THE CONSTITUTIONAL STATUS OF THE PRESIDENT'S IMPOUNDMENT OF NATIONAL SECURITY FUNDS

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INTRODUCTION

For a quarter century the constitutional status of the Executive branch's withholding of appropriated funds, a practice known as impoundment,[1] has been

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[1] There is no statutory definition of "impoundment." For purposes of this paper "impoundment," unless otherwise indicated by context, will be considered the non-routine withholding of funds by the Executive Branch for policy reasons; actions which are not authorized by Congress and which are justified by constitutional as well as statutory arguments. When "unauthorized impoundment" is used, the term "unauthorized" is used only for emphasis.

largely neglected by commentators. In the early 1970s, a fierce battle was waged between President Nixon and Congress over the extent to which the Executive branch could decline to spend appropriated funds, resulting in a torrent of scholarship about impoundment.[2] Since that time, however, the issue of impound-

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Because neither statutorily authorized nor routine impoundment, as authorized by the Congressional Budget and Impoundment Control Act of 1974 (ICA), has much bearing on the distribution of constitutional power between the branches, this paper's definition will not include the latter two forms of impoundment within its scope. In fact, a number of legal justifications have been advanced in favor of impoundment which do not involve the distribution of constitutional powers: 1) explicit statutory authority; 2) promotion of efficient management and savings; 3) reduction of inflation; 4) delegation of authority based on permissive statutory language in appropriation bills or previous legislation; and 5) reconciliation of competing statutory provisions.

This article's definition does not differ greatly from other definitions of impoundment. *See Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. Government Operations and the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary*, 93d Cong. 98 (1973) (quoting Deputy Attorney General Joseph Sneed who defined impoundment as "not spending money.") [hereinafter *1973 Hearings*]; 119 CONG. REC. 15221 (daily ed. May 10, 1973) (quoting Senator Ervin's statement regarding the anti-impoundment bill, S. 373, which defined impoundment as "any type of Executive action or inaction which effectively precludes or delays the obligation or expenditure of any part of authorized budget authority."); GENERAL ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 63 (3d ed. 1981) ("[a]ny action or inaction by an officer or employee of the United States Government that precludes the obligation or expenditure of budget authority provided by Congress."); JAMES P. PFIFFNER, THE PRESIDENT, THE BUDGET, AND CONGRESS: IMPOUNDMENT AND THE 1974 BUDGET ACT 28 (1979) (stating that impoundment "in its broadest sense . . . is the refusal by the executive to spend funds provided by Congress"); Louis Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 124 (1969) [hereinafter *Funds Impounded*] (defining impoundment as occurring "whenever the President spends less than Congress appropriates for a given period"); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 3 n.14 (1974) (paraphrasing Senator Ervin's definition: "reserving, withholding, delaying, freezing, or sequestering appropriations, funds or deferring the allocation of funds").

It should be noted that difficulties exist with any definition of impoundment. *See, e.g.*, Note, *The Likely Law of Executive Impoundment*, 59 IOWA L. REV. 50, 60 n.72 (1973) (discussing the difficulties inherent in defining past impoundments). Even the foremost authority in the area of the spending power, Dr. Louis Fisher, himself admitted that "no one can say precisely what impoundment is." Louis Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFF. L. REV. 141, 144 (1973) [hereinafter *Impoundment of Funds*].

[2] *See, e.g.*, Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149 (1975); Thomas T. Alspach, *Impounding Pollution Control Funds*, 2 FLA. ST. U. L. REV. 558 (1974) [hereinafter *Impounding Pollution Control Funds*]; Warren J. Archer,

Comment, *Presidential Impounding of Funds: the Judicial Response*, 40 U. CHI. L. REV. 328 (1973); Barry J. Bendes, *The President and the Congress: Impoundment of Domestic Funds*, N.Y.U. REV. L. & SOC. CHANGE 93 (1973); Hale Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, U. FLA. L. REV. 221 (1972); Frank Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control over Discretion*, 22 STAN. L. REV. 1240 (1970); R.H. Clark, *Presidential Impoundments of Appropriated Funds: The Supreme Court's First Pronouncement*, 5 CAP. U. L. REV. 81 (1976); Mark B. Coh, *Impoundment of Funds Appropriated by Congress*, 34 OHIO ST. L.J. 416 (1973); Gerald A. Figurski, *Presidential Impoundment of Funds: A Constitutional Crisis*, 7 AKRON L. REV. 107 (1973); Fisher, *Impoundment of Funds*, *supra* note 1; Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW AND CONTEMP. PROBS. 135 (1972) [hereinafter *Presidential Spending Discretion*]; J. Timothy Gratz, Note, *Impoundment—Separation of Powers*, 1975 WIS. L. REV. 203 (1975); Harold L. Levinson & Jon L. Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 194 (1974); Abner J. Mikva & Michael F. Hertz, *Impoundment of Funds--the Courts, the Congress and the President*, 69 NW. U. L. REV. 335 (1974); Jon L. Mills & William G. Munselle, *Unimpoundment: Politics and the Courts in the Release of Impounded Funds*, 24 EMORY L.J. 313 (1975); R. Adley Salomon, *The Case Against Impoundment*, 2 HASTINGS CONST. L.Q. 277 (1975); Neil M. Soltman, *Limits of Executive Power: Impoundment of Funds*, 23 CATH. U. L. REV. 359 (1973); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1 (1974); Neil Stanton, *Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25 (1973); Sally Weinraub, *The Impoundment Question--An Overview*, 40 BROOK. L. REV. 342 (1973); Comment, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973) [hereinafter "Comment, *Impoundment of Funds*"]; Note, *Jurisdictional and Constitutional Questions Concerning Judicial Relief from Impoundment: Eighth Circuit Holds Substantive Content of Appropriations Law is the Dispositive Factor*, 27 RUTGERS L. REV. 201 (1973); Note, *The Likely Law of Executive Impoundment*, 59 IOWA L. REV. 50 (1973); Recent Developments, *Separation of Power--Impoundment of Funds*, 6 IND. L. REV. 523 (1973); Comment, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 GEO. L.J. 1295 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973).

For other earlier articles on impoundment, see, e.g., Gerald W. Davis, *Congressional Power to Require Defense Expenditures*, 33 FORDHAM L. REV. 39 (1964); Fisher, *Funds Impounded*, *supra* note 1; Louis Fisher, *The Politics of Impounded Funds*, 15 ADM. SCI. Q. 361 (1970) [*Politics of Impounded Funds*]; Robert E. Goosetree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities*, 11 AM. U. L. REV. 32 (1962); Harry Kranz, *A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds from Segregated Institutions*, 11 AM. U. L. REV. 48 (1962); Arthur S. Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-making*, 43 N.C. L. REV. 502 (1965); John H. Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 GEO. L.J. 1159, 1186 (1969).

For other articles on the President's control over national security spending, see WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY SPENDING AND THE CONSTITUTION (1994); EDITH T. CARPER, THE DEFENSE APPROPRIATIONS RIDER (1960); RICHARD F. FENNO, JR., THE POWER OF THE PURSE (1966); ELIAS HUZAR, THE PURSE AND THE SWORD: CONTROL OF THE ARMY BY CONGRESS THROUGH MILITARY APPROPRIATIONS (1950); LOUIS FISHER,

ment's constitutionality has largely faded from public view.[3] This is primarily

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PRESIDENTIAL SPENDING POWER (1975); Don Wallace, Jr., *The President's Exclusive Foreign Affairs Powers over Foreign Aid: Part I*, DUKE L.J. 293 (1970) [hereinafter Wallace, Part I]; Don Wallace, Jr., *The President's Exclusive Foreign Affairs Powers over Foreign Aid: Part II*, DUKE L.J. 453 (1970) [hereinafter Wallace, Part II]; Garry J. Wooters, Note, *The Appropriations Power as a Tool of Congressional Foreign Policy Making*, 50 B.U. L. REV. 34 (1970).

For other commentary on the spending power within the context of separation of powers, see APPROPRIATIONS POLITICS IN CONGRESS (1966); FRED WILBUR POWELL, CONTROL OF FEDERAL EXPENDITURES: A DOCUMENTARY HISTORY: 1775-1894 (1939); ROBERT ASH WALLACE, CONGRESSIONAL CONTROL OF FEDERAL SPENDING (1960); LUCIUS WILMERDING, JR., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES (1943); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162; Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988); *cf.* PAUL EINZIG, THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT'S FINANCIAL CONTROL (1959) (discussing parallel issues of control over expenditure in Great Britain). For an analysis of the power and practice of congressional appropriations committees generally, see Louis Fisher, *The Authorization Appropriation Process in Congress: Formal Rules and Informal Process*, 29 CATH. U. L. Rev. 51 (1979); Arthur W. MacMahon, *Congressional Oversight of Administration: the Power of the Purse I*, 68 POL. SCI. Q. 161 (1943); Arthur W. MacMahon, *Congressional Oversight of Administration: the Power of the Purse II*, 68 POL. SCI. Q. 380 (1943). For a discussion of a congressional attempt at improving oversight through the authorization process rather than the appropriation process, see Raymond H. Dawson, *Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems*, 56 AM. POL. SCI. REV. 43 (1962).

For an overview of impoundment case law, see Jane C. Avery, *Executive Impoundment of Funds Appropriated by Congress*, 27 A.L.R. 214 (1999).

[3] *But see* Timothy R. Harner, *Presidential Power to Impound Appropriations for Defense and Foreign Relations*, 5 HARV. J.L. & PUB. POL'Y 131 (1982) (arguing that the President possesses the constitutional authority to impound funds earmarked for foreign affairs and to a lesser extent funds for military affairs). This article both expands and departs from Harner's article in several respects. First, there have been two major decisions construing the Presentment Clause since Harner's article. Both *I.N.S. v. Chadha*, 462 U.S. 919 (1983) and *Clinton v. City of New York*, 524 U.S. 417 (1998), strictly construed the Presentment Clause. This article incorporates discussion of these two major opinions into its analysis. *See infra* Part V.A.

Second, Harner neglects several critical issues in his argument in favor of National Security Impoundment. For example, he fails to discuss the dichotomy between national security and domestic affairs, which is at the core of the argument in favor of National Security Impoundment. *See infra* Part I. Moreover, he fails to discuss the past practice of presidential defiance of statutes outside of the realm of impoundment and overlooks a number of historical examples of impoundment. These examples lend further support to the argument that the President may impound certain national security funds.

There have also been discussions of the efficacy of the ICA. Several articles have focused

due to two factors: Congress' reassertion of its "Power of the Purse" through the adoption of the Congressional Budget and Impoundment Control Act of 1974[4] ("ICA") and the 1975 Supreme Court decision, *Train v. City of New York*,[5] which ordered the Executive branch to release funds appropriated for environmental projects.

In the wake of these two important events, the constitutionality of impoundment has been thought to be a dead issue, having been resolved once and for all in favor of the legislative branch. This traditional approach is reflected by the

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on the ICA and related issues. *See* Louis Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413 (1977); William Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209 (1990); Gathy S. Neurem, Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693 (1984). One commentator has even argued that the ICA is unconstitutional. *See* Irwin R. Kramer, *The Impoundment Control Act of 1974: An Unconstitutional Solution to a Constitutional Problem*, 58 UMKC L. REV. 157 (1990).

[4] *See* Pub. L. No. 93-344, 1974 U.S.C.C.A.N. (88 Stat.) 297 (codified as amended at 2 U.S.C.A. §§ 681-688 (West 1997)). The ICA is not the first statute to authorize impoundment. A number of appropriation bills authorized impoundment before the ICA. *See* 83 Stat. 469 (1969) (providing that section 613(a) of the Department of Defense Appropriation Act of 1970 that "[d]uring the current fiscal year, the President may exempt appropriations, funds, and contract authorizations available for military functions under the Department of Defense, from the provisions [31 U.S.C. § 665(c) (1964)] . . . whenever he considers such action to be necessary in the interest of national defense"). Other such statutes include Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d-1), a 1968 statute which required states to update their welfare payment standards to reflect cost of living increases (81 Stat. 898 (Jan. 2, 1968)), and the Revenue and Expenditure Control Act of 1968 (82 Stat. 271). *See also 1973 Hearings* at 368 (1973); *see generally* Goosetree, *supra* note 2, (discussing the limited statutory authority granted for presidential impoundment).

Presidents have also justified impoundment on implicit statutory authority from a number of statutes which governed the congressional budget process. *See also infra* note 132 (discussing other bills before passage of the ICA through which the President claimed impoundment authority).

Moreover, routine agency impoundment takes place all the time in order to save funds and to maximize efficiency. Very little of impoundment at this level is reported to Congress. *See* Middlekauff, *supra* note 3, at 211 n.10.

[5] 420 U.S. 35 (1975). *Train* was the culmination of considerable litigation over impoundment. *See, e.g., infra* Parts II.E.2 & 3. There has been some litigation over impoundment following *Train*. *See, e.g.*, City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987); West Cent. Missouri Rural Development Corp. v. Donovan, 659 F.2d 199 (D.C. Cir. 1981); Public Citizen v. Stockman, 528 F. Supp. 824 (D.D.C. 1981); Rocky Ford Housing Authority v. Dep't of Agriculture, 427 F. Supp. 118 (D.D.C. 1977).

Restatement Third of Foreign Relations: "[T]he President's claim of authority to impound funds appropriated by Congress apparently has been abandoned in the face of Congressional legislation denying such authority."[6] In recent years, the faint memory of impoundment has been recalled only to the extent that it informed debate over its cousin, the line item veto.[7]

This article contests the conventional wisdom that impoundment is a settled constitutional issue. It argues that, far from settled, the constitutional question of impoundment is still an open question,[8] but only within the narrow confines of

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[6] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1 RN 3. *See also* CONSTITUTION OF THE UNITED STATES OF AMERICA 559 (1992 Congressional Research Service) ("With passage of the [Congressional Budget and Impoundment Control] Act, the constitutional issues faded into the background; Presidents regularly reported rescission proposals, and Congress responded by enacted [sic] its own rescissions . . .").

[7] *See, e.g.*, Stephen Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied, in* NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 13 (1988) [hereinafter PORK BARRELS] (arguing that since impoundment had been curtailed through the ICA, an inherent line item veto power therefore exists).

The Line Item Veto Act of 1996 authorized a distinct subset of impoundment, which prevented funds from being spent. *See supra* note 1 (providing definitions of impoundment). Non-statutory impoundment, while related to a statutory line item veto, is potentially a more far-reaching power. The Line Item Veto Act involved what was known as enhanced rescission authority, through which the President was authorized within five days of signing a bill into law to nullify spending authority. *See* Line Item Veto Act § 1021(a)(3)(B), Pub. L. No. 104-130, 1996 U.S.C.C.A.N. (110 Stat.) 1200 (1996). Impoundment as discussed in this article, however, can occur at any time following enactment of a spending bill (theoretically limited to the lifetime of that appropriation bill). Moreover, unlike enhanced rescission, which had a procedure in place for congressional override, impoundment is more akin to an absolute veto in that Congress cannot override the President's decision. *See supra* Part V.A.2. Finally, impoundment provides the President with more discretion. With enhanced rescission, the President was limited to either spending all or none of the appropriated funds. With impoundment, the President may spend any amount he sees fit as long as it is below the amount appropriated. For a more complete discussion of enhanced rescission, see, e.g., Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgment of "National Security Rescission,"* 47 AM. U. L. REV. 1273 (1998).

[8] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 117 (1996) ("Presidents have apparently accepted this legislation [the ICA] but some President may yet reopen the issue or may insist that it is not applicable to expenditures and appropriations for foreign affairs"). *See also infra* notes 307-310 and accompanying text. This article does not necessarily advocate greater spending cuts by the President in the national security arena, only that the President in certain instances should not shy away from protecting his prerogatives in the face of congressional challenges to his heightened authority over national security expenditure.

national security[9] spending. Although previous articles have discussed the degree to which the Executive may control national security spending,[10] these discussions are decades old. Moreover, they also overlook compelling arguments supporting the President's control over national security spending.

To many the refrain that the President possesses the nonstatutory ability to control spending may seem like *deja vu* all over again, reviving long discredited notions such as inherent line item veto authority and generalized presidential impoundment power.[11] Unlike those arguments, both of which asserted the dubious claim that the President possesses the inherent power to restrict expenditures in any facet of government operation, this article merely contends that within the areas of his special constitutional authority—national security affairs—the President has some constitutional discretion to impound funds appropriated by Congress; an assertion that for the first 180 years of the Republic was quite unremarkable.

Part I of this article will discuss the theoretical, historical and jurisprudential differences that exist between national security affairs and domestic affairs. This section will draw upon constitutional text, the views of the Framers and case law and will conclude that the President's powers in national security affairs are constitutionally distinct. As such, it will foreshadow the next section which discusses the history of impoundment, reflecting as it does the greater legitimacy surrounding presidential impoundment of national security-related funds.

Part II of this article will discuss the history of impoundment from the time of the Founding to the present. This discussion will demonstrate that unauthorized national security-related impoundment, as opposed to its domestic counterpart, has a long pedigree. In addition, this section will establish that throughout our nation's history National Security Impoundment, in the words of Professor Ar-

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[9] "National security" refers to the military and diplomatic powers of the federal government. Thus, the President's national security powers would comprise his roles as Commander in Chief, Chief Diplomat and Chief Executive.

It bears noting that National Security Impoundment would not necessarily coincide with functional budget categories such as those used for national defense (050) and international affairs (150). *See, e.g.*, ALLEN SCHICK, THE FEDERAL BUDGET 76 (1995). Budget resolutions allocate total new budget authority, outlays, direct loans and loan guarantees. These functions are designated by a number. *See id.* at 73.

[10] *See generally* Harner, *supra* note 3; Davis, *supra* note 2; Stassen, *supra* note 2.

[11] *See, e.g.*, Glazier, *in* PORK BARRELS, *supra* note 7, at 9; L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year*, 18 PEPP. L. REV. 43, 43-44 (1990); Diane-Michele Krasnow, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL'Y 583 (1991).

thur Schlesinger, has held "a minor role in law and custom."[12] Following that discussion, Part II will analyze in turn both the ICA and the *Train* decision and the impact of each on the practice of impoundment. This section will conclude that, far from being abolished by the ICA, impoundment through this legislation was finally given permanent, formal legislative sanction. The statute brought impoundment within statutory bounds, which legitimately may confine the President in domestic affairs, but which in the realm of national security must reflect an appreciation of the President's unique authority in this field. At the same time, the *Train* decision, which required the President to release impounded funds, did not reach the question of impoundment's constitutionality, nor did the case in any way involve national security affairs. Part II demonstrates that the book on impoundment with respect to national security spending is far from closed.

Part III will discuss an analogue to impoundment, presidential defiance of conditions on appropriation bills involving national security. This section will begin by outlining the case law, past practice and theoretical underpinnings of presidential refusals to execute conditions placed on the expenditure of national security funds. At the same time, this section will demonstrate that the President, when defying a statute, is acting at the lowest ebb of his constitutional power. Only when the congressional enactment invades the constitutional domain of the Executive may the President act counter to statute. In these limited scenarios, the President may legitimately resist carrying out statutory requirements. This is because the President through his Oath of Office and his constitutional duty to "faithfully execute the laws" must first and foremost uphold the Supreme Law of the Land, the Constitution. As such, this section demonstrates that if Congress attempts to force the President to perform an unconstitutional act through the expenditure of funds, the President would be free to (and indeed should) impound the funds by interpreting the statutory language to be precatory instead of mandatory.

Part IV will discuss the limits of Congress' spending power. It will argue that despite the fact that the spending power is one of the most expansive of legislative powers, it, like all governmental powers, has its limits and those limits are reached when the Power of the Purse runs up against other constitutional provisions. As such, national security spending reflects a double intersection of constitutional authority. It is where the President's administrative power over details and Congress' spending power meet as well as the President's and Congress' national security power.[13] This part concludes that congressional spend-

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[12] ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 235 (1973).

[13] *Cf.* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 149 (1957) (stating that these two intersections are "the fields, namely, in which congressional power and presidential prerogative merge into each other. One such field is that of foreign relations . . . [the other] is

ing power with respect to impoundment must at times defer the President's national security powers.

Part V will discuss the arguments against impoundment within a national security context: 1) that the President through impoundment would be exercising either an unconstitutional form of line item veto power or an unconstitutional absolute veto; 2) that Congress through its spending power, its power to make rules for the military and its authority to provide for the common defense possesses the lawful authority to dictate the allocation of funds and not the President; 3) that the President may not defy a statute he has not vetoed; 4) that the President violates his constitutional oath to faithfully execute the laws if he impounds funds; and 5) that the ICA ended the constitutional debate over impoundment once and for all. The section will conclude that while these arguments are not unpersuasive each of them falls short of the mark.

The first two arguments are unsatisfactory because with impoundment the text of the statute in question is not altered, a distinction upon which the courts have placed great emphasis. They also fail because the lawmaking process in national security is often different from lawmaking in the domestic realm and consequently may not implicate the Presentment Clause in the same manner. The third argument falls short because there is no doctrine of waiver and estoppel with respect to constitutional law. The President by failing to veto a bill cannot in effect redistribute constitutional power. The fourth argument, fails in that the President does not violate his oath to faithfully execute the laws by impounding certain national security funds because by doing so, he would be executing the highest law of the land, the Constitution. Finally, the argument that the ICA ended the constitutional debate over impoundment does not succeed because the statute explicitly disclaims any attempt to define either branches' constitutional role. Moreover, even had the ICA purported to do so, a statute cannot repeal constitutional custom.

Part VI will conclude that based upon the textual, theoretical, jurisprudential and historical record a persuasive case exists for recognition of the President's ability to withhold national security-related funds, a practice that will be called "National Security Impoundment." That is to say that, when the President is acting within areas of his special competence—military and diplomatic affairs—he possesses some constitutional authority to impound funds. That is not the same, however, as contending that the President has unlimited impoundment authority in this area. To the contrary, the burden would fall upon the President to demonstrate his authority to act in such a manner. As such, the strength of the President's case would depend upon at least five factors: 1) whether the President's actions take place during wartime; 2) whether the President's impoundment involves funds earmarked for spending overseas; 3) whether the program's funds

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that of expenditure.").

have been eliminated entirely; 4) whether there exists a great degree of specificity in the statute; and 5) whether Congress is attempting to perform an Executive function under the guise of the spending power.

I. THE DISTINCTION BETWEEN NATIONAL SECURITY AND DOMESTIC AFFAIRS

At the core of the concept of National Security Impoundment is the notion that the President possesses greater constitutional authority in the field of national security affairs than in domestic affairs. The reason the two types of presidential power differ is because the law of international relations is distinct from that of municipal law. Dualist international relations theory teaches that international and municipal law occupy separate legal spheres.[14] The President is granted greater leeway in national security affairs by the Constitution because as Chief Executive he is the nation's agent in the unique legal realm which comprises the Law of Nations.[15]

The national security/domestic distinction is a centuries-old concept that is reflected by the greater power historically exercised by the Executive in what is today considered national security affairs. In the late-seventeenth century, John Locke, in his *Second Treatise of Civil Government*, distinguished between three types of power exercised by the English Crown: executive, prerogative and

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[14] The national security/domestic distinction is mirrored by the "dualist" concept of international law, which separates international law from domestic law. For a discussion of "dualist" legal theory, see e.g., LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 66 (1995) ("The international system today . . . is essentially dualist in principle . . . ."); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 83-84 (1993) ("The prevalent theoretical approach to the relationship between international and municipal law is . . . [the dualist model] . . . [which] views any national legal system and the international legal system as separate and discrete entities, each having the power to settle the effect any rule of law might have within it"); James A.R. Nafziger & Edward M. Wise, *The Status in the United States Law of Security Council Resolutions under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 422-23 (1998) ("The dualist theory . . . is a constitutional axiom in contemporary United States jurisprudence.").

[15] *See* EDWARD S. CORWIN, THE PRESIDENT'S CONTROL OVER FOREIGN RELATIONS 100-01 (1917) (quoting John Marshall on the floor of the House of Representatives who stated that the President "possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him"); 15 THE WORKS OF ALEXANDER HAMILTON 42 (Harold C. Syrett ed. 1969) (quoting Hamilton that "it belongs to the 'Executive Power' to do whatever else the laws of Nations, cooperating with the Treaties of the Country, enjoin, in the intercourse of the UStates with Foreign Powers"); *cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (1765) ("The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions").

"federative."[16] The latter, Locke contended, involved the "Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."[17] The federative power was therefore "distinct" from "executive" power even though the two powers were united in the English Crown.[18] The rationale behind this distinction was that nations exist in a somewhat anarchic state, while individuals in a civil society live under an enforceable rule of law.[19] For this reason, the power of the Executive must be more flexible and given wider parameters than in domestic affairs. For the very same reason, Congress may delegate greater power to the President in national security affairs. Locke's philosophic heirs—Montesquieu,[20] Blackstone[21] and DeLolme,[22]—all generally shared his understanding that national security power occupied a central role in the concept of Executive power.

The Lockean distinction that the Executive possesses greater national security

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[16] *See* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 190 (1698) (Mark Goldie ed. 1997); *see also* FRANCIS D. WORMUTH, THE ROYAL PREROGATIVE 1603-1649 13, 71-72 (1939) (discussing the views of seventeenth-century commentators who separated international law from national law).

[17] *See* LOCKE, *supra* note 16, at 190.

[18] *See id.*

[19] *See id.* at 189. *See also* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 60-61 (1967).

[20] *See* BARON MONTESQUIEU, THE SPIRIT OF THE LAWS 156-57 (1748) ("In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and executive in regard to matters that depend on civil law. . . By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those . . . already enacted . . . . [through executive power the prince or magistrate] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions").

[21] BLACKSTONE, *supra* note 15, at 253-54 ("With regard to foreign concerns, the king is the delegate or representative of his people").

[22] J.L DELOLME, THE CONSTITUTION OF ENGLAND 72-73 (Arno Press 1979) (1784) (stating that the English monarch is "the generalissimo of all sea or land forces . . . [and] with regard to foreign nations, the representation and depository of all the power and collective majesty of the kingdom."). *See also* Theophilus Parsons, *The Essex Result in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 337 (Oscar Handlin & Mary Handlin eds. 1966) ("We [at the state level] have therefore only to consider the internal executive power, which is employed in the peace, security and protection of the subject and his property, and in the defense of the state. The executive power is to marshal and command her militia and armies for her defense, to enforce the law, and to carry into execution all the orders of the legislative powers.").

authority than domestic authority is reflected in the text of the U.S. Constitution which was influenced in no small part by his writings.[23] Even the most perfunctory review of Article II of the Constitution reveals that the affirmative grants of power to the President are much more substantive in the area of national security affairs than in domestic affairs. In a formal sense, the President can affirmatively affect domestic policy only through the Appointments Clause or by making recommendations through the state of the Union, and even then his influence is only indirect.[24] With respect to formal, negative influence, he can also brandish his veto power to affect legislation before it arrives at his desk.[25] The rest of Article II, however, simply describes his responsibilities. For example, the President is required to faithfully execute the laws,[26] take the Oath of Office[27] and give a state of the Union.[28]

With respect to national security affairs, however, the President is given far more policy-oriented discretion than in the domestic realm. He is Commander in Chief of the armed forces,[29] he can make treaties subject to the advice and con-

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[23] *See, e.g.*, Robert F. Turner, *The Power of the Purse in* THE CONSTITUTION AND NATIONAL SECURITY (Howard E. Shuman & Walter R. Thomas eds. 1990) (stating that Locke, Montesquieu and Blackstone generally influenced the Framers and that each placed responsibility for external affairs with the Executive).

[24] *See, e.g.*, ALFRED CONKLING, THE POWERS OF THE EXECUTIVE DEPARTMENT 54-58 (1882) ("with the exception of the military authority conferred upon the president by constituting him commander-in-chief, not one of the designated powers, unless, perhaps, the power of appointment, is *in its nature executive* . . . . the distinction . . . between the *powers* and *duties* of the president"); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 213 (1990).

Of course, the President has less formal but equally formidable powers, which are not grounded in the Constitution, such as his ability to shape public opinion. This article is limited, however, to the legal considerations behind presidential action and will discuss nonlegal factors only to the extent they inform the legal ramifications of the customary relations between the political branches.

[25] *See* U.S. CONST. art. I, §§ 7, 8.

[26] *See* § U.S. CONST. art. II, § 1, cl. 8.

[27] *See id.*

[28] *See id.* art II, § 3.

[29] Although the scope of the Commander in Chief Clause was perhaps viewed more narrowly at the time of the Founding, it nonetheless provided the President with the discretion at the very least to maintain tactical command over the armed forces. *See, e.g.*, THE FEDERALIST No. 69, at 350 (Alexander Hamilton) (Garry Wills ed. 1982) (stating that the President's Commander in Chief powers "amount to nothing more than the supreme command and direc-

sent of the Senate,[30] and he can appoint and receive ambassadors.[31] The distinction between national security and domestic affairs was noted by the Framers not only with respect to the Executive power but also when the President and Congress act in concert in national security affairs. Alexander Hamilton hinted at the distinction between national security and domestic affairs in *The Federalist* No. 23.

> The authorities essential to the care of the common defense are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—*to direct their operations*—to provide for their support. These powers ought to exist without limitation. . . . The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[32]

Hamilton was even more explicit in *The Federalist* No. 75. He noted that the power to conduct foreign affairs "seems to form a distinct department . . ."[33]

In the years following Ratification of the Constitution the national security/domestic distinction was recognized regularly by early government officials and commentators. The First Secretary of State, Thomas Jefferson, provided an important early interpretation of the Executive's national security power. Jefferson remarked that "[t]he transaction of business with foreign nations is executive altogether. It belongs then, to the head of that department, *except* as to such portions of it as are specifically submitted to the Senate. *Exceptions* are to be construed strictly."[34] John Jay, the nation's First Chief Justice, also formally acknowledged this distinction between national security and domestic affairs.

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tion of the military and naval forces as first General and Admiral of the Confederacy").

[30] *See* U.S. CONST. art. II, § 2, cl. 1.

[31] *See id.*, § 3, cl. 2.

[32] THE FEDERALIST No. 23, at 112 (Alexander Hamilton) (Garry Wills ed., 1982) (emphasis added).

[33] THE FEDERALIST No. 75, at 380 (Alexander Hamilton) (Garry Wills ed., 1982).

