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## Panel IV: The Appropriations Power and the Necessary and Proper Clause

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## PANEL IV

### THE APPROPRIATIONS POWER AND THE NECESSARY AND PROPER CLAUSE

EDWIN MEESE III\*

During the earlier portion of the day, we were talking about the separate exercise of power and the sharing of power in a governmental structure that was unique when it was originally created. Particularly, we have been talking this morning about what some might call unconstitutional acts of Congress in restraining the executive branch, or at least actions and questions of unconstitutionality.

I was interested in Mr. Davidson's categorizing the various things Congress-people do into legislative, oversight, and constituent services—although he says that a particular problem seldom falls neatly into one of these categories. This concerned me a bit and, fortunately, I was sitting next to Harvey Cook, who always carries a pocket copy of the Constitution with him. I borrowed his copy of the Constitution and I found nothing that talked about oversight and absolutely nothing about constituent services. So I might present the direct view: there is no official constitutional authority for either oversight or for constituent services. If you follow this analogy a little bit further, a letter to a department head or agency employee from a member of Congress has no more official authority or weight than a letter from any other citizen. Now obviously in the practical world, there are certain coercive features associated with members of Congress that make that letter at least seem more authoritative than, perhaps, the average communication from an ordinary citizen.

This morning, we are going to talk about some of the coercive aspects that the Constitution, in a sense, gives to the Congress, because there are some constitutional powers given to the Congress which directly relate to how the executive branch does its job. And that is why this panel, today, is talking about the appropriations power<sup>1</sup> and the necessary and proper

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1. U.S. CONST. art. I, § 9, cl. 7.

clause.<sup>2</sup>

Every citizen knows that a legislature, whether it be city, county, state or federal, has potentially enormous power over his or her life, because the legislature has the authority to make the rules by which lives are lived. In a system of separated powers under a written Constitution, we do not normally expect a legislature to have that much authority over the coordinate branches of government. And indeed, the purpose of this conference is to define that authority, because in most cases, the written Constitution and not the legislative body makes the rules for the other branches. The other branches then enforce or apply those rules that are made by the legislature for persons outside the government.

To a great extent, that is how our Constitution operates in most cases. And it is the Constitution, then, that determines how the President is chosen, how long he or she serves, and what the powers are. It is the Constitution and not Congress, for example, that determines the tenure of judges or the cases to which judicial power applies. These are rules that cannot be changed easily, but can only be changed by the people themselves—the ultimate repository of governmental authority in a republic or a democracy—through the amending power of the Constitution under article V.

But today we are discussing the two possible exceptions to the principle that it is the Constitution that provides the rules for the executive and judicial branches. Those exceptions are: first, the explicit grant to Congress of the power to make laws to carry out the powers of the other two branches in the necessary and proper clause; and second, the implicit grant to Congress of the power over federal money, the appropriations power or the spending power.

As a practical matter, those of us who follow interbranch politics, and I must say as Judge Bell intimated in his remarks, the 72nd Attorney General, the 75th Attorney General, and the 76th, who was here yesterday, have a more close, personal involvement on a day-to-day basis with interbranch politics. It is nice to be able to watch this as a casual observer from the outside. For those of us familiar with Congress' use, or as some suggested earlier this morning, misuse of power, the appropriations power deserves a great deal of study, as I am sure it will receive this morning. We are going to be talking about ways in which that power is properly—or perhaps, improperly—used. But there is no question that it

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2. U.S. CONST. art. I, § 8, cl. 18.

is a constitutional power. The distinctions become much more exact and precise than some of the things we talked about earlier, when authority and power appear, at least in some instances, to be created out of the Oval Office.

The Boland Amendment,<sup>3</sup> which was referred to in passing this morning, is probably one of the best known examples of how the appropriations power is used by Congress and by writers or researchers on appropriations. Yesterday, Attorney General Thornburgh talked about other ways in which it is used and that discussion came up again this morning. But these are merely the latest in a long series of funding restrictions.

The use of the necessary and proper clause is less frequently debated. It seldom comes up, at least in the daily papers. But it is the power that enables Congress to create the executive departments and to prescribe, to a certain extent, its several procedures. It is this power, for example, that underlies most of the rules of governmental administration that are set forth in the statute under the Freedom of Information Act<sup>4</sup> or the Advisory Committees Act.<sup>5</sup>

The importance of such rules of administration and its impact or influence on the conduct of the executive branch and of the courts, should be fairly obvious, once you think about it. We will be discussing, this morning, the extent to which Congress may properly use these grants of authority to impress its will, not merely upon the substance of the law as it applies to persons outside of government, but upon the rest of government as it enforces those laws, applies those laws, and interprets those laws.

We have four panelists of distinguished backgrounds and experience. The first person has to deal on a daily basis with the questions to which I referred: Bill Barr.

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3. The Boland Amendment, passed December 21, 1982, prohibited aid "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua." Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). The Boland compromise, passed December 8, 1983, limited financial support for the contras to \$24 million. Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983). The Boland cutoff, passed October 12, 1984, provided that no funds made available to the intelligence agencies and the Department of Defense could be used to support the Contras during fiscal year 1985, but permitted Congress to provide up to \$14 million in such aid after February 28, 1985, if the President requested it. Continuing Appropriations Act for the Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-37 (1984).

4. 5 U.S.C. § 552 (1988).

5. 5 U.S.C. app. §§ 1-15 (1988).

**WILLIAM BARR\***

It is the beginning of wisdom to have knowledge of your own ignorance; and if that is true, then thinking about Congress' use of the appropriations power to control the activities of the other coordinate branches of government is a way to make yourself very wise indeed. It is a very difficult issue. The more I have thought about it, the more I come to appreciate its complexities. I have reached no firm conclusions myself and have no comprehensive theory to espouse today. But I have concluded that the easy answer is probably not a correct answer.

The easy answer—at least one we hear advanced most often these days—is that the appropriations power is a big power indeed; that it is essentially a freestanding power to allocate and control all the public resources that the government has at its disposal. It is a power that has almost magical qualities. Congress can do all sorts of things with this power of the purse that it cannot do directly under its enumerated powers. There is an implication that as long as Congress takes action in the form of an appropriations bill, Congress is somehow immunized from other constitutional constraints; or at least, by using its appropriations power, Congress can trump other constitutional constraints; or at a minimum, by invoking the appropriations clause, Congress can add greater weight to its claim that it has power over the other coordinate branches of government.

The premise is that, because Congress can decide to make no appropriations at all, when it does make appropriations, it can impose any control or restriction it wants on how money is spent. The argument is as follows: Congress does not have to fund the Department of Justice, but if it does create a Department of Justice, and it does appropriate money to the Department of Justice, then it can control all the activities of the Department of Justice. So, for example, Congress can tell the Solicitor General, "You may not use appropriated funds to argue a particular position in the Supreme Court." If Congress can do this then one would think it could also command its corollary: "These funds must be spent to present the Supreme Court with the following argument . . ." Now I do not think this position is tenable.

Just because Congress is acting as the appropriator of funds does not mean that it is immune from other constitutional rules or that it can

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trump them or even give greater weight to its claims. First, let us consider the application of spending decisions to the constitutional rules that deal with individual rights. Suppose Congress appropriates money for a program that gives funds to hospitals. Let us think of some of the various restrictions—the “usual suspects” of restrictions and conditions that Congress often tries to use in appropriations legislation. First, the direct restriction: “We hereby appropriate X funds for hospitals, provided however, that no funds can go to a Catholic hospital.” I think that would be unconstitutional. Now let us look at a condition on spending: “Money may be provided to Catholic hospitals only if they abandon their religious affiliation.” That seems to me to be an unconstitutional condition, and I suspect it would be unconstitutional. Now let us look at another device, most subtle of them all—Congress casts its action as a refusal to fund: “Money shall be spent as follows . . .” and then Congress lists all the hospitals, and the Catholic hospitals are not on the list. The use of impermissible criteria to select which hospitals are on the list and which are not is inadmissible under the Constitution. The fact that the action is cast as a refusal to spend is not sufficient to validate it.

