

Harvard Law School  
Federal Budget Policy Seminar

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*Briefing Paper No. 38*

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**The Constitutionality of  
Executive Spending Powers**

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Bob Allen  
Sarah Miller

Last updated: 5-10-08

## INTRODUCTION

This briefing paper examines presidential powers in the context of appropriations pertaining to war and national security. Specifically, it focuses on the issue of whether the President can assert any of his powers as Commander in Chief or in the realm of foreign affairs to supercede restrictions Congress has placed on his use of appropriations. This issue has assumed increasing prominence in the press as well as the academic literature due to the present conflict between Congress and the president over appropriations for the war in Iraq. Congress has recently tried to pass a number of bills to attach timetables for withdrawal or require benchmarks for progress as conditions of further appropriations for the war. It has also threatened to cut off appropriations for the war entirely after a yet to be defined deadline.<sup>1</sup> The issue has also come up in the context of congressional efforts in 2006 and 2007 to prohibit the use of any appropriated funds for covert actions designed to provoke regime change in Iran.<sup>2</sup> These bills have all either failed in committee or been vetoed by the President, but their increasing incidence suggests that Congress may be turning to appropriations conditions to try to assert greater control over foreign policy. Though much of this debate turns on tensions between the present Congress and President Bush, there are also larger institutional stakes. As legal academic and commentator Jeffrey Rosen remarked in a *New York Times* op-ed, “if Congress tries to manage the deployment and withdrawal of troops without cutting funds, the President’s powers as commander in chief would be encroached, perhaps leading to a constitutional confrontation of historic proportions.”<sup>3</sup>

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<sup>1</sup> JENNIFER K ELSEA, MICHAEL JOHN GARCIA & THOMAS J. NICOLA, CONG. RES. SERV., CONGRESSIONAL AUTHORITY TO LIMIT U.S. MILITARY OPERATIONS IN IRAQ 1 (2008), available at <http://www.fas.org/sgp/crs/natsec/RL33837.pdf>; see also *Bush, Congress Seek War Spending Compromise*, FRONTRUNNER, May 3, 2007.

<sup>2</sup> Jim Lobe, *Lawmakers Curb Bush’s Control to Attack Iran*, INTERPRESS SERV., Feb. 2, 2007.

<sup>3</sup> Jeffrey Rosen, *In Wartime, Who Has the Power?*, N.Y. TIMES, Mar. 4, 2007.

This paper accordingly looks to two possible areas of constitutional confrontation: (1) the President’s ability to spend in the absence of congressional appropriations to address emergency situations, and (2) the President’s ability to ignore appropriations conditions that he believes violate his exclusive prerogatives as Commander in Chief. In order to address these issues, Part I of this briefing paper first discusses the relevant constitutional doctrine. It explains why a court would likely approach these issues from a doctrinal approach that focuses on mediating overlapping congressional and presidential powers rather than from a vantage that considers the executive to have vast and preemptive powers in the war and foreign affairs fields. Part II then applies this framework to executive spending powers. Part III continues this analysis by examining historical practices related to these two questions, in acknowledgment of Justice Jackson’s famous observation in the hallmark separation of powers case *Youngstown Sheet & Tube Co. v. Sawyer*<sup>4</sup> that “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”<sup>5</sup> Part IV then describes some of the doctrinal barriers to adjudication of executive spending powers, specifically the doctrines of standing and political question. Finally, Part V explores the normative implications of judicial versus political resolution of these and related issues.

**I. The DOCTRINAL FRAMEWORK FOR RESOLVING SEPARATION OF POWERS CONFLICTS:  
*YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER***

At the heart of any separation of powers analysis is Justice Jackson’s famous concurring opinion in *Youngstown*. Jackson’s premise was simple: the strength of presidential powers is relative, and can only be assessed in relation to congressional powers. He then divided

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<sup>4</sup> 343 U.S. 579 (1952).

<sup>5</sup> *Id.* at 635 – 36 (Frankfurter, J., concurring).

presidential powers into three categories. In Category I, “[w]hen the President acts pursuant to an express or implied authorization of Congress,” presidential powers are at their peak and comprise all of the President’s own powers over the action and those that Congress has delegated to the President through its authorization. Category I actions are “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>6</sup> Category II, in contrast, involves presidential action “in the absence of either a congressional grant or denial of authority.” This, Jackson wrote, was the “zone of twilight in which the President and Congress may have concurrent authority, or in which distribution is uncertain.” Presidential power in such situations, Jackson implied, would be a matter more of practical politics than of constitutional interpretation.<sup>7</sup> And finally, Jackson identified Category III, when the President acts contrary to either a manifest or implied statement of congressional will, as the point at which the President’s “power is at its lowest ebb,” where the President “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” The bar for sustaining presidential actions in Category III is high: “[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject” on the basis of a “conclusive and preclusive” presidential power, and assertions of such a power are thus reviewed with especial scrutiny by courts.<sup>8</sup>

Before applying *Youngstown* to the context of presidential power in relation to emergency spending and limitations on war appropriations, however, it is necessary to address one further argument: that the *Youngstown* analysis is inapplicable in the realm of foreign affairs, and applies only to conflicts between the political branches over domestic issues. Some constitutional scholars have argued that the proper framework for analyzing presidential and

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<sup>6</sup> *Id.* at 636-7.

<sup>7</sup> *Id.* at 637.

<sup>8</sup> *Id.* at 638-9.

congressional powers in the realm of foreign affairs is found in the 1936 Supreme Court case *United States v. Curtiss-Wright Export Corp.*<sup>9</sup> Specifically, scholars and executive branch lawyers have relied on Justice Sutherland’s elaboration on the nature of executive power in foreign affairs: “In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>10</sup> This position has been rearticulated in more recent cases, including *American Insurance Association v. Garamendi*,<sup>11</sup> where the Court stated, “[a]lthough the source of the President’s power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’”<sup>12</sup> Under this interpretation, then, presidential actions relating to foreign affairs or U.S. external relations are presumptively constitutional, and congressional interference is presumptively impermissible because of the need for the President to act as the “sole organ.”

However, recent Supreme Court decisions have indicated that although presidential actions in the realm of foreign affairs merit greater deference, *Curtiss-Wright*’s sweeping assertion of presidential power cannot be the beginning and end of the constitutional analysis.

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<sup>9</sup> This argument has been articulated in various forms ever since *Youngstown* was decided. For recent iterations, see Julian Ku and John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 216-221 (2006), and Robert Turner, Testimony before the Senate Select Subcommittee on Intelligence, CONG. Q., Sept. 25, 2007. For an analysis of the relative weight the Supreme Court has given *Curtiss-Wright* over *Youngstown* between 1952 and the 1980s, see HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 138 – 46 (1990).

<sup>10</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

<sup>11</sup> 539 U.S. 396 (2003).

<sup>12</sup> *Id.* at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 – 11 (1952)). See also *Sale v. Haitian Center Council, Inc.*, 509 U.S. 155, 188 (1993) (noting the President’s “unique responsibility” over “foreign and military affairs”); *Dames & Moore v. Regan*, 453 U.S. 654, 679, 682-683 (1981); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (“The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs”); *Gherebi v. Bush*, 352 F.3d 1278, 1312 (9th Cir. 2003); *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2003) (rev’d on other grounds).

First, in a footnote in *Hamdan v. Rumsfeld*,<sup>13</sup> the Court noted in the context of the President’s Commander in Chief powers that the President could not assert constitutional primacy in foreign affairs; “he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”<sup>14</sup> More significantly, in *Medellin v. Texas*,<sup>15</sup> the Court clearly rejected the notion that *Curtiss-Wright* could supplant a more thorough analysis of presidential powers under *Youngstown*. Chief Justice Roberts’ majority opinion described the President’s unique role in foreign affairs as “compelling,” but continued, “Such considerations...do not allow us to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’”<sup>16</sup> Thus, Roberts concluded, “Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.”<sup>17</sup> Accordingly, it seems fairly settled that the *Youngstown* framework will govern analyses of both executive spending absent appropriations and the President’s power to ignore conditions on appropriations.

## II. APPLICATION OF *YOUNGSTOWN* TO EXECUTIVE SPENDING DISPUTES

Viewed from the *Youngstown* framework, questions of the President’s power to spend without first securing congressional appropriations or to disregard conditions on war appropriations turn on the same doctrinal foundation. Both are examples of *Youngstown* Category III, since both scenarios involve presidential action in the face of congressional disapproval. The former case—executive spending in the absence of congressional appropriations—would be “incompatible

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<sup>13</sup> 126 S. Ct. 2749 (2006).

<sup>14</sup> *Id.* at 2774 n.23.

<sup>15</sup> *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

<sup>16</sup> *Id.* at 1368 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (Black, J.)).

<sup>17</sup> *Id.*

with the expressed and implied will of Congress”<sup>18</sup> as embodied in the Anti-Deficiency Act,<sup>19</sup> which was passed to prevent executive and other officials from incurring obligations that and Congress would be forced to honor ex post.<sup>20</sup> Furthermore, no substantial history of unappropriated executive spending after the Anti-Deficiency Act exists to evidence congressional acquiescence with the practice.<sup>21</sup>

Presidential defiance of congressional restrictions on the use of appropriations—the latter case—arguably constitutes an even clearer Category III situation, as such conditions represent an explicit manifestation of congressional will. One might argue that appropriations are distinct from substantive laws and thus congressional prohibitions enacted through appropriations cannot be given the same weight as other evidence of congressional disapproval. But as Professors William Banks and Peter Raven-Hansen have persuasively discussed, the more accepted view in light of available precedent is that appropriations are no different from any other form of congressional action, at least for the purposes of interpreting congressional approval, disapproval, or silence.<sup>22</sup> Most significantly, the Supreme Court has held that “Congress may amend substantive law in an appropriations statute . . . as long as it does so clearly.”<sup>23</sup> Thus,

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<sup>18</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>19</sup> 31 U.S.C. § 1341(a)(2) (1982). The Act criminalizes “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation” and entering into “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), (2), but “no one appears to have been prosecuted or convicted for violating [it].” ELSEA, GARCIA & NICOLA, *supra* note 1, at 35. Professor Kate Stith, however, speculates that despite this record, the Act “clearly [has] an *in terrorem* effect.” See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, n.140 (1988).