[34] 16 THE WRITINGS OF THOMAS JEFFERSON 378-79 (J. Boyd ed. 1961). This was one of the few points that Jefferson and Alexander Hamilton agreed upon. *See* 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 403 (1974) (quoting Alexander Hamilton in the first *Pacificus* letter: "While . . . the Legislature can alone declare war . . . it belongs to the 'executive power' to do whatever else the law of nations . . . enjoin[s] in the intercourse of the United States with foreign Powers.")

While riding circuit, he presided over the *Trial of Gideon Henfield.* In his charge to the jury he stated that municipal and international law were "distinct."[35]

During the First Congress, the difference between national security and domestic affairs was demonstrated by the fact that the President exercised greater control over the national security departments (State and War) than he did over other departments.[36] The acts creating the latter two departments recognized that the responsibility owed by the heads of the two departments was to the President and not to Congress. This was unlike the act creating the Department of the Treasury, which made the Secretary directly responsible to the Congress.[37] Another example of this dichotomy was reflected by the creation of the Post Office. This office, which was given permanent status in 1794, was not made subject to the control of the President but rather to that of Congress.[38] On the other hand, when the Navy Department was created four years later, that body was placed under presidential control.[39]

Several years later in 1816, during its first year of operation, the Senate Committee on Foreign Relations explicitly affirmed the President's great national security power. Left unstated but nonetheless unmistakable was the implication that the President's actions in domestic affairs do not enjoy such exalted status.

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[35] *See* Trial of Gideon Henfield (C.C.D. Pa. 1793) (charge to the grand jury by C.J. Jay) *reprinted in* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATION OF WASHINGTON AND ADAMS 49, 62 (Philadelphia, Carey & Hart 1849).

[36] *See* WESTEL WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 620 (1934); Turner, *supra* note 23, at 77. *See also* JAMES THOMAS FLEXNER, GEORGE WASHINGTON AND THE NEW NATION (1783-1793) 215 (1969) ("Washington did not hesitate to assert his primacy in diplomatic affairs"); GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 153 (1993) (contrasting President Washington's general deference to Congress in domestic matters with his "much more activist notion of presidential power. . . . [in] foreign policy and military affairs").

Another reflection of the deference Congress grants the President in national security affairs lies in its requests for information. Professor Corwin pointed out this distinction: "[w]hile other heads of departments may be 'directed' by Congress or one of its committees to furnish needed documents, the Secretary of State is invariably 'requested' to furnish them; and in both instances the call is usually qualified by the softening phrase 'if the public interest permits.'" CORWIN, *supra* note 13, at 128.

[37] *See* CORWIN, *supra* note 13, at 96.

[38] *See id.*

[39] *See id.* In addition, Congress has often recognized its own limitations through legislation. *See infra* Parts III.D.

> The President is the constitutional representative of the United States with regard to foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.[40]

Just over a decade later in 1829, William Rawle in his great treatise on constitutional law discussed the national security/domestic distinction even more explicitly. "On a full view of the powers and duties of the president, the reader will probably perceive that they are of more importance with respect to foreign relations than to the internal administration of government."[41] A half century later, that same distinction was acknowledged by John Norton Pomeroy in his work on the Constitution. Of the President's "express affirmative grants of power . . . . [b]y far the most important function . . . is that which relates to the management of foreign affairs."[42] That same view was later reaffirmed by a host of other authorities including Alexis de Tocqueville,[43] James Bryce,[44] Clarence Berdahl,[45] Quincy Wright[46] and Norman Small.[47]

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[40] STAFF OF SEN. COMM. ON FOREIGN RELATIONS, S. REP., vol. 8, at 24 (1816), *quoted with approval in* United States v. Curtiss-Wright, 299 U.S. 304, 319 (1936).

[41] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 193 (2d. ed. 1829).

[42] JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 420-21 (1879).

[43] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 126 (J.P. Mayer ed., 1969) (original 1848) (describing the latent strength of the President's national security powers and stating that "[i]t is generally in its relations with foreign powers that the executive power of a nation has the chance to display skill and strength").

[44] *See* 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 48 (1888) (stating that the President in "foreign policy, retains an unfettered initiative," whereas "[t]he direct domestic authority of the president is in time of peace very small").

[45] *See* CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 25 (1921) (discussing the State Department "as having special status, as being more directly subject to the control of the President than any other department").

The distinction between the President's national security powers and his domestic powers was thus established in both legal theory and in practice long before it was finally given explicit judicial imprimatur[48] in the case of *United States v. Curtiss-Wright*.[49] That decision, which involved a congressional delegation to President Roosevelt to establish an arms embargo in South America, openly embraced this distinction. The Court speaking through Justice Sutherland stated: "That there are differences between them [external and internal affairs], and that these differences are fundamental, may not be doubted."[50]

Unfortunately, the Court justified this sound conclusion with unsound logic. The Court reasoned that after the Declaration of Independence the sovereignty of the colonies was transferred to the United States as a corporate whole.[51] The Court further reasoned that, with the establishment of the new Constitution, sovereignty became vested in the President.[52] Because of this manifestation of national sovereignty, the Court reasoned that the President possessed extraordinary

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[46] *See* QUINCY WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 140-41 (1922) ("the political functions of the executive are largely in the field of foreign relations"). *See also id.* at 336 ("For meeting the ordinary responsibilities and exercising the ordinary powers of states in the family of nations . . . [the President's] powers being in the main derived from the Constitution itself, he is not subject to the detailed direction of Congress, as he is in domestic administration.").

[47] *See* NORMAN J. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 55 (1932) ("Of the numerous duties which have been assigned to the President, perhaps no one of them may be considered as more truly executive in character than his task of conducting the relations of his country with foreign governments.")

[48] Prior to *Curtiss-Wright* other cases had hinted at the distinction between national security and domestic affairs, but had not explicitly stated it. *See, e.g.*, Cunningham v. Neagle, 135 U.S. 1 (1890) (concluding that the President is responsible for "the rights, duties, and obligation growing out of the Constitution itself, *our international relations*, and all the protection implied by the nature of the government under the Constitution") (emphasis added); Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) ("As the executive head of the nation, the president is made the *only* legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens.") (emphasis added).

[49] 299 U.S. 304 (1936).

[50] Id.

[51] *See id.* at 316.

[52] *See id.* at 319.

national security powers.[53] The Court further justified the national security/domestic distinction on policy grounds such as the President's better access to information.[54] Despite the Court's questionable foray into history and logic,[55] in the years following *Curtiss-Wright*, the external/internal distinction has been reiterated on numerous occasions by the courts[56] and is now accepted as the law of the land.[57]

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[53] *See id.*

[54] *See id.* at 320.

[55] *See, e.g.*, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 489 (1946) (stating that Justice Sutherland's "Springing Sovereignty" theory "does not harmonize with the [historical] facts"). The Supreme Court itself has recognized that after independence the 13 colonies acquired various aspects of sovereignty. *See* United States v. California, 332 U.S. 19, 31 (1947); Texas v. White, 74 U.S. 700, 725 (1869).

[56] *See* Clinton v. City of New York, 524 U.S. 417, 445 (1998) (citing *Curtiss-Wright* and stating that "this Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved'"); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993) (citing *Curtiss-Wright* and stating that "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility"); Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (stating that with respect to military affairs Congress "is permitted to legislate both with greater breadth and with greater flexibility"); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas"); Lichter v. United States, 334 U.S. 742, 778-79 (1948) ("A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes. . . . [such power] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress"); Ex Parte Endo, 323 U.S. 283, 298 (1944) (citing *Curtiss-Wright* and stating that "[b]road powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of war time problems have been sustained").

[57] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1, reporters note 2 (1986) ("In domestic affairs, Presidential action can be seen as a source of law primarily as he exercises authority delegated to him by Congress, and secondarily insofar as some law-making is inherent in the interpretation and execution of laws. In foreign affairs, however, the President is *clearly* a separate source of law since he makes treaties . . .") (emphasis added). The distinction has also been accepted as a practical, political matter. *See, e.g.*, Aaron Wildavsky, *The Two Presidencies, in* THE PRESIDENCY 230 (Aaron Wildavsky ed. 1969).

For example, in *Sale v. Haitian Centers Council, Inc.*,[58] the Supreme Court cited *Curtiss-Wright* and stated that with respect to "foreign and military affairs . . . the President has unique responsibility."[59] This distinction between national security and domestic affairs exists not only with respect to occasions when the President acts pursuant to congressional authorization but also when he acts absent or counter to such authorization. On repeated occasions since *Curtiss-Wright* the Court has cited the case in recognizing the distinction between national security affairs and domestic affairs with respect to presidential actions absent congressional authorization.[60]

Therefore a distinction exists in the exercise of presidential power. As reflected by political theory, case law and practice, the President possesses greater constitutional authority within the realm of national security affairs.[61] Ultimately, the question is not whether Congress lacks constitutional power in national security authority; it clearly has great power in both national security and domestic affairs. The issue is that, unlike in domestic affairs, where the legislature has a virtual monopoly of power, in national security affairs, the President also has significant power which necessarily diminishes Congress' relative stat-

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[58] 509 U.S. 155 (1993).

[59] *Id.* at 188.

[60] *See, e.g.*, Haig v. Agee, 453 U.S. 280, 291 (1981) (discussing "areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval."). *See also, e.g.*, United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J. L. & POLITICS 1, 73-78 (2000) (discussing the Supreme Court's frequent use of *Curtiss-Wright* in circumstances where the President takes action absent congressional authorization).

[61] It has been argued in defense of Congress' spending power that congressional appropriations power may itself be bifurcated. See BANKS & RAVEN-HANSEN, *supra* note 2, at 147. The Constitution addresses appropriations in a national security context; with respect to appropriations for raising and supporting armies, limited by a two-year "sunset" provision. *See id. Cf.* Velvel v. Nixon, 415 F.2d 236, 239 (1969) (concluding that "congressional appropriations for the [Vietnam War] are made under authority of the powers 'to raise and support Armies' and 'to provide and maintain a Navy' . . . [and] are not exercises of the power to spend for the general welfare") (footnotes omitted), *cert. denied*, 396 U.S. 1042 (1970). Of course, the obverse of the Executive's heightened power in national security affairs is that Congress' relative power is commensurably diminished. Thus, even if Congress' spending power were bifurcated, the authority of Congress would still be lessened due to the Executive's power in this area. *Cf.* ARTHUR S. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 29 (1977) ("When one branch of the nation becomes dominant, as has the Executive, the result is a diminution of power in Congress.").

ure in the area.[62] A manifestation of this greater Executive power will be reflected in the next section, which will discuss the history of presidential impoundment.

II. THE HISTORY OF IMPOUNDMENT

A. THE ROLE OF CUSTOM IN CONSTITUTIONAL LAW

Presidential impoundment of funds within a national security context has never been contested in federal court. In areas of constitutional law, such as National Security Impoundment, where little or no case law exists, past practice assumes primary importance. Absent case law, the Supreme Court has long recognized that custom puts flesh on the skeletal Article I and II clauses. While the Supreme Court is the ultimate arbiter of the Constitution,[63] the Court nonetheless accords great respect to the political branches in interpreting their own powers. The interpretation between the two branches forms its own type of precedent, a method of constitutional interpretation known as "coordinate construction."[64]

The Court in *United States v. Nixon*[65] articulated this view. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect by the others."[66] With reference more specifically to Executive power, Justice Frankfurter, in his concurrence in *Youngstown Sheet & Tube v. Sawyer*, explained the effect of custom on the Executive Branch. "[A] systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have been sworn to uphold the Constitution, *making as it were such exercise of power part*

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[62] *Cf.* MILLER, *supra* note 61, at 29 ("When one branch of the nation becomes dominant, as has the Executive, the result is a diminution of power in Congress.").

[63] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803) ("it is emphatically the province and duty of the judicial department to say what the law is").

[64] *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231 (1988). Of course, repeated unlawful acts can never be legitimized through repetition. Impoundment, however, does not bear the marks of illegal activity since it is grounded in the President's constitutional responsibilities in national security affairs and to see that the laws are faithfully executed. *See infra* Part III.

[65] 418 U.S. 683 (1974).

[66] *Id.* at 703.

of the structure of our government, may be treated as a gloss on 'executive power' vested in the President."[67]

The historical precedents of National Security Impoundment are an example of this customary Executive "gloss." William H. Rehnquist, while serving as Assistant Attorney General, appeared before a Senate subcommittee in 1971 to discuss the legality of impoundment. Although his testimony dealt with impoundment as a general matter, which at that time had never been contested in the courts, his words are nevertheless apropos today with respect to National Security Impoundment: "I think you pretty well have to go to the history [of impoundment] and the congressional and executive precedents, there just being no very helpful cases . . ."[68]

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[67] 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (emphasis added). *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299, 307-08 (1803) ("practice and acquiescence . . . affords an irresistible answer and has indeed fixed the construction [of the Constitution]."). *Cf.* Powell v. McCormack, 395 U.S. 486, 546-47 ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date").

Skeptics of impoundment would likely cite Justice Frankfurter's caveat that "[d]eeply embedded traditional ways of conducting the government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them." *Youngstown Sheet*, 343 U.S. at 610 (Frankfurter, J., concurring). They would contend that custom cannot overcome the strictures of the ICA (despite the fact that the preamble of the ICA specifically disclaims any attempt at defining the constitutional powers of the President and Congress). *See* 2 U.S.C.A. § 681 (West 1997). Despite Justice Frankfurter's caveat, there are persuasive arguments that indicate that legislation cannot strip away the "gloss" from Executive power. Justice Frankfurter himself acknowledged that custom becomes "part of the structure of our government." *See Youngstown Sheet*, 343 U.S. at 610-11 (Frankfurter, J., concurring). *See also* WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 135 (1916) ("so strong is the influence of custom that it seems almost to amend the Constitution"). Thus, Executive gloss appears to be a mode of constitutional construction since it involves areas of Executive-Congressional interaction where no statute is involved. Since it is a constitutional matter, a statute could not likely strip it away. For example, in 1867, Congress through the Tenure of Office Act attempted to strip the gloss off of the President's ability to remove cabinet officials. The President's removal power had been a customary constitutional power since the First Congress. The fact that Congress later tried to strip it away by statute did not render the President's action unconstitutional. The Supreme Court struck down the Act in *Myers v. United States*, and did not criticize the President for his defiance of the statute. *See* 272 U.S. 52 (1926). Other examples of Executive customary powers such as the power of diplomatic recognition are similarly beyond statutory limitation.

[68] *See Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong. 236 (1971) (testimony of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter *1971 Hearings*]; EDWARD S. CORWIN, ESSAYS IN CONSTITUTIONAL LAW 263 (Robert G. McCloskey ed., 1957) (concluding that "when two departments both operate upon the subject matter . . . . the question is what does *the pertinent historical record* show with regard to presidential action in the field of congressional

While constitutional custom is usually accorded great respect by courts, when the practice at issue was recognized by the Framers that custom is entitled to even greater deference. The Supreme Court has stated that "[t]he construction placed upon the Constitution . . . by the men who were contemporary with its formation . . . is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."[69] As will be demonstrated, the origins of impoundment stem from the first generation of the Republic and have survived up to the present, thus entitling the practice to the additional deference granted only to customs established by the Framers.

The long history of impoundment not only reflects constitutional custom, it also reflects the dichotomy between national security and domestic affairs. Before the 1970s, the majority of unauthorized impoundments occurred within the realm of national security affairs. Moreover, unlike domestic impoundment, National Security Impoundment has never been challenged in court, a fact that reflects the general acceptance that impoundment has been accorded when effected within the national security sphere. Thus, an historical discussion of the practice of impoundment is vital to understanding National Security Impoundment's modest but legitimate status within our constitutional scheme.

B. THE FRAMERS AND THE POWER OF THE PURSE

The Power of the Purse was a subject about which the Framers were much concerned. As any schoolboy knows (or should know), the Framers were greatly troubled about the prospect of uniting the Power of the Purse with the Power of the Sword.[70] This concern of the Framers was carried over from England where

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power?").

[69] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884); *see also* J.W. Hampton, Jr. v. United States, 276 U.S. 394, 412 (1928) (declaring through Chief Justice Taft that "contemporaneous legislative exposition of the Constitution when the founders of our Government . . . were actively participating in public affairs . . . fixes the construction given to its provisions"); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842) (concluding that "contemporaneous expositions of the Constitution by the Framers bolster long acquiescence in construction"). The author, however, is mindful of the difficulties inherent in trying to divine the intent of the Framers. *See, e.g., Youngstown Sheet*, 343 U.S. at 634 (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah").

[70] *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 139-140 (Max Farrand ed., 1937) (quoting George Mason at the Philadelphia Convention as stating that the "purse & the sword ought never to get into the same hands <whether Legislative or Executive>.").

Parliament wrested exclusive control over appropriations from the King only after decades of struggle.[71] The Framers' attention, however, was directed toward the ability of the Executive to spend more than was appropriated, not less. The issue of the Executive spending less funds than appropriated, much less the notion of the President impounding national security funds, was not discussed at the Constitutional Convention.[72]

Article I, section 9 of the Constitution provides little guidance on the impoundment question. It simply reads that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[73] Article I, section 8, clauses 12 and 13 are no more helpful. The first provides that Congress shall have the power to "raise and support Armies, but no Appropriation of Money to that Use shall be for longer than two Years."[74] The second clause states that the legislature may "provide and maintain a Navy."[75] Thus, while the constitutional ceiling for appropriations is unequivocal, the constitutional floor is not. During his Senate testimony in 1971, then-Assistant Attorney General Rehnquist focused on this point. "You do not have the same categorical direction at all in the Constitution as to whether the President must spend where Congress has appropriated. That is much more doubtful."[76]

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[71] *See* BANKS & RAVEN-HANSEN, *supra* note 2, at 13-16 (discussing the seventeenth-century struggle between the Stuart Kings and the Parliament).

[72] Despite the clear intent of the Framers and the clear language of Article I that the President may not incur obligations without prior appropriation, the Executive branch frequently makes financial commitments without prior statutory approval. *See* Symposium, *National Security and the Constitution: The Roles of Congress, the President and the Courts*, 43 U. MIAMI L. REV. 17, 24 (1988). As of 1988, Presidents had sent troops or arms abroad 199 times. Of these, 137 of the operations (69%) were carried out without prior congressional appropriation. For a thorough discussion of the Executive Branch unilaterally incurring budget obligations, see FISHER, *supra* note 2, at 229-56.

[73] U.S. CONST. art. I, § 9, cl. 7.

[74] *Id.* § 8, cl. 12.

[75] *Id.*, at cl. 13.

[76] *1971 Hearings*, *supra* note 68, at 243. *See also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 149-50 (Max Farrand ed. 1966) (quoting James McHenry, delegate to the Constitutional Convention from Maryland, who in explaining the appropriations clause to the Maryland House of Delegates indicated that the underlying purpose was to keep expenditure down: "When the Public Money is lodged in its Treasury there can be no regulation more consistant with the Spirit of *Economy* and free Government that it shall only be drawn forth under appropriation by law . . .) (emphasis added).

Of course, it could also be argued that Congress possesses the power to provide for the

In the years prior to Rehnquist's testimony, the Supreme Court had alluded to the very same point. In *Cincinnati Soap Co. v. United States*,[77] the Court concluded that Article I, section 9 should not be read too expansively. This constitutional provision, the Court wrote, "was intended as a restriction upon the disbursing authority of the Executive department .... It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[78] The Supreme Court gave no indication that Article I, section 9 should be read also to presumptively require full expenditure of funds; only that statutory ceilings on expenditure may not be breached. The constitutional text and sparse case law demonstrate why Congress rests on firmer constitutional footing when preventing an activity from taking place through denial of funds than by affirmatively requiring an activity to take place through mandatory expenditure.[79]

While the issue of impoundment is not addressed in the text of the Constitution and was not discussed during either the Constitutional Convention or the Ratifying Conventions, the same cannot be said about presidential administrative authority over national security affairs. Within a national security context, the Framers fully intended the President to have significant discretion.[80] While they

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common defence, and to make rules for the military and that these provisions could weigh in favor of the President having to fully expend appropriated funds. These arguments will be discussed in Part V.B.

[77] 301 U.S. 308 (1937).

[78] *Id.* at 321.

[79] This would appear to be especially true with respect to national security expenditure. *See, e.g.*, CONG. GLOBE, 27th Cong., 2d sess., 513-14 (1842) (quoting Representative Linn who supported a motion to deny the President funds for a minister to Mexico: "from the origin of the Government to the present time, this House has exercised this power, *in the negative form,* of either confining the appropriations within the limits of its own judgment and discretion, or of withholding them from particular branches of the service") (emphasis added); Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L LAW 69, 72 (1988) ("Regulations imposed by Congress on the foreign assistance process have been negative restrictions and prohibitions that bar the President from acting or spending funds in certain ways, rather than positive guidelines on how the money is to be spent."); *cf.* JAMES A. ROBINSON, CONGRESS AND FOREIGN POLICY-MAKING 193 (1962) ("While the executive possesses no constitutional mandate to impound funds which Congress appropriates, in fact Presidents have declined to use money for purposes directed by Congress. It is, therefore, more difficult for Congress to appear in an affirmative rather than a negative role.").

[80] *See* THE FEDERALIST No. 23, *supra* note 32, at 112 ("The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—*to direct their operations*—to provide for their support. These powers ought to exist without limitation.... The circumstances that endanger the

were concerned about military dictatorship, at the same time, the Framers realized that the Commander in Chief had to have some independent authority in order to fulfill his duties effectively.[81] From their unhappy experience with the Continental Congress during the Revolutionary War and under the Articles of Confederation, the Framers were leery of leaving too much control in the hands of the legislature.[82] It was in part for this reason that they purposely changed the constitutional language of Article I from authorizing Congress to "make war" to granting the legislature the power to "declare war."[83]

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safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed") (emphasis added).

[81] *See* THE FEDERALIST No. 72, at 366 (Alexander Hamilton) ("[T]he arrangement of the army and navy, the direction of the operations of war [among other matters] . . . constitute what seems to be most properly understood by the administration of government."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 768, at 546-47 (1833) (R. Rotunda & John Nowak ed. 1987) ("The command and application of the public force, to execute the laws, to maintain the peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken from it . . . . The direction of war most peculiarly demands these qualities which distinguish exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.").

[82] THE FEDERALIST No. 48, at 251 (James Madison) (Garry Wills ed. 1982) (stating that the legislature "is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.").

Alexander Hamilton complained in a letter in 1780 that one of the principal deficiencies of the Articles of Confederation was that under that regime Congress interfered too much with the execution of policies. "Congress have kept the power too much in their own hands and have meddled too much with details of every sort." *See* CHARLES C. THACH, JR. THE CREATION OF THE PRESIDENCY: 1775-1789, at 64 (1969 2d ed.).

Hamilton's ideological counterpart, Thomas Jefferson, later reiterated Hamilton's sentiments.

> I think it very material to separate in the hands of Congress the Executive and Legislative powers. . . . The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes the place of everything else.

Id. at 71.

[83] *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed.,

More specifically with respect to expenditure, the extent of Executive discretion was also discussed during the Ratification debates. Alexander Hamilton in *The Federalist* No. 72, wrote:

> The administration of government is . . . [largely] limited to executive details, and falls peculiarly within the province of the executive department. . . . the preparatory plans of finance, *the application and disbursement of the public moneys* in conformity to the *general* appropriations of the legislature the arrangement of the army and navy, the direction of the operations of war constitute what seems to be most properly understood by the administration of government.[84]

What Hamilton was emphasizing was that while Congress paints in broad strokes, the gaps in appropriation bills are to be filled in by the Executive Branch. This vision of Executive discretion over spending is accurately reflected in the words of the Dean of presidential scholars, Professor Edward Corwin, who noted that the Constitution "assumes that expenditure is primarily an executive function, and conversely that the participation of the legislative branch is essentially for the purpose simply of setting bounds to executive discretion—a theory confirmed by early practice under the Constitution."[85]

C. THE EARLY PRACTICE OF EXPENDITURE

Executive discretion over expenditure as envisioned by Hamilton and later

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1937).

[84] THE FEDERALIST No. 72, *supra* note 81, at 366 (emphasis added). *See also* GEORGE B. GALLOWAY, LEGISLATIVE PROCESS IN CONGRESS 141 (1946) ("Congress must concentrate on the making of broad policies . . . [and] refrain from intervening in the operating details of administration."); HARVEY C. MANSFIELD, JR., TAMING THE PRINCE 161 (1993) ("The purpose of separation [of the Executive and the Legislative branches] was to maintain the rule of law by denying the executive the privilege of law-making, and by preventing the legislative from descending too far into particulars."); Meyer, *supra* note 79, at 103 ("Congress should exert its authority over important 'policy' decisions in [foreign assistance] . . . and leave less important 'administrative details' to the Executive."). *Cf.* BLACKSTONE, *supra* note 15, at *270 (concluding that the "manner, time, and circumstances of putting laws into execution must frequently be left to the discretion of the executive magistrates.").

[85] CORWIN, *supra* note 13, at 149; MILLER, *supra* note 61, at 250 ("The living Constitution . . . has made the power over expenditures at the very least a shared power."). *But cf.* Act of March 3, 1799, ch. 48, 1 Stat. 749 (defining the rations to which troops were entitled as "eighteen ounces of bread or flour, or when neither can be obtained, one quart of rice and an half pound of sifted or bolted Indian meal").

described by Professor Corwin became a reality during the early days of the Republic. The first appropriation bills granted the President great leeway in allocating all public monies. In 1789,[86] 1790,[87] and 1791,[88] President Washington was given broad discretion over appropriations through the use of "lump-sum" appropriations. Through this approach, each department was granted a single sum to be disbursed as the Executive saw fit.[89] Thus, President Washington does not seem to have impounded funds against the will of Congress during his administration. This was because Washington had little need to do so since he could allocate public funds largely as he wished.[90]

Nonetheless, national security expenditure still enjoyed a unique status in the early Republic. Perhaps nothing better reflects the early coordinate construction placed on the Constitution with respect to national security expenditure than the discretion accorded the Executive branch to allocate funds for covert operations. While the Constitution mandates that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,"[91] this provision was not seen as preventing Congress from authorizing the President to withold publication of this expenditure. The First Congress when appropriating funds for covert activities provided:

> [T]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the amount of such expenditures *as he may think advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress

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[86] *See* Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 (providing "lump sums" for items such as the civil list, the department of war and pensions for invalids).

[87] *See* Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104.

[88] *See* Act of Feb. 11, 1791, ch. 6, 1 Stat. 190.

[89] *See, e.g.*, International Union v. Donovan, 746 F.2d 855, 861 (D.C. Cir. Scalia, J., 1984) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit").

[90] For example, with respect to a 1795 statute, Congress, at the behest of Secretary of the Treasury Alexander Hamilton, provided that with certain qualifications, any sum left unexpended for more than two years would go into a surplus fund. *See* WILMERDING, *supra* note 2, at 83. This very fact reflects that the functional equivalent of impoundment was occurring during the First Administration since funds were left unexpended. *See also supra* note 108.

[91] U.S. CONST. art. I, § 9.

annually . . . .[92]

The President's unique discretion with respect to the public accounting of national security funds was therefore acknowledged early on by Congress.[93] Such authority reflects both branches' early appreciation of the President's inherent discretion over national security expenditure.

The second Secretary of the Treasury, Oliver Wolcott, Jr., also emphasized the greater discretion enjoyed by the President in national security expenditure. In addressing the related issue of transfer of funds,[94] Wolcott stated:

> By far the greatest part of the expenditures for military purposes are, however, unsusceptible of such a minute distribution [from Congress], as are appropriated for other objects, and of course the expenditures for the military Department are kept under more general heads . . . . It has been my opinion, that the appropriations for mere military purposes, ought to be general grants of such sums . . .[95]

Even the great advocate of "specific appropriations,"[96] Albert Gallatin him-

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[92] 1 Stat. 129 (1790) (emphasis added). It should be noted that of the eighty-one members of the first Congress, fifty-four were members of the Constitutional Convention or of the state ratifying conventions. *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 61 (1976). *See also* Powell v. McCormack, 395 U.S. 486, 547 (1969) ("The relevance of prior [practice] is largely limited to the insight it afford[s] in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.").

[93] The use of covert spending has been authorized to varying degrees by Congress right up to the present, *see, e.g.*, LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 212-14 (3d. ed. 1991) (providing examples of the broad discretion and the secrecy surrounding the granting of funds to the President for covert spending), and has been upheld by the Supreme Court. *See also* Totten v. United States, 92 U.S. 105 (1875) (upholding President Lincoln's use of covert spending during the Civil War).

[94] A transfer of funds occurs when an Executive branch official takes funds from one appropriation account and puts them into another. *See* FISHER, *supra* note 2, at 99. This is different from reprogramming which involves the shifting of funds *within* an appropriation account. *See id.* at 75.

[95] WILMERDING, *supra* note 2, at 31. *Cf.* WRIGHT, *supra* note 46, at 336 ("For meeting the ordinary responsibilities and exercising the ordinary powers of states in the family of nations . . . [the President's] powers being in the main derived from the Constitution itself, he is not subject to the detailed direction of Congress, as he is in domestic administration.").

[96] The "doctrine of specific appropriations" is the view that Congress can and should specify appropriations as minutely as possible. *See* WILMERDING, *supra* note 2, at 50.

self conceded that "as laws can be executed only so far as they are practicable, and unavoidable deviations will promote a general relaxation, it will be expedient, in the several appropriation laws, *especially* for the War and Navy Departments, not to subdivide the appropriations, beyond what is substantially useful and necessary."[97]

Other early non-appropriation (authorization) bills also illustrate the greater discretion enjoyed by the President in national security affairs. With respect to accountability, the national security departments were granted considerably more independence from Congress than were their domestic counterparts. As discussed above, during the First Congress, the statute creating the Department of Foreign Affairs (later the State Department), provided that "the Secretary . . . shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."[98] On the other hand, the statute establishing the Department of the Treasury stated that the Secretary was required to make frequent reports to Congress.[99]

Beginning later in Washington's first term, annual appropriation bills began to contain more specific terms as Congress began to assert itself. This assertion of legislative power through the use of specific statutory terms generally did not, however, extend to appropriation bills for national security purposes.[100] Professor Corwin aptly summarized this phenomenon. Over the first three and a half decades of the Republic:

> [T]here were still certain fields in which Congress long left executive discretion a nearly free hand in this matter. Thus the provision made in the annual appropriation acts during Jefferson's two administrations and during Madison first administration 'for the expenses of intercourse with for-

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[97] *Id.* at 59 (emphasis added). For Wolcott's conflict with Gallatin over the principle of specific appropriations, see id., at 20-50.

[98] 1 Stat. 28-29 (1789).

