency, or section 632 of the Foreign Assistance Act, 22 U.S.C. § 2392, which authorizes, inter alia, the State Department to use its funds to obtain DOD's support under Foreign Assistance Act or Title 10 authorities.

695. Several statutory means exist for reimbursable support. Two more commonly used are section 607 of the Foreign Assistance Act, 22 U.S.C. § 2357, which allows federal agencies to furnish materiel and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis, and sections 21 and 22 of the Arms Export Control Act, 22 U.S.C. §§ 2761-62, under which other nations and the UN may enter foreign military sales contracts with the United States to purchase defense articles and services. *See generally* DEFENSE MANAGEMENT INSTITUTE, THE MANAGEMENT OF SECURITY ASSISTANCE 43 (1995).

approach is exemplified by the United States' Exercise Fairwinds in Haiti, by which U.S. military engineers have assisted in the reconstruction of the Haitian infrastructure—notably its roads and water-distribution system—while passing on the costs to non-U.S. sources.

Shortly after its intervention in Haiti, the United States considered various approaches to contributing visible support to the newly restored, democratically elected government, particularly refurbishment of its physical infrastructure. The U.S. military has organic engineering capabilities, which can furnish both the expertise and manpower needed to accomplish such a mission. Moreover, by deploying to Haiti, U.S. military engineers gain invaluable training in an austere environment unavailable in the United States.[696] Statute, however, explicitly prohibits using any appropriated funds for construction absent specific congressional authorization.[697] The General Accounting Office has previously opined that—no matter how valuable the training opportunity—the U.S. military may not engage in construction activities absent explicit statutory authority.[698]

Under the Humanitarian and Civic Assistance (HCA) program, DOD has limited statutory authority to provide construction assistance in developing nations; however, the assistance is limited to such basic construction—performed in conjunction with military operations—as building rudimentary surface transportation systems (*e.g.*, dirt roads) and drilling wells.[699] The engineering support needed to rebuild Haiti's physical infrastructure greatly exceeded the rudimentary assistance permitted under the HCA program.[700] Consequently, to fund the construction, DOD turned to a reimbursable funding authority—section 607 of the Foreign Assistance Act[701]—which authorizes federal agencies to furnish commodities and ser-

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696. *See generally* Letter from President William J. Clinton to the Speaker of the House of Representatives & the Speaker pro tempore of the Senate, *in* 32 WEEKLY COMP. PRES. DOCS. 542 (Mar. 21, 1996); Thomas W. Lippman, *U.S. Plans to Bolster Haiti Forces*, WASH. POST, Nov. 26, 1995, at A-1; *Haiti—U.S. Begins Training Deployments*, PERISCOPE, July 26, 1996.

697. 41 U.S.C. § 12 (1994): "No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury *appropriated for the specific purpose*" (emphasis added).

698. 63 Comp. Gen. 422 (1984).

699. 10 U.S.C. § 401(e) (1994).

700. Memorandum from Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, to Director, J-7, subject: Scope of Permissible Road Construction under Humanitarian & Civic Assistance (HCA) (Dec. 5, 1995) (copy on file with author).

701. 22 U.S.C. § 2357 (1994).

vices to friendly countries and international organizations on an advance-of-funds or reimbursable basis. Using section 607, the United States and Haiti entered a formal agreement whereby U.S. engineer units deployed for training (at U.S. expense) and Haiti paid the incremental costs of construction performed by the units (primarily using money furnished by the international community).[702]

Finally, if a situation is sufficiently grave and an operation is essential to national security, the President has the raw, physical power—but not the legal authority—to spend public funds without congressional approval, after which he or she can either seek congressional approbation or attempt to weather the resulting political storm. To the President's immediate advantage is the fact that the only sure means of directly stopping such unconstitutional conduct is impeachment.[703] Congress could, however,

