THE PRESIDENT'S POWER OF THE PURSE

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INTRODUCTION

During the Reagan administration, Congress discovered that it could intimidate the executive branch by uttering again and again the same seven words, "Provided, that no funds shall be spent . . . ." This limitation, attached to numerous appropriations bills, enabled Congress, under the guise of protecting the public fisc, to frustrate the President's ability to perform his duties and exercise his prerogatives under the Constitution.

The predicate for this encroachment by Congress on the Presidency lies in the appropriations clause: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . ."[1] Despite the importance of enabling public officials to spend money or incur debts in the name of the federal government, this provision in the Constitution is one of the least scrutinized. In a recent article entitled *Congress' Power of the Purse*,[2] Professor Kate Stith of Yale Law School argues that the Constitution prohibits the "expenditure of any public money without legislative authorization."[3] This proposition, which she calls the "Principle of Appropriations Control,"[4] is an elaboration on a theory of the appropriations clause espoused during the Iran-Contra hearings and in myriad appropriations laws.[5] This theory encompasses far more than fiscal responsibility; it envisions the appropriations power as an omnipresent legislative veto on presidential action, thereby fostering what Professor Stith calls "[t]he genius of regulating executive branch activities by limitations on appropriations . . . ."[6]

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1. U.S. CONST. art. I, § 9, cl. 7.

2. Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

3. *Id.* at 1345.

4. *Id.*

5. *See infra* text accompanying notes 26-34, 194-233.

6. Stith, *supra* note 2, at 1360. A similar, but less ambitious, articulation of this theory of the appropriations power is Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 8 AM. J. INT'L L. 758 (1989). Louis Fisher is a specialist on the separation of powers at the Congressional Research Service and assisted in preparing the *Iran-Contra Report*. Professor Stith also introduces a "Princi-

Professor Stith's theory of the appropriations power is flawed for a number of reasons. Part I of this Article examines the text and history of the appropriations clause and shows that the text of the clause is more ambiguous than commonly believed and that historical support for reading the clause to be a legislative veto on presidential action is dubious at best. A better view of the historical record shows that the appropriations clause was most likely intended to ensure fiscal responsibility and accountability. Part II argues, in direct contrast to Professor Stith's theory, that the President, without violating the Constitution or statutory law, may obligate the Treasury provided that Congress has failed to appropriate the minimum amount necessary for him to perform the duties and exercise the prerogatives given him by article II of the Constitution. I claim no originality of authorship, for the theory that I articulate here has been advanced in one form or another by Presidents and their Attorneys General since the Presidency of George Washington.[7] Part III then examines the limiting principles that constrain the President's implied power to spend public funds under this theory. And Part IV demonstrates how Congress has tried to use the appropriations power to impose unconstitutional conditions on the President's performance of his constitutional duties and exercise of his prerogatives. It will be shown that

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ple of the Public Fisc," which asserts that "all monies received from whatever source by any part of the government are public funds." Stith, *supra* note 2, at 1345. Although I do not agree with all implications that Professor Stith draws from this proposition, I accept its basic validity.

7. Throughout this Article, I rely (as does Professor Stith in *Congress' Power of the Purse*) on the authority of the published opinions of the Attorney General or the Office of Legal Counsel (OLC) in the Department of Justice (as well as veto messages of the Presidents, which often are prepared or at least reviewed by OLC). Some constitutional scholars believe that these opinions are insubstantial or lack objectivity, and consequently deserve little weight in scholarly analysis. *See, e.g.*, Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1231 (1988). I disagree for two reasons. First, these opinions represent official interpretations of the Constitution by one of the three branches of the federal government. Therefore, they should be entitled to considerable weight when the Department of Justice is interpreting the powers of the President under article II. Their probable bias, which is entirely predictable, does not limit their usefulness.

Second, these opinions often are harbingers of theories that the Court itself ultimately will embrace, as I show in the text of my argument. The Court never gets to opine on many separation of powers problems that, despite the granting of standing to Members of Congress, end up being resolved politically rather than legally. *Cf.* Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985) (members of House of Representatives have standing to challenge President's attempted pocket veto of legislation). On the other hand, the Attorney General can provide advisory opinions on separation of powers problems relatively quickly. These opinions form a valuable stock of precedent, even if it is not judicially created.

One also cannot ignore that many members of this and prior Courts (Justices Rehnquist, Scalia, Jackson, and Thurgood Marshall, for example) served in high positions in the Justice Department before elevation to the Court. Other Justices, like John Marshall, were Cabinet secretaries before the birth of the Justice Department; and indeed Justice Taft was formerly the President. I like to think that it was *because* these lawyers from the Executive Branch had wisdom on constitutional controversies that they were asked by the President and the Senate to start publishing their opinions in the *U.S. Reports*.

these efforts, if successful, undermine the unitary Executive sought by the Framers.

Part V argues that Professor Stith reads the appropriations clause so broadly that it would replace the unitary Executive with a plural one, thereby swallowing the principle of the separation of powers. Part VI examines the exception with which Professor Stith proposes to cure the absence of a limiting principle in her Principle of Appropriations Control. She argues that necessity might justify the President spending public funds in the absence of appropriations. However, I argue that a justification of necessity might make lawless spending by the President more likely to occur.

In conclusion, I argue that the fundamental principle animating the Constitution—the separation of powers—dictates a unitary Executive, and that a unitary Executive cannot tolerate congressional encroachments that, under the pretext of guarding the public purse, deny the President the funds necessary to perform the duties and exercise the prerogatives conferred on him by article II.

I. THE PROBABLE MEANING OF THE APPROPRIATIONS CLAUSE

The most plausible purpose of the appropriations clause is to encourage efficiency in the production of public goods by the federal government and to impose fiscal accountability on both Congress and the President. The people are entitled to know who spent how much of the public monies and for what purpose. Justice Joseph Story, writing in 1833 in his *Commentaries on the Constitution of the United States,* supports this interpretation of the appropriations clause: "The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money."[8] Admittedly, Justice Story recognized that the appropriations clause implicates the separation of powers, since "the executive would possess an unbounded power over the purse of the nation" in the absence of the clause and thus "might apply all its monied resources at his pleasure."[9] Still, Justice Story's principal focus seems to have been on the promotion of "unshrinking honesty" in the disbursement of public funds and the prevention of "profusion and extravagance."[10]

Of late, it has become fashionable to characterize the appropriations clause as a *power* of Congress—namely, the "power of the purse." The

8. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 681, at 486 (1833) (R. Rotunda & J. Nowak eds. 1987).

9. *Id.* This theme can be found in the history of Parliament's appropriation power in England. P. EINZIG, THE CONTROL OF THE PURSE 82-83 (1959).

10. J. STORY, *supra* note 8, § 681, at 486-87.

Congressional Record over the past decade contains literally hundreds of references to this phrase during debates over the appropriation of funds.[11] There is a sense, though, in which the "power of the purse" becomes a tautological concept as one interprets it more broadly. During the Constitutional Convention of 1787, James Wilson of Pennsylvania observed: "War, Commerce, & Revenue were the great objects of the Genl. Government. All of them are connected with money."[12] Speaking of money in a broader sense, David Hume wrote at the time of the American Revolution:

> Money is not, properly speaking, one of the subjects of commerce; but only the instrument which men have agreed upon to facilitate the exchange of one commodity for another. It is none of the wheels of trade: It is the oil which renders the motion of the wheels more smooth and easy."[13]

To say that it takes "money" (which is to say that it takes scarce resources of capital and labor) to operate a national government is to state the obvious and ignore why such inputs are needed—namely, to produce through collective action certain public goods that private parties acting individually would be unlikely to produce. Thus, it is stretching the argument to the breaking point to assert that because it takes money to make public goods, Congress is entitled to regulate the production of each of them. It takes money for the Judiciary to decide cases or controversies, or for the President to negotiate treaties, but the necessity of certain inputs of capital and labor to the production of those public goods does not of consequence empower Congress to constrain or direct the exercise of discretion by the Judiciary or the President in the course of their respective functions under the Constitution.

This part analyzes the text and history of the appropriations clause to correct the misconception created by the popular notion of Congress's "power of the purse." As section A shows below, the references to the public "purse strings" found in the debates of the Constitutional Convention of 1787,[14] and the subsequent debates in the states over ratification

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11. *E.g.*, 135 CONG. REC. S949 (daily ed. Jan. 31, 1989); 134 CONG. REC. S11,198 (daily ed. Aug. 9, 1988); 133 CONG. REC. S10,663 (daily ed. July 24, 1987); 132 CONG. REC. H4853 (daily ed. July 24, 1986); 131 CONG. REC. H9551 (daily ed. Oct. 31, 1985).

12. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 445 (1840) (1966 ed.).

13. D. HUME, *Of Money*, in ESSAYS: MORAL, POLITICAL, AND LITERARY 281 (1777) (E. Miller rev. ed. 1987); *cf.* J. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 277 (1954) (money serves "the modest role of a technical device that has been adopted to facilitate transactions" involving goods and services).

14. *See, e.g.*, J. MADISON, *supra* note 12, at 444-45 (such references to the public purse strings are generally, as here, made in the context of raising public funds, not spending them); *see also infra* text accompanying notes 27-33.

of the Constitution, as demonstrated in section C,[15] support the conclusion that the current understanding of the "power of the purse" is overdrawn. This historical record, at a minimum, rebuts any claim that the Framers intended to give Congress a broad "power of the purse." This argument is buttressed by section B, which reviews the plan, rejected by the Framers, for a congressionally appointed treasurer; this provides more historical support for the proposition that Congress does not enjoy exclusive control of public monies. Finally, section D canvasses the history of the appropriations clause during the Presidency of George Washington and finds that, rather than being a source of congressional veto power, the appropriations clause was intended to be and initially did serve as a tool for fiscal responsibility.

A. *The Text and History of the Appropriations Clause*

The appropriations clause appears in section 9 of article I, the same section that enumerates various limitations on the use of federal legislative power such as the prohibitions against bills of attainder and ex post facto laws. None of the provisions in section 9 grant affirmative powers to Congress; rather, the enumerated powers of Congress appear in section 8. Therefore, simply as a matter of interpreting article I in an internally consistent manner, the appropriations clause should be seen as a further limitation on the legislative power. It cannot be cast as an enlargement of congressional power at the expense of the people, the states, or the other branches of the federal government. Furthermore, the constraint that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," represents something of a departure from the less specific language used in the Articles of Confederation, which provided: "The United States in Congress assembled shall have authority . . . to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses . . . ."[16] In light of this context, Congress's "power of the purse" under the Constitution more accurately would be described as the "duty to guard the purse."

The language of the appropriations clause and other provisions in the Constitution bears out this interpretation. Congress has the power to collect revenues by taxes, duties, imposts, and excises.[17] It also has the

15. *See* J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788, at 143-46 (1961) (detailing anti-federalist concerns along with amendments presented at state ratifying conventions); *see also infra* text accompanying notes 69-78.

16. ARTICLES OF CONFEDERATION art. IX, § 5, cl. 3.

17. U.S. CONST. art. I, § 8, cl. 1.

power to "borrow money on the credit of the United States."[18] Having taken possession of funds from these various sources, the federal government has a fiduciary duty to use the funds efficiently and to account to the people as to how these funds have been, or are going to be, used to advance a public purpose.[19] The need for such care was obvious by the middle 1780s, for the United States was heavily in debt;[20] as historian William Culbertson wrote, when Alexander Hamilton took office as the first Secretary of the Treasury, "[t]he finances of the country were a total wreck."[21] Thus, it is not surprising that the Framers included two provisions in the appropriations clause to give the government the means it needed to control its finances and advance the purposes of efficiency and fiscal accountability.

1. *"Appropriations made by Law."* The first such provision is the requirement that the drawing of public funds be made "in Consequence of Appropriations *made by Law.*"[22] This language imposes the simple but powerful requirement that public spending be governed by the rule of law.[23] In this respect, the appropriations clause simply reflects the ideal of Adams, Hamilton, and other Framers that, through the rule of law, the arbitrariness of government action can be restrained.[24] That there must be a showing of legal authority in order to draw funds from the Treasury ensures that the people will have notice of the spending decisions of government. If the appropriation of funds were solely a matter of political discretion, the use of such funds would be less amenable to scrutiny by the people.

But the phrase "in Consequence of Appropriations made by Law" also raises several questions that tend to be ignored by those who assert in a conclusory fashion a congressional "power of the purse." For exam-

18. *Id.* cl. 2. During the Revolutionary War, there was another form of implicit borrowing in the form of "certificates" (essentially IOUs) issued by the quartermasters and commissaries of the Continental Army upon the impressment of private goods and services. *See* E.J. FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790, at 57-69 (1961).

19. That the use of the funds must be for a public, rather than private, purpose would seem self-evident. However, the point has not always been obvious in the jurisprudence of the takings clause. *See* Epstein, *Takings: Descent and Resurrection,* 1987 SUP. CT. REV. 1, 5.

20. 1 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 264 (1901).

21. W. CULBERTSON, ALEXANDER HAMILTON: AN ESSAY 64 (1911).

22. U.S. CONST. art. I, § 9, cl. 7 (emphasis added).

23. An outstanding discussion of the rule of law in American constitutional history (upon which I rely in the following pages) is F. HAYEK, THE CONSTITUTION OF LIBERTY 162-92 (1960), which amplifies the discussion in F. HAYEK, THE ROAD TO SERFDOM 72-87 (1944). *See also* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 270-73 (1980); J. RAWLS, A THEORY OF JUSTICE 235-43 (1971).

24. *See* G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 56-63 (1970).

ple, even if one acknowledges that appropriations must be made under the rule of law, what sources of legal authority does the phrase "by Law" regard as legitimate? "Law" can consist of the Constitution, legislation, treaties, the common law, and contract.[25] But the conventional notion of Congress's "power of the purse" rests on an unstated (and unsubstantiated) assumption that "by Law" envisions only legislation.

This assumption, addressed in Part IV below, underlies the contemporary view of many Representatives and Senators that Congress may limit, through its decision to appropriate or withhold funds, the ability or discretion of the President to perform duties and exercise prerogatives explicitly imposed on him by the text of article II. This view acquired a certain imprimatur in November 1987, when the House and Senate jointly published the *Iran-Contra Report.*[26] The report asserted: "The power of the purse, which the Framers vested in Congress, has long been recognized as 'the most important single curb in the Constitution on Presidential Power.' "[27] The core of the congressional report's theory of the power of the purse is captured in the following statement: "The appropriations clause was intended to give Congress *exclusive* control of funds spent by the Government, and to give the democratically elected representatives of the people *an absolute check* on Executive action requiring expenditure of funds."[28]

In support of this proposition, the *Iran-Contra Report* relies not just on the appropriations clause as evidence on congressional control; it further cites the power (of the House) to raise revenues and related statements as evidence that Congress possesses a plenary "power of the purse," one that has roots beyond the appropriations clause. The *Iran-Contra Report,* to anchor its assertion of "exclusive control" of government funds, quotes James Madison's *Federalist No. 58* and a statement by George Mason during the Constitutional Convention of 1787. Neither source, however, supports the proposition that the Framers intended Congress to have exclusive control over the expenditure of funds by another branch or an "absolute check" on the President's ability to

25. *See, e.g.,* H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961); J. RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 213 (1979).

26. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987) [hereinafter IRAN-CONTRA REPORT].

27. *Id.* at 411 (quoting E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 101 (3th ed. 1975)).

28. *Id.* at 412 (emphasis added). This theory is presented as well in a subsequent article by a principal draftsman of the *Iran-Contra Report. See* Fisher, *supra* note 6, at 761-65.

act, based on the simple reason that his actions might be characterized as requiring the expenditure of public funds.

The *Iran-Contra Report* notes that Madison wrote the following statements while explaining the tension between the House and the Senate:

> The House of Representatives alone can propose the supplies requisite for the support of government. They, in a word, hold the purse . . . . This power of 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.[29]

However, in the sentence quoted above that the *Iran-Contra Report* abbreviated with ellipses, Madison alluded to the potential threat to the separation of powers created by the broad power given the House to control the means for raising[30] (and thereby disbursing) revenues:

> 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 finally reducing, *as far as it seems to have wished,* all the overgrown prerogatives of the other branches of the government.[31]

Considering that the Framers were departing significantly from the British tradition of an unwritten constitution, and given the numerous statements elsewhere in the debates and in *The Federalist Papers* regarding the separation of powers, it seems far-fetched to suppose that Madison, so wary of the power of the House to control the raising of revenues, was endorsing in *The Federalist No. 58* the proposition that the House of Representatives, through the "power of the purse," ought to have exclusive power to judge when the balance of powers between the three branches (and between the House and the Senate) had reached the correct state of equipoise.

Furthermore, George Mason's remark at the Convention—that "[t]he purse and the sword ought never to get into the same hands whether Legislative or Executive"[32]—would seem on its face to undercut, rather than bolster, the extravagant claim of the *Iran-Contra Report* about the power conferred to Congress through its broadly defined "power of the purse." Indeed, the context of Mason's remark confirms this interpretation, for in the immediately preceding sentence he said:

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29. *Id.* (quoting THE FEDERALIST NO. 58, at 356, 359 (J. Madison) (C. Rossiter ed. 1961)); *see also* Fisher, *supra* note 6, at 761 (quoting same).

30. U.S. CONST. art. I, § 7, cl. 1.

31. THE FEDERALIST NO. 58, at 356, 359 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).

32. J. MADISON, *supra* note 12, at 81.

"The Executive power ought to be well secured [against] Legislative usurpations on it."[33] It is simply disingenuous for the drafters of the *Iran-Contra Report* to quote Mason's remark as support for the proposition that the appropriations clause "was intended . . . to give the democratically elected representatives of the people"—though the *Report* seems to ignore that the President is also a democratically elected representative—"an absolute check on Executive action requiring expenditures of fund."[34]

Another approach to disambiguating the phrase "in Consequence of Appropriations made by Law" is to ask whether the phase implies that only Congress may appropriate funds, as the *Iran-Contra Report* asserts. This is really another way of asking whether "Law" for purposes of the appropriations clause means just legislation. As Hamilton observed in *The Federalist No. 71,* "It is one thing to be subordinate to the laws, and another to be dependent on the legislative body."[35] It might seem obvious that, since the appropriations clause is placed in article I, it must be referring only to legal action taken by Congress. For example, Louis Fisher writes: "On the basis of the Constitution and traditional legislative prerogatives, Congress lays claim to exclusive control over the purse."[36] Even the Supreme Court asserted matter-of-factly in *United States v. Lovett* that "Congress under the Constitution has complete control over appropriations."[37] This claim simply cannot be literally true, for even if "by Law" means strictly "by act of Congress," the President still must sign the appropriations legislation (or have his veto overridden) before such legislation can become the "Law." Therefore, it is not correct to state that Congress "has complete control over appropriations," even if one construes the phrase "Appropriations made by Law" in the most restrictive manner possible.

Whether that claim is valid under a less literal interpretation is highly debatable on both textual and historical grounds. As a textual matter, article I addresses more than the powers of, and limitations on, Congress. Section 10 of article I imposes limitations on the states, and section 7 outlines the President's veto power.[38] Based on a generous reading of article I as a whole, therefore, one could argue that the appropriations clause establishes the general rule that when any one of the

33. *Id.* Louis Fisher, *supra* note 6, at 762, also neglects to quote this sentence, although he quotes the following remark by Mason.

34. *See* IRAN-CONTRA REPORT, *supra* note 26, at 412.

35. THE FEDERALIST NO. 71, at 433 (A. Hamilton) (C. Rossiter ed. 1961).

36. L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 110 (1972).

37. 328 U.S. 303, 313 (1946).

38. Conversely, the advice and consent powers of the Senate are found in article II, section 2, clause 2.

three branches (not just Congress) spends public funds, it must have a legal authorization for doing so—that is, it must be constrained by the rule of law, however defined.

As a historical matter, moreover, 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. On July 5, 1987, the Grand Committee reported to the Convention the first draft of what was to become the appropriations clause.[39] It read: "[N]o money shall be drawn from the public Treasury, but in pursuance of appropriations to be originated in the 1st branch,"[40] by which the Committee meant the House of Representatives. During the following month at the Convention, the language of the appropriations clause changed slightly, but the essential meaning of the clause did not. On August 6, 1787, the Committee of Detail reported to the Convention a printed draft of the Constitution that contained the language: "No money shall be drawn from the Public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives."[41]

On August 13, 1787, the Convention considered this version of the appropriations clause. The ensuing debate is instructive for what it does *not* contain. It does not contain any suggestion that the appropriations clause was to function as a lever to be used by Congress on the President. To the contrary, the Framers feared that the House might abuse its power to originate money bills. Thus began what historian Gordon Wood has called the "long wrangle in the Convention involving the Senate's authority over money bills."[42] James Wilson of Pennsylvania warned: "The House of Reps. will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate."[43] Similarly, George Mason of Virginia (who ultimately

39. J. MADISON, *supra* note 12, at 237-38.

40. *Id.* Max Farrand reported the text to read "*by* the first Branch." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 524 (1911) (emphasis added). Though it does not appear to be significant, this difference continues in the respective records of the Convention. *Compare* J. MADISON, *supra* note 12, at 298 *with* 2 M. FARRAND, *supra,* at 14.

41. J. MADISON, *supra* note 12, at 386.

42. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 555 (1969); *see also id.* at 241-44 (discussing bicameralism and money bills in state constitutions before 1787).

43. J. MADISON, *supra* note 12, at 444. Madison further reported of Wilson:

> He stated the case of a Preamble to a money bill sent up by the House of Commons in the reign of Queen Anne, to the H. of Lords, in which the conduct of the displaced Ministry, who were to be impeached before the Lords, was condemned; the Commons thus extorting a premature judgmt. without any hearing of the Parties to be tried, and the H. of Lords being thus reduced to the poor & disgraceful expedient of opposing to the authority of a law, a protest on their Journal agst. its being drawn into precedent.

Id.

refused to sign the Constitution[44]) was concerned that the House would adopt "the practice of tacking foreign matter to money bills."[45] But it appears that this debate of August 13 was directed primarily, if not exclusively, at the raising of revenue rather than the appropriation of public funds. The draft language regarding the origination of money bills in the House was rejected.[46] Although no recorded debate took place that day on the draft version of the whole appropriations clause, it too was rejected, by a vote of ten to one.[47]

The Convention did not consider the appropriations clause again until less than two weeks before the final version of the Constitution was signed. On September 5, 1787, a committee of eleven of the Framers presented the Convention with a compromise regarding the origination of money bills in the House. The new language included a redrafted appropriations clause that, with the exception of changes in capitalization subsequently made by the Committee on Style, became the language finally adopted in the Constitution: "[N]o money shall be drawn from the Treasury, but in consequence of appropriations made by law."[48] Debate was postponed on the compromise section until September 8. At that time, the only debate centered on revising language regarding the Senate's ability to amend money bills originating in the House; no debate is recorded to have occurred on the wording of the appropriations clause.[49]

This history from the Constitutional Convention provides little insight into the meaning of the appropriations clause, since debate on the clause almost always was overshadowed by the more controversial issue of the role of the Senate in introducing and amending legislation to raise revenues. However, one interpretation of the appropriations clause that finds no historical support in the 1787 proceedings in Philadelphia 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.

2. *"Statement and Account of . . . Expenditures."* The second provision of the appropriations clause that promotes efficiency and fiscal accountability is the requirement that "a regular Statement and Account

44. *Id.* at 659.

45. *Id.* at 443.

46. *Id.* at 449-50.

47. *Id.* at 450. Massachusetts was the sole state favoring the draft. *Id.*

48. *Id.* at 580.

49. *Id.* at 606-07. The Committee of Style adhered to this wording in its drafts of September 10-12, 1787. 2 M. FARRAND, *supra* note 40, at 568, 596.

of the Receipts and Expenditures of all public Money shall be published from time to time."[50] This language first appeared on September 14, 1787—only three days before the Constitution was signed. Initially, George Mason proposed requiring that "an Account of the public expenditures should be annually published."[51] Debate ensued over the practicality of this requirement. Gouverneur Morris of Pennsylvania objected that the requirement "wd. be impossible in many cases."[52] Rufus King of Massachusetts agreed and elaborated: "[T]he term expenditures went to every minute shilling. This would be impracticable. Congs. might indeed make a monthly publication, but it would be in such general statements as would afford no satisfactory information."[53] James Madison then made a motion to replace "annually" with "from time to time," which he believed "would enjoin the duty of frequent publications and leave enough to the discretion of the Legislature."[54] His remarks underscore the need for accountability in the expenditure of public funds: "Require too much and the difficulty will beget a habit of doing nothing. The articles of Confederation require half-yearly publications on this subject. A punctual compliance being often impossible, the practice has ceased altogether."[55] Madison's motion was approved, and as thus amended, Mason's proposal to require a periodic statement of accounts was adopted without further debate.[56]

The debate over this portion of the appropriations clause underscored the desire for greater accountability in public spending, which, as Madison emphasized, had been lacking under the Articles of Confederation.[57] The debate also suggests that the Framers presumed that Congress rather than the President would prepare the requisite periodic report, although it is less clear that this expectation meant that they also expected that Congress alone would have the power to authorize the expenditure of public funds.

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50. U.S. CONST. art. I., § 9, cl. 7.

51. J. MADISON, *supra* note 12, at 641.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. This concern over accountability is consistent with the concern in 1787 and 1788 over the difficulty of achieving a satisfactory accounting by the Confederation Congress for all of the public funds drawn from the Treasury during the Revolutionary War. *See* 2 W. SUMNER, THE FINANCIER AND THE FINANCES OF THE AMERICAN REVOLUTION 214 (1891) (quoting 1788 report that, "Considerable sums have been paid out of the treasury, of which no appropriation is to be found on the public journal of Congress.").

B. *The Abortive Plan for a Congressionally Appointed Treasurer*

The debates over one of the provisions deleted from the final draft of the Constitution cast further doubt on the proposition that the Framers intended Congress to have exclusive power to authorize the expenditure of public funds. The printed draft constitution distributed to the Convention on August 6, 1787, contained, as one of the enumerated powers of Congress, the power "To appoint a Treasurer by ballot."[58] George Read of Delaware "moved to strike the clause, leaving the appointment of the Treasurer as of other officers to the Executive."[59] "The Executive being responsible would make a good choice," he argued.[60] In opposition, George Mason of Virginia "desired it might be considered to whom the money would belong; if to the people, the legislature representing the people ought to appoint the keepers of it."[61] Read's motion to strike did not pass.