<sup>20</sup> For a description of the Anti-Deficiency Act’s history, see *Matter of Project Stormfury*, 59 Comp. Gen. 371, 372 (1980) (“The Anti-Deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations. . . . The Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse.”), and Stith, *supra* note 19, at 1370 – 72.

<sup>21</sup> In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the Court confronted similar questions. In holding that the President lacked the ability to independently enforce a non-self-executing treaty, it noted that the President’s actions were “not supported by a ‘particularly longstanding practice’ of congressional acquiescence, but rather [were] . . . unprecedented action.” *Id.* at 1372 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003)).

<sup>22</sup> William C. Banks & Peter Raven-Hansen, *Pulling the Purse Strings of the Commander in Chief*, 80 Va. L. Rev. 833, 839 – 45 (1994).

<sup>23</sup> *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 440 (1992).

presidential spending in the absence of appropriations or presidential defiance of appropriations riders cannot escape a Category III analysis merely because Congress has expressed its will through appropriations.

This Part proceeds as follows: section A discusses the implications of Category III placement, concluding that the presence of a “conclusive and preclusive” presidential power is necessary to survive Congress’s conflicting will. Section B then analyzes whether such a preclusive power exists to spend without appropriation in emergencies or in order to fulfill constitutionally required Article II duties. Section C similarly analyzes whether a preclusive war power exists and would potentially enable a President to disregard congressional restrictions on war- or foreign affairs-related appropriations.

### ***A. The Implications of Category III***

In the third *Youngstown* category, “‘Presidential claim[s]’ to power ‘must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.’”<sup>24</sup> But this categorization alone is not dispositive. Categorization of a particular power as a “lowest ebb” situation does not, by itself, imply that no such power exists; Justice Jackson “did not say that the President’s war powers always run dry when they conflict with a statutory restriction.”<sup>25</sup> In the more than fifty years since *Youngstown* was decided, the Supreme Court has offered little further guidance about how to resolve Category III cases. Professors David Barron and Martin Lederman, however, have recently turned scholarly attention to the subject, arguing that there is no obvious institutional winner in Category III conflicts. Congress will not always prevail, even

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<sup>24</sup> Ali Saleh Kahlah Al-Marri v. Wright, 487 F.3d 160, 191 (4th Cir. 2007) (quoting *Youngstown*, 343 U.S. at 648).

<sup>25</sup> David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 764 (2008). Professors David Barron and Martin Lederman suggest that this category of presidential powers is both the most important and least clear: “[T]he question of how to determine what should happen at the ‘lowest ebb’ . . . has been obscured by a dense fog of half-developed and largely unexamined intuitions.” *Id.* at 694.

though it has a range of very specifically enumerated powers from Article I of the Constitution, because these powers are still necessarily limited by powers the President possesses.<sup>26</sup> Likewise, the President will not always win in Category III conflicts because, even assuming the President possesses vast powers over war and foreign affairs, it is less clear that these powers necessarily trump congressional action; at best, they arguably allow the President to act in these fields when Congress is silent.<sup>27</sup>

Since there is no inherent institutional winner in Category III, it is thus conceivable that the Court might uphold executive spending even in these scenarios. To do so, however, a court would have to find that the President was validly exercising some element of the “conclusive and preclusive” presidential power to which Justice Jackson alluded in *Youngstown*. Such powers are not merely those the President can exercise in the absence of indications from Congress; they are powers that belong so utterly to the President alone that Congress is constitutionally prohibited from interfering with their exercise.<sup>28</sup>

### ***B. Possible Bases of a “Conclusive and Preclusive” Presidential Power to Spend Without Congressional Appropriation***

*Medellin* reaffirmed *Youngstown*’s holding that presidential powers “must stem either from an act of Congress or from the Constitution itself,”<sup>29</sup> a holding that naturally raises the threshold task of locating possible sources of a presidential spending power. Proponents of an inherent and preclusive presidential spending power will likely point to the Commander in Chief clause as its source, while opponents will argue that the Appropriations Clause vests the power

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<sup>26</sup> *Id.* at 737 – 40.

<sup>27</sup> *Id.* at 741 – 8.

<sup>28</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 – 38 (1952) (Jackson, J., concurring). As Professors Barron and Lederman frame the issue, “Resolution in such cases will instead require a judgment as to whether the statute in question infringes any of the ‘central prerogatives’—preclusive authorities—the President enjoys by virtue of his constitutional designation as Commander in Chief. In this regard, there is no avoiding an inquiry into what those core prerogatives are.” Barron & Lederman, *supra* note 25, at 750.

<sup>29</sup> *Id.*; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (Black, J.).

of the purse exclusively with Congress. This section examines judicial constructions of the Appropriations Clause, which are of critical importance given that the Clause is more specific to the power of the purse and thus, according to basic rules of statutory and constitutional construction, likely to take precedence over the more general Commander in Chief power.<sup>30</sup> This section examines, first, the Clause’s textual and structural bases, and, second, the impact of divergent interpretations of the Clause on the separation of powers.

*1. Structure and Text of the Appropriations Clause.* — The Appropriations Clause states that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law,”<sup>31</sup> and the Anti-Deficiency Act similarly prohibits federal officers from incurring financial obligations before funding is appropriated except when “authorized by law.”<sup>32</sup> The meaning of the two provisions accordingly turns on whether the phrase “made by law” includes only legislation, or whether the executive can also appropriate funds “by law” within the meaning of the Clause and the Act. Some scholars have adopted the latter position; Gregory Sidak, for example, advances a historically- and textually-based argument that the Appropriations Clause simply “establishes the general rule that when any one of the 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.”<sup>33</sup> Sidak emphasizes the a contrary interpretation would be inconsistent with the mandatory nature of the Presidents’ Article II duties, and he further argues that the Appropriations Clause was meant not to limit the

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<sup>30</sup> See *Edmond v. United States*, 520 U.S. 651, 657 (1997) (“Ordinarily, where a specific provision conflicts with a general one, the specific governs.”); *United States v. Woodley*, 726 F.2d 1328, 1330 (9th Cir. 1983) (“Under familiar principles of statutory construction, the very specific language of article III would, absent a countervailing reason, prevail over the general language of article II.”). Cf. *Doc v. United States House of Representatives*, 525 U.S. 316, 358 (1998) (“[T]he former more specific provision would prevail over the latter if there were any conflict between the two.”); *Basic v. Levinson*, 446 U.S. 398, 406 (1980) (“[A] more specific statute will be given precedence over a more general one.”); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

<sup>31</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>32</sup> See *supra* note 20.

<sup>33</sup> J. Gregory Sidak, *The President’s Power of the Purse*, 1989 Duke L.J. 1162, 1170 – 71 (1989).

President's powers or enlarge Congress's, but rather to encourage fiscal accountability by delineating a process for spending public monies.<sup>34</sup> As a result, Sidak concludes that the President has a constitutionally-based spending power; he or she "must be permitted to spend enough unappropriated funds to produce the minimally necessary level of public output required by the faithful performance of his article II duties or the reasonable exercise of his article II prerogatives."<sup>35</sup>

Professors Peter Raven-Hansen and William Banks, however, espouse the opposite position, arguing that "Sidak's implied powers argument draws no more support from the practice and understanding of the first congresses and presidents than it does from the constitutional text."<sup>36</sup> They note that the framers placed a particular intended to use the power of the purse to counterbalance executive power, and that early constitutional history reveals no instances in which Presidents have asserted such an inherent spending power.<sup>37</sup> They also contend that executive spending lacks a textual basis, especially since the President has no

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<sup>34</sup> See *id.* at 1167 ("[T]he conventional notion of Congress's 'power of the purse' rests on an unstated (and unsubstantiated) assumption that 'by Law' envisions only legislation."); *id.* at 1174 – 83 (referencing Constitutional Convention debates and the aborted plan for a congressional treasurer).

<sup>35</sup> Sidak, *supra* note 33, at 1197 – 98. For a similar view, see David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOKLYN L. REV. 1083, 1158 (1992) ("Congress has a duty to make certain that the United States has sufficient funds to provide for the common defense . . . . It cannot . . . obstruct the President's obligation to defend the nation."), and Orrin Hatch, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 197, 200 – 01 (1988) ("[C]onstitutional foreign policy functions may not be eliminated by a congressional refusal to appropriate funds. The Congress may not, for example, deny the President funding to receive ambassadors, negotiate treaties, or deliver foreign policy addresses . . . . Congress oversteps its role when it undertakes to dictate the specific terms of international relations.").

<sup>36</sup> William C. Banks & Peter Raven-Hansen, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 130 (1995). Other scholars have similarly criticized Sidak's argument. See, e.g., Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WISC. L. REV. 993, 1017 (1998) (noting that Professors Raven-Hansen and Banks "mount a persuasive rebuttal of Sidak's extremely limited view of the appropriations power" and espouse "a more reasonable middle ground to this issue"); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 12, 18 (1998) ("[T]he notion of an independent presidential spending authority is inconsistent with the text of the Constitution, the intent of the Constitution's Framers, and the country's experience under the Constitution."). The Congressional Research Service has also concluded that Congress has "virtually plenary constitutional power over appropriations." ELSEA, GARCIA & NICOLA, *supra* note 1, at 3. Also, for a pre-existing but influential description of the position opposite to Sidak's, see generally Stith, *supra* note 19.

<sup>37</sup> See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 9 – 32 (1994). For a discussion of those few instances in which presidents have spent without appropriations, see *infra* Part XX.

equivalent to Congress’s “necessary and proper” clause upon which a spending power might be based.<sup>38</sup> And while this may prevent the President from fulfilling his or her Article II duties, the Constitution provides “political remedies—persuasion and bargaining and elections.”<sup>39</sup>

Criticisms of preclusive executive spending powers can also be grounded on structural arguments and case law. The Framers placed the Appropriation Clause in Article I, which enumerates legislative powers.<sup>40</sup> This suggests that the Clause delineates an exclusively congressional power, and Article I’s consistent use of the word “law” “to refer to a bill approved by the Congress and presented to the President”<sup>41</sup> supports this view. Moreover, the contention that “by law” requires legislative authorization is also reinforced by the Court’s decisions in *INS v. Chadha*,<sup>42</sup> which invalidated a unicameral legislative veto,<sup>43</sup> and *Clinton v. City of New York*,<sup>44</sup> which invalidated the Line Item Veto Act.<sup>45</sup> Both decisions held that legislative functions—which include the appropriation of funds<sup>46</sup>—must abide by the Constitution’s bicameralism and presentment requirements.<sup>47</sup> Since executive lawmaking does not follow this process, the President arguably cannot appropriate funds “by law.”