[99] *See* 1 Stat. 65 (1789).

[100] *See* GERHARD CASPER, SEPARATING POWER 89 (1997) (stating that in the late 1790s, unlike civil appropriation acts which adhered to the doctrine of specific appropriations, military appropriations reverted to the earlier lump sum method, an occurrence that "must be interpreted as a congressional ratification of executive branch discretion in military matters"); THACH, *supra* note 32, at 160 ("The sole purpose of [the State Department] . . . was to carry out, not legislative orders, as expressed in appropriations acts, but the will of the executive."). *See also infra* note 598 (discussing the great discretion the Executive has always enjoyed in national security expenditure).

eign nations' was voted in lump sums.[101]

In fact, it was not until 1855 that Congress went so far as to assign definite diplomatic grades to individual countries with a specific annual compensation for each.[102] This historic congressional deference to the Executive in the expenditure of funds reflects the long-standing national security/domestic dichotomy that would later become manifested in the practice of impoundment by succeeding presidents. It also displays the appreciation by Congress of the President's need for greater control over the details of national security administration.

D. IMPOUNDMENT: 1801-1974

President Jefferson seems to have been the first President to have actually impounded funds in a manner inconsistent with the will of Congress.[103] In 1801, in his first message to Congress, Jefferson announced that he was refusing to spend the money Congress had appropriated for the construction of several navy yards.[104] Jefferson considered the expenditure wasteful and not essential to the nation's security. Consequently, he unilaterally "suspended" and "slackened these expenditures."[105] The funds went unspent and Congress never reappropri-

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[101] CORWIN, *supra* note 13, at 150.

[102] *See id. See also* CORWIN, *supra* note 13, at 486, n.102 (quoting a letter from Jefferson to Gallatin, dated February 19, 1804: "The maximum salaries of the different diplomatic grades were often stipulated in early appropriation acts.").

[103] Many would argue that President Jefferson's impoundments, like those of his successors, did not involve policy impoundments designed to frustrate the will of Congress, but instead, merely involved concerns about economy and efficiency, often deemed programmatic impoundment. *See* FISHER, *supra* note 2, at 148. Of course, the line between a policy and programmatic impoundment can often become blurred, especially if one of the President's overriding goals is to reduce spending. With Jefferson's presidency that was exactly the case; one of his primary aims as President was to reduce federal expenditure and with it, the size of the military. Thus, Jefferson's impoundment cannot be neatly dismissed as a programmatic impoundment. *See also* MILLER, *supra* note 61, at 83 (stating that the Ford Administration "deferred spending on all programs except those originally proposed in the President's budget."). The other examples of National Security Impoundment also generally reflect policy decisions made by the President. *See infra* Part II.D.

It could also be argued that impoundments before the ICA were generally second category actions by the President, not third category actions directly in conflict with the will of Congress. *See infra* note 336.

[104] 1 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 330 (James Richardson ed. 1896) [hereinafter 1 MESSAGES].

ated them.[106]

It bears noting that statutes enacted as late as 1806 have been cited by courts as qualifying for the deference granted to the Framers' interpretation of the Constitution.[107] In the case of impoundment, the first explicit instance appears to have occurred in 1801 and would fall well within the temporal range necessary for it also to qualify as a custom blessed by the Framers. That impoundment in a less obvious fashion began during the Washington Administration[108] makes all the more clear the Framer's endorsement of the concept that the Executive possesses some constitutional authority over the disbursement of national security funds.

Nor was the 1801 impoundment an isolated occurrence. The very next year Jefferson deferred[109] the expenditure of funds for fifteen gunboats.[110] Originally purchased to defend against the Spanish, Jefferson felt there was no longer the urgency for the gunboats after the U.S. completed the Louisiana Purchase.[111] He consequently withheld the $50,000 earmarked for their construction.[112] Jefferson stated that "[t]he sum of $50,000 appropriated by Congress for providing gunboats remains unexpended."[113] Jefferson reasoned that the "favorable and

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[105] *See id.*

[106] *See* Forrest McDonald, *The Framers' Conception of the Veto*, *in* PORK BARRELS, *supra* note 7, at 6.

[107] *See* Ex parte Quirin, 317 U.S. 1, 41 (1942).

[108] *See* Louis Fisher, *Budget, Management, and Personnel in* THE EXECUTIVE OFFICE OF THE PRESIDENT 99, 114 (1997 Harold C. Relyea ed.) ("Beginning with George Washington, presidents impounded funds with little incident . . . ").

[109] The term "defer" is a type of statutory impoundment and it is used here in generally the same sense as it is in the ICA. *See* 2 U.S.C.A. § 682(1) (West 1997) (defining deferral as "withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities"). Since Jefferson ultimately released the funds, this term describes the event with greater precision.

[110] *See, e.g.*, SCHLESINGER, supra note 12, at 235-36 (providing a brief summary of the Jefferson impoundment).

[111] *See* S. REP. NO. 104-9, at 3 (1995).

[112] *See* Act of Feb. 28, 1803, ch. 11, § 3, 2 Stat. 206 (stating that the President is "authorized and empowered" to build "a number not exceeding fifteen gunboats").

[113] 1 MESSAGES, *supra* note 104, at 348.

peaceable turn of affairs on the Mississippi rendered immediate execution of that law unnecessary . . ."[114] Nonetheless, following apparent congressional acquiescence to his action, Jefferson the next year announced to Congress: "The act of Congress of February 28, 1803, for building and employing a number of gunboats, is now in a course of execution to the extent there provided for."[115]

Jefferson's philosophy with respect to the President's discretion over national security spending is reflected in a letter he sent to Secretary of the Treasury Albert Gallatin the following year. The third President wrote: "The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties."[116] Jefferson explained:

> [T]here is annually a sum appropriated for the expenses of intercourse with foreign nations. The *purposes* of the appropriation being expressed by the *law*, in terms as general as the *duties* by the *Constitution*, the application of the money is left as much to the discretion of the Executive, as the performance of the duties . . . . From the origin of the present government to this day, the construction of the laws, and the practice under them, has been to consider the whole fund . . . as under the discretion of the President as to the persons he should commission to serve the United States in foreign parts, and all the expenses incident to the business in which they may be employed.[117]

Jefferson concluded that "it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specification, but leave the whole to the discretion of the President."[118] Thus, the nation's third President not only impounded national security funds but viewed all national security spending as falling within the discretion of the President to allocate or not allocate as he wished.

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[114] *Id.*

[115] *Id.* at 360 (quoting Jefferson's Fourth Annual Message).

[116] 11 THE WRITINGS OF THOMAS JEFFERSON 5 (Albert Bergh ed. 1904) [hereinafter JEFFERSON].

[117] *Id.* at 5 & 9. Despite Jefferson's earlier professions of support for Gallatin's doctrine of specific appropriation, in the words of Abraham Sofaer, "appropriations practice under Jefferson soon became largely indistinguishable from practice during the Federalist period." *See* SOFAER, *supra* note 92, at 170.

[118] JEFFERSON, *supra* note 116, at 9.

In the late 1820s and early 1830s, in the face of tightening congressional control over spending, a form of quasi-impoundment developed called "deferred payments."[119] It involved Executive officials suspending all payments once government coffers became empty but continuing to incur obligations.[120] Under this approach, government creditors went unpaid until after the passage of the next year's appropriation bill.[121] Apparently officials charged with national security responsibilities were especially apt to take these somewhat dubious actions. While serving as Secretary of Navy, Samuel Southard, John Branch and Levi Woodbury each carried on this practice.[122]

Presidential impoundment appears to have been continued by James Buchanan although it did not occur within the national security context. To punish representatives from Illinois, the President withheld certain funds earmarked for public buildings from their districts.[123] In 1876, President Grant followed suit and impounded harbor funds in a river and harbor bill that he did not think served the good of the country.[124] The latter two examples of unauthorized domestic impoundment, however, would prove to be the exception rather than the rule. Over the course of its history and until Presidents Johnson and Nixon began stretching the power of impoundment past its limits, most instances of impoundment would involve national security funds.[125] With respect to presidential control over domestic spending, the more appropriate approach was taken by Grant's successor, Rutherford B. Hayes. Instead of impounding funds in a domestic spending bill with which he disagreed, Hayes vetoed the bill three times rather than accept the unwanted spending.[126]

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[119] *See* WILMERDING, *supra* note 2, at 104.

[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] *See* LOUIS FISHER, THE CONSTITUTION BETWEEN FRIENDS 91 (1978).

[124] *See* 9 MESSAGES AND PAPERS OF THE PRESIDENTS 4331 (James Richardson 1897) [hereinafter 9 MESSAGES].

[125] *See infra* Part II.D.

[126] *See* 9 MESSAGES, *supra* note 124, 4475, 4475-80. Some prominent nineteenth-century members of Congress encouraged impoundment, however. In 1896, Senator John Sherman, an influential member of the Finance Committee expressed his disappointment that President Cleveland vetoed a bill. *See* FISHER, *supra* note 123, at 91. Sherman indicated he thought the appropriation bill was permissive in nature. *See id.* "If the President of the United States should see proper to say, 'that object of appropriation is not a wise one; I do not concur

In 1916, unauthorized impoundment apparently made its return. That year, Congress attached a rider to a Navy Appropriation bill declaring it "to be the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided. . . ."[127] The bill also authorized the President to invite other nations to attend a conference to discuss arbitration.[128] To this end, $200,000 was appropriated and nine U.S. citizens were appointed to represent the nation.[129] The President ignored the provisions.[130]

Two decades later,[131] impoundment was resurrected under President Franklin D. Roosevelt.[132] In 1938-39, Roosevelt impounded funds to keep the number of

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that the ought to be expended,' that is the end of it." 28 CONG. REC. 6031 (1896).

[127] 39 Stat. 618 (1916).

[128] *See id.*

[129] *See* Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 286 ANN. AM. ACAD. POL. & SOC. SCI. 145, 155 (Sept. 1953).

[130] *See id.*

[131] In 1923, President Harding threatened to impound funds earmarked for river and harbors. *See* FISHER, *supra* note 2, at 165. Harding died before he could carry out his threat and there is no evidence that his successor, President Coolidge, ever impounded the funds. *See id.* In the early 1930s, in an attempt to lessen the burdens of the Great Depression, President Hoover ordered a 10% cut in overall federal expenditures. *See* PFIFFNER, *supra* note 1, at 32. In so doing, Hoover relied on preexisting Bureau of the Budget procedures. *See id.*

[132] Of course, the routine impoundment of funds took place during this period. An 1896 Attorney General opinion concluded that the President was not required to obligate the total sum appropriated if the bill's objectives could be met with lesser amounts. FISHER, *supra* note 2, at 148. *See also* Ramsey Clark, Federal Aid Highway Act of 1956 – Power of President to impound Funds, OPINIONS OF THE ATTORNEY GENERAL (1967) ("Appropriations of a given amount for a particular activity constitutes only a ceiling on the amount which should be expended for that activity.").

The Anti-Deficiency Act of 1905, the Anti-Deficiency Act of 1906, the Budget and Accounting Act of 1921, the Full Employment Act of 1946, the Economic Stablilization Act, debt ceiling legislation and Executive Order 6166 all provided some legal justification for the routine withholding of funds by the Executive Branch. These authorizations, however, extended only to maximizing savings and assumed that congressional intent was being carried out. *See* LOUIS FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 106 (1972). These contingencies were interpreted broadly by the Executive Branch to include inflationary pressures. *See id.* During the Great Depression, both Presidents Hoover and Roosevelt requested and received congressional backing to cut down on costs by consolidating governmental agencies and reducing expenditures. *See* FISHER, *supra* note 2, at 363.

R.O.T.C. units at a level he thought more appropriate.[133] As the U.S. became increasingly involved in World War II, Roosevelt began to exercise greater control over federal expenditure of funds. In January 1941, in his budget message for the following year, Roosevelt unilaterally announced he would decline to spend funds for public works since he believed they would detract from the war effort.[134] Roosevelt linked the deferral of the funds to preparations for the impending war. "During this period of national emergency it seems appropriate to defer construction projects that interfere with the defense program by diverting manpower and materials."[135]

In 1942, by the time of his 1943 budget message, Roosevelt indicated he had already impounded nearly half a billion dollars in the name of national security.[136] The President stated:

> The public works program is being fully adjusted to the war effort. The general program of 578 million dollars includes these projects necessary for increasing production of hydroelectric power, for flood control, and for river and harbor work related to military needs. Federal aid for highways will be expended only for construction essential for strategic purposes. . . . For all other Federal construction I am restricting expenditures to those active projects which cannot be discontinued without endangering the structural work now in progress.[137]

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[133] *See* HUZAR, *supra* note 2, at 363. In both 1935-36 and 1936-37, instead of giving full effect to congressional appropriations, which called for an army of 165,000 enlisted men, the President instructed the War Department to withhold much of the funding above his submitted budget. *See id.* At the very least, the latter instance of presidential impoundment appears to have been explicitly authorized from the legislative history of the bills. *See id.* As a result, this withholding of funds does not appear to fit neatly within the category of National Security Impoundment. *See id.*

[134] *See* PFIFFNER, *supra* note 1, at 33.

[135] WALLACE, *supra* note 2, at 145.

[136] *See 1971 Hearings*, *supra* note 68, at 378 (submission of Professor J.D. Williams, entitled *The Impounding of Funds by the Bureau of the Budget*) [hereinafter Williams]. During actual wartime the President's ability to impound reaches its zenith. *See infra* Part VI.A.1. *Cf.*, *e.g.*, Bennet N. Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 59 (1966) ("There is no question but that a formal declaration of war by Congress serves to transfer some intangible quantum of power to the President").

[137] WALLACE, *supra* note 2, at 145.

Before the war was over these projects would also come to include appropriations for the Civilian Conservation Corps, civilian-pilot training projects and the Surplus Marketing Corporation.[138] In a letter to the Secretary of War dated April 28, 1942, Roosevelt requested that the Department "in cooperation with the Director of the Bureau of the Budget, establish reserves in the amount that can be set aside at this time by the deferment of construction projects not essential to the war effort."[139] The amounts would not prove insubstantial, ranging from $174 million to $405 million in the years 1940-1943.[140]

By the summer of 1942, Roosevelt began to come under political pressure from Congress for his impoundment of funds. In a letter to Senator Richard Russell of Georgia in August, 1942, Roosevelt explained himself: "the mere fact that Congress, by the appropriation process, has made available specified sums for the various programs and functions of the Government is not a mandate that such funds must be fully expended."[141] To require that funds be fully expended "would take from the Chief Executive every incentive for good management and the practice of common sense economy."[142]

Despite President Roosevelt's justification that the impoundments were necessary for the war effort, several members of Congress remained frustrated with his actions. In 1943, Senators Carl Hayden and Kenneth McKellar attempted to insert mandatory spending language into a section of the Rural Postal Roads Act.[143] The bill provided that "[n]o part of any appropriations authorized in this act shall be impounded or withheld from obligation or expenditure by any agency or official other than the Commission of Public Records."[144] House members during the Conference Committee, however, persuaded the Senate to drop the language.[145] Senator McKellar tried again that same year to add such language, this time to the National Defense Appropriation Bill.[146] Once again he

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[138] *See* PFIFFNER, *supra* note 1, at 33.

[139] WALLACE, *supra* note 2, at 146.

[140] *See id.*

[141] *Id.*

[142] Fisher, *supra* note 108, at 114.

[143] *See* Fisher, *Politics of Impounded Funds*, *supra* note 2, at 365.

[144] Williams, *supra* note 136, at 388.

[145] *See* Fisher, *Politics of Impounded Funds*, *supra* note 2, at 365.

[146] *See* Williams, *supra* note 136, at 389. The language of the amendment provided

was frustrated in his efforts. In the end, as with previous impoundments, Congress acquiesced in the face of presidential stubbornness.[147]

Roosevelt's actions reflect how the President's power over administrative details reaches its zenith during wartime. As the Supreme Court has stated, once the nation is at war, regardless of whether initiated by "declaration, invasion, or insurrection, the whole power of conducting it, as to manner, method, and as to all the means and appliances . . . is given to the President. He is the sole judge of the exigencies, necessities, and duties demanded by the occasion . . ."[148] As with other aspects of public administration, the President's power over expenditure is at its height during wartime.

Following the surrender of the Axis Powers, the federal government was left with billions of extra dollars earmarked for military purposes.[149] President Truman responded to a directive from Congress by submitting a list of proposed reductions in the civilian war agencies and military establishments.[150] The ultimate rescission bill, however, contained a rider that Truman found objectionable and he refused to sign the bill.[151] Despite the lack of legislative authority, Truman directed the Bureau of the Budget to designate the amounts as nonexpendable.[152]

In the years following World War II, President Truman and Congress clashed repeatedly over military spending.[153] One such area of conflict appears to have been over funds appropriated for one of Congress' favorite causes, the National Guard. Professor Elias Huzar reports that approximately half of the National Guard's appropriation for fiscal year 1946-47 were impounded.[154]

"[t]hat no appropriation or part of any appropriation heretofore, herein, or hereafter made available . . . to construct any particular project shall be impounded . . ." *Id.*

[147] *See id.*

[148] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 29 (1866).

[149] *See* FISHER, *supra* note 2, at 158.

[150] *See id.* at 159.

[151] *See id.*

[152] *See id.*

[153] Roosevelt and Truman both stymied spending for the Kings River Project in California's Central Valley Basin. *See* FISHER, *supra* note 2, at 166. Only in 1947 did Truman finally release the funds. *See id.*

[154] *See* HUZAR, *supra* note 2, at 276.

The principal area of discord between Truman and Congress would prove not to be the National Guard, however, but the Air Force.[155] In this conflict, Congress generally sided with Department of Defense officials, who believed that American defense capabilities needed to be increased in the late 1940s and early 1950s.[156] The Truman administration, on the other hand, vigorously opposed such efforts.[157] In 1948, Congress appropriated $822 million above the President's request.[158] The spending, however, was made contingent upon the President's finding that the amount was necessary to national defense.[159] Not surprisingly, the President made such a determination and declined to spend the additional funds.[160]

The next year Congress proved less pliant. After President Truman requested funding sufficient for the maintenance of a forty-eight group Air Force, the House of Representatives responded by providing for a fifty-eight group.[161] An impasse ensued during the conference committee when the Senate sided with the President and proved reluctant to add the funding for the extra groups.[162] To resolve the deadlock, an informal understanding was reached between the President and Congress whereby the bill granted the Secretary of Defense the discretion to spend the extra funds if he wished.[163] President Truman signed the bill only after announcing that he had placed the additional Air Force funds on reserve.[164] The impounded funds totaled $735 million and were never spent.[165] When asked if the impoundment violated his duty to faithfully execute the laws, Truman replied: "That is the discretionary power of the President. If he doesn't

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[155] *See* Abascal & Kramer Part I, *supra* note 2, at 1611.

[156] *See id.*

[157] *See id.*

[158] *See* Fisher, *Politics of Impounded Funds*, *supra* note 2, at 366.

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See id.* at 367.

[165] *See id.*

feel like the money should be spent, I don't think he can be forced to spend it."[166]

The House Appropriations Committee quickly grew frustrated by the President's actions, considering them an affront to its authority.[167] Consequently, Secretary of Defense Louis Johnson was called before the Committee to defend the Administration's actions.[168] There, Secretary Johnson faced pointed questions about the President's authority to withhold funds in the face of congressional appropriations.[169] Johnson explained that impoundment was based on the "inherent authority vested in the Commander in Chief and the President."[170] When pressed by Chairman George H. Mahon about whether the President could impound all appropriated funds and disband the armed forces entirely, Johnson dismissed the remark as "*reductio ad absurdum.*"[171] Johnson explained:

> There are certain duties and responsibilities of the President of the United States and the Commander in Chief. Operating in those fields he is inherently invested with certain powers. Any such assumption as the doing of those things which would conclude that he had not acted for the best interest of the country in the over-all picture within a sound and reasonable determination might raise questions such as you suggest, but as long as he moves as Harry Truman has moved, in my opinion, in the area above what he thinks are the necessary items for the defense or security—and you do not challenge and cannot challenge that defense and security—it is within the inherent authority of the President and Commander in Chief to so act.[172]

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[166] PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 661 (1950).

[167] *See Department of Defense Appropriations for 1951: Hearings on H.R. 1292 Before the Comm. on Appropriations,* 81st Cong. 52-55 (1950).

[168] *See* Fisher, *Politics of Impounded Funds*, *supra* note 2, at 367.

[169] *See id.*

[170] *Id.*

[171] HUZAR, *supra* note 2, at 367.

[172] *Id.* at 368. As discussed by Secretary Johnson, there are a host of policy reasons for allowing the President to impound funds. Since he maintains a national, instead of a parochial, constituency, he certainly benefits from being less caught up in, if not completely immune from, the allure of pork barrel projects. He also benefits from better access to information and from never being out of session.

Even Mahon himself, despite his tough questioning of Secretary Johnson, later acknowledged the legitimacy of impoundment.

> [O]ver the long span of time, through many Congresses and many administrations, weight of experience and practice bears out the general proposition that an appropriation does not constitute a mandate to spend every dollar appropriated.... That is a generally accepted concept.... I believe it is fundamentally desirable that the Executive have limited powers of impoundment in the interests of good management and constructive economy in public expenditures.[173]

Other congressional leaders contemporary with Mahon agreed that impoundment had some degree of legitimacy. Future Senate Majority Leader Robert Taft stated that "[t]he Appropriations Committee can reduce [military] funds to what it considers a point of safety, but it cannot feel sure about going further. It might be destroying a department's effective work. Only the department itself can make the additional saving necessary over what Congress has done."[174] Chairman Elmer Thomas of the Senate subcommittee on military appropriations concurred. In debate over impoundment of military funds, he stated: "I do not think the money should be used. I think it should be impounded, and leave the impression that if the money is appropriated it may not be used."[175]

Despite congressional pique over the size of the air force, that same year, President Truman also impounded funds for construction of an aircraft carrier, the *U.S.S. United States*.[176] Initial estimates for construction of the carrier ranged from $189 to $500 million.[177] For economic reasons, and to dampen interservice rivalry, President Truman cancelled construction of the carrier altogether.[178] As a compromise, Truman later approved construction of a more modest vessel.[179]

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[173] *Letter from George H. Mahon to Senator Ervin*, in *1971 Hearings*, *supra* note 68, at 501.

[174] 95 CONG. REC. H12635 (daily ed. Aug. 29, 1949).

[175] 95 CONG. REC. H14639 (daily ed. Oct. 12, 1949).

[176] Fisher, *Politics of Impounded Funds*, *supra* note 2, at 367.

[177] *See id.*

[178] *See id.* at 368.

[179] *See id.*

Nor were these the only examples of President Truman's National Security Impoundment. At the beginning of the Korean War, President Truman issued an executive order pursuant to congressional authorization. The order halted appropriations for construction projects other than those deemed essential to the war effort.[180] In so doing, Truman impounded $573 million.[181] During Truman's presidency, the Department of Defense also canceled the aircraft carrier *Forrestal*.[182] Finally, toward the end of the Korean War, Truman impounded funds earmarked for the construction of veteran's hospitals.[183]

President Truman's successor, Dwight Eisenhower, continued the executive tradition of impounding funds for military spending he thought unnecessary. In 1956, Eisenhower withheld $46.4 million in funds earmarked for Marine Corps personnel strength.[184] That same year, the Department of Defense declined to spend funds for the building of twenty superfort bombers.[185] In 1958, it was the Army's turn to feel the pinch of impoundment. The Army sought $6 billion for the funding of the Nike-Zeus antimissile system.[186] The Secretary of Defense opposed the idea, believing that more research was necessary.[187] Congress thought otherwise, and appropriated $137 million for the initial Nike-Zeus procurement.[188] Eisenhower countered by impounding the funds pending the system's initial test results.[189] In January 1960, Eisenhower finally defused the con-

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[180] *See id.* at 370. It should be emphasized that the President's power of impoundment during a declared war such as World War II would be greater than during an undeclared war such as the Korean War. *See, e.g.*, Hollander, *supra* note 136, at 59.

[181] *See id.*

[182] *See Hearings on the National Military Establishment Bill for 1950 Before the Senate Comm. on Appropriations*, 81st Cong. 328 (1949) (testimony of the Secretary of the Air Force).

[183] *See 1971 Hearings*, *supra* note 68, at 237 (statement of Sen. Ervin).

[184] *See id.* at 301 (memorandum of Mary Louise Ramsey, *Impoundment by the Executive Department of Funds Which Congress has Authorized it to Spend or Obligate*).

[185] *See 1973 Hearings*, *supra* note 1, at 98 (statement of Elmer Staats, Comptroller General of the United States).

[186] *See* Fisher, *Politics of Impounded Funds*, *supra* note 2, at 368.

[187] *See id.*

[188] *See id.* at 368-69.

[189] *See id.* at 369.

flict by announcing that the funds would be released for continued development but not for production.[190]

In 1959, Eisenhower impounded funds for a host of military projects. They included $37 million for increased Army modernization, $11 million in speeding work on Regulus submarines, $48 million for an increase in the Hound Dog missile program, $90 million for an increase in the Minuteman program, $55.6 million in additional KC-135 tankers, and $140 million for additional strategic airlift aircraft.[191] In 1960, Eisenhower proved no less zealous; impounding $43.1 million for maintaining Marine Corps strength at 200,000, $35 million in advance procurement for nuclear-powered carrier and $12.2 million for National Guard construction.[192] For fiscal year 1961, Eisenhower impounded $97 million for additional aircraft for air defense and $4 million for Army reserve construction.[193]

Much like Truman, Eisenhower also did not shy away from impounding funds earmarked for veterans. In 1959, Eisenhower signed a bill providing additional funds for housing loans to veterans.[194] Congress had added an extra $100 million to his request.[195] Eisenhower, in turn, narrowed the appropriation to areas where private capital was not available.[196] He emphasized that the Veterans Administration would "exercise maximum caution" in making such loans until an accurate determination of private capital could be made.[197]

President Kennedy also engaged in National Security Impoundment. In so doing, he became embroiled in one of the most publicized impoundment controversies up to that time. In 1961, the Administration requested $200 million for the B-70 strategic bomber[198] (later renamed the RS-70 weapon system).[199] Con-

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[190] *See id.*

[191] *See 1971 Hearings*, *supra* note 68, at 301 (memorandum of Mary Louise Ramsey).

[192] *See id.*

[193] *See id.*

[194] *See 1971 Hearings*, *supra* note 68, at 339 (statement of Sen. Ervin) (referring to *Memorandum to the President: Authority to Reduce Expenditures*).

[195] *See id.*

[196] *See id.*

[197] *See id.*

[198] Fisher, *Politics of Impounded Funds*, *supra* note 2, at 369.

gress, however, deemed it wise to spend $380 million for the plane.[200] Believing that intercontinental ballistic missile technology precluded the need for the new bomber, Kennedy refused to spend the additional $180 million.[201]

Kennedy's impoundment drew the ire of the powerful House Armed Services Committee Chairman Carl Vinson. In 1962, under Vinson's leadership, the committee drafted statutory language for fiscal year 1963 that stated that "[l]est there be any doubt as to what the RS-70 amendment means let it be said that it means exactly what it says, i.e., that the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize the full amount of the $491 million authority granted . . . 'for an RS-70 weapon system.'"[202] As if the challenge were not clear enough, the committee added, "[i]f this language constitutes a test as to whether Congress has the power to so mandate, let the test be made and let this important weapon system be the field of trial."[203] The amount—a full $320 million above the administration's request[204]—and the stark statutory and committee report language constituted an unequivocal challenge to the Executive branch's authority to allocate national security funds. President Kennedy bridled at the provision and his attorneys concluded he could ignore the mandatory language.[205] The President responded in a letter to Vinson, in which he argued that "the full powers and discretions [sic] essential to the faithful execution of [my] responsibilities as President and Commander in Chief" demanded that such mandatory language be removed.[206] Kennedy wrote: "I would respectfully suggest that, in place of the word 'directed,' the word 'authorized' would be made suitable to an authorizing bill (which is not an appropriation of funds) and more clearly in line with the spirit of the Constitution."[207]

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[199] *See* Davis, *supra* note 2, at 39.

[200] *See* Fisher, *Politics of Impounded Funds*, *supra* note 2, at 369.

[201] *See id.*

[202] H.R. REP. No. 1406, 87th Cong., 2d sess. at 9 (1962) (House Armed Services Committee).

[203] *Id.*

[204] *See* Fisher, *Funds Impounded by the President, supra* note 1, at 128.

[205] *See* TED SORENSON, KENNEDY 348 (1965).

[206] *Id.*

[207] PFIFFNER, *supra* note 1, at 38.

The tension between the two branches began to diffuse as Vinson began to hemorrhage political support in the House.[208] Congressional leaders opposed Vinson's attempt to require the Executive to spend the national security funds. Representative (and future Minority Leader and President) Ford stated that such statutory language "invaded the responsibilities and the jurisdiction of... the President... usurped the appropriating authority of the committee on appropriations... [and] created inflexibility in the management of the RS-70 program...."[209] Representative Bass reached much the same conclusion. "It is inconceivable to me that Congress should tell a Commander-in-Chief what weapons system to develop any more than it should tell a general in the field which weapons to fire."[210]

To resolve the conflict a conciliatory meeting was held between President Kennedy and Vinson[211] during which Kennedy expressed to Vinson his view that the bill's wording was ill advised for an appropriation bill. At the meeting, the President requested its replacement with "authorized."[212] Vinson grudgingly acceded to the President's request.[213]

To allow Vinson to save face, Kennedy instructed Secretary of Defense Robert McNamara to undertake a study of the RS-70 Program.[214] Ultimately only two prototypes were ever built. One crashed in 1966 and the other found its way into the Air Force Museum.[215] Much to the pique of many in Congress, the legislature had yet again acquiesced to the President with respect to national security spending. Vinson's open challenge to the President's discretion in national security spending met with defeat,[216] reflecting again the long-standing

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[208] House Speaker McCormack and Majority Leader Carl Albert opposed the mandatory language. *See id.* at 38.

[209] CONG. REC. 4329-30 (daily ed. March 21, 1962). *See also* EDWARD A. KOLODZIEJ, THE UNCOMMON DEFENSE AND CONGRESS, 1945-1963 414-16 (1966) (concluding that legislators realized that technical differences over the RS-70 were sufficiently complicated without forcing Congress "into a Procrustean bed of simplified and essentially misleading interpretations of Congress' constitutional role in defense policy").

[210] 108 CONG. REC. 4719 (1962).

[211] *See* Stassen, *supra* note 2, at 1166.