This provision was not further debated until September 14, 1787. It seems that two issues were debated simultaneously: (1) whether the Treasurer should be appointed by Congress or the President, and (2) if by Congress, whether Congress should vote jointly (thereby diluting the relative influence of the Senate) or sequentially, as in the case of ordinary votes on bills. At that time, John Rutledge of South Carolina moved to strike this congressional power of appointment altogether and, as Read had done, proposed that "the Treasurer be appointed in the same manner with other officers."[62] Gouverneur Morris of Pennsylvania argued in support that "if the Treasurer be not appointed by the Legislature, he will be more narrowly watched, and more readily impeached."[63] However, Roger Sherman of Connecticut disagreed: "As the two Houses appropriate money, it is best for them to appoint the officer who is to keep it; and to appoint him as they make the appropriation, not by joint but several votes."[64] And Charles Pinckney of South Carolina had the last word: "The Treasurer is appointed by joint ballot in South Carolina. The consequence is that bad appointments are made, and the Legislature will not listen to the faults of their own officer."[65] Rutledge's motion to strike the appointment power in its entirety passed, eight to three, with Massachusetts, Pennsylvania, and Virginia dissenting.

58. J. MADISON, *supra* note 12, at 389.
59. *Id.* at 472.
60. *Id.*
61. *Id.*
62. *Id.* at 636.
63. *Id.*
64. *Id.* at 637.
65. *Id.*

The debate over the appointment of the Treasurer is fairly inconclusive as far as the appropriations clause is concerned. Roger Sherman espoused the view that Congress alone may appropriate public funds, but he did so in the context of defending a provision that ultimately was stricken from the Constitution. However, this debate does have some interpretative significance on the margin because it shows that the Framers considered and rejected, three days before the signing of the Constitution, a proposal that would have enhanced Congress's role (and concomitantly reduced the President's role) in managing public funds and accounting for their use. Moreover, on the basis of the remarks made by Gouverneur Morris and Charles Pinckney, it appears that the rationale for this decision was to make the Treasurer more susceptible to congressional scrutiny and thus more accountable.

This resolution of the Treasurer appointment issue is consistent with the decision by the Framers not to adopt the proposal made August 20, 1787 by Gouverneur Morris of Pennsylvania that would have explicitly created a "Secretary of Commerce and Finance." The proposed officer would serve in the President's "counsel of State" and have the "duty to superintend all matter relating to the public finances, to prepare report plans of revenue and for the regulation of expenditures, and also to recommend such things as may in his Judgment promote the commercial interests of the U.S."[66] This proposal followed more general demands made earlier in the Convention presuming that the President, at a minimum, would need secretaries of finance, war, and foreign affairs.[67] The Framers evidently envisioned the need for a member of the Executive Branch to wield such powers (and indeed the enumeration of activities in Morris' proposal accurately describes what Alexander Hamilton subsequently did as the first Secretary of the Treasury); yet, they ultimately refrained from including in the Constitution any discussion of the size, composition, or function of the office serving the President in the belief that to do so would provide the President a means of reducing his ultimate personal accountability for decisions.[68]

C. *The Appropriations Clause and the Ratification Debates*

The ratification debates in the states reinforce the interpretation that the appropriations clause was designed to promote fiscal accountability rather than provide Congress a general veto over certain of the Presi-

66. *Id.* at 487.

67. *Id.* at 324 (Morris); *id.* at 481 (Elseworth); *id.* at 509-10 (Rutledge); 2 M. FARRAND, *supra* note 40, at 158 (Committee of Detail).

68. 2 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 408-09 (1863).

dent's enumerated duties and prerogatives. On November 29, 1787, John McHenry presented the Constitution to the Maryland House of Delegates.[69] Of the appropriations clause, he simply said: "When the Public Money is lodged in its Treasury there can be no regulation more consistent with the Spirit of Economy and free Government that it shall only be drawn forth under appropriation by Law and this part of the proposed Constitution could meet with no opposition as the People who give their Money ought to know in what manner it is expended."[70]

It appears that the only other discussion of the appropriations clause in the state legislatures occurred in Virginia, where James Madison defended the Constitution and George Mason warned of its deficiencies. However, even the Madison-Mason debate does not cast any doubt on the proposition that the appropriations clause was intended to advance fiscal responsibility. Madison began his explanation of the appropriations clause on June 12, 1788 by stating:

> The congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used, but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system. That part which authorizes the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the confederation—that very system which the gentleman advocates.[71]

The "gentleman" to whom Madison referred was evidently Mason, who debated the appropriations clause (and other provisions of the Constitution) with Madison before the Virginia Convention on June 17, 1788. Renewing the concern that he expressed at the Constitutional Convention in Philadelphia the preceding September, Mason objected to the ambiguity of the phrase "publication from time to time."[72] The rationale for ambiguity was to give Congress flexibility in disclosing sensitive matters. "In matters relative to military operations, and foreign negotiations," Mason conceded, "secrecy was necessary sometimes."[73] However, he opposed the wording of the appropriations clause in the belief that it frustrated fiscal accountability:

> [H]e did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money. But that this expression was so loose, it might be concealed forever from them, and might

69. 3 M. FARRAND, *supra* note 40, at 144.

70. *Id.* at 149-50.

71. *Id.* at 311 (*reprinted from* D. ROBERTSON, DEBATES OF THE CONVENTION OF VIRGINIA, 1788, at 236 (2d ed. 1805)).

72. 3 M. FARRAND, *supra* note 40, at 326.

73. *Id.*

> afford opportunities of misapplying the public money, and sheltering those who did it. He concluded it to be as exceptionable as any clause in so few words could be.[74]

Madison responded that "if the accounts of the public receipts and expenditures were to be published at short stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors."[75] Madison thought that simply permitting Congress to publish such accounts "from time to time" not only would suffice in terms of affording adequate public disclosure, but also would reduce the extent of erroneous reporting of tentative information.[76] In response, Mason doubted that this reporting arrangement "might be safely trusted"[77] and considered a requirement of monthly publication of receipts and expenditures to be "infinitely better than depending on men's virtue to publish them or not, as they might please."[78]

Like the debates during the Convention of 1787, these contemporaneous statements by McHenry, Madison, and Mason focus exclusively on the issue of fiscal accountability. There is no indication from these ratification debates that the Framers intended the appropriations clause to provide Congress a generic source of political leverage to use over the President.

D. *The Appropriations Clause in Practice During George Washington's Presidency: The Emerging Dispute Between Federalists and Republicans Regarding Itemization and Executive Discretion*

The manner in which public officials construed the appropriations clause during George Washington's Presidency does not support the view that the Framers, many of whom served in the first Congress or in Washington's administration,[79] intended the clause to be a legislative veto rather than a means of achieving fiscal accountability. If anything, Washington's actions—and Congress's reaction to them—tend to establish an early precedent that the President may exercise a large degree of discretion in making unappropriated disbursements necessary to effect his constitutional duties and prerogatives.

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 327.

78. *Id.* at 326.

79. *Cf.* Bowsher v. Synar, 478 U.S. 714, 723-24 (1986) (discussing interpretive significance of post-ratification remarks of the Framers).

President Washington exercised, with Congress's acquiescence, broad fiscal discretion.[80] Judge Abraham Sofaer notes that the Legislature deferred to the Executive in a number of ways:

> Congress quickly granted the executive branch broad control over funds by making appropriations in lump sums; by allowing the Secretaries of Treasury and War to shift such funds as were specifically appropriated from one category to another; by appropriating funds to cover deficiencies in categories for which appropriations had been expended; *and by ratifying expenditures on authorized purposes for which no appropriation had been made,* such as the expedition to suppress the so-called Whiskey Rebellion.[81]

During this time, from 1789 until January 31, 1795, Alexander Hamilton served as Washington's Secretary of the Treasury and, in the view of his detractors, as the "prime minister" during Washington's second term.[82] In his capacity as Secretary of the Treasury, Hamilton drafted the nation's first appropriations act at the express direction of the House, which requested that he produce "an estimate of sums requisite to be appropriated."[83] He did so in four days; and eight days thereafter, Washington signed the Act.[84] The appropriations Act consisted of four lump-sum categories and did not mention Hamilton's estimates or contain any further itemization or conditions on the use of the appropriate funds.[85] The appropriations acts for 1790 and 1791 followed the same process.[86]

Washington's unappropriated spending to suppress the 1794 Whiskey Rebellion in Pennsylvania clarifies an important essay on the meaning of the appropriations clause that Hamilton published November 11, 1795, shortly after resigning as Secretary of Treasury. The essay—entitled simply *Explanation*[87]—construes the appropriation clause as follows:

> The design of the Constitution in this provision was, as I conceive, to secure these important ends, that the *purpose,* the *limit,* and the *fund* of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be ex-

80. L. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 326-28 (1948).

81. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers,* 40 LAW & CONTEMP. PROBS. 12, 16 (Spring 1976) (emphasis added) (citation omitted).

82. *See, e.g.,* L. CALDWELL, THE ADMINISTRATIVE THEORIES OF HAMILTON & JEFFERSON 2 (1944) (noting that Hamilton "assumed a leadership in the formulation of policy that lead enemies to charge that he presumed the role of 'prime minister' ").

83. 1 ANNALS OF CONGRESS 929 (Sept. 17, 1789) (J. Gales ed. 1834).

84. 1 Stat. 95 (Sept. 29, 1789); *see* L. WHITE, *supra* note 80, at 324.

85. L. WHITE, *supra* note 80, at 326-37.

86. *Id.* at 327.

87. A. HAMILTON, *Explanation* (Nov. 11, 1795), *reprinted in* 19 THE PAPERS OF ALEXANDER HAMILTON 400 (H. Syrett ed. 1973).

> pended, but for an *object,* to an *extent,* and *out of a fund,* which the laws have prescribed.[88]

It is most noteworthy that Hamilton would describe the appropriations clause in these terms after having countenanced unappropriated expenditures a year before to quell the Whiskey Rebellion. That historical circumstance lends meaning to the most enigmatic portion of Hamilton's model of the appropriations function.

It is simple to identify the "object" of the expenditures to suppress the Whiskey Rebellion. It was to quell insurrection, which (as is shown in Part II) is a responsibility of the Executive that finds its legal authority in several specific provisions of the Constitution. Therefore, the Whiskey Rebellion exemplified Hamilton's general observation that "appropriations laws . . . are generally distinct from those which create the cause of expenditure."[89] It is only slightly more difficult to understand the meaning of "to an extent" in the case of the Whiskey Rebellion, although this is a subject considered in greater detail in Part III. The "extent" of appropriations that could be had for quelling the Whiskey Rebellion must have consisted of the minimum amount necessary to get the job done—namely, to restore order and the authority of the federal government. Using Hamilton's model, it would make no sense for the disbursement of funds from the Treasury to be, say, only half of what was projected as necessary to suppress the uprising. An expenditure of a half-hearted "extent" simply would deplete the public purse without restoring domestic peace and the authority of the federal government.

The hard question remaining within Hamilton's paradigm, therefore, is to identify the fund that financed the Whiskey Rebellion expedition. Hamilton asserted with respect to his rule: "Public convenience is to be promoted, public inconveniences to be avoided. The business of administration requires accommodation to so great a variety of circumstances, that a rigid construction would in countless instances arrest the wheels of government."[90] Thus, he believed that disbursements from the Treasury could be made not only for the payment of debts for which appropriations already had been made, but also as an advance on, or advanced in anticipation of, appropriations that Congress reasonably could be expected to make.[91] "With regard to the *expediency* of an advance," Hamilton argued, "in my opinion, the right of judging is exclu-

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88. *Id.* at 405.

89. *Id.* at 405. For further discussion of the uprising, see THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES (S. Boyd ed. 1985); H. BRACKENRIDGE, HISTORY OF THE WESTERN INSURRECTION IN WESTERN PENNSYLVANIA, COMMONLY CALLED THE WHISKEY INSURRECTION, 1794 (1859).

90. A. HAMILTON, *supra* note 87, at 405.

91. *Id.*

sively with the head of the Department," by which he meant the Secretary of the Treasury.[92] From this, it is evident that Hamilton (and presumably Washington) believed that the fund from which disbursements would be made for the Whiskey Rebellion expedition was a fund that Congress would create at a future time, in recognition of the constitutional justification for spending for the object and to the extent that the President had identified.

Hamilton believe that the ability of the Secretary of the Treasury to make advances on appropriations need not compromise the objective of fiscal accountability, for he provided that "sum unapplied must be accounted for and refunded."[93] He elaborated:

> The distinction here again is between an advance and a *payment.* More cannot certainly be finally *paid* than is equal to the object of an appropriation, though the sum appropriated exceed the sum necessary. But more may be advanced, to the full extent of the appropriation, than may be ultimately exhausted by the object of the expenditure, on the condition, which always attends an advance, of accounting for the application, and refunding an excess. This is a direct answer to the question, whether more can be *paid* than is necessary to satisfy the object of an appropriation. More cannot be *paid,* but more may be advanced on the accountability of the person to whom it is advanced.[94]

The significance of this statement by Hamilton does not turn on whether it has survived as the prevailing interpretation of the appropriations clause; as will be seen, the Anti-Deficiency Act put significant constraints on this theory. Rather it is alone significant that during Washington's Presidency, the Secretary of the Treasury acted on a theory of the appropriations clause that emphasized fiscal accountability and claimed, in an expansive manner, that the President had the authority to spend public funds even when Congress had not clearly appropriated money for that purpose beforehand. Moreover, the fact that a Congress containing many members who also were delegates to the Constitutional Convention acquiesced to Hamilton's interpretation would seem to suggest an early precedent that is antithetical to the view currently espoused by Congress in the *Iran-Contra Report.*

Of course, not everyone in Congress in the 1790s favored Hamilton's view of the President's authority to make unappropriated disbursements from the Treasury. One such opponent, Albert Gallatin, published *A Sketch of the Finances of the United States*[95] in 1796, the

92. *Id.* at 421.

93. *Id.* at 407.

94. *Id.*

95. A. GALLATIN, *A Sketch of the Finances of the United States* (1796), *reprinted in* 3 THE WRITINGS OF ALBERT GALLATIN 69 (H. Adams ed. 1879).

year he entered the House of Representatives and five years before he became Secretary of the Treasury under Jefferson. Gallatin's starting point for interpreting the appropriations clause was similar to Hamilton's. "Two things constitute the appropriation: 1st, the sum of money fixed for a certain expenditure; 2d, the fund out of which the money is to be paid."[96] However, Gallatin's central thesis was at odds with Hamilton's *Explanation*: "The executive officers can neither change the appropriation by applying money to an expense (although the object of that expense should have been authorized by law) for which no appropriation has been made, nor spend upon an authorized object of expense more than the sum appropriated, nor even that sum, unless the fund out of which it is payable is productive to that amount."[97]

Gallatin was clear that his interpretation of the appropriations clause would prohibit even unappropriated spending by the President in furtherance of his article II duties, for he directly criticized the funding of the Whiskey Rebellion expedition:

> Although the President of the United States was authorized to call out the militia in order to suppress insurrections, no moneys were appropriated for that service. When the western insurrection took place, until Congress had covered the expenditures of the expedition by an appropriation made only on the 31st of December, 1794, the expenses were defrayed out of the moneys appropriated for the military establishment.[98]

On a more specific level, Gallatin objected to the President's use of funds appropriated for another object:

> Yet even the principle by which the specific appropriations for the several objects of the military establishment have been considered as a general grant for the whole could not authorize the application of a part of that grant to the expenses of that expedition. No farther discretion has been claimed by virtue of that principle than that of indistinctly applying the whole sum appropriated by law to any of the objects enumerated and specified under distinct heads in the law itself. 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 only item applicable to militia being expressly confined to the defensive protection of the frontiers. The moneys drawn from 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 appropriation made by law.[99]

96. *Id.* at 109.
97. *Id.*
98. *Id.* at 117.
99. *Id.* at 117-18.

Gallatin then concluded with an expansive interpretation of Congress's appropriations power, an interpretation predicated on a view of the separation of powers that squarely conflicts with Hamilton's:

> It might be a defect in the law authorizing the expense not to have provided the means; but that defect should have been remedied by the only competent authority, by convening Congress. The necessity of the measure may in the mind of the Executive have superseded every other consideration. The popularity of the transaction may have thrown a veil over its illegality. But it should by no means be drawn hereafter as a precedent.[100]

Under Gallatin's influence, military appropriations for 1797 were defined so that sums appropriated for one object could not be applied to another object; but Congress abandoned the practice the following year.[101] Hamilton's successor at the Treasury, Oliver Wolcott, wrote to Hamilton in 1798 that Gallatin "is evidently intending to break down" the Treasury "by charging it with an impracticable detail" in appropriations legislation.[102]

When Thomas Jefferson became President, he sought to implement Gallatin's theory of the appropriations clause and repudiate the prevailing view espoused by Hamilton, who by that time was Jefferson's political and philosophical adversary. Jefferson stated in his first annual message to Congress in December 1801 that "in our care of the public contributions intrusted to our direction, it would be prudent to multiply barriers against the dissipation of public money by appropriating specific sums to every specific purpose, susceptible of definition; by disallowing all application of money varying from the appropriation in object or transcending it in amount, but reducing the undefined field of contingencies, and thereby circumscribing discretionary powers over money, and by bringing back to a single department all accountabilities from money where the examination may be prompt, efficacious, and uniform."[103] Hamilton wrote a harsh critique of Jefferson's message, stating that "nothing is more wild or of more inconvenient tendency than to attempt

100. *Id.* at 118. Gallatin believed that the President's treaty-making power, for example, could be limited by Congress's power to spend. *See* Fisher, *Congressional Participation in the Treaty Process,* 137 U. PA. L. REV. 1511, 1520 (1989); *see also id.* at 1520-21 (noting that "[a]lthough the Constitution continues to exclude the House from the treaty process, the dependence of treaties on appropriations makes the House a major player").

101. R. WALTERS, ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT 94 (1957); Sofaer, *supra* note 81, at 17 n.19.

102. Letter from Oliver Wolcott to Alexander Hamilton (Apr. 5, 1798), *reprinted in* 2 O. WOLCOTT, MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS 44-45 (G. Gibbs ed. 1846).

103. First Annual Message of Thomas Jefferson to Congress (Dec. 8, 1801), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 326, 329 (J. Richardson ed. 1897); *see also* L. FISHER, *supra* note 36, at 60-61.

to appropriate 'a specific sum for each specific purpose, *susceptible of definition,*' as the Message preposterously recommends."[104]

II. THE PRESIDENT'S "MINIMUM OBLIGATIONAL AUTHORITY" TO FUNCTION IN THE ABSENCE OF APPROPRIATIONS

The responsibilities of the Executive under the Constitution can be grouped into two categories. In the first category are the duties that article II explicitly imposes on the President. In the second category are the President's prerogatives, also enumerated in article II. This Part argues that the President has the right under the Constitution to perform these explicit duties and exercise these explicit prerogatives even if Congress has not appropriated funds for him to do so. The Constitution commands the President to act with respect to the subjects listed in article II—even if, as in the case of the President's prerogatives, the command is to exercise discretion. The Constitution does not condition its commands in article II on Congress periodically granting the President permission to act. This insight leads to the conclusion that the President has an implicit power to encumber the Treasury in the name of carrying out the responsibilities assigned to him by the plain text of article II.

In the alternative, one might argue that, even accepting that Congress cannot withhold appropriations for article II duties and prerogatives, it does not follow that the President may spend money in the absence of appropriations. Under the system of checks and balances, one branch can frustrate another's ability to fulfill its constitutional functions, as when Congress refuses to confirm the President's nominees, the President declines to enforce laws he disfavors, or the Judiciary strikes down an act of Congress. Recent Supreme Court decisions on the separation of powers have emphasized two themes in disputes between Congress and the President. First, the Court has looked to the interference another branch suffers in its ability to perform constitutionally assigned functions. *Morrison v. Olson,* for example, established that congressional efforts to impede the President's performance of his duty to faithfully execute the law do not violate the principle of separation of powers if they do not (1) "impermissibly undermine" the powers of the Executive Branch,[105] or (2) prevent the Executive Branch from "accomplishing its constitutionally assigned functions."[106] The second theme concerns the

104. A. HAMILTON, *Lucius Crassus, The Examination No. 11* (Feb. 3, 1802), in 25 THE PAPERS OF ALEXANDER HAMILTON 515 (H. Syrett ed. 1977).

105. 108 S. Ct. 2597, 2621 (1988) (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)). The meaning of this conclusory phrase baffled Justice Scalia in his dissent. 108 S. Ct. at 2637, 2641 (Scalia, J., dissenting).

106. *Id.* at 2621 (citing Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)).

aggrandizement of one branch by its acquiring powers assigned to the other branches. For example, as the Court wrote in *Bowsher v. Synar,* for Congress to order the Executive to refrain from "executing the laws in any fashion found to be unsatisfactory to Congress," is to exert the "kind of congressional control over the execution of the laws [that, as] *Chadha* makes clear, is constitutionally impermissible."[107] It would exemplify what the Court in *Commodity Futures Trading Commission v. Schor* called "the aggrandizement of congressional power at the expense of a coordinate branch."[108]

Given this, one could hardly assert, as the Court concluded of the independent counsel law in *Morrison,* that denying the President the funds with which to perform a duty or exercise a prerogative specified by article II "does not involve an attempt by Congress to increase its own power at the expense of the Executive Branch."[109] The Constitution is a roadmap designed by practical people for dealing with practical problems of self-government. It may not always yield juridically precise answers to real-world problems, but that is not its principal function. The purpose of the Constitution is to make representative government work and endure. The quest for intellectual elegance cannot excuse reading the text of the Constitution—including the appropriations clause—in counterintuitive ways that permit the government itself to collapse or become paralyzed by conflict or indecision, as it could be if Congress could defund the President. The Constitution is not, to borrow a familiar phrase in constitutional law, a suicide pact.[110] Therefore, I do not believe that Congress may impose conditions on the funding of article II duties and prerogatives; nor do I believe that such conditions lie in some indeterminate zone of action whose propriety is judged by the current balance of political power between Congress and the President rather than the language of the Constitution and the separation of powers that its structure is intended to effect.

107. 478 U.S. 714, 726-27 (1986); *see also id.* at 722 ("Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts"); *cf.* Springer v. Government of the Phillipine Islands, 277 U.S. 189, 202 (1928) (" 'Legislative power' as distinguished from 'executive power' is the authority to make laws, but not to enforce them . . . .").

108. 478 U.S. 833, 856 (1986).

109. 108 S. Ct. at 2620.

110. *See* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Vinson, C.J., dissenting) (choice "is between liberty with order and anarchy without either. The[ ] danger is that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

A. *Duties, Prerogatives, and the President's Implied Power to Spend Public Funds*

1. *Article II Duties.* Any article II duty is a mandatory task of the Presidency. By "duty" I simply mean a responsibility that the text of the Constitution says the President *shall* perform, as opposed to one that the text says he *may* perform or *has the power* to perform. The duties include the making of appointments, the faithful execution of law, the receipt of ambassadors, and the making of recommendations to Congress. The President's role as commander in chief, I would argue, is also a duty, although (unlike these other duties) the "shall" at the beginning of article II, section 2, clause 1 is not followed by a transitive verb: The President simply "shall be" in charge of the armed forces. (Of course, one could argue that this clause could simply be read to mean "the President shall command" the armed forces.) The incurring of a charge against the Treasury in the course of performing each of these article II duties is lawful Executive action regardless of whether Congress has appropriated adequate funds for that purpose.

Implicit in the Constitution's assigument of duties to the President under article II must have been the expectation on the Framers' part that Congress would appropriate at least the minimum amount necessary for the President to perform those duties. As a Framer of the Constitution and an author of *The Federalist Papers,* Alexander Hamilton advocated granting the President the "power" necessary to carry out his responsibilities effectively. He despised ineffectuality in any branch of the federal government, writing in *The Federalist No. 23*: "Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success."[111] Hamilton expressed this general belief even more forcefully in the specific case of the Executive, writing in *The Federalist No. 73* that a principal "ingredient towards constituting the vigor of the executive authority is an adequate provision for its support."[112] Hamilton believed that the Executive could be rendered ineffectual if the President lacked adequate financial resources or, worse, if he could be manipulated by Congress because of his need for adequate funds:

> It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as

111. THE FEDERALIST No. 23, at 155 (A. Hamilton) (C. Rossiter ed. 1961).

112. THE FEDERALIST No. 73, at 441 (A. Hamilton) (C. Rossiter ed. 1961).

> obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations .... [I]n the main it will be found that a power over a man's support is a power over his will.[113]

Therefore, Hamilton could not "commend too highly"[114] the provision in article II that "[t]he President shall, at stated Times, receive for his Services, a compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."[115] It should be clear from Hamilton's statements in *The Federalist Papers* that he would abhor the proposition that the appropriations clause empowered Congress to direct certain Executive functions as a condition of its appropriating the funds necessary to support the President.

There is a less textual (and more arduous) way to reach the same Hamiltonian conclusion regarding the President's implied power to fund the execution of his duties and prerogatives. "If the *end* be clearly comprehended within any of the specified powers" conferred on the federal government by the constitution, wrote Alexander Hamilton in his opinion on the constitutionality of a national bank, "and if the measure have an obvious relation to that *end* and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority."[116] Hamilton, of course, was addressing the powers of the federal government *vis-à-vis* the states; and Chief Justice Marshall adopted virtually this same formulation twenty-eight years later in *McCulloch v. Maryland*[117] when the Court construed Congress's authority to legislate under the necessary and proper clause.[118]

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113. *Id.; see also* L. CALDWELL, *supra* note 82, at 28 ("Hamilton saw that without a basis for compensation protected from legislative manipulation, the independence of the executive branch would be merely nominal.").

114. THE FEDERALIST No. 73, at 441 (A. Hamilton) (C. Rossiter ed. 1961).

115. U.S. CONST. art. II, § 1, cl. 7. In 1795, Hamilton wrote: "The manifest object of the provision is to guard the independence of the President from the legislative control of the United States or of any State, by the ability to withold, lessen, or increase his compensation." A. HAMILTON, *supra* note 87, at 410. Hamilton made this same argument with respect to the analogous provision in article III, section 1 regarding the compensation for federal judges: "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" THE FEDERALIST No. 79, at 472 (A. Hamilton) (C. Rossiter ed. 1961).

116. A. HAMILTON, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 107 (H. Syrett ed. 1965).

117. 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

118. U.S. CONST. art. I, § 8, cl. 18; *see* J. COOKE, ALEXANDER HAMILTON 92 (1982); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 97-104 (11th ed. 1985).

However, the power of this reasoning transcends the necessary and power clause. It legitimates the inference of constitutional authority—whether it is the authority of the federal government to act or the authority of one of the three branches of the federal government to act within the scope of the responsibilities assigned to it by the text of article I, II, or III.