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702. *See* Agreement Between the Department of Defense and the Government of Haiti Concerning the Provision of Support on a Reimbursable Basis to Assist in the Restoration of Democracy, Order and Economic Stability in Haiti (1995). The Department of Defense also furnished logistical support to the United Nations in Haiti under FAA § 607. *See* Agreement Between the United States and the United Nations Organization Concerning the Provision of Assistance on a Reimbursable Basis in Support of the Operations of the United Nations in Haiti (1994), *in* WALTER GARY SHARP, JR., UNITED NATIONS PEACE OPERATIONS 308 (1995). Another example is the United States' agreement to serve as the "Role Specialist Nation" (RSN) to provide bulk petroleum products to IFOR nations in Bosnia. Participating nations paid for the petroleum through the foreign military sales program, AECA § 22, 22 U.S.C. § 2762 (1994). *See* Message from Secretary of Defense to Department of the Army, subject: IFOR—Provision of Class III Bulk (POL) Support to IFOR Participants (Dec. 6, 1995). By designating one nation to acquire petroleum products, NATO prevented IFOR participants from competing against each other for petroleum purchases, thereby driving up prices. *See generally* Message from Joint Staff to Supreme Headquarters Allied Powers Europe, subject: Class III Role Specialist Nation (RSN) (Dec. 8, 1995).

703. *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500-01 (1866); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838). A President who intentionally expends public funds without an appropriation made by law likely commits an impeachable offense. Criminality, in the term's strict sense, is not a prerequisite. Serious and intentional disregard for the law, including encroachments on legislative prerogatives, constitute likely grounds for impeachment. *See* TRIBE, *supra* note 624, at 291; JOHN R. LOBOVITZ, PRESIDENTIAL IMPEACHMENT 126-31 (1978). While the President could also be indicted for violating the Anti-Deficiency Act, 31 U.S.C. § 1530 (1994), nothing on the face of the Constitution prohibits a President from pardoning himself or herself in the event of such a prosecution, with the exclusion of impeachment proceedings. U.S. CONST. art. II, § 2, cl. 1. Some have argued, however, that implicit in the pardon power, is a prohibition against presidential self pardons. *See* Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 781 (1996); *see also* James V. Jorgenson, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345 (1993) (advocating limits on pardon power to prevent President from escaping accountability for illegal acts).

certainly make a President's life miserable through other means, such as denying requested legislation or appropriations, delaying confirmation of presidential appointments, and conducting public investigations into the President's actions.

While a lawyer's natural tendency is to turn to the judiciary in the event of such unconstitutional behavior, the courts represent little more than "speedbumps" to a President determined to ignore the law. Other than moral suasion, federal courts are powerless to stop a President intent on disregarding their judgments.[704] The federal judiciary, in this regard, is akin to the Vatican, about which Joseph Stalin once derisively asked: "The Pope! How many divisions has *he* got?"[705]

The political, not the judicial, process is the ultimate check on a President intent on violating the Constitution; in the end, Congress must protect its own constitutional turf.[706] Writing in dissent in *Korematsu v. United States*,[707] Justice Jackson recognized the limits of judicial power:

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704. I do not mean to slight the "moral force" of the federal judiciary, which has made it the supreme "source of constitutional dogma." JACKSON, *supra* note 666, at x; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 29-33 (1962) (describing the "mystic function" of the Supreme Court). Should a President choose to ignore a court's command, however, the court is physically incapable of compelling compliance with its order. JACKSON, *supra* note 666, at ix. This is the lesson of *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487), in which military officers at Fort McHenry, Maryland, acting upon Lincoln's suspension of habeas corpus, intentionally disobeyed a writ of habeas corpus issued by Chief Justice Taney and barred from the fort the marshal who attempted to serve it. Taney acknowledged his impotence in producing compliance with the writ, stating: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." *Id*. at 153; *see also* Michael Stokes Paulsen, *The* Merryman *Power & the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 105 (1993) ("Supreme Court (and lower court) judgments are enforced by the executive branch as the law of the land only because (and only so long as) *the executive branch* decides to treat them that way.") (emphasis in the original).

705. JOHN BARTLETT, FAMOUS QUOTATIONS 638 (16th ed. 1992) (emphasis in original). Closer to home is the famous and perhaps apocryphal story of President Andrew Jackson's reaction to the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). When told of the ruling, Jackson reportedly declared: "John Marshall has made his decision, now let him enforce it." MARQUIS JAMES, THE LIFE OF ANDREW JACKSON 603 (1938).

706. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

707. 323 U.S. 214 (1944).