[212] Fisher, *Funds Impounded by the President*, *supra* note 1, at 128-29.

[213] Stassen, *supra* note 2, at 1166-67.

[214] *See* PFIFFNER, *supra* note 1, at 38.

[215] *See id.* at 39.

coordinate construction by the two branches.

President Johnson did more than merely carry on the presidential tradition of impoundment. Unlike his predecessors, who impounded funds outside of the national security arena only sparingly, Johnson stretched the custom to encompass domestic programs on a hitherto unprecedented scale. For example, in 1966, Johnson reduced by $5.3 billion the available obligations for the highway trust funds and other programs for housing and urban development, health, education and welfare, agriculture and the interior.[217] As a general matter, however, since these impoundments involved projects that Johnson strongly supported,[218] the reductions were only of a temporary variety and the funds were eventually released.[219] As a result, Johnson did not disable the projects, he only deferred the expenditure of funds to reduce inflation.[220]

At the same time, Johnson tried to weed out what he thought to be unnecessary military expenses. In 1965, the Navy requested that a third nuclear-powered guided missile ship, the DLGN-36, be constructed for the 1966 fiscal year.[221] The Department of Defense declined the Navy's request, however.[222] Congress had other ideas and it authorized $150.5 million to build the frigate.[223] Despite the congressional authorization, the Department of Defense refused to release the necessary funds for the Navy to begin construction.[224] It also declined the

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[216] Certainly Vinson's position after the incident did not resemble anything like a victory. Representative Leslie Arends at the time termed it a "paper victory." FISHER, *supra* note 2, at 307 n.47. Representative Frank Becker noted that the Administration's offer to conduct a study was "the surest way to brush something under the rug that you want to get rid of." *Id.* Representative H.R. Gross stated that the fight "had been lost." *See id.* For more of the Kennedy-Vinson conflict, *see* J. Malcomb Moore, *To . . . Provide for the Common Defense*, *in* PUBLIC ADMINISTRATION 371 (R. Golembiewski et al eds. 2d. ed. 1972).

[217] *See* Glazier, *in* PORK BARRELS, *supra* note 7, at 13.

[218] *Cf.* PFIFFNER, *supra* note 1, at 42-43.

[219] DENNIS S. IPPOLITO, THE BUDGET AND NATIONAL POLITICS 138 (1978).

[220] *See* PFIFFNER, *supra* note 1, at 42.

[221] *See* Stassen, *supra* note 2, at 1169.

[222] *Id.*

[223] *See id.* at 1169-70. The statute was the Act of June 11, 1965. *See* 79 Stat. 127-28 (1965).

[224] Stassen, *supra* note 2, at 1170.

Navy's request for the frigate in its fiscal year 1967 budget.[225] These actions prompted Vinson's successor as Chairman of the House Armed Services Committee, L. Mendel Rivers, to up the stakes. In its version of the authorization bill, the House Committee decided to use the same mandatory language for the construction of the frigate that Vinson had used for the RS-70.[226] The Senate Armed Services Committee proved less willing to use such sharp tactics, however.[227] In conference, the two houses agreed to less stringent language: "The contract for the construction of the nuclear powered guided missile frigate . . . shall be entered into as soon as practicable unless the President fully advises the Congress that its construction is not in the national interest."[228] The Department of Defense released funds for the DLGN-36 but did not request funds for a second frigate, the DLGN-37. Rivers, however, was determined to see construction of the other frigate begin. Consequently, similar strong language was inserted into the authorization act the next year including a provision allocating funds for a third frigate.[229] Again, the Department refused to release the funds.[230]

Only after it became apparent that the Joint Atomic Energy Committee of Congress might throw its weight behind the construction of the two additional frigates did President Johnson finally relent the following year and release the funds necessary to build the ships.[231] Although he had succeeded in deferring the expenditure of the funds for years, Johnson's retreat represented only the second setback suffered by a President with respect to the impoundment of funds and signaled the erosion of Congress' grudging acceptance of impoundment.

Drawing from President Johnson's precedents, President Nixon took impoundment to its next possible step: as a means to effect policy ends not only in the national security realm but also in the domestic arena.[232] President Nixon

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[225] *See id.*

[226] *See* PFIFFNER, *supra* note 1, at 39.

[227] *See* Stassen, *supra* note 2, at 1170.

[228] H.R. REP. NO. 1679, 89th Cong., 2d Sess. (1966), *quoted in* Stassen, *supra* note 2, at 1171.

[229] *See* 83 Stat. 231.

[230] *See* Stassen *supra* note 2, at 1174.

[231] *See id.* at 1169-76.

[232] At least part of the reason why Nixon did not impound defense funds in the manner of his predecessors was that Congress authorized him to impound such funds. Department of Defense Appropriation Act of 1970 § 613(a), 83 Stat. 469 (1969) ("During the current fiscal year, the President may exempt appropriations, funds, and contract authorizations available for

baldly asserted that he possessed a broad constitutional power to impound funds in order to combat inflation and prevent a tax increase. "The constitutional right of the President of the United States to impound funds, and that it is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear."[233] By arguing that the "executive power" clause empowered him to withhold funds,[234] the Nixon administration attempted to terminate programs with which the President disapproved.[235] In 1973 alone, Nixon attempted to impound more than $12 billion in appropriated funds.[236] Included in these monies were $6 billion of an $11 billion sewage treatment bill which Congress had passed over Nixon's veto.[237] Aside from the scale of impoundment, the fact that most of the President's actions occurred outside of the scope of his national security powers and involved domestic funds when the nation was no longer at war were both novel aspects of impoundment. Professor Pfiffner accurately noted that Nixon had recast impoundment both quantitatively and qualitatively.[238] In abandoning both the modest scale of impoundment and its national security underpinnings, the President's actions triggered a vigorous congressional response culminating in passage of the ICA in 1974.[239] These examples of impoundment also opened the door to much litigation,[240] including, ultimately, the *Train* decision.

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military functions under the Department of Defense . . . whenever he considers such action to be necessary in the interest of national defense.").

[233] PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1973 62 (1975).

[234] *See* Note, *Impoundment of Funds*, *supra* note 2, at 1513-16.

[235] *See* FISHER, *supra* note 2, at 176-77.

[236] *See* L. Gordon Crovitz, *Introduction in* PORK BARRELS, *supra* note 7, at x. Other estimates have run as high as $18 billion. *See* LANCE T. LELOUP, THE FISCAL CONGRESS 9 (1980). For a discussion of Nixon's impoundment, *see, e.g.*, ALLEN SCHICK, CONGRESS AND MONEY 43-48 (1980). President Johnson's impoundment totals also ran in the billions. *See* Boggs, *supra* note 2, at 226.

[237] Crovitz, *in* PORK BARRELS, *supra* note 7, at x.

[238] PFIFFNER, *supra* note 1, at 121.

[239] *Id.* at 3.

[240] *See infra* Part II.E.2 & 3.

E. THE CONTEMPORARY LEGAL FRAMEWORK FOR IMPOUNDMENT

1. THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974 (ICA)

In response to President Nixon's actions,[241] Congress passed the ICA, an act which comprehensively restructured the federal budget process.[242] The act officially recognized impoundment and brought what had been a custom into a more predictable, statutory framework.[243] The ICA classified impoundment into two categories: rescission and deferral. With rescission, the President, with the assent of Congress, was granted the power to cancel budget authority previously authorized by Congress.[244] The ICA mandates that whenever the President wishes to rescind spending he must first issue a special message to Congress.[245] In order for the funds to be canceled, both houses must complete action on a rescission bill approving the impoundment within forty-five days of a continuous session.[246] If Congress fails to act within the allotted time, the funds are to be released by the President.[247] Thus, the onus rests on Congress to cancel the funds, not to restore them.

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[241] *See* PFIFFNER, *supra* note 1, at 3.

[242] The Budget Act of 1921 had previously governed the budget process.

[243] LOUIS FISHER, THE POLITICS OF SHARED POWER 84 (4th ed. 1998) (stating that the ICA "explicitly recognized the right of the president to withhold funds but subjected executive discretion to congressional review and disapproval").

[244] *See* 2 U.S.C.A. § 683 (West 1997). Unlike the rescission procedure, which has remained largely the same since 1974, the deferral mechanism has been amended in light of a subsequent court decision. The original version of ICA contained deferral requirements much like those for proposed rescissions. The 1974 version, however, did allow for unilateral executive deferrals unless either house of Congress passed an impoundment resolution disapproving the deferral. *See* Pub. L. No. 93-344 § 1013, 88 Stat. 334 (1974) (amended 1987). Following I.N.S. v. Chadha, 462 U.S. 919 (1983), which struck down the legislative veto, the D.C. Circuit struck down the entire deferral section of the ICA. *See* City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987). Congress immediately codified the court's ruling. *See* 2 U.S.C.A. § 684(b) (West 1997).

[245] *See* 2 U.S.C.A. § 683 (West 1997).

[246] The Line Item Veto Act amended the ICA to add enhanced rescission authority. The Act was struck down, however, as a violation of the Presentment Clause. *See* Clinton v. New York, 524 U.S. 417 (1998).

[247] *See* 2 U.S.C.A. § 683 (West 1997).

Deferral involves the withholding or delay of an obligation or expenditure of budget authority which effectively precludes the obligation or expenditure of budget authority.[248] This may include, for example, authority to obligate by contract in advance of appropriations as specifically authorized by law.[249] Deferrals are permitted only to provide for contingencies, to achieve savings through greater efficiency or as otherwise specifically provided by law.[250] No employee may defer budget authority for any other reason.[251]

It should be noted that nowhere does the ICA make a distinction between national security and domestic affairs. Of course, this failure of the statute can in no way limit the President's constitutional authority and this lacuna reflects more a weakness in the statute than any diminution of the President's authority.

Under the ICA the President has two statutory responsibilities. First, he is required to issue a special message to Congress whenever he proposes rescissions or deferrals. Second, the President may only impound funds if the conditions of the ICA (or other relevant statutes) are met. The statute—far from prohibiting impoundment—actually recognized the practice in a formal sense and provided a statutory framework for it to occur. However, as will be discussed below, the President under certain limited circumstances may be justified in defying his statutory obligations under the ICA.[252]

2. *TRAIN V. NEW YORK*

Train v. New York[253] is the only Supreme Court case to address impoundment directly. It involved a class action for declaratory and injunctive relief against the Administrator of the Environmental Protection Agency ("EPA").[254] Pursuant to President Nixon's instructions, the EPA Administrator declined to distribute the full amount of funds authorized for sewage treatment works under the Federal Water Pollution Control Act Amendments of 1972.[255] The Supreme Court

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[248] *See id.* § 682.

[249] *See id.*

[250] *See* Pub. L. No. 100-119 § 206, 101 Stat. 785 (1987).

[251] *See id.*

[252] *See generally infra* Part III.

[253] *See* Train v. City of New York, 420 U.S. 35 (1975).

[254] *See id.*

[255] *See id.*

decided that the Amendments did not permit the Administrator to spend less than the appropriated amounts.[256]

What was notable about the decision was what it did not do. While the Court ruled that the President was required to release the funds earmarked for a domestic program, the Court did not specifically comment on the constitutional issue of impoundment. Justice White writing for the Court stated: "This case poses certain questions concerning the proper construction of the Federal Water Pollution Act of 1972 . . .."[257] The Court was careful to emphasize that the decision should be construed narrowly so as not to implicate constitutional issues. "The issue in this case is the extent of the authority of the Executive to control expenditures for a program that Congress has funded in the manner and under the circumstances present here."[258] From such statements, it is clear that the constitutional question of impoundment was avoided. It is also important to note that the decision in no way involved the President impounding national security funds.

3. LOWER COURT DECISIONS

Although the Supreme Court in *Train* did not reach the constitutional issue of impoundment, one of the nation's most prestigious courts, the United States Court of Appeals for the District of Columbia, has confirmed in dictum that the President does indeed have some constitutional authority to withhold funds in defiance of Congress.[259] The appellate court stated in *Brown v. Califano*[260] that the "President's authority to impound funds derives from his duty to take care that the laws [are] faithfully executed . . . and from specific statutory provisions."[261] The Court emphasized that "[i]mpoundment takes on special importance where the Executive believes the expenditure would violate a Constitutional provision."[262] Accordingly, if Congress through its spending power intruded impermissibly into the constitutional provisions involving the President's national security powers, he could lawfully withhold the appropriated funds.

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256 *See id.* at 37.

257 *Id.*

258 *Id.* at 39 n.2.

259 Brown v. Califano, 627 F.2d 1221, 1236 n.90 (D.C. Cir. 1980).

260 *See id.*

261 *Id.*

262 *Id.*

With respect to domestic affairs, lower federal courts, both before and after *Train*, have demonstrated the uphill legal battle faced by a President attempting to impound such funds.[263] Lower courts have almost uniformly invalidated Executive impoundment of domestic funds. These cases include monies earmarked for agricultural loans,[264] developmental loans,[265] antipoverty funds,[266] neighborhood youth programs,[267] education funds,[268] environmental programs,[269] highway funds,[270] housing funds,[271] funds earmarked to improve mental health,[272] and library services and construction funds.[273] Even when Executive impoundments were upheld, they were upheld on statutory, not constitutional grounds.[274]

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[263] Dr. Louis Fisher of the Congressional Research Service calculated that almost eighty suits were brought during this time. *See* Fisher, *supra* note 108, at 115.

[264] *See* Pealo v. Farmers Home Admin., 361 F. Supp. 1320 (D.D.C. 1973); Berends v. Butz, 357 F. Supp. 143 (Minn. 1973).

[265] *See* Sioux Valley Empire Elec. Assoc. v. Butz, 504 F.2d 168 (S.D. Cal. 1974); Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C. 1973).

[266] *See* Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973).

[267] *See* Community Action Programs Executive Dir. Ass'n v. Ash, 365 F. Supp. 1355 (D.N.J. 1973).

[268] *See* People ex rel. Bakalis v. Weinberger, 368 F. Supp. 721 (N.D. Ill. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973).

[269] *See* New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973); Maine v. Fri, 486 F.2d 713 (1st Cir. 1973).

[270] *See* Iowa ex rel. State Highway Com. v. Brinegard, 512 F.2d 722 (8th Cir. 1975); State Highway Com. v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Louisiana ex rel. Guste v. Brinegar, 388 F. Supp. 1319 (D.D.C. 1975); Minnesota by Spannaus v. Coleman, 391 F. Supp. 330 (Minn. 1975); Montana Dep't of Highways v. Brinegard, 380 F. Supp. 861 (Mont. 1974).

[271] *See* Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C. 1973).

[272] *See* National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973).

[273] *See* Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).

[274] *See* Office of Economic Opportunity Employees Union v. Phillips, 360 F. Supp. 1092 (N.D. Ill. 1973), Housing Authority of San Francisco v. United States Dep't of H.U.D., 340 F. Supp. 654 (N.D. Cal. 1972); *but see* American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973).

A minority of the lower court decisions striking down impoundment were couched in constitutional terms. An example is *Guste v. Brinegar*,[275] which involved impoundment of funds earmarked for interstate highway construction authorized under the Federal-Aid Highway Act. In the case, the court ruled that "the vesting of '[the] executive power' in the President and the requirement to 'take Care that the Laws be faithfully executed' are hardly grants of legislative power."[276] This reasoning, however, was not adopted by the Supreme Court in *Train*, nor did the facts of the *Guste* case involve national security spending. Although, lower federal courts have struck down most instances of Executive impoundment, none of these cases has involved national security-related funds. Moreover, the D.C. Circuit has suggested that if Congress through its spending power interferes with other constitutional provisions, the President should impound the funds.

4. *FRELINGHUYSEN V. KEY*

Although there have not been court challenges to presidential impoundment within the national security realm, there is relevant Supreme Court precedent that supports National Security Impoundment. In an often overlooked case, *Frelinghuysen v. Key*,[277] the Supreme Court refused to uphold the lower court's writ of mandamus against the Secretary of State. The writ would have forced the Secretary to distribute funds paid by the Mexican government to the United States for the settlement of claims among certain mining companies whose properties had been previously expropriated by Mexico.[278]

In *Frelinghuysen*, President Arthur re-evaluated the findings of a joint claims commission, and believing that the award was obtained by fraud and perjury, he negotiated a new treaty with Mexico, which provided for a new hearing of the

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[275] 388 F. Supp. 1319, 1324-25 (D.D.C. 1975).

[276] *Id.* at 1325.

[277] 110 U.S. 63 (1884). For other cases that inform discussion of impoundment, *see also infra* Part V.D. Another case involving an act similar to impoundment was *Decatur v. Paulding*. *See* 39 U.S. (14 Pet.) 497, 516 (1840) ("interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief . . ."). In that decision, the Secretary of the Navy refused to grant a widow a pension under one statute where she had already been provided a pension by a second statute. *Id.* The Secretary determined that the intent of Congress could not have been to provide her with two pensions. *Id.* The Court upheld the Secretary's actions as falling within his discretion. *Id.*

[278] *See* 110 U.S. at 63.

claims.[279] Consequently, the President ordered the funds not to be released.[280] The Supreme Court concluded that it was "clearly within the discretion of the President to withhold all further payments to the realtors until the diplomatic negotiations between the two governments on the subject are finally concluded. That discretion of the Executive Department of the government cannot be controlled by the Judiciary."[281] Although it does not speak directly to the issue of impoundment, *Frelinghuysen* suggests that the President has the authority to withhold funds within a national security context due to his inherent discretion in this field.

In conjunction with *Train* and other lower court decisions, *Frelinghuysen* demonstrates that while the President has little or no inherent power to impound funds appropriated for domestic purposes, he more than likely possesses some authority to impound national security-related funds.

F. IMPOUNDMENT FOLLOWING ICA AND *TRAIN*

In the period following passage of the ICA, the issue of impoundment largely faded from public view. That is not to say, however, that the practice was discontinued. Quite the contrary, President Ford actually engaged in more policy impoundments than did President Nixon,[282] flooding Congress with hundreds of special messages.[283]

More specifically, with respect to the impoundment of national security funds, the ICA did not stop President Carter from using impoundment to force Congress to cut back funding of the B-1 Bomber and Minuteman III missile.[284] President Carter's rescission proposals against the B-1 bomber and Minuteman III missile programs prompted congressional momentum against both pro-

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[279] *See id.*

[280] *See id.*

[281] *Id.* at 76.

[282] *See* FISHER, *supra* note 2, at 201.

[283] Nor was President Ford alone in impounding a large measure of funds through the ICA. As part of his effort to reduce federal expenditures, President Bush in 1992 proposed $7.9 billion in rescissions. *See* Fisher, *supra* note 108, at 116. Congress upped the ante in the end by rescinding more than $8.2 billion. *See id.*

[284] *See* Louis Fisher, *Effect of the Budget Act of 1974 on Agency Operations*, *in* THE CONGRESSIONAL BUDGET PROCESS AFTER FIVE YEARS 154 (Rudolph G. Penner ed. 1981).

grams.[285] In both instances, Carter took steps to terminate production contracts *prior* to sending rescission proposals to Congress, and ignored the strictures of the ICA.[286] Although members of Congress complained bitterly, they, nevertheless, acquiesced to the President's action.[287]

In 1989, in an attempt to save $200 million, President Bush and the Department of Defense decided to cancel production representation models for the Navy V-22 Osprey helicopter.[288] In February 1990, Bush announced that the $200 million would be deferred.[289] The General Accounting Office, however, determined that the deferral violated ICA.[290] Despite the ruling, the Department of Defense' budget request for 1991 did not include funds for the V-22.[291] Congress the next year reauthorized the original $200 million along with an additional $165 million.[292] Bush then submitted a rescission proposal for $200 million which Congress rejected, thus requiring obligation of the funds.[293] The President released the $200 million but not the additional $165 million, which he impounded without reporting to Congress.[294]

The Bush Administration was more successful in its efforts to terminate the

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[285] *See id.*

[286] *See id. See also* IPPOLITO, *supra* note 219, at 160 ("A major development during the Carter administration was the cancellation of programs in advance of congressional review by termination or curtailment of contracts.").

[287] *See* Fisher, *supra* note 284, at 154. President Carter took similar action with respect to certain water resource development works; ending the contracts before Congress deauthorized the projects. *See* IPPOLITO, *supra* note 219, at 147. Carter did, however, allow research and development to continue on the B-1 and President Reagan fully resurrected the plane during his administration. *See* Lawrence J. Korb, *Weapons Systems Just Don't Quit*, THE NEWS AND OBSERVOR, July 28, 1999, A13.

[288] *See* BANKS & RAVEN-HANSEN, *supra* note 2, at 84.

[289] *See id.*

[290] *See id.*

[291] *See id.*

[292] *See id.*

[293] *See id.*

[294] *See* BANKS & RAVEN-HANSEN, *supra* note 2, at 84. Much like the B-1, the V-22 survived a hostile administration to live another day under a friendlier president. *See* Korb, *supra* note 287, at A13.

Navy's A-12 Stealth aircraft.[295] In 1991, Secretary of Defense Dick Cheney canceled production of the plane altogether.[296] The Department of Defense essentially impounded all funds for the program and went so far as to request a refund from the contractors for the money the Pentagon had advanced them.[297] Although President Bush met with somewhat more ambivalent results than President Carter, he too successfully defied the strictures of the ICA within the context of national security spending.

While Presidents defied the ICA at a macro level, at a micro level, subtle forms of evasion also took place. Impoundment has continued in another more clandestine form, a phenomenon which Dr. Louis Fisher of the Congressional Research Service termed "quasi-impoundment."[298] This occurs when the funding for programs is purposely delayed due to the slow processing of applications, the frequent change of agency regulations, the rejection of applications for minor, technical shortcomings and all other manner of subtle administrative obstruction.[299] For example, after Congress had established a summer employment program in 1975, the Ford Administration successfully stymied the program by establishing it so slowly that the funds could not be appropriated during the fiscal year.[300] This *sotte voce* form of impoundment, when coupled with more formal routine impoundment, demonstrates that the practice of impoundment is alive and well even outside of the formalities of the ICA.

Thus, it is apparent that impoundment in violation of federal statutes was not brought to a halt after ICA, it only assumed new forms, both authorized and unauthorized. More specifically, precedent has been established for Presidents to impound national security funds even if such impoundment fell outside of the ICA's requirements.

G. LESSONS OF THE HISTORY OF IMPOUNDMENT

The history of impoundment teaches several lessons. First, it demonstrates that the distinction between the President's powers in national security and do-

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[295] *See* Korb, *supra* note 287, at A13.

[296] *See id.*

[297] *See id.*

[298] *See* LOUIS FISHER, THE POLITICS OF SHARED POWER 86 (1981).

[299] *See id.*

[300] *See* POWERS OF THE PRESIDENCY 38 (2d. ed. Congressional Quarterly 1997).

mestic affairs extends to the expenditure of public funds. Second, it reflects that impoundment (both authorized and unauthorized) has been "continuous and uninterrupted" right up to the present day and that the very length of the practice illustrates its legal legitimacy. Third, the practice indicates that throughout the nation's history, the President has exercised considerable discretion over the spending, particularly for weapons procurement. Fourth, the record reveals that impoundment has rarely involved the complete withholding of funds, an action with the effect of terminating a program outright. Finally, the history of impoundment indicates that during times of war, the President's discretion over spending is at its peak.

First, the history of impoundment demonstrates that the President's greater constitutional authority in national security affairs translates into a measure of discretion with respect to the expenditure of appropriated funds. This is reflected by the fact that the majority of presidential impoundments which occurred before the Johnson and Nixon administrations occurred in the field of national security affairs.[301] While the President's powers with respect to domestic spending absent statutory authorization are largely ministerial, in national security affairs, his powers are to a great degree discretionary since he possesses independent constitutional authority in national security affairs.[302]

William Rehnquist, in a memorandum written while he served as Assistant Attorney General, recognized the national security/domestic distinction with respect to expenditure. He viewed domestic impoundment as having dubious constitutional validity:

> With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. . . . It is in our view extremely difficult to formulate a constitutional theory to justify refusal by the President to comply with a Congressional directive to spend.[303]

On the other hand, with respect to funds appropriated for national security affairs, Rehnquist took a much different approach, arguing that the President could very well withhold funds in this area. Rehnquist argued:

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[301] *See* Part II.D *supra*. *See, e.g.*, RAYMOND TATALOVICH & BRYON W. DAYNES, PRESIDENTIAL POWER IN THE UNITED STATES 201 (1984) (remarking that impoundments by post-war presidents before Nixon "primarily involved defense spending").

[302] *See* Part I *infra*.

[303] *1971 Hearings*, *supra* note 68, at 282-83.

> [I]f a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs . . . a situation would be presented very different from [impoundment of funds for education].[304]

Commentators at the other end of the philosophical spectrum have echoed this distinction. Professor Arthur M. Schlesinger, Jr. has written that: "It could be contended . . . that military impoundment—Jefferson's in 1803, Roosevelt's in 1941 and thereafter, Truman's in 1949, Kennedy's refusal in 1961 . . . even arguably Johnson's in 1967—fell within the legitimate powers of the Commander in Chief."[305] In fact, it is a distinction that has been voiced repeatedly,[306]

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[304] *Id.* at 283-84.

[305] SCHLESINGER, *supra* note 12, at 236. Other commentators, who also tend to define the scope of presidential power more narrowly, acknowledge the unique status of presidential impoundment in the national security realm. *See* FISHER, *supra* note 2, at 127 ("In the area of defense procurement, in particular, the President could deny that Congress has the power to deprive him of his judgment and discretion in the administration of programs and in the management of funds").

[306] *See* Weinraub, *supra* note 2, at 360 (stating that "[a] conflict between Congress and the President on the issue of impoundments in the realm of foreign affairs would be difficult to resolve"); *1973 Hearings*, *supra* note 1, at 333 (quoting Counsel to President Kennedy: "Previous Presidents, in their roles as Commander-in-Chief, have 'impounded' Defense appropriations. Similar action in the civilian area is not customary and of doubtful legal basis."); *see id.* at 368 (quoting President Nixon's Deputy Attorney General Joseph Sneed: "[I]t is clear that any [congressional mandate to spend funds] is subject to at least two important qualifications. The President has substantial authority to control spending in the areas of defense and foreign relations. . . . Such authority flows from the President's constitutional role as Commander-in-Chief of the Armed Forces and from his relatively broad constitutional authority in foreign affairs. In those areas, congressional directives may intrude impermissibly into matters reserved by the Constitution to the President. It is noteworthy that Congress has never successfully challenged an impounding action in foreign relations and national defense fields"); *id.* (quoting Senator Edward Kennedy: "A reading of the Constitution does suggest one area where it can reasonably be argued that Presidential power—in this case power to impound funds—may flow directly from that document and not be dependent upon statutory authorities. That is the power of the President which can be implied from his constitutional role in foreign affairs and his designation as Commander in Chief. History indeed abounds with examples of impoundments by Presidents in these areas"); Memorandum to the President: Authority to Reduce Expenditures, Bureau of the Budget (Oct. 1, 1961), *cited in 1971 Hearings*, *supra* note 68, at 339 (quoting Special Counsel to President Eisenhower in a letter to a member of Congress dated August 12, 1955: "It is true that in the past Presidents have declined to spend funds . . . but I have not found any instance of this that did not relate to funds appropriated for the national defense. . . . These national defense precedents, however, cannot, in my opinion, be used as precedents for withholding funds for a non-defense purpose"); Wallace, Part II, *supra* note 2, at 466-67 ("The general authority to withhold appropriations is another example of

even in the years following the ICA and *Train*.[307] In his book on the ICA, entitled *The President, The Budget, and Congress*, Professor James Pfiffner states: "[t]he problem of impoundment in the area of national security and defense is . . . generally recognized to be a special case and will be treated as such."[308] Pfiffner argued that "[m]ilitary impoundments have been grouped into a separate category . . . [in large part] because of their special constitutional nature. The constitutional designation of the President as Commander in Chief of the armed forces places his decisions regarding military spending into a special status that may give him more legitimacy than he possesses in domestic spending."[309] Professor Louis Henkin also alluded to this distinction: "[e]ven after . . . [the ICA], there may be something still to be said about . . . presidential impoundment where foreign affairs are concerned."[310]

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the application of the separation of powers to foreign affairs."); *cf.* CLINTON ROSSITER & RICHARD P. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 163-64 (expanded ed. 1976) ("[p]rior to the 1970s there was a fragile but real distinction between impoundment of appropriations for weapons systems and the impoundment of other funds. There was some force in the argument that the President's power as Commander in Chief gave him a special responsibility to utilize or not utilize funds based on his strategic estimates and to control the special pleading of the services and the cluster of interest groups around them."); *but see* Stassen, *supra* note 2, at 1205 ("the President may not impound [funds for weapons systems] as a matter of constitutional theory"); Davis, *supra* note 2, at 60 (concluding that Congress can require the President to spend defense related funds unless the President is "unyielding").

[307] *See* IPPOLITIO, *supra* note 219, at 143-44 ("As commander in chief and with the relatively broad constitutional authority granted him in the field of foreign affairs, the President's discretionary authority in these areas may be somewhat greater than in the case of purely domestic spending"); Dean Norman Redlich, *Concluding Observations: The Constitutional Dimension in* THE TETHERED PRESIDENCY 283, 293 (Thomas M. Franck ed. 1981) (questioning "the ability of Congress to mandate expenditures for a weapons system which the President regards as ineffective"); Middlekauff, *supra* note 3, at 210 n.5 ("Several commentators and Presidents have argued that there is a constitutional exception to the Principle of Appropriations Expenditure in the area of foreign relations. The exception is said to derive from the Commander-in-Chief clause [of the Constitution]. . . and the President's broad authority in overseeing foreign affairs."); Neurem, *supra* note 3, at 693 ("the President's role as Commander in Chief seems to justify broad use of the impoundment authority"); *cf.* BANKS & RAVEN-HANSEN, *supra* note 2, at 79 (footnotes omitted) ("While Congress has tried to clarify impoundment through the passage of [ICA] . . . the role of impoundment in national security appropriations remains subject to the vagaries of legislative drafting, statutory interpretation, and the separation of powers").

[308] PFIFFNER, *supra* note 1, at 70.

[309] *Id.* at 35.