If one extends the Hamiltonian premise of *McCulloch v. Maryland* to the separation of powers, then it becomes clear that the President has the power, implicit in the delegation of duties and prerogatives to him by the people under article II, to spend funds to perform his constitutional responsibilities.[119] Indeed, Hamilton believed that the President's duties and prerogatives enumerated in sections 2 and 3 of article II "ought . . . to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution."[120] Madison similarly argued that "the Executive power being in general terms vested in the President, all power of an Executive nature not particularly taken away must belong to that department."[121] Thus, the contemporaneous writings of the principal draftsman of the Constitution, as well as those of his principal co-author of *The Federalist Papers,* would seem to support the following proposition: The assignment to the President of enumerated duties and prerogatives in article II implicitly conferred on the President the ability to have the funding necessary for him to carry out those duties and prerogatives. So, for example, Hamilton specifically believed that the Constitution's grant to the President of powers and prerogatives in foreign affairs precluded Congress from having any discretion to withhold funding for the execution of treaties as a means of controlling the Executive in foreign policy. Likening Congress's lack of discretion in this respect to its inability to manipulate the salaries of federal judges, Hamilton wrote that the House of Representatives "cannot deliberate whether they will appropriate and

119. Justice Jackson's disparagement of the implied powers theory in *Youngstown* rested on his quite accurate observation that the President had no constitutional authority, inherent or explicit, to confiscate private property. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640, 647, 649-50 (1952) (Jackson, J., concurring).

120. A. HAMILTON, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (H. Syrett ed. 1969); *cf.* Myers v. United States, 272 U.S. 52, 118 (1926) ("The executive power was given general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . . ."); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 210-11 (2d ed. 1988).

121. Letter from James Madison to Edmund Pendleton (June 21, 1789), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 405, 405-06 (G. Hunt ed. 1904).

pay the money" for the execution of treaties; rather "the *mode* of raising and appropriating the money only remains [a] matter of deliberation."[122]

Thus, the availability of implied funding for executing the President's duties and prerogatives did not depend on the relative necessity of each such enumerated duty or prerogative. As Hamilton pointed out in his opinion on the constitutionality of a national bank, arguments over the degree of necessity are fractious and ultimately beg the constitutional question:

> The *degree* in which a measure is necessary can never be a *test* of the legal right to adopt it; that must be a matter of opinion, and can only be a *test* of expediency. The *relation* between the *measure* and the *end;* between the *nature* of the *means* employed towards the execution of a power, must be the criterion of constitutionality, not the more or less of *necessity* or *utility.*[123]

Therefore, I believe that a President who acts to discharge his article II duties when Congress has failed or refused to provide him appropriations for that purpose does not violate the appropriations clause. He need not cite necessity or any other legal defense to justify his expenditure of funds to the extent necessary to execute the particular duty at issue.

2. *Article II Prerogatives.* The prerogatives of the President in article II also have a textual basis for their implicit source of funding. The pardon power, the power to negotiate treaties, and the power to make recess appointments are all preceded by the following words: The President (or "he") "shall have Power . . . to" perform the function. Although it is a fine point, this language is considerably more specific than simply saying "the President *may* grant pardons" or "the President *is authorized* to negotiate treaties." The text of article II makes clear that the people have given the President something more than merely the permission or the authority to perform these functions. He "shall have *Power*" to perform them as well. Indeed, John Locke's *Second Treatise on Government,* which influenced the Framers' thinking on separation of powers, defined executive prerogative to be "nothing but the Power of doing public good without a Rule."[124] 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 be-

122. Letter from Alexander Hamilton to William Smith (Mar. 10, 1796), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 72 (H. Syrett ed. 1974); *see also* L. CALDWELL, *supra* note 82, at 38.

123. A. HAMILTON, *supra* note 116, at 104.

124. Locke, *Second Treatise of Government,* § 166, in TWO TREATISES OF GOVERNMENT 425 (1690) (P. Laslett ed. 1960).

come meaningless whenever Congress refused him the necessary appropriation of funds. The power to negotiate treaties, for example, would be reduced to the precatory statement that it would be nice if the President could negotiate treaties now and then. Of course, this reasoning holds *a fortiori* in the case of the explicit duties imposed on the President by article II.

B. *Minimum Obligational Authority*

Attorney General Caleb Cushing opined in 1853 that "when the Constitution of the United States . . . authorizes and requires the President to do a thing, which involves the expenditure of public money . . . , the legality of an engagement of the President to have the thing done, that is, of a contract for its performance, is wholly independent of the question whether there is, or is not, an adequate appropriation by Congress for the object."[125] Attorney General Benjamin Civiletti rendered a similar opinion to President Carter in January 1981. Because "the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well," he opined, Congress "[m]anifestly could not deprive the President of this power" to perform his constitutional responsibilities "by purporting to deny him the minimum obligational authority sufficient to carry this power into effect."[126] Attorney General Civiletti reasoned that this "minimum obligational authority" to expend public funds in the absence of appropriations could be justified "in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President."[127] No activities of the Presidency better fit that definition than the duties and prerogatives that the Framers imposed on the office through the explicit text of article II. Civiletti specifically cited the example of the President's exclusive power in article II, section 2, clause 1 "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[128] But this principal is probably most evident in the context of national defense.

1. *President Lincoln's Unappropriated Expenditures at the Outbreak of the Civil War.* President Abraham Lincoln believed that if a President is called upon to defend the Union, then it is inconsequential

125. Contracts for the Extension of the Capitol, 6 Op. Att'y Gen. 26, 28 (1853).

126. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1, 5-6 (1981).

127. *Id.* at 6-7.

128. *Id.* at 5. Attorney General Civiletti's model of "minimum obligational authority" seems to resemble Professor Louis Henkin's distinction between "obligatory appropriations" and "voluntary spending." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 115 (1972).

that he might violate formalities like the appropriations clause in the process. "Is it possible," he asked in 1864, "to lose the nation and yet preserve the Constitution?"[129] Lincoln obviously believed that the possibility could not be seriously entertained: "By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."[130] Therefore, he concluded, "measures otherwise unconstitutional might become lawful by becoming *indispensable to the preservation of the Constitution* through the preservation of the nation."[131]

Probably no event before or since the Civil War so threatened the preservation of the national government in the United States, not to mention the life and property of its citizens.[132] But it hardly would require the President to break the law in order to summon the resources by which to respond decisively to a crisis of such proportion when Congress had made no appropriations for it. The oath of office imposes the duty on the President to "preserve, protect and defend the Constitution of the United States."[133] And indeed Lincoln believed he acted *within* his constitutional authority:

> 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 to 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.[134]

Lincoln recognized that he and every other President had been vested by the Constitution with a preexisting duty as the Commander in Chief and the Nation's highest law enforcement officer. He believed that he was not acting above the law, but in compliance with the rule of law as expressed in the Constitution itself.

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129. Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), *reprinted in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN 65, 66 (J. Nicolay & J. Hay eds. 1894) [hereinafter Lincoln's Letter to Hodges].

130. *Id.*

131. *Id.* (emphasis added).

132. The war claimed more American lives than all other wars in the nation's history—including, of course, the life of the President who sought to keep the nation together. *See* J. MCPHERSON, THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 854 (1988) (620,000 Union and Confederate soldiers killed).

133. U.S. CONST. art. II, § 1, cl. 8.

134. Letter of Abraham Lincoln to the Senate and House of Representatives (May 26, 1862), *reprinted in* 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3278, 3279 (J. Richardson ed. 1897) (emphasis added) [hereinafter Lincoln's Letter to Congress]. Congress did not actually declare war against the Confederacy until several months after hostilities had begun. Act of July 13, 1861, ch. 2, 12 Stat. 255.

Ironically, if the Iran-Contra Affair is any indication, it is conceivable that Congress today would impeach a President for what Lincoln did in 1861, for his unauthorized (and undisclosed) expenditures of $2 million for war material were made to four individuals (in violation of an express statute) and were not disclosed to Congress until a year later, even though Congress had long since returned to session.[135] Not knowing the extent of Lincoln's involvement in such spending decisions, Congress issued a resolution of censure of Secretary of War Simon Cameron when it learned that he had given public funds to a private citizen for the procurement of military supplies.[136] Lincoln explained to Congress that the importance of undertaking unappropriated spending did not cause him to disregard the objective of fiscal accountability embodied in the appropriations clause. To the contrary, Lincoln suggested that he attempted to deviate from the principle of fiscal accountability embodied in the appropriations clause to the least extent necessary for him to effectuate the actions he deemed necessary for preserving the nation:

> I believe that by these and other similar measures taken in that crisis, some of which were taken 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.[137]

Lincoln offered to share the censure that Congress had directed at Secretary Cameron, but he did not apologize to Congress or ask that it ratify after the fact "whatever error, wrong, or fault was committed,"[138] for Lincoln obviously thought that there had been none.

That President Lincoln had acted within his article II powers was also the Supreme Court's conclusion in the *Prize Cases*.[139] The Court faced the question whether a congressional declaration of war would be necessary for the President to use military force to put down a civil war—in particular, to capture neutral ships violating the Union blockade of Southern ports ordered by President Lincoln in 1861. The Court

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135. Lincoln's Letter to Congress, *supra* note 134, at 3279; *see also* B. HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 37-38 (1970). Consider also President Franklin Roosevelt's "Destroyer Deal" with Britain before the entry of the United States into World War II. In order to avoid the statutory restrictions of the Neutrality Act, Roosevelt conveyed government property to the British (namely American warships) in exchange for consideration that consisted of receiving leases for British bases in the western Atlantic—and hence the responsibility for defending them. *See* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1948, at 288-89 (1948).

136. Lincoln's Letter to Congress, *supra* note 134, at 3280.

137. *Id.*

138. *Id.*

139. 67 U.S. (2 Black) 635 (1862).

found the seizures lawful, concluding that Lincoln did not need prior congressional authorization to respond to war as opposed to initiating or declaring it. "However long may have been its previous conception," wrote Justice Grier, the rebellion had "sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war,*" such that "[t]he President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[140] Whether the war began by the invasion of a foreign nation or by a domestic rebellion was irrelevant, for "the President is not only authorized but bound to resist force by force, . . . bound to accept the challenge without waiting for any special legislative authority."[141]

2. *President Wilson's Least Restrictive Means Approach to Achieving Fiscal Responsibility.* President Woodrow Wilson made a similar argument about implied funding in 1920 when presented with an appropriations bill for fiscal year 1921 providing that "no journal, magazine, periodical or similar Government publication shall be printed, issued or discontinued by any branch or officer of the Government service unless the same shall have been authorized under such regulations as shall be prescribed by the Joint Committee on Printing."[142] Wilson stated in his veto message that "the obvious effect of this provision would be to give to that committee power to . . . determine what information shall be given to the people of the country by the executive departments."[143] Foreshadowing the reasoning in *Youngstown* that expediency in managing the federal government is no justification for sacrificing the separation of powers,[144] Wilson stated that, although he was in "entire sympathy with the efforts of the Congress and the departments to effect economies in printing and in the use of paper and supplies,"[145] Congress could readily accommodate its fiscal concerns by a means that did not "impose a flat prohibition against the exercise of executive functions."[146]

Without explicitly saying so, Wilson in effect proposed a least-restrictive-alternative analysis to appropriations controversies between Congress and the President that resembled Lincoln's approach: "If we

140. *Id.* at 669.

141. *Id.* at 668.

142. H.R. 12,610, 66th Cong., 2d Sess. § 8 (1920). The best account of this episode is by Wilson's Secretary of the Treasury, David Houston. *See* 2 D. HOUSTON, EIGHT YEARS WITH WILSON'S CABINET, 1913 TO 1920, at 71-82 (1926).

143. Veto Message of Woodrow Wilson (May 13, 1920), in 17 MESSAGES AND PAPERS OF THE PRESIDENTS 8845 [hereinafter Wilson Veto Message].

144. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

145. Wilson Veto Message, *supra* note 143, at 8845.

146. *Id.* at 8846. Interestingly, Wilson overruled his Solicitor General, who did not believe the rider to be unconstitutional. 2 D. HOUSTON, *supra* note 142, at 74-76.

are to have efficient and economical business administration of Government affairs, the Congress, I believe, should direct its efforts to control of public moneys along broader lines, fixing the amounts to be expended and then holding the executive departments strictly responsible for their use."[147] It appears, in other words, that Wilson was suggesting that Congress could achieve fiscal accountability and protect the public purse from a profligate President simply by appropriating *X* dollars to the President for the specific purpose of executing the laws, *Y* dollars for negotiating treaties, *Z* dollars for making presidential recommendations, and so forth. It would be up to the President to decide how to divide those respective lump sums. This view, of course, was the converse of the recommendation that Jefferson had made in 1801 in favor of identifying categories of appropriation for "every specific purpose, susceptible of definition."[148]

Wilson's veto message shows why it is impermissible for Congress to defund the performance of a particular duty or prerogative of the Executive by appropriating an unrealistically low amount. Congress could not, for example, appropriate only one dollar for the President to negotiate treaties with foreign heads of state. Nor, for example, could it refuse to appropriate any funds for the President to study and, in his discretion, order the issuance of a pardon to any person convicted of a crime committed while employed in the Executive Office of the President. It should be clear that, as the amount appropriated for the performance of a particular article II duty approaches zero, it becomes less credible for Congress to assert that it must restrict spending in that manner in order to conserve public funds. Surely, for example, Congress could not deny the President the funds for the pen by which he intended to veto a piece of legislation.[149] And if it did, could the President use his own pen? For him to do so, of course, would be to deny Congress ultimate control over all factors of government production—which Professor Stith, for example, asserts that Congress is entitled to have under the appropriations clause.[150] If Congress succeeded in banning all appropriations for pens in the Executive Branch, could the President then accept a 99¢ gift from a political supporter to buy a ballpoint pen by which to sign the veto message? Obviously, the dollar amount of a restriction on such spending would be trivial compared to the magnitude of other expenditures. Thus,

147. Wilson Veto Message, *supra* note 143, at 8846.

148. *See supra* text accompanying note 103.

149. Daniel E. Troy and Professor Michael McConnell each independently suggested this example to me. *Cf.* L. HENKIN, *supra* note 128, at 115 ("Congress cannot impose conditions which invade Presidential prerogatives to which the spending is at most incidental . . . .").

150. Stith, *supra* note 2, at 1374.

the presumption that Congress was acting within its article I duty to ensure fiscal accountability would disappear, and there would arise the contrary presumption—as Wilson insinuated in 1920—that Congress's action was undertaken to interfere with the President's performance of one of the duties or prerogatives imposed on him by the Constitution.

III. WHAT PRINCIPLE LIMITS THE PRESIDENT'S IMPLIED POWER OF THE PURSE?

The interpretation of the appropriations clause that I have presented distills to the proposition that the President has an implied power to incur claims against the Treasury to the extent minimally necessary to perform his duties and exercise his prerogatives under article II. The rule of law implies that some principle must limit the President's implied power to spend, but it is hardly obvious from the text of the Constitution what that principle would be. Therefore, what follows here in Part III should be regarded more as explorations of the question, rather than an assertion that I have identified a principle capable of delineating permissible from impermissible assertions of implied spending power by the President.

Some persons no doubt will view my claim of the President's implied power of the purse with trepidation, fearing that like Charles I's efforts to rule without Parliament and levy taxes on his subjects,[151] the President's routine assertion of an implied power to fund his duties and prerogatives would transform the Executive into a despot. To these skeptics, it would be little comfort that the British view of the King's prerogative over spending narrowed considerably over time,[152] eventually eclipsing even Locke's general definition that executive prerogative is nothing more than the power to do public good in the absence of a rule.[153] To justify the concern about a despotic President with his own source of funding, one might assert that everything the President does is, in one way or another, a constitutional duty or prerogative of the Executive for which the President could claim a implied source of lawful fund-

151. *See, e.g.*, 1 T. COOLEY, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 332 (rev. 3d ed. 1884); 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 41 (2d ed. 1937) ("in 1626 Charles, being hard pressed for money, attempted to compel his subjects to lend specific sums of money named by himself.").

152. During Queen Victoria's reign, one legal historian observed that "if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons which the founders of our constitution intended." 1 T. COOLEY, *supra* note 151, at 334.

153. *See* Locke, *supra* note 124.

ing. Therefore, it would seem that there would be no rule of law to limit the President's ability to disregard appropriations bills whenever Congress had not appropriated what the President deemed to be "adequate" funds to effect what the President, in turn, deemed to be the public good. With no limiting principle, the President's implied power to incur public debts would swallow the separation of powers as easily as would the extravagant interpretation of Congress's appropriations power contained in the *Iran-Contra Report* and embodied in the numerous appropriations riders imposing conditions on spending by the Executive.

I believe that this characterization has been shown by history to be an exaggeration. Furthermore, I believe that history also has shown that this concern is far less justified than is the concern over the demonstrable inclination of Congress to use the appropriations power to usurp the President's powers. This potential for the Executive to abuse its implied spending power must be evaluated in terms of the likelihood that the power would have to be exercised and the means available to Congress and the people for containing such spending if it did occur. On the first point, I would expect that unappropriated spending by the President would be the rare exception and not the general practice. Although the text and history of the appropriations clause does not demonstrate an intent by the Framers to create a legislative veto, they obviously do demonstrate an intent to give Congress the principal and recurring responsibility for raising public funds and directing their use. The primary value of the President's implied power to fund his duties and prerogatives, therefore, is like that of the veto: It is a strategic deterrent to opportunistic behavior by Congress, one that consequently gives the President bargaining strength *vis-à-vis* Congress in the ordinary course of setting the direction and magnitude of specific national policies.[154]

In the first instance, therefore, the political process imposes a limiting principle on the President's unappropriated spending. The President is not a king. Hamilton's proposal at the Constitutional Convention of a President who would serve for life on good behavior was never adopted;[155] to the contrary, Jefferson thought that the Constitution was flawed in not limiting the number of terms that a President could

154. However, as I have argued analogously with respect to the President's recommendation duty, the President would unlawfully delegate his duty to Congress if he acquiesced to the complete defunding of his ability to perform any of the duties enumerated in article II. *See* Sidak, *The Recommendation Clause,* 77 GEO. L.J. 2079, 2126-28 (1989).

155. J. MADISON, *supra* note 12, at 136, 138. Indeed, Hamilton subsequently stressed that the President had to stand for election every four years, a constraint that created "a total dissimilitude" between the President and the King of England. THE FEDERALIST NO. 69, at 415, 416 (A. Hamilton) (C. Rossiter ed. 1961); *see also id.* at 422.

serve[156]—a view that ultimately prevailed, producing a corrective amendment in 1951.[157] Like any rarely used but strategically potent constitutional power (such as the power to suspend habeas corpus, exercised by Lincoln), the President must be able, as a political matter, to persuade the people (from whom, of course, all powers under the Constitution have been delegated to the federal government) that his actions are necessary and proper to carrying out a responsibility that article II plainly imposes on him. In an era that has witnessed Presidents Johnson, Nixon, Ford, and Carter either denied reelection or driven from office (and President Reagan politically immobilized for the remainder of his second term once the story of arms shipments to Iran broke in the fall of 1986), there should be little doubt that the electoral process will provide a check on the President (and his party) if such an assertion of spending power appears to be unsupportable.

In addition to this potential political cost incurred in the electoral process, there would be a political cost to the President in terms of Congress's ability to use its own prerogatives in a retributive manner. So, for example, Congress might delay confirmation of appointees, as it did during the last year of the Reagan administration with respect to numerous positions for federal judges and commissioners (such as on the Federal Communications Commission, which operated from late 1987 until the summer of 1989 with only three of five commissioners, thereby creating a two-to-one majority for the Democrats on the Commission).[158] The confirmation hearings that would be permitted to proceed might emulate the acrimony of Judge Robert Bork's confirmation hearings. There are, of course, many other ways (some of dubious constitutionality themselves) by which Congress is able to burden Executive Branch officials through its investigative powers.[159]

In addition to these political constraints, there are two legal principles that limit the President's ability to spend in the absence of appropriations. Both principles can be traced to Hamilton's *Explanation* of the appropriations clause, if not to more general ideas espoused in preceding years by the Framers. First, the *object* of the unappropriated spending

156. Letter from Thomas Jefferson to John Taylor (Jan. 6, 1805), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 338, 339 (P. Ford ed. 1897); Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), *reprinted in* 5 THE WRITINGS OF THOMAS JEFFERSON 19, 20 (P. Ford ed. 1895).

157. U.S. CONST. amend. XXII.

158. President Reagan is reported to have agreed with congressional leaders during 1987 and 1988 not to exercise his prerogative to make recess appointments.

159. *See, e.g.*, Olson, *The Impetuous Vortex: Congressional Erosion of Presidential Authority*, in THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH 225, 235-42 (L.G. Crovitz & J. Rabkin eds. 1989).

must be a textually demonstrable duty or prerogative of the President under article II, such as the duty to faithfully execute the laws or the prerogative to negotiate treaties. The President could not, for example, order unauthorized spending for the launch of a scientific space probe because such an undertaking, although possibly beneficial to the general welfare, could not be derived from any duty or prerogative of the Executive contained in article II.

Second, the *extent* to which the President may spend public funds in furtherance of such an object is defined by the minimum amount necessary to successfully produce the desired public good. The performance of the President's duties and prerogatives under article II can be viewed as different kinds of public goods—enforcing the law, negotiating treaties, sending and receiving ambassadors, commanding the armed forces, making recommendations to Congress, issuing pardons, and so forth. Professors James Buchanan and Gordon Tullock have observed that the optimal size of a jurisdiction depends on the extent of the externality and the production technology of the public good used to address it.[160] In a similar manner, the amount of unappropriated funds that the President may spend would depend on the production technology of each particular public good. Thus, the minimum amount of spending needed for the President to make recommendations to Congress and report on the State of the Union would be relatively low (because the marginal cost of using information already in the President's possession for this purpose is low). On the other hand, the minimum amount of spending needed to protect the security of American citizens at home and abroad (for example, through the ability to execute a successful hostage rescue in Iran or apprehend the *Achille Lauro* hijackers) is likely to run into the billions of dollars. If Ronald Reagan honestly believed that deployment of the Strategic Defense Initiative were "minimally necessary" to defend the United States from nuclear attack by the Soviet Union, could he have encumbered the Treasury for billions of dollars? One's visceral reaction is that this result would be preposterous. But the reasoning required to reach that conclusion is less obvious.

As I argued earlier with respect to Hamilton's *Explanation,* it serves no useful purpose for the President to make disbursements of an amount of unappropriated funds that is too little to successfully discharge his duty or exercise his prerogative under article II. It makes no sense to disburse funds to send an envoy only as far as Paris if the arms reduction negotiations to which the President wishes to send his envoy are taking place in Geneva. Thus, the President must be permitted to spend enough

160. J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 111-14 (1965).

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 this article II prerogatives.

In other words, the President must identify the necessary level of public output implied by article II and then seek to minimize the cost of producing that level of output. This responsibility is analogous to a familiar problem in the theory of the firm.[161] However, there may be discontinuity or nonmonotonicity in the marginal productivity of the labor or capital employed to negotiate a treaty.[162] In the case of discontinuity, small expenditures of capital and labor may have a zero marginal product. As mentioned above, the President's expenditure of only enough resources to send an envoy as far as Paris does not make any contribution to the production of a foreign treaty when negotiations are to be held in Geneva.

Nonmonotonicity is slightly different. The President's decision to send an envoy to Geneva to negotiate with the Soviets presumably might have increasing marginal productivity of labor initially: The value of staying for a third day of talks might be even greater, in its incremental contribution to the successful negotiation of a treaty, than was staying for the second day of talks. However, the 100th day of talks might contribute less (on an incremental basis) to the successful negotiation of a treaty than did the 99th. In such a case, there would be diminishing marginal productivity of labor and capital to the production of a treaty.[163]

These concepts of continuous and monotonic production functions borrowed from the theory of the firm obviously are too abstract to yield a workable legal test for determining the permissible level of presidential

161. *See, e.g.*, J. HENDERSON & R. QUANDT, MICROECONOMIC THEORY: A MATHEMATICAL APPROACH 65-67 (2d ed. 1971) (discussing contrained cost minimization). In economic terms, one can think of the President as having the responsibility to identify the isoquant corresponding to the quantity of the public good demanded and to use the least-cost combination of inputs (capital and labor) necessary to attain the isoquant. Thus, he must keep the federal government on the expansion path, which is the locus of points of tangency between each isoquant and each isocost function. *See id.* at 67; A. CHAING, FUNDAMENTAL METHODS OF MATHEMATICAL ECONOMICS 414-15 (2d ed. 1974); M. INTRILIGATOR, MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY 192-93 (1971).

162. In other words, the expansion path has a step or an S-shaped bend in it with respect to total output. *See* J. HENDERSON & R. QUANDT, *supra* note 161, at 55-57. For further discussion of continuous and monotonic functions, see *id.* at 391; A. CHAING, *supra* note 161, at 156-57, 181-82.

163. Of course, as Bruce Owen has pointed out to me, there is no reason to suppose that most activities that the President has an implied right to fund under article II should be discontinuous or nonmonotonic in their production technology. The size of the envoy's staff or the magnitude of her entertainment allowance might provide continuous and monotonic measures of marginal productivity over the relevant range.

expenditures on an unfunded article II duty or prerogative.[164] Nonetheless, the analogy helps one to conceptualize the President's role in managing the production of certain public goods that article II directs him to produce. It helps as well to illustrate why allegations that the President has abused his implied power to spend public funds in certain circumstances are better suited to evaluation through the political process rather than through judicial review. The President's choice of the minimum necessary level of output presupposes that the *quality* level of the public good already has been defined satisfactorily. A federal law enforcement policy that seeks to prosecute every incident of unlawful racial discrimination will be more costly than one that seeks to prosecute ninety percent of such incidents, let alone one that seeks to prosecute only those in which prosecutors believe there is a high probability of satisfying the relevant evidentiary requirements. Similarly, a national defense system that seeks to destroy all incoming nuclear missiles will be more costly than one merely seeking to destroy ninety percent of them. Surely the choice of quality level—particularly in matters of prosecutorial discretion—must be a matter of political discretion left to the President in the first instance and non-reviewable by the Judiciary.

Hamilton's concern in his *Explanation* that every appropriation must come from a specific fund, raises an additional level of complexity when one attempts to find a limiting principle for the President's implied power to spend. Suppose hypothetically that Congress made total appropriations in a given year of $1,000 billion,[165] but that it specifically declined to appropriate a dime for the President to perform certain article II duties and prerogatives. One could argue that the President could fund these duties and prerogatives, and yet still respect the total budget constraint established by Congress, simply by diverting funds from one Executive Branch line item to the account necessary for paying for the execution of the unfunded duties and prerogatives. In this respect, the President would still respect fiscal accountability and public efficiency in the sense that he would not be obligating the Treasury in excess of the total spending level that Congress had approved through its enactment of appropriations.