Should this not also be the case when we encounter the rules that are set forth in the Constitution that deal with separation of powers? Consider the original jurisdiction of the Supreme Court, which is vested in the Court by the Constitution. The original jurisdiction extends to suits in which a state is a party. Now let us review the kind of appropriations conditions and restrictions that we commonly see. First, a Congress can place a direct restriction on appropriated funds: In a judiciary appropriations bill, Congress says, “You cannot use any funds to decide cases involving the state as a party.” Congress can cast it as a condition: “Funds can only be used if the Court refrains from deciding cases involving states as a party;” or “Only if the Court decides this particular case this way, will the funds be available for expenditure by the Court.” Let us add another one here when we talk about separation of powers—that is Congress’ use of restrictions to muscle in on the decision making process of the other branches: “Funds can only be spent to decide cases in which the Court has first cleared the decision with one of the judiciary committees.” And finally, the fourth kind of restriction, the most slippery kind of restriction, is the breakdown of the object of expenditure into separate categories of activity and then the selective funding of those subsets. For example, Congress passes an appropriations bill with line items for each area of the Court’s jurisdiction. When it comes to those

involving states as a party, it lists forty-nine states—and lo and behold, Rhode Island is not on it. I would suggest the criteria by which the list was drawn up is impermissible. It encroaches on judicial power. That kind of device of selective funding is unconstitutional.

It seems to me this analysis also applies to the constitutional powers of the President. Let us look at the pardon power. I will briefly run through the same four examples of appropriations restrictions: (1) “Provided, however, that no money for pardons may be spent for anyone who has committed the crime of lying to Congress.” (2) “Money for the executive, except the President’s salary, is appropriated only if the President refrains from pardoning someone who has lied to Congress.” (3) “Money can only be spent for pardons if the pardon had been previously reviewed and cleared by one of the judiciary committees.” And finally, (4) “You can list as line items all the crimes for which you can pardon people.” And lo and behold a crime is left off, and there is no money appropriated for pardoning persons who have committed the crime of lying to Congress. From this, I conclude that Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control.

The last type of restriction in each of these three sets of hypotheticals is the most difficult: it is the method of taking an overall object of public expenditure, breaking it down into separate categories of activity, and then making deliberate decisions of funding some of the subsets, but not all of them. Sometimes when Congress does this kind of thing, it looks okay. Congress can say, “We are going to spend a million dollars on building post offices; five hundred thousand has to be spent in Walla Walla, and five hundred thousand has to be spent in Dubuque. We want two post offices.” Now that looks okay. On the other hand, you can do this sort of thing, and it does not appear right, such as in the three earlier examples that I gave about this kind of restriction.

How do you tell the difference? What is the principle by which you can distinguish between when it is a guise to control executive or judicial activity, and when it is really a legitimate funding decision by Congress? Well, could it be an “intent” test? What is Congress’ purpose in subdividing the objects of expenditure, and then selectively funding them? Is it trying to control the exercise of constitutional power by the executive or the judiciary? Or is it simply making a bona fide funding decision for resource reasons?

Once you get beyond an “intent test,” it seems to me that you are

drawn in either of two directions. The logic of each leads to some fairly drastic conclusions. One approach is the familiar one—the appropriations clause gives Congress unfettered discretion to break down and define all areas of government activity and to determine how much to spend on each activity, including those involving the enumerated powers of the other branches. It is permissible for Congress to say, “We want 3,000 people to negotiate treaties this year with the Soviet Union and no one to help the President make pardon decisions.” That is fine. Congress can define the object of expenditure. Carrying this to its logical conclusion, I believe, would eviscerate completely the principle of separation of powers in the Constitution.

The other approach, it seems to me, is a less familiar one, but there is something to be said for it. It goes something like this: The appropriations clause is not an independent “power” of Congress, an independent source of congressional power. It is not a power clause. It does not confer a free-standing power to control the allocation of government resources. The appropriations clause is simply a procedural provision—a requirement that Congress pass a law before it can take money out of the Treasury. The only power logically implied by that procedural requirement is that Congress can control the overall amount of public funds that are drawn from the Treasury. The appropriations clause provides on its face that in order to get money out of the Treasury and get it to a place where you can spend it, you need a law.

The power to set, define, and subdivide objects of public expenditure and to restrict funds only to those specified objects does not come out of the appropriations clause. Any such power that Congress has must come from one of Congress’ enumerated substantive powers, which are set forth in article I, section 8. So if Congress says that there is going to be an army, and that army is going to consist of one rifle company and fifteen F-16 fighters, then the only thing the appropriations clause does is to say that to get money from the public Treasury to support the army, you need an appropriations bill, the act of giving out the money. The power to dictate the scope of the activity—one rifle company and fifteen aircraft—must come from one of the substantive enumerated powers. If Congress has that power, then it is probably under the power to raise and support armies and make rules for the armies in article I, section 8. But it does not come from the appropriations clause.

Let me illustrate this by another example. Suppose in the early days of the Republic all we could afford was one employee in the State Depart-



ment, the Secretary of State, and there are three countries with which we are conducting negotiations. Congress, appropriating money for the Secretary of State's operations, says, "For negotiations with France—\$50,000; for negotiations with the United Kingdom—\$1.00; and for negotiations with Spain—zero." Under each of those line items it says that these funds can only be spent for this activity. Now Congress may have legitimate reasons for doing this. They may feel relations with France are a higher priority than relations with the United Kingdom or Spain. They might want to make sure there are sufficient resources to handle the delicate relations with France, and there is always someone available to answer the mail from Paris. Because Spain is not a high priority, we can save money in that area by simply providing a zero amount. All the Secretary can do, except for one dollar of activity, is handle relations with France. Congress may have good or bad policy reasons for doing this. It may be that the appropriations clause does not empower Congress to segment the object of negotiating treaties into three separate and different subsets and then selectively fund them. The appropriations clause means that the only way the Secretary of State can get money is by an act of Congress. But the appropriations clause does not provide any power to define the President's treaty-making powers under the Constitution. If Congress has that power, it has to come out of its enumerated powers—principally article I, section 8. I would not think there is such an enumerated power.

The choices that Congress effectively makes when it attempts to categorize all the different permutations of Presidential treaty-making activity and then selectively fund them—those decisions: "How important are our relations to France?"—are decisions which the Constitution vests in the President. Under this approach, when we hear discussions about Congress' weighty role in various areas of shared power, such as the foreign relations power, and Congress adverts to "the power of the purse," it does not make sense. Congress still has to point to a substantive power. The power of the purse under this approach is only procedural.

That is not to say that Congress does not have substantial power to allocate resources. There is a lot of power under article I, section 8. Congress can dictate real results in the real world. Congress may even, in carrying out its enumerated powers, define the output it wants the government to produce in the way of goods or services. It can do so with great specificity. It can say, "We want a post office in Walla Walla, Washington. And we want to spend a million dollars on that post of-

face.” The reason Congress can direct that is not because of the appropriations clause; the reason is because Congress has the specific power to provide for post offices. Perhaps the reason it can say, “I do not care if you can build it for \$900,000; I want you to build it for a million,” lies in the commerce clause. It wants to pump a million dollars into Washington State.

The logic of this approach tends to lead to the conclusion that when Congress appropriates money for the constitutional activities of the President or the judiciary—in the President’s case, it includes the power to execute the laws and the power to supervise and manage the executive branch—it ultimately only has the power to provide a lump sum for those constitutional activities.

Let me just close by suggesting a metaphor: the difference between a master-servant relationship and the independent contractor. Did the framers really believe that the appropriations clause transformed the relationship between Congress and the other coordinate branches into a relationship of master-servant, that the congressional master directs the activities of the Presidential or judicial servant simply because the money passes from hand-to-hand? In both kinds of relationships, Party One gives money to Party Two to get results, and Party One specifies the results. In one relationship, it is an employment contract, and Party One can control every jot and tittle of what that Party Two does, because the money passes hands within the employment relationship. Ultimate responsibility lies only with Party One. In the independent contractor model, Party One also gives the independent contractor the money to produce results, but the independent contractor is ultimately responsible for producing those results. There are limits on the extent to which Party One may direct and control the activities of Party Two. And Party Two is separately responsible for producing results, as the President is separately responsible to the American people under the Constitution.

## LOUIS FISHER\*

I will start with a very familiar executive-legislative clash over appropriations. It is one you should have no problem identifying. The Chief Executive wants to pursue certain objectives, but is denied funds by the legislative body. To circumvent the legislature, the Chief Executive turns to foreign governments and private citizens for financial contributions. What conflict are you thinking of? President Reagan wanting to assist the Contras, being blocked by the Boland Amendment, and then going to Saudi Arabia and other sources for financial assistance?

