

# Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes

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## Introduction

Article I of the Constitution places the power of the purse in the hands of Congress: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>1</sup> Congress’s power to appropriate — or fail to appropriate — money for the operations of

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1. U.S. CONST. art. I, § 9, cl. 7.

the other two branches of the government is one of its most potent weapons. It has been described as "the most important single curb in the Constitution on Presidential Power,"<sup>2</sup> and as being "at the foundation of our constitutional order."<sup>3</sup> Yet there has been surprisingly little scholarly discourse on the contours of this power.<sup>4</sup> In particular, there has been little discussion of the limitations rider — a method Congress has used to an increasing degree in recent years to control the activities of the executive branch. This Article investigates possible separation-of-powers limitations on the legislature's ability to effectuate substantive policy changes through limitation riders on appropriations bills.

Part I presents some historical background on the Appropriations Clause, describes the types of policy objectives Congress has sought to promote through the use of appropriations riders, and surveys the few scholarly contributions to the field. Part II presents a more detailed analysis of the implications of appropriations riders in several areas. It argues that although there is no overriding constitutional prohibition on the use of appropriations riders to establish policy directives, those riders are subject to the same constitutional limitations as are other kinds of legislation, and the riders often violate specific constitutional provisions. Part III examines situations in which Congress attempts to interfere directly with executive functions concerning prosecutorial discretion, and argues that these appropriations riders must not interfere with the President's duty to uphold the law. Part IV analyzes riders attached to bills appropriating funds for the conduct of foreign relations, and suggests that Congress may not attempt to prescribe activities in areas the President is better suited to analyze. Part V discusses how courts should enforce the constitutional limitations. It suggests that Congress should avoid using appropriations riders to enact substantive legislation, and that, when Congress does attach impermissible riders to appropriations bills, the President should refuse to abide by them.

## I. Historical Background and Recent Commentary

Perhaps more perfectly than any other provision in the Constitution, the Appropriations Clause embodies the notion of the separation of powers. The Clause "reflects the ideal of Adams, Hamilton, and other

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2. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 101 (13th ed. 1975).

3. Kate Stith, *Congress' Power of the Purse*, 97 *YALE L.J.* 1343, 1344 (1988).

4. *Id.* Some recent works which address the issue are J. Gregory Sidak, *The President's Power of the Purse*, 1989 *DUKE L.J.* 1162; Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 *DUKE L.J.* 456; Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 *AM. J. INT'L L.* 758 (1989).

Framers that, through the rule of law, the arbitrariness of government action can be restrained.”<sup>5</sup> An additional concern of the Framers was the separation of the power to wage war from the power to fund it. Thus, the Commander in Chief of the armed forces was made dependent on the legislature.<sup>6</sup> Comparing the American system of government to that of the British, Jefferson stated that the United States Constitution shifted the war power “from the executive to the legislative body, from those who are to spend to those who are to pay.”<sup>7</sup> Madison voiced similar sentiments:

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.<sup>8</sup>

Finally, the Framers hoped that, by placing the power to levy taxes and appropriate money squarely with Congress, they could forestall the civil strife engendered in Britain by the ambiguous placement of that power.<sup>9</sup>

The Appropriations Clause grants to Congress an awesome power over the other branches of government. It can be used as a shield and as a sword, resisting unwelcome intrusions by the other branches and enabling forays into their territory. Madison captured the double-edged essence of this power when he wrote:

The House of Representatives alone can propose the supplies requisite for the support of government. They, in a word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power of the purse may, in fact, be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.<sup>10</sup>

The Framers foresaw some of the potential problems that might arise from the placement of the power of the purse exclusively within the

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5. Sidak, *supra* note 4, at 1167.

6. Fisher, *supra* note 4, at 762.

7. 5 THE WRITINGS OF THOMAS JEFFERSON 123 (Paul L. Ford ed., 1895).

8. 6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906).

9. Although the power to levy taxes was nominally placed with Parliament, English Kings had long relied on extraparliamentary sources of revenue. Fisher, *supra* note 4, at 761.

10. THE FEDERALIST NO. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961).

domain of Congress. Curiously, several of the Framers even envisioned the practice, which was to emerge only much later, of using indispensable "money bills" as a means of forcing the Senate and the Executive to accept otherwise objectionable substantive legislation. George Mason of Virginia, who ultimately refused to sign the Constitution,<sup>11</sup> predicted that the House would adopt "the practice of tacking foreign matter to money bills."<sup>12</sup> James Wilson of Pennsylvania warned that "the House of [Representatives] will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate."<sup>13</sup> Although the debate appears to have been concerned primarily with the power to raise revenue rather than with the power to spend,<sup>14</sup> the same concerns apply to both.<sup>15</sup>

Despite these premonitions, the Framers could not possibly have envisioned the position appropriations riders occupy today. Although Congress has been attaching limitation riders to appropriations bills since at least 1878,<sup>16</sup> in recent years Congress has made increasing use of limitation riders in order to effectuate substantive policy changes.<sup>17</sup> For example, between 1963 and 1977, Congress proposed 341 such riders.<sup>18</sup>

Throughout history Congress has used limitation riders to advance a bewildering array of policy objectives. For example, Congress has used appropriations riders to deprive former slaves of the right to vote,<sup>19</sup> to protect farm subsidies from executive scrutiny,<sup>20</sup> to prevent the President from making recess appointments,<sup>21</sup> to enter into the conduct of negotiations with foreign powers,<sup>22</sup> and to remove suspected Communists from

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11. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 659 (Adrienne Koch ed., 1966) (1840).

12. *Id.* at 443.

13. *Id.* at 444.

14. Sidak, *supra* note 4, at 1172.

15. A government, in order to operate, must both raise money and spend it, a process to which both taxing and appropriations measures are indispensable. Accordingly, the practice of inserting objectionable material into appropriations bills raises concerns identical to those implicated when similar material is inserted into tax bills. Both situations work a sort of extortion on the executive branch.

16. See EDWARD C. MASON, THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES (1789-1889), at 47-49 (Albert B. Hart ed., Russell & Russell 1967) (1890) (describing rider attached to the Army appropriations bill of 1878 prohibiting the presence of Army personnel at the polls).

17. Devins, *supra* note 4, at 456.

18. *Id.* at 462.

19. See *infra* notes 99-105 and accompanying text.

20. See *infra* notes 71-75 and accompanying text.

21. See *infra* notes 76-83 and accompanying text.

22. See *infra* notes 161-68 and accompanying text.

the federal payroll.<sup>23</sup>

Few scholars have analyzed whether there are constitutional limitations on Congress's ability to effectuate substantive policy changes through the use of appropriations riders. Professor Neal E. Devins touches on this issue in his article, *Regulation of Government Agencies Through Limitation Riders*.<sup>24</sup> Devins argues that appropriations riders are inappropriate vehicles for the advancement of congressional views regarding substantive policy changes.<sup>25</sup> He suggests that the appropriations process in general, and the way limitation riders are attached to bills in particular, are not conducive to sound policymaking.<sup>26</sup> Finally, Devins argues that the ephemeral nature of appropriations bills makes it difficult for both the executive and judicial branches to interpret the law.<sup>27</sup>

Louis Fisher's article, *How Tightly Can Congress Draw the Purse Strings?*,<sup>28</sup> addresses the expansive notion of the executive appropriations power advocated by the Reagan Administration during the Iran-Contra hearings.<sup>29</sup> In particular, Fisher disputes the administration's contention that it had the right to expend in any way funds raised in the peculiar manner involved.<sup>30</sup> Fisher concludes that both constitutional limitations and political concerns would have allowed Congress to prevent the Executive from obtaining and expending funds through improper channels.<sup>31</sup>

Professor Kate Stith<sup>32</sup> and J. Gregory Sidak<sup>33</sup> have contributed a spirited debate over an implied presidential power to spend. In her article *Congress' Power of the Purse*,<sup>34</sup> Professor Stith develops the dual theories of the "Principle of the Public Fisc" and the "Principle of Appropriations Control."<sup>35</sup> Through these two theories, Stith proposes

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23. See *infra* notes 106-12 and accompanying text.

24. Devins, *supra* note 4, at 456. Professor Devins is Assistant Professor of Law, Marshall-Wythe School of Law, College of William and Mary; Research Fellow, Institute of Bill of Rights Law, College of William and Mary.

25. *Id.* at 457-58.

26. *Id.* at 458.

