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**WAR &
APPROPRIATIONS**

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I. REVIEW OF FACTS ¹

The Constitution grants Congress the power of the purse: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law...”² It also states that “The President shall be Commander in Chief of the Army and navy of the United States,”³ and that the President has the duty to faithfully execute the laws.⁴ The intersection of Congress’ power to control appropriations and the President’s powers derived from his position as Commander in Chief has resulted in much historical conflict and academic interest. To understand this intersection better, one must be familiar with the relationship between the Executive and Legislative branches regarding appropriations generally.

Every year, Congress makes appropriations to fund the Executive branch for the following year. As stated above, this is a central responsibility given to Congress by the Constitution. The Executive branch, however, has long sought to attain as much discretion and power in its spending actions as possible. One mechanism that the Executive used was to spend before Congress granted it money, and thus create a moral and political (if not legal) obligation for Congress to foot the bill.⁵ Congress responded to this tactic with the Anti-Deficiency Act, which makes it a crime for any employee or officer of the federal government to “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”⁶

Conversely, at times the Executive has desired to spend less than Congress has

¹ We rely on the factual sections of the accompanying memos provided by Prof. Jackson, and provide only a cursory review of the facts here. For background on War Powers generally, see Cornell University’s “LII Backgrounder on National Security Law and Counter-Terrorism,” available on-line at:

<http://www.law.cornell.edu/background/warpower/>. For a summary of major works in the field, see: Leonard E. Klein. *The War Powers Resolution: A Bibliography*. 2 *J. Nat’l Security L.* 191 (1998).

² U.S. Const. Art. I § 9, cl. 7

³ U.S. Const. Art. II, § 2, cl. 1

⁴ U.S. Const. Art. II, § 1.

⁵ See discussion in Raven-Hansen & Banks, section II.C.1 at 110. Peter Raven-Hansen & William C. Banks. *From Vietnam to Desert Shield: The Commander in Chief’s Spending Power*. 81 *Iowa L. Rev.* 79 (1995).

⁶ 31 U.S.C.A. § 1341 (2005).

appropriated.⁷ This may be because the purpose for the appropriation no longer exists or is relevant, or simply because the President does not agree with the policy goal motivating Congress' appropriation. Congress curtailed this practice with the Impoundment Control Act of 1974, which among other things, requires further Congressional action after the President requests rescission, before the funds can be rescinded or impounded.⁸

The Executive branch also pursues many more common, and less confrontational, methods to gain spending control. These include transferring funds between appropriation accounts, or reprogramming funds from the use designated by Congress for a different purpose within the same account.⁹ One example of this technique is seen in the recent Department of Defense request for prior approval of reprogramming to use funds set aside for the Operation and Maintenance of the Army to be used instead to procure, among other things, additional armor kits for tactical vehicles used in Iraq.¹⁰

Another method is to accelerate the use of appropriated funding designed to last the course of a whole fiscal year to a smaller portion of the year. These techniques were used very effectively to fund Operation Desert Storm from prior defense appropriations without ever

⁷ See Brownell for a lengthy discussion of impoundment. Roy E. Brownell II. *The Constitutional Status of the President's Impoundment of National Security Funds*. 12 *Seton Hall Const. L.J.* 1. (2001).

⁸ 2 U.S.C.A. § 681-88, § 683. Rescission of budget authority. The majority of scholars consider the impoundment issue closed. But see Brownell, *supra* note 7 at 6, who "contests the conventional wisdom that impoundment is a settled constitutional issue." He argues that, "far from settled, the constitutional question of impoundment is still an open question, but only within the narrow confines of national security spending."

⁹ For a detailed description of reprogramming and transfers, see *Briefing Paper # 8, The Capacity to Reprogram, Rescind, and Impound*, Fujitani and Shirck, pg 2.

¹⁰ Reprogramming Action- Prior Approval, 04-38 Force Protection, Sept. 23 2004. In 2004, before the House Armed Services Committee, Lieutenant General Benjamin Griffin (Deputy Chief For Plans And Programs, United States Army), stated that, "... the timely support this committee has provided in approving reprogramming actions to resource force protection equipment has been crucial and is appreciated. ... First, Up-Armored HMMWVs. As you are probably aware, theater commanders submitted their first request for additional Up-Armored HMMWVs in May 2003. ... With the receipt of \$331 million in reprogramming, we will be able to move 300 vehicles per month by July 2004." Testimony available on-line at: http://www.globalsecurity.org/military/library/congress/2004_hr/04-04-01griffin.htm.

seeking additional, specified, funding from Congress.¹¹

Congress has a good deal of control over these types of techniques. It can limit reprogramming and transfers by specifying precisely what use the funds are appropriated for, and by including language limiting the freedom of the Executive to use those techniques in the appropriating legislation, as it did in the reprogramming example mentioned above.¹² It can require prior approval for reprogramming, or limit the reprogramming of funds to uses that have been specifically authorized elsewhere. One (albeit problematic) example of Congress using this authority is the Boland Amendment, passed in 1982 to limit the President's funding of Nicaraguan Contras, which stated that no appropriations could be used to aid in the overthrow of the Nicaraguan government.¹³ In matters of national defense, however, Congress has typically granted broad transfer and reprogramming authority to the Executive Branch.

II. CRITIQUES

There are several differing viewpoints about the balance of power between the Legislative and Executive branches regarding appropriations and war. In addition to these diverse opinions on the subjective questions (e.g. what *should* the balance of power be), objective questions are also open for debate: what *is* the current balance of power? How does a particular budget process affect military spending and ultimately, the safety of U.S. citizens? We discuss the reasons why these empirical questions (1) are important for informing the normative debates, but (2) have been difficult for analysts to comprehensively answer.

II.A. Congress Retains Power

¹¹ See: William C. Banks and Peter Raven-Hansen. (1994). *National Security Law and the Power of the Purse*. Oxford University Press.

¹² *Id.*

¹³ Defense Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982)

One strand of academic literature supports the point of view that, even in matters of war, Congress retains the bulk of the power of Appropriations. This viewpoint is supported by Constitutional and historical arguments.

II.A.1. Constitutional

As stated earlier, the Appropriations Clause of the Constitution grants Congress the power of the purse. Building from this textual support, one type of Constitutional argument made are structural arguments about the proper separation of powers. As Jefferson wrote to Madison after the Constitutional Convention in 1789, “we have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.”¹⁴ This eloquent statement captures the structural argument made by those who believe that the proper separation of powers means that Congress has strong powers and duties in its appropriations, even regarding war and security.¹⁵

Kate Stith is one proponent of the idea that the proper separation of powers creates a “‘limited’ federal government, capable of growing only by incremental, deliberate, and coordinated decisions of the political branches,”¹⁶ and that only an active Congress, acting under its Constitutional mandate, can insure this limited government. At the other end of the spectrum, Gregory Sidak argues that the “most plausible purpose of the appropriations clause is to

¹⁴ Peter Raven-Hansen, William C. Banks, Pulling the Purse Strings of the Commander in Chief, 80 VALR 833, 834, (1994), citing letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 The Papers of Thomas Jefferson 392, 397 (Julian P. Boyd ed., 1958).

¹⁵ Serving as a reminder that it is often difficult in this area to draw lines between parties, Rosen observes that, “Ironically, it was Thomas Jefferson—with Albert Gallatin as his Secretary of the Treasury—who first spent significant sums of money in the complete absence of an appropriation. On 22 June 1807, the British warship H.M.S. Leopard attacked the American frigate Chesapeake as it left port at Hampton Roads, Virginia. Anticipating a possible war with England and with Congress in recess, Jefferson ordered certain military purchases even though no appropriations had been made for that purpose. When Congress reconvened in late October, President Jefferson recounted the events of the summer and sought ex post facto approval of the expenditures he had made: When Congress returned to session, it ultimately enacted an appropriation to cover Jefferson's expenditures, but not before heated debate over the propriety of the President's actions.” Colonel Richard D. Rosen. Funding “Non-Traditional” Military Operations: The Alluring Myth of A Presidential Power of the Purse. *155 Mil. L. Rev.* 1 (1998) at 105.

¹⁶ Kate Stith, Congress’ Power of the Purse, 97 YLJ 1343, 1347.

encourage efficiency in the production of public goods by the federal government and to impose fiscal accountability on both Congress and the President.”¹⁷

One way to see the structural debate over the proper balance of power in military appropriations is to view it as an argument over which branch of government one should fear the most. Those favoring increased Congressional oversight will join with Raven-Hansen and Banks and argue, “that the power of the purse is not only ‘the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people,’ as James Madison said, but also that it 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.”¹⁸

Functionally, these arguments center on the deliberative and democratic nature of Congress. As a deliberative body, Congress is less apt to act quickly or rashly than the Executive. Additionally, the deliberative nature of Congress increases its fact finding capacity, leading to better decisions, and further decreasing the chances of rashly heading into war, which has been a concern since the Founders. Furthermore, since commentators argue that Congress is the most democratic branch of the federal government, it is proper that it should have control over such important decisions as entering into war.

This belief that Congress has strong Constitutional powers regarding war and appropriations has textual support, not only in the previously cited Appropriations Clause, but also in several military clauses, which taken together, give Congress the power to “provide for the Common Defence... declare War and grant Letters of Marque and Reprisal... raise and support Armies... provide and maintain a Navy, and... to make all Laws which shall be necessary and proper for carrying into Execution the foregoing.”¹⁹

¹⁷ Sidak, J. Gregory. *The President's Power of the Purse*, DUKE L.J. 1162 at 1164 (1989).

¹⁸ Raven-Hansen & Banks, *supra* note 14, at 890.

¹⁹ U.S. Constitution, Art. I, §8.