The example I have in mind is much earlier. It takes place in the 1600s, and leads to civil war in England and a loss by Charles I of two assets: his office and his head.<sup>6</sup> Some historians say the latter was not much of an asset. The framers, being good historians, were aware of the danger of placing in one branch the power to go to war and the power to fund it. Although they did not adopt a separation of powers in a narrow, pure sense, they did very much provide for separation of the purse and the sword. If the framers feared one threat to individual liberties, it would be the union of the sword and the purse. We are familiar in the Constitution with the different parts of the power of the purse granted to Congress: the power over appropriations, to raise revenues, to borrow money, coin money, and regulate the value thereof.<sup>7</sup>

The framers provided not so much for separation of powers, but for overlapping, for checks and balances. After the draft constitution came out of Philadelphia in 1787, some states and some delegates were very alarmed by the mixing of the branches and powers. Three states asked Congress to add to the Constitution an amendment on separation of powers. Seventeen amendments were considered; twelve went out to the states, and of course ten were ratified for the Bill of Rights.

One of the amendments that never got out of Congress, because it lacked merit, was the separation of power amendment, which was taken from the Constitution of Massachusetts. It basically said that a legislative body shall never exercise executive and judicial power; the President shall never exercise legislative and judicial power; and the Court shall

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6. P. EINZIG, *THE CONTROL OF THE PURSE* 57-62, 100-06 (1959). For further details on the spending power, see Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758 (1989).

7. U.S. CONST. art. I, § 9, cl. 7 and art. I, § 8.

never exercise legislative and executive power.<sup>8</sup> The framers knew that that kind of crisp separation, which comes fairly close to what Montesquieu had in mind, was not acceptable from their own experiences. They knew that pure separation was not a device to protect liberty; instead, it jeopardized liberty.<sup>9</sup> To make government workable and to permit the branches to protect their prerogatives, there had to be a power of self-defense. That requires overlapping, not separation.

Peter Strauss very clearly pointed out one of the anomalies in the Constitution. The framers wanted the President to have unity and responsibility. That is very, very important. But the Constitution also gives to Congress the power to create the executive branch, to create the departments and the agencies, and make them creatures of Congress. What you have is the capacity of Congress, if it wants to, to place certain powers in executive officials who are not controlled by the President. The framers knew that could be a result. You may object to it on policy grounds, but it derives from the necessary and proper clause<sup>10</sup> as a potential power of Congress.

Early in the nineteenth century, by the 1820s, we started to get opinions from the Attorney General in which the President asked: "Is it okay if I go into certain departments or certain agencies and reverse what an agent has decided about a claim or pension? May I do that?" Consistently, from the 1820s on, the Attorney General would tell the President, "No, you have no legal or constitutional right to interfere with an executive judgment placed by Congress in a particular official. Not only do you have no legal or constitutional right, it is politically imprudent to involve yourself in such matters. You have no business doing that; you have other, much more important responsibilities, such as Commander-in-Chief."<sup>11</sup>

In 1789, in the great debate in the House of Representatives on the removal power, James Madison spoke very, very strongly and eloquently

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8. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 174-75, 183, 199 (1957); I *ANNALS OF CONG.* 453-54 (D. Appleton & Co. June 8, 1789) and 789-90 (Aug. 18, 1789); I *U.S. SENATE, JOURNALS*, 1789-94, 64, 73-74 (1820).

9. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 176-211 (1967); J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 396 (5th ed. 1905).

10. U.S. CONST. art. I, § 8, cl. 18.

11. *E.g.*, 1 Op. Att'y Gen. 624 (1823); 1 Op. Att'y Gen. 636 (1824); 1 Op. Att'y Gen. 678 (1824); 1 Op. Att'y Gen. 705 (1825); 2 Op. Att'y Gen. 480 (1831); 2 Op. Att'y Gen. 507 (1832); 4 Op. Att'y Gen. 515 (1846). See L. FISHER, *AMERICAN CONSTITUTIONAL LAW* 222-23, 251-53 (1990).

about the need to make the President personally accountable. To protect that value, the President had to have the power to remove executive officials.<sup>12</sup> But Madison, understanding what had happened in the Continental Congress, recognized that there might be some officials in the executive branch—the person he identified was the Comptroller in the Treasury Department—who required independence from the President. Although the Comptroller was an executive official, Madison said he exercised quasi-judicial powers and should not serve at the pleasure of the President.<sup>13</sup> So you see from the start there has been a tension: on the one hand, wanting the President to have unity and responsibility, and on the other hand, wanting a certain amount of independence for some executive officials. Those values are balanced by Congress through the statutory process.

In contrast to the uncertain separation between executive and legislative powers and branches, the separation between the purse and the sword is quite crisp. In *Federalist No. 69*, Alexander Hamilton argued that the American President was far less threatening than the King of England. Hamilton explained that the power of the King “extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies.”<sup>14</sup> The Constitution, as Hamilton pointed out, gave those powers expressly to Congress. Jefferson praised the transfer of the war power “from the executive to the legislative body, from those who are to spend to those who are to pay.”<sup>15</sup> Madison warned against concentrating in the Commander-in-Chief the power to go to war and to fund it:

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges of whether *a war ought* to be *commenced*, *continued*, or *concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.<sup>16</sup>

At the Philadelphia convention in 1787, George Mason told his colleagues that the “purse & the sword ought never to get into the same hands, whether legislative or executive.”<sup>17</sup>

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12. L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 61-63 (1985).

13. *Id.* at 66.

14. THE FEDERALIST NO. 69, at 465 (A. Hamilton) (J. Cooke ed. 1961).

15. 5 THE WRITINGS OF THOMAS JEFFERSON 123 (P. Ford ed. 1895).

16. 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed. 1906).

17. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139-40 (M. Farrand ed. 1937).

Bill Barr has pointed, appropriately, to a number of restrictions on the appropriations power. It can be abused, and has been abused. Congress cannot use an appropriations bill, as it once tried to do, to prohibit certain executive officials from receiving their salaries; that was a bill of attainder and was struck down by the Supreme Court.<sup>18</sup> Congress cannot use an appropriations bill to create a national church.<sup>19</sup> It cannot use the funding power to interfere with the President's pardon power,<sup>20</sup> nor is it permissible under the Constitution to diminish the salaries of the President or federal judges.<sup>21</sup> There are many restrictions on what Congress may do. My remarks are aimed particularly at the dangers of a President's wanting to conduct military operations as Commander-in-Chief, being denied funds, and attempting to carry out operations by going to sources outside of Congress. This leads us to the Boland Amendment.

You can object to the Boland Amendment, if you like, on policy grounds. However, I think the Boland Amendment was a legitimate constitutional constraint on the President. If the executive branch felt it was not legitimate, not constitutional, then it had several obligations to maintain accountability. One was to warn Congress that if you pass the Boland Amendment—I am talking particularly about the October 1984 version, which stayed in effect until October 1986—I will veto it. That is generally a sufficient threat. Because it is so difficult for Congress to override a veto, it will often delete a provision that is objectionable to the President. If Congress took the dare and kept the Boland Amendment in, then the duty of the President was to veto the bill.

You might say: "Well, he cannot veto the bill because the Amendment is only a small part of a massive continuing resolution." Well, he can. Reagan vetoed omnibus bills, including appropriations bills, supplemental bills, and continuing resolutions. The advantage in such a situation is clearly with the President. Generally, Congress will be unable to override a veto of an omnibus bill.

Finally, if the President decides to let the bill become law, he could, in his signing statement, say, "I am signing this bill into law, but I want to indicate that part of it, the Boland Amendment, is unconstitutional and interferes with my executive duties." That was not done either. So no-

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

19. *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968).

20. *Hart v. United States*, 118 U.S. 62 (1886); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

21. U.S. CONST. art. II, § 1, cl. 7 and art. III, § 1; *United States v. Will*, 449 U.S. 200 (1980).

where from the executive branch was there any suggestion of unconstitutionality about the Boland Amendment. There was never a word from the White House, the Justice Department, the Attorney General or the Office of Legal Counsel that the Boland Amendment was unconstitutional.

I think if President Reagan had defied the Boland Amendment by seeking financial or other assistance from foreign governments or private individuals, at a minimum this would have put the United States in a position of ridicule. The President would basically say: "I have some foreign policy objectives. Congress will not give me the money. I have to go out with a tin cup and get whatever I can from whatever nation is willing to chip in." You remember that part of the implementation of United States foreign policy in Central America depended on a \$10 million contribution from the Sultan of Brunei.