27. *Id.*

28. Fisher, *supra* note 4. Louis Fisher is Senior Specialist, Congressional Research Service, Library of Congress.

29. *Id.*

30. *Id.*

31. *Id.* at 765.

32. Associate Professor of Law, Yale Law School.

33. Covington & Burling, Washington, D.C.

34. Stith, *supra* note 3.

35. *Id.* at 1345. The Principle of the Public Fisc asserts that "all monies received from whatever source by any part of the government are public funds," and the Principle of Appropriations Control prohibits the "expenditure of any public money without legislative authorization."

that the executive branch during the Iran-Contra affair was without authority to obtain and expend money not specifically allocated by Congress, and further, that were Congress not to fund constitutionally mandated executive activities, neither the Executive nor the Judiciary would be in a position to remedy the situation.<sup>36</sup> In his article *The President's Power of the Purse*,<sup>37</sup> Mr. Sidak argues that Professor Stith's theory would "swallow[ ] the principle of the separation of powers."<sup>38</sup> Mr. Sidak advances a theory of implied executive spending power which allows the Executive to function even when Congress has failed to appropriate money to fund constitutionally mandated activities,<sup>39</sup> a classification that Mr. Sidak interprets much more broadly than does Professor Stith.<sup>40</sup>

## II. Specific Constitutional Limitations

### A. Introduction

The Constitution does not distinguish appropriations from other legislation. Nor, as Louis Fisher has noted, does it make any mention of appropriations committees.<sup>41</sup> Indeed, prior to the Civil War, both the House Ways and Means Committee and the Senate Finance Committee handled both revenue and expenditure bills.<sup>42</sup> As a consequence, there is no general constitutional limitation on the types of policy objectives that may be promoted through the use of appropriations bills, much less a specific constitutional stricture regarding limitation riders on those bills. Limitation riders on appropriations bills are therefore subject to the same constitutional prohibitions that circumscribe all legislation.

This conclusion, simple though it may seem, eludes Congress now and then. Congress may not do in an appropriations rider what it is

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36. *Id.* at 1345-53.

37. Sidak, *supra* note 4.

38. *Id.* at 1164.

39. Sidak argues that where Congress has denied funding for a "textually demonstrable duty or prerogative of the President," the President has implied authority to create a source of funds sufficient to enable the President to execute that duty or prerogative. *Id.* at 1201.

40. Professor Stith divides the President's duties into indispensable and incidental duties, placing the duty to execute treaties and statutes in the latter category, where they are subject to complete congressional control. Stith, *supra* note 3, at 1352 & n.38. Mr. Sidak, on the other hand, would place the President's duty to execute the law, as well as the executive prerogatives, squarely within the realm of executive functions with the exercise of which Congress is not permitted to interfere. Sidak, *supra* note 4, at 1163-64.

41. LOUIS FISHER, *THE AUTHORIZATION-APPROPRIATION PROCESS: FORMAL RULES AND INFORMAL PRACTICES* 3 (Congressional Research Service No. 79-161, 1979).

42. *Id.*

prohibited from doing through other means.<sup>43</sup> It could not, for example, use an appropriations rider to enact a bill of attainder or ex post facto law,<sup>44</sup> to reduce the salaries of the President or of federal judges,<sup>45</sup> or to grant a title of nobility.<sup>46</sup> Scholars who have discussed the issue generally agree that Congress may not utilize its appropriations power to accomplish these forbidden ends. For example, both Fisher and Stith agree that "Congress would overstep its boundaries if it 'refused to appropriate funds for the President to receive foreign ambassadors or to make treaties.'"<sup>47</sup> Fisher continues, "It is conventional to say that Congress, in adding conditions and provisos to appropriations bills, may not achieve unconstitutional results."<sup>48</sup>

The Constitution contemplates three types of executive activity: immutable duties, prerogatives, and mutable duties.<sup>49</sup> Immutable duties are those explicitly mandated by the Constitution. These include the duties to nominate and to appoint,<sup>50</sup> the duties to deliver a State of the Union address and to make recommendations,<sup>51</sup> the duty to receive ambassadors,<sup>52</sup> and the duty to commission federal officers.<sup>53</sup> Prerogatives include those activities in which the President may constitutionally engage, and encompass the ability to pardon,<sup>54</sup> the ability to make treaties,<sup>55</sup> and

43. "Congress may not use its powers over appropriations to attain indirectly an object which it could not have accomplished directly." 41 Op. Att'y Gen. 507, 526 (1960) (statement of Attorney General William P. Rogers).

44. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

45. U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . ."); U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

46. U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . .").

47. Fisher, *supra* note 4, at 762 (quoting Stith, *supra* note 3, at 1351).

48. *Id.*

49. *Cf.* Sidak, *supra* note 4, at 1183 (recognizing two types of executive responsibilities).

50. U.S. CONST. art. II, § 2, cl. 2 ("[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .").

51. U.S. CONST. art. II, § 3 ("[The President] shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .").

52. *Id.* ("[The President] shall receive Ambassadors and other public Ministers . . .").

53. *Id.* ("[The President] shall Commission all the Officers of the United States.").

54. U.S. CONST. art. II, § 2, cl. 1 ("[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

the ability to make recess appointments.<sup>56</sup> There is only one mutable duty: the duty to ensure that the laws be faithfully executed.<sup>57</sup> This duty is mutable because the laws themselves change.

Congress has a duty to fund those executive functions related to immutable duties. For example, Stith concedes that "Congress is obliged to provide public funds for constitutionally mandated activities—both obligations imposed upon the government generally and independent constitutional activities of the President."<sup>58</sup> Similarly, Sidak has observed that "[i]mplicit in the Constitution's assignment of duties to the President under article II must have been the expectation on the Framers' part that Congress would appropriate at least the minimum amount necessary for the President to perform those duties."<sup>59</sup>

Congress also has a duty to fund those executive activities related to prerogatives. Such a construction is the only reasonable one, for a grant of power to the President would be meaningless if Congress could deny the President the funds necessary to execute that power. Sidak notes, "The power to negotiate treaties, for example, would be reduced to the precatory statement that it would be nice if the President could negotiate treaties now and then."<sup>60</sup>

There is little consensus, however, concerning a congressional duty to fund that executive function which relates to a mutable duty — the duty to execute the laws. One line of reasoning suggests that, in attempting to control the implementation of the substantive legislation through the use of appropriations riders, Congress may prevent the executive branch from carrying out its constitutional mandate faithfully to execute the laws. One writer has observed, for example, that "[i]f the power to execute the laws means anything, it is that neither Congress nor individual congressmen may interfere with the executive decisions of administrative agencies as to how they interpret laws already in force."<sup>61</sup>

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55. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

56. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

57. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . .").

58. Stith, *supra* note 3, at 1350-51 (footnote omitted).

59. Sidak, *supra* note 4, at 1185.

60. *Id.* at 1189.

61. Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1379 (1980). Mr. Parnell is Senior Staff Counsel to the Ways and Means Oversight Committee of the House of Representatives.



Another line of reasoning suggests that it is perfectly legitimate for Congress to use limitation riders on appropriations bills to restrict the Executive's ability to implement policies that it deems unsound. Under this view, the argument that Congress is without the power to prescribe policy through the use of appropriations riders "is based on the remarkable and unfounded proposition that article II provides the Executive plenary power to shape the implementation of substantive legislative authorizations. Limitation riders are as much an act of Congress as are authorizations."<sup>62</sup>

Part III discusses congressional ability to deny funds for activities related to the Executive's duty to execute the laws. This Part presents a survey of situations in which Congress has attempted to limit the exercise of those executive functions related to immutable duties and executive prerogatives. Each example represents an attempt by Congress to avoid specific constitutional prohibitions through the use of appropriations riders. An analysis of congressional attempts to direct the Executive's foreign policy is reserved for Part IV.

## B. The Recommendations Clause

The Recommendations Clause provides that the President shall "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient . . ."<sup>63</sup> Yet Congress from time to time attaches to appropriations bills riders that have the effect of denying the President the power to make recommendations.

Just why Congress would want to do this is a mystery. Perhaps Congress is attempting to maintain an asymmetry of information between the Executive and Congress. In other words, certain members of Congress may fear that if the true policy implications of a course of action proposed by the Executive were made known to a majority of the Congress, that majority would support such a change. In any event, Congress frequently attempts to deprive the executive branch of its power to make recommendations. Many commentators and politicians feel these measures are blatantly unconstitutional.