> But I would not lead people to rely on this Court for a review that seems to me wholly delusive . . . . The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.[708]

On the other side of Pennsylvania Avenue, irrespective of either their innate physical ability to draw funds from the Treasury or the circumstances that impel them to do so, presidents who spend without statutory authority do so unconstitutionally. Admittedly, in times of national emergency, the American people may expect their presidents to take all steps necessary (even though illegal) to preserve the nation and its citizens. As President Lincoln observed in referring to the extreme measures taken during the Civil War: "Was it possible to lose the nation and yet preserve the Constitution?"[709]

That a President's unlawful actions may be compelled by a national emergency does not, however, provide a legal safety-net. Emergencies neither create power[710] nor "redistribute the powers of government allocated by the Constitution."[711] Like Jefferson and Lincoln, presidents who deem it essential to spend public funds without an appropriation must be willing to put their offices on the line and either seek congressional ratification of the expenditure or be prepared to accept the adverse consequences of their actions, including eviction from the White House.

> There are certain circumstances which constitute a law of necessity and self-preservation and which render the *salus populi* supreme over the written law. The officer who is called to act upon this superior ground does indeed risk himself on the justice of the controlling powers of the Constitution, but his station makes it his duty to incur that risk. As for Congress, when expenses are incurred without its sanction, it is discretionary with it to approve or disapprove the conduct of the officer con-

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708. *Id.* at 248.

709. Monaghan, *supra* note 92, at 37 n.171, *citing* Alexander J. Groth, *Lincoln & the Standards of Presidential Conduct*, 22 PRES. STUD. Q. 765, 766 (1992).

710. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934); *see also Youngstown Sheet & Tube*, 343 U.S. at 650-51; *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120 (1866); The Apollon, 22 U.S. (9 Wheat.) 362 (1824). Justice Sutherland's dissent in *Blaisdell* is especially apropos: "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned. 290 U.S. at 483.

711. WORMUTH & FIRMAGE, *supra* note 326, at 12.

> cerned. If it approves, a bill is passed to cover the expenditure; if it disapproves, the officer must bear the loss or disgrace.[712]

Consequently, if all else fails and an operation is sufficiently important to national security, operational lawyers may turn to the President to direct the expenditure of funds without congressional authorization; however, in doing so, they must realize that the President gives such direction in certain contravention of the Constitution and, absent subsequent congressional approbation, places the office at risk.

V. Conclusion

As U.S. military involvement in non-traditional operations accelerates and the novelty of missions proliferates, operational lawyers will be confronted increasingly with the challenge of discovering lawful mechanisms for funding the operations. Discerning innovative means of applying existing authorities, turning to other agencies or the international community for financial support, and pursuing congressional authorization for operations where none exists constitute the paths operational lawyers are destined to follow in meeting the challenge.

Looming in the background—ever present—is the siren song of an inherent presidential spending power. In time of crisis, when pressure to discover a spending source becomes crushing, the song is extraordinarily

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712. WILMERDING, *supra* note 468, at 12. Writing several years later, Professor Wilmerding re-emphasized the point:

> The Founding Fathers, it is important to understand, were not "so strait laced, as to let a nation die or be stifled, rather than it should be helped by any but the proper officers." On the contrary, they thought it incumbent on those who accept great charges to risk themselves on great occasions, when the safety of the nation or some of its high interests were at stake. But—and here is the significant point—they never confounded acts which the law says may be lawfully done in a case of necessity with acts done in violation of the law for the public good. They never presented that acts of the latter type were legal acts. When, in some cases of urgent necessity, they ventured to act without law or against law, they boldly took a responsibility; they ran the risk of the law, sometimes the risk of their fortune in damages; then they hastened to acknowledge on the records of the legislature that they had done a thing, meritorious indeed, but illegal; and asked the legislature to cover them with an indemnity.

Wilmerding, *The President & the Law*, *supra* note 456, at 322-23 (footnote omitted); *see also* Lobel, *supra* note 548, at 1389-90; Monaghan, *supra* note 92, at 36, 38; *supra* notes 548-49, 556, and accompanying text.

alluring—the temptation to rely upon such authority very real. But the notion that the President is constitutionally empowered to spend public funds without congressional authorization is fantasy. Albeit interesting grist for the law review and academic seminar circuit, it is hardly an authority upon which operational lawyers should rely in advising the nation's civilian and military leadership. Nothing in the text, history, practice, or judicial construction of the Constitution leads to any other conclusion.

To be sure, emergencies may arise that so threaten U.S. interests as to make immediate action—including spending without congressional authority—imperative. In such situations, the President may find it essential to direct spending without an appropriation made by law. But the President, and those who advise the President, should recognize that such expenditures contravene the clear and explicit terms of the appropriations clause and are patently unconstitutional. When emergencies necessitate spending without prior congressional approval, the President must be prepared to seek subsequent congressional ratification or face the political consequences of the unlawful conduct.