Last night, Richard Epstein was trying to figure out what might be a low point in government. Here is my candidate. Congress, in an ill-advised statute passed in August 1985, gave the State Department authority to solicit humanitarian assistance for the Contras.<sup>22</sup> It was on the basis of that statutory authority that someone using the pseudonym "Mr. Kenilworth" (actually assistant Secretary of State Elliott Abrams) met in a park in London to solicit a contribution from Brunei.<sup>23</sup> This is the sorry way we conducted foreign policy. Other than the statutory source for Brunei, had the President decided to circumvent the restriction in Boland, I think he would have committed an impeachable offense. He would have taken a step, the most ominous step of all, in exercising both the power of the sword and the power of the purse.

The dispute in Iran-Contra leads to the whole question of quid pro quo, which some people call leveraging: namely, for the executive branch to tell foreign governments, such as Saudi Arabia, "Please give us money for the Contras, and you will get your arms sales in return." This is an open invitation to corruption in foreign and economic assistance.

Congress has attempted to place some restrictions on that practice. I think what we have seen the last couple of years is a fair amount of

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22. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105(b)(2), 99 Stat. 1002, 1003 (1985).

23. Iran-Contra Affair, H.R. REP. NO. 433 and S. REP. NO. 216, 100th Cong., 1st Sess. 71, 148-49 (1987); *Iran-Contra Investigation, Joint Hearings before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran* (Vol. 5), 100th Cong., 1st Sess. 48-49 (1987).

cooperation and a good understanding by President Bush that there is a legitimate principle at stake. This past year, 1989, language was added to the Foreign Assistance Appropriations Act to restrict quid pro quos. The bill was vetoed by President Bush, who had some concerns about how it would affect the ability of the President and executive officials to communicate with other nations.

But Bush's veto message said: "I am sensitive to the concerns that have prompted the adoption of Section 582."<sup>24</sup> After further negotiation, a compromise was reached. The public law signed November 21, 1989, the Foreign Operations Appropriations Bill, with an eye toward future Iran-Contras, provides:

None of the funds appropriated by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States person in exchange for that foreign government or person undertaking any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law.<sup>25</sup>

If Congress prohibits something by law, such as with Boland, there would be restrictions in the future about efforts to circumvent it.

There is other language in this new section 582, which Bush signed into law, to respect prerogatives he has in communicating with other nations. This is an effort by President Bush and Congress to identify constitutional principles and design language to reconcile the competing needs of both branches. In signing the bill, President Bush said he agreed with the view expressed during the House and Senate debates that the language in the statute would prohibit quid pro quo transactions, which he understood to mean "transactions in which U.S. funds are provided to a foreign nation on the express condition that the foreign nation provide specific assistance to a third country, which assistance U.S. officials are expressly prohibited from providing by U.S. law."<sup>26</sup>

Yesterday, Defense Secretary Cheney talked about the dispute over covert operations. Congress wanted to be notified within forty-eight hours of any covert action. I think another constructive compromise was hammered out between President Bush and Congress. There is a letter from President Bush, read yesterday by Secretary Cheney, saying that in "almost all instances" he would notify the Intelligence Committee ahead

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24. 25 WEEKLY COMP. PRES. DOC. 1784 (Nov. 19, 1989).

25. 103 Stat. 1251, § 582(a) (1989).

26. 25 WEEKLY COMP. PRES. DOC. 1811 (Nov. 21, 1989).



of time of any covert operation. The letter goes on to say that in "rare instances" he would provide notification "within a few days" after the operation took place. Then he said—which I think is very constructive—that there might be incidents in which he does not notify Congress, but in such instances he would be operating solely on his constitutional powers, not on statutory authority.<sup>27</sup>

Some executive officials had argued that the Intelligence Oversight Act of 1980 allowed the executive branch not to notify Congress at all, although the statute required the President to inform the Intelligence Committee "in a timely fashion" of covert operations.<sup>28</sup> Ten months went by before Congress learned about the shipment of arms to Iran, and then only after a newspaper in Lebanon revealed the operation. Was ten months, through a third party, timely fashion? As the letter from President Bush makes clear, such an interpretation of the statute is impermissible. The statute intends prior notice or notice within a few days. Anything beyond that, the President is operating under his reading of the Constitution of his prerogative powers.

I will close with what was talked about yesterday—the so-called CICA (Competition in Contracting Act) case that came up in 1984. President Reagan signed it and indicated that a provision giving the Comptroller General certain powers was unconstitutional.<sup>29</sup> You heard details yesterday that the Justice Department wrote a memo explaining why it was unconstitutional; Office of Management and Budget (OMB) Director Stockman told the agencies not to comply with that provision. Yesterday Ted Olson said that when the case reached the Supreme Court it was tossed out on procedural grounds. It is true that Congress had, that year, made a change in CICA, removing some of the objections raised by the Justice Department. I think it is also true, in addition to mootness, that the Justice Department was getting a beating in the Third and the Ninth Circuits. After two district court opinions upholding the statute, the Third Circuit affirmed.<sup>30</sup> Because of the Supreme Court's decision in *Bowsher v. Synar*,<sup>31</sup> the Third Circuit felt it had an obligation to rehear

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27. Letter from President George Bush to Hon. David L. Boren (Oct. 30, 1989).

28. Intelligence Authorization Act, Pub. L. No. 96-450, § 501(b), 94 Stat. 1975, 1982 (1980) (codified at 50 U.S.C. § 413(b) (1982)).

29. 2 PUB. PAPERS, 1984, at 1053.

30. *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986); *Ameron, Inc. v. United States Army Corps of Engineers*, 610 F. Supp. 750 (D.N.J. 1985); *Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962 (D.N.J. 1985).

31. 478 U.S. 714 (1986).

the case. It affirmed again.<sup>32</sup> The Ninth Circuit later, in a similar case, came up with even tougher language sustaining the statute, warning the President that he does not have the power to “item veto” particular provisions he regards as unconstitutional.<sup>33</sup>

I think that the Justice Department looked at those decisions and one other ingredient: *Morrison v. Olson*,<sup>34</sup> which repudiated the various strict, pure separation of powers doctrines from *Chadha*<sup>35</sup> to *Bowsher*. I believe the Justice Department felt it was going to lose overwhelmingly in the Supreme Court and asked the Court to dismiss the case, which it did.

One final note. Attorney General Meese said that at times there are things called “coercive aspects” in relations between Congress and the President. The picture I have in mind is Macduff, coming back for revenge and facing Macbeth with their swords drawn. They exchange a few words, but this is not the time for conversation. Soon there comes the phrase: “Lay on, Macduff!” The battle is about to start.

The stage of “Lay on, Macduff” was reached in the CICA case after the Administration said it was not going to implement part of the statute. The Justice Department indicated they would not implement it either, even if the district judge upheld the constitutionality of the statute. Congressman Jack Brooks—a very subtle guy, as you know—resorted to a “coercive aspect.” He was successful in having adopted, as an amendment to the authorization bill of the Justice Department, language that deleted all funds for the Office of Attorney General.<sup>36</sup> At that point, the Justice Department announced its intention to implement the disputed section in CICA.

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32. *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986).

33. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1121-24 (9th Cir. 1988).

34. 487 U.S. 654 (1988).

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

36. H. REP. NO. 113, 99th Cong., 1st Sess. 11 (1985).

**GEOFFREY MILLER\***

The scenario driving this session is the appropriations measure of the sort: "No money appropriated by this provision shall be used to log contacts with members of Congress;" a measure which, in other words, prohibits the executive branch from doing something which it firmly believes it has the constitutional power to do.

In the interest of efficiency, I have boiled my thoughts on the subject down to three propositions: First, Congress has no more authority to control the executive branch by means of the appropriations power than it would have to control the executive branch under other provisions of the Constitution. Second, aside from matters such as appointments and impeachments, whatever Congress can do under other provisions of the Constitution to control the executive branch, it can also do under the appropriations power. Third, Congress may not use the appropriations power to circumvent other provisions of the Constitution.

Take the first thesis: Congress has no more authority to control the executive branch through appropriations than it would under other provisions of the Constitution. The obvious difficulty with this thesis is that there *is* an appropriations provision in the Constitution. Congress is given the authority to appropriate funds, and at least implicitly, the President and the executive branch cannot spend funds in the absence of an appropriation. What does this mean if not that Congress has some type of permission to control the executive branch through the appropriations power that is broader than Congress' authority to control the executive branch under other provisions of the Constitution?

I suggest that the appropriations clause serves four functions that do not involve a roving commission to control the executive branch. First, the framers had to allocate the appropriations authority to someone in order to avoid the danger of constitutional controversy and breakdown of relations between the branches of government. One could easily see that if the power had not been exclusively granted to Congress, it is quite possible that the President would assert inherent authority to draw on general revenue from the Treasury in order to carry out the President's powers under the Constitution or a statute. The framers foresaw this danger and dealt with it by granting the appropriations power exclusively to Congress.