An example of Congress's failure to fund a constitutionally mandated executive function is contained in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990.<sup>64</sup> Embedded deep in the middle of section 608 of that Act is a provision stipulating that

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62. Devins, *supra* note 4, at 472.

63. U.S. CONST. art. II, § 3.

64. Pub. L. No. 101-162, 103 Stat. 988 (1989).

none of the funds appropriated under this Act or under any prior Acts for the Legal Services Corporation shall be used to consider, develop, or implement any system for the competitive award of grants or contracts until such action is authorized pursuant to a majority vote of a Board of Directors of the Legal Services Corporation composed of eleven individuals nominated by the President after January 20, 1989, and subsequently confirmed by the United States Senate . . . .<sup>65</sup>

This provision can be interpreted either as a limitation on the President's power to make recess appointments, or as a limitation on the Executive's power to make recommendations. Because consideration of a policy change is a necessary prerequisite to proposing that change to the legislative branch, a prohibition against such consideration is the functional equivalent of a denial of the power to recommend.

Such "muzzling" provisions appear with some regularity in acts appropriating funds for the maintenance of a federal system for the production and distribution of electricity. For example, the Energy and Water Development Appropriations Act of 1990,<sup>66</sup> which provided funds for the Department of Energy, contained such a provision. Section 506 prohibits the use of funds "for the purposes of conducting any studies relating or leading to the possibility of changing from the currently required 'at cost' to a 'market rate' or any other noncost-based method for the pricing of hydroelectric power by the six Federal public power authorities."<sup>67</sup>

The Urgent Supplemental Appropriations Act of 1986<sup>68</sup> contained a similar provision. Section 208 prohibited the federal government from soliciting or studying any proposals to sell the Tennessee Valley Authority or the Federal Power Marketing Administrations without specific congressional authorization. That section provided that

no funds appropriated or made available under this or any other Act shall be used by the executive branch for soliciting proposals, preparing or reviewing studies or drafting proposals designed to transfer out of Federal ownership, management or control in whole or in part the facilities and functions of the Federal power marketing administrations located within the contiguous 48 States, and the Tennessee Valley Authority, until such activities have been specifically authorized and in accordance with terms and conditions established by an Act of Congress hereafter enacted.<sup>69</sup>

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65. *Id.* § 608, 103 Stat. at 1036.

66. Pub. L. No. 101-101, 103 Stat. 641 (1989).

67. *Id.* § 506, 103 Stat. at 666.

68. Pub. L. No. 99-349, 100 Stat. 710 (1986).

69. *Id.* § 208, 100 Stat. at 749.

These provisions represent blatant attempts by Congress to interfere with the recommendation power. President Reagan, in signing the Urgent Supplemental Appropriations Act of 1986, correctly declared section 208 to be an "unreasonable restriction on the executive branch."<sup>70</sup>

Perhaps the most extreme example of Congress's attempts to silence the executive branch concerns farm subsidies. In 1981, President Reagan, concerned about agency regulations that benefitted special interest groups at the expense of taxpayers or consumers, issued Executive Order No. 12291,<sup>71</sup> which directs the Office of Management and Budget to review proposed regulations in order to determine whether they "are able to pass a simple cost-benefit test."<sup>72</sup> In response, Congress each year uses an appropriations rider to ensure that farm subsidies cannot be subjected to such scrutiny.<sup>73</sup> For example, a provision of the Treasury, Postal Service and General Government Appropriations Act of 1990<sup>74</sup> provides that "none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. [§] 601 et seq.)."<sup>75</sup>

### C. The Recess Appointments Clause

The Recess Appointments Clause provides that "the President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."<sup>76</sup> Occasionally, Congress has attempted to interfere with the President's ability to make these appointments. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990<sup>77</sup> contains one example of congressional interference with the recess appointments power. As noted above,<sup>78</sup> section 608 of that Act,<sup>79</sup> which prohibits certain activities of the Legal Services Corporation until its Board of Directors has been confirmed by the Senate, can be interpreted as a limitation on the power of recess ap-

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70. Statement on Signing the Urgent Supplemental Appropriations Act, 1986 PUB. PAPERS 1906 (July 2, 1986).

71. 46 Fed. Reg. 13, 193 (1981).

72. Sidak, *supra* note 4, at 1210.

73. *Id.*

74. Pub. L. No. 101-136, 103 Stat. 783 (1989).

75. *Id.* § 105, 103 Stat. at 792-93.

76. U.S. CONST. art. II, § 2, cl. 3.

77. Pub. L. No. 101-162, 103 Stat. 988 (1989).

78. Pub. L. No. 101-162, § 608, 103 Stat. 988, 1032 (1989).

79. *See supra* text accompanying note 65.

pointees. It therefore can be interpreted as a limitation on the power of the President to make those appointments. President Bush criticized the provision on these grounds when he signed the bill into law.<sup>80</sup>

Another example of congressional limitation on the President's recess appointments power is contained in the 1990 Appropriations Act for the Executive Office of the President.<sup>81</sup> Section 606 of that Act provides:

No part of any appropriation for the current fiscal year contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.<sup>82</sup>

This provision is patently unconstitutional. The Recess Appointments Clause does not condition the power on congressional approval; it is precisely because such approval is not necessary that the Clause provides that the commissions of recess appointees will expire at the end of the next session of Congress. Congress may not be enthralled with the prospect of having to live with an appointee whom it once rejected, but it is not free to rewrite the Constitution to prevent it.<sup>83</sup>

#### D. The Bicameralism Requirement and the Presentment Clause

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."<sup>84</sup> The Presentment Clause provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . ."<sup>85</sup> The Constitution further provides that

[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . 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 re-passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations

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80. Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, at 1989 PUB. PAPERS 1570 (Nov. 21, 1989) ("This section might have been read as an attempt to limit the powers exercised by future recess appointees who lack Senate confirmation.").

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

82. *Id.* § 606, 103 Stat. at 817.

83. See Sidak, *supra* note 4, at 1208 ("This provision appears to be an attempt by Congress to use its appropriations power to prevent the President from freely exercising his prerogative to make recess appointments of politically controversial persons.").

84. U.S. CONST. art. I, § 1.

85. U.S. CONST. art. I, § 7, cl. 2.

prescribed in the Case of a Bill.<sup>86</sup>

Until 1983, these provisions were thought to provide no bar to the use of the so-called legislative veto. Legislative vetoes allowed Congress, pursuant to a resolution adopted by one or both Houses, to invalidate actions taken by the executive branch. But in the 1983 landmark case *INS v. Chadha*,<sup>87</sup> the Supreme Court invalidated on constitutional grounds a section of the Immigration and Nationality Act<sup>88</sup> that provided for a legislative veto mechanism. In doing so, the Court “sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’ ”<sup>89</sup> Despite the Court’s ruling in *Chadha*, Congress still attaches riders to appropriations bills which purport to condition the expenditure of funds allocated for certain activities on the approval of Congress or, in particularly egregious violations, on the approval of a particular congressional committee.<sup>90</sup>

Several appropriations bills that have been passed in recent years have conditioned, on the approval of various committees in both Houses, the authority of the executive branch to spend otherwise allocated money. The Department of Housing and Urban Development — Independent Agencies Appropriations Act of 1985<sup>91</sup> contained several such provisions. The Act authorized appropriations for several independent agencies, including the Environmental Protection Agency, the Veterans Administration, and the National Aeronautics and Space Administration. Seven sections of the Act prohibit the expenditure of appropriated funds on certain activities unless the particular projects received the approval of the Committees on Appropriations of both the House and the Senate.<sup>92</sup>

Many other bills contain similar restrictions. Numerous provisions of the Treasury, Postal Service and General Government Appropriations Act, Fiscal Year 1990,<sup>93</sup> condition executive action on the approval of various legislative committees.<sup>94</sup> In addition, the Department of the In-

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86. U.S. CONST. art. I, § 7, cl. 3.

87. 462 U.S. 919 (1983).

88. 8 U.S.C. § 1254(c)(2) (1976).

89. *Chadha*, 462 U.S. at 967 (White, J., dissenting).

90. Of course, the existence of these riders in the post-*Chadha* era could be due to the fact that Congress has never gotten around to removing them from bills that pass every year in essentially identical form.

91. Pub. L. No. 98-371, 98 Stat. 1213 (1984).

92. See Statement on Signing the Department of Housing and Urban Development — Independent Agencies Act, 1985, at 1984 PUB. PAPERS 1056 (July 18, 1984).