As discussed in Part I, disputes over such transferring of funds between accounts was the impetus for Gallatin's pigeonholing proposals of

164. Indeed, such a test becomes considerably more complicated in its economic treatment if one considers economies of scope that might arise from the President's production of multiple public goods. *See* Sidak, *supra* note 154, at 2085-89, 2103-05. On the implications of economies of scope, see generally W. BAUMOL, J. PANZAR & R. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982).

165. *See* 1989 ECONOMIC REPORT OF THE PRESIDENT 399 Tab. B-77 (total estimated federal outlay of $1,151 billion for fiscal year 1990).

the 1790s, as well as his (and Jefferson's) proposal for greater line-item specificity in appropriations. Congress subsequently incorporated these features into the early, and existing, versions of the Anti-Deficiency Act.[166] Clearly, pigeonholing and excessive specificity were both discretion-limiting developments. It is striking that their constitutionality has never been challenged, other than by President Wilson in his 1920 veto message. Surely it would not be a frivolous interpretation of the fiscal accountability principle contained in the appropriations clause to assert that Congress's power to control appropriations extends no farther than the setting of a spending ceiling (the nation's budget constraint) and a number of general subdivisions of spending, including perhaps affirmative statements that "$X shall be spent" to build a particular dam or aircraft carrier and so forth.

One might argue, however, that congressional control over the nation's aggregate budget constraint is not enough in terms of the constitutional allocation of power. Rather, the argument would run, the appropriations clause envisions Congress as having the power to rank the preferences (and intensities of preference) for the production of the various public goods that compete for the taxpayers' dollars. Under this view, if the President were to take funds earmarked for a congressionally identified object in the Executive Branch and use those funds instead to pay for the execution of unfunded article II duties and prerogatives, then he would be frustrating Congress's putative right under the Constitution to produce the ranking of consumer preferences for national public goods. I am skeptical that Congress has so superior a position in the national government when it comes to responding to the electorate's revealed preferences for the production of public goods.[167] It is not at all clear, in light of the debates during the Convention of 1787 and the early budgetary practices from 1789-1792, that the Framers intended Congress to control the composition of public spending to such detail and thereby diminish the President's discretion. If one assumes nonetheless that the Framers did so intend, there arises another provocative issue relating to the constitutionality of the statutory means by which Congress has limited the President's ability to redirect public expenditures while still complying with the budget constraint imposed by the overall appropriations ceiling.

At the lowest point of President Nixon's political power, Congress enacted over his veto the statutory prohibition against presidential impoundment of spending, the Congressional Budget and Impoundment

166. 31 U.S.C. § 1342-1349; *see also* L. WILMERDING, THE SPENDING POWER (1943).

167. *See* Sidak, *supra* note 154, at 2108-10 (discussing whether the Executive or Congress has the comparative advantage in ascertaining the electorate's preferences for governmental outputs).

Control Act of 1974.[168] The constitutionality of the impoundment ban takes on new significance when one searches for a way to reconcile the President's implied power to fund the execution of his article II duties and prerogatives with the object of fiscal accountability and efficiency embodied in the appropriations clause. Suppose that the President determines that he needs $100 million to pay for the execution of his unfunded article II duties and prerogatives. If he were to impound .01 percent of the entire $1,000 billion appropriated by Congress and use those funds to execute his unfunded duties and prerogatives, the President would neither exceed the aggregate spending level set by Congress nor disturb Congress's relative ranking of preferences for public goods (other than for those defunded Executive activities). (The President would seem to be on even firmer ground if the pie whose size he was reducing by impoundment were solely the appropriations already made for the Executive Branch, or even the Executive Office of the President.) Of course, the President's assertion of such a right under article II would directly attack the constitutionality of the statutory prohibition on impoundment.

In light of these considerations, I propose the following limiting principles on the President's implied ability to spend public funds to execute his duties and prerogatives:

> 1. The object of spending must relate to a textually demonstrable duty or prerogative of the President under article II.
>
> 2. The permissible extent of spending depends on the minimal output of the public good whose production is necessary to execute the article II duty or prerogative. Determinations as to minimum output and quality should be matters of Executive discretion.
>
> 3. Congress's interest in ensuring fiscal responsibility does not enable it to prohibit the President from creating a source of funds, either by transfer between Executive Branch accounts or by impounding a small percentage of aggregate appropriations, to finance the execution of article II duties or prerogatives.
>
> 4. A President claiming the right to fund the execution of unappropriated duties and prerogatives must comply, in the interest of fiscal accountability, with the requirement contained in the appropriations clause of publishing a statement and account of his disbursements from the Treasury, as well as his understanding of the legal authority by which his actions are justified.

There are other principles, or canons of construction, that one can envision. For example, as I have argued elsewhere,[169] Congress may not forbid the President from executing duties or prerogatives that have a zero

168. Pub. L. No. 93-344, 88 Stat. 297, codified at 2 U.S.C. § 622-688 (1982); *see also* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework,* 62 GEO. L.J. 1549, 1552-53 (1974).

169. Sidak, *supra* note 154, at 2106.

marginal cost; as the cost of executing one of those duties or prerogatives gets closer to zero dollars, there can be no justification that withholding funding for that duty or prerogative is necessary to achieve fiscal accountability or efficiency in the production of public goods.

These principles are tentative and surely will need refinement. They are my attempt to balance two competing objectives under the Constitution: the protection of the public purse and the endowment of the President with the power and resources necessary to perform his job effectively. I propose them as a means by which to stimulate debate, and not as any claim that I have solved a puzzle that has engaged constitutional scholars since the time of Hamilton and Jefferson.

IV. WHAT THE APPROPRIATIONS CLAUSE IS NOT: THE MISCHARACTERIZATION OF THE "POWER OF THE PURSE" AS A LEGISLATIVE VETO BY WHICH TO ERODE THE UNITARY EXECUTIVE

The appropriations power does not empower Congress to impair, through the defunding of certain Executive activities, the President's ability to perform those duties and exercise those prerogatives, whether they are routine or extraordinary. To interpret the appropriations clause in this mauner would destroy the principle of the unitary Executive. In other words, the Union does not have to be on the brink of civil war or invasion or reeling from natural disaster for the President, lacking appropriations, to be able to spend funds or obligate the Treasury in order to perforin the duties and exercise the prerogatives constitutionally assigned to him under article II. Nonetheless, Congress has been intent in recent years on advancing an interpretation of the appropriations clause that would undermine the unitary Executive—a tendency evidenced not only by the reasoning of the *Iran-Contra Report* (discussed earlier), but also by numerous riders in recent appropriations legislation and by the 1989 Bipartisan Accord on Central America.

A. *The Virtue of a Unitary Executive*

The American Constitution inherited from philosophers such as Locke[170] and Montesquieu,[171] and from British constitutional theory,[172] the principle of separation of powers. However, after the failure of the Articles of Confederation, the Framers of 1787 made a significant varia-

170. Locke, *supra* note 124, §§ 143-148, at 409-12.

171. C.L. DE S. MONTESQUIEU, THE SPIRIT OF LAWS, book 9, ch. 6, at 201-13 (1784) (D. Carrithers ed. 1977); *see also* P. SPURLIN, MONTESQUIEU IN AMERICA, 1769-1801, at 134-37 (1940).

172. 10 W.S. HOLDSWORTH, *supra* note 151, at 713-24.

tion on that theory by creating a *unitary* Executive that differed fundamentally from England's Parliament and from the Confederation Congress. The relationship of the appropriations clause to the unitary Executive is self-evident: Without sufficient funds to perform the duties and exercise the prerogatives of the Executive, the President would witness his office become "feeble," to borrow Madison's and Hamilton's adjective,[173] and thus be transformed into a plural Executive.[174] Consequently, the use by Congress of the appropriations power as a lever on the President concerns something far more fundamental to American constitutionalism than the admirable goal of controlling government spending. To understand why it matters that the unitary Executive is not undercut, it is necessary to retrace briefly the practical political rationale by which the Framers concluded that a unitary Executive was necessary to an effective federal government and why, in particular, history has demonstrated that unitary executive action is essential to the successful execution of foreign affairs.

I begin by asserting that the purpose of the Constitution is to achieve a tempered mixture of individual liberty and collective strength. The goal of preserving individual liberty is served, of course, not only by the Bill of Rights and the limitations on legislative power of article I, but also by the diffusion of power—effected by federalism and by the separation of powers among Congress, the President, and the Judiciary. The goal of collective strength is served by ensuring that the three branches of government have the ability to perform their respective functions (particularly those relating to national defense and foreign policy) in a efficacious manner. A unitary Executive is indispensable to that purpose.

The Framers did not fear a strong Executive. To the contrary, they feared the tyranny and irresolution to which legislatures before 1787 had proven themselves to be vulnerable.[175] In a famous passage from *Notes on the State of Virginia,* Thomas Jefferson wrote in 1781:

> All powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no allevia-

173. THE FEDERALIST No. 48, at 309 (J. Madison) (C. Rossiter ed. 1961); THE FEDERALIST No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961).

174. *Cf.* McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change,* 1987 U. CHI. LEGAL F. 295, 319 (discussing the President's inability to "bargain away" his "constitutionally vested" powers).

175. As Charles Warren wrote in a noted essay: "When, in 1787, the Federal Convention met to frame a new Constitution for the United States, the danger of this predominance of the Legislative power had become so well recognized, that the Convention deliberately designed a Federal Government in which the Legislative should be restricted and the Executive enhanced." Warren, *Presidential Declarations of Independence,* 10 B.U.L. REV. 1, 2 (1930). *See also* Rostow, *President, Prime Minister or Constitutional Monarch?,* 83 AM. J. INT'L L. 740, 747 (1989).

> tion that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy three despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectively checked and restrained by the others.[176]

Madison quoted this passage in its entirety in *The Federalist No. 48* [177] and offered there his own equally famous warning on legislative power: "The legislative department is everywhere extending the sphere of its activity and drawing all powers into its impetuous vortex."[178] But the concern over legislatures was not simply, as Madison and Jefferson argued, that they tended to usurp power, but also (as Hamilton believed) that they failed to get the business of government accomplished efficiently.

The danger of a weak Executive was abundantly clear to the Framers, for national defense had suffered under the Articles of Confederation,[179] particularly by the inability of the Confederation Congress to deal effectively with the British army in North America.[180] After the Revolutionary War, Great Britain was obliged to relinquish its forts along the Great Lakes pursuant to the Treaty of Paris. It refused to do so, however, and the Confederation Congress was unable to produce a policy of sufficient clarity and unity to dislodge this foreign army from America's borders.[181] George Washington wrote in 1784 that "if the British Government can no longer hold the western posts under [the] cover" of the United States not respecting the terms of the Treaty, "I shall be mistaken if they do not entrench themselves behind some other expedient to effect it."[182] In its day (given the limited technology of weaponry, transportation, and communications) the situation would be

176. T. Jefferson, *Notes on the State of Virginia,* at Query XIII (1782), in 3 THE WRITINGS OF THOMAS JEFFERSON 214, 223-24 (P. Ford ed. 1894).

177. THE FEDERALIST NO. 48, at 310-11 (J. Madison) (C. Rossiter ed. 1961).

178. *Id.* at 309.

179. *See* THE FEDERALIST NO. 23, at 152, 154 (A. Hamilton) (C. Rossiter ed. 1961).

180. *Cf.* R. MORRIS, THE FORGING OF THE UNION, 1781-1789, at 196 (1987) ("Of all postwar problems confronting the Confederation, the most exigent stemmed from differing interpretations of the Definitive Treaty on the part of the United States and Great Britain.").

181. *See* 1 J. FLEXNER, GEORGE WASHINGTON AND THE NEW NATION, 1783-1793, at 73, 78 (1969); F. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973); R. MORRIS, *supra* note 179, at 201; C. RITCHESON, AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES, 1783-1795, at 49, 141-43, 151-63 (1969); J. WRIGHT, BRITAIN AND THE AMERICAN FRONTIER, 1783-1815 (1975); *see also* THE FEDERALIST NO. 25, at 163 (A. Hamilton) (C. Rossiter ed. 1961).

182. Letter from George Washington to the President of Congress (Dec. 14, 1784), *reprinted in* 28 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 9, 10 (J. Fitzpatrick ed. 1938).

analogous to Soviet deployment of nuclear missiles in Cuba—a prospect, of course, that drove President Kennedy to the brink of war in 1962. This experience of the British forts in the 1780s—along with Shays' Rebellion in Massachusetts in 1786[183]—motivated the Framers to endow the Executive with attributes that would enable him to respond quickly and decisively to threats to national security. Of course, as the Cuban Missile Crisis demonstrates, the threat of war in a nuclear age manifests itself with greater suddenness and destructive potential than in 1787. Thus, the need for unity and decisiveness in matters of national defense has grown, not diminished, since 1787.[184]

The nature of the Legislature, however, prevents Congress from providing that desired unity and decision. The potential for moral hazard and deadlock attendant to decisionmaking by committee, articulated in economic terms today by public choice theorists,[185] was described intuitively by a frustrated Alexander Hamilton, who criticized the weaknesses of the Confederation Congress and praised the advantages of instead having a President with "energy."[186] Similarly, Hamilton argued that the accountability of an energetic, "unitary" President helped to protect individual liberty. He wrote in *The Federalist No. 70* that "a plurality in the executive . . . tends to conceal faults and destroy responsibility" and "adds to the difficulty of detection" of untrustworthy conduct.[187] Thus, a suspicion of legislative power, and a dissatisfaction with the ineffective execution of national policy under the Articles of Confed-

183. *See* THE FEDERALIST No. 28, at 178 (A. Hamilton) (C. Rossiter ed. 1961); G. LYCAN, ALEXANDER HAMILTON & AMERICAN FOREIGN POLICY 32-33 (1970); J. MAIN, *supra* note 15, at 105; G. WOOD, *supra* note 42, at 412-13, 465; Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts,* in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 113 (R. Beeman, S. Botein, & E. Carter eds. 1987).

184. It is instructive that, after the failed coup attempt in October 1989 to oust General Manuel Noriega from power in Panama, some in the United States questioned whether Congress had dulled the President's resolve to confront risky foreign policy situations for fear of paralyzing his administration in Iran-Contra-style congressional hearings and possible criminal prosecutions. *See, e.g.,* Abrams, *Panama: How America Lost Its Will to Act,* Wash. Post, Oct. 15, 1989, at B1, col. 4 (editorial by former Assistant Secretary of State).

185. *See* J. BUCHANAN & G. TULLOCK, *supra* note 160, at 111-12; M. OLSON, THE LOGIC OF COLLECTIVE ACTION 53 (1964).

186. THE FEDERALIST No. 70, at 427-28 (A. Hamilton) (C. Rossiter ed. 1961); *see also* Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *reprinted in* 2 THE PAPERS OF ALEXANDER HAMILTON 400, 404 (H. Syrett ed. 1961) ("Another defect in our system is want of method and energy in administration. This has partly resulted from . . . the want of a proper executive."). Edmund Burke had similar observations in France about the executive branch there: "The office of execution is an office of exertion. It is not from impotence we are to expect the tasks of power." E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 235 (1790) (T. Mahoney ed. 1955).

187. THE FEDERALIST No. 70, at 427-28 (A. Hamilton) (C. Rossiter ed. 1961); *see also* Morrison v. Olson, 108 S. Ct. 2597, 2638 (1988) (Scalia, J., dissenting) ("The President is directly dependent on the people and since there is only *one* President, *he* is responsible. The people know whom to blame . . . .").

eration, led the Framers to implement a separation of powers in both the text and structure of the Constitution[188] that envisioned the "energetic" and "unitary" President praised at length by Hamilton in the *The Federalist Papers.*[189]

B. *The Contemporary Predilection of Congress to Read the Appropriations Clause To Be a Legislative Veto on Presidential Action*

It is generally accepted—rather unquestioningly in light of the history of the appropriations clause—that Congress may enact or repeal substantive legislation by means of a rider to an appropriations bill.[190] But the Supreme Court's decision in the bill of attainder case, *United States v. Lovett,* makes clear that Congress cannot use its appropriations power indirectly to accomplish an unconstitutional objective.[191] *Lovett* does more than forbid Congress to use its appropriations power to violate the constitutional rights of individual citizens: It also prohibits Congress from using that authority to achieve *any* unconstitutional end, including the aggrandizement of congressional power at the expense of the Executive or the Judiciary. This is no great stretch of constitutional interpretation; as explained earlier, the rationale for separating the power of the three branches in the first place is to protect the rights of individuals by diffusing political power.[192] In particular, therefore, I read *Lovett*—as did Attorney General William P. Rogers in 1960[193]—to mean that Con-

188. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1; *see also Morrison,* 108 S. Ct. at 2626 (Scalia, J., dissenting) ("this does not mean *some of* the executive power, but *all of* the executive power"); Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("The Constitution confers on the President the whole Executive power."); A. HAMILTON, *supra* note 120, at 39.

189. THE FEDERALIST No. 70, at 423-31 (A. Hamilton) (C. Rossiter ed. 1961); *cf.* THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961) (praising the concept of separation of powers, claiming that "the accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny").

190. United States v. Dickerson, 310 U.S. 554, 555 (1940); City of Los Angeles v. Adams, 556 F.2d 40, 48-49 (D.C. Cir. 1977). However, this conventional view presumes the constitutionality of logrolling, which has not been squarely addressed by a federal court.

191. 328 U.S. 303, 313 (1946); *see also* Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.") (citation omitted); Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230, 233 (1955) (Congress "may . . . impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution").

192. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

193. Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller, 41 Op. Att'y Gen. 507, 527-28 n.33 (1960) [hereinafter Cutoff of Funds] (also citing United

gress may not use the appropriations power to impair the President's ability to perform duties or exercise prerogatives the Constitution imposes on him.

1. *Unconstitutional Conditions Contained in Recent Appropriations Legislation.* The Constitution does not establish a process by which Congress declares, through its willingness or unwillingness to appropriate funds, that some of the President's article II duties and prerogatives are at a given moment "indispensable" and others "dispensable."[194] Nonetheless, members of Congress routinely insert unconstitutional conditions into annual appropriations bills in a manner that would make the appropriations power an all-purpose legislative veto on actions of the President. Several provisions found in the appropriations acts for fiscal year 1990 and for recent preceding years demonstrate this phenomenon.

For sheer absurdity, no such provision can rival section 119 of the Department of the Interior Appropriations Act of 1990, a law signed by President Bush on October 23, 1989. The law provides: "This section shall be effective only on October 1, 1989. None of the funds available under this title may be used to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."[195] Originally, section 119 did not contain its first sentence and, so drafted, plainly interfered with the President's ability to manage the operations of the Executive Branch. On *October 2, 1989,* the House and Senate conferees agreed to limit the applicability of section 119 to one day—October 1, 1989.[196] The insertion of the first sentence to section 119 might have provided Congress a way to gut the rider without declaring defeat in the face of the President's objections, but it did so in a manner that arguably created an ex post facto law,[197] given that the legislation did not become law until twenty-two days after the one day that section 119 was to have been in effect.[198] The other

States v. Butler, 297 U.S. 1 (1936)); *see also* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); Flast v. Cohen, 392 U.S. 83, 104-05 (1968).

194. I completely agree with Professor Michael McConnell, who argues: "There is no calculus for determining which of the President's constitutional powers are more important than the others." McConnell, *supra* note 174, at 320.

195. Pub. L. No. 100-121, § 119, 103 Stat. 701, 722 (Oct. 23, 1989).

196. 135 CONG. REC. H6398 (daily ed. Oct. 2, 1989); *see also* 135 CONG. REC. H6515 (daily ed. Oct. 3, 1989) (remark of Rep. Yates).

197. U.S. CONST. art. I, § 9, cl. 3.

198. *See* Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 138 (1810) ("An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.") (Marshall, C.J.). As I explain below, *see infra* text and notes accompanying notes 351-54, the violation of an appropriations rider could result in the criminal prosecution of an Executive Branch official. Of course, one might argue that no ex post facto law had been created because the Interior

unconstitutional conditions contained in the appropriations legislation for fiscal year 1990 are less farcical than section 119, and considerably more threatening to the separation of powers.

a. The appointments power. The President's appointment power is one Executive prerogative upon which Congress has imposed conditions under the 1990 appropriations legislation for the Executive Office of the President. Article II of the Constitution places on the President the duty to nominate, "and by and with the Advice and Consent of the Senate" appoint, ambassadors, judges, and other officers of the United States.[199] Article II also empowers the President to make recess appointments, without Senate approval: "The President shall have Power to fill up all vacancies that may happen during the recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[200] So, to take a concrete example, if during the Senate's 1989 Labor Day recess President Bush had made a recess appointment of William Lucas to be Assistant Attorney General in charge of the Civil Rights Division of the Justice Department (after the Senate Judiciary Committee rejected Lucas' nomination to the civil rights job by a seven-seven vote and voted against sending his nomination to the Senate floor[201]), Mr. Lucas would be able to serve in that office until the end of the second session of the 101st Congress, or roughly until the end of 1990.

The 1990 appropriations act for the Executive Office of the President in effect has rewritten article II's appointments powers for fiscal year 1990. Section 606 of the act provides: "No part of any appropriation for the current fiscal year contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person."[202] This provision appears to be an attempt by Congress to use its appropriations power to prevent the President from freely exercising his prerogative to make recess appointments of politically controversial persons.[203]

Department funds could not be "available under" the law until the President had signed it (or had his veto overriden), which could not possibly occur until after October 1, 1989.

199. U.S. CONST. art. II, § 2, cl. 2.

200. *Id.* cl. 3.

201. Johnson, *Senate Committee Bars Bush's Choice from Rights Post,* N.Y. Times, Aug. 2, 1989, at A1, col. 4.

202. Treasury, Postal Service, and General Government Appropriations Act, 1990, Pub. L. No. 101-136, 103 Stat. 783, 817 (Nov. 3, 1989).

203. Technically, in Mr. Lucas' case the Senate Judiciary Committee voted not to refer the nomination to the Senate floor; therefore, the Senate as a whole never voted "not to approve the nomination." Johnson, *supra* note 201, at A14, col. 1. Of course, if Congress were subsequently to maintain

Moreover, as drafted, section 606 also would impose unconstitutional conditions on the President's ability to nominate and appoint officers subject to the usual Senate confirmation process. For example, Judge Robert Bork's nomination to the Supreme Court was rejected by the Senate in 1987. The language of section 606 would seem to prevent the President from being able to pay Judge Bork if he were nominated and confirmed, for example, to the position of Secretary of Agriculture or, for that matter, if Judge Bork were simply reappointed to the United States Court of Appeals for the District of Columbia Circuit. This possibility exists because the appropriations rider does not restrict the payment of a rejected nominee only if the Senate has rejected "the [*said*] nomination of said person." To the contrary, *any* nomination to any position of a rejected nominee would seem to result in the President being denied funding to pay the salary of the person (assuming rather unrealistically that the person would be willing to take office under such hostile circumstances). Moreover, given the rule against voluntary service contained in the Anti-Deficiency Act,[204] it is not even clear that a person lawfully could serve the President free of charge under such circumstances.

b. The recommendation duty. The 1990 appropriations bills also contain a number of muzzling provisions that violate the recommendation clause.[205] One of the most egregious examples is section 506 of the Energy and Water Development Appropriations Act of 1990, the Act that contains appropriations for the Department of Energy.[206] This muzzling law prohibits the use of any funds available under *any* law "for the purposes of conducting any studies relating or leading to the possibility of changing from the currently required 'at cost' to a 'market rate' or any other noncost-based method for the pricing of hydroelectric power by the six Federal public power authorities . . . ."[207] So, for example, section 506 would prohibit the President or his officers from recommending, with respect to government hydroelectric facilities, the adoption of a pricing regime that would depart from conventional rate-of-return regulation. This muzzling provision escaped the notice of Presi-

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that the vote of an individual committee of the Senate was sufficient for purposes of section 606, this rider would be an even more egregious rewriting of the President's power to make recess appointments.

204. 31 U.S.C. § 1342 (1982).

205. U.S. CONST. art. II, § 3 (President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient"). *See generally* Sidak, *supra* note 154.

206. Pub. L. No. 101-101, 103 Stat. 641 (Sept. 29, 1989).

207. *Id.* § 506, 103 Stat. at 666.

dent Bush, who signed the Act without any comment on this particular section.[208]

A similar muzzling provision appears in the appropriations act for the Executive Office of the President. Throughout the Reagan administration, and now during the Bush administration, Congress has resisted the efforts of the Office of Management and Budget (OMB), acting pursuant to Executive Order 12,291 issued in 1981 by President Reagan,[209] to review federal regulations promulgated by Executive Branch departments to ensure that they are able to pass a simple cost-benefit test. In particular, Congress inserted into annual appropriations legislation a muzzling provision that prevented OMB from subjecting agricultural marketing orders to cost-benefit scrutiny, presumably because many such price support programs imposed costs on consumers or taxpayers that far exceeded their benefits.[210] Again for 1990, Congress has conditioned appropriations for OMB as follows: "*Provided further,* That none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 . . . ."[211] Muzzling the President in this manner is plainly unconstitutional. As I have argued elsewhere at length, Congress has no constitutional authority to restrict the content of presidential recommendations.[212] In a sign that perhaps the resolve of the White House to resist such congressional encroachments is on the rise, President Bush, while not explicitly mentioning the recommendations clause, asserted in his signing statement accompanying the Act that "[t]hese restrictions . . . raise constitutional concerns because they impair my ability as President to supervise the executive branch."[213]

208. Statement on Signing the Energy and Water Development Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1472 (Sept. 29, 1989).

209. 3 C.F.R. § 127 (1981); *see also* DeMuth & Ginsburg, *White House Review of Agency Rulemaking,* 99 HARV. L. REV. 1075, 1076 (1986); Sidak, *supra* note 154, at 2079, 2111.

210. *E.g.,* Continuing Appropriations, Fiscal Year 1984: Joint Resolution Making Further Appropriations for Fiscal Year 1984, Pub. L. No. 98-151, § 575, 97 Stat. 964, 973 (1983) (incorporating by reference H.R. 4139, 98th Cong., 1st Sess. § 514 (1983)).

211. Treasury, Postal Service, and General Government Appropriations Act, 1990, Pub. L. No. 101-136, 103 Stat. 783, 792-93 (Nov. 3, 1989).

212. Sidak, *supra* note 154, at 2106, 2122; Sidak, *How Congress Erodes the Power of the Presidency: The Appropriations Muzzle,* Wall St. J., Feb. 6, 1989, at A8, col. 3.

213. Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1669, 1670 (Nov. 3, 1989) [Treasury Signing Statement].

c. The power to negotiate treaties.[214] The Constitution envisions that, through the ratification process, the Senate will participate in making of treaties. However, the Senate's role does not extend to the negotiation of treaties. John Jay wrote in *The Federalist No. 64* that the need for secrecy and dispatch made the Senate an inappropriate body for negotiating treaties: "[T]here doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly."[215] The nature of diplomacy requires that the nation speak confidentially, with one voice to foreign powers. "The convention have done well," Jay concluded, "in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."[216]

Despite the clarity of this reasoning in *The Federalist Papers,* many in Congress evidently agree, in the treaty negotiation context, with Professor Tribe's view that Congress "may simply refuse to appropriate funds for policies it deems unsound" and "may condition appropriations in ways that limit presidential foreign policy choices."[217] Certain legislators again displayed for fiscal year 1990 an inclination to use the appropriations power to rewrite the President's power to negotiate international agreements. On July 31, 1989, Representative Bill Richardson of New Mexico offered an amendment to H.R. 2991, the appropriations bill covering the Department of State.[218] The amendment would "prohibit the obligation or expenditure of funds for any meeting of the Conference on Security and Cooperation in Europe, also known as

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214. I wish to acknowledge Bruce Fein for suggesting to me the following discussion of encroachments on the President's power to make treaties.

215. THE FEDERALIST No. 64, at 392 (J. Jay) (C. Rossiter ed. 1961).

216. *Id.* at 392-93. Similarly, Hamilton wrote that "[t]he constitution . . . considers the Power of Treaty as different from that of Legislation." A. HAMILTON, *Camillus No. XXXVI* (1796), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 319 (H. Syrett ed. 1974). He wrote that, "while the Constitution declares that all the *legislative* powers which it grants shall be vested *in Congress,* it vests the power of making Treaties in *The President* with consent of the Senate." *Id.*

217. L. TRIBE, *supra* note 120, at 221-22. Similarly, Louis Fisher writes:

> It is conventional to say that Congress, in adding conditions and provisos to appropriations bills, may not achieve unconstitutional results. But this merely restates the issue. What types of conditions are unconstitutional? It is false to assume that conditions on appropriations bills are proper for domestic legislation but improper for legislation governing foreign affairs and the war power. In foreign affairs as in domestic affairs, Presidents acknowledge that Congress can use conditions to tailor its spending power.

Fisher, *supra* note 6, at 762-63 (citing L. HENKIN, *supra* note 128, at 114). *Cf.* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 282 (1980) ("The most potent congressional weapon against executive encroachment is the power of the purse.").

218. 135 CONG. REC. E2756 (daily ed. July 31, 1989).

the Helsinki Commission . . . ."[219] The Congressmen complained that "the Department of State has precluded the participation of Congress in the important substance of the conference."[220]

Although the House ultimately passed H.R. 2991 without this amendment, Representative Richardson's proposal is hardly aberrant in illustrating how the power of the purse has been viewed by some in Congress as encompassing the power to rewrite the President's power under article II to negotiate treaties. A more striking example took place in 1987, when Speaker of the House Jim Wright headed a congressional delegation in Moscow that conferred with Mikhail Gorbachev on the subject of arms control.[221] Shortly thereafter, the House of Representatives passed, 208-178, a supplemental appropriations bill for the Department of Defense containing a rider that would require President Reagan to comply with the unratified SALT II treaty regarding numerical limits on nuclear weapons and test bans,[222] thus limiting President Reagan's ability to proceed with work on the Strategic Defense Initiative, which might in turn affect the bargaining power of the United States in future arms negotiations with the Soviets.

This expansionary interpretation of the power of the purse was doubly illegitimate. First, it interfered with the President's treaty-making power in a manner that is impossible to reconcile with Justice Sutherland's statement in *United States v. Curtiss-Wright Export Corp.* that "the President alone has the power to speak or listen as a representative of the nation."[223] Second, it asserted a role for the House (thus encroaching on the proper role of the Senate) in the ratification of treaties despite the fact that the Framers intentionally excluded the House from having any role in the making or ratification of treaties, as Hamilton

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219. *Id.*

220. *Id.*

221. Keller, *House Group in Soviet Union Hopeful on Arms,* N.Y. Times, Apr. 19, 1987, at A14, col. 1.

222. Gordon, *In a Setback to Reagan's Policy, House Votes to Halt Nuclear Tests,* N.Y. Times, May 20, 1987, at A10, col. 3; *see also* Fuerbringer, *House Leaders Drop Two Curbs on Arms from Budget Bill,* N.Y. Times, June 27, 1987, at A2, col. 3 (Democratic leadership in Congress agrees to drop provision in supplemental budget requiring President Reagan to adhere to the weapons limits of the unratified 1979 SALT II treaty).

This attempt by the House to use the appropriations power to insinuate itself into the treaty process is reminiscent of the effort by the House in 1796 to condition the appropriation of funds for the execution of the Jay Treaty on the House being given access to the papers pertaining to negotiation of the treaty. President Washington refused to turn over the documents, and the House eventually appropriated the requisite funds by a close vote. *See* L. WHITE, *supra* note 80, at 63-64.

223. 299 U.S. 304, 319 (1936). For a recent assertion of this principle by President Bush, see Message to the Senate Returing Without Approval the Bill Prohibiting the Export of Technology, Defense Articles, aud Defense Services to Codevelop or Produce FS-X Aircraft with Japan, 25 WEEKLY COMP. PRES. DOC. 1191, 1192 (July 31, 1989).

explained unambiguously in *The Federalist No. 75.*[224] It is a classic example of the House's misuse of its exclusive power to originate money bills, which, as described earlier, was a great concern to the Framers.[225]

d. A legislative veto over regulations. The preceding examples of Congress's misuse of the appropriations power demonstrate efforts to replace a unitary Executive with a plural Executive. Perhaps none of the unconstitutional conditions contained in the appropriations bills for fiscal year 1990 better illustrates this objective than section 610 of the bill appropriating funds for the Executive Office of the President: "None of the funds made available pursuant to the provisions of this Act shall be used to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with the applicable law of the United States."[226] This provision amounts to a legislative veto over the President's execution of the law, for it does not require that the congressional resolution be a *joint* resolution subject both to bicameralism and presentment to the President.[227] There are, of course, one-house resolutions that can be said to be made "in accordance with the applicable law of the United States" in the sense that they are passed pursuant to the formal rules of the House or Senate,[228] but obviously they do not have the force of law because of *Chadha.*[229]

The President should veto appropriations bills that contain this kind of unconstitutional condition on his ability to discharge his duties and exercise his prerogatives. If a veto is politically unworkable because it would leave part of the Executive Branch unfunded, the President could sign the appropriations bill into law and assert a power of excision, declaring the rider restricting his article II power to be unconstitutional

224. THE FEDERALIST No. 75, at 452 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton justified the exclusion of the House as follows:

> The fluctuating and . . . multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy,* and dispatch, are incompatible with the genius of a body so variable and so numerous.

Id.; *see also* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 136-39 (1848) (H.S. Commager ed. 1947).

225. *See supra* text accompanying notes 42-45.

226. Treasury, Postal Service, and General Government Appropriations Act, 1990, Pub. L. No. 101-136, § 610, 103 Stat. 783, 819 (Nov. 3, 1989).

227. *See* U.S. CONST. art. I, § 7, cl. 3.

228. *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H. Doc. No. 248, 100th Cong., 2d Sess. §§ 396-397 (1988).

229. INS v. Chadha, 462 U.S. 919 (1983).

and severable.[230] While the Constitution does not expressly give the President such power, the President, however, does have a duty not to violate the Constitution. The question is whether his only means of defense is a veto of the entire bill.

President Bush quite clearly answered that question in the negative. On November 3, 1989, he signed H.R. 2989, the appropriations bill funding the Executive Office of the President, but he noted that "numerous provisions . . . purport to condition my authority, and the authority of affected executive branch officials, to use funds otherwise appropriated by the Act on the approval of various committees of the House of Representatives and the Senate."[231] He then asserted that the provisions were void and possibly severable:

> These provisions constitute legislative veto devices of the kind declared unconstitutional in *INS v. Chadha,* 462 U.S. 919 (1983). Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear. I direct agencies confronted with these devices to consult with the Attorney General to determine whether the grant of authority in question is severable from the unconstitutional condition. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684-87 (1987).[232]

Excision of appropriations riders that trespass on the President's duties and prerogatives under article II would be different from the line-item veto. As discussed in the context of controlling federal spending, the line-item veto is characterized as a way for the President to excise perfectly constitutional provisions in a spending bill that he finds objectionable merely because they conflict with his policy goals. The excision of unconstitutional conditions in an appropriations bill would be an Executive power of far more limited applicability. One could argue that it is not an assertion of an item veto at all for the President, by exerting a power of excision, to resist unconstitutional conditions in legislation that violate the separation of powers. Rather, such action might simply be characterized as the President's determination as to how the Constitution and its prior interpretations by the Supreme Court require him to faithfully execute the laws.[233]

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230. I recommendeded in an editorial on November 2, 1989 that President Bush consider such a course of action with respect to this and other riders contained in the Treasury, Postal Service and General Government Appropriations Act of 1990. *See* Sidak, *Spending Riders Would Unhorse the Executive,* Wall St. J., Nov. 2, 1989, at A18, col. 3.

231. Treasury Signing Statement, *supra* note 213, at 1669.

232. *Id.*

233. This question is explored further in Sidak & Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland,* 84 NW. U.L. REV. (forthcoming 1990).

2. *The 1989 Bipartisan Accord on Central America.* In March 1989, Secretary of State James Baker unveiled an agreement between the Bush Administration and Congress—called the Bipartisan Accord on Central America—whereby Congress would provide limited nonmilitary funding to the Nicaraguan opposition to the Sandinista government through February 28, 1990. In a secret side agreement, the President gave each of four congressional committees the unilateral power to halt that funding after November 30, 1989.[234] Presidential Counselor C. Boyden Gray argued to President Bush that this contract constituted an unconstitutional legislative veto, one even more illegitimate than the legislative veto in *Chadha,* which at least required bicameral action by both full houses of Congress.[235] The legal authority supporting Mr.

234. Weinraub, *Bush and Congress Sign Policy Accord on Aid to Contras,* N.Y. Times, Mar. 25, 1989, at A1, col. 6. The official statement signed by President Bush and five congressional leaders on March 24, 1989 contains no mention of the legislative veto provision. Bipartisan Accord on Central America, 25 WEEKLY COMP. PRES. DOC. 420, 420-21 (Mar. 24, 1989). Nor did the public statements issued by President Bush or Secretary Baker disclose this fact, *Transcript of White House Remarks,* N.Y. Times, Mar. 25, 1989, at A6, col. 3, even though the *New York Times* reported the following day that there existed ancillary "secret agreements under which Mr. Bush would yield considerable leverage to Congress." *Id.* at A6, col. 6. Even H.R. 1750, the bill to enact the Bipartisan Accord, does not specify the nature of the legislative veto. *See* 135 CONG. REC. H1178 (daily ed. Apr. 13, 1989) ("Congressional oversight within the House of Representatives and the Senate . . . shall be within the jurisdiction of the Committees on Appropriations of the House of Representative and the Senate [and other enumerated committees] . . . ."). This omission suggests a question of whether Congress fully complied with the requirement to "keep a Journal of its Proceedings, and from time to time publish the same." U.S. CONST. art. I, § 5, cl. 3.

Even the draft letter from the Secretary of State to congressional leaders that was eventually published in a House report is remarkably vague. IMPLEMENTATION OF THE BIPARTISAN ACCORD ON CENTRAL AMERICA OF MARCH 24, 1989, H.R. REP. NO. 23, 101st Cong., 1st Sess. 4 (1989) ("This assistance has been authorized and appropriated but will not be obligated beyond November 30, 1989, *except in the context of consultation* among the Executive, the Senate Majority and Minority leaders, the Speaker of the House of Representatives and the Minority Leader, and the relevant authorization and appropriations committees *and only if affirmed via letter* from the Bipartisan leadership of Congress and relevant House and Senate authorization committees and appropriation subcommittees.") (emphasis added).

235. Pear, *Unease Is Voiced on Contra Accord,* N.Y. Times, Mar. 26, 1989, at 1, col. 5; Seibin, *White House Reaffirms Contra Aid Plan After Bush's Counsel Expressed Doubts,* Wall St. J., Mar. 28, 1989, at A20, col. 1; Weinraub, *White House Rebukes Counsel on Pact,* N.Y. Times, Mar. 28, 1989, at 6, col. 1. The requirement of bicameralism is articulated, somewhat obliquely, in the presentment clause—article I, section 7, clause 2. Nonetheless, the necessity of the requirement is evident from the structure of articles I and II and was clearly remarked on by the Framers. THE FEDERALIST NO. 51, at 322 (J. Madison) (C. Rossiter ed. 1961); *see also* INS v. Chadha, 462 U.S. 919, 948-51 (1983) ("[T]he Framers were acutely conscious that the bicameral requirement and the Presidential clause would serve essential constitutional functions. The division of the Congress into two distinct bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings."). Indeed, bicameralism was the object of the Great Compromise at the Constitutional Convention. *Id.* at 950.

Four Members of Congress asserted that the Bipartisan Accord was an unconstitutional violation of the separation of powers. 135 CONG. REC. H1194 (daily ed. Apr. 13, 1989) (Reps. Robert Dornan, Dan Burton, Chuck Douglas, and Henry Hyde). They subsequently filed suit in federal

Gray's position consisted not only of *Chadha,* but also precedent within the Executive Branch: President Eisenhower's Attorney General, Herbert Brownell, Jr., had opined in 1955 that a statute then enacted by Congress and containing a legislative veto vested in either of two congressional committees violated the principle of separation of powers.[236] Indeed, it is worth asking whether President Bush's excision of legislative veto provisions on November 3, 1989, implicitly repudiated the Bipartisan Accord on Central America.

Mr. Arthur Liman, who served as Chief Counsel to the Senate Select Committee for the Iran-Contra investigation, vigorously defended the constitutionality of Secretary Baker's agreement after the editors of the *Wall Street Journal* had denounced it.[237] Not surprisingly, the reasoning of Mr. Liman's defense of Secretary Baker echoed the expansive, but textually and historically unsubstantiated, interpretation of the appropriations clause contained in the *Iran-Contra Report*:

> The Constitution did not even attempt to define the outer bounds of either executive or legislative power over foreign affairs, but those powers clearly intersect and overlap. *The president was made deliberately dependent on Congress for funds.* The Constitution forbids the president to spend money unless it has been appropriated by Congress. And if Congress has the sole power to declare war, what lawyer (even a president's counsel) could argue seriously that Congress cannot promote peace by refusing to appropriate aid to rebel forces. That is what the Boland Amendments did—they cut off appropriations and expenditures for the Contras.
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court to invalidate the agreement. Congressional standing, of course, remains a highly controversial issue. *See* Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting).

236. Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230 (1955); *see also* Wilson Veto Message, *supra* note 143, at 8845 ("I do not concede the right, and certainly not the wisdom, of the Congress endowing a committee of either House or a joint committee of both Houses with power to prescribe 'regulations' under which executive departments may operate."). In addition, President Franklin Roosevelt wrote a confidential memorandum to Attorney General Robert Jackson in 1941 stating that a legislative veto provision in the Lend-Lease Act, which Roosevelt had signed into law, was "clearly unconstitutional." Memorandum for the Attorney General from President Franklin D. Roosevelt (Apr. 7, 1941), *reprinted in* Jackson, *A Presidential Legal Opinion,* 66 HARV. L. REV. 1353, 1357 (1953).

Lonis Fisher candidly suggests how, notwithstanding *Chadha,* Congress could avoid presentment and replicate through the appropriations process the effect of the legislative veto:

> With regard to war powers in general, Congress may pass a concurrent resolution (not subject to the President's veto) stating that it shall not be in order in either House to consider any bill, joint resolution or amendment that provides funding to carry out any military actions inconsistent with an enabling statute, such as the War Powers Resolution. Under the ruling of *INS v. Chadha,* concurrent resolutions may not direct the President or the executive branch, but they can control the internal procedures of Congress.

Fisher, *supra* note 6, at 763.

237. Liman, *The Constitution and the Contras,* Wall St. J., May 12, 1989, at A15, col. 1. The newspaper's editorial was *Holy Roman Bipartisanship,* Wall St. J., Mar. 27, 1989, at A10, col. 1.

> Mr. Gray's concern that the accords provide for a legislative veto by any of four congressional committees ignores the fact that Congress already had turned off aid for the Contras. The accords turned the aid back on. It was not Mr. Baker, but the Constitution, that gave Congress the sole right to grant or decline appropriations.[238]

Mr. Liman concluded that "Secretary Baker has exhibited a far more sensitive appreciation of the Constitution and of how to wield executive power effectively than critics with a crimped view of congressional power."[239]

I disagree. The Bipartisan Accord subverted the rule of law. As Chief Justice Marshall wrote in *Marbury v. Madison:* "The powers of the legislature are defined and limited; *and that those limits many not be mistaken or forgotten, the constitution is written.* To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[240] The Bipartisan Accord presumed the validity of an assertion of congressional power over appropriations that was illegitimate from the start: Congress cannot condition appropriations on its ability to veto subsequent Executive decisions. Compounding this constitutional infirmity, the secret contract that evidently effectuates this legislative veto violates the principle of bicameralism. Of course, Congress and the President took these actions in the name of political expediency, bipartisanship, and pragmatism but these are the same genre of reasoning that the Court vigorously rejected in *Youngstown.* The net effect of the Bipartisan Accord is to erode the unitary Executive by ceding power from the President to Congress; to subordinate the separation of powers to ephemeral political objectives; and thus to stray farther from the ideal that the people of this country consented to be governed by "a government of laws, and not of men."[241]

C. *Unconstitutional Conditions on the Unitary Executive*

The preceding examples show the recurrent attempt by Congress in recent years to impose conditions on appropriations in a manner that would transform the Presidency from a unitary to a plural Executive. President Rutherford B. Hayes provided in 1879 perhaps the most artic-

238. Liman, *supra* note 237, at A15 (emphasis added).

239. *Id.*

240. 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Discussing the extent of legislative power, Locke wrote: "[T]he Ruling Power ought to govern by *declared* and *received Laws,* and not by extemporary Dictates and undetermined Resolutions." J. LOCKE, *supra* note 124, § 137, at 405.

241. MASS. CONST., pt. I, art. XXX (1780); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("the distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation").

ulate attack on the impropriety and unconstitutionality of this use of the appropriations clause.

During Reconstruction, former slaves in parts of the South were subjected to violence and intimidation when they attempted to vote or assemble peacefully for political purposes.[242] President Ulysses S. Grant responded to the situation in 1874 by sending General Philip Sheridan and the U.S. Army into Louisiana, where two rival groups (one obviously hostile to blacks) claimed to have been legitimately elected to the same public offices.[243] By the summer of 1875, however, President Grant's support for former slaves had flagged in the face of enormous political pressure from white supremacists in both the North and South, and he refused to send any more federal troops into the South to protect black voters.[244] The year 1877 brought the inauguration of Rutherford B. Hayes, the return of home rule in the South, and diminished protection of blacks there.[245] Congressional resistance to the renewed use of federal troops had hardened, and Congress began to use its power of the purse to try to prevent the use of U.S. Army troops as a *posse comitatus.*

By April 1879, Hayes had vetoed the first of five separate appropriations bills[246] that contained riders prohibiting, under threat of criminal penalties, the use of any appropriated monies to deploy federal troops as a *posse comitatus*—a prohibition that would have prevented the President from using such troops to maintain peace and prevent fraud at polling places in furtherance of the fifteenth amendment.[247] Hayes considered the situation extremely grave, writing in his diary on July 30, 1879:

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242. *See, e.g.,* Crouch, *Postbellum Violence, 1871* in 3 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, at 1689 (A. Schlesinger & R. Burns eds. 1975).

243. *See* E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 554-56 (1988); W. GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 121-35 (1979).

244. E. FONER, *supra* note 242, at 560-63; W. MCFEELY, GRANT: A BIOGRAPHY 417-19 (1981); Crouch, *supra* note 242, at 1712.

245. W. GILLETTE, *supra* note 243, at 346; *cf.* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 484 (1935).

246. H.R. 1, 46th Cong., 1st Sess. (1879); H.R. 2, 46th Cong., 1st Sess. (1879); H.R. 2252, 46th Cong., 1st Sess. (1879); H.R. 2382, 46th Cong., 1st Sess. (1879); H.R. 4924, 46th Cong., 2d Sess. (1880).

247. *See* E. MASON, THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES (1789-1889), at 47-49 (1890); Veto Message of Rutherford B. Hayes (Apr. 29, 1879), in 9 MESSAGES AND PAPERS OF THE PRESIDENTS 4475, 4475-80 (J. Richardson ed. 1897) [hereinafter Hayes Veto Message]. For further commentary on President Hayes' veto controversy, see K. DAVISON, THE PRESIDENCY OF RUTHERFORD B. HAYES 162-63 (1972); A. HOOGENBOOM, THE PRESIDENCY OF RUTHERFORD B. HAYES 74-78 (1988); W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 25 (1916). Historian William Gillette argues that Hayes' vetoes were politically expedient in the sense that, looking forward to the election of 1880, they would prop up the Republican Party in the South, which had suffered from the disenfranchisement of blacks. W. GILLETTE, *supra* note 243, at 353-54.

> No doubt the Government is a good deal crippled in its means of enforcing the laws by the proviso attached to the Army Appropriations Bill which prohibits the use of the Army as *posse comitatus* to aid United States officers in the execution of process. The States may and do employ state military force to support as a *posse comitatus* the state civil authorities. If a conflict of jurisdiction occurs between the States and the United States on any question, the United States is thus placed as a great disadvantage. But in the last resort, I am confident that the laws give the Executive ample power to enforce obedience to United States process.[248]

Reflecting this concern, Hayes vetoed each of five consecutive appropriations bills that contained riders forbidding his use of the Army to protect the polls.

It seems clear that President Hayes had the Constitution on his side. The fifteenth amendment provides that no citizen shall be denied his right to vote on the basis of race.[249] Two other rights expressly guaranteed by the federal government under the Constitution are the protection of the states against domestic violence and the guarantee of a republican form of government.[250] It is not difficult to envision that the infringement of voting rights because of racial animosity would undermine the republican process by which the authority exercised by government receives its legitimacy.[251] In addition, the President has a constitutional duty to faithfully execute the laws[252] and defend the Constitution[253]—provisions that require the President to enforce the fifteenth amendment and the guarantee clause of article IV, regardless of whether Congress has enacted legislation and appropriated funds specifically for that purpose.[254] Moreover, the President, as the Commander in Chief of the armed forces,[255] has the power to dispatch federal troops for this purpose; the foreign policy powers granted to Congress[256] are clearly irrele-

248. 3 DIARY AND LETTERS OF RUTHERFORD RICHARD HAYES (July 30, 1878) 492, 492-93 (C. Williams ed. 1924).

249. U.S. CONST. amend. XV; *see, e.g.,* Neal v. Delaware, 103 U.S. 370, 389 (1881) ("Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove . . . that provision [of state law] which restricts the right of suffrage to the white race.").

250. U.S. CONST. art. IV, § 4. *See generally* Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause,* 93 YALE L.J. 561 (1984) (by Thomas A. Smith) (arguing that federal courts, under the auspices of the guarantee clause, should police state governments in their compliance with their respective state constitutions).

251. *Ex Parte* Yarbrough, 110 U.S. 651, 657-58, 662 (1884).

252. U.S. CONST. art. II, § 3.

253. *Id.* art. II, § 1, cl. 8; *id.* art. VI, cl. 3.

254. *Cf. In re* Neagle, 135 U.S. 1, 63-68 (1890) (recalling episodes of executive action undertaken pursuant to textual provisions of the Constitution without congressional implementing legislation).

255. U.S. CONST. art. II, § 2, cl. 1.

256. *E.g., id.* art. I, § 8, cl. 3 (power to regulate commerce with foreign nations); *id.* cl. 11 (power to declare war); *id.* art. II, § 2, cl. 2 (Senate ratification of treaties and confirmation of ambassadors).

vant to this domestic use of military forces pursuant to the guarantee clause.

Hayes recognized the scope of the problem and the scope of his powers. The first of his five veto messages is extraordinary, for it resembles a lengthy Supreme Court opinion on the separation of powers.[257] Opportunistic use of the appropriations power by the House of Representatives, Hayes argued, would usurp the power of the Senate, the Executive Branch, and the Judiciary: "The enactment of this bill into a law will establish a precedent which will tend to destroy the equal independence of the several branches of the Government. Its principle places not merely the Senate and the Executive, but the Judiciary also, under the coercive dictation of the House."[258] Hayes thought it perverse that the House of Representatives, by virtue of its power of the purse, could elevate itself to the position of ultimate arbiter of constitutional disputes: "The House alone will be the judge of what constitutes a grievance, and also of the means and measure of redress."[259] This remark harkened back to the original concern expressed at the Constitutional Convention about the danger of the House abusing its exclusive power to originate money bills.[260] Hayes' following remark was prophetic of the attempt by Congress in 1987 to use the appropriations clause to force President Reagan to abide by a particular interpretation of the unratified 1979 SALT II treaty with the Soviet Union:

> An act of Congress to protect elections is now the grievance complained of; but the House may on the same principle determine that any other act of Congress, *a treaty made by the President with the advice and consent of the Senate,* a nomination or appointment to office, or that a decision or opinion of the Supreme Court is a grievance, and that the measure of redress is to withhold the appropriations required for the support of the offending branch of the Government.[261]

Hayes' original reasoning received further refinement in 1933, when Attorney General William Mitchell opined that Congress cannot defund the President's performance of his various duties: "Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, *provided always that the conditions do not require operation of the*

257. The grandiosity of the controversy does not necessarily mean that conditions improved appreciably for blacks in the South as a result of Hayes' stand. *See* W. GILLETTE, *supra* note 243, at 434 n.69.

258. Hayes Veto Message, *supra* note 247, at 4483-84. Ultimately, Congress relented and presented Hayes an appropriations bill without the rider. E. MASON, *supra* note 247, at 49.

259. Hayes Veto Message, *supra* note 247, at 4484.

260. *See supra* text accompanying notes 42-45.