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Second, the appropriations power serves as a mechanism for regular congressional oversight of the executive branch. Because the executive cannot spend funds that have not been appropriated, executive branch officials have to go back to Congress repeatedly to get more money. In that context, I think it is appropriate for members of Congress to ask, "What did you do with the money we gave you before?" That is oversight. The framers wisely created a mechanism for such oversight in the appropriations clause.

Third, the appropriations clause gives Congress a power to control—at least roughly—the level of executive branch enforcement or execution of the law. Say, for example, Congress prohibits insider trading in the stock market. In fact, it has done so. Now Congress wants to control, in a rough sense, how vigorously the prohibition of insider trading is enforced. It can do so by appropriating more or less funds to the relevant agency for the purpose of enforcing the prohibition. It can then effectively set the thermostat that controls the heat, as it were, of executive prosecutorial zeal.

Fourth, and most important, the appropriations clause is, I believe, a tool for fiscal responsibility. How is the appropriations power used to accomplish fiscal responsibility? The clause requires Congress to review programs on a regular basis in order to see if they are working, to evaluate whether the level of funding is appropriate, and to compare funding for one program with that of other programs. It is no accident that the appropriations clause is in the same sentence of the Constitution as the statement of accounts clause, which requires regular publication of the government's fiscal books. Obviously, the latter clause is intended to produce fiscal responsibility. I think the appropriations clause was also so intended.

These are four good functions that the appropriations clause fills. Does the clause also provide Congress with a roving commission to control the actions of the executive branch? It does not. Such a roving commission would be entirely inconsistent with the scheme of the Constitution. We should never forget that article I of the Constitution begins with the statement: "All legislative Powers herein granted shall be vested in a Congress. . . ."<sup>37</sup> Compare that with article II: "The executive Power shall be vested in a President . . .,"<sup>38</sup> not "all executive pow-

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37. U.S. CONST. art. I, § 1.

38. U.S. CONST. art. II, § 1.

ers *herein granted* shall be vested in the President.” I think the language is significant, because it implies that the framers intended Congress to have *only* those powers set forth in article I of the Constitution and not other powers. The obvious reason for so limiting congressional power is the concern expressed by the framers and the authors of *The Federalist Papers* about congressional domination of the government. One way to control congressional overreaching is to narrowly limit and circumscribe the powers that Congress can exercise—only those in article I and not others.

A general appropriations authority to control the executive branch would circumvent, undermine, indeed vitiate that careful allocation, that laundry list of powers given to Congress. For this reason, the scheme of the Constitution does not permit an interpretation in which Congress can exercise a roving mandate under the appropriations clause.

There is a connection between this view of the appropriations power and the necessary and proper clause. Why is there a necessary and proper clause with respect to Congress, and not with respect to the executive branch? It is because the framers understood that Congress had only those authorities set forth explicitly in article I. Therefore, the framers were worried that the Constitution might be too restrictive and gave a little bit of an out in the necessary and proper clause. Such a device was not necessary for the executive branch, because the executive branch has a reservoir of inherent authority to take actions not specifically mentioned in the Constitution. The necessary and proper clause should be understood in that way: not as a massive grant of power to Congress, but as an attempt to prevent the possibility that the powers specified in article I would be read in an overly restrictive fashion.

I want to turn to the second part of my thesis, which is that Congress can use the appropriations power to control the executive branch to the same extent that it can control such actions through other provisions in the Constitution. All executive action involves the expenditure of time by some executive official. Time is compensated by salary. Salaries are paid pursuant to appropriated funds. Thus, as a general proposition, the appropriations power gives Congress the authority to control the executive branch—subject to the limitations I discuss elsewhere in this paper.

Finally, consider the third proposition, namely, that Congress may not use the appropriations power to circumvent other provisions of the Constitution. This is not a controversial position, but it may be worth cate-

gorizing the substantive limits on the appropriations power somewhat differently than has been done before. Four points are worth noting.

First, Congress cannot use an appropriations measure to *prohibit* the President from doing something that he or she is constitutionally *required* to do. For example, in the event that an administrative agency is found to have engaged in intentional discrimination in hiring on the basis of race, I believe the President and his or her subordinates would have an obligation to correct that situation. And if Congress, for some strange reason, were to pass an appropriations measure denying funds to remedy the situation, that statute would be unconstitutional. The President could take corrective action and could freely ignore the unconstitutional statute.

Second, Congress cannot use the appropriations power to *deny* the President the power to do something that the President has the constitutional discretion to do. For example, Congress passes an appropriations measure: "No funds shall be used for the purpose of pardoning or granting clemency to any individual in connection with crimes committed in aid of the Nicaraguan Contras." That is an unconstitutional intrusion on the pardon power, and the President does not have to follow the measure.

Third, Congress cannot use the appropriations power to *force* the executive branch to do something that it is constitutionally *prohibited* from doing. Congress cannot pass a statute appropriating funds for the construction of Presbyterian churches. The President does not have to carry out that appropriations measure if one is passed.

Finally, Congress cannot use the appropriations power to *require* the President to do something the President has the discretion, or an inherent authority, *not* to do. For example, if Congress passed a statute appropriating money for the purpose of the President signing legislation establishing federal funding for abortions, I do not think there is anybody who would say that such a statute would be constitutional.

These examples are pretty uncontroversial, and they illustrate the fact that the dispute here is not so much over the scope of the *appropriations power*, as over the scope of *inherent executive authority*. Most people would agree that the appropriations power cannot be used to circumvent or intrude on the President's inherent authority. The question is, what is the scope of that inherent authority? A few years ago, I had the privilege

of addressing the Federalist Society on the War Powers Resolution.<sup>39</sup> I suggested that the sixty day sunset provision in that statute was unconstitutional because it intruded on the President's inherent authority to commit troops to hostilities in foreign countries short of war. That sunset provision would be equally unconstitutional if framed as an appropriations measure. But its validity does not have to do with whether it is an appropriations measure or a substantive measure; it has to do with the scope of the President's inherent authority.

I conclude by reminding you of Madison's famous statement in *Federalist No. 48*: "[t]he legislative department is every where extending the sphere of its activity, and drawing all power to its impetuous vortex."<sup>40</sup> Madison understood that the legislature, while a magnificent and necessary institution, also poses the danger of accumulating too much power. I would ask, given that understanding of the dangers of legislative supremacy—an understanding still appropriate today—whether it is really sensible to think that the appropriations power gives Congress a roving mandate to control the executive branch in ways that would be unavailable to Congress under other provisions of the Constitution? I think not.

#### KATE STITH\*

We have been told that the prevailing interpretation of the appropriations clause<sup>41</sup> on Capitol Hill is that "it gives Congress an omnipresent veto over every conceivable action of the President through the ability to withhold funding."<sup>42</sup> I do not know who has this view. To recognize that Congress has exclusive control over the purse-strings of the federal

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39. See *The President's Powers as Commander-in-Chief versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 31 (1988).

40. THE FEDERALIST NO. 48, at 250-51 (J. Madison) (G. Wills ed., 1982).

\* © by Kate Stith 1990. Professor of Law, Yale Law School. Slightly revised version of remarks delivered at the Federalist Society Conference.

41. U.S. CONST. art. I, § 9, cl. 7: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."

42. Sidak, *Spending Riders Would Unhobble the Executive*, Wall St. J., Nov. 2, 1989, at A18, col. 3 [hereinafter, Sidak, *Spending Riders*]. Mr. Sidak's argument that the appropriations clause and other constitutional provisions do not vest Congress with exclusive control over the fisc is presented in Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 [hereinafter, "Sidak, *President's Power*"]; that article is presented as a response to my earlier article, Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

government<sup>43</sup> is a far cry from concluding that Congress may attach any conceivable condition or limitation on federal funding.<sup>44</sup> I, for one, agree that when the Constitution confers the President exclusive, enumerated authority, Congress may not assume that authority as its own by the simple expedient of cutting off or conditioning appropriations.<sup>45</sup>

I have heard little disagreement this morning about the reach of the Constitution's appropriations clause. Rather, we seem to disagree about the reach of the necessary and proper clause. Stated another way, we disagree on the scope of the Presidential power on which the legislature cannot intrude, by appropriations limitations or any other means.

We also disagree, I think, on the appropriate fora and mechanisms for determining which Presidential powers are subject to legislative regulation. I submit that the courts play a critical role here.