93. Pub. L. No. 101-136, 103 Stat. 783 (1989).

94. See Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, at 1989 PUB. PAPERS 1448 (Nov. 3, 1989).

terior and Related Agencies Appropriations Act, Fiscal Year 1989,<sup>95</sup> contains provisions requiring the approval of congressional committees for (1) changes in Forest Service regional boundaries, or movement or closure of regional offices, (2) changes in the Forest Service appropriations structure, (3) reduction of personnel in the Indian Health Service, and (4) assessments against certain programs or activities.<sup>96</sup>

Finally, Congress has recently announced in appropriations riders that no funds may be used to engage in any activity of which it does not approve. Congress has recently enacted numerous funding bills that contain the following clause: "No part of any appropriation contained in this Act shall be available to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with the applicable law of the United States."<sup>97</sup>

This provision, and every appropriations bill that contains it, violates the Court's ruling in *Chadha*. Resolutions of disapproval, which are not subject to the bicameralism and presentment requirements, are precisely the types of congressional action that the Court ruled must be denied the force of law. This objection was echoed by President Reagan, who pointed out that, "[u]nder the Constitution and [*Chadha*], the 'resolution of disapproval' referred to in section 413 must be a joint resolution presented to the President for approval or disapproval."<sup>98</sup>

#### E. The Fifteenth Amendment and the Guarantee Clause

The Guarantee Clause of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . ."<sup>99</sup> The Fifteenth Amendment, passed in 1869 and the last of the reconstruction amendments, provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."<sup>100</sup> During Reconstruction, these two provisions provided a basis for the presence of federal troops in Louisiana as a *posse*

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95. Pub. L. No. 100-446, 102 Stat. 1774 (1988).

96. See Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1989, at 1988 PUB. PAPERS 1228 (Sept. 27, 1988).

97. See, e.g., Department of Housing and Urban Development — Independent Agencies Appropriations Act of 1986, Pub. L. No. 99-160, § 413, 99 Stat. 909, 931 (1985); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act of 1985, Pub. L. No. 98-411, § 505, 98 Stat. 1545, 1573 (1984).

98. Statement on Signing the Department of Housing and Urban Development — Independent Agencies Appropriations Act, 1986, at 1985 PUB. PAPERS 1419 (Nov. 25, 1985).

99. U.S. CONST. art. IV, § 4.

100. U.S. CONST. amend. XV, § 1.

*comitatus* to prevent violence at the polls on election day.<sup>101</sup> After Reconstruction, however, congressional support for such measures dwindled, and President Hayes, who was committed to upholding the Fifteenth Amendment through whatever means necessary, became embroiled in a constitutional crisis.

In 1879 and 1880, Congress passed five separate army appropriations bills that contained riders prohibiting the use of appropriated funds for the maintenance of federal troops as a *posse comitatus*.<sup>102</sup> The bills provided for criminal penalties in the event that the funding limitations were disregarded.<sup>103</sup> President Hayes, understanding the full import of what Congress was attempting to do, vetoed every one. In a veto message that has been said to “resemble[ ] a lengthy Supreme Court opinion on the separation of powers,”<sup>104</sup> President Hayes stated that “[t]he enactment of this bill into a law will establish a precedent which will tend to destroy the equal independence of the several branches of the Government. Its principle places not merely the Senate and the Executive, but the Judiciary also, under the coercive dictation of the House.”<sup>105</sup>

#### F. The Bill of Attainder Clause

The Constitution provides that “[n]o Bill of Attainder or ex post facto Law shall be passed.”<sup>106</sup> In the Bill of Attainder Case,<sup>107</sup> the Supreme Court ruled that a rider on an appropriations bill could function as a bill of attainder. The case involved section 304 of the Urgent Deficiency Appropriation Act of 1943.<sup>108</sup> That section provided that

[n]o part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been ap-

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101. Sidak, *supra* note 4, at 1217-22.

102. H.R. 1, 46th Cong., 1st Sess. (1879); H.R. 2, 46th Cong., 1st Sess. (1879); H.R. 2252, 46th Cong., 1st Sess. (1879); H.R. 2382, 46th Cong., 1st Sess. (1879); H.R. 4924, 46th Cong., 2d Sess. (1880). *See also* Sidak, *supra* note 4, at 1218.

103. Sidak, *supra* note 4, at 1218.

104. *Id.* at 1220.

105. Veto Message of Rutherford B. Hayes (Apr. 29, 1879), in 9 MESSAGES AND PAPERS OF THE PRESIDENTS 4475, 4483 (James Richardson ed., 1897).

106. U.S. CONST. art. I, § 9, cl. 3.

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

108. Pub. L. No. 78-132, 57 Stat. 431 (1943).

pointed by the President, by and with the consent of the Senate

. . . .

The amendment was prompted by a congressional effort, spearheaded by Congressman Martin Dies, to curtail the influence of “subversives” occupying positions in the federal government.<sup>109</sup> The three government employees named in the act were considered, in the words of Congressman Dies, “irresponsible, unrepresentative, crackpot, radical bureaucrats” and affiliates of “Communist front organizations.”<sup>110</sup> The purpose of section 304, then, was to rid the federal government of subversives and to “protect the Nation against sabotage and fifth-column activity.”<sup>111</sup> The Supreme Court ruled that the section fell “precisely within the category of congressional actions which the Constitution barred”<sup>112</sup> as bills of attainder.

### III. Prosecutorial Discretion and the Take Care Clause

The Vesting Clause of Article II provides that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>113</sup> The Constitution further provides that the President “shall take Care that the Laws be faithfully executed . . . .”<sup>114</sup> The extent of the executive power, and the nature of the laws the President is bound to execute, have been a matter of some debate. The debate concerns the extent to which Congress can, through appropriations riders, direct the implementation of laws it has already passed without amending the underlying statutes.

There are two lines of reasoning on this issue. One contends that since the Constitution does not distinguish between authorization and appropriations bills, the latter are as much a part of the law to be executed as are the former. Neal Devins writes that “[l]imitation riders are as much an act of Congress as are authorizations,”<sup>115</sup> and that “there is no doubt that appropriations bills can establish, amend, or repeal federal programs and priorities.”<sup>116</sup> And J. Gregory Sidak observes that “[i]t is generally accepted — rather unquestioningly in light of the history of the appropriations clause — that Congress may enact or repeal substantive legislation by means of a rider to an appropriations bill.”<sup>117</sup> Under this

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109. *Lovett*, 328 U.S. at 308.

110. *Id.* at 308-09.

111. *Id.* at 310.

112. *Id.* at 315.

113. U.S. CONST. art. II, § 1, cl. 1.

114. U.S. CONST. art. II, § 3.

115. Devins, *supra* note 4, at 472.

116. *Id.* at 481.

117. Sidak, *supra* note 4, at 1206.



view, it makes no difference whether Congress chooses to enact substantive legislation through the authorizations process or through the appropriations process.

The second line of reasoning suggests that limiting executive discretion through the use of appropriations bills effectively prohibits the Executive from fulfilling its constitutional duty to execute the underlying substantive law. Archie Parnell has written that “[i]f the power to execute the laws means anything, it is that neither Congress nor individual congressmen may interfere with the executive decisions of administrative agencies as to how they interpret the laws already in force.”<sup>118</sup> Under this view, Congress is free to amend the underlying statutes, but may not attempt to direct execution of laws already in force.

The Supreme Court has expressed support for both lines of reasoning. In *United States v. Dickerson*,<sup>119</sup> the Court held that a limitation rider on an appropriations bill had the effect of permanently amending the underlying substantive legislation. According to the Court, there was “no doubt” that Congress could utilize the appropriations process to amend the underlying statute.<sup>120</sup> On the other hand, in *Tennessee Valley Authority v. Hill*,<sup>121</sup> the Court recognized that, while “both substantive enactments and appropriations measures are ‘Acts of Congress,’ . . . the latter have the limited and specific purpose of providing funds for authorized programs. . . . [Otherwise,] every appropriations measure would be pregnant with prospects of altering substantive legislation . . . .”<sup>122</sup>

This second line of reasoning is more compelling than the first. It would subvert the entire notion of separation of powers to allow Congress to direct the implementation of laws already enacted. The concept of the rule of law requires those who enact legislation to refrain from executing it. Only then is the risk of a tyrannical legislature averted. If Congress is permitted to control the implementation of laws, it will be free to tailor those laws to suit its whims.