261. Hayes Veto Message, *supra* note 247, at 4484 (emphasis added).

Government in a way forbidden by the Constitution."[262] Attorney General Mitchell in effect anticipated the Court's holding in *Lovett* by articulating a theory of unconstitutional conditions in the context of separation of powers: "Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution."[263] Like Hayes, Mitchell feared an imperial Congress using its appropriations power to subordinate the coequal branches:

> If such a practice were permissible, Congress could subvert the Constitution. It might make appropriations on the condition that the executive department abrogate its function. It might, for example, appropriate money for the War Department on condition that the direction of military operations should be conducted by some person designated by Congress, thus requiring the President to abdicate his functions as Commander in Chief.[264]

Thus, President Hayes and Attorney General Mitchell understood the inherent tension between the separation of powers and the appropriations clause, and they recognized the underlying fallacy of the expansive notion, now commonly accepted, of Congress's "power of the purse": If the appropriations power may serve as a legislative veto, it has no self-limiting principle.

This insight eluded the drafters of the *Iran-Contra Report* but not the drafters of the accompanying *Minority Report,* who stated that "Congress may not use its control over appropriations, including salaries, to prevent the executive or judiciary from fulfilling Constitutionally mandated obligations."[265] The *Minority Report* stated in simple terms the broader constitutional principle at stake:

> Congress may not condition an authorization or appropriation upon any other procedural requirements that would negate powers granted to the President by the Constitution. What Congress grants by statute may be taken away by statute. But Congress may not ask the Presi-

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262. Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933) (emphasis added) [hereinafter Mitchell Opinion]; *see also* Appropriations Limitations for Rules Vetoed by Congress, 4B Op. Off. Legal Counsel 731, 733-34 (1980). In 1957, President Eisenhower dispatched federal troops (and "federalized" the Arkansas National Guard) to keep peace and protect the constitutional rights of black citizens when riots erupted following the issuance of a federal court order to desegregate Central High School in Little Rock. Attorney General Herbert Brownell relied expressly on the rationale used 78 years earlier by President Hayes and counseled President Eisenhower that he had "grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate." President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att'y Gen. 313, 331 (1957).

263. Mitchell Opinion, *supra* note 262, at 61.

264. *Id.*

265. IRAN-CONTRA REPORT, *supra* note 26, at 476 (Minority Report).

> dent to give up a power he gets from the Constitution, as opposed to one he gets from Congress, as a condition for getting something, whether money or some other good or power from Congress.[266]

I believe that President Hayes, Attorney General Mitchell, and the minority draftsmen of the *Iran-Contra Report* were plainly correct in their reasoning. If they were wrong, Congress could, in the name of protecting the public purse, prevent the President from fulfilling any of his duties, including protecting the rights guaranteed or reserved to the people under the Constitution. The President's prerogatives likewise would be jeopardized, for he would lack any discretion with which to exercise them. As a consequence, the unitary Executive would be converted into a plural Executive, the entire scheme of separation of powers would be subordinated to the appropriations power, and the boundaries of individual liberty would depend at any moment on the ephemeral passions of Congress.

V. PROFESSOR STITH'S THEORY OF THE APPROPRIATIONS CLAUSE

Professor Stith's theory of the appropriations clause would emasculate the Presidency and upset the separation of powers in precisely the manner that President Hayes and Attorney General Mitchell feared. Ironically, Professor Stith concedes at the outset of her argument that article I, clause 9 does not give Congress the authority to do anything that it cannot already do by virtue of its enumerated powers in clause 8: "While section 8 of article I enumerates the powers of the legislative branch, the appropriations clause in section 9 is not a grant of power."[267] However, a few pages later Professor Stith reads the appropriations clause as a sweeping grant of power far more potent than the necessary and proper clause,[268] a grant of power so great as to enable Congress to usurp the duties and prerogatives of the President by imposing specific conditions on how he may perform or exercise those duties and prerogatives.

Professor Stith's Principle of Appropriations Control—the proposition that the President is prohibited from making any "expenditure of any public money without *legislative* authorization"[269]—is obviously

266. *Id.* Based on this reasoning, the *Minority Report* made the following recommendation: "Require Congress to divide continuing resolutions into separate appropriations bills and give the President an item veto for foreign policy limitation amendments on appropriations bills." *Id.* at 585 (italics suppressed).

267. Stith, *supra* note 2, at 1348.

268. U.S. CONST. art I, § 8, cl. 18. *See generally* Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (Spring 1976).

269. Stith, *supra* note 2, at 1345 (emphasis added).

anti-presidential. That alone would not be a valid criticism, for one can argue that a number of provisions in articles I and III are intentionally anti-presidential in order to effect the separation of powers. Thus, Professor Stith's theory might simply embody the "interdependence" and "reciprocity" between the separate branches that Justice Jackson described in *Youngstown,*[270] and which the Rehnquist Court in turn has cited recently in support of its decisions in *Morrison v. Olson*[271] and *Mistretta v. United States.*[272] On closer examination, however, it is clear that Professor Stith's theory would diminish radically the President's article II powers under the pretext of guarding the public purse; the theory would make the Presidency an arm of Congress, rather than a coequal branch, and thus violate the principle of separation of powers far more than did, say, the legislative veto at issue in *INS v. Chadha.*[273] It is ironic, therefore, that although Professor Stith readily acknowledges that "the First Amendment imposes a limitation upon the exercise of . . . Congress' appropriations power,"[274] she fails to recoguize that the separation of powers acts as a limitation on Congress's appropriations power.

The political controversy to which Professor Stith repeatedly refers in explaining her theory of the appropriations clause is the private funding of the Contras—the opponents of the Marxist regime in Nicaragua—through both private contributions and diversions of profits made on the secret sale of arms to Iran. She considers whether Congress, having denied President Reagan the aid he requested for arms to the Contras, should have to tolerate individual citizens who, with the assistance of

270. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

271. 108 S. Ct. 2597, 2620 (1988).

272. 109 S. Ct. 647, 659 (1989).

273. 462 U.S. 919 (1983).

274. Stith, *supra* note 2, at 1350; *cf.* Clarke v. United States, 886 F.2d 404 (D.C. Cir. 1989) (holding, as violative of the first amendment, the "Armstrong Amendment," which made expenditure of funds appropriated for the District of Columbia contingent on the adoption by the District's city council of a measure that would have permitted Georgetown University, a private institution affiliated with the Catholic Church, to discriminate against homosexuals); News Am. Publishing Corp. v. FCC, 844 F.2d 800, 815 (D.C. Cir. 1988) (holding, as violative of the first amendment, an appropriations rider that limited the discretion of the FCC to re-examine its policy for granting waivers to its rule prohibiting cross-ownership of newspapers and television stations in the same region). Similarly, but more broadly, Louis Fisher writes:

> The congressional power of the purse is not unlimited. Congress cannot use appropriations bills to enact bills of attainder, to restrict the President's pardon power or to establish a national religion. The Constitution prohibits Congress from diminishing the salaries of the President or federal judges. Congress would overstep its boundaries if it "refused to appropriate funds for the President to receive foreign ambassadors or to make treaties."

Fisher, *supra* note 6, at 762 (quoting Stith, *supra* note 2, at 1351) (citations omitted)). Nonetheless, Fisher plainly views the appropriations power as a legislative veto on important functions of the President in both domestic and foreign affairs. *Id.* at 762-63.

Executive Branch employees, donate time and money to support armed resistance against the Sandinista government.[275] Professor Stith believes that even if privately funded initiatives to overthrow the Sandinistas imposed no incremental cost on the Treasury, Congress has the authority *under its appropriations power* to prohibit them. From the Iran-Contra controversy, Professor Stith thus attempts to fashion a broad theory of the appropriations clause.

Apart from whatever light it may shed on the conduct of foreign affairs, the Iran-Contra controversy is an unlikely starting point for interpreting the appropriations clause. There is obviously a great deal of disagreement regarding the desirability and propriety of helping the Contras to dislodge a Marxist military government in Nicaragua.[276] Indeed, the disagreement often has been bitter.[277] This polarity and tendentiousness complicate the task of trying to derive from the circumstances of this controversy a neutral rule for interpreting the appropriations clause.[278] That difficulty should be manifest when the constitutionality of the underlying congressional attempts to constrain the President's management of foreign policy in Central America (through the Boland Amendment)

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275. On July 18, 1989, the Senate approved an amendment sponsored by Senator Moynihan that would add language to a foreign aid bill to criminalize the solicitation of private contributions to fund activities forbidden by Congress. Dewar, *Senate Bans 3rd-Country Fund Raising*, Wash. Post, July 19, 1989, at A1, col. 6; *see also* 135 CONG. REC. S8107-10 (daily ed. July 18, 1989) (discussing Amendment No. 268 to S. 1160) (remarks of Sen. Moynihan). President Bush vetoed legislation containing such a prohibition. Message to the House of Representatives Returning Without Approval the Foreign Operations, Export Financing, and Related Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1783 (Nov. 19, 1989). He later signed a bill with a diluted form of the prohibition. Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1810 (Nov. 21, 1989).

276. United States policy toward the Government of Nicaragua shall be based upon the government's responsiveness to continuing concerns affecting the national security of the United States and Nicaragua's neighbors about . . . Nicaragua's close military and security ties to Cuba and the Soviet Union and its Warsaw Pact allies including the presence in Nicaragua of military and security personnel from those countries and allies . . . .

Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, § 203(a), 100 Stat. 1783, 1783-96 (1986).

277. Consider, for example, the acrimonious exchange over whether the Sandinista regime endorsed the massacre in Tiananmen Square on June 4, 1989. *Compare Fellow Travelers*, Wall St. J., June 7, 1989, at A32, col. 1 (reporting a story appearing in *Barricada*, the official Sandinista newspaper, supporting actions of the Chinese government); 135 CONG. REC. H2844 (daily ed. June 20, 1989) (statement of Rep. Ballenger) ("A government that would casually dismiss this type of brutal suppression cannot realistically be expected to meet its obligations for holding free elections.") *and Solidarity Forever*, Wall St. J., Oct. 12, 1989, at A16, col. 2 (quoting Chinese Xinhua news agency report of Sept. 12, 1989 that a member of the Sandinista Directorate said in Beijing that Nicaragua gives China "firm support in" "quelling of anti-government riots") *with* Cockburn, *Nicaragua, Vietnam and Cuba Praise China? Dead Wrong*, Wall St. J., June 15, 1989, at A13, col. 1 (refuting *Wall Street Journal*'s editorial of June 7, 1989).

278. *Cf.* Posner, *Constitutional Scholarship: What Next?*, 5 CONST. COMMENTARY 17, 17 (1988) ("Most of what passes for constitutional scholarship is heavily tendentious commentary on recent decisions by the Supreme Court.").

is itself so hotly disputed. Moreover, even if one considers the appropriations clause to serve as a kind of vector of national policy (having both direction and magnitude), congressional support for and opposition to the Contras provide testimony to the inconsistency in foreign affairs that the Framers feared from a plural Executive.[279]

I do not mean to suggest that Professor Stith's undertaking is doomed to a resulted-oriented analysis because she has chosen a politically controversial starting point. However, one need not be an adherent of "original intent" to be skeptical that the events of the Iran-Contra controversy (as opposed to, say, the text of the appropriations clause or the history of debates of the Convention of 1787) reveal the probable meaning of the appropriations clause, and that, in the course of construing that clause two centuries later, the illegitimacy of assisting the private funding of the Contras emerges as a straightforward implication. I believe that one of Professor Stith's predecessors at Yale Law School, Eugene Rostow, has the clearer perspective on the appropriations clause issues raised by the Iran-Contra Affair. He considers them to be rather mundane:

> Whether the Boland amendments are constitutional, and exactly what they mean, are . . . irrelevant to the ultimate question left by the Iran-Contra episode: whether every penny received from the sales of arms to Iran belonged to the United States, or whether the so-called "profits" from the sales fell into another category. That is an important question, and not a very difficult question, but it does not account for the political excitement engendered by the affair. There can be little

279. *E.g.*, THE FEDERALIST No. 72, at 435-36 (A. Hamilton) (C. Rossiter ed. 1961); THE FEDERALIST No. 75, at 452 (A. Hamilton) (C. Rossiter ed. 1961). In 1983, Congress appropriated $24 million in military aid for the Contras. Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983); Department of Defense Appropriations Act, 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983). In 1984 and 1985, Congress eliminated the military aid but appropriated $27 million in *humanitarian* aid. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(g)(1), 99 Stat. 254; Supplemental Appropriations Act, 1985, Pub. L. No. 99-88, 99 Stat. 293, 324. In 1986, Congress appropriated $100 million for both military and humanitarian purposes. Military Construction Appropriations Act, 1987, § 206(a)(2), Pub. L. No. 99-591, 100 Stat. 3341, 3341-300 (1986). In 1987, Congress appropriated $3.6 million for humanitarian purposes and $4.5 million for the transportation of humanitarian and other assistance.. Continuing Appropriations, Fiscal Year 1988—Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. No. 100-202, tit. VI, § 111, 101 Stat. 1329-437 (1987). In 1988, Congress appropriated $16.5 million for military aid and $27.1 million for humanitarian purposes. Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, §§ 9003, 9006(a)(1), 102 Stat. 2270, 2270-50, 2270-53 (1988). And, in 1989, Congress and the Bush Administration reached an agreement (discussed in greater detail earlier) by which Congress appropriated $49.75 million through February 28, 1990 for humanitarian purposes, subject to the unilateral power of Congress to halt funding after November 30, 1989. IMPLEMENTATION OF THE BIPARTISAN ACCORD ON CENTRAL AMERICA ACT OF 1989, H.R. REP. No. 23, 101st Cong., 1st Sess. 13 (1989) [hereinafter REPORT ON BIPARTISAN ACCORD].

> doubt that the proceeds of the sales should have been paid to the Treasury.[280]

Professor Stith's pedagogical reliance on the Iran-Contra Affair threatens to deflect attention away from an attempt to interpret, as neutrally as possible, the history, text, and structure of the appropriations clause. Instead, the considerable political excitement engendered by the Iran-Contra Affair threatens to taint the dispassionate interpretation of the clause. In this respect, Professor Stith's essay is rhetorically adept, for it enables her to free ride in her explication of the appropriations clause on the popular indignation over "trading arms for hostages" and on the animus that many legal scholars evidently feel toward the institution of the Presidency[281] (and perhaps toward Ronald Reagan as a political figure). We are tempted to agree with Professor Stith's theory on the appropriations clause not because we are convinced that it is right, but because we know that what happened in the Iran-Contra Affair was wrong and should not be permitted to happen again.

A. *Aggrandizement of Congressional Power*

Professor Stith asserts that Congress may prohibit presidential actions that do not cost taxpayers anything and thus cannot be said to require that "Money shall be drawn from the Treasury." She writes: "Even where unauthorized spending by the Executive would impose *no additional obligation on the Treasury* . . . , the Constitution prohibits such spending if it is not authorized by Congress."[282] (At the same time she asserts that no such limitation applies to the Legislature: "Congress has constitutional power to govern by means *that involve no cost to the federal government* and no federal government action."[283]) The scope of

280. E. ROSTOW, PRESIDENT, PRIME MINISTER, OR CONSTITUTIONAL MONARCH? 23 (Institute for National Strategic Studies, National Defense University, Oct. 1989).

281. *E.g.*, P. KURLAND, WATERGATE AND THE CONSTITUTION 153 (1978) ("The primary evil revealed by the events of Watergate was the presidency: not the man but the office.")

282. Stith, *supra* note 2, at 1345 (emphasis added).

283. *Id.* at 1348 n.20 (emphasis added). Professor Stith gives as examples of this proposition the ability of the federal government to coerce *states* to tax or regulate private conduct. *Id.* Apart from implicitly endorsing the expansion of the coercive power of government at the expense of the individual, this line of reasoning ignores some of the most powerful language that the Constitution contains regarding the legitimacy of government. Although Congress may avoid creating costs for the federal government by coercing the states to tax and spend, by so doing it still clearly creates a cost for the *people,* from whom all powers of the federal government (including those of Congress) are delegated. *See* U.S. CONST. preamble ("We the People . . . do ordain and establish this Constitution"); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people."); *see also* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 331 (1985) ("Representative government begins with the premise that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction.").

congressional power and oversight of the President created by the appropriations power is plenary in Professor Stith's opinion, such that "*all activity of the executive branch*—all actions undertaken by and in the name of the United States government—must be authorized and paid for pursuant to the Constitution."[284]

At this point in her interpretation of the appropriations clause, Professor Stith performs a legerdemain that cannot escape notice. She defines a governmental activity to be "authorized and paid for pursuant to the Constitution" only after *Congress* has authorized it and appropriated funds for it. Thus, her derivation of the Principle of Appropriations Control implies a startling morphology of the Constitution: Because Professor Stith asserts that only Congress has the power to appropriate funds, she concludes that it can decline to "authorize" the President to perform any of the activities of the Executive Branch that the Framers specified in article II. In other words, the President is a constitutional amanuensis who may perform his duties and exercise his few discretionary powers only to the extent that Congress authorizes him to do so by permitting him to draw money from, or make obligations on, the Treasury.[285] Even if the President would only trivially burden the Treasury by taking a particular action—such as delivering a speech advocating a particular policy[286]—he may not act unless Congress "authorizes" him to do so, since Professor Stith declares it to be an "indispensable function"[287] of the appropriations clause for *Congress* to decide whether "under our constitutional scheme . . . the specific activity is . . . within the realm of authorized government actions."[288]

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284. Stith, *supra* note 2, at 1348 (emphasis added).

285. This diminution in the role of the President would be even greater than that created by the statutory elimination of the impoundment power, which Deputy Attorney General Joseph Sneed argued in 1973 would transform the President into the nation's "Chief Clerk." *See Impoundment of Appropriated Funds by the President: Joint Hearings on S. 373 Before the Subcomm. on Impoundment of Funds of the Senate Comm. on Gov't Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 93d Cong., lst Sess. 369 (1973).

286. U.S. CONST. art. II, § 3.

287. Stith, *supra* note 2, at 1381.

288. *Id.* at 1361. It is informative that the Confederate Constitution substantially *expanded* the President's power over spending: "Congress shall appropriate no money from the Treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some of the heads of departments and submitted to Congress by the President . . . ." CONFEDERATE CONST. art. I, § 9, cl. 9 (1861), *reprinted in* 1 THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY, 1861-1865, at 37, 43-44 (A. Nevins & J. Richardson eds. 1966); *see also* E. COULTER, THE CONFEDERATE STATES OF AMERICA, 1861-1865, at 28 (1950) ("Congress could not . . . make any appropriations without a two-thirds majority *unless* asked for in the Presidential budget.") (emphasis added). In other words, the seven states that adopted the Confederate Constitution less than 75 years after the ratification of the U.S. Constitution changed the appropriations clause contained in the 1787 document in a manner antipodal to Professor Stith's Principle of Appropriations Control. Jefferson Davis observed that even a Northern newspaper, the

This reasoning reveals a major weakness in Professor Stith's theory of the appropriations power. She repeatedly refers to "our constitutional order,"[289] yet the meaning of this phrase remains obscure, and the significance of the text and history of the appropriations clause—and of the enumerated duties and prerogatives of the President in article II—seem incidental. Consequently, Professor Stith is able to make the following assertion: "If Congress permits the Executive access to the public fisc without effective appropriations control, *then the Executive alone* defines the scope and character of the public sphere, especially in areas that inherently require significant executive discretion."[290] What about the text of the Constitution? Before there was a tripartite federal government, there were the Framers, who surely thought that one important purpose of their undertaking in Philadelphia in 1787 was to define "the scope and character of the public sphere."[291] Thus, it simply does not follow, as Professor Stith asserts, that the President will have dictatorial powers to delineate the extent of the federal government unless Congress keeps him on a strict allowance.

Despite her concern over the President exercising too much power to define the extent and scope of the public sphere, Professor Stith creates a double standard by which Congress is free to govern the nation (in some unspecified manner with an equally unspecified degree of accountability) without the President's participation or his agreement that its activities are within Professor Stith's "realm of authorized government

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New York Herald of March 19, 1861, praised this and other structural modifications that the Confederacy had made to the U.S. Constitution in drafting their own document. 1 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 263 (1881). On the public finance of the Confederacy, see generally R. LESTER, CONFEDERATE FINANCE AND PURCHASING IN GREAT BRITAIN (1975); R. TODD, CONFEDERATE FINANCE (1954).

289. Or "our constitutional structure" or "our constitutional scheme." Stith, *supra* note 2, at 1344, 1346 (twice), 1353 n.48 ("our democratic order"), 1358, 1360, 1361. It is unclear whether Professor Stith considers "our" to refer to the views of the Framers, or rather the views of some contemporary group of constitutional thinkers. I presume, for example, that she has something different in mind from what Justice Scalia does when, dissenting in Mistretta v. United States, 109 S. Ct. 647, 683 (1989), he refers to "our constitutional structure" as something that would not permit "improvisation" regarding the separation of powers.

290. Stith, *supra* note 2, at 1345 (emphasis added).

291. By comparison, the framers of the Confederate Constitution defined the public sphere more narrowly than the extent of the United States public sphere of 1861 in the sense that the Confederate post office—to take one example—was to have been subsidized by the national government only until March 1, 1863. CONFEDERATE CONST. art. I, § 8, cl. 7 (1861), *reprinted in* 1 THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY, 1861-1865, at 37, 42 (A. Nevins & J. Richardson eds. 1966). The U.S. Constitution is considerably more open-ended about public ownership or subsidization of the Post Office. *See* Priest, *The History of the Postal Monopoly in the United States,* 18 J.L. & ECON. 33, 50-51 (1975) ("It is conceivable that the authors of the Constitution intentionally drafted a postal clause that was vague, to allow Congress the option at some later date of withdrawing from management or of relaxing the monopoly . . . . Congress, if it wishes . . . may simply establish offices and designate postal routes.") (footnotes omitted).

actions." She writes that "the Constitution does not require that all forms of national governance involve activity by the executive branch; Congress may exercise its constitutional powers in ways other than creating executive authority to act in the name of the United States."[292] This is a mysterious proposition: What could Congress do that on the one hand would be an act of "national governance" but on the other hand would not be "undertaken by and in the name of the United States government"? That the power to execute national policy resides in the Executive Branch pursuant to article II simply adds to the mystery, for I doubt that Professor Stith has in mind ministerial acts so bland as the sanctioning of Members of Congress.[293] I doubt as well that she merely has in mind Congress's power to conduct investigations.[294] To the contrary, Professor Stith strongly implies that the appropriations clause authorizes Congress to direct foreign affairs.[295] I suspect, therefore, that Professor Stith envisions "national governance" by Congress legitimately to include the numerous versions of the Boland Amendment;[296] then Speaker of the House Jim Wright's negotiations on Capitol Hill with Nicaraguan President Daniel Ortega;[297] and the appropriations rider forcing the President to close the Palestine Liberation Organization's mission in the United States,[298] notwithstanding that article II imposes on the President the duty to "receive Ambassadors and other public Ministers."[299] I do not believe that such congressional attempts at "na-

292. Stith, *supra* note 2, at 1348.

293. U.S. CONST. art. I, § 5, cl. 2; *see* Powell v. McCormack, 395 U.S. 486, 550 (1969).

294. *See* Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 174 (1927). *See generally* 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 242; J. HAMILTON, THE POWER TO PROBE 4 (1976).

295. Stith, *supra* note 2, at 1383 & n.198. Similarly, Professor Stith hints that "national governance" undertaken unilaterally by Congress permits the Legislature to assign greater prosecutorial functions to independent agencies. *Id.* at 1383 n.199. In this regard, she posits: "The faithful execution clause should not be understood as a separate grant of power to the President." *Id.* at 1347 n.15.

296. *See* IRAN-CONTRA REPORT, *supra* note 26, at 395-407, 489-500; *see also* Malbin, *Legalism versus Political Checks and Balances: Legislative-Executive Relations in the Wake of Iran-Contra,* in THE FETTERED PRESIDENCY, *supra* note 159, at 273, 275-77.

297. Lewis, *Ortega Proposes Truce but Rebels Object to Terms,* N.Y. Times, Nov. 13, 1987, at A1, col. 6; *see also* Roberts, *Reagan-Wright Argument Grows on Central American Policy Role,* N.Y. Times, Nov. 17, 1987, at A1, col. 2 (reporting President Reagan's anger over Speaker Wright's negotiations with Daniel Ortega).

298. Anti-Terrorism Act of 1987, Pub. L. No. 100-204, § 1003, 101 Stat. 1331, 1406.

299. U.S. CONST. art. II, § 3; *see also* Ambassadors and Other Public Ministers of United States, 7 Op. Att'y Gen. 209 (1855) ("As the President appointed negotiating agents of himself, and ministers proper with consultation of the Senate alone, so he reduced or discontinued a mission in his discretion . . . ."); Marcus, *Bush Must Protect the Presidency,* Wall St. J., Jan. 10, 1989, at A18, col. 3 ("specified U.S. Consulates [were required to] remain open when the president wanted to close them, though the Constitution clearly states that the president alone is to determine how and with whom the U.S. maintains diplomatic relations").

tional governance" can be extrapolated from the history, text, and structure of the *appropriations* clause, particularly when, as Professor Stith initially concedes, that clause is not an independent grant of power to Congress.[300]

B. *Interference with the President's Ability to Perform His Duties and Exercise His Prerogatives Under Article II*

Apart from aggrandizing the power of Congress at the President's expense, Professor Stith's Principle of Appropriations Control also would undermine the President's ability to perform his duties and exercise his prerogatives under article II. This eventuality is apparent in three seemingly contradictory paragraphs in Professor Stith's article in which she derives and defines her constitutional principle.

1. *A President Without Constitutional Remedies.* Professor Stith first asserts that "Congress is obliged to provide funds for constitutionally mandated activities," including "independent constitutional activities of the President."[301] That position I share and is unassailable, as explained in Part I. However, only four sentences later Professor Stith pulls the rug out from under this congressional obligation, revealing that she regards it to be unenforceable and thus ineffectual: "Even where the President believes that Congress has transgressed the Constitution by failing to provide funds for a particular activity, the President has no constitutional authority to draw funds from the Treasury to finance the activity."[302]

I find this suggestion impossible to accept. If Professor Stith's interpretation of the appropriations power is correct, Congress could, for example, effectively deny blacks the right to vote by denying the President the necessary funding to enforce the fifteenth amendment, and neither the President nor the Supreme Court could do anything to protect those voting rights. The President, acting in his official capacity, could "not spend one minute to make one phone call"[303] to enforce that constitutional right. Obviously, such a result would contradict the principle in *Lovett* and in President Hayes' veto messages of 1879-80. For the simple reason that Congress has no authority to enact a law suspending the fifteenth amendment, it could not achieve the same result through clever use of its appropriations power. By enlarging the powers of Congress, Professor Stith loses sight of the fact that the Framers' justification for

300. Stith, *supra* note 2, at 1348.
301. *Id.* at 1350-51.
302. *Id.* at 1351 (footnote omitted).
303. *Id.* at 1361.

the separation of powers was to protect individual liberty and achieve collective strength.