II.A.2. Historical Arguments

Scholars have also attempted to support Congress' Appropriations power by pointing to periods in which Congress actively expanded and protected these powers. A brief analysis of these historical arguments, however, reveals that the case they make for broad Congressional power is mixed, at best. Although the consensus of the Founding Fathers seems to have favored more Congressional checks on Executive power, there is a long line of examples of the Executive avoiding Congressional restraints on military spending. Fisher argues that, "Congress repeatedly surrenders its powers to the President. Congress contributes to presidential independence by conferring substantial spending discretion by statute and by declining to challenge the growing customary spending discretion that Presidents assume."²⁰

A number of scholars have examined the debates over the proper procedures for military appropriations, as they appear in records of the Constitutional Convention and ratification debates.²¹ Fisher suggests that the widely held view at the founding was that of Madison. Madison cautioned strongly against allowing the power of the sword and the power of the purse to be realized in one place:

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter by a great principle in free government, analogous to that which separate the sword from the purse, or the power of executing from the power of enacting laws.²²

Proponents of Presidential power, however, back up their argument by pointing to the long tradition of Congressional deference to the Executive regarding war powers. The Whiskey

²⁰ Louis Fisher. Presidential Independence and the Power of the Purse. 3 U.C. Davis J. Int'l L. & Pol'y 107 at 109 (1997).

²¹ See, e.g. L. Fisher, *Presidential Spending Power* (1975). Wilmerding, *The Spending Power* (1943).

²² Louis Fisher. Presidential Independence and the Power of the Purse. 3 U.C. Davis J. Int'l L. & Pol'y 107 (1997). At 109. Citing: 6 The Writings Of James Madison 148 (Gaillard Hunt ed., 1906).

Rebellion of 1794 provides the earliest example of such deference.²³ To suppress the Rebellion, President Washington used funds that weren't specifically appropriated for that goal. It drew the ire of Representative Albert Gallatin, who argued that, "When the western insurrection took place, until Congress had covered the expenditures of the expedition by an appropriation made only on the 31st of December, 1794, the expenses were defrayed out of the moneys appropriated for the military establishment."²⁴ The majority of Congress, however, did not take the same position on Washington, as "Congress commended him and appropriated the money to cover the cost of the expedition."²⁵ A partial list of other early and notable Executive non-appropriated military spending that was later acquiesced to by Congress is provided in Table 1.

Table 1. Selected examples of early Presidential spending of non-appropriated funds, and subsequent Congressional acquiescence to that spending

| President | Year | Description |
|------------|------|--|
| Washington | 1794 | Uses non-appropriated funds to suppress Whiskey rebellion |
| Jefferson | 1807 | British warship H.M.S. Leopard attacks the American Chesapeake in Hampton Roads, Virginia, and Jefferson buys more military supplies without appropriation |
| Lincoln | 1861 | "President Lincoln 'authorized and directed his Secretary of the Treasury to advance, without requiring security, \$ 2,000,000 of public money' to three private citizens to be used 'in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defense and support of the Government . . .'" ²⁶ |
| Coolidge | 1926 | Coolidge instructs his Secretary of Agriculture to use \$ 253,000 originally appropriated for the eradication of hoof-and-mouth disease, and instead use it to assist "farmers in storm-stricken areas of Florida by purchasing seed, fertilizer, and other items." ²⁷ |

Recent Trends²⁸

²³ See: Monroe Johnson. "Washington Period Politics," *The William and Mary Quarterly*, Vol. 12, No. 3 (Jul., 1932), pp. 159-166. Richard H. Kohn. "The Washington Administration's Decision to Crush the Whiskey Rebellion." *The Journal of American History*. Vol. 59, No. 3 (Dec., 1972), pp. 567-584 Sidak, *supra* note 15, at 1178-79.

²⁴ Sidak, *supra* note 17, at 1179 (1989).

²⁵ Rosen, *supra* note 15 at 104.

²⁶ Rosen, *supra* note 15, at 108. Citing: 473 5 *Compilation Of The Messages & Papers Of The Presidents* 597, 598 (James D. Richardson ed., GPO, 1897).

²⁷ *Id.* at 109.

²⁸ Three earlier memos prepared for Prof. Jackson provide great detail on the appropriations for conflicts in Vietnam, the Persian Gulf, and the Iraq & Afghanistan campaigns. See: Kitchen, Nathan, "Memorandum to Prof. Howell Jackson, March 18, 2005, Re: Comparative study of Military Appropriations for the Vietnam War, Persian Gulf War, and Afghanistan & Iraq Campaign." Glasheen, Jeffrey M. "Memorandum to Prof. Howell Jackson,

Recent experience provides many examples where Congress has both guarded its spending power and acquiesced to the President expanding his war powers, with or without Congressional appropriations.

Vietnam

Throughout the Vietnam War, Congress did tacitly support the war by continuing to make the appropriations necessary to fund it. However, as the war proceeded, Congress increasingly limited the appropriations, until it finally completely cut off funding.²⁹ Nine months after the Gulf of Tonkin resolution, in 1965, Congress granted \$700 million in a broadly stated supplemental appropriation, granting the funds based on the “determination by the President that such action is necessary in connection with military activities in southeast Asia.”³⁰ General appropriations made during this early period to the Department of Defense (DOD) in order to fund the war granted the Department wide latitude to use the funds, and allowed broad transfer authority if the Secretary of Defense deemed the transfer necessary to national defense.³¹ Additionally, the Food and Foraging Act, among other laws, created exemptions to the Anti-Deficiency Act, allowing the DOD to incur obligations without appropriations in the case of emergency or to support national defense.³²

However, by the later years of the war, Congress placed restrictions on the transfer authority of the DOD, and in 1971, it barred transfers unless the President provided prior notice to Congress in writing and accompanied the request with findings of fact that supported the transfer.³³ In 1973, Congress also limited transfers by forbidding defense transfers for items that

November 14, 2003, Re: Chronologies of Military Action in Afghanistan & Iraq”. Bopp, Michael. “Memorandum to Prof. Howell Jackson, July 10, 1992. Re: Research on the funding of Operation Desert Shield / Desert Storm”.

²⁹ Memorandum re: Comparative Study of Military Appropriations, March 18, 2005, pg 2

³⁰ Id. citing Department of Defense Supplemental Appropriation, Pub. L. No 89-18, 79 Stat. 109 (1965).

³¹ Id. at 5

³² Id. at 7, citing 41 U.S.C.A. s. 11

³³ Id. at 8

had been rejected by Congress.³⁴ Additionally, during this period Congress also placed more restrictions on the appropriations themselves, for example, by preventing the funds from being used to in Cambodia or Laos.³⁵

After the last troops left Vietnam in 1973, the Continuing Appropriations Act enacted that year ended funding for the war, stating that “no funds ... may be obligated or expended to finance...combat activities by the United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.”³⁶

1973 also saw the passage of the War Powers Resolution, which was a direct effort by Congress to limit the power of the President to make war or conduct military actions without the blessing of Congress. It states that the President may only introduce the Armed Forces into hostilities pursuant to “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”³⁷ The gradual increase of congressional oversight over appropriations during the Vietnam war, culminating with a complete halt to appropriations and the War Powers Resolution, is seen by many commentators as the beginning of a recent trend of increasing powers by the Legislative branch at the expense of the Executive.

Iran-Contra

The Iran-Contra affair provides fuel both for commentators who see the Executive expanding its power of the purse, and those who see it as an example of spirited, if ineffective, Congressional oversight.

In 1981, the US government began covertly aiding the Contras, a resistance group attempting to remove the Sandinista Government from power in Nicaragua. Congress, motivated

³⁴ Id. citing Department of Defense Appropriation Act of 1974, Pub. L. No 93-238, 87 Stat. 1026, 1044 (1974)

³⁵ Id. at 9

³⁶ Id. at 10; Continuing Appropriations Act of 1974, Pub. L. No 93-52, s. 108, 87 Stat. 130, 134 (1973)

³⁷ 50 U.S.C.A. § 1541

by fear of another Vietnam War, and worried by claims that the Contras used torture and terrorist techniques, attempted to restrict the power of the President to provide aid to them.³⁸ These restrictions took the form of the Boland Amendments, which prohibited financial assistance to the Contras.³⁹ President Reagan responded by soliciting money for the Contras from foreign countries and wealthy individuals, as well as transferring funds from the sale of missiles to Iran to the Contras. The Congressional committees who investigated these events after the fact reported “By circumventing Congress’ power of the purse through third-country and private contributions to the Contras, the Administration undermined a cardinal principle of the Constitution.”⁴⁰ Thus, the Iran-Contra affair is most commonly viewed as an Executive infringement on the domain of the Legislative branch.

An opposing strand of legal theory is that the Boland Amendments, by reaching into the President’s foreign affairs and Commander in Chief powers, were unconstitutional infringements by Congress on the Executive Branch, or at least that the actions of the Executive branch took place in a murky area of unclear constitutional direction.⁴¹ Regardless of the constitutional issues surrounding the matter, the Iran-Contra affair highlights the common critique that Congress it is not capable of overseeing the Executive’s use of funds during short or covert operations, even when Congress makes its intentions clear, as it did with the Boland Amendments.

Persian Gulf War

The Persian Gulf War provides further evidence of this critique, and also provides an illustration of what Congress would have to do in the future to control the power of the purse.