The first line of reasoning, in addition to raising separation-of-powers objections, also raises a number of prudential concerns. The first is that appropriations riders often place executive agencies in the difficult, if not untenable, position of having to decide when a rider is essentially an amendment of the underlying statute. Parnell has pointed out that limitation riders will force an agency to ask the following questions: “Do

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118. Parnell, *supra* note 61, at 1379.

119. 310 U.S. 554 (1940).

120. *Id.* at 555.

121. 437 U.S. 153 (1978).

122. *Id.* at 190.

changes in the law apply only for the last quarter of one calendar tax year and for the next three quarters of the next calendar tax year? At the end of the fiscal year, does the former substantive law again come into effect?"<sup>123</sup> Inconsistent answers to questions such as these could seriously disrupt the execution of the laws. Legislating through appropriations riders also makes it difficult for citizens to know what the law is. A person looking at a statute has no way of knowing whether it has been modified or repealed through the use of an appropriations bill.

Additionally, substantive policy changes contained in appropriations riders are objectionable because they often do not receive adequate consideration. Riders are usually introduced during floor debate on the bill in question, and voted on at a time when few if any congressional members have given them the attention appropriate to questions of policy. For this reason, one Senator described limitation riders as "an insult to the legislative process . . . . [They] are often offered with no advance warning and with little explanation. They are taken up in circumstances where they cannot be carefully considered and are unlikely to be fully understood."<sup>124</sup> Another member of Congress described the process as follows: "Frequently, copies of the amendment or 'rider' are not available when Congress is scheduled to vote, nor are Congressional staff aides provided with adequate time to review appropriation amendments and prepare background material for meaningful debate or reflective voting."<sup>125</sup>

Finally, the fact that Congress often relies on limitation riders to enact substantive policy changes, even though amending the authorization statutes would be a more direct method, suggests that there is some impediment — either constitutional or political — preventing Congress from enacting the desired legislation through the use of "normal" channels. In these cases, Congress may be attempting to enact legislation that, if put in the form of substantive legislation, would be unconstitutional. For instance, Congress may be attempting to influence the outcome of a specific adjudication, or it may be trying to direct implementation of a law with respect to a limited class of persons, when substantive legislation designed to achieve the same results would violate the Due Process Clause or the Bill of Attainder Clause in the one instance, or the Equal Protection Clause in the other.

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123. Parnell, *supra* note 61, at 1376.

124. Murray, *House Funding Bill Riders Become Potent Policy Force*, 38 CONG. Q. WEEKLY REP. 3251, 3252 (Nov. 1, 1980) (quoting Senator Harrison Williams, Jr.).

125. Charles B. Rangel, *Use of Congressional Rules to Delay Progress in Civil Rights Policy*, 8 J. LEGIS. 62, 65 (1981). Mr. Rangel is a member of the U.S. House of Representatives (D-N.Y.).

Alternatively, Congress may face legitimate political obstacles to enactment of the same legislation through substantive channels. Particular members of Congress may use appropriations riders to enact substantive policy changes that would not survive the heightened scrutiny of the authorization process. Or, they may use the riders to enact legislation that would never be signed into law by a President whose administration was not in dire need of funds. This state of affairs cannot be considered a virtue of the system.

In sum, both separation-of-powers concerns and prudential concerns indicate that Congress should not be allowed to affect the execution of laws through the use of limitation riders on appropriations bills. The primary consideration remains this: In prohibiting the executive branch from using funds to implement the laws, Congress prevents the President from fulfilling his or her constitutionally mandated duty to take care that the laws are faithfully executed. This Congress may not do.

One can argue that there is no difference between Congress's failure to fund execution of the laws pursuant to a particular interpretation of those laws, and Congress's failure to fund the execution of the laws in general. In other words, Congress's use of the limitation rider no more prevents the President from executing the laws than does Congress's failure to appropriate adequate funding (and failing to appropriate funds for statutorily mandated programs is of course well within Congress's constitutional powers<sup>126</sup>). Accordingly, the distinction between limitation riders and inadequate levels of funding is one of quantity, not quality.

This theory is true only as far as it goes. In addition to the quantitative difference between the two modes of withholding funding, there is a qualitative difference arising from the specificity of the limitation rider. Inadequate funding may hamper the Executive in its duty to execute the law, but it does not subvert the rule of law in the way that limitation riders do. Limitation riders that attempt to direct the President's enforcement of the law are inconsistent with the notion of separation of powers because they impose Congress's will unilaterally.

This line of reasoning is consistent with the most recent Supreme Court pronouncement on the issue in *Bowsher v. Synar*:

Congress of course initially determine[s] the content of the [law]; and undoubtedly the content of the [law] determines the nature of the executive duty. However, . . . once Congress makes its choice

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126. See *supra* notes 1-3 and accompanying text. The practice of appropriating insufficient funds to hinder statutory law (as opposed to constitutional law) can be seen as legitimate if one interprets the lack of funds as a repeal of the underlying statute. Since Congress cannot repeal the Constitution, it cannot accomplish the same end by failing to appropriate funds necessary to enforce the Constitution.

in enacting legislation, its participation ends. Congress can thereafter control the execution of its laws only indirectly — by passing new legislation.<sup>127</sup>

Despite the evident clarity of these words, Congress from time to time attempts to command the Executive to adopt one or another interpretation of a substantive statute. The Supplemental Appropriations Act of 1987<sup>128</sup> contained an example of this type of legislative encroachment into the executive realm. Section 505 of that Act provides:

None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as amended (46 U.S.C. [§] 1101 et seq.), shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985, and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act . . . .<sup>129</sup>

President Reagan correctly believed that this measure did not represent a valid exercise of legislative power. In his signing statement, the President stated:

Article II of the Constitution assigns responsibility for executing the law to the President. While the Congress is empowered to enact new or different laws, it may not indirectly interpret and implement existing laws, which is an essential function allocated by the Constitution to the executive branch. If the Congress disagrees with a statutory interpretation advanced by the executive branch — or with the efforts of the executive branch to defend or prosecute judicial action based on that interpretation — the Congress may, of course, amend the underlying statute. The use of an appropriations bill for this purpose, however, is inconsistent with the

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127. 478 U.S. 714, 733-34 (1986) (citing *INS v. Chadha*, 462 U.S. 919, 958 (1983)). The Court in *Bowsher* found a provision of the Gramm-Rudman deficit reduction act unconstitutional. The act appointed the Comptroller General, allowed the Comptroller General to select which programs to cut (an executive function), and gave Congress the power to remove unilaterally the Comptroller General. The Court held "that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.* at 726.

128. Pub. L. No. 100-71, 101 Stat. 391 (1987).

129. *Id.* § 505, 101 Stat. at 471.

constitutional scheme of separation of powers.<sup>130</sup>

Another example of Congress's dictating the proper interpretation of a statute involved the so-called Baxter Amendment to the antitrust laws. In 1911, the Supreme Court ruled in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>131</sup> that vertical price fixing, or resale price maintenance, constituted a per se violation of the Sherman Antitrust Act. Since then, economists have pointed out that such agreements can often promote economic efficiency by encouraging non-price forms of competition that the market cannot provide because of the free-rider problem.<sup>132</sup> Thus, when William F. Baxter took over the post of Assistant Attorney General in charge of the Justice Department's Antitrust Division in 1981, his division consistently refused to bring antitrust actions against manufacturers who utilized resale price maintenance agreements, and often filed amicus briefs in private antitrust actions urging that *Dr. Miles* be overturned.

One such private action was *Monsanto Co. v. Spray Rite Service Corp.*<sup>133</sup> Spray Rite, a wholesale distributor of Monsanto Herbicides, sued Monsanto for damages caused by Monsanto's enforcement of a resale price maintenance agreement. At the close of trial, the jury awarded \$3.5 million to Spray Rite, which the district court trebled to \$10.5 million. The Seventh Circuit Court of Appeals, relying on *Dr. Miles*, upheld the verdict.<sup>134</sup> When Monsanto appealed to the Supreme Court, the Justice Department filed an amicus brief urging that *Dr. Miles* be overturned, arguing that "[a] per se rule against resale price maintenance can be justified only if there is some persuasive basis for supposing that the practice reduces output, retards innovation, or otherwise interferes with

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130. Statement on Signing H.R. 1827 into Law, 23 WEEKLY COMP. PRES. DOC. 800 (July 11, 1987).

131. 220 U.S. 373 (1911).

132. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 128-29 (1972). The theory may be summed up as follows: Certain products are best sold in conjunction with certain services. These services may add significantly to the retailer's cost. For example, hi-fi equipment is best sold in conjunction with an opportunity for the prospective purchaser to examine and experiment with the equipment. This requires the retailer to build, at significant cost, extra rooms for display and audition. In a free market, retailers will have an incentive to free ride, each attempting to take advantage of the others' provision of the supplemental services. In our example, stereo shoppers will go first to an expensive retail outlet to audition the equipment, then to a stripped-down discount house to buy it. Eventually, the system will collapse, no retailer will offer the extra services, and fewer people will purchase the product. Retail price maintenance, the theory goes, is a method of preventing retailers from undercutting one another, and at the same time allowing them sufficient profits to enable them to provide the supplemental services.

133. 465 U.S. 752 (1984).

134. The Seventh Circuit obtained a remittitur of \$172,412 for excessive damages. *Spray Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1251 (7th Cir. 1982).

Sherman Act goals.”<sup>135</sup> Baxter further argued that “the Court has never analyzed resale price maintenance in terms of its actual economic effects, much less found that those effects are so necessarily anti-competitive as to justify a per se ban.”<sup>136</sup> But five months after the Justice Department filed its amicus brief, and just one week before the case came up for oral argument, Congress passed the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1984.<sup>137</sup> Section 510 of that Act provided that “[n]one of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws.”<sup>138</sup> President Reagan signed the bill into law, but expressed “strong reservations about the constitutional implications of section 510 . . . .”<sup>139</sup> One week later, at oral argument, Baxter dutifully withdrew the argument, contained in section II(B) of his brief, that *Dr. Miles* should be overturned.<sup>140</sup> Instead, Baxter argued that although *Dr. Miles* should not actually be overturned, it should not be applied to the facts of the case at hand.<sup>141</sup> In doing so, Baxter may have acceded to an unconstitutional congressional demand.

In both the Merchant Marine and the antitrust areas, Congress attempted to influence the executive’s interpretation of a law through the use of an appropriations rider, thereby impermissibly intruding on executive discretion. In both areas, the change in policy that Congress sought to advance could have been enacted through substantive legislation. Congress chose instead to utilize appropriations riders. The implications

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135. Brief for United States as Amicus Curiae, *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752 (1984) (No. 82-914), reprinted in David Lauter, *Antitrust Revolution Slows*, NAT’L L.J., July 25, 1983, at 1.

136. *Id.*

137. Pub. L. No. 98-166, 97 Stat. 1071 (1983).

138. *Id.*, 97 Stat. at 1102.

139. Statement on Signing a Fiscal Year 1984 Appropriations Bill, 1983 PUB. PAPERS 1627 (Nov. 28, 1983). The President stated:

I do not understand Congress to have intended by this provision to limit or direct prosecutorial discretion, or otherwise to restrict the government’s ability to enforce the antitrust laws within the framework of existing case law. Thus, despite the breadth of its language, pursuant to the advice of the Attorney General, I interpret section 510 narrowly to apply only to attempts to seek a reversal of the holdings of a certain line of previously decided cases. Even as narrowly construed, however, the provision potentially imposes an unconstitutional burden on executive officials charged with enforcing the antitrust laws. Therefore, I believe it is my constitutional responsibility to apply section 510 in any particular situation consistently with the President’s power and duty to take care that the laws be faithfully executed.

140. *Baxter Urges Supreme Court to Adopt New Rule on Resale Price Maintenance*, DAILY REPORT FOR EXECUTIVES, Dec. 5, 1983, at A-14.

141. *Id.*

of such a course of action are clear from the antitrust case, where, it could be argued, Congress came close to enacting a bill of attainder. At the core of the notion of separation of powers lies the concern that Congress ought not to be able to influence the outcome of any piece of adjudication. If Congress perceives that it may do with impunity what it attempted to do with the Baxter Amendment, it may well become emboldened. This result should be avoided.

#### IV. Foreign Relations

##### A. Introduction

The complicated constitutional relationship between the executive and the legislative branches in the realm of foreign affairs has caused considerable difficulty for theorists. As with matters of prosecutorial discretion, foreign policy issues present difficult questions concerning the proper level of legislative oversight of executive activity. Professor Stith writes that “[i]n the areas of foreign affairs and federal prosecution, it is generally conceded that Congress cannot closely circumscribe agency powers and the strategies of government policy, much less the particulars of government action.”<sup>142</sup> On the other hand, Mr. Fisher points out that “[i]t is false to assume that conditions on appropriations bills are proper for domestic legislation but impermissible for legislation governing foreign power and the war power.”<sup>143</sup> Similarly, Professor Tribe has written that Congress “may condition appropriations in ways that limit presidential foreign policy choices.”<sup>144</sup>

The confusion stems in part from the intricate structure contemplated by the Constitution. The Treaty and Appointments Clauses provide that the President “shall have [the] Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . .”<sup>145</sup> The Constitution also provides that the President “shall receive Ambassadors and other public Ministers . . . .”<sup>146</sup> It further provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into

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142. Stith, *supra* note 3, at 1383.

143. Fisher, *supra* note 4, at 762.

144. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-4, at 222 (2d ed. 1988).

145. U.S. CONST. art. II, § 2, cl. 2.

146. U.S. CONST. art. II, § 3.

the actual Service of the United States . . . .”<sup>147</sup>

The Constitution grants to Congress the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”;<sup>148</sup> “[t]o raise and support Armies”;<sup>149</sup> “[t]o provide and maintain a Navy”;<sup>150</sup> “[t]o make Rules for the Government and Regulation of the land and naval Forces”;<sup>151</sup> “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”;<sup>152</sup> and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . .”<sup>153</sup>

Congress’s use of appropriation riders to maneuver within this intricate structure of foreign relations is subject to the same constitutional constraints as is legislation designed to direct the implementation of domestic policies. First, Congress may not enact appropriations riders that are contrary to specific constitutional proscriptions. For example, Congress could not enact an appropriations rider prohibiting the use of funds for the reception of foreign ambassadors. Second, Congress may not interfere impermissibly with the exercise of executive discretion in the realm of foreign relations. The problem, of course, is defining “impermissible” in this context.

Analyses of domestic legislation and of foreign affairs legislation in this context may be superficially similar, but a fundamental difference distinguishes them. The analysis of the preceding separation-of-powers issues first considers whether Congress has violated a specific constitutional proscription — such as the Bill of Attainder Clause — and then considers whether Congress has intruded impermissibly on executive discretion. The former inquiry implicates specific constitutional proscriptions, whereas the latter involves a more general analysis under the Take Care Clause. These two inquiries are more easily separable with respect to domestic legislation than to foreign affairs legislation. Thus, the question of whether Congress has passed a bill of attainder is distinct from that of whether Congress has passed a bill which infringes on executive discretion. In foreign affairs, however, the question of whether Congress intruded impermissibly into executive discretion is really the same question as whether Congress violated the specific constitutional proscription

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147. U.S. CONST. art. II, § 2, cl. 1.

148. U.S. CONST. art. I, § 8, cl. 11.

149. U.S. CONST. art. I, § 8, cl. 12.

150. U.S. CONST. art. I, § 8, cl. 13.

151. U.S. CONST. art. I, § 8, cl. 14.

152. U.S. CONST. art. I, § 8, cl. 15.

153. U.S. CONST. art. I, § 8, cl. 16.



at issue. For instance, one cannot answer the question of whether Congress has violated the Commander-in-Chief Clause without first determining the appropriate quantum of discretion which that position entails.

Accordingly, Part B will first present a framework for determining the level of discretion inherent in the President's role as the sole actor of the United States in its conduct of foreign affairs. This framework will then be applied in Parts C and D to some of the specific clauses in the Constitution that incorporate the idea of executive discretion in the realm of foreign relations, including the Appointments, Treaty, and Commander-in-Chief Clauses.

## B. Executive Discretion in Foreign Affairs

One way to define the proper respective roles of Congress and the President in the realm of foreign affairs is to demarcate those areas where one branch is better suited to operate. Congress, as a large deliberative body, is well suited to prescribing the ultimate objectives of foreign relations, and to establishing general policies calculated to promote those objectives. The President, on the other hand, is unitary and, to borrow a term from Hamilton, more "energetic,"<sup>154</sup> and is therefore better suited to act in situations where dispatch is needed.