But suppose that Professor Stith is correct and the President has no constitutional authority to withdraw funds from the Treasury to finance his execution of the law, or to perform his other duties and exercise his prerogatives. What recourse does that leave the President? Evidently none, for Professor Stith asserts that Congress is entitled to the last word in disputes with the President over appropriations to fund the performance of executive functions: "If a court determines that Congress's failure to provide funds is unconstitutional, one would expect Congress to abide by this judicial decision and appropriate funds accordingly. If Congress fails to do so, however, a court has no more constitutional authority than does the President to mandate withdrawal from the Treasury."[304] At first encounter, this position might seem to be a strict interpretation of Hamilton's view that the judiciary "has no influence over either the sword or the purse."[305] But it becomes clear that this is not Professor Stith's position at all, since she believes that the federal courts *do* have the authority to order *state* legislatures to appropriate funds for programs necessary to "effectuate federal constitutional guarantees," such as for school desegregation.[306] To paraphrase Justice Powell, I would infer from this assertion that Professor Stith's Principle of

304. *Id.* at 1351 n.34. In Professor Stith's defense, it should be noted that Thomas Jefferson similarly said: "If the legislature fails to pass laws for a census, for paying the judges and other officers of government, for establishing a militia, for naturalization as prescribed by the constitution, . . . the judges cannot issue their mandamus to them . . . ." Letter from Thomas Jefferson to William C. Jarvis (Sept. 28, 1820), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 160 (P. Ford ed. 1899). As I explain in Part VI, however, Jefferson's solution to there being an absence of appropriations for a desired course of conduct was simply to incur debts in the name of the federal government anyway.

Professor Stith does not attempt to reconcile her view of Congress's supreme power to interpret the appropriations clause with the Supreme Court's intimation in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), and its overt assertion in Cooper v. Aaron, 358 U.S. 1, 18 (1958), that it has the last word in interpreting the Constitution. Even if one does not agree with the Court, it is too facile for Professor Stith to ignore this issue, particularly when it is so central to the validity of her thesis. *Compare* A. BICKEL, THE LEAST DANGEROUS BRANCH 264 (1962) ("[U]nder *Marbury v. Madison* . . . the Court is empowered to lay down the law of the land, and citizens must accept it uncritically. Whatever the Court lays down is right, even if wrong, because the Court and only the Court speaks in the name of the Constitution.") *and* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1982) (Frankfurter, J., concurring) ("The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government.") *with* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1, 25 n.155 (1964) (to equate judicial authority to interpret the Constitution with judicial exclusiveness is to confuse *Marbury v. Madison* with statements in *Cooper v. Aaron*).

305. THE FEDERALIST NO. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

306. Stith, *supra* note 2, at 1351 n.34 (citing Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988), *cert. granted,* 109 S. Ct. 2463 (1989)); *see also* Wermeil, *Test of Power: Can a Federal Judge Raise*

Appropriations Control would relegate the states to "precisely the trivial role that opponents of the Constitution feared they would occupy."[307] In light of the language of the tenth amendment, however, and given that the states created the federal government (and not vice versa), I cannot understand how Professor Stith could conclude that a federal court has such power to compel appropriations at the state level but not the federal level.

Professor Stith supports her view of limited presidential recourse by quoting the statement in *Hart's Case* that "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."[308] For further support, Professor Stith looks to the United States Court of Appeals for the District of Columbia Circuit, which has relied on *Hart's Case* in saying that the appropriations clause "is not self-defining and Congress has plenary power to give meaning to the provision."[309] But these statements cannot be read to imply that Congress is free to interpret its appropriations power in a way that encroaches on the duties or prerogatives of another branch. Even if Congress were answerable "only to the people" when it interprets the appropriations clause, it was for the benefit of the people that the Framers separated power among the three branches. Therefore, even "plenary power" cannot encompass the power to usurp.

Professor Stith carries the argument further: When Congress refuses to fund "an inherent executive activity," the President's sole recourse is to unleash on Congress the "[p]olitical processes contemplated by the Constitution," particularly "elections and impeachment."[310] Evidently, a humbled President should ask Congress to impeach the majority of its members, all of those who cast votes against funding the disputed Executive functions. The suggestion is unrealistic as a matter of politics, and probably also as a matter of constitutional law.[311] Professor Stith's suggestion that the election process provides a remedy is too facile as well. It presumes that an election would serve as a plebiscite on a single, relatively abstruse issue, whereas most national elections seem to

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Property Taxes? One in Missouri Did, Wall St. J., Oct. 2, 1989, at A1, col. 1 (Judge Russell G. Clark "nearly doubled Kansas City's property tax to pay for school desegregation").

307. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 (1985) (Powell, J., dissenting).

308. Stith, *supra* note 2, at 1386 n.212 (quoting Hart v. United States, 16 Ct. Cl. 459, 484 (1880), *aff'd,* 118 U.S. 62 (1886)).

309. Stith, *supra* note 2, at 1392 n.253 (quoting Harrington v. Bush, 553 F.2d 190, 194 & n.7 (D.C. Cir. 1977)).

310. Stith, *supra* note 2, at 1351-52 & n.36.

311. *See* R. BERGER, IMPEACHMENT 220 (1973) ("[L]egislators are not impeachable for their *legislative* acts—that is, where they vote collectively on bills and the like—assuming always that individual votes in consequence of bribery and corruption are distinguishable.").

focus on a variety of issues. In addition, it would delay resolution of the question until the next election cycle. Even then, there likely would be debate over whether the election results constituted a "mandate" from the voters (whatever that would mean).[312]

Professor Stith supports her argument by quoting an opinion by Attorney General William P. Rogers. In fact, Attorney General Rogers' opinion flatly contradicts Professor Stith's implied premise that the separation of powers does not limit Congress's appropriations power. She quotes the following language: "Conceivably, under [the appropriations clause] Congress could refuse to appropriate any funds at all to implement legislation, however essential the appropriation might be for the country's welfare. The remedy in such a case would be political."[313] She does not mention, however, that on the same page Attorney General Rogers stated: "Congress may not use its powers over appropriations to attain indirectly an object which it could not have accomplished directly."[314] And on the following page, the Attorney General, citing *United States v. Klein,*[315] stated that "the power to appropriate . . . cannot be exercised without regard to constitutional limitation."[316] *Klein* involved the President's issuance of a pardon—an entirely *discretionary* power conferred by article II. As Attorney General Rogers observed,[317] the Court in *Klein* stated that "it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law."[318] Given that Attorney General Rogers believed that Congress may not use its appropriations power to restrict the President's exercise of discretionary power, it follows *a fortiori* that he believed that Congress may not use the appropriations power to restrict the President's ability to discharge duties over which article II permits the Executive no discretion at all. Indeed, Attorney General Rogers concluded that when a "constitutional duty and right of the President" is involved, "the Constitution does not permit any indirect encroachment by Congress upon this authority of the President through resort to conditions attached to appropriations."[319] This conclusion hardly supports Professor Stith's

312. In addition, it is possible that the plural nature of decisionmaking in Congress will make the electoral process a less satisfactory check on violations of the separation of powers than it is for a unitary Executive. *See* THE FEDERALIST No. 70, at 427-28 (A. Hamilton) (C. Rossiter ed. 1961); Sidak, *supra* note 154, at 2091-92.

313. Stith, *supra* note 2, at 1352 n.36 (quoting Cutoff of Funds, *supra* note 193, at 526) (brackets supplied by Professor Stith).

314. Cutoff of Funds, *supra* note 193, at 526.

315. 80 U.S. (13 Wall.) 128 (1871).

316. Cutoff of Funds, *supra* note 193, at 527.

317. *Id.*

318. *Klein,* 80 U.S. (13 Wall.) at 148.

319. Cutoff of Funds, *supra* note 193, at 530.

suggestion that the Attorney General already has conceded that Congress may use its appropriations power however it likes and then declare, when it is at loggerheads with the Executive Branch, that such an interpretation of the appropriations clause as it affects article II duties and prerogatives was a political question all along.

Even if one overlooks this problem, why is the converse of Professor Stith's argument not equally plausible as a political matter? The statutory mechanism by which Congress guards its appropriations power is the Anti-Deficiency Act, which prohibits any officer or employee of the United States from making expenditures or incurring obligations either in excess of available appropriations or in advance of appropriations, unless he has legal authorization for making them.[320] "The manifest purpose of the Anti-Deficiency Act," opined Attorney General Benjamin Civiletti in 1980, "is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose."[321] But clearly nothing in the Act permits Congress, in reaching its determination of government spending, to refuse to fund activities that the Constitution guarantees, including those it guarantees by imposing a duty on the President to perform certain functions.[322] Suppose, for example, that Congress refuses to fund the President's performance of something that Professor Stith would agree is an "inherent executive activity," such as the enforcement of criminal laws against members of Congress who had accepted bribes. The President balks. He announces that he considers it unconstitutional for Congress to refuse to fund the activity; he will perform the activity even without appropriations for it; and he will pardon any Executive Branch officer prosecuted under the Anti-Deficiency Act for incurring obligations on the Treasury in the performance of the activity. One could reverse Professor Stith's argument and assert that Congress's recourse against the President is limited to the "[p]olitical processes contemplated by the Constitution."[323] If Congress thinks the issue is important enough, let it try to impeach the President

320. An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or . . . involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1) (1982 & Supp. V 1987).

321. Applicability of Anti-deficiency Act upon a Lapse in an Agency's Appropriation, 4A Op. Off. Legal Counsel 16, 19-20 (1980).

322. *See* Note, *Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee,* 55 U. CHI. L. REV. 237, 251 (1988) (arguing that the seventh amendment obligates Congress to appropriate funds for civil jury trials in federal court in cases in which a jury trial would have been available at common law when the Constitution was ratified).

323. Stith, *supra* note 2, at 1352 n.36.

or prevent his re-election on the ground that he has spent public funds to perform an "inherent executive activity" without receiving Congress's permission beforehand.

2. *A Dispensable President.* After asserting that the President lacks constitutional authority to obligate the Treasury, Professor Stith suggests in the next of these three puzzling paragraphs the rule that Congress may defund the President's exercise of his constitutional duties as long as they are not "*indispensable* constitutional duties."[324] Evidently, in the view of Professor Stith, the Framers were ambivalent about some of the duties they imposed on the President in article II. Some of the duties must have been merely ceremonial or precatory—in short, "dispensable." Indeed, Professor Stith states at an earlier point in her argument: "In contrast to the forthright and wide-ranging enumeration of legislative powers in article I, the enumeration of presidential powers in article II is remarkably vague and emphasizes the formal, almost ceremonial, aspects of presidential leadership."[325]

a. Does textual specificity denote the relative significance of presidential powers? Professor Stith's vision of a President having some dispensable and some indispensable duties suffers from two misconceptions about constitutional construction. The first relates to the textual specificity of the Constitution as a whole (as opposed to the specificity of article II compared with that of, say, article I), and it harkens back to Chief Justice Marshall's famous remark in *McCulloch v. Maryland,* "we must never forget . . . that it is *a constitution* we are expounding."[326] A constitution could not possibly be written like a book of statutes in Marshall's view:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the proclivity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[327]

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324. *Id.* at 1352 (emphasis added).

325. *Id.* at 1347 n.14.

326. 17 U.S. (4 Wheat.) 316, 407 (1819).

327. *Id.* In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816), Justice Story wrote: "It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." Another decision by the Marshall Court stated:

> A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its

Thus, one purpose served by resorting to textual generality throughout the Constitution is to avoid daunting complexity. This consideration calls to mind Madison's observation in *The Federalist No. 37*: "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[328]

Justice Story made a related point about the need to adapt to unforeseeable circumstances. Discussing textual generality in *Martin v. Hunter's Lessee,* he wrote that the Constitution's "powers are expressed in general terms" because "the instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."[329] This consideration of futurity would seem to be an example of one of the "sources of vague and incorrect definitions" that Madison labeled generally as "indistinctness of the object" when briefly addressing textual specificity in *The Federalist.*[330]

Finally, Judge Richard Posner has observed, while reading the general language of the cruel and unusual punishment clause of the eighth amendment, that, "[p]articularizing not only would have been time-consuming but might have sparked debilitating controversy, since it is easier to agree on generalities than on particulars."[331] This may be what

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duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject.

United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 14 (1833); *see also Ex Parte* Yarbrough, 110 U.S. 651, 658 (1884) (discussing the principle, in interpreting the Constitution, that "what is implied is as much a part of the instrument as what is expressed . . . is a necessity, by reason of the inherent inability to put into words all derivative powers"); Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 22-26 (1936).

328. THE FEDERALIST No. 37, at 229 (J. Madison) (C. Rossiter ed. 1961).

329. 14 U.S. (1 Wheat.) at 326-27. Judge Robert Bork has made a related point about the framers of the fourteenth amendment taking "refuge in the majestic and ambiguous formula: the equal protection of the laws." Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 14 (1971).

330. THE FEDERALIST No. 37, at 229 (J. Madison) (C. Rossiter ed. 1961).

331. R. POSNER, LAW AND LITERATURE 226-27 (1988). In a related vein, Judge Posner has asserted that attempting to define "reasonable doubt" for juries in criminal cases is "likely to yield barren tautologies." United States v. Hall, 854 F.2d 1036, 1045 (7th Cir. 1988) (Posner, J., concurring).

It is useful to compare these judges' insights on the specificity of the Constitution with Professor Oliver Williamson's analogous insight about the specificity of contracts. It is possible (in theory) to write contracts that describe all foreseeable contingent states of the world and then prescribe outcomes between the parties with respect to each such contingency. However, the transactions costs of doing so are high. *See* Hayek, *The Use of Knowledge in Society,* 35 AM. ECON. REV. 519 (1945).

Madison meant when he described in *The Federalist No. 37* the "embarassment" that "no language is so copious as to supply words and phrases for every complex idea."[332]

Professor Stith does not consider any of these arguments favoring open-ended rather than specific language throughout the Constitution. It is not clear that a more explicit articulation of the duties and prerogatives contained in article II would have evidenced an intent by the Framers to make the President "more" powerful.

When Professor Stith does explicitly address the relevance of textual specificity, she argues that the dividing line between legislative power and executive power should be drawn in Congress's favor because article I is more specific than article II in defining the powers conferred on the respective branch. This reasoning, however, presumes that the authors of a national constitution would have equal difficulty in defining legislative and executive responsibilities. But they would not. Such parity of definition is illusory; the quest for symmetry leads to a flawed conclusion. "The powers of the President are not as particularized as those of Congress," wrote Justice Felix Frankfurter in *Youngstown.* "But unenumerated powers do not mean undefined powers."[333]

It is not difficult to understand why Justice Frankfurter's is the more persuasive view. The degree of textual specificity in a statute or constitution is an increasing function of the predictability of the tasks entrusted to a particular actor. For example, the Delaware corporate code devotes considerably more text detailing the responsibilities of the board of directors of a Delaware corporation than those of its officers; indeed, there is no discussion at all of the responsibilities of a chief executive officer.[334] Yet, it would contradict common perceptions to conclude on that basis that the CEO of a Delaware corporation is weak and ceremonial, and the board of directors is strong and substantive.

Similarly, it is difficult to define exhaustively every kind of problem that the President of the United States will be called upon to address as

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Therefore, it may be more efficient for the parties to eschew specificity in their enumeration of rights and duties under the contract in innumerable contingent situations, and to rely instead on an alternative mechanism for ensuring that neither party will act opportunistically with respect to the other; such mechanisms include vertical integration and credible commitments. O. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 69 (1985); Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations,* 22 J.L. & ECON. 233, 236 (1979); *cf.* Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing,* 94 YALE L.J. 239, 262 (1984) (discussing the value of boilerplate in corporate acquisition agreements as a means of producing homogeneous expectations in heterogeneous circumstances).

332. THE FEDERALIST No. 37, at 224, 229 (J. Madison) (C. Rossiter ed. 1961).

333. 343 U.S. 579, 610 (1952) (concurring opinion).

334. *Compare* DEL. CODE ANN., tit. 8, § 141 (1989) (duties of directors) *with id.* § 142 (detailing minimal duties of corporate officers).

the figure whose constitutional purpose it is to execute the policies of the federal government. Indeed, Hamilton noted in *Pacificus No. 1* that "[t]he different mode of expression employed in the constitution, in regard, to the two powers, the legislative and the executive serves to confirm [the] inference" that "[t]he difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd [sic] as a substitute for those terms, when antecedently used."[335] An exhaustive definition of Executive action is inherently difficult to produce in the abstract, for the Executive is the branch called upon to act in the face of greatest uncertainty. One factor contributing to this uncertainty in the lack of agenda control.[336] The President cannot screen out decisions on the basis of justiciability the way the Judiciary can, nor does he have the luxury of time inherent in the bicameral process of the legislature.[337] Executive action, like jazz, is structured improvisation.

b. Who decides? Another problem with Professor Stith's vision of "dispensable" presidential duties relates to the old question of the authority of one branch to interpret the Constitution and bind the other branches by that interpretation. Who decides which duties are indispensable for the President to perform? Professor Stith's earlier remarks about Congress's freedom to ignore the Judiciary in disputes with the President over appropriations necessary to fund the performance of an "inherent executive activity" imply that Professor Stith would have Congress define for the President the parts of his job that are "indispensable." Yet this conclusion would contradict the legal presumption that when one of the three branches acts, it acts within its constitutional power.[338] Indeed, it is telling that Professor Stith does not properly view her "indispensability" caveat as carte blanche for Congress to encroach on any Executive function it deems to be "dispensable"; instead, she views the caveat as a necessary *limitation* on Congress's appropriations power, al-

335. A. HAMILTON, *supra* note 120, at 76, 80.

336. The literature on agenda control has largely focused on the agenda process within Congress, and not between Congress and the President. *See* Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures,* 74 VA. L. REV. 373, 386-88 (1988).

337. *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (legislative power operates more slowly than does executive power).

338. INS v. Chadha, 462 U.S. 919, 951 (1983); *see also* Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 140. 141 (P. Ford ed. 1899) (Each branch of the government "has an equal right to decide for itself what is the meaning of the constitution *in the case submitted to its action;* and especially, where it is to act ultimately and without appeal.") (emphasis added).

beit a limitation for which she believes no apology to Congress is necessary, since the caveat's practical constraint on legislative power is so negligible. "Although Congress may not *completely* frustrate the exercise of the President's constitutional duties," Professor Stith concludes, "this is but a marginal circumscription of Congress power over the purse and its other legislative power."[339]

C. *Neutrality in Application*

Jeane Kirkpatrick has said that "in considering a constitutional system and placement of power in the system, you should begin by imagining that your bitterest opponents might eventually control it."[340] Perhaps I unfairly presume that Professor Stith would approve of the examples cited in Part IV of how Congress has used the appropriations clause to veto Executive action and enervate the Presidency. However, the few examples that Professor Stith offers of how her Principle of Appropriations Control would be applied in specific cases tend to reinforce rather than rebut that presumption and demonstrate how her Principle—whether or not it is neutral in derivation and definition—would lack neutrality in application[341] and thus could be used to permit unappropriated efforts to advance certain preferred political objectives of Congress.

Consider, for example, Professor Stith's discussion of the Anti-Deficiency Act's ban on voluntary service to the government.[342] She writes:

> [T]he naked words of the rule against voluntary service would appear to prohibit all donated personal service to the government except to the extent authorized by Congress (or as necessary in an emergency). Like the rule against deficiencies, the prohibition on voluntary service would appear to be a part of a larger Principle of Appropriations Control. The government cannot accept unauthorized voluntary service because all resources available for government activity—all factors of production in the business of "producing" federal government activity—must be authorized by Congress.[343]

Professor Stith's statement of the rule against voluntary service appears to be a neutral principle in its derivation and definition. How neutrally would that principle be applied?

In a much publicized episode, Professor Laurence Tribe of Harvard Law School offered his services free of charge to Mr. Lawrence Walsh, the special independent counsel investigating possible criminal wrongdo-

339. Stith, *supra* note 2, at 1352 (emphasis added).

340. Kirkpatrick, *Commentary,* in THE FETTERED PRESIDENCY, *supra* note 159, at 44, 44.

341. *See* R. BORK, THE TEMPTING OF AMERICA 143-53 (1990) (defending theory of neutral principles); Bork, *supra* note 329 (same).

342. Stith, *supra* note 2, at 1372-73 (discussing 31 U.S.C. § 1342 (1982)).

343. *Id.* at 1374-75.

ing relating to the Iran-Contra Affair. The *Wall Street Journal*'s editors denounced Mr. Walsh, asserting that it would violate the Anti-Deficiency Act for the Justice Department to accept Professor Tribe's offer.[344] Professor Stith disagrees: "If Professor Tribe's services were clearly intended to be gratuitous, there was no violation of the rule against voluntary service under the prevailing interpretation of that rule."[345] Although she considers this prevailing interpretation by the Comptroller General and the Attorney General to be "a curious construction,"[346] Professor Stith does not say whether it is right or wrong. She acquiesces to it notwithstanding that it would violate her principle that "all factors of production in the business of 'producing' federal government activity . . . must be authorized by Congress,"[347] and that the legal test for whether the federal government could accept voluntary services would become positively delphic, turning on the *donor's* subjective intent either to be gratuitous or self-serving. It would seem that in the course of accepting or rejecting a gift of professional services, the federal government would have to resolve (at least implicitly) one of the thorniest questions in moral philosophy—namely, whether altruistic behavior is ever undertaken without the expectation of reciprocal altruism or some other economic benefit.[348]

But would the same principle apply if the donor were not Professor Tribe but rather Judge Robert Bork, and the controversy were not the prosecution of Executive Branch officials but the drafting of the amicus brief for the United States in *Webster v. Reproductive Health Service*?[349] In that event, would the Anti-Deficiency Act's prohibition on voluntary service have to be interpreted more rigorously, such that it would no longer suffice for the government to accept voluntary services merely upon the donor's word that he honestly expected nothing in return for lending his expertise to the Justice Department? Professor Stith's accept-

344. Crovitz, *Walsh Is Above the Law,* Wall St. J., Mar. 15, 1988, at 34, col. 4.

345. Stith, *supra* note 2, at 1373 n.152.

346. *Id.* at 1373.

347. *Id.* at 1374-75. Of course, Congress might "authorize" the acceptance of voluntary services in a specific instance by passing a resolution of both houses. But unless presented to the President, and either signed or enacted by override, this resolution could not be a constitutional means by which to selectively repeal the voluntary service provision of the Anti-Deficiency Act.

348. *Compare* R. POSNER, THE ECONOMICS OF JUSTICE 159-60 (1981); Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism,* 7 J. LEGAL STUD. 83 (1978) *and* Posner, *Gratuitous Promises in Economics and Law,* 6 J. LEGAL STUD. 411 (1977) *with* T. NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

349. 109 S. Ct. 3040 (1989); *cf. Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Comm. on the Judiciary* (pt. 2), 100th Cong., 1st Sess. 1299 (testimony of Professor Laurence Tribe regarding Judge Bork's criticisms of Roe v. Wade, 410 U.S. 113 (1973)).

ance of the peculiar interpretation of the Anti-Deficiency Act's ban on voluntary service that permits Professor Tribe to donote his services causes me to doubt how neutrally her Principle of Appropriations Control would be applied in other politically controversial cases. For example, would the Principle of Appropriations Control enable Congress to forbid the President to assist private parties seeking to fund efforts of the African National Congress to abolish apartheid in South Africa?[350] If one extends Professor Stith's assessment of the Iran-Contra Affair, the answer obviously would be that Congress could do so. However, if Professor Stith's assessment of Professor Tribe's situation is the guide, the answer is ambiguous at best.

D. *The Tacit Threat of Impeachment*

Whether Professor Stith is correct or I am correct about the President's implicit power to fund the performance of his duties and the exercise of his prerogatives, is not just an academic exercise, because the answer implies whether the President acts within his constitutional powers or commits an impeachable offense when he spends without congressional permission. Knowing or willful violations of the Anti-Deficiency Act are punishable by a fine not exceeding $5,000, imprisonment not exceeding two year, or both.[351] Certainly, the President's intentional violation of the Act could constitute a "high Crime" subjecting the President to the risk of impeachment.[352] Thus, Congress's reliance on the Anti-Deficiency Act to defend its appropriations power is tantamount to reliance on the implied threat of impeachment, as Professor Stith recog-

350. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 102, 100 Stat. 1086, 1090 (policy toward African National Congress); *id.* § 312, 100 Stat. at 1103-04 (policy toward use of violence or terrorism); *id.* § 603, 100 Stat. at 1114-15 (establishing civil and criminal penalties for violations of "provisions of this Act").

351. 31 U.S.C. § 1350 (1982). The Comptroller General has interpreted the precursor to the current Anti-Deficiency Act, 31 U.S.C. § 665(a) (1976), in a manner that would subject the President to criminal penalties if he intentionally expended federal funds to perform a constitutional duty forbidden by an appropriations bill:

> When an appropriations act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Anti-Deficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case the Anti-Deficiency Act is violated.

60 Op. Comp. Gen. 440, 441 (1981). For a discussion of prosecutorial discretion regarding violations of the Anti-Deficiency Act, see Applicability of Anti-Deficiency Act Upon a Lapse in an Agency's Appropriation, 4A Op. Off. Legal Counsel 16, 20 (1980).

352. U.S. CONST. art. II, § 4.

nizes.[353] Indeed, the *Congressional Record* contains recent remarks by Representative William Broomfield that acknowledge this assertion of power.[354]

Clearly that threat of impeachment must lack any constitutional legitimacy, since Congress could vitiate the separation of powers if it was allowed to threaten the President with criminal prosecution and removal for attempting to perform certain duties or exercise certain prerogatives assigned to the Presidency by the Constitution, but to which Congress objected. As Professor Henry Black argued in 1927, because "the grant of executive powers to the President necessarily implies that he shall be enabled to exercise them without any obstruction or hindrance, it follows that he cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office."[355] Hamilton made a similar point in 1795 in his *Explanation* concerning the appropriations clause, in response to allegations that he, his successor at the Department of the Treasury, and President Washington had all engaged in an "intentional violation of the Constitution, of the law, and of their oaths of office" by the manner in which they had disbursed funds from the Treasury to pay Washington's salary.[356] He wrote:

> Hard would be the condition of public officers if even a misconstruction of constitutional and legal provisions, attended with no symptom of criminal motive, carrying the proof of innocence in the openness and publicity of conduct, could justly expose them to the odious charges which on this occasion are preferred. Harder still would be their condition if, in the management of the great and complicated business of a nation, the fact of miscalculation, which is to constitute their guilt, is to be decided by the narrow and rigid rules of a criticism no less pedantic than malevolent.[357]

Article II is an authorization by law—law that has supremacy over any statute—by which the President may encumber the Treasury for the minimum amount reasonably necessary for him to perform his constitutional

353. Stith, *supra* note 2, at 1353 n.48 (discussing "impeachments of officials in England for misapplication of appropriated funds"). *Cf.* Fisher, *supra* note 6, at 764-65 (arguing that the President's solicitation of funds from foreign governments and private citizens to assist his implementation of foreign policy would be an impeachable offense).