The President had such flexibility to reprogram and transfer funds within the DOD

³⁸ J. Graham Noyes, *Cutting the President Off from Tin Cup Diplomacy*, 24 UCCLR 841, 843 (1991)

³⁹ *Id.*

⁴⁰ *Id.* at 852, citing Iran-Contra Report, S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 3, 5 (1987)

⁴¹ Anthony Simones, “The Iran-Contra Affair: Ten Years Later,” *UMKC Law Review*, (Fall 1998) 61, 75 “At the heart of the Iran-Contra Affair was the uncertain allocation of constitutional power to formulate and conduct national security policy. One of the primary reasons for the Iran-Contra Affair was the lack of clarity on how these constitutional questions should be resolved.”

appropriations, to accelerate annual apportionment of funds, and to rely on assistance from allies, that it was able to wage the war and receive appropriations afterwards.⁴²

Peacekeeping in the 1990s

In the words of the 2001 opinion of the Attorney General regarding President Bush's authority to respond to the attacks of September 11th, "Recent deployments ordered solely on the basis of the President's constitutional authority have also been extremely large, representing a substantial commitment of the Nation's military personnel, diplomatic prestige, and financial resources. On at least one occasion, such a unilateral deployment has constituted full-scale war. On March 24, 1999, without any prior statutory authorization and in the absence of an attack on the United States, President Clinton ordered hostilities to be initiated against the Republic of Yugoslavia."⁴³ These examples from the 1990s are further evidence that Congress is ill-suited to control the power of the purse when the military operations are relatively low in cost, short in duration, and/or covert in nature.

War on Terror

If the Peacekeeping missions of the 1990s hinted at a trend away from Congressional oversight, the more recent War on Terrorism (including the missions in Iraq and Afghanistan) suggests that the trend toward more Executive power continues. By itself, the fact that the War on Terrorism has been funded primarily through supplemental appropriations might not be associated with Executive control.⁴⁴ In the supplemental appropriations bill, for instance, Congress can provide detailed appropriations guidelines just as they would in an annual Department of Defense appropriations bill.

Accompanying the supplemental requests, however, is some anecdotal evidence that the

⁴² Memorandum re: Comparative Study of Military Appropriations, March 18, 2005, pg 11

⁴³ Office of Legal Counsel, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and the Nations Supporting Them," September 25, 2001, available online at <http://www.usdoj.gov:80/olc/warpowers925.htm>

⁴⁴ Kitchen (2005) provides the details of these appropriations.

balance is pushing back toward the White House. In January 2005, Vice-President Dick Cheney sharply criticized Congress' actions over the past 30 years as they related to restricting the President's role as Commander-in-Chief.⁴⁵ Cheney commented that Congress, "made a change in the institutional arrangements that I don't think is healthy. I don't think you should restrict the president's authority to deploy military forces because of the Vietnam experience."⁴⁶ Relating back to a fear of (or disdain for) the legislature, Cheney suggested that, "Congress would be with us if we were successful and against us if we weren't successful and it wouldn't matter, even if they had voted for it in advance. I admit that was a somewhat cynical view by a former member of Congress."⁴⁷ In response to Cheney's comments, as well as to military spending developments in the War on Terror, the Future of Freedom Foundation (FFF) issued a policy memo arguing that, "a more powerful President is the last thing we need."⁴⁸ This recent debate suggests that perhaps the balance between Congressional and Executive control remains unsettled.⁴⁹

⁴⁵ Woodward, Bob, "Cheney Upholds Power of the Presidency: Vice President Praises Bush as Strong, Decisive Leader Who Has Helped Restore Office," *Washington Post*, Thursday, January 20, 2005; Page A07.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Anthony Gregory. *A More Powerful President Is the Last Thing We Need*. The Future of Freedom Foundation. February 2005.

⁴⁹ This unsettled balance arises in the more general context of National Security law which, even to judges, remains somewhat unclear. For a commentary on this point, see: Hon. David B. Sentelle. National Security Law: More Questions Than Answers. *31 Fla. St. U.L. Rev.* 1 (2003).

II.B. Executive Appropriations Powers: Is War Different?

Many scholars believe that, regarding military matters, the Executive Branch and the President have broad Constitutional powers that necessitate the freedom to appropriate when necessary without seeking the approval of Congress. After all, the Constitution states that “The executive Power shall be vested in the President...” without explicitly enumerating the scope of the executive power.⁵⁰ Supreme Court cases from *Curtiss-Wright*⁵¹ to *Dames & Moore v. Regan*⁵² have recognized the power of the President in international relations, particularly if Congress supports, or at least acquiesces, to the President’s actions. Rosen outlines the two views that have been most often raised to support Executive independence:

“First, there is the argument that Congress may not unduly fetter the President's constitutional activities (usually foreign or military affairs) by imposing restrictions on appropriations or by refusing to appropriate the funds necessary to carry out the activities. Some who assert this position (but not all) also contend that when Congress--through the appropriations process--interferes with the President's constitutional responsibilities, the President may lawfully expend the funds necessary to fulfill those responsibilities despite either the restrictions imposed or the absence of appropriations.

Second, there is the even bolder argument that, apart from anything Congress may or may not do to obstruct the President's constitutional activities, the President has an autonomous, constitutionally based authority to expend public moneys. In other words, presidential spending authority is not dependent upon the "constitutional misconduct" of Congress--it exists wholly independent of Congress.”⁵³

II.B.1. Constitutional

As stated above, the Constitution states that “The President shall be Commander in Chief of the Army and navy of the United States,”⁵⁴ and that the President has the duty to faithfully

⁵⁰ U.S. Const. Art. II, § 2, cl. 1

⁵¹ 299 U.S. 304 (1936)

⁵² 453 U.S. 654 (1981)

⁵³ Rosen, *supra* note 15 at 14.

⁵⁴ U.S. Const. Art. II, § 2, cl. 1

execute the laws.⁵⁵ It is not unreasonable to read this text as granting the President the power to conduct urgent military affairs without express Congressional appropriation, or to go further and believe that if Congress limits the President's war powers through narrow appropriations, such limitations are unconstitutional. One proponent of such beliefs was Alexander Hamilton. In contrast to Jefferson, Hamilton believed that "Public convenience is to be promoted, public inconveniences to be avoided. The business of administration requires accommodation to so great a variety of circumstances, that a rigid construction would in countless instances arrest the wheels of government."⁵⁶

This fundamental structural debate between keeping proper checks and balances (Jefferson) versus allowing for flexibility (Hamilton) remains at the center of present day academic discussion. Those who prefer a stronger Executive will side with Sidak's argument that, "The Framers did not fear a strong Executive. To the contrary, they feared the tyranny and irresolution to which legislatures before 1787 had proven themselves to be vulnerable."⁵⁷ In the words of Raven-Hansen and Banks, "The unpredictability of national security events, the flexibility and speed required for effective response, and the need for current and sometimes secret information may make it impractical for Congress to delegate specific national authority to the President in advance of the need."⁵⁸ Many commentators agree with the view put forth by Hamilton that a powerful President is the only governmental figure capable of the decisive and prompt action often required for national defense, particularly compared to the slow and uncoordinated abilities of the Congress.

⁵⁵ U.S. Const. Art. II, § 1.

⁵⁶ J. Gregory Sidak, *supra* note 17, citing: A. HAMILTON, Explanation (Nov. 11, 1795), reprinted in 19 The Papers Of Alexander Hamilton 400 (H. Syrett ed. 1973). Sidak also discusses at length Hamilton's general theory on appropriations, "The design of the Constitution in this provision was, as I conceive, to secure these important ends, that the purpose, the limit, and the fund of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed."

⁵⁷ Sidak (1989), *supra* note 17, at 1203.

⁵⁸ Raven-Hansen, Banks Pulling the Purse Strings of the Commander in Chief, 80 VALR 833, 848

II.B.2. Attorney General's Office

The Office of the Attorney General (AOG) has also been called upon to rule on the legality of Executive action.⁵⁹ The OAG opinions are useful to consider because they analyze existing statute. An early opinion, in 1877, focused on the “Food and Forage” Act.⁶⁰ The Food and Forage Act, codified today as 41 U.S.C. § 11(a) (2005), says that:

“No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies which, however, shall not exceed the necessities of the current year.”

The Act was designed to allow armies, potentially far away from Congress, to sustain themselves with basic necessities until they could gain Congressional approval for expenditures. The 1877 AOG Opinion interpreted this statute as allowing the military to contract for the stated goods: clothing, subsistence, etc. At the same time, however, the AOG argued that direct payments to the Army, or contracting for reasons outside the listed exceptions (e.g. for ammunition) were now allowed. Finally, the AOG opinion addressed the issue of whether private (“third party”) donations could be used by the Executive to fund the military without Congressional approval. An example of third party donations would be foreign gifts to the U.S. to support military action.⁶¹ The 1877 AOG Opinion argued that such third party gifts were not allowed.⁶²

⁵⁹ Attorney General Opinions are discussed in more length in the Briefing Paper on Government Shutdown, written by Puja Seam and Brad Shron. “Government Shutdowns,” Briefing Paper No. 10, Harvard Law School, Federal Budget Policy Seminar, 2005. This section draws on their work.