Additionally, “courts have not supported Sidak’s theory” of a preclusive spending power, and those courts that have considered similar issues have produced outcomes clearly inconsistent

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<sup>38</sup> See Rosen, *supra* note 36, at 25 – 26. For a lengthier discussion of the origins and intentions underlying the Clause, see BANKS & RAVEN HANSEN, *supra* note 37.

<sup>39</sup> Raven-Hansen & Banks, *supra* note 36, at 130.

<sup>40</sup> *But see* Sidak, *supra* note 33, at 1170 (noting that “[a]s a textual matter, article I addresses more than the powers of, and limitations on, Congress.”).

<sup>41</sup> Raven-Hansen & Banks, *supra* note 36, at 130.

<sup>42</sup> 462 U.S. 919 (1983).

<sup>43</sup> *Id.* at 958 – 59.

<sup>44</sup> 524 U.S. 417 (1998).

<sup>45</sup> See *Clinton*, 524 U.S. at 448. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), gave the President “the power to ‘cancel in whole’ three types of provisions that have been signed into law: ‘(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.’” *Clinton*, 524 U.S. at 436 (quoting The Line Item Veto Act, Pub. L. No. 104-130, § 2(a), 110 Stat. 1200)).

<sup>46</sup> See *Bowsher v. Synar*, 478 U.S. 714, 763 (1986) (“[A]ppropriating funds is a peculiarly legislative function, and one expressly committed to Congress by Art. I, § 9.”).

<sup>47</sup> See U.S. CONST. art. I, § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”).

with his argument.<sup>48</sup> In one early case, *Knote v. United States*,<sup>49</sup> the Court held that the President’s power to grant pardons did not imply a spending power, and, as a result, the President could not unilaterally reimburse a pardoned individual for forfeited property.<sup>50</sup> And while a spending power may be of greater necessity to effectuate the Commander in Chief power than the pardon power, recent cases have continued to construe the Appropriations Clause as establishing an exclusively congressional power of the purse. In *Office of Personnel Management v. Richmond*,<sup>51</sup> for example, the Court noted that “[o]ur cases underscore the straightforward and explicit command of the Appropriations Clause. ‘It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.’”<sup>52</sup> Furthermore, the Court noted that “[a]ny exercise of a power granted by the Constitution to one of the other Branches of Government,” such as, for example, the Commander in Chief power, “is limited by a valid reservation of congressional control over funds in the Treasury.”<sup>53</sup> The Third Circuit, in *American Federation of Government Employees v. Federal Labor Relations Authority*,<sup>54</sup> explained the rationale for this rule: “The purpose of the [Appropriations] Clause is to place authority to dispose of public funds firmly in the hands of Congress, rather than the

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<sup>48</sup> Banks & Raven-Hansen, *supra* note 36, at 131. See also Rosen, *supra* note 36, at 130 (noting that “no federal court has come close to suggesting the President may appropriate money on his own constitutional authority”).

<sup>49</sup> 95 U.S. 149 (1877).

<sup>50</sup> See *id.* at 154.

<sup>51</sup> 496 U.S. 414 (1990).

<sup>52</sup> *Id.* at 424 (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). For early cases discussing congressional control over appropriations, see, for example, *Reeside v. Walker*, 52 U.S. 272 (1851) (“It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.”), and *Knote v. United States*, 95 U.S. 149, 154 (1877) (“However large, therefore, may be the power of pardon possessed by the President . . . there is this limit to it, as there is to all his powers—it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress”).

<sup>53</sup> *Richmond*, 496 U.S. at 425.

<sup>54</sup> 388 F.3d 405 (3d. Cir. 2004).

Executive. This not only allows Congress to guard against ‘extravagance,’ but hands the Legislative Branch a powerful tool to curb behavior by the Executive.”<sup>55</sup>

2. *Separation of Powers Considerations.* — As the Court noted in *American Federation of Government Employees*, the Appropriations Clause was intended to reinforce the constitutional separation of powers. Accordingly, analyzing the viability of various interpretations of the Clause requires one to consider their effects on the American system of checks and balances. Advocates of an inherent executive power to spend will likely emphasize two points in response to separation of powers objections: that the Constitution affords the President heightened powers in the realm of national security, and, second, that executive flexibility is particularly necessary in this realm. Opponents, however, will argue that an inherent presidential spending power is completely baseless and would tip the balance of powers between the three branches too far in the executive’s favor.

Proponents of a preclusive spending power undoubtedly have their best arguments in the context of the President’s foreign policy and war powers.<sup>56</sup> The strong presidential role in this area can partially be explained by institutional competency: the President is better situated to quickly respond to events in foreign countries, form and maintain diplomatic relationships, and

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<sup>55</sup> *Id.* at 408 – 09 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858)). Other circuits have described the Clause similarly. *See, e.g.,* *Shuford v. Fid. Nat’l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1343 (11th Cir. 2007); *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 251 – 52 (5th Cir. 2005); *North Dakota ex rel. Olson v. Centers for Medicare & Medicaid Servs.*, 403 F.3d 537, 541 (8th Cir. 2005) (“If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive.” (quoting *Richmond*, 496 U.S. at 428) (internal quotation marks omitted)); *Estate of Hunt v. United States*, 103 Fed. Appx. 475, 477 (4th Cir. 2004); *Maryland Dep’t of Human Resources v. United States Dep’t of Agric.*, 976 F.2d 1462, 1481 – 82 (4th Cir. 1992); *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 184 – 86 (D.C. Cir. 1992).

<sup>56</sup> *See supra* Part I. For a discussion of the historical origins of the foreign/domestic distinction, see Roy E. Brownell II, *The Constitutional Status of the President’s Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 11 – 20 (2001).

maintain secrecy when necessary.<sup>57</sup> The ability to spend absent appropriations would clearly enhance these advantages; Professors Raven-Hansen and Banks, for example, speculate that “if the Commander in Chief may never spend for national security activities without prior specific appropriation, he loses needed flexibility to cope with fast-breaking national security crises and may be prevented from discharging his constitutional national security responsibilities.”<sup>58</sup> Moreover, Sidak contends that one of the “primary value[s] of the President’s implied power to fund his duties and prerogatives” would be its role as a “strategic deterrent to opportunistic behavior by Congress, one that consequently gives the President bargaining strength *vis-a-vis* Congress in the ordinary course of setting the direction and magnitude of specific national policies.”<sup>59</sup> Accordingly, even if an inherent spending power did shift the balance of power between the three branches, it might do so in a desirable way—one that better balanced the three branches’ power so as to increase the government’s ability to effectively respond to crises.

But while Courts have articulated a strong role for the President in foreign affairs and wartime, this by no means implies that the President may disregard the Appropriations Clause. Courts might advance two arguments to reject such an argument. First, in *Curtiss-Wright*, the Court was careful to note that the President’s power to manage foreign relations, “like every other governmental power, must be exercised in subordination to the applicable provisions of the

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<sup>57</sup> See, e.g. *Curtiss-Wright*, 299 U.S. at 320 (“Moreover, [the President] has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”); Peter J. Spiro, Book Review, *Old Wars/New Wars*, 37 Wm. & MARY L. REV. 723, 725 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995), and WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994)) (“The ingredients of a successful foreign policy—precision, flexibility, dispatch, secrecy, leadership—are all made virtuous requirements in the wartime setting; all are enhanced by the concentration of decisionmaking authority in a single, pyramidal institution and, ultimately, in a single individual.”).

<sup>58</sup> Banks & Raven-Hansen, *supra* note 36, at 82. Professors Banks and Raven-Hansen, however, ultimately conclude that such a power does not exist. See *id.* at 146 – 47.

<sup>59</sup> Sidak, *supra* note 33, at 1195. In response to separation of powers-based objections, Sidak also claims that executive spending would remain relatively rare for political reasons. See *id.*

Constitution.”<sup>60</sup> The Appropriations Clause clearly qualifies as such an “applicable provision,” and, even without it, the Commander in Chief Clause by no means confers exclusive control over national security to the President.<sup>61</sup> The Constitution affords Congress substantial wartime powers, such as the ability to raise armies and declare war.<sup>62</sup> Moreover, the Court has not been overly receptive to invocations of the Commander in Chief power in recent cases. In *Hamdi v. Rumsfeld*,<sup>63</sup> *Rumsfeld v. Padilla*,<sup>64</sup> and *Rasul v. Bush*,<sup>65</sup> for example, “not a single Justice on the Court suggested any favorable disposition to the argument” that the President’s Commander in Chief power allowed him to disregard wartime statutes that limited his discretion.<sup>66</sup>

Second, and more importantly, creating an inherent executive spending power would dramatically rearrange the constitutional system of checks and balances. According to Professors Raven-Hansen and Banks, the power of the purse “was specially intended in the United States as an antidote to executive abuse of military power and as a tool for congressional control of such power.”<sup>67</sup> The framers meant for the Clause to be a “substantive” mechanism to prevent unwise military activity,<sup>68</sup> and while the Court may not find the framers’ intent dispositive, congressional control over appropriations may serve an even more important role today. With Congress’s power to declare war “practically vestigial,” congressional power of the purse is virtually the only real check on executive warmongering.<sup>69</sup>

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<sup>60</sup> *Id.* at 320. *Cf.* *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

<sup>61</sup> *See supra* TAN 26 – 28.

<sup>62</sup> *See infra* TAN 84 – 88.

<sup>63</sup> 542 U.S. 507 (2004).

<sup>64</sup> 542 U.S. 426 (2004).

<sup>65</sup> 542 U.S. 466 (2004).

<sup>66</sup> Barron & Lederman, *supra* note 25, at 765.

<sup>67</sup> Banks & Raven-Hansen, *supra* note 22, at 890, 899.

<sup>68</sup> *Id.* at 890.

<sup>69</sup> Banks & Raven-Hansen, *supra* note 36, at 79. *But see* *Mistretta v. United States*, 488 U.S. 361, 380 – 81 (1989) (noting that “our constitutional system imposes upon the Branches a degree of overlapping responsibility”). *See also* *Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005) (“We catalogued above those authorities specifically related to international relations and national security . . . [W]ithout an appropriation from Congress to fund an undertaking, the President cannot conduct any such undertaking.”).