The President is better suited than Congress to oversee many aspects of foreign policy for a number of reasons related to his greater "energy." The unitary nature of the Executive not only lends itself to dispatch, but also presents a stronger, more solid, and more trustworthy face to other nations. The importance of a strong appearance cannot be underestimated in the course of foreign relations. A President compelled to obtain the approval of Congress for significant moves during negotiations would lose this advantage. As a result, those negotiating with the United States would lose confidence in the ability of the ambassador to enter into any binding agreement on even the most insignificant details. The Supreme Court has recognized this concern in cases such as *United States v. Curtiss-Wright Export Corp.*,<sup>155</sup> in which Justice Sutherland wrote:

It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory re-

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154. See, e.g., THE FEDERALIST NO. 70, at 469 (Alexander Hamilton) (Carl Van Doren ed., 1973).

155. 299 U.S. 304 (1936).

striction which would not be admissible were domestic affairs alone involved.<sup>156</sup>

Similarly, the trustworthiness of an ambassador plays a key role in negotiations. Representatives of foreign governments would be loathe to disclose strategic details to an ambassador directly accountable to Congress. As John Jay wrote, "There doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly."<sup>157</sup> George Washington delivered a powerful statement of this reasoning when he refused to comply with a congressional request to produce certain documents relating to the negotiation of the Jay Treaty with Great Britain:

The nature of foreign relations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members.<sup>158</sup>

The President's close involvement with the diplomatic corps suggests other ways in which the President is better suited to oversee foreign affairs. The President's access to information concerning foreign relations is more regular and more in-depth than that available to Congress. As the Court noted in *Curtiss-Wright*, the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials."<sup>159</sup> In addition to his access to information regarding the current state of international relations, the President is privy to information concerning negotiations already concluded, and the strategies and tactics that have proved effective in the past. Due to the complex nature of negotiations, tactics that might appear foolhardy to someone inexperienced in the field might well produce the best results. In 1816, the Senate Committee on Foreign Relations voiced this sentiment:

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156. *Id.* at 320.

157. THE FEDERALIST NO. 64, at 392 (John Jay) (Clinton Rossiter ed., 1961).

158. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194 (James Richardson ed., 1897).

159. *Curtiss-Wright*, 299 U.S. at 320.

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with 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.<sup>160</sup>

These considerations suggest a method of determining what congressional directives “impermissibly” intrude into the realm of executive discretion in foreign affairs: Congress should not be allowed to do anything the President is better suited to do. For instance, Congress cannot direct the movement of troops during wartime because the President alone can act with the necessary dispatch. Congress could not appoint its own members to conduct negotiations with foreign nations because its members may not be schooled in the art of diplomacy and because Congress as a body cannot be trusted to keep secrets. The following section applies this concededly simple test to various instances of congressional involvement in foreign affairs which Congress achieved through the use of limitation riders.

### C. The Treaty and Appointments Clauses

The Treaty and Appointments Clauses provide that the President “shall have [the] Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . .”<sup>161</sup> The Constitution also provides that the President “shall receive Ambassadors and other public Ministers.”<sup>162</sup> Taken together, these two Clauses dictate an expansive role for the executive branch in the conduct of diplomacy. Despite this language, in recent years Congress has not been satisfied with the limited role which the Constitution assigns to it in the conduct of negotiation.

In 1989, Representative Bill Richardson of New Mexico complained before Congress that the executive branch had excluded Congress from involvement in the Helsinki Commission. Richardson stated that “the Department of State has precluded the participation of Congress in the important substance of the conference.”<sup>163</sup> In order to remedy what he viewed as an unacceptable situation, Congressman Richardson proposed an amendment to the bill appropriating funds for the operation of the

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160. COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, S. DOC. No. 231, Part 8, 56th Cong., 2d Sess. 24 (1901).

161. U.S. CONST. art. II, § 2, cl. 2.

162. U.S. CONST. art. II, § 3.

163. 135 CONG. REC. E2756 (daily ed. July 31, 1989).

Department of State.<sup>164</sup> If adopted, the amendment would have prohibited "the obligation or expenditure of funds for any meeting of the Conference on Security and Cooperation in Europe, also known as the Helsinki Commission."<sup>165</sup> This type of attempt by Congress to participate in foreign negotiations, or to prohibit such negotiations entirely, is remarkable in light of the plain meaning of the Constitution.

Surprisingly, a majority of Congress appears to share Representative Richardson's concerns, for while Congress did not approve Richardson's rider, it adopted a slightly different one later. In its final form, the rider adopted by Congress does not deny funds completely, as Representative Richardson had proposed, but simply places a condition on the expenditure of those funds. Paragraph (1) of section 102 of the Foreign Relations Authorization Act of 1990<sup>166</sup> authorizes funding for United States delegations to International Conferences and Contingencies, but paragraph (2) provides that

[n]one of the funds authorized to be appropriated under paragraph (1) may be obligated or expended for any United States delegation to any meeting of the Conference on Security and Cooperation in Europe (CSCE) or meetings within the framework of the CSCE unless the United States delegation to any such meeting includes individuals representing the Commission on Security and Cooperation in Europe.<sup>167</sup>

The Commission on Security and Cooperation in Europe is an organ of the legislative branch. Thus, Congress, through the use of the rider, attempted to enter into the realm of negotiations. Because this is an area for which the Executive is better suited, this provision intrudes impermissibly on executive control of foreign relations. More specifically, it intrudes on the President's ability both to appoint ambassadors and to enter into treaties.

Section 108 of the same Act amends the International Security and Development Cooperation Act of 1985 (22 U.S.C. 2151) to include the following limitation:

[N]o funds authorized to be appropriated by this or any other Act may be obligated or made available for the conduct of the current dialogue on the Middle East peace process with any representative of the Palestine Liberation Organization if the President knows and advises the Congress that that representative directly participated in planning or execution of a particular terrorist activity

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164. *Id.*; Foreign Relations Authorization Act, fiscal years 1990 and 1991, Pub. L. No. 101-246, 104 Stat. 15 (1990).

165. 135 CONG. REC. E2756 (daily ed. July 31, 1989).

166. Pub. L. No. 101-246, 104 Stat. 15, 19 (1990).

167. *Id.*

which resulted in the death or kidnapping of a United States citizen.

This provision represents an impermissible attempt by Congress to interfere with executive discretion. The 1816 Senate Committee on Foreign Relations observed that the President was best suited to determining when, how, and on what subjects negotiations should be attempted. The words "with whom" could easily be added to this list. The President is intimately familiar with the international political ramifications of negotiating with representatives of the Palestine Liberation Organization or other internationally controversial organizations. The President alone is qualified to decide whether the formal recognition of a nation will have adverse consequences. The limitation rider was an impermissible intrusion into an area best left to the Executive. This is a conclusion with which President Bush agrees.<sup>168</sup>

Some of Congress's attempts at involvement in foreign policy may be acceptable. Section 104 of the Intelligence Authorization Act, fiscal year 1989,<sup>169</sup> prohibits the use of funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States to provide assistance to the Nicaraguan Democratic Resistance (the Contras), except as specifically provided by law. In his signing statement, President Reagan expressed his belief that the provision could impinge on his power to conduct foreign affairs.<sup>170</sup> Under the theory advocated here, it is not clear that the President's contention has a firm basis in the Constitution. The Constitution grants to Congress the power to declare war, so presumably Congress is at least as well suited as the President to determine when armed hostilities are appropriate. Moreover, if Congress is well suited to make that determination, it is probably also well suited to determine whether the United States should assist the armed resistance to the Nicaraguan government. Congress, then, was arguably within its rights in passing this limitation rider.<sup>171</sup>

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168. See Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 WEEKLY COMP. PRES. DOC. 266 (Feb. 16, 1990).

169. Pub. L. No. 100-453, 102 Stat. 1904, 1905 (1988).

170. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1989, at 1988 PUB. PAPERS 1249-50 (Sept. 29, 1988). The President noted that an analogous restriction contained in previous annual intelligence authorization acts applied only to federal entities engaged in intelligence activities. He then stated that he had "signed the Act with the understanding that the extension of the restriction to all entities of the United States Government is not intended to, and does not, apply in a manner and to an extent that would conflict with my constitutional authority and duty to conduct the foreign relations of the United States."

171. The history of the Boland Amendment has been covered in detail elsewhere. For a good discussion, see Fisher, *supra* note 4.

A similarly acceptable limitation is contained in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990.<sup>172</sup> Section 582(a) of that Act provides:

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

President Bush objected to the provision on the grounds that it was too all-encompassing and that it would consequently chill the conduct of diplomacy.<sup>173</sup> Again, however, the provision on its face is the result of a policy decision that Congress is at least as well suited as the President to make. No special virtue of the unitary executive, or at least none considered here, makes it more able to choose when to circumvent United States laws.