⁶⁰ Support of the Army, 15 Op. Atty. Gen. 209 (1877)

⁶¹ Raven-Hansen and Banks (1995) argue in the same way that such circumvention is in violation of Appropriations Clause: “The power of the purse developed in 16th century England in direct response to the King's efforts to find “other sources of funds,” and the clear thrust of parliamentary efforts was to control such sources. The free availability of third-party funding outside the scope of the Appropriations Clause is inconsistent with this history and the subsequent colonial history of the power of the purse. Moreover, the Framers carefully divided national security authority by designating the President as Commander in Chief and chief diplomat and Congress as the holder of the purse strings for military operations. The Appropriations Clause requires that all expenditures from the United States Treasury be authorized, however generally or specifically, by Congress. To the extent that third-party

While the 1877 AOG Opinion found in the Constitution a strong argument in favor of Congressional power of the purse, more recent AOG opinions seem to have tilted in favor of the Executive Branch. The AOG Opinion which started this push back toward Executive Latitude is a 1981 Opinion by Attorney General Benjamin Civiletti.⁶³ Returning to the language of the Statute, but now focusing on the exception, “*unless the same is authorized by law,*” the 1981 Opinion argued that this “‘authorized by law’ language in Section 1341(a)(1)(B) exempts not only obligations in a period of appropriations lapse for which there is express or implied authority in Congressional statutes, but also ‘those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.’”⁶⁴

Both Republican and Democratic Presidents have seen modern legal challenges to some of their military decisions. In defending President Clinton’s Deployment of United States Armed Forces Into Haiti, the Attorney General, Walter Dellinger, Asst. Attorney General argued that based on a “pattern of Executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of broad constitutional power.’”⁶⁵ A similar theme was seen in 2001, in the wake of September 11th, in a Memo from the Office of Legal Counsel regarding President Bush’s anti-terrorism military operations.⁶⁶ Deputy Asst. Atty. General John Yoo analyzed the text of Article II, and argued that, “the constitutional structure requires that any ambiguities in the allocation of a power that is

funding affords the Commander in Chief the means to fund a military operation explicitly opposed by Congress, it undermines at least the spirit, if not the letter, of the Appropriations Clause.” *Supra*, note ____ at 133-134.

⁶² The reasoning, as noted by Seam & Shron, is that, “that alternative funds required appropriation just as other government funding, even if not first paid into and then disbursed from the Treasury, and that regardless of whether there was a legal obligation to repay the financing, “it would certainly place the Government . . . under the strongest moral obligation to use every proper and reasonable effort that the donors or lenders should be reimbursed by Congress.”

⁶³ 43 U.S. Op. Atty. Gen. 293 (1981).

⁶⁴ Seam & Shron (2005), citing 43 U.S. Op. Atty. Gen. 293 at 301.

⁶⁵ Walter Dellinger, Asst. Attorney General “Deployment of United States Armed Forces Into Haiti,” Letter to Senators Dole, Simpson, Thurmond, and Cohen, September 27, 1994. Citing: Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. at 187.

⁶⁶ John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them,” September 25, 2001.

executive in nature - such as the power to conduct military hostilities - must be resolved in favor of the executive branch.”⁶⁷

II.C. Executive Power in Practice

II.C.1. Breadth of Executive Latitude

Setting aside the theoretical/legal questions for a moment, however, this section of the paper addresses the question of how much appropriations power the President has in recent practice. We find that in practice, Congress has ceded much military spending power to the President. The Executive has found power through a number of different provisions, including the Food and Foraging Act, the national security exceptions to apportionment, and the broad transfer and reprogramming power that Congress writes into Department of Defense appropriations.

To illustrate how many different methods the Executive has for military spending in the absence of express Congressional authorization, we have provided in Table 2 a list of different examples of Executive latitude. The illustrations in Table 2 suggest that the Executive has many avenues to spend on defense in the absence of express Congressional authorization. In some respect, it may be inevitable that this cessation of power occur. To limit the spending powers of the Executive, whether they be Constitutional or not, Congress would have to drastically limit the flexibility of the President and the military to transfer, reprogram, and apportion funds, but it is generally agreed that national security is the area where the President and the military require the most flexibility and the quickest reactions, especially given the climate after the attacks of September 11th.

Table 2. Illustrations of Executive Latitude in Military Spending

⁶⁷ Id. at 4.

| Funding Strategy / Source of Authority | Illustration |
|---|---|
| Broad transfer authority under lump sum DoD appropriation, e.g. Department of Defense Appropriations Act, 2001, <i>106 P.L. 259</i> | Annual lump sum appropriation to Dept. of Defense – they internally reprogram with great discretion. “Each appropriation act provided broad transfer authority between accounts if the Secretary deemed it “vital to the security of the United States,” with \$200 million authorized annually with the approval of the Bureau of the Budget between fiscal year 1967 and fiscal year 1970. ⁶⁸ Also, “the fiscal year 1991 defense appropriations act authorized transfer of up to \$2.25 billion in military funds for ‘unforeseen military requirements.’ Reprogramming and transferring funds from general congressional appropriations thus Provided the Pentagon with flexibility to meet early war costs. ⁶⁹ |
| Speeding up apportionment | Gulf War I, ““When an intervening legislative act or emergency “involving the safety of human life, the protection of property, or the immediate welfare of individuals” requires expenditure beyond the level of appropriations, however, appropriations may be apportioned at a more rapid rate that would later require supplemental funding.” ⁷⁰ |
| Food & Forage Act, <i>41 U.S.C. § 11</i> (2005) | While the Anti-Deficiency Act generally bars obligation beyond funds granted by Congress, the president can incur obligations if such action is “necessary in the interest of national defense.” “Operation Desert Shield/Desert Storm was financed by DOD through the feed and forage law until Congress enacted the Operation Desert Shield/Desert Storm Supplemental Appropriations Act in April 1991 to fund the obligations.” ⁷¹ |
| Shift funding responsibility to another federal agency, | “Illustrative statutory mechanisms are the Economy Act, 31 U.S.C. § 1535, which permits one federal agency to place an order for goods and services with another federal agency, or section 632 of the Foreign Assistance Act, 22 U.S.C. § 2392, which authorizes, inter alia, the State Department to use its funds to obtain DOD’s support under Foreign Assistance Act or Title 10 authorities.” ⁷² |
| Shift funding responsibility to the international community | Rebuilding of Haiti’s infrastructure: U.S. helps to build roads and water distribution systems, and then passes on costs to the International Community |
| Section 607 of the Foreign Assistance Act | To pay for construction needs in Haiti that were not covered by the HCA; “authorizes federal agencies to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis” ⁷³ |
| Go ahead and spend anyway | Debated as to whether or not there is legal authority or not. Rosen: “the President has the raw, physical power--but not the legal authority--to spend public funds without congressional approval, after which he or she can either seek congressional approbation or attempt to weather the resulting political storm.” ⁷⁴ |
| Congress has not said anything about appropriations, one way or the other | “President Nixon drew on such accounts to finance hostilities in and over Cambodia during the war in Southeast Asia; more recently, President Bush used them to finance Operation Desert Shield until Congress made specific appropriations.” ⁷⁵ |
| In-Kind Contributions, <i>10 U.S.C. § 2608</i> | Since the Defense Cooperation Account permitted the Secretary of Defense to use contributions of property “without specific authorization,” the DOD could use in-kind contributions without waiting for congressional approval. |

⁶⁸ *Supra*, p.2.

⁶⁹ *Supra*, p. 5.

⁷⁰ *Supra*, p. 13.

⁷¹ Raven-Hansen & Banks (1995), *supra* note 5.

⁷² Rosen (1998), *surpa* note 15, note 694.

⁷³ *Id* at 148.

⁷⁴ *Id*.

⁷⁵ Raven-Hansen & Banks, *supra* note 5, at 82.

Table 2. Illustrations of Executive Latitude in Military Spending

| Funding Strategy / Source of Authority | Illustration |
|---|---|
| Not telling Congress about spending because of national security; <i>US v Nixon</i> , 418 U.S. 683 (1974) | According to a Government Accountability Office report, total in-kind contributions from the international coalition amounted to \$5.6 billion. ⁷⁶ The Supreme Court recognized that the doctrine of executive privilege could allow the President to refuse to disclose information if the President identifies a “need to protect military, diplomatic, or sensitive national security secrets.” This provided the legal thinking that supported the President’s actions during the Iran-Contra affair. |
| Obtaining third-party or private funds; “Appropriations Clause,” Art. I, § 9, cl. 7 ⁷⁷ | Private funding of the Contras via both “private contributions and diversions of profits made on the secret sale of arms to Iran”. ⁷⁸ |
| Defense Production Act, 50 U.S.C. App. 2166 (2005) | Used in Korean War and still good law, “The Act instructs the President to mobilize industrial production so as “to ensure national defense preparedness, which is essential to national security,” “productive capacity beyond the levels needed to meet the civilian demand” so as to “reduce the time required for industrial mobilization.” ⁷⁹ |

II.C.2. Looking at the First Iraq War

To see how these provisions can be invoked to give the President wide spending authority, we can take a quick look at funding for the first Iraq War.⁸⁰ As noted by Raven-Hansen & Banks, “Operation Desert Shield/Desert Storm was financed by DOD through the feed and forage law until Congress enacted the Operation Desert Shield/Desert Storm Supplemental Appropriations Act in April 1991 to fund the obligations.”⁸¹ The scope of food and forage authority had already been widened during the Vietnam Era conflict. Raven-Hansen & Banks point out that, “When Congress threatened to cut off funds for the bombing of Cambodia in 1973, Defense Secretary Elliot Richardson testified before the Senate Appropriations Committee that, if the funds were denied, ‘we can find the money. . . . We could invoke [the feed and forage

⁷⁶ *Supra*, p. 12.

⁷⁷ Article I, Section 9, Clause 7 states: “No money shall be drawn from the treasury, but in consequence of appropriations made by law.”

⁷⁸ Sidak (1989), *supra* note 17, at 1223. Whether this is Constitutional or not is a matter of debate between Sidak and Stith (1989).

⁷⁹ Raven-Hansen & Banks (1995), *supra* note 5, at 103-104.

⁸⁰ A more detailed discussion can be found in Raven-Hansen & Banks (1995). The capsule summary here draws on their analysis.