Finally, we disagree on how important Congress' appropriations power is. I believe Congress' exercise of its power over the purse is essential to defining the separation of powers, not because the power of the purse greatly expands legislative power, but because it is the clearest, purest assertion of legislative power.

Congress' power to appropriate originates, not in the appropriations

43. See Stith, *supra* note 42, at 1348-52 (*Congress has exclusive constitutional power to authorize expenditure of federal funds*); H.R. REP. NO. 433, S. REP. 216, 100th Cong., 1st Sess. 412 (1987) ("*Iran-Contra Report*") ("The appropriations clause was intended to give Congress exclusive control of funds spent by the Government, and . . . an absolute check on Executive action requiring expenditure of funds."); Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 761-65 (1989). Mr. Sidak apparently is referring to these sources in purporting to characterize the "prevailing" congressional understanding of the power of the purse. See Sidak, *President's Power*, *supra* note 42, at 1168-69. The understanding that Congress has exclusive control over the purse strings of the federal government is indeed widely shared. Consider, for example, the statement of then-Secretary of State George Shultz at the Iran-Contra hearings: "You cannot spend funds that the Congress doesn't either authorize you to obtain or appropriate. That is what the Constitution says, and we have to stick to it." *Iran-Contra Report*, *supra* at 412; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 96 (1972); Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284, 297 (1989) ("The significance of Congress' power of the purse should not be misconceived. Under the Constitution the president cannot spend a dollar unless Congress has authorized and appropriated the money.").

44. See *Iran-Contra Report*, *supra* note 43, at 406; L. Henkin, *supra* note 43, at 113 (discussing unconstitutional conditions on appropriations); Henkin, *supra* note 43, at 297 ("But where the President has independent constitutional authority to act, Congress, I believe, is constitutionally bound to implement his actions, notably by appropriating the necessary funds . . ."); Fisher, *supra* note 43, at 762 ("The congressional power of the purse is not unlimited. Congress cannot use appropriations bills to enact bills of attainder, to restrict the President's pardon power or to establish a national religion.").

45. See Stith, *supra* note 42, at 1351 ("Although Congress holds the purse-strings, it may not exercise this power in a manner inconsistent with the direct commands of the Constitution.").



clause, but in the necessary and proper clause of article I, section 8. The concept of “necessary and proper” legislation to carry out “all . . . Powers vested by this Constitution in the Government of the United States” includes the power to spend public funds in ways that do not transgress the Constitution. The appropriations clause then imposes a limitation *on the executive branch*: The President and other offices of the federal government may not spend money without legislative permission.<sup>46</sup>

If we do not agree that the appropriations clause prohibits unauthorized augmentation of appropriations, then I do not know where our conversation can begin. The appropriations requirement would be superfluous if the executive branch could avoid appropriations limitations by transferring funds among appropriations accounts, by selling government assets and services, or by independently financing executive activities with private funds.<sup>47</sup>

The power to appropriate rests, therefore, *exclusively* in Congress. But it is *not a plenary* power—Congress’ exclusive power of appropriation does not trump the rest of the Constitution.<sup>48</sup> For instance, the first amendment imposes a limitation upon the exercise of all government powers,<sup>49</sup> including Congress’ power under the necessary and proper clause to appropriate public funds. Similarly, the legislative veto violates separation of powers principles, whether the veto is explicit as in *Chadha*<sup>50</sup> or is accomplished indirectly, by conditioning appropriations.<sup>51</sup> Nor may Congress use funding legislation to deny or direct the

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46. Because “no Money” may be withdrawn from the treasury without legislative appropriations, the executive branch cannot spend tax funds or other federal government resources without advance legislative permission to do so. Elsewhere I derive two principles which delineate the appropriation power. First, the Principle of the Public Fisc: All funds belonging to the United States—received from whatever source, however obtained, and in whatever form—are public monies subject to public control and accountability. Second, the Principle of Appropriations Control: All expenditures from the public fisc must be made pursuant to constitutional “Appropriations made by law.” *See id.* at 1356-60.

47. Of course, the idea of independent financing with private funds is attractive in an age of chronic deficits. I once gave a talk (at Valparaiso Law School, in October 1987) about executive solicitation of funds which I entitled “Government Spending Without Taxes or Deficits.”

48. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303 (1946) (Congress may not use appropriation power to effect a bill of attainder, in contravention of United States Constitution Art. I, § 9, cl. 3); *United States v. Will*, 449 U.S. 200 (1980).

49. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (Congress may not exercise its legislative authority in a manner that offends other provisions of the Constitution).

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

51. *See, e.g.*, Pub. L. No. 101-136 § 610, 103 Stat. 783, 819 (1989) (appropriation bill providing that “None of the funds made available pursuant to the provisions of this Act shall be used to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolu-

pardon power<sup>52</sup> or any other exclusive constitutional power of the President.<sup>53</sup>

But what *are* these areas of exclusive Presidential power? I believe *this* is where the disagreement on this panel begins. In several areas where Congress has sought to affect executive behavior through limitations or conditions on appropriations, it is claimed that Congress has exceeded its power of the purse. But the real issue is not the scope or reach of Congress' power of the purse; the real issue is the scope and reach of the necessary and proper clause.

Among the questions we must face are these: Does the President have sole constitutional authority to decide what arguments "the United States" shall make to the Supreme Court?<sup>54</sup> Does the President have sole constitutional authority to determine the process of inter-agency review preceding promulgation of regulations?<sup>55</sup> Does the President have sole constitutional authority to decide whether to stop all U.S. aid to a particular government or insurgency?<sup>56</sup> In my view, in each of these areas the

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tion of disapproval duly adopted in accordance with the applicable law of the United States."'). This mischievous provision appears to provide for funding cutoff in the event of a two-house legislative veto. See Sidak, *President's Power*, *supra* note 42, at 1213-14.

52. See U.S. CONST., art. II, § 2, cl. 1.; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871).

53. For instance, the President's exclusive power to receive ambassadors, U.S. CONST., art. II, § 3.

54. See Pub. L. No. 98-166, 97 Stat. 1071, 1102 (1983) (provision in appropriations act for, *inter alia*, the Department of Justice, proscribing use of funds for "any activity, the purpose of which is to overturn or alter the *per se* prohibition on resale price maintenance. . ."). The Reagan Administration narrowly interpreted this provision to proscribe "attempts to seek a reversal of the [judicial] holdings of a certain line of previously decided cases" and expressed the view that even as thus narrowly interpreted the provision might be unconstitutional. Statement on Signing H.R. 3222 Into Law, 19 WEEKLY COMP. PRES. DOC. 1619 (Nov. 28, 1983).

55. See, *e.g.*, Pub. L. No. 101-136, 103 Stat. 783, 792-93 (1989) (providing that "none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders. . ." pursuant to Executive Order 12,291 (1981)). The executive order in question provides that OMB shall undertake cost-benefit analysis of a variety of proposed administrative regulations. Gregory Sidak argues that such legislative interference with OMB unconstitutionally limits the President's constitutional authority under the "recommendation clause," U.S. CONST. art. II, § 3. See Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2122 (1989). Yet the appropriation rider at issue does not purport to limit the President's authority to propose legislation, nor even to undertake analysis in anticipation of legislative recommendations. Rather, in providing that agricultural marketing orders should not be subjected to cost-benefit analysis by OMB, Congress is structuring the manner in which particular agricultural legislation is implemented.

56. I refer here, of course, to the so-called "Boland" Amendments, in particular, to Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984) ("Boland II"), which prohibited the CIA, the Department of Defense "or any other agency or entity of the United States involved in intelligence activities"

Executive has important constitutional powers, but pursuant to constitutional grants of legislative power,<sup>57</sup> Congress does too. Most of the disagreements discussed at this conference involve the President's prerogatives in foreign affairs, not an area of my immediate concern. Hence, I will leave it to others to pursue these issues.

Let me instead discuss two arguable difficulties with the concept of an appropriations power that is at once *exclusive* but not *plenary*. One difficulty with this understanding of Congress' power of the purse is that it permits constitutional deadlock. I have asserted that only Congress *may* appropriate. But I also recognize that sometimes Congress *must* appropriate (or at least may not attach certain conditions to its appropriations).

What happens if Congress imposes a spending limitation or condition that unconstitutionally interferes with an exclusive Presidential power? This is the separation-of-powers version of the hypothetical immovable object meeting an irresistible force. What "gives"—Congress' exclusive power over the purse, or the President's exclusive power in the area of dispute?