An executive spending power would also threaten the separation of powers in a less direct fashion by “render[ing] Congress’ other fiscal powers meaningless.”<sup>70</sup> If the executive could spend under its own authority, “then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will. The ‘legislative Powers’ referred to in section 8 of article I would then be shared by the President in his executive as well as in his legislative capacity.”<sup>71</sup> The framers intended the powers to spend and the powers to tax to be “two sides of the same coin,”<sup>72</sup> and for good reason. Separating the two powers—or giving the President one without the other—might reduce accountability<sup>73</sup> and result in excessive spending: the President would be able to spend and leave Congress to deal with the political repercussions of financing such spending through heightened tax rates.<sup>74</sup>

### ***C. Possible Bases of a Preclusive Executive Power to Disregard Congressionally-Imposed Conditions on Appropriations***

To survive a Category III inquiry the context of congressional appropriations riders, the President would have to win the argument that the congressional limitation constituted an unconstitutional encroachment upon a preclusive executive power. Indeed, this formulation of *Youngstown* Category III tracks with the doctrine of “unconstitutional conditions,” which recognizes Congress’ wide power over appropriations except where the exercise of this power would impermissibly interfere with the constitutionally prescribed roles of the other branches. In its precedents, the Supreme Court has framed this doctrine in a way to suggest that Congress

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<sup>70</sup> Stith, *supra* note 19, at n.24.

<sup>71</sup> *Id.* at 1349.

<sup>72</sup> Rosen, *supra* note 36, at 71.

<sup>73</sup> See *Loving v. United States*, 517 U.S. 748, 756-758 (1996) (“The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.”).

<sup>74</sup> Additionally, Congress may be better situated to make spending decisions. See Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 312 – 19 (1998).

cannot, at a minimum, use its appropriations power to attach conditions that would violate exclusive prerogatives of the other branches: “Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive.”<sup>75</sup> Thus, as a recent Congressional Research Service analysis concluded, the answer to the question of whether Congress can place restrictions on the conduct of war or foreign policy—and whether the President must comply—is that there is no universal answer. Instead, the outcome turns on “whether specific proposals involve purely operational decisions committed to the President in his role as Commander in Chief, or whether they are instead valid exercises of Congress’s authority to allocate resources using its war powers and power of the purse.”<sup>76</sup>

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<sup>75</sup> *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). *See also* *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926) (“If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”). The doctrine of unconstitutional conditions is also frequently invoked in Office of Legal Counsel opinions in relation to a wide variety of perceived congressional limitations on executive power. *See*, for instance, *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 3 Op. Off. Legal Counsel 258 (1989), and *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. Off. Legal Counsel 182 (1996) (including a brief history of O.L.C. opinions invoking the unconstitutional conditions doctrine).

<sup>76</sup> ELSEA, GARCIA & NICOLA, *supra* note 1, at 2. Though the central question of whether the President can disobey congressional appropriations riders turns on whether such conditions encroach upon preclusive presidential powers, there are two further doctrinal questions of note. The first is whether the President may constitutionally sidestep restrictions Congress has imposed through the appropriations process by obtaining private sector and other non-public funding. The Reagan administration used this practice to fund the Nicaraguan Contras after Congress passed the Boland Amendments, which prohibited the use of funds for that purpose. Defenders of the practice have argued that, by using other sources of funds, the President technically has not spent appropriations in violation of congressional instructions. Oliver North, among others, advanced this argument during the Iran-Contra hearings. *See* Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 A.J.I.L. 758, 764 (1989). However, it seems clear from the Anti-Deficiency Act and from the text of the Appropriations Clause that the President cannot evade what he believes are unconstitutional conditions by spending monies not appropriated by law, as Congress has near-plenary power over appropriations. *See* Part II.B. This restriction on the use of non-public resources is desirable because executive dependence on such funding could compromise the independence of American foreign policy. *See* Fisher, *supra* note 76, at 762-6. Congress has authorized agencies to solicit contributions from foreign sovereigns or international organizations in certain instances, *see, e.g.*, Continuing Resolution for Fiscal Year 1991 § 202, P.L. 101 – 403 (1990); ELSEA, GARCIA & NICOLA, *supra* note 1, at 34, but it seems settled that the President cannot unilaterally solicit such funds without congressional authorization.

The second question is whether the President can ignore an unconstitutional condition and simply spend appropriated monies as if Congress had placed no restrictions upon them. As a matter of interpretation, the answer would seem to depend upon an examination of congressional intent. On one hand, “[a] provision is further presumed severable if what remains after severance ‘is fully operative as a law,’” suggesting that the President can

What are potential preclusive presidential powers in the national security context?

Unlike the many enumerated powers given to Congress in Article I of the Constitution, the President has relatively few precisely defined powers in Article II. Those powers that are concretely identified as sole executive powers—like the power to pardon,<sup>77</sup> the power to require the opinion of executive officers,<sup>78</sup> and the power to make recess appointments<sup>79</sup>—are primarily domestic in nature. But in the national security context, whether the President possesses preclusive powers turns on the more difficult question of what powers are encompassed in the phrase “The President shall be Commander in Chief of the Army and Navy of the United States.”<sup>80</sup> Of course, the President has historically taken a position of leadership in asserting executive powers in this area. But, as Barron and Lederman point out, one of the difficulties in analyzing the President’s Commander in Chief powers is to distinguish between those powers the President can assert absent congressional authorization, and the preclusive core the President can assert even in the face of congressional disapproval.<sup>81</sup> Not only are these powers difficult to identify, but there is no easy doctrinal test to apply to distinguish between them. The constitutional text, original understandings, functional implications, and custom can all inform the analysis, but in this area of amorphously defined powers, there are no hard and fast rules.<sup>82</sup> Thus, instead of describing a methodology for discovering preclusive presidential powers, this

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safely act as if no restrictions were placed on appropriations if the restriction is unconstitutional. *INS v. Chadha*, 462 U.S. 919, 934 (1983). On the other hand, if, in the absence of the restriction, there is reason to believe Congress would have refused to grant appropriations, then proceeding as if the restriction never existed may be constitutionally dubious. *See, e.g., Davis v. Wallace*, 257 U.S. 478, 484-485 (1922) (“Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which was intended to qualify or restrain.”); *Chadha*, 462 U.S. at 931 – 35 (discussing severability and the effect of invalidation). In practice, given the difficulties of going back to Congress to request unconditional appropriations after the budget has been passed, presidents have simply spent conditional funds as if no conditions had been attached.

<sup>77</sup> U.S. CONST. art. II § 2 cl. 1; *see generally* *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>78</sup> U.S. CONST. art. II § 2 cl. 1.

<sup>79</sup> U.S. CONST. art. II § 2 cl. 3.

<sup>80</sup> U.S. CONST. art. I § 2 cl. 1.

<sup>81</sup> Barron & Lederman, *supra* note 25, at 721.

<sup>82</sup> Barron & Lederman, *supra* note 25, at 752-3.

section instead discusses a broad spectrum of presidential powers encompassed within the notion of “Commander in Chief.” Specifically, this section discusses three areas of asserted preclusive presidential powers: war powers; presidential powers over intelligence; and the President’s power to control battlefield operations.

*1. War powers.* — Proponents of presidential power have suggested that the President has near-plenary power over the making and conduct of war, as well as over the decision to end a war. Though the Constitution gives Congress the power to “declare war,” scholars like Professor John Yoo of Berkeley have suggested that this only refers to formal, large-scale conflicts, and that the President need not ask for a declaration of war in all or even most circumstances.<sup>83</sup> But the President almost certainly cannot win the argument that war powers generally constitute a preclusive power. First, such an interpretation is undermined by the constitutional text. The Constitution establishes that the President is Commander in Chief, but gives Congress the powers to “regulate captures on land and water,”<sup>84</sup> to “punish and define offenses against the law of nations,”<sup>85</sup> to “raise and support Armies,”<sup>86</sup> and “To provide and maintain a navy,”<sup>87</sup> among others; Congress also has the power “To make all laws which shall be necessary and proper for carrying into execution the foregoing power.”<sup>88</sup> Even if these powers are construed narrowly, when taken together, they strongly suggest that the Framers intended Congress to have some role in a wide range of areas relating to war and foreign affairs. Moreover, in terms of historical

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<sup>83</sup> John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1669 – 71 (2002). Professor Yoo also relied on this argument in some of the memoranda he wrote for the Office of Legal Counsel immediately following 9/11 in order to justify broad interpretations of executive power. See, for instance, John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, Op. Off. Legal Counsel (2001), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 4 – 5 (Karen Greenberg & Joshua Dratel, eds., 2005).

<sup>84</sup> U.S. CONST. art. I § 8 cl. 11.

<sup>85</sup> U.S. CONST. art. I § 8 cl. 10.

<sup>86</sup> U.S. CONST. art. I § 8 cl. 12.

<sup>87</sup> U.S. CONST. art. I § 8 cl. 13.

<sup>88</sup> U.S. CONST. art. I § 8 cl. 18.

practice, Congress has never conceded the executive full control over this area. To the contrary, through legislation like the War Powers Act, Congress has instead consistently asserted a belief in its own primacy.<sup>89</sup> Finally, in the recent case *Hamdan v. Rumsfeld*, the Supreme Court squarely rejected any near-exclusive executive or congressional powers over war. Instead, the Court suggested, most of these powers were shared between the President and Congress, making “the interplay between these powers” hard to distinguish.<sup>90</sup> Thus, though the precise areas of overlap are indefinite, neither the President nor Congress can broadly assert preclusive powers over the whole field of war.

2. *Intelligence*. — Scholars like Robert Turner of the University of Virginia have suggested that the President’s control of foreign intelligence operations abroad is a preclusive presidential power.<sup>91</sup> In support of this argument, he has argued that this power is distinct from ordinary war powers because it relates more to the secret intelligence essential for diplomacy in war or in peace. Moreover, intelligence may be a preclusive presidential power because it is an area that uniquely requires executive supervision and discretion as opposed to joint involvement from both political branches. There is also some evidence from the founding onwards to support the proposition that Congress has historically deferred to the executive on intelligence matters in recognition of the executive’s unique functions and the particular need for secrecy in this area.<sup>92</sup> Legal academics like Harold Koh, however, have instead suggested that there may be some preclusive dimensions to the President’s powers to conduct foreign intelligence operations, but such a power is much more limited. To Koh, a preclusive power in this area would likely be

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<sup>89</sup> See generally Barron & Lederman, *supra* note 25; David Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941 (2008).