⁸¹ Raven-Hansen & Banks, (1995), *supra* note 5, at 103.

law] authority.”⁸² In the first Iraq War, the food and forage authority was used in conjunction with Department of Defense Authorization Act. The Authorization Act allowed the President to incur certain obligations, and the Food and Forage Act then allowed the Department of Defense to meet those obligations.⁸³

II.C.3. Relative magnitudes of Presidential latitude

While it is clear that there are many possible avenues for getting around Congress’ control, a separate question can also be asked: what are the relative magnitudes of these various options? In practice, what paths does the Executive most often take? Our survey of the literature did not find analysis adequate to answer these questions. To begin answering the question, therefore, we provide our own analysis of Department of Defense Reprogramming actions. This analysis is intended to be preliminary, but illustrative of how various types of reprogramming were used at the start of the new Iraq War.⁸⁴

The analysis draws on the unclassified Department of Defense Reprogramming actions made publicly available on the Internet.⁸⁵ Reprogramming in the Department of Defense is governed not by statute, but by an agreement with Congress.⁸⁶ Under the current agreement, the Department of Defense has two types of Reprogramming: (1) Prior Approval Reprogramming, which must be approved by the House Committee on

⁸² *Id.*

⁸³ Raven-Hansen & Banks, (1995), *supra* note 5, at 90, describe the process: ““The DOD Authorization Act permits the President to incur obligations each year for various military activities, whenever he "determines such action to be necessary in the interest of national defense." ... After the President finds an activity necessary, the Secretary of Defense is required to "immediately advise" Congress if any action is taken under this authority. After advising Congress, the Secretary invokes provisions of the feed and forage law ... Spending under this provision is limited only by the needs for the current year. Once DOD obligates the government, Congress has no choice but to appropriate funds for later expenditure.”

⁸⁴ Given multiple years of data availability, as well as rich detail on some of the spending requests, there is ample opportunity for future research in this area. It would make a nice research paper, and would be a contribution to the literature.

⁸⁵ All data on reprogramming actions was downloaded from the Department of Defense web site: <http://www.dod.mil/comptroller/execution/reprogramming/fy2002.html>. The DoD has data for FY 1999 through present FY 2005. We focus here on FY 2002.

⁸⁶ U.S. Navy note on Reprogramming: <http://cno-n6.hq.navy.mil/N6E/PPBS/Execution/reprogramming.htm>.

Appropriations⁸⁷, and (2) Internal Reprogramming, for which only notification to Congress is required. For FY2002, we were able to examine 17 Prior Approval Reprogramming Actions, and 71 Internal Reprogramming Actions.⁸⁸ All of these reprogramming actions are listed in Appendix Table A.

Table 3 summarizes, by reprogramming category, and by type of transfer authority, Department of Defense reprogramming for FY2002. We can note several findings in the table. First, Internal Reprogramming far outweighs the Prior Approval Reprogramming. Further, under Internal Reprogramming, the Department of Defense enjoys wide latitude to moves funds around as they see fit. A second thing to see is that by far the single largest Internal Reprogramming was execution of the Defense Emergency Response Fund. This accounted for approximately \$11.5 billion in reprogramming, and it was done under the blanket transfer authority in chapter 3 of the P.L. 107-206, the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks On the U.S. It is important to note that the three Prior Approval Reprogramming Actions under the Global War on Terrorism sum to only \$778 million.⁸⁹ While this analysis is too cursory to draw strong conclusions, it lends credence to the notion that in the context of the current War on Terrorism, it is the broad discretion in the Supplemental Appropriations that has given the Executive the most latitude.⁹⁰

Table 3. Summary of FY 2002 Department of Defense Reprogramming, by Prior Approval and Internal Sub-Categories

⁸⁷ Prior Approval is required when the Department of Defense: (1) relies general transfer authority (movement of funds between appropriations), (2) makes major system procurement quantity increases, (3) has a “new start” program, (4) reprograms with respect to an item that has been designated as a matter of special interest to Congress.

⁸⁸ In addition, 3 Prior Approval Reprogramming actions were

⁸⁹ These must be submitted for prior approval because that is a requirement under the general transfer authority of section 8005 of P.L. 107-117, the Department of Defense Appropriations Act of 2002, and section 1001 of P.L. 107-107, the National Defense Authorization Act for FY 2002.

⁹⁰ If this inference is correct, one implication may be that for those interested in curtailing (or enacting more oversight over) spending on the War on Terror, the legislation to examine most carefully would be the next Emergency Supplemental.

| Type of Reprogramming | Amount (in \$000) |
|--|--------------------------|
| <i>Prior Approval Total</i>⁹¹ | 1,747,304 |
| New Starts (From: High explosive plastic, To: Smoke White Phosphorus) | 1,900 |
| New Starts (From: Missile procurement, To: Tracked combat vehicles & Tank armament system) | 19,587 |
| New Starts (From: Depot maintenance, To: F/A-18 Squadron development & Cruise missile project) | 10,000 |
| C-17 Aircraft (From: C-17 Boeing contract, FY00, To: Retirement & restructuring of other programs) | 32,081 |
| National Guard and Reserve Requirements (From: Various equipment for Air National Guard, To: Base procured equipment) | 2,000 |
| National Defense Sealift Fund; Shipbuilding & Conversion, Navy (From: National Defense Sealift Fund, To: ADC(X) Class of ships) | 360,818 |
| FY 2002 Omnibus (From: Various, To: Various) | 282,834 |
| SBIRS High (From: Space Based Infraed System, To: Delay launch of Wideband Gapfiller Satellite) | 88,300 |
| SOCOM New Start (From: Special Operations Command, To: Operational Systems Development) | 1,875 |
| C-40 Lease (From: Boeing 737 Lease Pilot Program, To: Pushed off funding for Engineering & Manufacturing Development test items to later years) | 37,200 |
| Objective Force Indirect Fires (From: Future Combat Systems, To: Crusader artillery systems terminated) | 32,000 |
| Army Requirements (From: Weapons & Ammunition - Various, To: Weapons & Ammunition - Various) | 100,552 |
| Global War on Terrorism Requirements - I (From: Pay of officers; change in travel funding; pay of Guard & Reserve soldiers for Operation Enduring Freedom; Training and recruiting; Operating forces, mobilization, training and recruiting; Administration, To: Slower execution of TRICARE for Life benefit) | 691,557 |
| Global War on Terrorism Requirements - II (Air Force Requirements) (From: Air Force Operating Forces, To: Unit & Individual Training) | 60,300 |
| Global War on Terrorism Requirements - III (From: Operation & Maintenance, Air Force, To: National Guard, Individual & Group Training) | 26,300 |
| <i>Internal Total</i> | 16,154,744 |
| Airborne Low Frequency Sonar | 4,000 |
| Airborne Mine Countermeasures | 8,465 |
| Blacklight | 10,000 |
| Camera Assisted Monitoring System | 7,000 |
| Casualty Care Research Center | 700 |
| Chief Engineering | 9,075 |
| Civil Military Program - Innovative Readiness Training Program | 12,627 |
| Commercial Technology & Maintenance Activities | 6,000 |
| Composite Track Improvement | 1,346 |
| Counter-Terrorism and Operational Response Transfer Fund | 474,678 |
| Defense Emergency Response Fund | 11,448,300 |
| Defense Health Program | 128,335 |
| DERF Cost Reimbursement | 6,900 |

⁹¹ Two of these Prior Approval Reprogramming Actions were withdrawn: One for National Missile Defense, and a second for Support for International Sporting Competitions. In addition, a reprogramming for semi-trailer tankers was denied by the HCA (02-04_PA_SEMI-TRAILERS).

Table 3. Summary of FY 2002 Department of Defense Reprogramming, by Prior Approval and Internal Sub-Categories

| Type of Reprogramming | Amount (in \$000) |
|--|-------------------|
| Digital Modular Radio | 6,000 |
| DLA Congressional Adds | 5,957 |
| Drug Interdiction and Counter-Drug Activities, Defense | 849,425 |
| DTRA | 84,053 |
| Eagle Vision | 4,000 |
| Environmental Restoration Transfer Fund | 1,269,356 |
| Financial Management Modernization Program | 3,409 |
| Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) | 1,285,504 |
| FY2002 Congressional Adjustments | 20,122 |
| General Defense Intelligence Program | 1,500 |
| Information Assistance | 13,100 |
| Information Systems | 1,500 |
| Missile Test Set Upgrades | 1,700 |
| Movement Tracking System | 2,410 |
| National Imagery and Mapping Agency | 6,000 |
| Navy Coastal Warfare Training Improvements | 3,500 |
| Navy Program | 2,117 |
| NIMA Proper Execution | 7,700 |
| Operations | 73,562 |
| Overseas Contingency Operations Transfer Fund (OCOTF) | 146,333 |
| Procurement Programs | 5,747 |
| Productivity, Reliability, Availability, and Maintainability | 2,000 |
| Rapid Acquisition Program for Transformation | 14,995 |
| Ship Cost Adjustments | 104,066 |
| Site Closure Execution | 1,200 |
| Small Waterplane Area Twin Hull (SWATH) | 1,207 |
| SOCOM Helicopter Infrared Countermeasure Program | 38,389 |
| Transportable Detonation Chamber | 5,786 |
| TRIDENT | 76,000 |
| USS Cole Repairs | 680 |

II.D. New Challenges

II.D.1. Multi-national military efforts

A debate over the Executive's power to place troops under UN control emerged in the Clinton Presidency, requiring the Attorney General's Office of Legal Counsel to address the issue of multi-national military efforts.⁹² In that Memo, Dellinger argued that Congress' choice "to invade the President's authority indirectly, through a condition on an appropriation, rather than through a direct mandate, is immaterial. ... as our Office has insisted over the course of several Administrations, 'Congress may not use its power over appropriation of public funds to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.'⁹³

Arguing the other side is Hartzman, who concludes that the funding restrictions are "a constitutionally permissible constraint on the President's power to conduct diplomacy and negotiate military agreements with the UN for the disposition of American forces in peace operations."⁹⁴ Hartzman argues that "Congress has the direct power to enact the restriction contained in House Bill 3308, [therefore] there is no infirmity in its doing so indirectly through the spending power."⁹⁵ If the United States increases its involvement in multi-nation military operations, this Constitutional question may become increasingly important.