[310] Louis Henkin, *Preface in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 3 n.8 (Louis Henkin et al eds. 1990). *Cf.* WILLIAM C. BANKS ET AL, NATIONAL SECURITY LAW 113 (1997)

Second, it is clear that the history of impoundment is a long and continuous one, thus affirming its status as constitutional custom. Having begun with the Washington Administration and its implementation of lump sum appropriations[311] and becoming more pronounced at least as early as 1801, impoundment is a practice that has existed for the duration of the Constitution. It has occurred both with frequency over this two-century period and during periods of normalcy, further reinforcing its standing.[312] In the years before the ICA, presidents impounded millions of dollars of appropriated funds for weapons systems and personnel. These actions, while arousing the ire of Congress, were seldom directly challenged.[313] On the other hand, domestic impoundment during the pre-ICA period prompted a host of lawsuits, which culminated in the *Train* decision.

Far from abolishing impoundment, the ICA merely gave impoundment formal legislative sanction and placed it within a more predictable setting. Although it has been termed "framework legislation,"[314] the ICA is not a constitu-

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("Does it matter [from a constitutional standpoint] whether the impounded funds are for military forces or nonmilitary foreign relations activities?").

[311] *See, e.g.,* Fisher, *supra* note 108, at 114.

[312] *See* Michael J. Glennon, *The Use of Custom in Resolving Separation of Power Disputes*, 64 B.U. L. REV. 109, 129-33 (1984) (putting forth indicia of constitutional custom which include whether or not occurrences were commonplace or whether they took place during times of normalcy).

[313] The question remains: when presidents impounded funds before the ICA what could Congress have done under the circumstances but acquiesce? By not enforcing a spending statute a President would appear to be thwarting Congress. Part of Congress' acquiescence, however, occurs during the drafting of statutes and is reflected by Congress' avoidance of mandatory language in its national security spending bills. That appropriation language in national security bills is rarely if ever mandatory is of itself telling. The showdown between Kennedy and Vinson over the mandatory language is instructive in this respect. *See supra* notes 198-216 and accompanying text. In that situation, Vinson backed away from using mandatory language, recognizing in part that others in Congress questioned (among other things) the legality of such an action.

Even after impoundment occurs, Congress is not without recourse against a President. To name just a few options, Congress could litigate a claim on its own behalf and/or recruit litigants, begin impeachment proceedings, exercise political pressure through committee hearings and resolutions, withhold appointments or deny funds for presidentially favored projects. None of these measures appears to have been taken following presidential exercises of National Security Impoundment.

[314] *See* HAROLD HONJU KOH, THE NATIONAL SECURITY CONSTITUTION 69 (1990). Other authorities have characterized the ICA as "quasi-constitutional" since it addresses fundamental relationships between the political branches. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 416 (9th ed. 1975).

tional amendment. It clarified much that was previously unclear about the budget process and the practice of impoundment, but it did not, nor could it, strip the President of his constitutional discretion to spend funds within his unique area of competence: national security affairs. National Security Impoundment has existed for two hundred years and can certainly qualify as "gloss" on Executive power.

Third, the history of impoundment reflects that the President maintains control over administrative details. This discretion over details is greater in national security affairs where the President enjoys unique authority. Due to the ever-changing needs of national defense, Congress appreciates the need for the Executive branch to be flexible enough to respond to sudden threats and contingencies. Commensurate with the President's enhanced discretion with respect to the details of national security administration, the precedents involving national security expenditure do not generally involve the President unilaterally terminating major programs. Instead, the precedents generally reflect his ability to limit the amount of funds expended for certain programs depending on the ever-changing needs of national security. Under his authority as Commander in Chief and Chief Diplomat,[315] the President remains able to reduce costs for programs.

Fourth, the history of impoundment also reflects that once impoundment veered away from its modest scale and began to transcend the bounds of national security, the customary interaction between the branches with respect to impoundment broke down. Most impoundments prior to the ICA involved relatively small amounts of funds.[316] Once impoundment began to assume gargantuan proportions and to creep into domestic affairs under Presidents Johnson and Nixon, Congress no longer accepted its legitimacy and responded with the ICA. The public also responded by bringing suits to compel the expenditure of domestic funds.

Finally, as evidenced by President Roosevelt's actions, National Security Impoundment reaches its height during wartime. As noted by the Supreme Court in *Ex Parte Milligan*, once "war is originated, . . . the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President."[317] The Court emphasized that the President during wartime "is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration."[318] Even the dissenters in

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[315] The term "Chief Diplomat" is borrowed from Clinton Rossiter. *See* THE AMERICAN PRESIDENCY 25 (1960 2d ed.).

[316] *See* PFIFFNER, *supra* note 1, at 28.

[317] 71 U.S. (4 Wall.) 2, 28 (1866).

[318] *Id. See also* Charles Evans Hughes, *War Powers under the Constitution*, S. DOC. No. 105 65th Cong., 1st Sess. 7 (1917) ("There is no limitation upon the authority of Congress to

Milligan agreed on this point. Chief Justice Chase, writing in dissent, concluded that "Congress cannot direct the conduct of [military] campaigns . . .."[319] It should be remembered that Roosevelt's impoundments also drifted well into what would traditionally be thought of as domestic funds. The only time that the impoundment of domestic funds could lawfully occur would be during wartime. In the same manner, President Johnson impounded domestic funds during the Vietnam War. President Nixon, however, attempted much, if not most, of his domestic impoundment either toward the end or immediately following the Southeast Asian conflict. Thus, during wartime, the President becomes the focal point of national power. Within that power surely lies at least limited authority to impound national security funds.

With respect to the disbursement of funds for overseas deployment of weapons or troops, the President, particularly during wartime, is likely to possess al-

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create an army and it is for the President as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on"); DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES 67 (1991) ("A declaration of war, or similar measure, opens the floodgates for the expansion of presidential powers."); W.W. WILLOUGHBY, 3 THE CONSTITUTIONAL LAW OF THE UNITED STATES, 1567 (1929 2d ed.) (stating that "when the military exigencies of the war so require" the President might send troops outside the United States without control or limitation by Congress); William Howard Taft, *The Boundaries between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916) ("When we come to the power of the President as Commander in Chief, it seems perfectly clear that Congress could not order battles to be fought on a certain plan and could not direct parts of the Army to be moved from one part of the country to another."); *Cf.* HERMAN VON HOLST, CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA (1887) *quoted in* WARREN W. HASSLER, JR. THE PRESIDENT AS COMMANDER IN CHIEF 14 (1971) ("Congress provides where forts shall be built and what kind of forts they shall be, how many and what kinds of arms are to be provided and how the men are to be distributed among different branches of the service; but as to what the strength and compositions of the garrisons are to be, how the arms and ammunition are to be stationed and moved—as to all this, Congress can give the President no directions whatever."); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 635-38 (1870) ("Congress raises and supplies armies and navies, and makes rules for their government, and there its power and duty end; the additional power of the President as supreme commander is independent and absolute. . . . He commands the army and navy; Congress does not. He may make all dispositions of troops and officers, stationing them now at this post, now at that; he may send out naval vessels to such ports of the world as he pleases; *he may distribute the arms, ammunition, and supplies in such quantities and at such arsenals and depositories as he deems best.*") (emphasis added); WILLIAM WHITING, WAR POWER UNDER THE CONSTITUTION OF THE UNITED STATES 82 n.* (1871) ("Congress may effectually control the military power, by refusing to vote supplies or to raise troops and by impeachment of the President; but for the military movement, and measures essential to overcome the enemy—for the general conduct of the war—the President is responsible to and controlled by no other department of Government.").

[319] 71 U.S. (4 Wall.) at 140.

most exclusive control over the expenditure of funds. This distinction was noted by Justice Jackson in his celebrated concurrence in *Youngstown Sheet & Tube v. Sawyer*. "I should indulge the widest latitude of interpretation to sustain his *exclusive* function to command the instruments of national force, at least when turned against the outside world for the security of our society."[320] The President, who enjoys broad impoundment powers during wartime, is likely to possess maximum authority to withhold funds with respect to overseas operations during an international conflict.

III. PRESIDENTIAL DEFIANCE OF CONDITIONS ON APPROPRIATIONS

Aside from the long history of impoundment, there are a number of other precedents that exist which reflect the limits of congressional spending power in a national security context. These precedents demonstrate the authority of the President under limited circumstances to defy statutes when they intrude upon his constitutional responsibilities. The legal authority supporting the President in this respect includes: 1) dicta from court opinions; 2) past practice through Executive defiance or narrow interpretation of appropriation bills and/or conditions on appropriation bills; 3) past practice involving congressional self-restraint in considering spending bills; and 4) academic support. This examination of presidential defiance of statutory law broadens the context of the discussion of National Security Impoundment since the practice would almost certainly involve the President defying the requirements of the ICA.

A. THE ARGUMENT IN FAVOR OF DEFIANCE

The argument that the President may defy statutory law is as follows: the Constitution requires the President to "faithfully execute" the laws and since the Constitution is the highest law, if a statute conflicts with it, the statute is considered to be no law at all.[321] Consequently, the statute should not be enforced by the Executive. In effect, the higher law of the Constitution governs. The Executive in fulfillment of his duties must necessarily enforce the Constitution. This Executive authority should in no way, however, be confused with the ancient royal dispensing power, which involved the suspension of valid laws by the Eng-

[320] 343 U.S. 579, 645 (1952) (emphasis added).

[321] *See* Norton v. Shelby County, 118 U.S. 425, 442 (1886) (stating that an unconstitutional statute is "no law at all").

lish monarch.[322]

B. THE CASE LAW

Although "[l]he law is no respecter of persons,"[323] the President does have unique authority in that he may defy statutory law in certain instances.[324] Perhaps not surprisingly, little case law exists on the subject. Some Supreme Court decisions, however, have addressed the issue in passing. These precedents lend support by analogy to impoundment, which after all involves presidential defiance of an authorization and/or appropriation law. This case law informs interpretation of impoundment by again reflecting the limits of congressional spending power and the irreducable degree of discretion the President possesses in this area. This jurisprudence also provides precedent for presidential defiance of the ICA under certain circumstances.

1. THE LEGAL FRAMEWORK FOR PRESIDENTIAL ACTION: *YOUNGSTOWN SHEET & TUBE V. SAWYER*

Youngstown Sheet & Tube v. Sawyer[325] is perhaps the most prominent case with respect to the President's constitutional power and how it interacts with that of Congress. In 1952, in the midst of the Korean War, President Truman, relying on his own authority, issued an executive order seizing privately owned steel mills in order to avert an industry-wide strike.[326] Prior to Truman's action, Con-

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[322] *See* 4A Op. O.L.C. 55, 59-60 (1980) ("The President has no 'dispensing power'" in that he "may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot."). *See also* In re Sealed Case, 838 F.2d 476, 524 n.19 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (stating that the "faithful execution" clause "was intended to rule out any power for the President to dispense with, or suspend, the execution of the laws"), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

[323] JAMES MORRIS, FAREWELL THE TRUMPETS 284 (1978) (quoting British magistrate Robert Broomfield in his remarks to the Court in the 1922 East Indian case, Rex Imperator v. Gandhi).

[324] The tradition that the Executive may at times defy statutory law finds its origins in England. English kings with limited success contended that Parliament could not limit them in the exercise of their prerogative powers. WORMUTH, *supra* note 16, at 63.

[325] 343 U.S. 579 (1952).

[326] *Id.* at 579. For a discussion of the background of the case, see MARVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1994); ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE (1990).

gress had considered granting the President authority to seize property and decided against it. In a 6-3 decision, the Supreme Court struck down the executive order.[327] The Court's opinion was authored by Justice Black, but over time the concurrence by Justice Jackson has come to be acknowledged as the case's controlling opinion.[328]

In his concurrence, Justice Jackson limned the contours of presidential power by pinning the legitimacy of Executive actions to the actions of Congress. Justice Jackson reasoned that three scenarios exist where the Executive exercises power.[329] When the President acts pursuant to congressional authorization, his power is at its height.[330] When the President acts in absence of congressional action, however, the legality of his actions is unclear and the legitimacy of such actions may be dictated more by pragmatic concerns than by legal doctrine.[331] Finally, when the President acts counter to congressional will, his powers are at their lowest ebb.[332] In such a situation, Justice Jackson stated that a third-category action by the President would involve a constitutional calculus involving the subtraction of the President's independent powers in the area from those of Congress.[333] If the President were "in the red" so to speak, the action would be struck down, but if the President had sufficient powers to overcome those of Congress, his action would be upheld.[334] With respect to President Truman's

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[327] *See Youngstown*, 343 U.S. at 579.

[328] *See* Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) (stating that Justice Jackson's tripartite analysis in *Youngstown* "brings together as much combination of analysis and common sense as there is in" the area of national security jurisprudence); *see also* Mistretta v. United States, 488 U.S. 361, 381 (1989) ("Justice Jackson summarized the pragmatic, flexible view of differentiated government power to which we are heir"); Morrison v. Olson, 487 U.S. 654, 694 (1988) (citing Justice Jackson's opinion favorably); Bowsher v. Synar, 478 U.S. 714, 721 (1986) (same); Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) (concluding that in *United States v. Nixon*, "the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown*." 418 U.S. 683, 707 (1974)).

[329] *See Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

[330] *See id.* at 635 (Jackson, J., concurring).

[331] *See id.* at 637 (Jackson, J., concurring).

[332] *See id.* at 637-38 (Jackson, J., concurring).

[333] *See id.* at 635-37 (Jackson, J., concurring).

[334] *Cf.* United States v. Klein, 80 U.S. (13 Wall. 128) 141 (1872) (invalidating Congress' interference with the President's Pardon Power).

seizure of the mills, Justice Jackson concluded that since Congress had declined to grant the President the power to seize private property in this manner, the President was acting within the third scenario and thus his action could not be sustained.[335]

According to Justice Jackson's formula, the President's actions through impoundment (at least following ICA) would likely place him within Justice Jackson's third category.[336] With impoundment in the domestic realm, the equation would involve subtracting the President's limited, inherent domestic power from Congress' spending power.[337] The outcome would be that the President's constitutional authority to impound such funds is virtually nonexistent. On the other hand, a scenario involving the President's national security power would involve a somewhat different equation. In a national security scenario, the result of the calculus would be different since the President would have the maximum power he could exercise within a third category action since he is empowered by the

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[335] *See Youngstown*, 343 U.S. at 640. Justice Jackson's conclusion that President Truman's actions fell within his third category has been much criticized. *Cf.*, TRIBE, *supra* note 24, at 240.

[336] The author uses "likely" since it is possible that non-mandatory spending language could be interpreted as a second-category action under Justice Jackson's framework despite the ICA's mandate that all appropriations are presumptively mandatory. In exercising National Security Impoundment power under the Constitution, the President would more than likely, however, be defying the ICA by refusing to spend the funds despite not receiving subsequent approval for the rescission or deferral by Congress. These would seem to be the only provisions a President should defy since there is little reason why other aspects of the ICA such as the sending of rescission reports to Congress should not be complied with. Barring compelling intelligence reasons to the contrary, were National Security Impoundment to occur, Congress should be notified by the Executive in a timely fashion.

It could also be argued that the majority of the impoundments occurring before the ICA may have constituted second category and not third category actions since most did not involve mandatory spending language. An argument could be made that clearly the spirit of many of these statutes was that the funds should be expended. Moreover, in light of some of the testy exchanges between the branches on the subject, it is difficult in many cases to argue that Congress (or at least many members of the body) were not strongly opposed to impoundment. Thus, if not falling squarely within Justice Jackson's third category, then these examples of National Security Impoundment would certainly fall near it. *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (stating that "executive action . . . falls, not neatly in one of three [Jacksonian] pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition"). Even if it were the case that pre-ICA impoundments constituted second-category actions and not third-category actions, legal and historical precedent would still strongly support National Security Impoundment in defiance of the ICA. *See supra* Part III (providing examples of presidential defiance of national security spending legislation).

[337] *See* U.S. CONST. art. I, § 14, 16.

Constitution as Commander in Chief,[338] Chief Diplomat,[339] and also more than likely, as Chief Executive.[340]

2. JUDICIAL TREATMENT OF EXECUTIVE DEFIANCE OF STATUTES

There is little case law directly discussing actions taken by the President that fall within Justice Jackson's third category. Courts have hinted, however, that presidential defiance under certain circumstances may be acceptable. In *Myers v. United States*,[341] President Wilson had defied the Tenure of Office Act which prevented the President from removing postmasters without Senate approval. The Court struck down the Act as an unconstitutional infringement on the President's removal power.[342] Although the issue had been a point of contention between the branches since its passage in 1867, no member of the Court suggested that Wilson had overstepped his constitutional bounds—or had even acted improperly for that matter—by refusing to comply with a statute that he deemed to be unconstitutional.[343] By implication, the Court can be seen as having vindicated the notion that the President may decline to comply with a statute that limits his constitutional powers. Since the President's national security power, like his removal power, involves explicit constitutional grants of authority, it provides support for the notion that the President could defy a congressional mandate to spend national security funds.

The Supreme Court has even upheld third-category actions by the President in areas where Congress ostensibly should occupy the field. In *United States v. Midwest Oil Co.*,[344] the legality of an executive order issued by President Taft was challenged. In that order, Taft withdrew certain public lands from further sale to private parties.[345] This action was contrary to a federal statute and in seeming contravention of Article IV, section 2 of the Constitution, which pro-

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[338] *See id.* art. II, § 2, cl. 1.

[339] *See id.* art. II, § 2, cl. 2, § 3.

[340] *See id.* art. II, § 1, cl. 1.

[341] 272 U.S. 52 (1926).

[342] U.S. CONST. art II, § 2, cl. 2.

[343] *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, Op. O.L.C. 199, 201 (1994).

[344] 236 U.S. 459 (1915).

[345] *See id.* at 467.

vides that Congress has the power to dispose of federal property.[346] Nonetheless, the Court upheld the President's action.

Further support for presidential defiance of unconstitutional statutes can be found in a dissenting/concurring opinion in *Freytag v. Commissioner*.[347] There, four members of the Court indicated in dictum that under certain circumstances the President possesses the ability to defy statutory law. This case involved whether Congress could grant the Chief Judge of the U.S. Tax Court the authority to appoint special trial judges.[348] In a concurrence joined by three other justices, Justice Scalia spoke to the issue of presidential defiance of a statute.[349] Scalia concluded that if Congress passed laws that invade the Executive domain, the President might have the power "to disregard them when they are unconstitutional."[350]

Thus, there is judicial support that is not inconsiderable which bolsters the argument that the President may act counter to federal law if a statute interferes with his constitutional duties. This has been the legal position taken by several recent administrations[351] and is one that is by no means a recent notion. It has

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[346] U.S. CONST. art. IV, § 2, cl. 2.

[347] 501 U.S. 868 (1991) (Scalia, J., concurring in part and concurring in judgment).

[348] *See id.* at 868.

[349] *See id.*

[350] *Id.* at 906. *Cf.* Ameron Inc. v. United States Army Corps Eng'rs, 787 F.2d 875, 889 n.11 (3d Cir. 1986) (commenting that the President may have the power or duty to refuse to execute "a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals.").

[351] *See, e.g.*, Presidential Authority to Decline to Execute Unconstitutional Statutes, Op. O.L.C. 199, 201 (1994); Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendment and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183, 195 (1984); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980) (Civiletti, A.G.). Nor is this advice limited to recent administrations. *See* Income Tax—Salaries of President and Federal Judges, 31 Op. Att'y Gen. 475, 467 (1919) (advising President Wilson to defy a section of a merchant marine bill); Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 476 (1860) (advising President Buchanan to defy a condition of an appropriation act); 7 Op. Att'y Gen. 186, 217 (1855) (posing the hypothetical: "Suppose a law should provide that the President of the United States should not make a treaty with England .... It would be a plain infraction of his constitutional power . . ."); Part III.C; *see also* CORWIN, *supra* note 13, at 71 ("If a law be declared by the Supreme Court unconstitutional he should not execute it. If the law be upon its very face in flat contradiction to plain express provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if a law should declare that he should not be Commander-in-Chief, or if a law should declare that he should take no part in the making of a treaty, I say the President . . . is bound to execute no such legisla-

also had advocates among the Founders[352] and members of the federal bench.[353]

At the same time, precedent on the other side of the argument exists. This precedent indicates a President may not act counter to federal law. Nonetheless, these cases do not go specifically to the issue of a President defying an unconstitutional law as do *Myers* and *Freytag*. *Kendall v. United States*[354] spoke to the President's legal obligations under a federal statute.[355] This case involved con-

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tion . . . .").

[352] James Wilson, one of the most prominent Framers and an early Supreme Court Justice, was of the opinion that the President could defy a statute if the law ran counter to the Constitution. He stated to the Pennsylvania Ratification Convention that

> the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges . . . it is their duty to pronounce it void . . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.

II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliott ed., 1836).

Thomas Jefferson believed much the same. He wrote that if a law were unconstitutional, it was the President's "duty to arrest its execution." 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43-44 (Albert E. Bergh ed., 1905). He put this philosophy into action as President. Believing the Sedition Law to be unconstitutional, Jefferson instructed federal attorneys not to enforce the law. *See* SMALL, *supra* note 47, at 21. In addition, he "remit[ted] the [the Act's] execution" by pardoning all the Act's offenders. *See id.* Much as President Johnson would ultimately be vindicated in his defiance of the Tenure of Office Act, Jefferson may have been justified in his defiance of the Sedition Act. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 725 n.9 (2000) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964) which alluded to the unconstitutionality of the statute).

[353] *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905-06 (1990) (arguing that the President should not enforce patently unconstitutional laws).

[354] 37 U.S. 524 (1838). *See also* DaCosta v. Nixon, 55 F.R.D. 145, 146 (1972) ("No executive statement denying efficacy to the legislation could have either validity or effect."); United States v. Smith, 27 Fed. Cas. 1192, 1230 (C. Ct. N.Y. 1806), No. 16,342 ("The President cannot control the statute nor dispense with its execution").

[355] *See also* Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1850) (stating that mandamus may "only . . . compel the performance of some ministerial, as well as legal duty. . . . When the duty is not strictly ministerial, but involves discretion and judgment, like the general doings of a head of a department . . . no mandamus lies.").

tractors who brought suit to compel the Postmaster General to pay certain credits and allowances on contracts, which had been authorized by a special Act of Congress.[356] The Court concluded that the Postmaster General did not possess the discretion to withhold the full amount of funds mandated by Congress.[357] "To contend that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution and entirely impermissible."[358] Of course, in *Kendall* the President did not claim that he was acting in defiance of an unconstitutional statute, his act merely constituted defiance.

Kendall has often been cited by courts and many commentators as authority for refuting the President's authority to impound funds.[359] The case, however, did not involve impoundment. Impoundment does not involve a claim for services rendered, as was the case in *Kendall*.[360] With impoundment the services are performed only after the funds are made available.[361] *Kendall* followed *Marbury v. Madison*'s distinction between ministerial and discretionary duties, concluding that the release of funds was ministerial and thus outside of the President's discretionary power.[362] Furthermore, *Kendall* did not involve national security affairs, a field much more likely to involve a discretionary rather than ministerial presidential action.[363]

Perhaps of more relevance is the case of *Little v. Barreme*.[364] In the late

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Yet another related case is *National Treasury Employees Union v. Nixon*, which involved an action by the union to force the President to effectuate their pay raise in conformity with the Federal Pay Comparability Act (5 U.S.C.A. § 5301). *See* 492 F.2d 587 (D.C. Cir. 1974). The court ruled that the President only possessed the discretion to decline a pay raise if he had timely submitted an alternate plan. *See id.* at 616. Since the President did not submit such a plan, the court ruled that the pay raise was mandatory. *See id.*

[356] *Kendall*, 37 U.S. at 613.

[357] *See id.*

[358] *Id.*

[359] *See, e.g.*, Brown v. Ruckelshaus, 364 F. Supp. 258, 262 (C.C.D. 1973).

[360] *See* FISHER, *supra* note 2, at 159.

[361] *See id.*

[362] *See id.*

[363] *See infra* note 606.

[364] 6 U.S. (2 Cranch) 170 (1804).

1790s, during the Quasi-War between the United States and France, Congress passed an act that authorized the President to instruct commanders of armed vessels "to stop and examine any ship or vessel of the United States on the high sea" suspected of violating the statute.[365] Although the legislation authorized American forces only to intercept vessels coming from U.S ports and heading to French ports, the Secretary of the Navy issued orders which authorized commanders not only to seize ships heading to French ports, but also any ships departing *from* French ports.[366] Pursuant to such orders, Captain George Little intercepted a Danish vessel, *The Flying Fish*, which was sailing *from* France.[367] Captain Little sent the vessel to the United States whereupon he was sued for damages by the Danish owners of the vessel.[368]

The decision, delivered through Chief Justice John Marshall, concluded that Congress, by only authorizing seizures of vessels headed toward French ports, effectively prohibited any interception of vessels heading from French ports.[369] The Court concluded that Captain Little would have to pay damages to the ship owners, despite the orders given to him by his superiors in the Executive Branch, orders which were based upon their faulty construction placed on the act.[370] Essentially, the Court affirmed that Congress has broad authority to limit Executive discretion in national security affairs by defining the scope of hostilities in a war setting.[371] Congress not only has the power to declare war,[372] but also the au-

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[365] *Id.* at 177.

[366] *See id.* at 178.

[367] *See id.* at 176.

[368] *See id.*

[369] *See id.* at 177-78.

[370] With respect to the President's inherent power, the Court, however, was careful to note that it did not rule out whether the President could have ordered the seizure of such vessels absent congressional intent otherwise.

[371] *See also e.g., Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT'L L. 79, 80 (1971) (quoting Robert H. Bork: "The Constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach the tactical and managerial are for the President, while the major questions of war or peace are, in the last analysis, confined to Congress.") [hereinafter Bork]; *cf.* Bas v. Tingy, 4 Dall. 37 (1800) (indicating that Congress has the power to authorize "a limited war."); Talbot v. Seeman, 1 Cranch. 28 (1801) (same).

[372] *See* U.S. CONST. Art. 1, § 8, cl. 11.

thority "[t]o define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations."[373] In this case, Congress authorized a limited response to French aggression and the Court ruled that the President could not violate those limits. Similar statutes delimiting the bounds of Executive action were passed during the Vietnam War[374] and the Nicaraguan conflict.[375]

Little, however, should not be read as limiting the President's power over administrative details. Nor should it be read as precluding the President from defying Congress in certain matters of national security expenditure. In *Little*, the President acted outside of his power as Commander in Chief by violating the power of Congress to set the broad parameters of the conflict (a choice Congress often does not make). Were Congress to delve into matters of battlefield tactics or diplomatic recognition—matters of exclusive Executive concern--the President could lawfully defy Congress.

3. EXECUTIVE PRECEDENTS: PRESIDENTIAL DEFIANCE OR NARROW CONSTRUCTION OF APPROPRIATION BILLS

By impounding funds presidents have often acted counter to federal law. In addition to the long-standing tradition of National Security Impoundment, which involved defiance of spending legislation, there also exists considerable support for the notion that the President may act counter to unconstitutional conditions on spending bills if they intrude on his constitutional functions.[376]

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[373] *Id.* cl. 10.

[374] *See, e.g.*, 83 Stat. 469, 487 (1969) (barring the "introduction of American ground combat troops into Laos or Thailand").

[375] *See* 100 Stat. 1783-298 § 203(e) (1986) (prohibiting U.S. personnel from providing assistance to members of the Nicaraguan democratic resistance in areas of Honduras and Costa Rica within 20 miles of the Nicaraguan border).

[376] There are also a number of examples of presidents defying non-appropriation national security legislation. President Jefferson appears to have explicitly authorized a military expedition against Spain in contravention of the Act of April 24, 1800. *See* GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 292 (1957). Jefferson was, however, sharply rebuked for his actions in *United States v. Smith*. *See* 27 Fed. Cas. 1192, 1230 (C. Ct. N.Y. 1806), No. 16, 342 ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids"). In 1920, President Wilson signed a merchant marine bill but refused to enforce a provision he found constitutionally objectionable. *See* FISHER, *supra* note 93, at 134. He declared that implementing the provision "would amount to nothing less than the breach or violation" of thirty-two treaties. *Id.* Wilson recognized that Congress was interfering with his constitutional powers in national security affairs and defied the enactment. *Id.*

Prior to World War II, President Roosevelt, in completing his bases-for-destroyers deal with Great Britain, violated at least two statutes. *See* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 26-27 (1947). Toward the end of World War II, President Franklin Roosevelt essentially nullified a deportation proceeding against trade union leader Harry Bridges on the grounds that he felt such an action would jeopardize the formation of the United Nations. *See* CORWIN, *supra* note 13, at 436 n.9.

President Eisenhower followed a similar course when a statute threatened his prerogatives. Eisenhower placed a "saving" construction on a 1959 statute amending the Mutual Security Act. *See* PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER 549 (1959). He declared:

> I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers doctrine.

Id.

Both Presidents Nixon and Ford defied the Case Act, which required the Secretary of State to notify Congress of any executive agreements entered into by the President. *See* FISHER, *supra* note 123, at 209. It has also been argued that Presidents Ford, Carter and Reagan all at some point failed to comply with §4(a)(1) of the War Powers Resolution. *See* John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 293 (1993). Certainly presidents have been hesitant to acknowledge the constitutionality of the Resolution. For example, both Presidents Reagan and Bush in issuing reports to Congress specifically stated they were acting "consistent with" instead of "pursuant to" the Resolution. *See id.* For other examples of defiance of statutes, see CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 102, 120 (1998). There are, of course, examples of presidential defiance of non-national security statutes for constitutional reasons but they appear to be less numerous.

There is also precedent supporting presidents defying resolutions, which do not rise to the level of law but which express the preference of Congress. Congress has frequently passed resolutions denouncing treaties or treaty provisions. *See* WRIGHT, *supra* note 46, at 258. Professor Quincy Wright contended that more often than not presidents have complied with congressional resolutions affecting national security affairs. *See id.* Others have concluded the opposite, that presidents have generally *not* complied with foreign policy resolutions. *See* HOLBERT N. CARROLL, THE HOUSE OF REPRESENTATIVES AND FOREIGN AFFAIRS 12 (1958).