<sup>90</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006).

<sup>91</sup> See Robert Turner, Testimony before the Senate Select Subcommittee on Intelligence, CONG. Q., Sept. 25, 2007 (summarizing the findings of his forthcoming book on the subject).

<sup>92</sup> *Id.*

limited to the collection of foreign intelligence, through human sources or through signals or imaging intelligence. In contrast, covert operations designed to influence foreign affairs could not constitute a preclusive power, because they can take the form of paramilitary operations or even low-intensity covert warfare and are therefore closer to a joint war power shared with Congress.<sup>93</sup> Moreover, Congress has sought to regulate various elements of foreign intelligence operations with some vigor since the late 1960s, challenging the notion of unbroken executive practice in this area.

3. *Chain of Command.* — The President’s asserted sole control over the conduct of war is probably the most consistently asserted preclusive presidential power.<sup>94</sup> However, the scope of this power is also subject to challenge. Traditionally, the power has been taken to mean that Congress categorically cannot regulate the military chain of command or issue orders to those in the field because these are matters that require the federal government to speak with a single voice.<sup>95</sup> With respect to congressional conditions on troop levels, then, it is possible that if Congress reduced troop levels to a point where certain battlefield operations were foreclosed, Congress might impermissibly infringe upon a core executive function.<sup>96</sup> However, Professors Barron and Lederman have instead relied on an analysis of understandings at the time of the founding and on customary practice to suggest that any preclusive power in this area is far narrower. Instead, they argue, the President does not have a demonstrable preclusive power over all tactical decisions, but he does seem to possess preclusive power over the superintendence of the military: “[A]t least with respect to certain functions, Congress may not (by statute or

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<sup>93</sup> KOH, *supra* note 9, at 102 – 03.

<sup>94</sup> This has been true since the days of the Founding. See, for instance, THE FEDERALIST No. 69 (Alexander Hamilton) (arguing that the core of the President’s Commander in Chief powers inhered in the President’s “supreme command and direction of the military and naval forces, as first general and admiral of the confederacy”).

<sup>95</sup> ELSEA, GARCIA & NICOLA, *supra* note 1, at 4 – 5. For an exhaustive survey of proponents of this position, see Barron & Lederman, *supra* note 25, at 751 n.191.

<sup>96</sup> See ELSEA, GARCIA & NICOLA, *supra* note 1, at 4 – 5.

otherwise) delegate the ultimate command of the army and navy (or of the militia when in the service of the national government) to anyone other than the President.”<sup>97</sup> Though this debate is far from settled, there is broad scholarly agreement that, whether the power to control military operations pertains primarily to the battlefield or to personnel supervision, there is at least some certain, generally accepted preclusive power in this area.

### III. EXECUTIVE SPENDING CONTROVERSIES IN PRACTICE

While “the Court has been careful to note that ‘[p]ast practice does not, by itself, create power,’”<sup>98</sup> an analysis of the historical exercise of executive power in relation to spending decisions nevertheless serves two functions. Doctrinally, it informs *Youngstown* analyses,<sup>99</sup> and, descriptively, it helps predict how such situations will—and do—play out in practice. Section A of this Part discusses past acts of unappropriated spending by the President, and section B analyzes presidential responses to congressional limitations on appropriations in the context of national security.

#### A. *The (Limited) History of Unappropriated Spending by the Executive*

Instances of spending without appropriation by Congress are extremely rare. Three such instances are commonly discussed: Washington’s unilateral spending to suppress the 1794 Whiskey Rebellion,<sup>100</sup> Jefferson’s purchases of saltpepper and sulphur after the Chesapeake incident,<sup>101</sup> and Lincoln’s advance of \$ 2 million to purchase supplies in advance of the Civil

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<sup>97</sup> Barron & Lederman, *supra* note 25, at 769.

<sup>98</sup> *Medellin v. Texas*, 128 S. Ct. 1346, 1372 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

<sup>99</sup> *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 – 11 (1952) (Frankfurter, J., concurring) (“[A] a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President.”).

<sup>100</sup> *See Sidak, supra* note 33, at 1178 – 80.

<sup>101</sup> *See Barron & Lederman, supra* note 89, at 974 – 76.

War in 1861.<sup>102</sup> But, since Lincoln’s expenditures, executives have refrained from unappropriated spending. This is true even during lapses in appropriations, or “government shutdowns.” Although the executive does continue spending for essential day-to-day operations during such lapses, this spending is grounded on existing appropriations and congressional intent rather than executive power. In a series of opinions, Attorney General Benjamin Civiletti<sup>103</sup> noted that spending is only allowed during shutdowns when supported by statute: “appropriations lapses will not interrupt government activities funded by multi-year or indefinite appropriations, activities expressly authorized continued obligation or contract authority by statute, and activities ‘authorized by necessary implication from the specific duties imposed on agencies by statute.’”<sup>104</sup> No presidents or members of their administration have asserted an ability to spend absent statutory authorization, even in a prolonged shutdown.<sup>105</sup>

That no significant act of unappropriated spending has occurred in the 147 years since the beginning of the Civil War should not be surprising; Presidents are generally quite adept at securing the resources they need without risking the political repercussions of spending tax dollars based on a seemingly undemocratic and constitutionally-suspect theory of an inherent spending power. The need for such a power would only arise when, for whatever reason, the President was unable or unwilling to ask Congress for a supplemental appropriation. And even in those situations, the executive possesses a wide-ranging arsenal of mechanisms for securing funding short of asserting a controversial new power. For example, the executive is often able to acquire resources for a desired action by reprogramming funds, or shifting them from one object

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<sup>102</sup> *See id.* at 1001 – 02.

<sup>103</sup> *See, e.g.,* Applicability of Antideficiency Act Upon a Lapse in Agency Appropriation, 19 Op. Off. Legal Counsel No. 235 (1980).

<sup>104</sup> Rosen, *supra* note 36, at 99. *See also* Alan L. Feld, *Shutting Down the Government*, 69 B.U.L. REV. 971 (1989).

<sup>105</sup> For greater discussion of government shutdowns, see Puja Seam & Brad Shron, *Government Shutdowns* (2005), available at [http://www.law.harvard.edu/faculty/hjackson/GovernmentsShutdowns\\_10.pdf](http://www.law.harvard.edu/faculty/hjackson/GovernmentsShutdowns_10.pdf).

to another within the same appropriation account; transferring funds between appropriation accounts; utilizing funds allotted in contingency or emergency accounts;<sup>106</sup> or relying on the Feed and Forage law,<sup>107</sup> which authorizes presidents to incur obligations if required to maintain deployed troops. These tools have been successfully utilized to circumvent the need for appropriations in the past; Nixon was able to finance hostilities in Cambodia through these means, and Bush was able to do the same during Operation Desert Shield.<sup>108</sup> Furthermore, Presidents may be able to simply forward-deploy troops and thereby coerce funding. In such a situation, Congress would be left with the choice of either funding the President's desired course of action or facing politically disastrous consequences.<sup>109</sup> In light of diverse options available to the President—and their successful use in previous conflicts—there is simply little need for the executive to resort to inherent spending powers.

Additionally, it is not even certain that the three historical instances of unappropriated executive spending—Washington, Jefferson, and Lincoln's—even reflect a claim to an inherent executive spending power. Gregory Sidak has argued that “Lincoln recognized that he and every other President had been vested by the Constitution with a preexisting duty as the Commander in Chief . . . [and] believed that he was not acting above the law, but in compliance with the rule of

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<sup>106</sup> See Takeshi Fujitani & Jared Shirck, *Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound* (2005), available at [http://www.law.harvard.edu/faculty/hjackson/ExecutiveSpendingPowers\\_8.pdf](http://www.law.harvard.edu/faculty/hjackson/ExecutiveSpendingPowers_8.pdf); Brownell, *supra* note 45, at 103 (noting that lump-sum appropriations are often used during wartime); Banks & Raven-Hansen, *supra* note 36, at 82 (“[The President] has customarily claimed and exercised the discretion to spend transferred, reprogrammed, emergency, and contingency funds (the discretionary funds) without prior specific appropriation from Congress.”). See also Spiro, *supra* note 48, at 739 (“In a budget measuring in the hundreds of billions of dollars, the executive is able to find the funds it needs . . . . When unilateral presidential efforts in the way of what might be called ‘strike operations’ (Grenada, Panama, the Gulf of Sidra, Desert One) are under contemplation, funding has proved no obstacle.”).

<sup>107</sup> Pub. L. No. 98-557, 98 Stat. 2868, 41 U.S.C. § 11 (1994).

<sup>108</sup> See Banks & Raven-Hansen, *supra* note 36, at 82 – 83.

<sup>109</sup> See *id.* at 91 – 92 (“The compelling need for Congress to support troops already in the field effectively decided the appropriation issue. . . . [F]or most members of Congress, it was too late to reverse the decision by the time he returned for more money.”).

law as expressed in the Constitution itself.”<sup>110</sup> Professors Barron and Lederman, however, explain the incident differently. According to them, Lincoln—and Jefferson during the Chesapeake incident—“mounted a bounded necessity defense, owing to Congress's absence at a moment of crisis.”<sup>111</sup> In other words, Lincoln did not assert a claim to an inherent spending power; he admittedly acted in violation of the Constitution because the situation so required and hoped that Congress would ratify his actions after the fact.<sup>112</sup> Washington’s expenditures can be explained similarly as a concededly unconstitutional action.<sup>113</sup>

Given these historical foundations, a court would find it extremely difficult to assert the existence of a customary practice of spending absent appropriation, even in emergencies. Even if Sidak is correct and Washington, Jefferson, and Lincoln’s acts of unappropriated spending were assertions of an inherent executive spending power rather than unconstitutional acts left to the political channels for resolution, these three acts are almost certainly inadequate to constitute the “systematic, unbroken executive practice” referenced in *Youngstown*.<sup>114</sup> In fact, the opposite may be true. As the Boland amendments show, in modern times, Congress has often used its power over appropriations to “ratify or restrict” presidential actions.<sup>115</sup> The appropriation power

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<sup>110</sup> Sidak, *supra* note 33, at 1190. *See also* The Prize Cases, 67 U.S. (2 Black) 635 (1862) (noting that “the President is not only authorized but bound to resist force by force . . . [and] bound to accept the challenge without waiting for any special legislative authority.”).