II.D.2. Non-traditional military activity

Non-traditional military activities, defined as "operations that may not ordinarily be funded out of the operations and maintenance accounts (O&M) of DOD and the military

⁹² Walter Dellinger, Assistant Attorney General, "Placing Of United States Armed Forces Under United Nations Operational Or Tactical Control," May 8, 1996.

⁹³ Citing earlier OLC opinions, 16 Op. O.L.C. 18, 30 (1992) (preliminary print) (quoting 14 Op. O.L.C. 38, 42 n.3 (1990) (preliminary print) (quoting 13 Op. O.L.C. 311, 315 (1989) (preliminary print)).

⁹⁴ 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) at 118.

⁹⁵ *Id.*

services,”⁹⁶ are on the rise. Examples include helping to establish governments and building infrastructure.⁹⁷ No comprehensive funding apparatus has been put in place to address these new funding needs. Instead, a patchwork of legislation has been put in place. As discussed by Rosen in a lengthy article, “Over the last fifty years ... Congress has enacted a potpourri of statutory authorities for "non-traditional" operations, which are scattered through titles 10 and 22 of the United States Code and in various DOD and foreign operations authorization and appropriations acts.”⁹⁸

Each year the Defense Institute of Security Assistance Management (DISAM) Journal analyzes the U.S. funding of security assistance.⁹⁹ They include analysis of funding for programs such as anti-terrorism efforts, Nonproliferation and Disarmament funds, and peacekeeping. In analyzing FY2004, the report (which spans 80 pages) details a wide number of funding sources that contribute to national security. Rosen argues that “this crazy quilt of authorities does not, however, always furnish a basis for funding the "non-traditional" operations U.S. forces are called on to perform,” and it raises the question: is the current set of budget procedures capable of efficiently handling the types of new missions that the military is increasingly engaged in?

II.D.3. Funding strategies

When “Congress has neither specifically appropriated nor restricted funds for national security activities,” Raven-Hansen and Banks suggest that the President “has consistently exercised discretion conferred by statute and by custom to spend on national security activities.”¹⁰⁰ His discretion arises primarily through lump sum appropriations (which allow for much discretion from the start), reprogramming (which allows the Executive to use funds for

⁹⁶ Rosen, *supra* note 15, at 7.

⁹⁷ Rosen provides a series of examples such as these.

⁹⁸ Rosen, *supra* note 15, at 8.

⁹⁹ Martin, Kenneth W. Fiscal Year 2004 Security Assistance Legislation and Funding Allocations. DISAM Journal of International Security Assistance Management; Spring2004, Vol. 26 Issue 3.

¹⁰⁰ Raven-Hansen & Banks (1995), *supra* note 5, at 97.

new, “higher priority” uses), and transfers (either between agencies or divisions).¹⁰¹ In each case, the Executive is tipping the discretionary scales somewhat in his favor, but is not breaking free entirely of Congressional oversight. Congress, for instance, sets the limits on transfer authority. For FY 2005, “Transfer authority is provided, permitting up to \$2,000,000,000 of these amounts to be reprogrammed among activities following approval by the congressional defense committees through prior-approval reprogramming procedures.”¹⁰²

Although each of these funding strategies raises familiar questions about balance of power, analysis and commentary seems to be more focused on questions of efficiency and management. A 1986 GAO report on Department of Defense Reprogramming, for instance, found that both branches of government agree that reprogramming is a vital element in the Defense budget process – but both sides also found the present reprogramming mechanisms a “cumbersome process”.¹⁰³ Recent years have seen efforts to improve reprogramming. A Report of the Committee on Appropriations voiced concern that reprogramming policies were not being implemented uniformly throughout the Defense Department.¹⁰⁴ The Report also called for better “visibility,” a theme picked up in two 2004 GAO reports on reprogramming: one on the funding of military housing expenditures and another on funding research and development.¹⁰⁵

¹⁰¹ Id.

¹⁰² Summary of Department of Defense Appropriations Act for FY 2005. Summary provided at: <http://www.gop.gov/Committeecentral/bills/hr4613.asp>.

¹⁰³ GAO 86-184. Budget Reprogramming: Department of Defense Process for Reprogramming Funds.

¹⁰⁴ Report of the Committee on Appropriations. June 18, 2004. Report 108-553.

¹⁰⁵ GAO. Defense Acquisitions: Better Information Could Improve Visibility over Adjustments to DOD's Research and Development Funds. GAO-04-944, September 17. <http://www.gao.gov/cgi-bin/getrpt?GAO-04-944>. GAO. Military Housing: Opportunities Exist to Better Explain Family Housing O&M Budget Requests and Increase Visibility over Reprogramming of Funds. GAO-04-583, May 27. <http://www.gao.gov/cgi-bin/getrpt?GAO-04-583>

II.E. Assessment. Who will resolve this debate? How do we judge?

In this section we consider a number of factors that might be considered by policymakers and academics as they think through this debate and try to resolve it.

II.E.1. *Don't look to the judiciary for help*

One group who will almost certainly *not* resolve it is the judiciary. In a case against President George H. W. Bush, a group of Congressmen requested “an injunction directed to the President of the United States to prevent him from initiating an offensive attack against Iraq without first securing a declaration of war or other explicit congressional authorization for such action.”¹⁰⁶ Drawing on the doctrine of “ripeness,” the court made clear that it would do everything possible to stay away from getting in the middle of this Executive-Legislative feud.¹⁰⁷ The court drew on Justice Powell’s definition of ripeness: “Justice Powell proposed that “a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.”¹⁰⁸ Because the issue is not likely to rise to this state of ripeness, the court’s position effectively puts the judiciary out of the review business when it comes to war appropriations.

To justify their position (of non-action), courts have also pointed to their belief that the legislators’ power of the purse has teeth. In other words, the courts need not get involved because the legislators have other means with which to restrain the President. In *Campbell v. Clinton* (2000), legislators argued that President Clinton, by directing U.S. forces’ participation in the NATO campaign in Yugoslavia, had acted unconstitutionally.¹⁰⁹ The court distinguished from an earlier case involving a ratification vote on a constitutional amendment, on the grounds that here,

¹⁰⁶ *Dellums v. Bush*, 752 F. Supp. 1141, (2000).

¹⁰⁷ At a minimum, the court said that, “unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.” *Dellums v. Bush* at 1151.

¹⁰⁸ *Id.* at 1150.

¹⁰⁹ *Campbell v. Clinton* (2000), 340 U.S. App. D.C. 149.

even after Clinton sent in troops, Congress had many options available to it.¹¹⁰ The court noted that in military affairs, “Congress always retains appropriations authority and could have cut off funds for the American role in the conflict.”¹¹¹

II.E.2. Economic effects

While legal scholars are most interested in the Constitutional questions surrounding war appropriations, other disciplines of scholarship have looked to the effects of military appropriation procedures on other outcomes. In a 2001 dissertation, Amnuay Thadalkit analyzes defense appropriations and finds evidence to support the conclusion that Congressional defense committee members use the defense budget as a means to stimulate their state’s economy, keep the unemployment rate in their state lower, and help them secure victory in the next election.¹¹² From the same political science background, but with a slightly different perspective, Joshua Gordon argues that the changing (more partisan) House of Representatives has made it more difficult for House appropriations committees to use their “power of the purse”.¹¹³ The reason, Gordon argues, is that the power of the purse requires committee solidarity that is more difficult to achieve in a deeply divided legislature.

II.E.3 Budget inefficiencies

Aside from the debates over national security, it is also important to know if the present funding scheme for military appropriations is economically efficient. While research in this area remains scarce, one study of supplementals (not just military supplementals) found that they are used not only to account for legitimate, unexpected costs, but also as a strategic tool to keep

¹¹⁰ Coleman v. Miller, 307 U.S. 433 (1939).

¹¹¹ Campbell v. Clinton (2000), 340 U.S. App. D.C. 149. at 23.

¹¹² Thadalikit, Amnuay. The effects of congressional defense committees' authorization and appropriation on civilian engineering employment, Doctoral Thesis, University of La Verne. (2001).

¹¹³ Gordon, Joshua Barrett. The power of the purse reconsidered: Partisanship and social integration in the House Appropriations Committee. Ph.D. Dissertation. University of Florida, 2002.

regular budgets lower.¹¹⁴ If this finding is applicable to the defense supplementals currently being used to fund the ongoing War on Terrorism, we might be on the lookout for strategic gaming by both branches. Art (1985) argued that Congress continues “to look mostly at the details of defense spending but rarely at the big picture.”¹¹⁵ Art proposes institutionalizing more policy oversight, perhaps within the Senate Armed Forces Committee. Thompson makes a similar point about the need for better management.¹¹⁶ Banks and Straussman have also attempted to formulate recommendations to enhance overall efficiency.¹¹⁷

II.E.4 Empirical assessment and analysis remains minimal

The bulk of scholarship on war appropriations consists of case studies and theoretical arguments. This makes it difficult to settle on a final evaluation of where the balance of powers should lie. For instance, when Stephen Carter argued in 1990 (during the Gulf War) that “At any time that enough members care to do so, the Congress can refuse to fund a war that the president wants to fight,” he stands on sound theoretical and legal ground.¹¹⁸ But we might expect significant political fallout from such a vote. Further, in light of the political science research on defense appropriations, Congressmen might have other motivations for approving war appropriations. In short, we know what *can* happen (and what the law allows), but we know much less about what actually *is* happening or what might happen in the future as the “crazy quilt” of laws governing appropriations interact with each other in new ways.