In 1806, a Senate resolution stated "that the President be requested to demand and insist upon the restoration of the property of citizens captured and condemned on the pretext of being employed in a trade with the enemies of Great Britain" and to enter into arrangements with Britain on this issue among others. President Jefferson ignored the provision. *See* 9th Cong., 1st Sess., Senate, Feb. 12, 14, 1806. *See also* Charles Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1, 4 (1930). In 1813, the Senate appointed a committee to

For example, in 1860, Congress appropriated $500,000 to finish an Army Corps of Engineers project.[377] The measure stated that the funds were "to be expended according to the plans and estimates of Captain Meigs and under his superintendence."[378] President Buchanan signed the bill but stated he would treat the provision requiring Captain Meigs' supervision as only an expression of congressional "preference."[379] Buchanan stated he would interpret the statute so as not to "deprive the President of the power to order [Meigs] to any other army duty for the performance of which he might consider him better adapted."[380]

Buchanan reasoned that "[i]f they (Congress) could withdraw an officer from the command of the President and select him for the performance of an Executive duty, they might upon the same principal, annex to an appropriation to carry on a war on condition requiring it not to be used for the defense of the country unless a particular person of its own selection should command an army."[381]

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confer with President Madison on who should be made Minister to Sweden. *See* Warren, *supra*, at 5. Madison declined to meet the appointees on the ground that their appointment "appears to lose sight of the coordinate relation." *Id.* Similarly, in 1836, President Jackson refused to recognize the independence of Texas despite the passage of resolutions in both houses advocating such a course of action. *See* FISHER, *supra* note 93, at 249.

Secretary of State William Seward disregarded a unanimous resolution deploring French aggression in Mexico in the 1860s. *See* CORWIN, *supra* note 15, at 41-44. President Lincoln defied an 1865 resolution calling for him to revoke the Rush-Bagot Accord of 1817. *See* WRIGHT, *supra* note 46, at 281 n. 60.

Some years later, President Grant went so far as to disregard a House Resolution which innocuously expressed gratitude to the Republic of Pretoria for its congratulatory message to the United States on the nation's centenary. *See* CORWIN *supra* note 15, at 44. Grant viewed the resolution as an unconstitutional encroachment on his authority by Congress and he ignored it. *See id.* Presidents Cleveland and Lincoln both disregarded resolutions stating that Congress had a say in the recognition of foreign nations. *See* BERDAHL, supra note 45, at 32 n. 27. In the 1970s, Congress passed several statutes that denied foreign aid or arms sales to nations committing human rights abuses. *See* HENKIN, supra note 8, at 118 n.*. Presidents have generally declined to enforce these provisions. *See id.*

[377] *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 949 (1994).

[378] *Id.* at 950.

[379] *See id.*

[380] *Id.*

[381] Warren, *supra* note 376, at 18.

President Buchanan reassigned Meigs in defiance of the statute.[382] Buchanan's actions demonstrate that while Congress has authority to issue broad instructions, in national security affairs, there reaches a level of detail below which Congress may not descend. In effect, Congress acts impermissibly if it interferes with details the responsibility of which are the President's alone to fill in.

Later in the decade, President Andrew Johnson signed an Army appropriation bill but protested against one of the sections of the legislation.[383] Johnson asserted that part of the bill "in certain cases virtually deprives the President of his constitutional functions as Commander in Chief of the Army."[384]

In 1876, Johnson's successor, President Grant, issued a signing statement with respect to an appropriation bill for consular and diplomatic services.[385] The bill in part prescribed the closing of certain consular and diplomatic offices.[386] Grant stated "in the literal sense of this directive it would be an invasion of the constitutional prerogatives and duty of the Executive."[387] He announced that he would construe the provision as "to fix a time at which the compensation of certain diplomatic and consular officers shall cease, and not to invade the constitutional rights of the Executive."[388] The President in effect interpreted the provision out of existence.

The Appropriation Act of March 4, 1913 prohibited the President from "extend[ing] or accept[ing] any invitation to participate in any international congress, conference, or like event without specific authorization to do so."[389] Subsequent history bears out that this statute has been violated more in the breach than in the observance.[390]

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[382] *See* May, *supra* note 377, at 951. President Lincoln ultimately put the beleaguered Captain Meigs back to work on the aqueduct. *See* Richard D. Rosen, *Funding "Nontraditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 91 n.454 (1998).

[383] *See* 6 MESSAGES AND PAPERS OF THE PRESIDENTS 472 (James Richardson ed., 1898).

[384] *Id.*

[385] *See* 7 MESSAGES AND PAPERS OF THE PRESIDENTS 377 (James Richardson ed., 1898).

[386] *See id.*

[387] *Id.*

[388] *Id.* at 377-78.

[389] CORWIN, *supra* note 13, at 221.

[390] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 112 (1972) (describing these statutes as "dead letter[s]").

The Naval Appropriations Act of 1924, requested the President "to enter into negotiations" with a number of nations to conclude an international agreement limiting certain types of naval armaments.[391] Even though a similar act was passed into law in 1921 and was complied with by President Harding, the legislation for 1924 was apparently ignored by President Coolidge.[392]

Periodically, riders to appropriation bills have passed into law only later to be ignored by the Executive branch.[393] An example includes a 1924 joint resolution which authorized an appropriation for a delegation to the International Opium Conference. Congress provided that "the representatives of the United States shall sign no agreement which does not fulfill the conditions necessary for the suppression of [opium] . . ."[394] Delegates to a 1931 conference paid no heed to this restriction.[395]

The Third Deficiency Appropriations Act of 1951 contained an anti-communist rider to restrict trade with the Soviet Union.[396] President Truman signed the bill because it was "urgently needed" but he interpreted the legislation broadly so that he would not be bound by the rider.[397]

Section 3(d) of the Mutual Security Act of 1952[398] provided that "[n]ot less than $25,000,000 of the funds made available [under certain sections] shall be used for economic, technical, and military assistance to Spain in accordance with the provisions of this Act." Truman objected to the provision authorizing loans to Spain[399] and interpreted the provision in a manner that avoided what he believed to be an unconstitutional outcome. "I do not regard this provision as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be

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391 43 Stat. 204 (1924).

392 *See* Nobleman, *supra* note 129, at 156.

393 *See id.*

394 Joint Resolution of May 15, 1924, ch. 155, 43 Stat. 119, 120.

395 *See* HENKIN, *supra* note 390, at 361.

396 *See* DANIEL S. CHEEVER & H. FIELD HAVILAND, AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS 33-34 (1952).

397 *See id.* at 34.

398 *See* Mutual Security Act of 1952, § 3 (d), 66 Stat. 852, ch. 449 (1952).

399 *See* TRUMAN, *supra* note 166, at 616.

made."[400] Truman ultimately lent Spain the funds but only after he had made clear the Executive branch's constitutional position.[401]

In 1959, President Eisenhower stated that he would disregard a provision calling for congressional access to secret documents.[402] Eisenhower interpreted the provision as violating the President's need to protect national security.[403]

Similarly, President Nixon signed a 1971 military authorization bill but objected to the Mansfield Amendment which set a final withdrawal date for U.S. troops to leave Southeast Asia.[404] Nixon declared the provision to be "without binding force or effect."[405]

Upon signing the Defense Appropriations Act of 1976, President Ford objected to a provision restricting the Executive's ability to obligate funds for certain purposes until such obligations were approved by several Congressional committees.[406] Ford declared that he could not "concur in this legislative encroachment," and he stated he would treat the restriction "as a complete nullity."[407]

Similarly, President Carter defied appropriation provisions he found contrary to the Constitution. Section 115 of the 1978 foreign assistance appropriation bill provided: "None of the funds made available by this Act may be obligated under an appropriations account to which they were not appropriated without the written prior approval of the Appropriations Committees of both Houses of Congress."[408] President Carter wrote Secretary of State Cyrus Vance to express his doubt about the constitutionality of the provision.[409] Secretary Vance treated the

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[400] *Id.*

[401] *See* HENKIN, *supra* note 390, at 111.

[402] *See* POWERS OF THE PRESIDENCY, *supra* note 300, at 95.

[403] *See id.*

[404] *See* PUBLIC PAPERS OF THE PRESIDENTS: RICHARD NIXON 1114 (1972) [NIXON PAPERS]. *But see* DaCosta v. Nixon, 55 F.R.D. 145, 146 (1972) ("No executive statement denying efficacy to the legislation could have either validity or effect").

[405] *See* NIXON PAPERS, *supra* note 404, at 1114.

[406] 1 PUBLIC PAPERS OF THE PRESIDENTS: GERALD R. FORD 242 (1979).

[407] *Id.*

[408] 91 Stat. 1235, § 115 (1977).

[409] *See* FISHER, *supra* note 243, at 95.

provision as merely precatory. President Carter also objected to a provision in the 1980-81 Department of State Appropriations Act.[410] This provision purported to require the President to close certain consular posts.[411] Carter took the same position President Grant had taken on the issue over a century before. He stated that Congress "cannot mandate the establishment of consular relations at time and place unacceptable to the President."[412] As a result, Carter indicated he would not construe the provision as being mandatory.[413]

In signing the 1990 defense appropriation bill, President Bush drew attention to language in the statute instructing the Department of Defense to follow certain procedures for spending as outlined in a committee report.[414] Bush remarked that "such language has no legal force or effect."[415]

In a similar move, President Clinton in signing the 1999 defense authorization bill singled out a handful of provisions he considered constitutionally dubious.[416] He stated: "To the extent that these provisions conflict with my constitutional responsibilities . . . I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do so likewise."[417]

Thus, past practice demonstrates what many courts and commentators have hinted, that the President may, and indeed should, defy or narrowly interpret a congressional enactment if the statute invades exclusive areas of presidential authority. Since the President's power is at its zenith in national security affairs, the converse is true—that Congress' ability to interfere in the administrative details of national security issues is at its lowest ebb. While Congress obviously

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[410] *See* 2 PUBLIC PAPERS OF THE PRESIDENTS: JIMMY CARTER 1434 (1980).

[411] *See id.*

[412] *Id.*

[413] *See id.*

[414] *See* 25 WEEKLY. COMP. PRES. DOC. 1809, 1810 (Nov. 21, 1989).

[415] *Id.* President Bush took much the same approach regarding a provision in the 1990-1991 State Department Authorization Bill, *see* PUBLIC PAPERS OF THE PRESIDENTS: GEORGE BUSH (1990), and the 1990-1991 Foreign Relations Authorization Act, 26 Weekly Comp. Pres. Doc. 266 (Feb. 16, 1990).

[416] *See* William Jefferson Clinton, *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000*, 35 WEEKLY COMP. PRES. DOC. 1927 (October 5, 1999).

[417] *Id.*

possesses formidable national security power of its own, the Constitution does not allow it to interfere with the President's use of his powers which include inherent discretion over details. Thus, when the Congress invades the national security realm unduly by placing unlawful conditions on spending bills, the President may defy the law.

D. LEGISLATIVE PRECEDENTS: CONGRESSIONAL SELF-RESTRAINT

The coordinate construction placed on Executive national security power is not merely the product of presidential ambition and congressional acquiescence. It is reflected in the affirmative interpretations given the Constitution by Congress in considering national security legislation. In interpreting its own powers, Congress has often recognized the limits of its powers by voting down provisions in and amendments to appropriation legislation which would have encroached upon Executive authority.[418] This long-standing tradition further reflects the coordinate construction placed on the Constitution by legislators.

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[418] Again, much like Executive defiance of national security authorization bills, there is considerable precedent for congressional self-restraint in its deliberation over legislation in this area. For example, in 1806, John Quincy Adams introduced legislation in the Senate authorizing the President to send foreign diplomats back home. *See* 9th Cong., 1st Sess., March 3, 7, 1806, 4-24. In his floor speech, Adams stated that the President had no constitutional power except as authorized by Congress. The bill went down to defeat. *See id.*

That is not to say that Congress has never restrained the President's Commander-in-Chief powers by statute. During Theodore Roosevelt's administration, Congress enacted an appropriation bill which required the President to maintain a ratio of eight percent marines to navy enlisted men on battleships. *See also* Wooters, *supra* note 2, at 47. Roosevelt signed the bill and the legislation was viewed as constitutional by his attorney general. *See* 27 Op. Att'y Gen. 259, 259-61 (1909).

A provision of the Selective Training and Service Act of 1940 mandated that no person inducted into the land forces of the United States under the Act's provisions could be stationed outside the Western Hemisphere or territories of possessions of the United States. *See* Selective Training and Service Act of 1940, ch. 720, § 3(e), 54 Stat. 885, 886 (1940) ("Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands"). This provision remained in force until the U.S. became engaged in World War II. Although this provision has been cited in favor of Congress possessing the authority to limit the President's Commander in Chief power, *see* Lawyers Symposium, *cited in* Wooters, *supra* note 2, at 47, this statute was defied by President Roosevelt when he dispatched troops to occupy Iceland and Greenland. *See* Wallace Part I, *supra* note 2, at 299. For a more measured congressional limitation, *see* 100 Stat. 1783-298 § 203(e) (1986) (prohibiting U.S. personnel from providing assistance to members of the Nicaraguan democratic resistance in areas of Honduras and Costa Rica within 20 miles of the Nicaraguan border).

Restrictions in the form of conditional appropriations have been frequently attempted by lawmakers but have been frequently defeated.[419]

It was during the Washington Administration that the question of the limits of congressional authority to restrict the President's Commander in Chief powers first arose. While considering a treaty appropriation bill, Representative James Jackson offered an amendment that would have provided the President with the funds to raise troops and build fortifications only if necessary to protect Georgians from the Creek Indians.[420] James Madison, a representative at the time, argued against such a level of detail. "By the constitution the President has the power of employing these troops in the protection of those parts which he thinks require the most."[421] The measure was defeated.

In 1818, Henry Clay attempted to force President Monroe to recognize the new South American Republics.[422] He moved in the House for an appropriation for the salary of a Minister to the Government of Rio de la Plata.[423] After an exhaustive debate the motion was defeated.[424]

In 1826, opponents of the Panama Congress attempted to attach certain conditions to the appropriation for the mission.[425] On the floor of the Senate, Daniel Webster thundered against the measure. "It was unprecedented, nothing of the kind having been attempted before. It was in opinion, unconstitutional; as it was taking the proper responsibility from the Executive and exercising, ourselves, a power which, from its nature, belong to the Executive, and not to us."[426] The amendment was defeated.[427]

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[419] *See* Turner, *supra* note 23, at 88. A proviso to the Defense Appropriations Act of 1970 stipulated that no funds appropriated by that or any other Act could be used to finance the introduction of ground troops into Laos or Thailand. *See* Pub. L. No. 91-171, 83 Stat. 469, § 643 (1969).

[420] *See* 1 ANNALS OF CONG. 697 (Joseph Gales ed., 1789).

[421] *Id.* at 697-98.

[422] *See* Warren, *supra* note 376, at 20.

[423] *See id.*

[424] *See id.*

[425] *See* CORWIN, *supra* note 13, at 448 n.64.

[426] *Id.*

[427] *See* HENKIN, *supra* note 8, at 397.

In 1837, members of the House of Representatives attempted to prod the President into recognizing the new Republic of Texas.[428] In so doing, they tried to amend a civil and diplomatic appropriation bill by providing funds for "an outfit and salary of a diplomatic agent to be sent to the independent Republic of Texas."[429] Former President John Quincy Adams took the floor of the House to denounce the legislation. He argued "that the act of recognition of a foreign power has heretofore always been an executive act of this Government. It was the business and duty of the President . . . , and he [Adams] was not willing to set the example of giving that recognition on the part of the legislative body without recommendation of the Executive."[430] The bill was amended to read that an agent should be sent to Texas "whenever the President shall receive satisfactory evidence that Texas is an independent Power, and that it is expedient to appoint such a minister."[431]

In 1842, Senator Levi Woodbury moved to amend an appropriation bill with language providing that no part of the funds should be spent in payment of special agents to foreign nations without them having received the advice and consent of the Senate or authorization by congressional enactment.[432] The amendment was defeated 15 to 25.[433] That same year, a motion was made in the House to amend an appropriation bill providing funds for the salaries of U.S ministers to eight governments.[434] The proposed amendment would have eliminated the salary for a minister to Mexico because the country was deemed to be of insufficient importance.[435] Representative Pickens spoke out against the measure arguing that "he believed that some alterations in our diplomatic arrangements were necessary, but he was willing to leave that matter to the direction of the Executive, who was constitutionally charged with it."[436] Following a lengthy debate,

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[428] *See* Nobleman, *supra* note 129, at 151.

[429] S. DOC. 56, 54th Cong., 2d sess., 43 (1837).

[430] *Id.*

[431] *Id.*

[432] *See* Warren, *supra* note 376, at 16.

[433] *See id.*

[434] *See* Nobleman, *supra* note 129, at 150.

[435] *See id.*

[436] *Id.* at 150-51.

the amendment was withdrawn.[437]

In 1867, following ratification of a treaty for the purchase of Alaska, Congress sought to amend the appropriation by implementing legislation to curb the President's constitutional treaty power.[438] The amendment provided, "the powers vested by the Constitution in the President and the Senate to enter into treaties with foreign governments do not include the power to complete the purchase of territory before the necessary appropriations shall be made therefor by act of Congress . . . ."[439] The measure was defeated.[440]

In 1912, Senator Bacon of Georgia proposed an amendment to the Army Appropriation bill that "except as herein provided, or specifically otherwise provided by statute," none of the funds appropriated by the bill should be used for "the pay or supplies of any part of the army of the United States employed or stationed in any country or territory beyond the jurisdiction of the laws of the United States, or in going to or returning from points within the same."[441] Senator Root objected that the amendment would interfere with the President's powers as Commander in Chief, and it was defeated without a recorded vote.[442] In essence, the Senate recognized that such a broad prohibition would have stripped the President of his power to repel sudden attacks and tactically deploy forces.[443]

Provisions similar to the Bacon proposals were also defeated in 1922, 1928, and 1951.[444] During the debate over the 1928 version of the amendment, Senator Borah, Chairman of the Foreign Relations Committee, stated, "[b]ut if the Army is in existence, if the Navy is in existence, if it is subject to command, he [the President] may send it where he will in the discharge of his duty to protect the life and liberty of American citizens. Undoubtedly he could send it, although

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[437] *See id.*

[438] *See id.* at 152.

[439] *Id.*

[440] *See* Nobleman, *supra* note 129, at 152.

[441] *Id.*

[442] *See* CONG. REC. 62d Cong., 2d Sess, pp. 10, 921-30.

[443] *Cf.* 100 Stat. 1783-298 § 203(e) (1986) (prohibiting U.S. personnel from providing assistance to members of the Nicaraguan democratic resistance in areas of Honduras and Costa Rica within 20 miles of the Nicaraguan border).

[444] *See* Hollander, *supra* note 136, at 62.

the money were not in the Treasury."[445]

In 1940, on two occasions, members of the House of Representatives attempted to terminate diplomatic relations with the Soviet Union through appropriation bills.[446] Both occurrences involved the House trying to cut off funding for the U.S. ambassador and the American embassy.[447] Both attempts met with defeat.[448] Congressman Celler aptly stated, "[i]f such a motion . . . could prevail, then what would be the use of a State Department? Let the Appropriations Committee carry on our foreign affairs."[449]

Thus, it is apparent that Congress has often recognized the limits of its own authority to compel the President to act through its appropriation power.[450] In so doing, Congress has frequently interpreted the Constitution to reflect that its spending power may not interfere with the President's national security responsibilities. These examples of congressional self-restraint prevented the Presidents from having to defy or narrowly interpret even more statutes than they already have. Consequently, were Congress in a fit of pique to lose temporarily its self-restraint and use its appropriation power to affirmatively force the President to perform certain exclusive Executive functions within the national security realm, the President could (and should) impound the funds and defy the authorization and/or appropriation statute and the ICA.

E. ACADEMIC SUPPORT FOR PRESIDENTIAL DEFIANCE OF STATUTES

In addition to dicta and past practice, academic support exists which lends further support to the argument that the President may upon occasion act contrary to federal law. Professor Quincy Wright in his groundbreaking study, *The Control of American Foreign Relations*, wrote, "[i]n foreign relations . . . the President exercises discretion, very little limited by directory laws, in the method of carrying out foreign policy. . . . In foreign affairs the President . . . has a constitutional discretion as the representative organ and as commander-in-chief which cannot be taken away by Congress . . ."[451]

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[445] *Id.*

[446] *See* Wallace Part I, *supra* note 2, at 316.

[447] *See id.*

[448] *See id.*

[449] 86 CONG. REC. 1192 (1940).

[450] *See infra* Part IV.

[451] WRIGHT, *supra* note 46, at 149.

A generation after Professor Wright's remarks, Professors McDougal and Lans suggested that the President could "disregard" congressionally enacted laws which concern the "President's special competence."[452] These areas of special competence extend to the power to recognize "a foreign government or to an exercise of his authority as Commander in Chief. . . ."[453] More recently, Professor Peltason has suggested much the same view. The President, "perhaps, in desperate situations, [can act] even against the law—to preserve the *national safety*. Such actions are subject, however, to the peril of subsequent judicial reversal, of impeachment, or of political defeat."[454] Even academics normally disinclined to support Executive claims of authority appear to be in general agreement on this point. Professor Raoul Berger asserted that "the presidential oath to protect and defend the Constitution posits both a right and a duty to protect his own constitutional functions from congressional impairment."[455]

F. CONCLUSION

What this section has endeavored to demonstrate is that impoundment falls within a broader context of presidential authority to defy or narrowly interpret appropriation legislation if it invades his national security responsibilities. In the words of Professor Tribe, "[t]his theory may sound more radical than it really is."[456] Tribe accurately notes that it "is thus rather unremarkable to posit [that] the President [may] . . . take his or her own views of the Constitution into account when executing the law."[457] If Congress is encroaching upon his exclusive functions, such as his inherent discretion over administrative details as Commander in Chief and Chief Diplomat, or forcing him to perform a function in an

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[452] *See* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 338 (1945).

[453] *Id. See also* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1161 n.253 (1987) (stating, for example, that unlawful interference would involve Congress providing funds only if the President recognized the government of mainland China instead of Taiwan).

[454] J.W. PELTASON, UNDERSTANDING THE CONSTITUTION 132 (1997) (emphasis added).

[455] RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 309 (1974). *Cf.* STORY, *supra* note 81, at 552-53 (§ 777) ("A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument.").

[456] TRIBE, *supra* note 352, at 726.

[457] *Id.* at 729.

area where he alone has the discretion to act, it is not only the President's prerogative but his constitutional duty to defy these statutes.

IV. THE LIMITS OF CONGRESSIONAL SPENDING POWER

The Constitution grants Congress the Power of the Purse. This authority stems primarily from Article I, section 9, clause 7 of the Constitution, which provides that "[n]o money shall be drawn from the treasury, but in Consequence of Appropriations made by Law," and Article I, section 8 which provides that Congress possesses the "Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare."[458] The Power of the Purse, in the words of Madison, is "the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people."[459] Like all constitutional powers, however, the spending power must be exercised within the confines of the Constitution as a whole.[460] Speaking of the Appropriations Clause, Alexander Hamilton wrote in his 1791 *Report on the Subject of Manufactures*, "[a] power to appropriate money . . . would not carry a power to do any other thing not authorised in the constitution, either expressly or by fair implication."[461] The Supreme Court, in *United States v. Butler*, echoed this sentiment, stating that "the power to spend [is] subject to limitations."[462]

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[458] U.S. CONST. art. I, § 9, cl. 7.

[459] THE FEDERALIST No. 58, at 297 (James Madison) (Garry Wills ed., 1982).

[460] *See* United States v. Will, 449 U.S. 200 (1980) (striking down the use of the Spending power as interfering with the independence of the federal judiciary); Flast v. Cohen, 392 U.S. 83, 104-05 (1968) (invalidating the use of federal expenditure for religious purposes); Clark v. Bd. of Edn. of Little Rock School Dist., 374 F.2d 569, 571 (8th Cir. 1967) (stating that the flow of federal funds is not "the final arbiter of constitutionally protected rights"). *See also* Califano v. Wescott, 443 U.S. 76, 92-93 (1979). The obverse of the spending power is the taxing power. It, of course, is also subject to the same limitations as the spending power and the courts' treatment of this power also reflects the constitutional restrictions placed upon Congress' power to tax and spend. The Supreme Court, in *United States v. Butler*, stated, "[t]he power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." 298 U.S. 1, 68-69 (1963).

[461] 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303-04 (Harold C. Syrett et al eds. 1966).

[462] 297 U.S. 1, 66 (1936).

As such, Congress' spending power may not encroach upon the functions of the other branches. For example, the Constitution prohibits Congress from reducing the salary of federal judges or of the President.[463] Congress through the spending power may not establish a national religion[464] or rescind a pardon.[465] The Supreme Court has also held that Congress may not use its spending power to effect bills of attainder.[466] In the latter decision, *United States v. Lovett*, the Court rejected the government's assertion that "Congress under the Constitution has complete control over appropriations."[467] The words of Judge Madden, who concurred in the lower court's decision in *Lovett*, are of particular interest. In his concurrence, he stated, "I do not think . . . that the power of the purse may be constitutionally exercised to produce an unconstitutional result such as . . . trespass upon the constitutional functions of another branch of the Government."[468]

It necessarily follows that Congress, under the guise of the spending power, may not interfere with the national security powers assigned exclusively to the President under the Constitution.[469] Justice Kennedy, who was joined by Chief Justice Rehnquist and Justice O'Connor in his concurrence in *Public Citizen v. United States Dept. of Justice*,[470] noted, "[i]n a line of cases of equal weight and authority . . . where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch."[471] By extension, areas of national security

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[463] *See* U.S. CONST. art. II, §1 and art. III, §1; *Will*, 449 U.S. at 200.

[464] *See Flast*, 392 U.S. at 103-04.

[465] *See* Hart v. United States, 118 U.S. 62, 66-67 (1886); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871).

[466] *See* United States v. Lovett, 328 U.S. 303, 315 (1946); Blitz v Donovan, 538 F. Supp. 1119, 1125-26 (D.D.C. 1982).

[467] *Lovett*, 328 U.S. at 313.

[468] 66 F. Supp. 142, 152 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946).

[469] *See* Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CON. L.Q. 457, 480-81 (1992) ("In foreign affairs, however, the question of whether Congress intruded impermissibly into executive discretion is really the same question as whether Congress violate[d] . . . [a] specific constitutional proscription . . ."); *cf.* 2 STORY, *supra* note 81, at 552 (§775) ("No law can abridge the constitutional powers of the executive department.").

[470] 491 U.S. 440 (1989).

[471] *Id.* at 485 (emphasis in original).

which fall under the President's exclusive purview, such as diplomatic recognition and negotiation, would be insulated from congressional interference through the spending power (or any other legislative prerogative for that matter).

In areas of concurrent authority between the President and Congress, the Court has indicated it would use a balancing test. In *Nixon v. Administrator, General Services*, the Supreme Court stated that "in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."[472] In essence, if Congress, through its spending power, inhibits the Executive from performing his own specific constitutional duties even though Congress may also possess some authority over the matter, the statute would be a nullity. For example, both Congress and the President share authority over the armed forces. The President has strategic and tactical authority over the military, but Congress has the power to declare war and make rules for the armed forces. While the President cannot declare war, by the same token, Congress cannot interfere with tactical decisions.

More specifically, a lower court has suggested that the President's national security power cannot be limited by an appropriation bill. In *Federal Employees v. United States*,[473] a district court, relying upon the "role of the Executive in foreign relations," struck down a statute forbidding the use of appropriated funds to enforce or implement nondisclosure agreements. Thus, judicial precedent specifically limiting Congress' spending power within a national security context does exist.

A number of authorities have also pointed out the limits of the spending power with respect to national security affairs. Senator Robert Byrd, no shrinking violet when it comes to asserting Congress' Power of the Purse, has written that Congress may not use its appropriation power to prevent the President from receiving foreign ambassadors.[474] Professor Henkin has written that "[e]ven

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[472] 433 U.S. 425, 443 (1977).

[473] 688 F. Supp. 671, 685 (D.D.C. 1988), *vacated as moot and remanded sub nom.*, American Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) (per curiam). Another lower court overstated the case for Congress. Spaulding v. Douglas Aircraft Co., Inc., 60 F. Supp. 985, 988 (S.D. Calif. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946) ("Congress in making appropriations has the power and authority not only to designate the purpose of the appropriations, but also the terms and conditions under which the executive department . . . may expend such appropriations. . . . The purpose of appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with same . . . ."); *cf.* Hukill v. United States, 26 Sup. Ct. 316 (1880) ("An appropriation by the Congress of a given sum of money for a named purpose is . . . simply legal authority to apply so much of any money in the Treasury to the indicated object.").

[474] *See* Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J.

when Congress is free not to appropriate, it ought not to be able to regulate Presidential action by conditions on the appropriations of funds to carry it out, if it could not regulate the action directly."[475] Henkin continued that "Congress cannot impose conditions which invade Presidential prerogatives to which the spending is at most incidental, or which violate individual rights . . . ."[476] Professor Kate Stith has argued that "Congress cannot . . . deny the President sufficient money to carry out his Article II duties (by, for example, stipulating that no money be expended by the Executive on receiving foreign ambassadors, *in contravention of section 3*), or make treaties."[477] In short, the spending power, similar to the commerce power, may be among the most elastic of legislative powers, may not do indirectly what Congress is forbidden from doing directly.[478]

Because of these limits on the spending power, when Congress exceeds these limits, the President must not enforce these laws since they are unconstitutional. These limits are exceeded when Congress either (1) tries to appropriate in too much detail within a national security context, thus brushing up against the President's discretionary power as Chief Executive, or (2) when Congress attempts through the spending power to force the President to perform certain acts the decision of which is the President's alone. Either of these factors may be enhanced by a factor of two if congressional actions take place during wartime and/or involve funds to be expended overseas. When Congress impinges on the

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ON LEGIS. 297, 311 (1998).

[475] HENKIN, *supra* note 390, at 113-15.

[476] *Id.* at 115.

[477] Stith, *supra* note 2, at 1351.

[478] *See* Fairbank v. United States, 181 U.S. 283, 294 (1901) ("what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result."). *See also* Williams v. Rhodes, 393 U.S. 23, 29 (1968) ("[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."); Frost Trucking Co. v. R.R. Com., 271 U.S. 583, 599 (1926) ("Acts generally lawful may become unlawful when done to accomplish an unlawful end.. . . and a constitutional power cannot be used by way of condition to attain an unconstitutional result.").

Many advocates of congressional spending prerogatives cite *Hart's Case*. *See* 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people"). The court in the case, however, was careful to distinguish the case from cases which "impinged . . . on function[s] entrusted by the Constitution to the Executive." *See id.* at 483. *See also* Turner, *supra* note 23, at 84.

President's constitutional power by mandating that certain specific national security funds be spent, the President may impound the funds. In such situations, Congress has at best concurrent power with the President, with both theoretical and practical considerations seeming to lean in favor of the President.