<sup>111</sup> Barron & Lederman, *supra* note 89, at 1001. *Cf.* Richard A. Posner, *Torture Terrorism, and Interrogation*, in *TORTURE: A COLLECTION* 297–98 (Sanford Levinson ed., 2004).

<sup>112</sup> *Cf.* Stith, *supra* note 19, at 1351–52 (“[W]here an emergency exists, the President might decide that principles more fundamental than the Constitution’s appropriations requirement justify spending. The constitutional processes for resolving such situations, as well as cases where Congress fails to appropriate money for an inherent executive activity, are political.”).

<sup>113</sup> *See* Rosen, *supra* note 36, at 19 (“Even on those relatively rare occasions that presidents have spent funds without prior congressional approbation, they have always returned to Congress—hat in hand—seeking an appropriation to cover their expenditures.”).

<sup>114</sup> *See supra* note 99.

<sup>115</sup> Banks & Raven-Hansen, *supra* note 22, at 835.

“has become, by necessity and preference, a key congressional tool for participating in national security decisionmaking.”<sup>116</sup>

### ***B. Historical Examples of Conditions on Congressional Appropriations in the War and National Security Context***

Until the Cold War, there were very few historical examples of Congress placing conditions on appropriations in the field of war or foreign affairs. The present situation has changed to some extent, but, even if Congress succeeds in placing conditions on such appropriations, the President has a number of possible remedies short of refusing to comply. First, the President can rely on his constitutional duty to “take care that the laws be faithfully executed”<sup>117</sup> and interpret any ambiguous provisions to construe the condition as narrowly as possible. If the appropriations bill yields no such ambiguities, the President can veto it, though this option is often considered undesirable when Congress has attached conditions to a single provision in an entire defense appropriations bill. In such a situation, the President would be forced to veto all appropriations for a war simply to eliminate a single objectionable condition. Nonetheless, as this section will detail, there are historical instances of presidential vetoes.

Second, the President can insert a signing statement when he signs the bill. The signing statement might take the form of promising to faithfully execute the law consistent with the President’s powers as Commander in Chief, offering some advance indication that he or she considers the appropriations condition to be an unconstitutional encroachment upon his

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<sup>116</sup> *Id.* at 835 – 36. For a historical description of Congress’s successful use of legislation to limit the executives wartime actions, see generally Barron & Lederman, *supra* note 89. It is important to note that past appropriations for a particular activity do not create any kind of custom out of which a power to continue such spending might emerge. “The fact that Congress may have appropriated funds in other crises or that Congress did not object to the President’s prior interventions, is hardly the constitutional equivalent of an appropriation.” Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 770 (1998). *See also id.* (“No one would argue that because Congress appropriated funds last year for the National Endowment for the Arts, the President can appropriate funds this year for the same purpose without Congress’ approval.”).

<sup>117</sup> U.S. CONST. art. II, §3, cl. 4.

prerogative and that the he or she would potentially decline to enforce it. Proponents of signing statements argue that the use of signing statements prior to executive non-enforcement of the condition avoids some of the potential constitutional problems that could come from simply disregarding the condition after the fact. Because bills require the assent of the President as well as Congress to become law, the signing statement effectively indicates that the President would not have signed the bill—and it could not have become law—absent the understanding he has placed upon it.<sup>118</sup> A fuller discussion of the constitutional implications of signing statements is beyond the scope of this briefing paper. The use of signing statements in this context, however, has become increasingly controversial.<sup>119</sup> The use of signing statements, like executive defiance, may risk congressional reprisals in the form of further conditions on appropriations the following budget cycle or through reduced appropriations.<sup>120</sup> More blatant executive disregard for appropriations conditions may invite even more serious congressional countermeasures in the form of investigations or even impeachment.

The remainder of this section will discuss historical examples of presidential acquiescence to and disregard of congressional conditions on appropriations. Subsection 1 discusses conditions to which the President has either acquiesced or vetoed, and subsection 2 discusses two conditions that the President has deliberately ignored: the Clark and Boland amendments. Subsection 3 concludes by discussing themes apparent from this history.

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<sup>118</sup> For a further exploration of this argument, see Curtis Bradley & Eric Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 338 (2006) (“[I]n the signing statement, the president is not purporting to use his presidential authority to block enactment of the law, which is what happens with a veto. Instead, he is claiming that the Constitution itself blocks the law from taking effect. He may or may not be right about such a claim, but his position is different from when he exercises a veto. For example, unlike with a veto, the president cannot validly use a signing statement to announce that he will not enforce a statute merely because he disagrees with it as a matter of policy.”).

<sup>119</sup> See Charlie Savage, *Bush challenges hundreds of laws; President cites powers of his office*, BOSTON GLOBE, Apr. 30, 2006 (giving a brief history of presidential signing statements and their various uses); see generally Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006).

<sup>120</sup> Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?* 42 STAN. J INT'L L. 291, 332 (2006).

1. *Historical examples of presidential acquiescence to congressional conditions and failed efforts to impose conditions.* — As Charles Tiefer has documented, the most significant uses of congressional conditions on appropriations began during the Vietnam War. During that war, Congress successfully passed appropriations measures conditioned on troop withdrawals and ultimately a provision in an appropriations bill with a funding cutoff date for the war. Though President Nixon used the Feed and Forage Law to bypass these measures,<sup>121</sup> the Ford administration complied, leading to the eventual U.S. withdrawal.<sup>122</sup> More recent examples of presidential compliance include the DoD Appropriations Act for FY 1994, in which Congress inserted a funding withdrawal timetable for armed forces in Somalia. Congress specified that after the end of March 1994, there would be no further funding save for essential protective functions, and the Clinton administration complied.<sup>123</sup> However, later in the Clinton administration, Congress proposed a number of bills with riders to prevent U.S. military officials from serving under non-American commanders during U.N. peacekeeping operations. Clinton vetoed the only version that came before him on the grounds that it impermissibly encroached upon his powers as Commander in Chief to command battlefield operations.<sup>124</sup> Even more recently, beginning in 2005, Congress conditioned spending in Iraq on compliance with detainee treatment provisions and attempted to pass troop withdrawal timetables as a condition of further appropriations. These measures have been repeatedly proposed up through the present. To date, Congress has made some progress in inserting detainee provisions into appropriations bills, but

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<sup>121</sup> See *supra* note 108.

<sup>122</sup> Tiefer, *supra* note 120, at 309.

<sup>123</sup> ELSEA, GARCIA & NICOLA, *supra* note 1, at 31.

<sup>124</sup> None of the other bills made it to full votes. For a further discussion of the constitutional powers potentially implicated by different versions of these bills, see Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50 (1999).

other kinds of conditions, including withdrawal timetables and funding cut-offs for the war, have stalled.<sup>125</sup>

2. *Historical examples of presidential disregard for congressional conditions.* — Both major examples of inter-branch conflict over presidential disregard for appropriations conditions come from the Reagan era. These examples are the Clark Amendment and the Boland Amendments.

(a) *The Clark Amendment.* — Civil war broke out in Angola beginning in late 1974, and in the chaos, two main factions of liberation groups emerged: the MPLA, supported by the Soviet union, and UNITA, supported by the United States. Citing fears of “another Vietnam,” Congress passed the Clark Amendment in December 1975 to prohibit the use of any appropriations to support the Angolan liberation fighters.<sup>126</sup> Nonetheless, the Carter administration strongly encouraged American allies to intervene and fill the gap. The Reagan administration, moreover, reportedly circumvented the Clark Amendment more directly by channeling funds and other support through Saudi Arabia, Morocco, and Israel.<sup>127</sup> By 1982, Jonas Savimbi, the leader of UNITA, was boasting in the Portuguese press, “Let's not kid ourselves . . . there are other ways to provide assistance. The Clark Amendment doesn't mean anything. A great nation such as the United States has other channels.” Afterwards, senior State Department and CIA officials issued strategically worded non-denials.<sup>128</sup> The House Foreign Relations Committee eventually held hearings to investigate likely violations of the Clark

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<sup>125</sup> Tiefer, *supra* note 120, at 291 – 92.

<sup>126</sup> Michael McFaul, *Rethinking the 'Reagan Doctrine' in Angola*, 13 INT'L SECURITY 99, 100 – 01 (1990). The amendment was later repealed in 1985. *See id.*

<sup>127</sup> William Minter, *The US and the War in Angola*, REV. OF AFR. POL. ECON., Spring 1991, at 135, 136.

<sup>128</sup> KOH, *supra* note 9, at 23.

Amendment. However, these investigations were limited in scope and quickly lost steam, their momentum supplanted by the prior investigation of the Iran-Contra scandal.<sup>129</sup>

(b) *The Boland Amendments and Iran-Contra.* — The leftist Sandinistas overthrew Nicaragua’s dictatorship in 1979 and formed a new government. By the early 1980s, the United States feared that the Sandinistas were aligning with Cuba and the Soviet Union to support the conflict in El Salvador. The Reagan administration responded by commencing covert support for the opposition Contras. Congress was opposed and passed the Boland Amendments, a series of appropriations restrictions passed by Congress from 1982 – 86 in order to prevent any agency, including the CIA, from using appropriated funds “to support military or paramilitary operations in Nicaragua.”<sup>130</sup> To evade these restrictions and continue covertly supporting the Contra, high-ranking executive branch officials, including members of the National Security Council, engaged in illegal arms sales to Iran and used the proceeds to finance the Nicaraguan Contras, thereby bypassing the ordinary appropriations process. The arms deals were ultimately revealed, provoking a serious political and constitutional controversy that led to congressional investigations in 1987.<sup>131</sup> Colonel Oliver North, the NSC official primarily responsible for the arms deals, was initially convicted of criminal charges relating to obstruction of the Congressional investigation, though the conviction was later overturned on appeal; others were later pardoned by the first President Bush.<sup>132</sup> The scandal sapped President Reagan’s popularity, but he escaped serious political sanctions from Congress.<sup>133</sup>

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<sup>129</sup> House of Representatives, Africa Subcommittee of the Foreign Affairs Committee, Hearing on the Possible Violation or Circumvention of the Clark Amendment, 100<sup>th</sup> Congress, Jul. 1, 1987.