Gregory Sidak has proposed that there is a Presidential power of "excision" over unconstitutional appropriations provisions.<sup>58</sup> This is a fancy term that appears to mean the President should ignore a spending limitation he finds constitutionally offensive. The idea is that the President openly and clearly proclaims to Congress and the American people his intention to ignore or violate the ostensibly unconstitutional statutory provision: "This spending condition is unconstitutional, and therefore, I am going to ignore it." Even under this theory, unarticulated or secret

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from spending "funds available" in support of the armed Nicaraguan opposition to the Sandinista regime. The theory of Congress' power of the purse set forth in Stith, *supra* note 42, only once in the text (with accompanying footnotes) referred to the Boland Amendment controversy. *Id.* at 1360-61 and nn. 80, 81, 86, 89. This brief discussion was critical of Boland II for its ambiguity and even left open the possibility that under some interpretations, Boland II might be unconstitutional. *See id.* at 1362, n.89. I was thus quite surprised to learn that my article had "repeatedly refer[red] . . . [to] the private funding of the Contras," that the Iran-Contra controversy was the "starting point" for my theory, and (alas) that my theory of Congress' preeminence over the power of the purse might be "result-oriented." *See Sidak, President's Power, supra* note 42, at 1223-24.

57. In addition to the powers provided in article I, see also U.S. CONST. art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States."

58. *See Sidak, Spending Riders, supra* note 42. This theory is presented at greater length in Sidak & Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 85 Nw. U.L. REV. 701 (1990).

excisions could have no pretense of lawfulness.<sup>59</sup>

I can see the short-term advantage of this idea to the Executive. As Mr. Sidak tells us, the President cannot lose. If the dispute gets to the courts, the courts may rule against the President—but in that event the President is in no worse a position than he would have been if he had originally abided by the spending. And maybe, we are informed, doctrines of judicial restraint will lead the courts to avoid deciding the conflict between the two political branches of government.<sup>60</sup>

There is a great disadvantage to this idea. The President can and should resist legislative encroachment in areas of exclusive executive authority. But his initial response should not be to create a constitutional crisis by ignoring or violating statutory law. The President's *first* weapon against unconstitutional legislation should be the major legislative weapon in his constitutional arsenal, his veto.

And when that preferred weapon is just too expensive or too cumbersome—because, for instance, the offending provisions are buried in omnibus spending bills—the President's *second* response should be recourse to the courts.<sup>61</sup> If the President believes that a funding provision is unconstitutional, why should he not simply seek declaratory and injunctive relief? There may arise the extraordinary case in which the President believes that fealty to fundamental constitutional values requires immediate spending in violation of conditions on appropriations. But even in these extraordinary cases, the President can and should quickly seek judicial resolution of the underlying constitutional dispute. What kind of message would a President be sending to the country by violating the terms of a statute and simultaneously arguing that no court may review his actions?

To be sure, the courts have increasingly invoked doctrines of nonjusticiability in refusing to review challenges to Presidential action, including allegations that the executive branch has failed to abide by funding limi-

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59. *Cf. Iran-Contra Report*, *supra* note 43, at 406 (accusing the Reagan Administration of waiting until years after the President had signed legislation containing the "Boland II" provision to assert that the provision exceeded Congress' authority and thus could be disregarded).

60. *See Sidak, Spending Riders*, *supra* note 42.

61. *Cf. Presidential Statement on Signing H.J. Res. 372 Into Law*, 21 WEEKLY COMP. PRES. DOC. 1490-91 (Dec. 12, 1985) (in signing Gramm-Rudman-Hollings balanced budget legislation, President Reagan noted "serious constitutional questions" raised by, *inter alia*, its assignment of role to Comptroller General and expressed his expectation that these "constitutional problems will be promptly resolved" in court).

tations.<sup>62</sup> When members of Congress or others *have* been able to bring the President to court, the courts have seldom held that the President acted extra-constitutionally. Instead, the courts have tended to find implicit legislative delegation or approval or acquiescence in the disputed Presidential action.<sup>63</sup> Especially when the President's disputed actions involve national security or foreign affairs, there is an understandable reluctance to hold that the President violated the law.<sup>64</sup>

The reluctance of the courts to subject some species of executive action to thorough constitutional review is hardly justification for the President paying heed only to his own vision of the Constitution, waiting for someone to stop him, knowing that probably no one can. Indeed, it is arguably an invitation to the Executive to place more, rather than less, faith in the courts. Judicial deference to the President in the area of foreign affairs means that the President bears a special responsibility to avoid a constitutional crisis—a special responsibility *not* to spend in violation of a statute, with only his own interpretation of the Constitution as authority. When a purportedly immovable object (an offensive funding condition) is in the President's path, he should *not* respond with irresistible force (acting in violation of the funding statute). Whenever possible, the President should appeal to the courts to resolve this constitutional impasse.

Let me acknowledge one other difficulty with the idea of an exclusive, but limited, appropriations power. If I am right that Congress' power of the purse is not itself a source of legislative power, then why all the limitations on appropriations? Why, especially in recent years, does Congress so often resort to conditions on appropriations instead of direct prohibitions or prescriptions as a way of limiting executive action?

The partial answer is that as long as the President does not have line item veto power, appropriation limitations in massive spending bills, or even in critical authorization statutes, may be nearly veto-proof.

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62. For a comprehensive discussion of Supreme Court and lower court decisions in the area of foreign affairs that invoke nonjusticiability doctrines (including ripeness, mootness, and standing) in response to challenges to Presidential authority, see H. KOH, *A POWER SHARED: THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 137-148 (1990).

63. *See, e.g.*, *Japan Whaling Ass'n. v. American Cetacean Soc'y*, 478 U.S. 221 (1986); *Department of Navy v. Egan*, 484 U.S. 518 (1988); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Regan v. Wald*, 468 U.S. 222 (1984).

64. *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996 (1979) (holding that challenge to Presidential treaty-making is nonjusticiable); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding seizure of property pursuant to Presidential hostage-release agreement).

But there is more to it than legislative politics. Money is the essential oil of government. If you cannot spend money on it, you cannot do it. Hence, when Congress withholds money, neither the President nor the courts can readily claim legislative acquiescence, implicit approval, a lack of preemption, or effective delegation of authority. Congress uses appropriations limitations because they are red lights. In most instances, it is hard to say you did not see them or that you thought they were green.

I readily agree that on occasion appropriation conditions are less than clear and determinative. The Boland Amendments, I submit, were unclear,<sup>65</sup> and their ambiguity is at least partly to blame for the ensuing constitutional crisis.

Unlike the vulnerable “partisans of congressional power”<sup>66</sup> to whom Gregory Sidak has responded, I do not believe that Congress is the only interpreter of its power of the purse. There are constitutional limits on appropriations conditions, and the President has an important constitutional role in ensuring that these limits are not transgressed.

But there are not *many* areas in which the President has exclusive power under our constitution; if there were—if Congress often had to defer to the President on how and where to spend money—it would make little sense to place the power of the purse, as the Constitution does, in the legislative branch.

Finally, just as Congress is not the sole interpreter of its own powers, the President is not the sole interpreter of his powers. Nor should he try to be.

## QUESTIONS AND ANSWERS

**GREG SIDAK:**\* I would like to ask a two-part question. I would like to address the first part to Professor Stith and Dr. Fisher, and the second part to Professor Miller and Assistant Attorney General Barr.

It has been asserted that no one is claiming that the appropriations power is an omnipresent legislative veto on the President. I do not agree, and I quote from the Iran-Contra Report, to which, I might add, Dr. Fisher made a contribution to drafting: “The appropriations clause was

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65. See Stith, *supra* note 42, at 1361 n.86.

66. See Sidak, *Spending Riders*, *supra* note 42.

\* Covington & Burling, Washington, D.C., A.B. 1977, A.M., J.D. 1981, Stanford University.

intended to give Congress exclusive control of funds spent by the Government, and to give the democratically elected representatives of the people an absolute check on executive action requiring expenditure of funds."<sup>67</sup> Now, I consider that language to be fairly clear—that this is a very sweeping assertion of power by Congress.

With that premise, let me ask: If we are talking about a sweeping grant of power to Congress—one, as Dr. Fisher suggests, that could even lead to the impeachment of the President if it were breached—should we not be able to find more substantial support in the text of the Constitution, the debates of the Convention, and the history of the period during which the Constitution was drafted? In particular, I am troubled by Dr. Fisher's reliance and emphasis on George Mason's comment about the purse and sword, because if you look at the sentence immediately preceding that one in the records of the Constitutional Convention, you will find that Mason was actually warning about usurpations by the Legislature on the Executive.<sup>68</sup> So usurpation in this respect is certainly a two-way street. I would like, therefore, to ask Professor Stith and Dr. Fisher to tell us how their interpretation of the appropriations clause can be grounded in the text, history, and structure of the Constitution, so that it is a theory based on something more than just contemporary political thought.