¹¹⁴ Christopher Wlezien. The Political Economy of Supplemental Appropriations. *Legislative Studies Quarterly*. Vol. 18, No. 1 (Feb., 1993), pp. 51-76.

¹¹⁵ Robert J. Art. Congress and the Defense Budget: Enhancing Policy Oversight. *Political Science Quarterly*. Vol. 100, No. 2 (Summer, 1985), pp. 227-248.

¹¹⁶ Fred Thompson. Managing Defense Expenditures. *Proceedings of the Academy of Political Science*. Vol. 35, No. 4, Control of Federal Spending (1985), pp. 72-84.

¹¹⁷ William C. Banks; Jeffrey D. Straussman. Defense Contingency Budgeting in the Post-Cold-War World. *Public Administration Review*. Vol. 59, No. 2 (Mar., 1999), pp. 135-146.

¹¹⁸ Stephen L. Carter, Going to War Over War Powers, *Washington Post*, Nov. 18, 1990, at C1.

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Appendix Table A. Summary of FY 2002 Department of Defense Reprogramming Actions¹

| DoD Serial No. | Description | Amount | Approved |
|-------------------------------|--|---------|------------|
| 01-06_PA_NEW_STARTS | New Starts (From: High explosive plastic, To: Smoke White Phosphorus) | 1,900 | 5/10/2001 |
| 01-06_PA_NEW_STARTS | New Starts (From: Missile procurement, To: Tracked combat vehicles & Tank armament system) | 19,587 | 5/10/2001 |
| 01-06_PA_NEW_STARTS | New Starts (From: Depot maintenance, To: F/A-18 Squadron development & Cruise missile project) | 10,000 | 5/10/2001 |
| 01-32_PA_C-17_REVISIED | C-17 Aircraft (From: C-17 Boeing contract, FY00, To: Retirement & restructuring of other programs) | 32,081 | 12/20/2001 |
| 02-06_PA_NGRE_REQUIREMENTS | National Guard and Reserve Requirements (From: Various equipment for Air National Guard, To: Base procured equipment) | 2,000 | 3/20/2002 |
| 02-07_PA_T-AKE | National Defense Sealift Fund; Shipbuilding & Conversion, Navy (From: National Defense Sealift Fund, To: ADC(X) Class of ships) | 360,818 | 4/24/2002 |
| 02-8_PA_FY_2002_OMNIBUS_FINAL | FY 2002 Omnibus (From: Various, To: Various) | 282,834 | 9/27/2002 |
| 02-09_PA_SBIRS_HIGH | SBIRS High (From: Space Based Infraed System, To: Delay launch of Wideband Gapfiller Satellite) | 88,300 | 5/7/2002 |
| 02-10_PA_SOCOM_NEW_STARTS | SOCOM New Start (From: Special Operations Command, To: Operational Systems Development) | 1,875 | 5/30/2002 |
| 02-11_PA_C-40_LEASE | C-40 Lease (From: Boeing 737 Lease Pilot Program, To: Pushed off funding for Engineering & Manufacturing Development test items to later years) | 37,200 | 6/27/2002 |
| 02-12_PA_OBJECTIVE | Objective Force Indirect Fires (From: Future Combat Systems, To: Crusader artillery systems terminated) | 32,000 | 7/26/2002 |
| 02-13_PA_ARMY_RQMTS | Army Requirements (From: Weapons & Ammunition - Various, To: Weapons & Ammunition - Various) | 100,552 | 8/9/2002 |
| 02-14_PA_GWOT | Global War on Terrorism Requirements - I (From: Pay of officers; change in travel funding; pay of Guard & Reserve soldiers for Operation Enduring Freedom; Training and recruiting; Operating forces, mobilization, training and recruiting; Administration, To: Slower execution of TRICARE for Life benefit) | 691,557 | 8/28/2002 |
| 02-15_PA_GWOT_II | Global War on Terrorism Requirements - II (Air Force Requirements) (From: Air Force Operating Forces, To: Unit & Individual Training) | 60,300 | 8/28/2002 |
| 02-16_PA_GWOT_III | Global War on Terrorism Requirements - III (From: Operation & Maintenance, Air Force, To: National Guard, Individual & Group Training) | 26,300 | 8/28/2002 |

¹ This is limited to Unclassified reprogramming actions that were made publicly available at: <http://www.dod.mil/comptroller/execution/reprogramming/fy2002.html>.

Appendix Table A. Summary of FY 2002 Department of Defense Reprogramming Actions

| DoD Serial No. | Description | Amount | Approved |
|--------------------------------|--|---------|-----------|
| 02-01_IR-C_FCFCD | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: FCF, C, D Funds, To: Remaining balances in NATO security investment accts.) | 62,070 | 11/6/2001 |
| 02-01_IR-C_FCFCD | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: CMAs, To: FCF, C, D Funds) | 150,422 | 11/6/2001 |
| 02-01_IR_COUNTER-DRUG | Drug Interdiction and Counter-Drug Activities, Defense (From: Training helicopter pilots (via defense-wide operation budget), To: Drug Interdiction and Counter-Drug Activities) | 7,700 | 10/4/2001 |
| 02-02_IR-C_FCFCD | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: FCF, C, D Funds, To: Remaining balances in Housing construction accts.) | 13,524 | 2/28/2002 |
| 02-02_IR_CMP_IRT | Civil Military Program - Innovative Readiness Training Program (From: Operations & Maintenance, Defense Wide, To: Innovative Readiness Training Programs) | 9,465 | 2/1/2002 |
| 02-03_IR-C_FCFCD | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: FCF, C, D Funds, To: Remaining balances in Housing construction accts.) | 6,000 | 8/19/2002 |
| 02-03_IR_COUNTER-DRUG | Drug Interdiction and Counter-Drug Activities, Defense (From: Various components, To: Drug Interdiction and Counter-Drug Activities, Defense) | 630,580 | 2/1/2002 |
| 02-04_IR-C_FCFCD | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: FCF, C, D Funds, To: Remaining balances in Housing construction accts.) | 180,019 | 9/30/2002 |
| 02-04_IR_ENVIRONMENTAL | Environmental Restoration Transfer Fund (From: Various components, To: Five Environmental Restoration appropriations) | 763,530 | 9/30/2002 |
| 02-05_IR_OCOTF | Overseas Contingency Operations Transfer Fund (OCOTF) (From: Overseas Contingency Operations, To: Overseas Contingency Fund) | 83,260 | 2/1/2002 |
| 02-06_IR_CMP_IRT | Civil Military Program - Innovative Readiness Training Program (From: Training and support, various components, To: Operations & Maintenance, Defense Wide) | 3,162 | 3/6/2002 |
| 02-07_IR_DTRA | DTRA (From: Research, Test, Evaluation, To: Operations & Maintenance, Defense Wide) | 46,653 | 2/28/2002 |
| 08_IR_DRUG_INTERDICTI ON | Drug Interdiction and Counter-Drug Activities, Defense (From: National Guard Counterdrug Program, To: Drug Interdiction and Counter-Drug Activities, Defense) | 12,224 | 3/11/2002 |
| 02-09_IR_SIIRCM | SOCOM Helicopter Infrared Countermeasure Program (From: Rotary Wing Upgrades, To: Moved ASE Infrared program to Special Ops Account) | 38,389 | 3/8/2002 |
| 02-10_IR_TRIDENT | TRIDENT (From: Shipbuilding, Navy, To: Other Procurement, Navy) | 76,000 | 3/12/2002 |
| 11_IR_NAVY_COASTAL_ WARFARE | Navy Coastal Warfare Training Improvements (From: Navy Reserve, Operations, To: Navy, Operations) | 3,500 | 3/1/2002 |
| 02-12_IR_OCOTF | Overseas Contingency Operations Transfer Fund (OCOTF) (From: Base Maintenance & Support, To: Overseas Contingency Fund) | 9,073 | 3/13/2005 |
| 13_IR_USS_COLE_REPAIR S | USS Cole Repairs (From: Repair parts, To: Operating Forces, Navy) | 680 | 3/27/2005 |
| 02-14_IR_DHP | Defense Health Program (From: Military treatment facility, To: Defense Health Operations) | 114,475 | 4/3/2002 |