<sup>130</sup> KOH, *supra* note 9, at 52.

<sup>131</sup> *Id.* 11-37.

<sup>132</sup> See *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (overturning North’s conviction on the grounds that North’s immunized testimony before Congress on the Iran-Contra affair was impermissibly used to incriminate him in subsequent criminal trial); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991) (overturning Admiral John Poindexter’s convictions for similar reasons.)

<sup>133</sup> KOH, *supra* note 9, at 57 – 62.

The Clark Amendment and Boland Amendments illustrate situations where the President disregarded potential restrictions on his powers to conduct covert operations and foreign policy. However, they are also problematic examples for drawing constitutional conclusions. Once revealed, the President's disregard for Congressional restrictions was framed less in terms of the constitutional question of whether Congress had imposed unconstitutional conditions and more in terms of the wisdom of supporting the rebel groups in question, how much the President knew about these operations, and disapproval of the manner in which covert support was hidden from the public.

3. *Implications.* — Though these historical examples are equivocal, they suggest that there is no customary practice of presidential objections to *all* congressional conditions on appropriations in the war or national security contexts. Instead, the history reveals that Presidents have complied with some of these conditions, especially in the realm of congressionally mandated troop withdrawal deadlines. Presidents have, however, resisted congressional limitations on the use of appropriations for covert actions with especial vigor, possibly suggesting that congressionally imposed conditions on intelligence functions are considered a more threatening encroachment into perceived executive powers. Finally, this history suggests that presidents certainly have the political option to openly flout congressional conditions on appropriations, but they may be forced to pay a high political price. The political price, however, is not necessarily due to the perceived impermissibility of violating congressional conditions on appropriations, but instead seems to turn more on the manner in which the President sought out alternative appropriations or ignored the restriction.

#### IV. BARRIERS TO RESOLUTION OF THE CONSTITUTIONAL STATUS OF EXECUTIVE SPENDING

The debate over the existence of a preclusive executive spending power, while vigorous, is unlikely to become more than academic in the immediate future. Even if the executive did spend unappropriated funds or ignore congressionally-imposed restrictions, courts might simply decline to intervene and thus leave the question to the political branches to resolve. Professor Kate Stith, for example, argues that courts often “invoke prudential justiciability doctrines, such as ‘standing’ requirements and the political question doctrine, to avoid consideration of the constitutional adequacy of appropriations legislation.”<sup>134</sup> Accordingly, “[w]hile one may certainly imagine courts directing such relief, given centuries of practice and precedent to the contrary, the likelihood of such federal judicial intrusion into the appropriations process is remote.”<sup>135</sup> Section A of this Part describes the doctrine of standing and discusses why, in the context of an inter-branch conflict over appropriations and executive power, standing may impede judicial resolution of such controversies. Section B then discusses the political question doctrine. It analyzes reasons why a court could likely find that cases pitting the President’s powers as Commander in Chief against Congress’ appropriations and other powers would constitute a non-justiciable political question.

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<sup>134</sup> Stith, *supra* note 19, at 1393. *See also id.* (“Often, however, when faced with an issue of executive compliance with appropriations limitations, courts have declined to decide cases on the merits, particularly in areas where the Executive’s constitutional powers are significant.”). For a discussion of the political question doctrine and standing, see Drew McLelland & Sam Walsh, *Litigating Challenges to Federal Spending Decisions: The Role of Standing and Political Question Doctrine* (2006), available at [http://www.law.harvard.edu/faculty/hjackson/LitigatingChallenges\\_33.pdf](http://www.law.harvard.edu/faculty/hjackson/LitigatingChallenges_33.pdf). As McLelland and Walsh note, these two doctrines were once “thought to be two sides of the same coin. . . . ‘Standing is just the obverse of political questions. If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question.’” *Id.* (quoting HOWARD FINK & MARK TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 231 (2d ed. 1987)).

<sup>135</sup> Rosen, *supra* note 36, at 132.

### *A. Standing*

The constitutional doctrine of standing is grounded in the notion that “the province of the court . . . is, solely, to decide on the rights of individuals.”<sup>136</sup> By this, the Court meant that the judiciary’s role is to decide cases where a plaintiff has personally suffered a demonstrable injury capable of adjudication as opposed to an abstract societal harm. The doctrine is thus naturally difficult to square with the intangible harms to the political branches often alleged in separation of powers disputes.

Plaintiffs must generally meet three requirements to establish standing: they must show that they have been injured, that their injury was caused by the defendant’s alleged conduct, and that their injuries can be redressed in court.<sup>137</sup> Whether these requirements can be satisfied depends on the facts of each suit, and, although the theories by which plaintiffs might challenge unconstitutional executive spending are limited only by the breadth of their imaginations, two groups are particularly likely to act as plaintiffs: members of Congress (likely of the political party opposite to the President’s), and taxpayers. Because both of these classes of plaintiffs face especial constitutional obstacles to bring suit, standing appears a particular hurdle for executive spending power cases.

First, the Court has been hostile to legislators’ attempts to secure standing in separation of powers and other institutional disputes, which, given the vague and intangible harms at issue, should not be surprising. The Court’s treatment of standing in relation to the Line Item Veto Acts demonstrates some of the difficulties that would face challenges to executive spending. In

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<sup>136</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). *See also* *United States v. Richardson*, 418 U.S. 166, 192 (1974) (noting that the Court’s proper role “lies in the protection [of] constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action[,] . . . not some amorphous general supervision of the operations of government”).

<sup>137</sup> *McLelland & Walsh*, *supra* note 134, at 5.

*Raines v. Byrd*,<sup>138</sup> a group of Congressmen alleged that they had been injured by the Act because it shifted the constitutional balance of power in the executive's favor, diluting the power of their votes.<sup>139</sup> The Court, however, denied standing on the grounds that "the institutional injury they allege[d] [was] wholly abstract and widely dispersed."<sup>140</sup> Lower courts have interpreted *Raines* broadly; in *Campbell v. Clinton*,<sup>141</sup> for example, the D.C. Circuit noted that the plaintiffs in *Raines* were "denied . . . standing as congressmen because they possessed political tools with which to remedy their purported injury."<sup>142</sup> In the context of the separation of powers, then, standing doctrine reflects a belief that the political interactions between the branches are better left to politics,<sup>143</sup> and, more generally, that "legislators have standing to pursue their own personal interests affected by the legislative process, but not their institutional interests"<sup>144</sup>

Suits by taxpayers alleging an unconstitutional usurpation of power by the executive face similar if not greater difficulties. Courts have been particularly hostile to such claims,<sup>145</sup> requiring that taxpayer-plaintiffs "establish a nexus between that status and the precise nature of

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<sup>138</sup> 521 U.S. 811 (1997).

<sup>139</sup> *Id.* at 816; see also McLelland & Walsh, *supra* note 134, at 15.

<sup>140</sup> *Raines*, 521 U.S. at 829. The plaintiffs in such a case would rely on *Coleman v. Miller*, 307 U.S. 433 (1939), which upheld legislative standing on the basis of the plaintiffs' "plain, direct, and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. The *Raines* decision, however, draws the continued vitality of *Coleman* into question, and *Raines* is also more analogous to an executive spending case. In *Coleman*, a group of (state) senators alleged that a constitutional amendment had been ratified without satisfying the proper procedures. The Court granted standing on the basis that the senators' votes had been nullified. See *Coleman*, 307 U.S. at 456. *Raines*, however, interpreted this holding more narrowly, finding that the plaintiffs' claims against the Line Item Veto Act did "not fall within our holding in *Coleman*" because they did not "allege[] that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Raines*, 521 U.S. 824.

<sup>141</sup> 203 F.3d 19 (D.C. Cir. 2000).

<sup>142</sup> *Id.* at 24.

<sup>143</sup> Accordingly, were a President to violate the Anti-Deficiency Act, for example, Congress's formal constitutional remedies would be limited to impeachment.

<sup>144</sup> McLelland & Walsh, *supra* note 134, at 15 n.69.

<sup>145</sup> *United States v. Richardson*, 418 U.S. 166, 192 (1974) ("The considerations outlined above underlie, I believe, the traditional hostility of the Court to federal taxpayer or citizen standing where the plaintiff has nothing at stake other than his interest as a taxpayer or citizen. It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government.").

the constitutional infringement alleged.”<sup>146</sup> While this “nexus” requirement was satisfied in *Flast v. Cohen*,<sup>147</sup> which challenged spending under the Establishment Clause, “[s]ubsequent cases . . . suggest that the Court is not likely to extend taxpayer standing for violations of constitutional provisions other than the Establishment Clause.”<sup>148</sup> In *United States v. Richardson*,<sup>149</sup> for example, the Court rejected standing in a case where the plaintiff alleged the CIA’s secret budget violated constitutionally mandated statements and accounts of public funds.<sup>150</sup> Presumably, the taxpayers’ “nexus” arguments in challenges to executive spending would be somewhat similar to those in *Richardson*, as both are based on violations of the mechanics of federal budget policy. And as a result, taxpayers are likely to encounter severe difficulties in establishing standing.

### ***B. Political Question Doctrine***

The political question doctrine can also operate as a serious bar to most claims challenging executive or congressional actions in the appropriations context, especially when such actions also relate to the conduct of war or foreign affairs.<sup>151</sup> The political question doctrine is premised on the notion that in order to preserve the independence of branches essential to the separation of powers, the judiciary must refrain from deciding cases that would force it to speak on inherently political matters that are ordinarily the purview of the political branches. In *Marbury v. Madison*,<sup>152</sup> Justice Marshall laid out the basis for the political question doctrine: “[q]uestions, in their nature political, or which are, by the Constitution and laws,

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<sup>146</sup> *Flast v. Cohen*, 392 U.S. 83, 102 – 03 (1968).

<sup>147</sup> *Id.*

<sup>148</sup> McLelland & Walsh, *supra* note 134, at 18.

<sup>149</sup> 418 U.S. 166 (1974).

<sup>150</sup> *Id.* at 175.

<sup>151</sup> For a broader discussion of this subject, see McLelland & Walsh, *supra* note 134.