V. ARGUMENTS AGAINST NATIONAL SECURITY IMPOUNDMENT

There are several cogent arguments that can be marshaled against the President impounding national security funds. They include: 1) that impoundment effects an unlawful line item veto and also an absolute veto; 2) that Congress through its authority to set rules for the Army and Navy coupled with the spending power has the authority to require funds to be spent; 3) that the President would have to first veto the bill in question before he defies Congress; and 4) that by impounding funds the President violates his oath of office to faithfully execute the laws.

A. THE PRESIDENT IS VIOLATING THE PRESENTMENT CLAUSE

1. THE PRESIDENT IS EXECUTING AN UNCONSTITUTIONAL LINE ITEM VETO

The primary argument against National Security Impoundment is that it may violate section 7 of Article I, known as the Presentment Clause.[479] The Present-

[479] There are in fact two Presentment Clauses in the U.S. Constitution. The first lies in Article I, section 7, clause 2, and the second in clause 3. Clause 2 refers specifically to bills, while clause 3, termed the "Residual" or "Orders" Presentment Clause, refers to orders, resolutions or votes. For convenience and to follow standard usage, the two Clauses will be referred to in the singular as the Presentment Clause. The first Presentment Clause states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If later such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

ment Clause lays out the twin requirements of the federal lawmaking process: bicameral approval of the bill and Presentment to the President. The Supreme Court has amplified that language to mean that "repeal of statutes, no less than enactment, must conform with Art. I."[480] The argument against National Security Impoundment would be that by impounding funds and thus frustrating the will of Congress, the President would be exercising unconstitutional line item veto authority.[481] The argument would follow that since presidential actions *pursuant* to the Line Item Veto Act were struck down as a violation of the Presentment Clause, then the President acting against appropriation statutes (and the ICA) *without* statutory authority would be all the more likely to have his actions defeated in court. There are four persuasive reasons, however, why the Presentment Clause is not likely to blunt the argument in favor of National Security Impoundment: 1) impoundment, unlike the Line Item Veto Act, does not change the text of the law; 2) the *City of New York* decision implicitly draws the distinction between the President's authority over national security and domestic spending; 3) within the national security sphere the requirements of Presentment may be somewhat different from those in the domestic realm; and 4) to the extent that Congress is unlawfully invading the powers of the President, the strictures of Presentment are irrelevant.

In *Clinton v. City of New York*,[482] the Supreme Court struck down the Line

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U.S. CONST. art I, § 7, cl. 2.

The "Residual" or "Orders" Presentment Clause states:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art I, § 7, cl. 3.

[480] I.N.S. v. Chadha, 462 U.S. 919, 954 (1983).

[481] *See, e.g.*, H.R. REP. No. 1797, at 311 (1950) (House Comm. on Appropriations) (indicating that impoundment has a place in Executive-Congressional relations to effect savings so long as it was not used to frustrate a major congressional policy); Fisher, *supra* note 108, at 115 (quoting President Franklin D. Roosevelt who indicated that impoundment should be not be used as "a substitute for item or blanket veto power, and should not be used to set aside or nullify the expressed will of Congress.").

[482] 524 U.S. 417 (1998).

Item Veto Act of 1996. The Act provided the President with the authority to cancel certain spending provisions within five days following Presentment.[483] The Court ruled that his power, known as enhanced rescission authority, did not follow the requirements of the Presentment Clause and was therefore unconstitutional.[484] The Court concluded that "the cancellation procedures set forth in the [Line Item Veto] Act [of 1996] violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution."[485]

Unlike with enhanced rescission, however, the President, through impoundment, is not changing the text of a law and, consequently, the Presentment Clause is not implicated. Whereas with enhanced rescission, "[i]n both legal and practical effect, the President has amended . . . Acts of Congress by repealing a portion [of the legislation],"[486] with impoundment, some of the practical *but none of the legal effect* of the appropriation statute is repealed. Although this may at first appear to be a distinction without a difference, it is one that the Court embraced. In comparing the Line Item Veto Act with statutes in which Congress appropriated specified amounts using "sums not exceeding" language and allowed the President to spend what he wished under those caps, the Court stated, "[t]he critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power *to change the text of duly enacted statutes*. None of the Act's predecessors could even arguably have been construed to authorize such a change."[487]

Moreover, when National Security Impoundment involves a mere reduction or deferral in spending and not an outright elimination of expenditure for a program, the law is not being repealed even in a practical sense and can all the more compellingly be said to fall within the President's discretion over administrative details. For example, assume during wartime that Congress passed an appropriation bill mandating that $500 million be spent on aircraft carrier maintenance. If the President impounded $250 million of the funds, the law would not have been repealed, although it would have been altered somewhat in its practical effect. Efforts toward aircraft carrier maintenance would still be carried out, just not at the exact pace wished by Congress. This is because during times of war the President "determine[s] what degree of force the crisis demands."[488]

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[483] 2 U.S.C. § 691(a) (1994 ed., Supp. II).

[484] *See Clinton*, 524 U.S. at 437.

[485] *Id.* at 447.

[486] *Id.* at 438.

[487] *Id.* at 446 (emphasis added).

[488] The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863).

The lower court in the first Line Item Veto Act case decided on the merits distinguished even more clearly between the legitimacy of impoundment and the illegitimacy of the Line Item Veto Act. Judge Thomas Penfield Jackson in *Byrd v. Raines*[489] stated, "[c]ancellation under the Act is simply not the same thing as impoundment, or any other suspension of a statutory provision."[490] Quoting *I.N.S. v. Chadha*, Jackson noted that "[i]nstead, cancellation is equivalent to repeal . . . and repeal of statutes, no less than enactment, must conform with Art. I."[491] Jackson concluded that while cancellation

> forever renders a provision of federal law without legal force or effect, so the President who cancelled an item and his successors must turn to Congress to reauthorize the foregone spending. Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting *executive* (or legislative) priorities, cancellation occurs immediately and irreversibly in the wake of the operationalizing "approval" of the bill containing the very same measures being rescinded.[492]

Although Judge Jackson was referring to authorized impoundment, unauthorized impoundment's effect on the law is identical. It does not necessarily nullify a statutory provision, it may only defer or reduce the expenditure involved. Moreover, the act of impoundment does not irrevocably strike the law from the statute books, it may only delay the statute's implementation. Thus, with impoundment, while the practical effect of the law is changed (if perhaps only temporarily), the legal effect is not. Because the statute is not legally altered or repealed, the requirements of the Presentment Clause are not implicated.

Second, the Court's opinion in *Clinton* recognized the important distinction between the President's discretion over national security spending and domestic spending. Citing *United States v. Curtiss-Wright*, the Court stated, "this Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better

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[489] 956 F. Supp. 25 (D.D.C. 1997), *vacated*, Raines v. Byrd, 521 U.S. 811 (1997) (vacating *Byrd v. Raines* due to lack of standing by plaintiffs). Although later overturned by the Supreme Court on questions of justiciability, the merits of Jackson's argument were later justified by the High Court in *Clinton v. City of New York*, 524 U.S. 417 (1998).

[490] *Byrd*, 956 F. Supp. at 36.

[491] *Id.* (footnote omitted).

[492] *Id.* at 36-37 (emphasis added).

opportunity of knowing the conditions which prevail in foreign countries.'"[493] In this dictum, the Court hinted that the President through the Line Item Veto Act could have canceled spending items outright had they involved national security affairs. In so doing, the Court acknowledged the greater discretion the President enjoys with respect to withholding national security expenditure. By endorsing *United States v. Curtiss-Wright*'s dictum about the President's "greater freedom from statutory restriction,"[494] the Court also provided support for the notion that the President's discretion in this respect may transcend statutory boundaries such as those found in the ICA.

Third, as demonstrated above, national security affairs comprise a unique legal realm. Even if it could be concluded that impoundment implicates the Presentment Clause—a position at odds with what the Supreme Court indicated in *Clinton*—National Security Impoundment might still pass constitutional muster. Within the parallel universe of the Law of Nations, the requirements of Presentment are often different, if not reversed at times. For example, with treaties, which establish international legal obligations, instead of Congress presenting the prospective law to the President for his ratification, the President presents the prospective law to the Senate for its approval in the form of Advice and Consent and thereafter the President may or may not ratify the Treaty.[495] In this respect, the President is the legislative organ. The President may also unilaterally repeal treaties. Repealing a non-self-executing treaty has more than just international legal ramifications, it renders congressionally enacted authorization and/or appropriation laws implementing the treaty without legal effect.[496] Much like impoundment, the presidential abrogation of a treaty or decision to sever diplomatic relations with a state would nullify (but not repeal) federal statutes.[497] The provisions technically remain on the books until repealed by Congress. These examples reflect the President's much enhanced role in national security lawmak-

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[493] *Clinton*, 524 U.S. at 445.

[494] *Id.* at 445.

[495] *See* CORWIN, *supra* note 15, at 92.

[496] *Cf.* Goldwater v. Carter, 444 U.S. 996 (1979) (refusing to review the President's unilateral abrogation of the American mutual defense treaty with Taiwan). *See also* HENKIN, *supra* note 8, at 54.

[497] For example, following President Carter's abrogation of the American mutual defense treaty with Taiwan, a host of federal statutes were nullified. The domestic effect of the treaty repeal had to be addressed through the Taiwan Relations Act. For a discussion of the statute, see Lee R. Marks, *Legislating and the Conduct of Diplomacy: The Constitution's Inconsistent Functions*, *in* THE TETHERED PRESIDENCY, *supra* note 307, at 199, 201-03.

ing; he often "drafts" the law and upon receiving the Senate's assent, he may or may not ratify it. Following ratification, he then may repeal it unilaterally.[498] It could be argued that owing to the President's unique discretion within national security affairs, the requirements of the Presentment Clause may be somewhat relaxed if not inverted, thus perhaps permitting National Security Impoundment.

Finally, to the extent that Congress is invading the President's constitutional prerogatives, Presentment is irrelevant since an unconstitutional law is no law at all *ab initio*.[499] Put another way, concern over the proper lawmaking procedure with respect to unlawful acts is irrelevant. Congress cannot attempt to unconstitutionally undermine the President's national security power and then legitimately argue that by impounding the funds and defying the statute, the President is the party who is acting unlawfully by circumventing the Presentment Clause.

2. THE PRESIDENT IS EXERCISING AN ABSOLUTE VETO

The second argument against National Security Impoundment is that it could be contended that impoundment also amounts to an absolute veto, leading to an outcome the Framers purposely chose not to implement. As discussed above, however, with impoundment the affected statute remains on the books. The law is not in a legal sense repealed since the statutory language is not eliminated. If the President merely defers spending, the argument in favor of the Executive branch is all the more persuasive since the law is being implemented, just not at the pace intended by Congress.

Even if impoundment were considered an absolute veto, that alone would not be fatal to National Security Impoundment. This is because the President is not without the power to effect an absolute veto under certain circumstances. Presidential failure to sign a bill after Congress has adjourned amounts to an absolute veto since Congress cannot override his actions. This practice has been upheld by the Supreme Court.[500] In addition, the President, by pardoning individuals, can effect a second type of absolute veto. For example, President Jefferson used

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[498] This presumes that the Senate has not conditioned its consent on securing a voice for itself in any subsequent treaty abrogation. A similar argument could be made with respect to the War Power. While Congress through a Declaration of War (and with or perhaps even without the President's signature) transforms the nation in a legal sense from a state of peace to a state of war, the President through his power as Commander in Chief may unilaterally sign an armistice and complete executive agreements which have the legal effect of repealing the state of war.

[499] Norton v. Shelby County, 118 U.S. 425, 442 (1886) (stating that an unconstitutional statute is "no law at all.").

[500] *See* United States v. Schwimmer, 279 U.S. 644 (1929).

this tactic to nullify the effect of the Sedition Act.[501] Since Congress cannot interfere with the President's pardoning power,[502] Congress is without power to override such presidential actions. Thus, even if National Security Impoundment were considered an absolute veto, that alone is not dispositive of unconstitutionality.

B. CONGRESS HAS THE POWER OF THE PURSE, THE AUTHORITY TO SET RULES FOR THE ARMED FORCES AND TO PROVIDE FOR THE COMMON DEFENCE

Opponents of National Security Impoundment could also counter that the Constitution authorizes Congress to set the rules for the military and to provide for the armed forces.[503] Article I, section 14 of the Constitution provides that Congress has the power to "make Rules for the Government and Regulation of the land and naval Forces."[504] In addition, the Constitution confers upon Congress the power to "provide for the common Defence,"[505] to "raise and support Armies,"[506] and to "provide and maintain a Navy."[507]

First, it should be noted that these clauses are irrelevant with respect to the

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[501] *See* Easterbrook, *supra* note 353, at 907.

[502] *See* Schick v. Reed, 419 U.S. 256, 266 (1974) (stating that the power to pardon "cannot be modified, abridged, or diminished by the Congress.").

[503] *See* U.S. CONST. Art. I, § 8, cl. 14; HENKIN, *supra* note 8, at 115 ("one must conclude that Congress could insist on its spending power as on other express powers, and in foreign as in domestic matters can spend (and not spend) according to its views of what would promote the general welfare of the United States.").

[504] Justice Jackson's powerful concurrence in *Youngstown* reinforces the power of Congress to set military rules. "The Constitution expressly places in Congress power 'to raise and support Armies' and to 'provide and maintain a Navy.' This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement." *Youngstown Sheet*, 343 U.S. at 643 (Jackson, J., concurring). While *prima facie* this dictum would seem to refute the notion of National Security Impoundment, the dictum is not inconsistent with the practice at all. Justice Jackson was stating that the Executive cannot determine where funds are to be allocated. Such a statement goes more to the issue of transferring or reprogramming funds than it does the act of withholding them.

[505] U.S. CONST. Art. I, § 8, cl. 1.

[506] *Id.* at cl. 12.

[507] *Id.* at cl. 13.

President's diplomatic powers. On their very face these clauses speak only to military and not diplomatic matters. Thus, Congress' power in these areas does not extend to diplomatic intercourse conducted by the President.[508]

Second, that Congress has the authority to make rules for the military is little different from the preceding Presentment arguments. The President, through impoundment, is not claiming Congress' authority for his own since he is not repealing statutory law or military regulations. Impoundment generally involves the President's inherent discretion, which as Hamilton stated in the *Federalist No. 72*, includes the "application and disbursement" of funds subject to the broad authority granted by Congress. Congress, through its spending power, may place a ceiling on the maximum amount of national security funds that the President can expend, but if it interferes with the President's own constitutional duties by legislating too minutely, he may possess the authority to impound certain funds.

The same is true with regard to congressional rulemaking for the military. Congress through its authority to make rules, may not interfere with the President's Commander in Chief power. In *Swaim v. United States*,[509] the court stated, "Congress may increase the Army, reduce the Army, or abolish it altogether, but so long as we have a military force Congress cannot take away from the President the Supreme Command . . . . Congress cannot in the disguise of 'Rules for the Government' of the Army impair the authority of the President as Commander in Chief."[510]

Moreover, presidents have claimed and courts have acknowledged that the Executive has power of its own to make rules governing the armed forces.[511] During the Civil War, President Lincoln promulgated the rules governing the Lieber Commission.[512] The Supreme Court in *United States v. Eliason*[513] stated

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[508] *Cf.* United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936) (stating that the President is the "sole organ" of American diplomacy).

[509] 28 Ct. Cl. 173 (1893), *aff'd* 165 U.S. 553 (1897).

[510] *Id. See also* WRIGHT, *supra* note 46, at 320 ("The Constitution puts the organization of the Army, Navy and militia in the hands of Congress. The President, however, exercises considerable independent power as commander-in-chief in the detailed organization of the military forces . . ."); *cf.* TAFT, *supra* note 67, at 129 ("If Congress were to attempt to prevent [the President from using the army to suppress rebellion or enforce the laws] . . . the action would be void . . . ."); THE FEDERALIST No. 74, at 377 (Alexander Hamilton) (Garry Wills ed. 1982) ("the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority.").

[511] HENKIN, *supra* note 8, at 46.

[512] General Orders No. 100, *reprinted in* 3 THE WAR OF THE REBELLION: A COMPILATION OF THE UNION AND CONFEDERATE ARMIES, Ser. III (Scott ed. 1901).

that the "power of the executive to establish rules and regulations for the government of the army is undoubted." In *Kurtz v. Moffitt*,[514] the Supreme Court again gave legal effect to military regulations issued pursuant to the President's own authority. Thus, to some extent, Congress' power to establish rules and regulations is not exclusive and may be somewhat offset by the President's Commander in Chief power which brings with it its own rulemaking authority.[515]

Finally, judicial precedent suggests that, when a conflict exists between the President's Commander in Chief power and Congress' authority to make rules governing the military, past practice will govern. In *Beard v. Stahr*,[516] a federal district court was faced with the competing clauses of Article II, section 2 and Article I, section 8, clause 14. The court concluded that "[a]n historical review of the usages of the executive and legislative branches of the Government" was necessary.[517] In the case of impoundment, the historical record reveals that the President does indeed possess the authority to impound national security-related funds.[518]

C. THE PRESIDENT MUST VETO A BILL BEFORE HE IMPOUNDS FUNDS

It could be maintained that if there are constitutional defects to an appropriation bill, the President would first have to veto the legislation before he could defy it through impoundment. The argument would be that by signing a bill (assuming the President's veto was not overridden), the President has already rendered his constitutional interpretation of the statute and his assent to the bill's legality. This argument is not without some force. The nation's first Secretary of State, Thomas Jefferson, advised President Washington that the veto power "is the shield provided by the constitution to protect against invasions of the legislature [of] 1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures."[519] In fact, until the presidency of Andrew Jackson, the prin-

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[513] 41 U.S. (16 Pet.) 291, 301 (1842).

[514] 115 U.S. 487, 503 (1885).

[515] In a sense, the Court's treatment of presidential rulemaking power is not unlike its approach toward the removal of public lands from future sale in that at first blush the text of the Constitution would seem to dictate that Congress should occupy the field.

[516] 200 F. Supp. 766, 771 (D.D.C. 1961), *vacated on other grounds*, 370 U.S. 41 (1962).

[517] *Id.*

[518] *See supra* Part II.

[519] *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15,

cipal justification for exercise of the veto power was that the Executive believed the law to be unconstitutional.[520]

Such a notion, however, fails on several grounds. First, whether the President vetoes or signs the bill is irrelevant with respect to the Act's constitutionality. There is no constitutional equivalent of waiver and estoppel. The President by signing a mere statute cannot reallocate the constitutional distribution of powers.[521] Second, the Supreme Court itself has recognized that presidents frequently sign bills, which have constitutional problems. In one of the preeminent cases about the lawmaking process, *I.N.S. v. Chadha*,[522] the Court stated: "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds."[523] The Court in *Chadha* also cited the example of a memorandum sent by President Franklin Roosevelt's to Attorney General Robert Jackson in which the President stated that he would not implement an unconstitutional provision in a statute he had just signed.[524] Thus, it appears that while the President may be under some moral obligation to veto a bill with unconstitutional measures in it, such an action does not render an unconstitutional act constitutional.

1791), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 247 (Philip B. Kurland & Ralph Lerner eds. 1987).

[520] *See, e.g.*, SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS & DEVELOPMENT 127 (1994).

[521] During the early years of the Constitution the Framers through statute formed a number of constitutional constructions regarding the constitutional allocation of powers. An example of this is the debate over the removal power. As indicated below, *see infra* note 531, custom develops over a long period of time as the two branches come to some agreement about their respective powers. By giving his assent to a single statute, a single President cannot create a constitutional custom and thus cannot alter the constitutional relationship between the branches. This could only be done over time by a number of presidents and congresses. Moreover, custom is most persuasive the closer its origin is to the time of the Framing. *See* Powell v. McCormack, 395 U.S. 486, 547 (1969) ("The relevance of prior [practice] is largely limited to the insight it afford[s] in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.").

[522] 462 U.S. 919 (1983).

[523] *Id.* at 942 n.13.

[524] *See id.* at 969 n.4.

D. THE PRESIDENT VIOLATES HIS OBLIGATION TO FAITHFULLY EXECUTE THE LAWS BY IMPOUNDING FUNDS

The argument could be advanced that by impounding funds the President is violating his Oath of Office and his constitutional obligation to see that the laws are faithfully executed. This position is less persuasive than it seems at first blush. As discussed above in more detail,[525] if a statute is at odds with the Constitution, it is null and void *ab initio*. Thus, by refusing to enforce an unconstitutional statute, the President is faithfully executing the highest law in the land, the Constitution.[526] By impounding funds that impermissibly intrude into the scope of the Executive's constitutional power, the President is in fact faithfully executing the provisions of the Constitution.

E. THE PASSAGE OF THE ICA CONCLUDED THE CONSTITUTIONAL DEBATE OVER IMPOUNDMENT

The final and perhaps most persuasive argument against National Security Impoundment is that the ICA ended the constitutional debate over impoundment. The argument would be that the passage of the ICA and the subsequent, apparent acquiescence by the Executive branch to its provisions indicates that as a constitutional matter the issue has been resolved in favor of Congress. The ICA, by making all spending bills presumptively mandatory, represents the ultimate coordinate construction and renders obsolete any earlier congressional hesitation to mandate the expenditure of national security funds. Moreover, the ICA made no concession to Executive discretion over national security-related funds. In effect, when Congress decided to no longer acquiesce to Executive impoundment, it passed the ICA which removed the "gloss" from Executive discretion over national security spending.

Underscoring the argument regarding the coordinate construction involved with passage of the ICA is that the early 1970s witnessed a full public airing of the constitutional issues surrounding impoundment. Congress conducted extensive hearings into the legal and historical basis for impoundment in both 1971[527] and 1973,[528] and much academic research was conducted on the issue during this

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[525] *See supra* Part III.

[526] *See* Norton v. Shelby County, 118 U.S. 425, 442 (1886) (stating that an unconstitutional statute is "no law at all.").

[527] *See generally 1971 Hearings supra* note 68.

[528] *See generally 1973 Hearings supra* note 1.

same period.[529]

While this argument is not without some merit, ultimately it has a number of flaws, which tend to favor the existence of National Security Impoundment. First, the ICA did not involve constitutional construction by Congress as to its ability to compel the expenditure of funds. In fact, the ICA expressly disclaimed such intent. The first section of the ICA reads: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . asserting or conceding the constitutional powers or limitations of either the Congress or the President."[530]

Second, if the ICA included unambiguous statutory language emphasizing Congress' absolute power to compel all expenditure (which it does not), it should be remembered that the ICA is only a statute and cannot revoke the constitutional powers of the Executive. The Executive gloss with respect to impoundment is a constitutional and not a statutory construction. Justice Frankfurter himself stated that such actions were an "exercise of power [which is] part of the structure of our government . . . ."[531]

The argument that the ICA ended congressional acquiescence is further undercut by the fact that the ICA did not forbid impoundment, it merely brought the practice within a statutory framework.[532] This has led commentators to conclude that "Congress has not stopped executive impoundment of appropriated

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[529] *See supra* note 2.

[530] 2 U.S.C.A. § 681 (West 1997).

[531] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). In his concurrence, Justice Frankfurter indicated that a statute could repeal Executive gloss. *See id.* Frankfurter misapprehended his own formula, however. The problem with his contention is how can a statute repeal a *constitutional* gloss? For example, nowhere in the Constitution does it indicate which branch is to recognize foreign governments. Through constitutional custom the Executive branch has long been acknowledged as the proper organ to carry out this function. Certainly a statute could not repeal this Executive gloss. *See also supra* note 521.

In a similar vein, the very fact that the ICA did not make special allowances for the President's constitutional discretion over the disbursement of national security funds does not indicate that the President has no greater discretion in this area. The ICA, by not reflecting the constitutional distinction between national security and domestic affairs, does not lessen the constitutional claims of the Executive, it merely reflects a defect in the ICA. As a statute, the ICA cannot deprive the President of his constitutional powers. *See also supra* note 521.

[532] *See also* FISHER, *supra* note 243, at 84 (stating that the ICA "explicitly recognized the right of the president to withhold funds but subjected executive discretion to congressional review and disapproval.").

funds."[533]

That the President has meekly acquiesced to congressional spending restrictions has also not been borne out by past practice. The Executive was if anything emboldened by the ICA, treating it not as a limitation but as a blanket authorization to withhold funds. For example, President Ford made vigorous use of deferrals and flooded Congress with special messages.[534] Following the ICA, lawmakers anticipated no more than a few dozen requests annually, which was the high mark under President Nixon. President Ford, however, used the ICA to effect over a hundred impoundments per year.[535] Nor were these impoundments an exercise in futility. Over 90% of President Ford's deferrals escaped legislative veto and went into effect.[536] From 1975 through 1984, almost 60% of presidential rescission requests were granted by Congress.[537] These results belie a presidency chastened in its attempts to withhold funding.

Furthermore, on occasion presidents have defied the ICA provisions in their impoundment of funds. As discussed earlier, President Carter took steps to impound funds for the B-1 Bomber and the Minuteman III missile system before he sent rescission proposals to Congress.[538] President Bush deferred spending for the V-22 helicopter without notifying Congress and unilaterally terminated the A-12 stealth aircraft.[539]

Finally, it bears noting that while the ICA presumes funds will be spent, generally it has not been followed by mandatory language in national security appropriation bills. Language of the type initially drafted by Carl Vinson's House Armed Services Committee in 1962 is rarely to be found.[540] More typical is language found in the Department of State and Related Agency Appropriations Act

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[533] CHRISTOPHER H. PYLE & RICHARD M. PIOUS, THE PRESIDENT, CONGRESS, AND THE CONSTITUTION 230 (1984).

[534] *See id.* at 229.

[535] *See id.*

[536] *See id.*

[537] *See* ROBERT J. SPITZER, THE PRESIDENTIAL VETO 139 (1988).

[538] *See* Fisher, *supra* note 284, at 154.

[539] *See supra* notes 288-297 and accompanying text.

[540] *See* HOUSE REP. 1406, *supra* note 202, at 9 ("the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize . . . $491 million . . . 'for an RS-70 weapon system.").

for fiscal year 2001.[541] The Act provides a lump sum of $2,569,825,000 for the "necessary expenses of the Department of State and the Foreign Service."[542] To be sure there are specific provisions but they do not contain language mandating their expenditure. For example, the statute reads that for international peacekeeping activities $500,000,000 is provided, "of which not to exceed $20,000,000 shall remain available until September 30, 2001."[543] Much like the earliest appropriation bills, a spending cap is put into place and is often accompanied by limitations on how the money is to be spent, but language compelling the funds to be expended is rarely used.[544]

Thus, because the practice of National Security Impoundment was not expressly forbidden by the ICA, and more fundamentally, because it could not have been, the legitimacy of National Security Impoundment does not appear to have been diminished by the passage of the ICA.

F. CONCLUSION

The foregoing arguments against National Security Impoundment raise important concerns about the legitimacy of the practice. Nonetheless, they do not appear to provide compelling legal reasons why a President could not exercise such a power under the circumstances described below.

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[541] *See* Pub. L. 106-113, 113 Stat. 1501A-38 (2000). *See also* HENKIN, *supra* note 8, at 117 ("No doubt, many laws, including laws that authorize or appropriate funds (especially for programs initiated by the President), can properly be interpreted as leaving the President discretion as to whether or not to act, or to spend.").

[542] *Id.*

[543] *Id.* at 1501A-41.

[544] *See, e.g.*, Departments of Defense and Energy Appropriations Act, Pub. L. 106-398, 114 Stat. 1654A-324 (2000) ("Of the amount authorized to be appropriated by section 301(5), up to $1,000,000 is available for the support of programs to promote formal and informal region-wide consultations among Arab, Israeli, and United States officials and experts on arms control and security issues concerning the Middle East region."). *See also supra* note 598.

Of course, one reason why specific mandates are not given is because Congress understands the need of the Executive Branch to be flexible to meet contingencies. Therefore, in part due to reasons of comity between the branches many of the specifics of the funds to be allocated are found in the legislative history of the spending bills. *See* FISHER, *supra* note 93, at 103. Nonetheless, legislative history is not legally binding. *See, e.g.*, I.N.S. v. Chadha, 462 U.S. 919 (1983); MICHAEL W. KIRST, GOVERNMENT WITHOUT LAWS 6-7 (1969) (discussing the nonbinding nature of legislative history).

VI. THE LEGAL CONTOURS OF NATIONAL SECURITY IMPOUNDMENT

The argument that the President may impound funds despite contrary statutory language[545] is based on two closely-related principles. The first is that Congress through its Power of the Purse may not interfere with areas involving the President's exclusive constitutional powers such as diplomatic recognition.[546] The second principle is that in areas where the President and Congress have overlapping authority (such as control over the armed forces through Congress' Power of the Purse and authority to provide for the common defence and the President's authority as Commander in Chief), Congress interferes with the President's authority when it gets too involved in legislating details or if Congress interferes with his ability to perform his Executive functions.[547] That Congress may paint with a broad brush in setting the parameters of military action is not to be doubted,[548] but if it legislates too minutely, if it interferes with the President's inherent discretion to carry out his duties in national security affairs, its actions improperly intrude onto Executive terrain and are unconstitutional. With respect to areas of concurrent authority, surely there exists a "salutary medium"[549] between undue congressional specificity and overweening Executive discretion. Where that line lies is unclear. What follows is a discussion of the broad contours of National Security Impoundment power and approximately where amid the ever shifting sands of congressional-executive relations that salutary medium might be found.

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[545] Such defiance could well include defiance of three statutes: the ICA, the appropriation language and the authorizing legislation. Probably it would simply constitute defiance of the ICA. The mechanics of defiance would likely be that the President would mention in his signing statement that he intended not to expend the funds in question. He would then provide a special message to Congress regarding his impoundment, but after Congress failed to agree to the President's deferral or rescission, the President would send a second special message to Congress indicating that he would not be releasing the funds consistent with his signing statement. A less aggressive stance, one not involving actual impoundment but which would still help to protect the powers of the Executive branch from encroachment, would involve the President in his signing statement concluding that he is not obligated to expend the funds in question. In this manner the President would interpret the ICA (and relevant authorization and appropriation bills) as authorizing but not mandating the national security expenditure.

[546] *See, e.g.,* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); *supra* notes 452-53 and accompanying text.

[547] *See supra* note 472 and accompanying text.

[548] *See, e.g.,* Little v. Barreme, 2 Cranch (6 U.S.) 170 (1804).

[549] WILMERDING, *supra* note 2, at 195 (quoting Alexander Hamilton).