Now for the question that I would like to direct to the other two panelists: If the appropriations clause is not an omnipresent legislative veto on the President—if it is something more like what Professor Miller has suggested, a duty on the part of Congress to engage in fiscal accountability and responsibility—then what happens when Congress refuses to appropriate money for the execution of an article II duty or the exercise of a prerogative textually assigned to the President? May the President spend in the absence of an appropriation, and if so, how much? What is the limiting principle on the President's ability to spend in the absence of appropriations?

**FISHER:** My remarks here and also in my writings are not based merely on contemporary political thought. They are based on what the

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67. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 412 (1987).

68. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 81 (1840) (1966 ed.). See also Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1168-70.

framers said at the time, and what the framers understood about the history before them. I wrote a book in 1975 called *Presidential Spending Power*. It has been an interest of mine for a long time. I had never heard at any time the claim that was made in Iran-Contra, namely, that if Congress cuts off funds, no sweat; we can go off to foreign governments and private citizens and get whatever we want to accomplish Presidential objectives. I have never even heard of such a theory before, because it is a contemporary view, I think, an appalling view, one that would have shocked the framers. And I think they were very firm at the time of Madison that you could not allow the Commander-in-Chief both to direct the armed forces and fund them. That was totally obvious. It was very, very clear.

As for George Mason's warning that Congress might usurp executive power, that is true, and it was a concern of many framers. But there is nothing incompatible between Mason's warning and his insistence that the purse and the sword be kept separate.

**STITH:** Let me assure you that if my theory were based on contemporary political thought, or indeed on my own predilections in the recent areas of dispute, it would not have recognized Congress' exclusive power of the purse. As I make very clear in the *Yale Law Journal* article, Congress has hardly exercised that power with care and foresight. Yet, it is abundantly clear that the history, structure, and wording of the Constitution place the power of the purse in the legislative branch alone.

Hence I found the second part of Mr. Sidak's question more interesting: what does the President do when Congress fails to appropriate where it constitutionally must? What I have suggested today is that he should either veto or seek resolution in the courts. Except in some dire circumstance I cannot now foresee, he should *not*, as you propose, spend without appropriations and then argue that the courts should not review his action.

**MILLER:** I think, in answer to your question, you do have to go ahead and spend. The money is there if you take it. The President is constitutionally obligated to take it. I want to briefly express concern that the President not go too quickly to the courts because that would intrude the courts into the process of compromise and conciliation between Congress and the executive branch. The courts are necessary, but I think they are best reserved for situations when there is truly a constitutional breakdown between the two political branches of government.



**BARR:** I think there are two parts to the question. The real hard part is, what gives Congress the power to subdivide and selectively fund the spectrum of the President's constitutional powers, whatever they may be? We can argue all day about what is the President's constitutional power. But, once defined, what gives Congress the right to classify it, and then to restrict funds to specific classifications? Where does the power come from to say, "You can only spend this one million dollars on foreign relations, and cannot spend it on intelligence collection and on prosecuting criminals?" That is the real difficult question about the appropriations clause. The obvious restrictions and conditions are pretty easy to detect. But what gives Congress the power to put that kind of restriction on funds when you are talking about the President's constitutional powers.

Now the necessary and proper clause has been referred to, but I would suggest another reading of that clause: The clause empowers Congress to carry into execution the President's powers. Congress can create the Department of State because that carries the President's power into execution. But what is the source of the power to allocate only a set amount of money to the State Department and to restrict the money for that activity alone, prohibiting the President from using it to carry out some other constitutional power, say prosecuting criminals? That kind of restriction is not "necessary and proper" for carrying into execution the powers of the President of the United States. If that power is not under the necessary and proper clause, then Congress has to find some other source of power to impose such restrictions.

So there may be an argument that if the President finds no appropriated funds within a given category to conduct activity, but there is a lot of money sitting somewhere else in another category—and both categories are within his constitutional purview—he may be able to use those funds. There is an argument along those lines. The other part of the question really goes to the point made in Kate Stith's article. The argument is made that the appropriations clause really says, "Look, not only do we give you the money, and therefore, we can attach strings to it, i.e., the power to specify each object, in however great detail we want and restrict you to those categories, but you cannot get money anywhere else." It may be that the President cannot get money anywhere else. But the case has not been made for that here. That is not what the appropriations clause says.

The pivotal factor in the Constitution is that it gave to Congress the

power to tax—to coercively take money from the people. The appropriations clause makes sure the money taken from the people is going to be controlled by the conjunction of legislative and executive power that is involved in passing the law. But the appropriations clause does not say that the President cannot use other sources of funds. The President is not the King, and Congress is not the Parliament under the new order.

A case could be made that the President cannot go out and get money from other sources, but in my mind, it does not rest upon the appropriations clause. It seems to me someone might argue that the President cannot hold property except as property of the United States. And therefore, under Congress' power to control the disposition of property, it can require the President to put it into the Treasury, thus putting it under Congress' control. To me, that would be a better argument than trying to extract from the Constitution some general principle that only appropriated money can be spent.

**AHKIL AMAR:**\* My question is mainly for Professor Barr. It is indeed a perplexing set of issues that the panel has brought to our attention, and I am not sure that I got to the bottom of them. But I am struck, nevertheless, with the unanimity of the panel on the basic irrelevance of this topic to the issue before us: that whatever limitations there are on the spending power they really flow from other parts of the Constitution; that the appropriations clause is somewhat formal. It simply cross-references us to other parts of the Constitution. The necessary and proper clause also cross-references us to other parts of article I, section 8.

An analogy to the tenth amendment comes to mind. It specifies that there are certain things the federal government may not do, but to define those limitations, we must look beyond the tenth amendment to article I, section 8 and other provisions of the Constitution.

Given that unanimity goes to what Congress cannot do directly, it is extremely problematic for Congress to do something indirectly by the appropriations power. It seems to me, that the example about lump sum versus more itemized appropriations is a little problematic. I am not sure that conclusion follows from the premises on which everyone seems to agree. What your hypothetical assumes is that Congress is doing something that is independently unconstitutional because it violates individual rights.

Let us take the establishment clause. Congress can violate the estab-

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\* Professor, Yale Law School.

ishment clause through itemized funding that denies appropriations to Catholic hospitals. But the same thing could happen systematically if there was a lump sum fund, and the President refused to allocate the fair share of money to Catholic hospitals. So I do not think that the lump sum versus itemized issue really follows, in any way, from the premise that elsewhere in the Constitution the limits are to be found.

Let us now move away from individual rights, which perhaps symmetrically constrain the President and the Legislature to separation of powers limitations, both articles II and III, to limitations on what Congress might be able to do. We mentioned original jurisdiction. It is not as clear as, perhaps, you think that Congress has the direct power to limit original jurisdiction over controversies in which states shall be a party. Let us talk about foreign affairs. If we are going to mark carefully the appropriations clause, if we are going to say that there is no congressional oversight, it is not clear that there is a foreign affairs power as such in article II. There is power to receive ambassadors, but that is capable of different readings. It could have a purely ministerial reading.

Finally, let us take the third hypothetical you offered about Congress using the appropriations power to enforce laws. If there is a problem about repealing a law, is it not because there are certain kinds of laws, perhaps, that Congress cannot repeal because they are afraid of vested rights?

**BARR:** In a way, the question goes to the last answer I gave. Again, the central problem in thinking about the appropriations clause is this: Where does Congress get the power to subdivide activity and restrict funds when the President is acting under constitutional powers? We could argue all day about what is, or is not, within the President's constitutional power. And that is why I tried to use examples in which most people would say the President's power is clear—to negotiate treaties or to pardon—because otherwise we would cloud up the issue. And a lot of your question had to do with arguing what is or is not Presidential power.

The reason Congress frequently tries to control the execution of the law, rather than the content or rule of law, is because it is attempting to avoid responsibility. One of the reasons we have separation of powers is to prevent that.

**MEESE:** I think you will agree that the panelists have demonstrated that we have indeed an issue in which the tensions that were referred to

earlier today continue. I think we have had an excellent presentation of the parameters of the debate, and the various points of view regarding these particular clauses.