<sup>152</sup> 5 U.S. (1 Cranch) 137 (1803).

submitted to the executive can never be made in this court.”<sup>153</sup> The political question doctrine is thus grounded in constitutional interpretation, in the sense that the judiciary must refrain from deciding cases committed to the discretion of the political branches. But it is equally a matter of comity, grounded in the judiciary’s deference to the political branches on matters in which they possess superior competence.<sup>154</sup> Not all instances of the political question doctrine arise in the context of a conflict between Congress and the executive branch, but inter-branch conflicts are among the issues most frequently considered a political question by federal courts. The Supreme Court has made its preference for non-intervention in such controversies clear: “[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a political impasse.”<sup>155</sup>

However, the Supreme Court has also made it clear that it will not declare entire categories of cases presumptively non-justiciable, and will instead weigh the circumstances of individual cases.<sup>156</sup> To this end, in *Baker v. Carr*,<sup>157</sup> the Supreme Court set out the six factors used to define a non-justiciable political question: (1) a textually demonstrable commitment of the issue to the other branches; (2) a lack of judicially discoverable or manageable standards; (3) the impossibility of deciding the case without making an initial policy determination; (4) the impossibility for a court to independently resolve the case without disregarding comity towards the other two branches, (5) a need for the U.S. to adhere to an already-made political decision, and (6) the potential for embarrassment from multifarious pronouncements by different branches

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<sup>153</sup> *Id.* at 170.

<sup>154</sup> *See* *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990); *see also* KATHLEEN SULLIVAN & JOHN GUNTHER, *CONSTITUTIONAL LAW* 49 (17th ed., 2007).

<sup>155</sup> *Goldwater v. Carter*, 444 U.S. 996, 997 (1979).

<sup>156</sup> *See Baker v. Carr*, 369 U.S. 186, 210-211 (1962) (reaffirmed in *INS v. Chadha*, 462 U.S. 919, 942 – 43 (1983), and *Walter Nixon v. United States*, 506 U.S. 224, 240 (Souter, J. concurring) (1992)).

<sup>157</sup> 369 U.S. 186 (1962).

of government.<sup>158</sup> These factors are disjunctive; a court need find that only one of the factors is met in order to dismiss the case.<sup>159</sup>

Thus, any case involving a challenge to executive non-compliance with congressional appropriations conditions or executive spending in the absence of appropriations would almost certainly face a political question challenge at the outset. Such a challenge may not be fatal in all cases. But the Supreme Court has broadly observed that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,”<sup>160</sup> leading the D.C. Circuit to describe national security and foreign relations as “quintessential sources of political questions.”<sup>161</sup> The fate of *Sanchez-Espinoza v. Reagan*, the D.C. Circuit case that has come closest to adjudicating the question of executive power to flout congressional conditions on foreign policy-related appropriations, suggests that courts will rely on a wide range of objections to avoid deciding such matters. In that case, a dozen members of Congress joined numerous Nicaraguan citizens claiming injury from the Contras and sued a number of senior executive branch officials, including the President, under the theory that the executive’s covert support for the Contras violated Congress’s power to declare war, the Boland Amendments prohibition of the use of any funds to support the Contras, and other legislation. Then-Judge Scalia dismissed most of the case on standing grounds and on the basis that appropriations acts created no cause of action to challenge their violation. He then concluded “the war powers issue presented a non-

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<sup>158</sup> *Id.* at 217.

<sup>159</sup> *See id.* at 210.

<sup>160</sup> *Haig v. Agee*, 453 U.S. 280, 292 (1981).

<sup>161</sup> *Bancoult v. McNamara*, 445 F.3d 427, 433 (2006). In that case, the D.C. Circuit found a political question where inhabitants of Diego Garcia challenged a decision nearly a half-century ago to build a military base on the island of Diego Garcia.

justiciable political question.”<sup>162</sup> All courts seized of the issue have declined to resolve the precise division of war powers between the President and Congress on similar grounds.<sup>163</sup>

Moreover, the Supreme Court has never ruled on the issue, but in *Goldwater v. Carter*, four justices found that the question of executive power to unilaterally abrogate a treaty constituted a political question. That finding suggests that the Court may look for ways to avoid hearing even thornier cases in the appropriations and foreign affairs contexts.<sup>164</sup> This seems particularly true for cases that would require a court to discern whether congressionally mandated changes in troop levels might have had the effect of dictating strategic decisions on a battlefield, or whether such limitations were simply incidental to Congress’ power to raise armies.<sup>165</sup> In conclusion, the political question doctrine will likely pose an especially difficult bar to adjudication of cases involving inter-branch conflicts that pit congressional appropriations and war powers against the President’s asserted powers as Commander in Chief.

## **V. THE DESIRABILITY OF JUDICIAL AS OPPOSED TO POLITICAL RESOLUTION OF CONTROVERSIES OVER EXECUTIVE SPENDING POWERS**

The foregoing analysis ultimately raises the question of whether it is better for the judiciary or for the political branches to resolve such controversies. There are strong arguments for both sides. Those who favor the former interpretation include Professor Mark Tushnet, who

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<sup>162</sup> *Sanchez-Espinoza v Reagan*, 248 U.S. App. D.C. 146, 210 (D.C. Cir. 1985).

<sup>163</sup> *See, e.g., Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) for two of the most influential decisions on the subject. The D.C. District Court’s recent decision in *Beaty v. Republic of Iraq*, 480 F.Supp.2d 60 (D.D.C. 2007), does not constitute a divergence from this trend, though it concerned what might have been considered a political question, namely Iraq’s amenability to suit for acts of hostage-taking and torture committed by the Hussein regime in the wake of numerous statements from the executive that it considered the issue one of particular political sensitivity. The D.C. District Court declined to find a political question in that case because it largely turned on the statutory interpretation of §1605(a)(7) of the Foreign Sovereign Immunities Act (the terrorism exception) and thus gave the judiciary manageable adjudicatory standards where they might otherwise have been absent.

<sup>164</sup> *See Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>165</sup> *See, e.g. Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973). In that case, the Second Circuit was faced with the question of whether President Nixon’s bombing of Cambodia was in violation of a congressional statute mandating that the war in Vietnam was to end as soon as possible. The Second Circuit cited the judiciary’s lack of “military and diplomatic expertise” in declaring the matter a non-justiciable political question.

recently argued that “it is entirely unclear that the classical version of separation of powers required any substantive outcomes at all, and in particular whether it envisioned compromises between President and Congress over the division of power . . . whatever the political process produces is what the Constitution requires (or permits, if you prefer.”<sup>166</sup> This view is echoed in Judge Sentelle’s analysis in the D.C. Circuit case *Schneider v. Kissinger*. In his majority opinion, Judge Sentelle found that although the legality of U.S. covert action in Chile in the 1970s constituted a non-justiciable political question, “the lack of judicial authority to oversee the conduct of the executive branch in political matters does not leave the executive power unbounded,” and “the nation has recompense,” since “[t]he political branches effectively exercise such checks and balances on each other in the area of political questions.” The political branches, he concluded, had divided powers over war and national security, but above all, the appropriations power provided Congress with its most effective check. Citing the Boland Amendment and Congress’ subsequent investigation of the Iran-Contra affair with apparent approval as examples of congressional checks and balances at their best, Sentelle concluded that judicial restraint in the area of separation of powers struggles over foreign affairs was “precisely consistent” with the Constitution, leaving resolution of thorny, politically charged issues to the branches best equipped to resolve them, even if the ultimate result is stalemate rather than unequivocal answers.<sup>167</sup> Given that the precise distribution of war powers between the President and Congress has been unresolved throughout the nation’s history, keeping the courts out of such issues arguably allows for the greatest flexibility and accounts for the waxing and waning of relative executive and legislative power in successive administrations.

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<sup>166</sup> Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons From Hamdan*, 91 MINN. L. REV. 1451, 1468 (2007).

<sup>167</sup> *Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005)

In contrast, others have argued that inter-branch conflicts over foreign affairs are precisely the kinds of things the judiciary must decide in order to safeguard the independence of all three branches. Professors Barron and Lederman conclude their analysis with the argument that the judiciary's role is to adjudicate cases, and that where the difficult threshold of standing is met in such cases, courts should not then decline the case. If the President or Congress acts in a blatantly unconstitutional fashion, the American system cannot risk continued acquiescence, and the judiciary should properly intervene to resolve the conflict.<sup>168</sup> Other scholars such as Rachel Barkow have drawn the argument further, suggesting that the judiciary, as the supreme interpreter of the Constitution, is not only best-suited but obligated to interpret even the most ambiguous constitutional provisions. Inter-branch controversies, under this view, are precisely what the Supreme Court is supposed to resolve.<sup>169</sup> Finally, legal academics like Harold Koh have suggested that these arguments apply with special force in the context of inter-branch conflicts over national security and war. The political question doctrine, he argued, should not function as a bar to the adjudication of such controversies. Courts are more than capable of adapting to the needs of classified intelligence as evidence and formulating standards for judging such issues. To construe the political question doctrine broadly in this area would be especially detrimental to democratic accountability, he concluded, since the federal government is supreme in foreign affairs and thus without the check ordinarily provided by federalism.<sup>170</sup> If the purpose

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<sup>168</sup> See Barron & Lederman, *supra* note 25, at 722-3.

<sup>169</sup> See Rachel Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 242-3 (2002). Barkow's conclusion that the political question doctrine is shriveling as evidenced by the Supreme Court's failure to find more than two cases to constitute a political question in the more than forty years since *Baker v. Carr*, 369 U.S. 186 (1962), can, however, be questioned given that the Supreme Court has denied certiorari in a number of recent D.C. Circuit cases that did find political questions, such as *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), and *Bancourt v. McNamara*, 445 F.3d 427 (2006), among others. See also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1295 (2006) (on the general proposition that the determination of non-justiciability is no less difficult than the judicial analysis that would be required to analyze the case before the court.)

<sup>170</sup> KOH, *supra* note 9, at 221 – 24.

of the separation of powers is to preserve liberty, then, the judiciary is obliged to intervene when actions by one of the political branches threaten the independence of the other branches.

## **V. CONCLUSION**

This briefing paper attempts to probe the boundaries of the President's spending powers and determine whether he or she may spend absent congressional appropriation or in defiance of congressional limitations. Ultimately, each side has strong arguments, and, depending on the facts of the case, it is conceivable that a court's analysis could come out either way. It seems unlikely, however, that these issues will be resolved by the courts given justiciability concerns. Accordingly, the assertion of presidential spending powers will likely remain a political rather than judicial question.

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