A. CRITERIA TO BE CONSIDERED IF THE PRESIDENT DEFIES APPROPRIATION BILLS

1. IF THE NATION IS AT WAR

There are a number of circumstances where the President's impoundment authority would seem most compelling. The first is during wartime. No President has ever had any action related to his military powers overturned by a court during time of declared war.[550] When the nation is on a war footing, appropriations for national security purposes, which are generally broad in peacetime,[551] are frequently made in lump sum to the President.[552] This reflects not only Congress' recognition in a legal sense that the President enjoys expanded powers during wartime but also practical considerations concerning the capability of the Executive to act with dispatch during a national emergency.

With respect to his position as Commander in Chief, the President's inherent power to repel sudden attacks could be reasonably read to include the authority to reorder military spending priorities. As the Supreme Court has noted: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. . . . 'He must determine what degree of force the crisis demands.'"[553] This authority would seem to include not only impoundment but also the power to transfer and reprogram funds in the event of an attack on the U.S. Certainly, if President Lincoln could incur federal obligations and justify them (at least in part) on his ability to repel attacks—an action in flat contradiction of constitutional text—it would appear that presidents could spend less than was appropriated in certain military areas—an act of much less dubious

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[550] *See, e.g.*, MILLER, *supra* note 61, at 179-80 ("The Supreme Court has never invalidated *any* presidential act as Commander in Chief when that act meant anything substantial in the prosecution of a declared war."); *cf.* FRANKLIN, *supra* note 318, at 67 ("A declaration of war, or similar measure, opens the floodgates for the expansion of presidential powers."); HOWARD WHITE, EXECUTIVE INFLUENCE IN DETERMINING MILITARY POLICY IN THE UNITED STATES 273 (1925) ("In the declaration of war and subsequent policies resulting from it while war is going one, executive influence reaches its maximum."); Hollander, *supra* note 136, at 59 ("There is no question but that a formal declaration of war by Congress serves to transfer some intangible quantum of power to the President").

[551] *See* Fisher, *Presidential Spending Discretion*, *supra* note 2, at 136.

[552] *See id. Cf.* EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 60 (1951) (during wartime "itemization [of funds] is put out of the question by the demands of military secrecy").

[553] The Prize Cases, 67 U.S. (2 Black) 635, 668, 670 (1863).

constitutionality.[554]

More broadly, regarding the President's power during wartime, the Supreme Court has concluded that the President possesses extremely broad strategic and tactical authority.[555] "He is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[556] In particular, the President's charge to subdue the enemy in the "most effectual" manner quite plausibly implies that he could eliminate areas of waste and inefficiency through means such as impoundment. One lower court has gone so far as to state that "when war has been declared and is actually existing, his functions as Commander in Chief become of the highest importance and his operations in that connection are *entirely beyond the control of the legislature.*"[557]

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[554] *See, e.g., supra* notes 71-79 and accompanying text.

[555] *See, e.g.,* BERDAHL, *supra* note 45, at 117-18. *See also* United States v. Sweeney, 157 U.S. 281, 284 (1895) ("the object of [the Commander in Chief clause] . . . is evidently to vest in the President the supreme command over all the military forces—such supreme and undivided command as would be necessary to the prosecution of a successful war."); JOHN N. MOORE, LAW AND THE INDO-CHINA WAR 560 (1972) (stating that restriction on the President's authority as Commander in Chief bears "a heavy burden of constitutional justification" and "would seem highly doubtful"); *Letter from Eugene V. Rostow, et al., to Sen. Gordon Allott,* May 26, 1970, at 1, *quoted in* RAVEN-HANSEN, *supra* note 2, at 245 n.168 ("The constitutional validity of congressional *action* limiting the President's discretion with respect to attack upon the Cambodian sanctuaries seems highly dubious . . . ."); Bork, *supra* note 371, at 79-80 ("Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President. . . . It is completely clear that the President has complete and exclusive power to order tactical moves in an existing conflict, and it seems to me equally clear that the Cambodian incursion was a tactical maneuver and nothing more"); Orrin Hatch, *Symposium: Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts—What the Constitution Means by Executive Power,* 43 U. MIAMI L. REV. 165, 201 (1988) ("Congress oversteps its role when it undertakes to dictate specific terms of international relations. This is a power granted specifically to the executive branch, which is equipped to acquire the information necessary for foreign policy creation. Thus, when the Congress enters into the process of creating new policies . . . it is venturing beyond its own constitutional mission . . ."); Hollander, *supra* note 136, at 70 ("History substantiates the view that in practice the President has had unfettered operational control over the employment and use of the armed forces overseas."); LeBoeuf, *supra* note 469, at 483 ("Congress cannot direct the movement of troops during wartime because the President alone can act with the necessary dispatch."); William H. Rehnquist, *The Constitutional Issues—Administrative Position,* 45 N.Y.U.L. REV. 628, 639 (1970) (stating that "even those authorities least inclined to a broad construction of the executive power concede that the Commander-in-Chief provision does confer substantial authority over the manner in which hostilities are conducted . . .");.

[556] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[557] Ken-Rad Tube & Lamp Corp. v. Badeau, 55 F. Supp. 193, 197-98 (W.D. Ky. 1944)

The limitations on wartime congressional action (and by extension the Power of the Purse) were expressed by Chief Justice Chase in his concurrence in *Ex parte Milligan*. Chase wrote that Congress has "the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as it interferes with the command of the forces and the conduct of campaigns. That power and duty belongs to the President as commander-in-chief."[558]

Scholars have concurred with Chase's view that during wartime Congress must provide the President with sufficient breathing room so that he can successfully perform his military functions. Professor Clarence Berdahl in his classic work, *The War Powers of the Executive in the United States*, stated that the President during wartime has "practically complete control of the army and navy."[559] Ernest May in his book, *The Ultimate Decision*, concurs.

> Once war had been declared, he [the President] was to determine where it was to be fought. He . . . was to make the choices between primary and secondary theaters. He was to assume responsibility for naming the officers to direct operations in each of these theaters and hence for their choice of subsidiary aims. He was expected, in other words, to make decisions on *priorities* and *command*.[560]

This ability to set "priorities" is of particular importance since it is closely related to the President's authority to impound national security funds. During wartime, the President must prioritize among scarce military resources. If, during wartime, Congress attempted to force the President to commit valuable resources to a program against his better judgment, the President would quite likely have the authority to impound those funds irrespective of the ICA and/or the appropriation statute.

Obviously, the more defense-related the expenditure, the closer it would be to falling under the President's National Security Impoundment authority. That

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(emphasis added).

[558] 71 U.S. (4 Wall.) 2, 139 (1866).

[559] BERDAHL, supra note 45, at 129.

[560] ERNEST R. MAY, THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 19 (1960). *See also* HOLST, *supra* note 318, at 14 ("Congress must regulate by law whatever is of general importance and bears a permanent character . . . . on the other hand, the President alone must determine how military forces shall be employed, and he must make all provisions, temporary and not general in their nature, because, from the nature of things, *these must be adapted to special circumstances*.") (emphasis added).

said, the President's impoundment authority during wartime would likely still extend into areas not traditionally thought of as defense related. The Supreme Court in *Ex Parte Milligan* concluded that once "war is originated . . . *the whole power of conducting it*, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President."[561] During wartime, the President "is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration."[562] A lower court has indicated much the same, that "[t]here devolves upon him [the President], by virtue of his office, a solemn responsibility to preserve the nation and it is my judgment that there is specifically granted to him authority to utilize *all resources of the country* to that end."[563] Thus, from a legal as well as a practical standpoint, the President's authority during wartime extends into areas not typically thought of as involving national security. The concept of total war in particular would seem to necessitate extending the power of the presidency deep into areas thought during quieter times to be strictly domestic in nature.[564]

Although courts have written broadly about the power of the President to control battlefield tactics as well as the resources of the nation, they have not directly addressed the issue of impoundment during wartime. Once again because of this lack of judicial precedent, it is important to consult the historical record. During World War II, President Roosevelt displayed the full measure of this discretion by impounding funds earmarked for a variety of infrastructure projects.[565] These impoundments ran into hundreds of millions of dollars and on their face had little to do with military matters.[566] Nonetheless, President Roosevelt determined that all national resources had be channeled into the war effort and Congress acquiesced to his judgment.[567]

In areas of concurrent authority such as the expenditure of national security funds, presidential authority can wax and wane according to various circumstances. Based on case law and on past practice, it would appear that in a situa-

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[561] 71 U.S. (4 Wall.) 2, 28 (1866) (emphasis added).

[562] *Id. Cf.* WHITE, *supra* note 550, at 273 ("In the declaration of war and subsequent policies resulting from it while war is going on, executive influence reaches its maximum.").

[563] Ken-Rad Tube & Lamp Corp., 55 F. Supp. at 197-98 (emphasis added).

[564] *See* CORWIN, *supra* note 376, at 47-55.

[565] *See supra* notes 134-47 and accompanying text.

[566] *See supra* notes 136-40 and accompanying text.

[567] *See supra* notes 141-47 and accompanying text.

tion where the nation is involved in total war, the President would seem to possess maximum authority to impound military funds and at least some authority to withhold funds deemed generally to be domestic in nature.[568]

2. IF THE FUNDS ARE TO BE EXPENDED OVERSEAS

Second, the President would appear to possess the constitutional authority to impound funds earmarked for overseas expenditure. The Courts have indicated a geographic component exists with respect to the President's national security power. In this respect, the President appears to have maximum discretion to combat aggression abroad. Justice Jackson in *Youngstown* stated that: "[w]e should not use this occasion to circumscribe, much less to contract the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his *exclusive* function to command the instruments of national force, at least when turned against the outside world for the security of our society."[569] In effect, Justice Jackson, in this highly regarded opinion, concluded that the President has "exclusive" power to direct national power against outside opposition. That language would seem to preclude almost any congressional interference with the President's use of his Commander in Chief power abroad.[570] Professor Quincy Wright has underscored this point. "Though Congress has legislated on broad lines for the conduct of... [diplomatic, consular, military and naval] services it has descended to much less detail than in the case of services operative in the territory of the United States."[571] It

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[568] It could be argued that by declaring war, Congress has implicitly delegated power to the President. *See, e.g.*, Hollander, *supra* note 136, at 59 ("There is no question but that a formal declaration of war by Congress serves to transfer some intangible quantum of power to the President"); *cf.* FRANKLIN, *supra* note 318, at 67 ("A declaration of war, or similar measure, opens the floodgates for the expansion of presidential powers.").

[569] *Youngstown Sheet*, 343 U.S. at 645 (1952) (emphasis added); *cf.* HUZAR, *supra* note 2, at 344 (describing a hearing in which congressional objections were aired with respect to expenditure for unspecified defense purposes within the United States but that unspecified spending overseas passed essentially unremarked upon). *See also* CARROLL, *supra* note 376 (concluding that greater detail was used in appropriation bills funding general State Department functions than in bills funding agencies distributing aid to foreign nations; these programs included foreign aid and "government and relief in occupied areas" funds for Germany, Austria, Korea, Japan, Italy and Trieste following World War II and the Korean War).

[570] That Congress has difficulty limiting the President abroad is evidenced, for example, by President Roosevelt's defiance of federal law by dispatching troops to occupy Greenland and Iceland. *See* Wallace Part I, *supra* note 2, at 299.

[571] WRIGHT, *supra* note 46, at 149.

would appear that almost any mandate to spend funds overseas could be seen as constitutionally suspect.

An example of when the President could likely impound national security funds would be if Congress mandated the construction of certain fortifications along the Demilitarized Zone in North Korea. If the President thought the facilities were unwarranted and detrimental to the nation for diplomatic or military reasons, he could withhold the funds. More difficult questions arise regarding the impoundment of funds earmarked for projects such as weapons systems made in the U.S. The construction of these systems in the U.S. has no small domestic impact. Because the construction takes place on U.S. soil, the President's power would appear to be reduced accordingly. What is more, from a practical standpoint, the impoundment of funds to be spent in the United States would also appear to have a better chance of being litigated and heard in a U.S. court.[572] Presidential actions overseas are often non-reviewable in U.S. courts.[573] Despite the domestic impact of impounding funds for weapons systems, the history of impoundment, however, would appear to point toward the legitimacy of such action under certain circumstances, particularly during wartime. Since the courts have never ruled on the issue of National Security Impoundment, the coordinate construction since 1801,[574] which strongly favors its existence, must be accorded significant weight.

The President could also plausibly argue that by impounding funds for certain military purposes (even though they are to be spent domestically) he is exercising his broad constitutional authority to defend the nation.[575] The delegates at the Constitutional Convention conferred upon the President the power "to repel sudden attacks."[576] As a result, presidents have always maintained that they possess the power of national self-defense if the United States is attacked. The argument could be made that modern weapons systems have strategic importance in that they deter the nation's enemies.[577] In this respect, the deterrence of the nation's enemies is an essential element of the President carrying out his consti-

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[572] *See id.* ("because of the extraterritorial character of most of his [the President's] action[s] [in foreign affairs], his subordinates are not generally subject to judicial control.").

[573] *See id.*

[574] *See infra* Part II.A.

[575] *See* HENKIN, *supra* note 390, at 111 n.*.

[576] *Id.*

[577] *See id.*

tutional charge to defend the nation against attack.[578] By Congress forcing the President to expend sums for non-essential weapons systems it could be argued that they are undercutting his ability to defend the nation. A similar argument could be made regarding the President's power to conduct diplomacy.[579] He could contend that strategic balance is central to his conduct of foreign affairs and, by forcing him to expend funds in areas not of critical importance, the President's ability to conduct his diplomatic functions is undercut.[580] This argument might further blunt the force of an argument supporting Congress' power to force the expenditure of defense funds.

An argument supporting the President's ability to impound foreign aid and similar appropriations might be even more convincing than the President's position regarding the impoundment of defense funds. Whereas the President and Congress share concurrent authority over the armed forces, most aspects of diplomacy—particularly the power over diplomatic recognition and negotiation—are the exclusive preserve of the Executive. Although it is unclear to what extent the President as "sole organ" controls the conduct of American foreign relations,[581] it is not open to question that the President has a monopoly of diplomatic communication. If an appropriation bill were to interfere with the President's diplomatic intercourse with other nations or acts reasonably radiating from such communication,[582] he would seem to have the capacity to impound the funds.

The Supreme Court has indicated that with respect to foreign affairs the President enjoys "'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. . . . he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.'"[583] Owing to this "freedom from statutory restriction," if Congress tried to compel the President to provide foreign aid to nations that he had not recognized, or only somewhat less compellingly, one that he did not

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[578] *See id.*

[579] *See id.*

[580] *See id.*

[581] *See, e.g.*, Haig v. Agee, 453 U.S. 280, 289 (1981).

[582] *See, e.g.*, United v. Pink, 315 U.S. 203, 229 (1942) ("[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a *modest* implied power of the President who is the 'sole organ' of the federal government in the field of international relations.") (emphasis added).

[583] Clinton v. City of New York, 524 U.S. 417, 445 (1998) (quoting with approval United States v. Curtiss-Wright, 299 U.S. 304, 320 n.38 (1936)).

think merited the aid, he almost assuredly could impound the funds. Professor Quincy Wright accurately noted that in foreign relations the President "exercises a discretion, very little limited by directory laws, in the method of carrying out foreign policy."[584]

3. IF THE PROGRAM'S FUNDS HAVE BEEN ELIMINATED ENTIRELY

A third factor to be considered in evaluating the legitimacy of the impoundment is whether or not the spending for the program has been eliminated entirely or just partially. If funding for the entire program has been completely eliminated, the President would be on his weakest constitutional footing since the President would be functionally repealing the statute and such action would come closest to being considered an absolute or line item veto.[585] As the Fourth Circuit Court of Appeals stated in the case that would ultimately become *Train v. New York City*:

> When the executive exercises its responsibility under appropriations legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions . . .[586]

By merely reducing, or even more convincingly, deferring spending, the President would not be functionally repealing the statute and would have a better defense that he was merely implementing the statute's broad intent consistent with his own inherent power over national security details. In this way, the President would maintain the discretion to determine how best to meet a particular national security threat.[587] There is, however, an absolute limit to the President's discretion over spending. For example, a pacifist President could not impound all funds for the army.[588]

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[584] WRIGHT, *supra* note 46, at 149.

[585] *See infra* Part V.A.

[586] Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1973).

[587] *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) ("[The President] must determine what degree of force the crisis demands.").

[588] *See* Wallace Part I, *supra* note 2, at 300 (arguing that the Constitution confers upon the president exclusive powers over the making of foreign policy and "*all* diplomatic and

By only reducing spending for a program, the President would also be on sounder footing in that he could claim to be saving funds in a manner more akin to a programmatic rather than a policy impoundment. While programmatic impoundments are authorized by the ICA through the deferral and rescission process,[589] policy impoundments are unauthorized by statute.[590] This could potentially place the President less directly at odds with the provisions of the ICA.

4. THE LEVEL OF SPECIFICITY OF THE APPROPRIATION BILL

The fourth factor is the level of specificity in the spending legislation. The more minute the level of legislative detail, the more persuasive the claim the President has to impound the funds. This stems from the President's inherent power over details. Hamilton wrote in *The Federalist* No. 72 that "administration of government . . . is limited to executive details, and falls . . . within the province of the executive department."[591] As has been demonstrated above, the President has historically had even greater discretion over the details of national security spending.[592]

Debates in the First Congress reflect the legislature's early appreciation that descent into minutiae was both impracticable and an intrusion into the Executive domain. During consideration of the bill establishing the Department of Foreign Affairs, a senator stated:

> There are a number of such bills . . . tending to direct the most minute particle of the President's conduct. If he is to be directed, how he shall do everything, it follows he must do nothing without direction. To what purpose, then, is the executive power lodged with the President, if he can do nothing without a law directing the mode, manner, and, of course, the

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Commander-in-Chief foreign affairs decisions, except for the following particular classes: . . . the withholding of appropriations altogether"); notes 169-172 and accompanying text.

[589] *See* U.S.C.A. §§ 682, 684 (West 1997).

[590] Under the ICA, the line between programmatic and policy impoundment has often become blurred as presidents attempt to defer and rescind funding for programs they do not support.

[591] THE FEDERALIST No. 72, *supra* note 81, at 366. *See also* Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 670 (1915) (stating that the "legitimate function [of discretion] is indicated by the organization of a chief executive power which stands for that residuum of government not otherwise subject to law which cannot be reduced to rule"); *supra* note 84.

[592] *See infra* note 598.

> thing to be done? May not the two Houses of Congress, on this principle, pass a law depriving him of all powers?[593]

Because the President needs greater freedom to properly execute his national security functions,[594] too high a degree of specificity in appropriation bills may encroach on that authority.

Furthermore, any congressional interference with minutiae presents both practical as well as theoretical drawbacks. For example, attempts to implement successfully the doctrine of specific appropriation have been characterized as a "subject for jest—even among Congressmen."[595] President Jefferson, who had previously been a strong advocate for specific appropriations, later himself acknowledged that "too minute a specification has its evil as well as a too general one."[596] Had they even the authority to do so, even the most prescient lawmakers could not and cannot anticipate all of the changing day-to-day national security demands that take place throughout the duration of an appropriation cycle. Things change and overly restrictive legislation in national security affairs can become a straightjacket if the President does not possess some limited authority to defy appropriation bills. When it legislates minutiae, Congress has been unable and partially unwilling to enforce its will.[597] As a result, Congress historically has legislated much more broadly with respect to national security spending.[598] This is because Congress has recognized that the Executive has the

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[593] CORWIN, *supra* note 15, at 37-38.

[594] *Cf.* LOCKE, *supra* note 16, at 189.

[595] WILMERDING, *supra* note 2, at 82.

[596] Fisher, Presidential Spending Discretion, *supra* note 2, at 136.

[597] *See generally* WILMERDING, *supra* note 2.

[598] This has been pointed out by authorities at various points throughout the nation's history. *See* CASPER, *supra* note 100, at 89 (stating that in the late 1790s, unlike civil appropriation acts which adhered to the doctrine of specific appropriation, military appropriations reverted to the earlier lump sum method, an occurrence that "must be interpreted as a congressional ratification of executive branch discretion in military matters"); CORWIN, *supra* note 13, at 150 ("there were still certain fields in which Congress long left executive discretion a nearly free hand in this matter. Thus the provision made in the annual appropriation acts during Jefferson's two administrations and during Madison first administration 'for the expenses of intercourse with foreign nations' was voted in lump sums."); HUZAR, *supra* note 2, at 320 ("Congress does not ordinarily prescribe in minute detail how Army appropriations shall be spent. It recognizes the need of administrators for discretion in making expenditures for the national security."); JEFFERSON, *supra* note 116, at 9 ("it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specification, but leave the whole to the discretion of

inherent capacity to act with dispatch which is all the more vital in national security affairs.[599]

Examples of too much detail in national security legislation have been discussed by Professor Don Wallace. He has argued persuasively that congressional control over administrative detail should not extend to questions such as the rank and size of embassies or questions of executive management.[600] He contended that numerous foreign aid decisions as to the "existence, content, and conduct" of U.S. foreign relations with foreign states would "fall within the

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the President."); WALLACE, *supra* note 2, at 70 (stating that congressional debates on foreign policy appropriations "tend to concentrate on broad policy issues rather than on details of administration."); HENRY M. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 123 (1929) (describing the "self-imposed limitation by Congress of its . . . right to appropriate for specific objects and to scrutinize and investigate expenditures [in national security affairs]."); Lawrence E. Chermak, *Financial Control: Congress and the Executive Branch*, 17 MIL. L. REV. 83, 90 (1962) (describing the defense budget as addressing only "extremely broad functions set [as] forth in the appropriations."); Meyer, *supra* note 79, at 72 ("Congress has always granted the President wide discretion to manage foreign assistance. Authorizations are typically broad and sweeping, and appropriations are in lump sums."); Stith, *supra* note 2, at 1383 ("[i]n the areas of foreign affairs . . . it is generally conceded that Congress cannot closely circumscribe agency powers and strategies of government policy, much less the particulars of government action."); Morgan Thomas, *Appropriations Control and the Atomic Energy Program*, 9 W. POL. Q. 713, 725 (1956) ("The low degree of appropriations control over the AEC [Atomic Energy Commission] has one overriding cause . . . . [that is that its] mission [is] vital to national defense and security . . . [which] endows an executive agency with considerable protection from legislative encroachment."); notes 94-97 and accompanying text; *cf.* Clinton v. City of New York, 524 U.S. 417, 445 (1998) ("this Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved'"); BERDAHL, *supra* note 45, at 111 ("In the matter of the organization of the armed forces, the statutes have generally been careful to provide the details, but the President has frequently been granted considerable power in this respect also, especially in time or war or public emergency.").

There is evidence suggesting that, within the area of national security expenditure, Congress gives the Executive branch a wider berth with respect to funds that are to be provided to foreign nations than those that fund the administration of the foreign policy apparatus. *See* CARROLL, *supra* note 376, at 190 (concluding that greater detail was used in appropriation bills funding the general functions of the State Department than in bills funding agencies which distribute aid to foreign nations; these programs included foreign aid and "government and relief in occupied areas" funds for Germany, Austria, Korea, Japan, Italy and Trieste following World War II and the Korean War).

[599] *See* THE FEDERALIST No. 70, at 356 (Alexander Hamilton) (Garry Wills ed. 1982).

[600] *See* Wallace, Part II, *supra* note 2, at 467.

President's independent powers."[601] These examples accurately reflect the greater discretion that the President enjoys in national security affairs, a flexibility, which, no doubt, extends to expenditures.

5. When Congress Attempts to Perform an Executive Function Through the Spending Power

Fifth, if the allocation of funds involves Congress requiring the President to do something that he alone has the discretion to decide (that is to say, one of his exclusive functions), the President may impound funds. The Framers recognized the dangers of an overly ambitious legislature. James Madison wrote: "The legislative department is everywhere extending its sphere of activity, and drawing all power into its impetuous vortex . . . it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions."[602] Madison reasoned further that the powers of Congress "being at once more extensive and less susceptible of precise limits . . . can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question . . . whether the operation of a particular measure, will, or will not extend beyond the legislative sphere."[603] Madison concluded that the spending power in particular was susceptible to abuse. "As the legislative department alone has access to the pockets of the people . . . [it has] a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter [Executive branch] . . ."[604]

In order to fulfill his constitutional duties, the President would almost certainly seem to possess some inherent discretion over how certain national security funds are spent. This is because the expenditure of funds goes to the very core of political action. Alexander Hamilton recognized this fact when he stated: "[m]oney is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions."[605] Thus, to the extent that the President is carrying out his

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[601] *Id.* at 471.

[602] THE FEDERALIST No. 48, *supra* note 82, at 250-51 (James Madison) (Garry Wills ed. 1982).

[603] *Id.*

[604] *Id.* at 252.

[605] THE FEDERALIST No. 30, at 143 (Alexander Hamilton) (Garry Wills ed., 1982).

These essential functions would appear to be the same political functions discussed in

"essential" functions as Commander in Chief or Chief Diplomat, Congress is limited in its ability to interfere with his discretion to withhold such funds. To allow otherwise would be to make the Executive subordinate to the Legislative Branch; a circumstance decidedly at odds with the Constitution's underlying structural principle of coordinate and coequal branches.[606]

Such unlawful congressional interference would include, for example, if Congress tried to compel the President to commit funds to a certain theater of war or to earmark expenditure for certain areas within a theater. Either of these examples would likely interfere with the President's strategic and tactical responsibility as Commander in Chief to best subdue the opposing forces.[607] In the diplomatic field, similar examples might involve Congress attempting to require the President to spend funds to construct a new American embassy in a location at odds with the President's wishes,[608] to recognize a foreign government,[609] to

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Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), through which the President possesses unreviewable discretion. From a practical standpoint, a court might find it difficult to issue a writ of mandamus against the President to expend appropriated national security funds. In *Marbury*, the Court ruled that presidential powers are divided between ministerial acts and political or discretionary acts. "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Id.* at 166. In other words, regarding political matters "the decision of the executive is conclusive." *Id. Marbury* hinted that many presidential actions in national security affairs would appear to be deemed "political" and not reviewable by the courts. *See id.* (alluding to the unique status that the State Department enjoys owing to its exercise of political functions). Professor Schubert said it well: "the exercise of practically any facet of the presidential war power is a political act in the highest degree." SCHUBERT, *supra* note 376, at 323. Because of the likely political status of many presidential actions in national security affairs, a court may find it difficult to order him to release the impounded funds.

[606] *See, e.g.,* Morrison v. Olson, 487 U.S. 654, 704 (1989) (Scalia, J.,) (referring to the Constitution's "separation and equilibration of power"); CORWIN, *supra* note 13, at 9 (concluding that "the three functions of government are reciprocally limiting . . . each department should be able to defend its characteristic functions from intrusion by either of the other departments . . . none of the departments may abdicate its powers to either of the others.").

[607] *See, e.g., supra* note 555.

[608] Congress recently passed legislation requiring the President to transfer the Israeli embassy from Tel Aviv to Jerusalem but it added a waiver to avoid constitutional difficulties. Section 3(a) of Public Law 104-45 states that it is the policy of the United States that the U.S. Embassy should be moved to Jerusalem by May 31, 1999. Section 7 of the Act, however, authorized the President to waive section 3(b) for two 6 month periods if such a waiver is necessary for national security interests. Certainly, if Congress mandated that $1 million be spent on the construction of an embassy in Jerusalem, those funds could and (as a constitutional matter) should be impounded.

reach an international agreement,[610] to participate in an international conference,[611] or to provide specific amounts of foreign aid to a particular country.[612] In these examples, the President would appear to be well within his constitutional powers to impound the funds since they intrude upon his exclusive prerogatives as Chief Diplomat. In this capacity, the President has the sole power to recognize foreign governments and to conduct diplomatic communication.[613] As such, any attempt in this vein to force the President into a particular diplomatic course of action would be a nullity and any funds allocated for such a purpose could be lawfully withheld.

B. CONCLUSION

It appears that there are at least five factors[614] that must be considered regarding National Security Impoundment. Admittedly, some of these factors have the potential to overlap. The President's authority to withhold funds would likely have the most clout if it were combined with other factors discussed above. For example, the President would probably have his strongest case for National Security Impoundment if he were to impound funds during a declared war after Congress attempted to direct that specific funds be spent on an overseas project. The President's argument would be even stronger if the expenditure would force the President to make certain strategic, tactical or diplomatic decisions with which he disagreed.[615] At the opposite end of the spectrum, were the President during peacetime to impound all the funds allocated for a weapons system, which was built and deployed in the United States, his impoundment power would likely be near its lowest ebb.

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[609] *See, e.g., supra* notes 452-53 and accompanying text.

[610] See U.S. CONST. art. II, § 2, cl. 2; United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); notes 428-31 and accompanying text.

[611] *Cf. supra* notes 425-27 and accompanying text (discussing the defeat of a Senate effort to place conditions on the President sending representatives to an international conference).

[612] *See* Wallace, Part I, *supra* note 2, at 327.

[613] *See* U.S. CONST. art. II, § 2, cl. 2; *Pink*, 315 U.S. at 203; *Belmont*, 301 U.S. at 324.

[614] Of course, under the ICA if a contingency arises, the President may defer the expenditure of funds but not for policy reasons.

[615] *See supra* Part VI.A.

CONCLUSION

At first blush, the passage of the ICA and the Supreme Court's *Train* decision appeared to close the book on the constitutional issue surrounding presidential impoundment of funds. Such a notion is oversimplified, however, since it overlooks the discretion possessed by the President to control his Executive functions, particularly those involving military and diplomatic affairs. The coordinate construction given the Constitution by both Congress and the President over the past two centuries demonstrates the legitimacy of impoundment in this area. Moreover, the practice is reflected by the dichotomy that exists between national security and domestic affairs, a dichotomy that has been long recognized by the courts and commentators.

To be sure, National Security Impoundment power may be rather limited in its application since it would likely be exercised only during somewhat extraordinary times. Therefore, it should not be confused with past notions of inherent line item veto power or presidential impoundment in all aspects of governmental endeavor. Only under certain circumstances involving national security affairs could the President withhold funds in defiance of federal statutes. Five circumstances would seem to reflect these key considerations. They include: 1) if the nation is at war; 2) if the spending takes place overseas; 3) if the program has not been eliminated in its entirety; 4) if there is a high degree of the specificity in the statute; and 5) if Congress is attempting to force the President to perform an Executive function. If the mandate or authorization takes place during wartime, or involves spending on overseas deployments or diplomatic functions, the President's power in this respect would seem all but assured.

Thus, National Security Impoundment reflects not the ambition of an imperial Executive, but rather constitutes a measured response to fend off the actions of an overweening Congress. Far from undercutting the principal of separation of powers, National Security Impoundment helps to preserve it.