Appendix Table A. Summary of FY 2002 Department of Defense Reprogramming Actions

| DoD Serial No. | Description | Amount | Approved |
|---|---|---------|-----------|
| 02-15_IR_PRAM | Productivity, Reliability, Availability, and Maintainability (From: Productivity, Reliability, Availability, and Maintainability, To: USAF Modeling & Simulation) | 2,000 | 5/17/2002 |
| 02-16_IR_CTMA | Commercial Technology & Maintenance Activities (From: Commercial Technology & Maintenance Activities, To: Operations & Maintenance, Defense Wide) | 6,000 | 4/3/2002 |
| 02-17_IR_FOREIGN_CURRNCY | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: Army Operations, Marines Pay, Army Pay, To: Navy Operations, Marine Operations) | 48,282 | 4/5/2002 |
| 02-18_IR_DIA | General Defense Intelligence Program (From: Army Operations, To: Operations & Maintenance, Defense Wide) | 1,500 | 4/5/2002 |
| 02-18_IR_INFORMATION_SYSTEMS | Information Systems (From: Army Operations, To: Operations & Maintenance, Defense Wide) | 1,500 | 4/5/2002 |
| 02-19_IR_SOCOM_ADDS | Congressional Add Realignments (From: Congressionally-mandated program elements, To: Other program elements in Procurement, Defense-Wide) | . | 4/12/2002 |
| 02-20_IR_NAVY_PROGRAM | Navy Program (From: Navy, Operations and Maintenance, To: Other Procurement, Navy) | 2,117 | 4/12/2002 |
| 02-21_IR_NAVY_MISSILE_TEST_SET_UPGRADES | Missile Test Set Upgrades (From: Weapons Procurement, Navy, To: Navy, Operations and Maintenance) | 1,700 | 4/12/2002 |
| 02-22_IR_CHIEF_ENGINEERING | Chief Engineering (From: Research, Test, Evaluation, To: Navy, Operations and Maintenance) | 9,075 | 4/23/2002 |
| 02-23_IR_DERF | Defense Emergency Response Fund (From: Other Procurement, Air Force, To: Defense Emergency Response Fund) | 238,000 | 4/29/2002 |
| 02-24_IR_DRUG_INTERDICTION | Drug Interdiction and Counter-Drug Activities, Defense (From: Various components, To: Drug Interdiction and Counter-Drug Activities, Defense) | 160,717 | 4/19/2002 |
| 02-25_IR_AIRBORNE_MINE_COUNTERMEASURES | Airborne Mine Countermeasures (From: Aircraft Procurement, Navy, To: Other Procurement, Navy) | 8,465 | 4/23/2002 |
| 02-26_IR_DLAACONGADDS | DLA Congressional Adds (From: Defense Logistics Agency, To: Office of Sec. of Defense) | 5,957 | 5/9/2002 |
| 02-27_IR_DHP | Defense Health Program (From: Congressionally-mandated program elements, To: Defense Health Operations) | 13,860 | 5/17/2002 |
| 02-28_IR_CONGADJUSTMENTS | FY2002 Congressional Adjustments (From: Admin & Management, To: Army, Navy - Operations) | 20,122 | 4/29/2005 |
| 02-29_IR_NIMA | NIMA Proper Execution (From: Research, Test, Evaluation, To: Operations & Maintenance, Defense Wide) | 7,700 | 4/30/2002 |
| 02-30_IR_TRANSPORT_DETONATION_CHAMBER | Transportable Detonation Chamber (From: Demonstration and Validity, To: Applied Research) | 5,786 | 4/30/2002 |

Appendix Table A. Summary of FY 2002 Department of Defense Reprogramming Actions

| DoD Serial No. | Description | Amount | Approved |
|-------------------------|---|---------|-----------|
| 02-31_IR_OPERATIONS | Operations (From: Base Maintenance & Support, To: Operations & Maintenance, Defense Wide) | 73,562 | 5/1/2002 |
| 02-32_IR_SWATH | Small Waterplane Area Twin Hull (SWATH) (From: SWATCH, To: Post Delivery) | 1,207 | 5/6/2002 |
| 02-33_IR_ER | Environmental Restoration Transfer Fund (From: Various components, To: Five Environmental Restoration appropriations) | 427,279 | 5/9/2002 |
| 02-34_IR_FCF | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: Military personnel - operations and maintenance, To: FCF, C, D Funds) | 441,795 | 5/9/2002 |
| 02-35_IR_DIGITALMODULA | | | |
| RRADIO | Digital Modular Radio (From: Research, Test, Evaluation, To: Other Procurement, Navy) | 6,000 | 5/9/2002 |
| 02-36_IR_CT | Counter-Terrorism and Operational Response Transfer Fund (From: Research, Test, Evaluation, To: Counter-Terrorism and Operational Response Transfer Fund) | 30,000 | 5/28/2005 |
| 02-37_IR_MOVEMENTTRAC | Movement Tracking System (From: Heavy Tactical Vehicles, To: Combat Vehicle Adv. Technology) | 2,410 | 6/3/2002 |
| KINGSYSTEM | Rapid Acquisition Program for Transformation (From: Rapid Acquisition Program for Transformation, To: Research, Development, Text and Evaluation) | 14,995 | 5/23/2002 |
| 02-38_IR_RAPT | | | |
| 02-39_IR_INFORMATION_AS | Information Assistance (From: Army Operations, To: Research, Development, Text and Evaluation) | 13,100 | 5/23/2002 |
| SURANCE | Eagle Vision (From: Other Procurement, Air Force, To: Air National Guard, Operation and Maintenance) | 4,000 | 7/1/2002 |
| 02-40_IR_EAGLE_VISION | | | |
| 02-41_IR_CASUALTY_CARE_ | Casualty Care Research Center (From: Defense Health Program, To: Navy, Operations and Maintenance) | 700 | 6/13/2002 |
| DHP | | | |
| 02-42_IR_AIRBORNE_LOW_F | Airborne Low Frequency Sonar (From: MH-60R Series, To: SH-60 Series) | 4,000 | 6/13/2002 |
| REQUENCY | | | |
| 02-43_IR_COMPOSITE_TRAC | Composite Track Improvement (From: Combate Vehicle Adv. Technology, To: Combat Vehicle Improvement Program) | 1,346 | 6/13/2002 |
| K | | | |
| 02-44_IR_CAMS | Camera Assisted Monitoring System (From: Research, Test, Evaluation, To: Camera Assisted Monitoring System) | 7,000 | 6/21/2002 |
| 02-45_IR_CT | Counter-Terrorism and Operational Response Transfer Fund (From: Various components, To: Counter-Terrorism and Operational Response Transfer Fund) | 279,200 | 6/27/2002 |
| 02-46_IR_DERF | Defense Emergency Response Fund (From: Other Procurement, Air Force, To: Defense Emergency Response Fund) | 40,000 | 7/10/2002 |
| 02-47_IR_OCOTF | Overseas Contingency Operations Transfer Fund (OCOTF) (From: National Guard Personnel, training and support, To: Overseas Contingency Operations Transfer Fund (OCOTF)) | 51,400 | 7/22/2002 |
| 02-48_IR_OCOTF | Overseas Contingency Operations Transfer Fund (OCOTF) (From: Navy, Operations and Maintenance, To: Overseas Contingency Operations Transfer Fund (OCOTF)) | 2,600 | 7/18/2005 |
| 02-49_IR_DERF | DERF Cost Reimbursement (From: Military Construction, Defense Wide, To: Defense | 6,900 | 7/25/2002 |

Appendix Table A. Summary of FY 2002 Department of Defense Reprogramming Actions

| DoD Serial No. | Description | Amount | Approved |
|-----------------------|--|---------------|-----------------|
| | Emergency Response Fund) | | |
| 02-50_IR_CMS | Procurement Programs (From: Other Procurement, Air Force, To: Procurement, Defense Wide) | 5,747 | 7/23/2002 |
| 02-51_IR_ER | Environmental Restoration Transfer Fund (From: Various components, To: Five Environmental Restoration appropriations) | 78,547 | 7/23/2002 |
| 02-52_IR_DTRA | DTRA (From: Research, Test, Evaluation, To: Operations & Maintenance, Defense Wide) | 37,400 | 7/30/2002 |
| 02-53_IR_FCF | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: Army, Navy, Marine - Operations & Personnel, To: FCF, C, D Funds) | 159,463 | 8/29/2002 |
| 02-54_IR_INTERDICTION | Drug Interdiction and Counter-Drug Activities, Defense (From: Various components, To: Drug Interdiction and Counter-Drug Activities, Defense) | 28,204 | 8/8/2002 |
| 02-55_IR_FMMP | Financial Management Modernization Program (From: Operations & Maintenance, Defense Wide, To: Research, Development, Text and Evaluation) | 3,409 | 9/26/2002 |
| 02-56_IR_DERF_SUP | Defense Emergency Response Fund (From: Most urgent requirements of Global War on Terrorism (Military personnel pay, Operating forces - all branches, procurement), To: Defense Emergency Response Fund) | 6,700,000 | 8/8/2002 |
| 02-57_IR_CT | Counter-Terrorism and Operational Response Transfer Fund (From: Chemical Biological Defense Program; Army Chemical Agents and Munitions Destruction, To: Counter-Terrorism and Operational Response Transfer Fund) | 165,478 | 8/8/2002 |
| 02-58_IR_DRUG | Drug Interdiction and Counter-Drug Activities, Defense (From: Various components, To: Drug Interdiction and Counter-Drug Activities, Defense) | 10,000 | 8/23/2002 |
| 02-59_IR_DERF | Defense Emergency Response Fund (From: Most urgent requirements of Global War on Terrorism (Military personnel pay, Operating forces - all branches, procurement), To: Defense Emergency Response Fund) | 3,200,000 | 8/28/2002 |
| 02-60_IR_BLACKLIGHT | Blacklight (From: 114D8Z Blacklight, To: 114E Blacklight) | 10,000 | 9/17/2002 |
| 02-61_IR_DERF_III | Defense Emergency Response Fund (From: Most urgent requirements of Global War on Terrorism (Military personnel pay, Operating forces - all branches, procurement), To: Defense Emergency Response Fund) | 1,270,300 | 9/20/2002 |
| 02-62_IR_SITE_CLOSURE | Site Closure Execution (From: Navy Operations, To: Procurement, Defense Wide) | 1,200 | 9/25/2002 |
| 02-63_IR_SCA | Ship Cost Adjustments (From: Cover cost increases on ship building, To: Deobligated contracts) | 104,066 | 9/22/2002 |
| 02-64_IR_FCFD | Foreign Currency Fluctuations, Construction, Defense (FCF, C, D) (From: FCF, C, D Funds, To: FY00 and FY01 gains from currency fluctuations) | 223,929 | 9/27/2002 |
| 02-65_IR_NIMA | National Imagery and Mapping Agency (From: Operations & Maintenance, Defense Wide, To: Research, Development, Text and Evaluation) | 6,000 | 9/27/2002 |