354. *E.g.*, 133 CONG. REC. E4196 (daily ed. Oct. 28, 1987) ("Congress has ample powers of the purse to put an end to any [military] expedition it wishes to. And it can impeach any president who flagrantly disregards its will on the expenditures of public monies.") (extension of remarks of Rep. Broomfield, Ranking Minority Member on the Committee on Foreign Affairs, quoting Yoder, *War Powers Resolution Doesn't Apply in Gulf*, Atlanta Const., Oct. 20, 1987, at A23, col. 1).

355. H. BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 81, at 121 (4th ed. 1927).

356. A. HAMILTON, *supra* note 87, at 123.

357. *Id.* at 152. *See also* Message to the House of Representatives Returning Without Approval the Foreign Relation Authorization Act, Fiscal Years 1990 and 1991, 25 WEEKLY COMP. PRES. DOC. 1806 (Nov. 21, 1989).

duties and exercise his constitutional prerogatives.[358] To conclude otherwise would require one to make the false presumption that Congress could amend article II through the enactment of a mere statute, the Anti-Deficiency Act.

VI. NECESSITY AND THE RULE OF LAW

Professor Stith's Principle of Appropriations Control would empower Congress to deny the appropriations necessary for the President to perform his constitutional obligations. Her view is not fundamentally different even when the President concludes that he must, in the absence of appropriations, expend funds and incur obligations in order to respond to an emergency. Under those circumstances, Professor Stith still believes that the President violates the appropriations clause, but that the defense of necessity might excuse his violations. However, the President bears the risk that his defense of necessity will be rejected. In times of genuine crisis, therefore, Professor Stith's version of the appropriations power would inhibit the President from acting with decision and dispatch.

I disagree with Professor Stith's vision of the separation of powers. A President who obligates the Treasury when responding to a crisis need not throw himself upon Congress's mercy. As I argued in Part I, the President has an implied power of the purse to perform the duties and exercise the prerogatives specified in article II.

This Part begins by examining the public necessity rationale that Professor Stith offers as an exception to her Principle of Appropriations Control. I argue that "necessity" is too ambiguous to constitute a reliable constitutional principle and indeed was used by President Jefferson to justify action of doubtful constitutionality. As a result, I conclude by showing that Professor Stith's defense of necessity would diminish the likelihood that the President would be constrained by the rule of law.

A. *The Defense of Necessity:* Salus Populi Maxima Lex

Professor Stith minces no words that the President is powerless to perform his duties and exercise his prerogatives in the absence of appropriations, even if it would be unconstitutional for Congress to refuse to fund that Executive action: "Congress may itself violate the Constitution by failing to provide funds for presidential activities independently au-

358. The Comptroller General has opined in numerous cases that a violation of the Anti-Deficiency Act does not occur when a *statute* requires an agency to take specific actions that create obligations exceeding its appropriations. *See* 44 Op. Comp. Gen. 89, 90 (1964); 39 Op. Comp. Gen. 422, 426 (1959); 31 Op. Comp. Gen. 238, 239 (1955); 28 Op. Comp. Gen. 300, 302 (1948); 15 Op. Comp. Gen. 167, 169 (1935).

thorized by the Constitution. A presidential claim of such a violation, however, does not give the President constitutional authority to spend in the absence of appropriation."[359] This reasoning would imply, for example, that President Hayes was wrong about the inviolability of his power to protect the voting rights of black citizens when Congress would deny him the money to do so.[360]

Even Professor Stith appears uncertain about the implications of so broad an assertion. Perhaps sensing the implausibility of her position, she hedges by summoning the defense of necessity: Although presidential "[s]pending in the absence of appropriations is ultra vires," there is nonetheless a vast but nebulous exception to the Principle of Appropriations Control "where an emergency exists."[361] In an emergency, "the President might decide that principles more fundamental than the Constitution's appropriations requirement justify spending."[362] Professor Stith cites as an example President Lincoln's expenditure of $2 million in advance of appropriations at the outbreak of the Civil War and while Congress was out of session, which Lincoln considered necessary to save the federal government from overthrow.[363] She then quotes approvingly the following assertion made in Professor Lucius Wilmerding's 1942 study of the appropriations power (a study that in turn paraphrases Thomas Jefferson, without attribution): "There are certain circumstances which constitute a law of necessity and self-preservation and which render the *salus populi* supreme over the written law."[364]

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359. Stith, *supra* note 2, at 1362 n.89.

360. Professor Thomas McGarity presumably would join Professor Stith's argument: "The President's duty to take care that the laws are faithfully executed does not imply an obligation on the part of Congress to appropriate any particular level of funding to aid the President." McGarity, *Presidential Control of Regulatory Agency Decisionmaking,* 36 AM. U.L. REV. 443, 474 (1987). Evidently, so too would Professor Laurence Tribe: "[T]he President surely may not spend unappropriated funds in order to 'execute the laws.' In large part, then, it is up to Congress to provide the means whereby the President ean discharge his duty; the President may not arrogate congressional powers by reference to this clause." L. TRIBE, *supra* note 120, at 187 n.7.

361. Stith, *supra* note 2, at 1351.

362. *Id.*

363. *See* Proclamation of Abraham Lincoln (Apr. 15, 1861), *reprinted in* 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3214 (J. Richardson ed. 1897); Lincoln's Letter to Congress, *supra* notc 134, at 3278, 3279.

364. Stith, *supra* note 2, at 1351-52 n.35 (quoting L. WILMERDING, *supra* note 166, at 12). Jefferson wrote of circumstances that "constituted a law of necessity and self-preservation, and rendered the *salus populi* supreme over the written law." Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON 279, 281 (P. Ford ed. 1898) [hereinafter Jefferson's Letter to Colvin].

1. Salus populi maxima lex. The welfare of the people is the highest law.[365] In English law, the maxim can be traced at least as far back as Sir Edward Coke's commentaries[366] and Locke's *Second Treatise of Government.*[367] But the fact that the maxim is old does not mean that it is rigorous. As a legal maxim, it was not necessarily limited to instances in which the Executive was asserting authority in the absence of written law. The maxim has been used as a rationale for the expansive exercise of the police power[368] and the power of eminent domain,[369] and for the New Deal era cases that gutted the contract clause[370] in the course of affirming the federal government's moratorium on mortgage foreclosures.[371] Less explicitly, the maxim also seems to have influenced the common law reasoning of the "private necessity" cases in tort law[372] in which a private party in distress would be excused from trespassing on another's property, provided (in some cases) that he subsequently pay the marginal cost of his use (such as the cost of repairs to the property necessitated by his use).

Of course, the common law is by definition unwritten law.[373] Therefore, if the rationale of *salus populi* has affected the common law in a pervasive manner, then its influence would seem to be, from a positive perspective, a vague shorthand for some more grandiose efficiency norm or social welfare principle such as the Pareto principle with Hicks-Kaldor compensation.[374] Thus, perhaps *salus populi* animates all common law defenses of necessity, whether they are for trespass, breach of contract, or homicide.[375]

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365. Sometimes the maxim appears as *salus populi est suprema lex. E.g.,* West River Bridge Co. v. Dix, 47 U.S. 507, 545 (1848) (Woodbury, J., concurring).

366. 13 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 139 (1642).

367. J. LOCKE, *supra* note 124, § 158, at 419-20.

368. St. Louis & S.F. Ry. v. Matthews, 165 U.S. 1, 23-24 (1897) (quoting Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877)); Workman v. New York City, 179 U.S. 552, 585 (1900) (Gray, J., dissenting).

369. *Dix,* 47 U.S. at 535-36.

370. U.S. CONST. art. I, § 10, cl. 1.

371. Lingo Lumber Co. v. Hayes, 64 S.W.2d 835, 839-40 (Tex. Civ. App. 1933) (citing Blaisdell v. Home Bldg. & Loan Ass'n, 189 Minn. 422, 448, 249 N.W. 334, 893 (1933), *aff'd,* 290 U.S. 398 (1934)). *But see* Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 743-44 (7th Cir. 1987) (Easterbrook & Posner, JJ., concurring) (criticizing modern contract clause jurisprudence); Epstein, *Toward a Revitalization of the Contract Clause,* 51 U. CHI. L. REV. 703, 735-38 (1984) (same).

372. Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910); Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908); *see also* Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 HARV. L. REV. 5, 18 (1988) (discussing private necessity cases).

373. *See generally* M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (1713) (C. Gray ed. 1971).

374. *See, e.g.,* R. POSNER, *supra* note 348, at 11-15.

375. *See, e.g.,* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 416 (2d ed. 1960).

But that question is separate from the question of how *salus populi* entered and influenced American *public* law. Even on this narrower question, *salus populi* might be as abstract as the preamble's statement of "promot[ing] the general Welfare" "in Order to form a more perfect Union."[376] For example, in *Ex Parte Milligan* counsel argued: "The maxim is revolutionary and expresses simply the right to resist tyranny without regard to prescribed forms."[377] Thus, even in American public law, the concept must be disambiguated before it can be useful for Professor Stith's purposes. Within the field of constitutional law, *salus populi* may have entered American thinking on separation of powers through Montesquieu's *Spirit of Laws*,[378] which Jefferson admired, although with some skepticism.[379] Montesquieu wrote: "When that political law which has established in the kingdom a certain order of succession, becomes destructive to the body politic for whose sake it was established, there is not the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first, it would in the main be entirely conformable to it, since both would depend on this principle, that, THE SAFETY OF THE PEOPLE IS THE SUPREME LAW."[380]

Reliance on this Jeffersonian concept of unwritten law to adumbrate a theory of the appropriations power in an argument so deeply concerned with the Iran-Contra Affair is ironic, for it was during the congressional inquiry of that matter that Fawn Hall, the secretary to Lieutenant Colonel Oliver North at the National Security Council, testified (in a remark later stricken from the record) that she believed her assistance in shredding classified documents was justified because "sometimes you just have to go above the written law."[381] Ms. Hall's remark embodies the Jeffer-

376. U.S. CONST. preamble; *see* St. George Tucker, *The General Welfare*, 8 VA. L. REV. 167 (1922).

377. 71 U.S. 2, 81 (1866) (argument of counsel).

378. C.L. DE S. MONTESQUIEU, *supra* note 171, book 26, ch. 33, at 368.

379. Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), *reprinted in* 16 THE PAPERS OF THOMAS JEFFERSON 448, 449 (J. Boyd ed. 1961); *see also* N. CUNNINGHAM, IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 16, 29-30 (1987).

380. C.L. DE S. MONTESQUIEU, *supra* note 171, book 26, ch. 23, at 368 (capitalization in original).

381. Butterfield, *Key North Memo Altered by Hall*, N.Y. Times, June 10, 1987, at A15, col. 10; *see also* Safire, *Waiting for the Docudrama*, N.Y. Times, June 15, 1987, at A17, col. 1. One member of the Iran-Contra Committee recognized this similarity between Ms. Hall's testimony and Jefferson's theory of *salus populi*. IRAN-CONTRA REPORT, *supra* note 26, at 667 (supplemental views of Congressman Henry Hyde). Judge Gerhard Gesell, however, made clear in his charge to the jury that he rejected the *salus populi* excuse, saying that "neither the president nor any of the defendant's superiors had the legal authority to order anyone to violate the law." Lardner, *North Not Authorized to Break Law, Jury Told*, Wash. Post, Apr. 21, 1989, at A1, col. 5; Abramson, *Gesell's Instructions to Jury in North Case Could Play Pivotal Role in Deliberations*, Wall St. J., Apr. 21, 1989, at B9, col. 1.

sonian theory of public necessity—the same theory upon which Professor Stith relies implicitly, if not explicitly, to provide the authority for the sole exception to her Principle of Appropriation Control.

Jefferson was an enthusiastic advocate of the *salus populi* argument. In 1807, when the British warship *Leopard* attacked the American frigate *Chesapeake,* President Jefferson ordered the procurement of military supplies in the absence of appropriations—out of "anxiety for the safety of our country"—and thereafter sought congressional ratification for the expenditures,[382] which Congress promptly granted on the rationale of *salus populi.*[383] "To have awaited a previous and special sanction by law," wrote Jefferson, "would have lost occasions which might not be retrieved."[384] Judge Abraham Sofaer has remarked critically on the expedient to which Jefferson resorted: "Rather than attempting to legitimize his orders under the Constitution, he justified the purchases on the ground of emergency, trusting in the legislature to condone his conduct."[385]

Throughout his two terms as President, Jefferson embraced a broad theory of *salus populi,* one not limited to spending necessary to effect the President's duties as Commander in Chief. The most notable instance of action predicated on that belief was Jefferson's expenditure of $15 million in 1803 to purchase the Louisiana Territory from France.[386] Responding by letter to a publisher's question in 1810, after the conclusion of his Presidency, Jefferson asserted to John Colvin that an executive officer at times has a *duty* to disobey the law:

> The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but somewhat embarrassing in practice. A strict observance of written law is *one* of the high duties of a good citizen, but it is not the *highest.* The laws of necessity, of self-preservation, of saving our country when in danger, are higher obligations. To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, prop-

382. T. Jefferson, Seventh Annual Message to Congress (Oct. 27, 1807), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 413, 414-15, 416 (J. Richardson ed. 1897).

383. 17 ANNALS OF CONG. 832, 840, 848 (1807).

384. T. JEFFERSON, *supra* note 382, at 416.

385. Sofaer, *supra* note 81, at 22.

386. T. Jefferson, Third Annual Message to Congress (Oct. 17, 1803), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 345, 346 (J. Richardson ed. 1897); *see also* L. FISHER, *supra* note 36, at 229 (Jefferson purchased Louisiana even though amount he agreed to pay exceeded instructions set forth by Congress).

> erty, and all those who are enjoying them with sacrificing the end to the means.[387]

These remarks resemble Lincoln's after the outbreak of the Civil War. However, the reasoning they follow differs significantly from Lincoln's. And these differences expose the fallacy of Professor Stith's reliance on a Jeffersonian excuse of *salus populi* for unauthorized presidential action.

In the sentences immediately following the passage quoted above, Jefferson sought to illustrate his general proposition by citing several examples of the need for General Washington and others to destroy private property while battling the British during the Revolutionary War. But Jefferson them gave a quite different example of private necessity: "A ship at sea in distress for provisions, meets another having abundance, yet refusing a supply; the law of self-preservation authorized the distressed to take supply by force."[388] This example is curious because it posits no danger of foreign invasion or domestic rebellion. The harm to be averted is loss of life, but not a loss of life caused by the action of a government or an action in defiance against a government. Put differently, Jefferson's example of private necessity is not even what Montesquieu envisioned in his remark on *salus populi* when he spoke of a "political law . . . becom[ing] destructive to the body politic."

It is also significant that Jefferson condoned unauthorized presidential spending not merely when national defense was immediately at stake, as it was perceived to be in the *Chesapeake* incident, but also when attractive opportunities arose, such as the opportunity to buy territory west of the Mississippi for purposes of long-term security or, simply future, westward expansion.[389] In particular, Jefferson supported the unauthorized acquisition of all of the Louisiana Territory for $15 million in April 1803, even though he had only received authorization from Congress in January 1803 to obligate the Treasury in the amount of the $2 million for the acquisition of New Orleans or West Florida.[390] Jefferson explained his views in 1810:

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387. Jefferson's Letter to Colvin, *supra* note 364, at 148. John Colvin was editor of the *Republican Advocate* in Fredericktown, Maryland. *See* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 606 n.1 (A. Koch & W. Peden eds. 1944).

388. Jefferson's Letter to Colvin, *supra* note 364, at 147.

389. I disagree, therefore, with Professor Lobel, who argues on the basis of Jefferson's 1810 letter to Colvin that "[t]he Jeffersonian position implicitly argues that reading the Constitution to provide for broad emergency power in the executive is unwise, because it would inevitably lead to vast assertions of executive power unjustified by actual emergencies." Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1396-97 (1989). I do not read Jefferson's Letter to Colvin, *supra* note 364, to indicate any reluctance whatsoever on Jefferson's part to assert great Executive powers in the name of necessity.

390. *See, e.g.*, R. WALTERS, *supra* note 101, at 152-54.

> Suppose it had been made known to the executive of the Union in the autumn of 1805, that we might have the Floridas for a reasonable sum, that that sum had not indeed been so appropriated by law, but that Congress were to meet within three weeks and might appropriate it on the first or second day of their session. Ought he, for so great an advantage to his country, to have risked himself by transcending the law and making the purchase? The public advantage offered, in this supposed case, was indeed immense: but a reverence for law, and the probability that the advantage might still be legally accomplished by a delay of only three weeks, were powerful reasons against hazarding the act. But suppose it foreseen that a John Randolph would find means to protract the proceeding on it by Congress, until the ensuing spring, by which time new circumstances would change the mind of the other party. Ought the executive, in that case, and with that foreknowledge, to have secured the good to his country, and to have trusted to their justice for the transgression of the law? I think he ought, and that the act would have been approved.[391]

Jefferson's reasoning is troubling. His example would be equivalent to President Reagan, thinking there would be immense public advantage to funding the Contras, personally authorizing the diversion to the Contras of the public revenues received from the secret sale of arms to Iran, despite the clear refusal of Congress to appropriate funds for the Contras.

Professor Stith's necessity exception is further undermined by the fact that Jefferson's discussion of the President's power to justify unauthorized spending on the grounds of *salus populi* does not even mention article II of the Constitution. This omission is consistent with Judge Sofaer's assessment of Jefferson's predilection, as illustrated by the *Chesapeake* incident, not to predicate his unappropriated spending on any claim of superseding constitutional authority. Unlike Lincoln, who sought to derive his exercise of Executive prerogative from the text or structure of the Constitution, or from the simple purpose for the document's existence, Jefferson evidently believed that politics, not the Constitution, provided the effective check on abuse of presidential action. He wrote in his 1810 letter to Colvin:

> It is incumbent on those only who accept of 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.[392]

391. Jefferson's Letter to Colvin, *supra* note 364, at 147.

392. *Id.*

Professor Jules Lobel asserts that "President Thomas Jefferson adhered to the view that *the Constitution* carefully limited executive emergency power and therefore openly acknowledged that certain emergency actions were unlawful, requiring public ratification by Congress."[393] I disagree. Jefferson's letter to Colvin supports a contrary conclusion—namely, that Jefferson believed that the President's power to spend came from some unwritten source rather than the text of the Constitution, and that such an assertion of presidential power was held in check not by the rule of law, but rather by the countervailing *political* power of Congress.

B. *Every Tyrant's Excuse*

Ultimately, *salus populi maxima lex* is an empty box. Who defines what serves the public welfare? What lesser societal interests, as reflected in laws that a President will disobey, are worth sacrificing? Is the maxim applicable to more than instances of foreign attack or domestic rebellion, as Jefferson evidently believed? And, given that there are certain efficiencies created by delegating decisions to those with superior information or other comparative advantages, what stops a President from delegating these *salus populi* determinations to the Fawn Halls and Ollie Norths of the Executive Branch?

It is dangerous and unnecessary to construct a rationale for Executive power based on "higher law," which is to say law that resides in an "unwritten constitution."[394] If the welfare of the people is the highest law, it is also every tyrant's excuse—a point made forcefully in 1948 in Professor Clinton Rossiter's bluntly titled book, *Constitutional Dictatorship.*[395] The law of necessity, wrote Professor Rossiter, "is little better than a rationalization of extra-constitutional, illegal emergency action."[396] The vagueness of *salus populi,* particularly the Jeffersonian variety, places a broad field of presidential action outside any governing law or constitutional principle. Yet, the whole reason for having a constitution and constitutional law is to bring government action *within* the rule of law.

Thus, Professor Stith's reliance on the defense of necessity is inconsistent wih the rule of law. She says that Congress should be able to tell the President, "Go ahead, break the law if you think it is necessary."

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393. Lobel, *supra* note 389, at 1392 (emphasis added).

394. *See* Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149 (1928), 42 HARV. L. REV. 365 (1929); Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703 (1975).

395. C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

396. *Id.* at 11 & n.7.

(Conveniently for Congress, her Principle of Appropriations Control would guarantee that the President would have to break the law routinely just to perform many of his ordinary article II duties.) "If we approve of your lawlessness after the fact," Congress would then tell the President, "we won't impeach you; but if we don't, we will." As Lucius Wilmerding put it in 1943, and as Professor Stith evidently agrees: "The high officers of the government, and a fortiori the President, have a right, indeed a duty, to do what they conceive to be indispensably necessary for the public good, *provided always that they submit their action to Congress to sanction the proceeding.*"[397]

Euphemized as "ratification after expenditure,"[398] this reasoning expands the legislative veto to encompass every action for which the President has a duty to perform but for which Congress has not appropriated money. It is an invitation not only for Congress to usurp Executive power, but also for the President to become a tyrant—for he routinely would have to operate "above the law" (which is to say, without regard for the law) and subsequently use political power to prevent his impeachment. One of the reasons that Alexander Hamilton opposed excessive specificity in the Constitution was his belief that "fettering the government with restrictions that cannot be observed" would breed disrespect for those restrictions that ought to be observed.[399] He believed that "every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable."[400]

Moreover, reliance on congressional "ratification after expenditure" is troubling as a matter of jurisprudence and very possibly is unconstitu-

397. L. WILMERDING, *supra* note 166, at 19 (emphasis added).

398. *Id.* at 18-19 n.31 (quoting 68 CONG. REC. 2979 (1923) (remarks of Rep. Chindblom)); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (justifying Lincoln's seizure of railroads during the Civil War in part because "his order was ratified by the Congress"); Prize Cases, 67 U.S. (2 Black) 635, 671 (1863) ("[I]f the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, [then] on the well known principle of law, *'omnis ratihabitio retrotrahitur et mandato equiparatur,'* this ratification has operated to perfectly cure the defect.").

399. THE FEDERALIST NO. 25, at 167 (A. Hamilton) (C. Rossiter ed. 1961).

400. *Id.* Professor Stith's necessity exception is, therefore, an invitation to expand the power of the state relative to the individual. *See* P. JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES 14-17 (1983); F. HAYEK, THE ROAD TO SERFDOM (1944); F. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 23, at 190. That the Principle of Appropriations Control would create this danger is doubly ironic in view of Professor Stith's assertion that the Principle is integral to drawing the "distinction between the public sphere and the private sphere" that "[t]he Constitution presupposes" and to "permit[ting] expansion of the public sphere only with legislative approval." Stith, *supra* note 2, at 1345.

tional. As a jurisprudential matter, it is elemental that the rule of law requires that legislation exhibit prospectivity and generality.[401] The granting of retroactive approval to specific actions by the President is obviously neither prospective nor general. This same deficiency raises constitutional issues. Justice Holmes described legislative action as that which "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."[402] By this standard, "ratification after expenditure" looks more like an adjudicative determination than a legislative one. Thus, the source of legitimacy for such action is hardly self-evident among the enumerated powers of Congress; to the contrary, such action raises the same concerns as those reflected in the Framers' express prohibition against Congress enacting ex post facto laws or bills of attainder.[403]

Viewed in these terms, Professor Stith's necessity exception is simply lawless action with a political check after the fact.[404]

CONCLUSION

No principle is more elemental to the logic of the Constitution than the separation of powers.[405] However, much constitutional scholarship since Watergate has been predicated on the belief that a metamorphosis from a unitary Executive to a plural Executive would be salutary.[406] The Framers did not start from that premise. Such a metamorphosis is plainly contrary to the history, text, and structure of the Constitution. "The accretion of dangerous power does not come in a day," wrote Justice Frankfurter in *Youngstown.*[407] "It does come, however slowly, from

401. *See, e.g.,* J. RAZ, *supra* note 25, at 214-16, 219.

402. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Justice Holmes was distinguishing legislation from "judicial inquiry," which he said "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Id.; see also, e.g.,* Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 693 (9th Cir. 1949) (distinguishing between "rulemaking" and "adjudication").

403. U.S. CONST. art. I, § 9, cl. 3.

404. As Professor Rossiter observed, "Hitler could shout 'necessity' as easily as Lincoln." C. ROSSITER, *supra* note 395, at 12. The internment of Japanese-Americans during World War II, for example, was rationalized on the basis of "[p]ressing public necessity." Korematsu v. United States, 323 U.S. 214, 216 (1944). *See also Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 76 (1867) ("Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as the pretense of state necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy.") (argument of counsel).

405. *See, e.g.,* THE FEDERALIST NO. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).

406. *E.g.,* P. KURLAND, *supra* note 281, at 169 (Watergate revealed "the failure of Congress to perform adequately its function as a check on the executive"). For an eloquent warning of the dangers of this premise, and a spirited rebuttal of it, see Rostow, *supra* note 175.

407. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[408]

Behind the pretext of protecting taxpayers from a spendthift President, Professor Stith's Principle of Appropriations Control would have Congress control decisions that the Constitution said should be made by a unitary Executive. In its extremity, Professor Stith's theory would go so far as to tell the President that he cannot protect the constitutional rights of citizens if Congress should withhold the money necessary for him to take such action.

I do not claim that mine is the last word on the appropriations clause. In particular, more thought is needed on the question of a feasible limiting principle for unappropriated spending by the President. The one clear lesson that scrutiny of this provision affords is that its text is one of the "great silences"[409] in the Constitution. Particularly because the clause can generate conflicts over the separation of powers, its probable meaning must be evaluated in light of the history and structure of the Constitution and in light of whether a particular interpretation of the clause (such as Professor Stith's Principle of Appropriations Control) would produce implausible results at odds with other portions of the Constitution. I have attempted to show that the conventional understanding of Congress's "power of the purse" has virtually no support in the historical records of the Constitutional Convention of 1787, the *Federalist Papers,* or other contemporaneous writings of the Framers.

Unlike Professor Stith, I consider Congress's misuse of the appropriations power to be a grave constitutional problem. 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 laws if they expected that 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. To conclude otherwise would require embracing the unlikely proposition that thrift was an object more precious to the Framers than was the perfection of a Constitution that "diffuses power the better to secure liberty."[410]

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408. *Id.*

409. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) (Jackson, J.); *see also* Schauer, *An Essay on Constitutional Language,* 29 U.C.L.A. L. REV. 797 (1982).

410. *Youngstown,* 343 U.S. at 635 (Jackson, J., concurring).