#### D. The Commander-in-Chief Clause

The Constitution provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .”<sup>174</sup> Congress and the President have disagreed about precisely what this position entails. The Supreme Court has stated that this Clause empowers the President “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.”<sup>175</sup> This statement and others like it, however, have done little to define the contours of the power of Commander-in-Chief.

The two branches recently disagreed over what measures the President may take to ensure that information affecting national security is not unintentionally leaked. President Reagan requested several executive departments to devise methods to increase the Executive’s ability to pre-

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172. Pub. L. No. 101-167, 103 Stat. 1195 (1989).

173. Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1810 (Nov. 21, 1989) (“Diplomacy by its nature involves give-and-take. Many routine and unobjectionable diplomatic activities could be misconstrued as somehow involving a forbidden ‘exchange.’ Given the ease with which such activities would be so misconstrued, this type of provision can chill U.S. diplomats in the proper discharge of their duties.”).

174. U.S. CONST. art. II, § 2, cl. 1.

175. *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

vent such leaks. As a result, two standard forms were drafted in 1982 by the Information Security Oversight Office, the Director of Central Intelligence, and the Department of Defense.<sup>176</sup> The forms, Standard Form 189 and Standard Form 4193, embody several methods for restricting unauthorized disclosure of information affecting national security.<sup>177</sup> The forms, which defense employees were required to execute, restricted access to information not yet classified; provided for mandatory prepublication review of any manuscript containing, or purporting to contain, or derived from classified information; and provided for civil remedies in the event of unauthorized disclosure.<sup>178</sup>

Congress, concerned that use of the forms might restrict its access to security information, responded with an amendment to the Omnibus Continuing Resolution of 1988.<sup>179</sup> Section 630 of that Act provides:

No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:

- (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
- (2) contains the term "classifiable";
- (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
- (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;
- (5) imposes any obligations or invokes any remedies inconsistent with statutory law . . . .<sup>180</sup>

In 1987, three individuals, two federal employee unions, and several members of Congress sued to enjoin the use of the forms, claiming, *inter alia*, that the use of the forms violated section 630 of the omnibus continuing resolution.<sup>181</sup> The defendants claimed that section 630 represented an unconstitutional interference with executive control over national se-

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176. See *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671, 674-75 (D.D.C. Cir. 1988).

177. *Id.*

178. *Id.*

179. Treasury, Postal Service and General Government Appropriations Act of 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987).

180. *Id.*

181. *National Fed'n of Fed. Employees*, 688 F. Supp. at 674-75.

curity. The District Court for the District of Columbia ruled that section 630 was inconsistent with the President's authority in the field of national security.<sup>182</sup> The court relied, in dismissing the case, on a 1988 case in which the Supreme Court described the source and extent of executive power over national security, *Department of the Navy v. Egan*.<sup>183</sup> The case involved a Navy employee who had been discharged when his security clearance was revoked. The *Egan* Court held that the decision to grant, deny, or revoke a security clearance was an unreviewable one, committed to executive discretion.<sup>184</sup> In support for this finding, Justice Blackmun observed:

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.<sup>185</sup>

The plaintiffs appealed directly to the Supreme Court, which vacated and remanded the district court's ruling on the grounds that the lower court improperly reached unnecessary constitutional questions.<sup>186</sup> The Court noted that the government had replaced Standard Forms 189 and 4193 with Standard Forms 312 and 4355 shortly after the passage of the omnibus continuing resolution. Neither of the new forms contained the word "classifiable." This substitution necessitated a closer examination of whether the government was acting in accordance with the proscriptions of section 630, or whether the new forms violated the section's prohibition, as had the older forms. The Supreme Court did not consider it appropriate to reach the constitutional ruling, and reminded the district court that it "should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so."<sup>187</sup>

By the time the case returned to the district court,<sup>188</sup> Congress had replaced section 630 with an analogous section in an analogous act: section 618 of the Treasury, Postal Service and General Government Ap-

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182. *Id.* at 685.

183. 484 U.S. 518 (1988).

184. *Id.* at 527.

185. *Id.*

186. *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989).

187. *Id.* at 161.

188. *American Foreign Serv. Ass'n v. Garfinkel*, 732 F. Supp. 13 (D.D.C. 1990).



proprations Act, Fiscal Year 1990,<sup>189</sup> is identical in all respects, with the exception that Congress replaced mention of Standard Forms 189 and 4193 with mention of Standard Forms 312 and 4355. In accordance with the Supreme Court's instructions, the district court set out to determine whether the government's continued use of Forms 312 and 4355 violated the new Act. The plaintiffs argued that section 618 operated as a complete bar to the use of the forms, and the defendants argued that the section prohibited the use of the specifically enumerated forms only if such use also violated the more general proscriptions set forth in subsections (1) through (5) of the section. The court adopted the latter construction.<sup>190</sup> Because the plaintiffs failed to make the alternative argument that continued use of the forms did in fact violate the proscriptions of subsections (1) through (5), the court concluded that continued use of the forms did not violate the section.<sup>191</sup>

The limitation rider at issue poses a problem for the theory advocated by this Article. On the one hand, the President may be better suited than Congress to determine the appropriate manner for preventing unintentional leaking of information affecting national security. Expertise in keeping secrets, expertise enhanced by executive agencies such as the Information Security Oversight Office, the Central Intelligence Agency, and the Department of Defense, puts the President in a better position to regulate access to vital information.

On the other hand, the plain text of the Constitution grants to Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."<sup>192</sup> In such a case, any reconstructivist theory of the separation of powers must yield to the text of the document. The limitation rider in question, therefore, appears to be a valid exercise of Congress's power to regulate the armed forces.

## V. Remedies

Assuming that Congress and the President will often arrive at different conclusions regarding the constitutionality of particular limitation riders, the question becomes one of which interpretation will prevail. Although these differing interpretations might easily create constitutional impasses, such crises could be resolved in a number of ways.

When Congress attaches to appropriations bills limitations riders that the President believes to be unconstitutional, the President could

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189. Pub. L. No. 101-136, 103 Stat. 783, 820 (1989).

190. *Garfinkel*, 732 F. Supp. at 16.

191. *Id.*

192. U.S. CONST. art. I, § 8, cl. 14.

veto the legislation and inform Congress that he will veto any piece of legislation containing the offending provision. President Hayes chose this approach during the Reconstruction.<sup>193</sup> The first problem with this course is that it is not foolproof — a two-thirds vote of both houses could override the veto. More importantly, this approach, together with a President and a Congress both assured of the moral superiority of their positions, could lead to a complete breakdown of whatever governmental functions were to be funded by the bill containing the offending clause.

The President could simply abide by the condition, expressing regrets that he or she is constrained to do so, and ask that Congress in the future avoid such unconstitutional limitations on the Executive. This approach, however, is largely ineffectual. The President could supplement it through the political process. For example, the President could campaign on behalf of congressional candidates who oppose those Representatives and Senators who voted for the allegedly unconstitutional limitation rider. This method, too, would likely prove ineffectual, due to its reliance on widespread public appreciation of an obscure point of constitutional law.

The President could rely on a suit against the government by a private individual. Such an individual, however, might be difficult to find. Of course, if Congress has denied the funds necessary for enforcement of a particular constitutional right, there will be an aggrieved individual somewhere. But in many instances no such individual will exist. For example, a failure to spend money to assist in the Middle East peace process, or to consider the discontinuation of farm subsidies, will not aggrieve any particular citizen.

Finally, the President could simply ignore any spending limitations that he or she believes unconstitutional. This appears to be the method favored by President Bush.<sup>194</sup> It is an effective method, and might be the method that produces the least harm. In these cases, the President effectively returns the political ball to Congress's court. Congress may then choose from a number of methods of ensuring executive compliance with the funding limitations.

The first method Congress can use to enforce funding limitations is provided by the Anti-Deficiency Act,<sup>195</sup> which provides:

An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding

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193. See *supra* notes 99-105 and accompanying text.

194. See L. Gordon Crovitz, *President Bush Exercises the So-Sue-Me Line-Item Veto*, WALL ST. J., Nov. 21, 1990, at A13.

195. 31 U.S.C. § 1341(a)(1) (1982 & Supp. V 1987).

an amount available in an appropriation or fund for the expenditure or obligation; or . . . involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.<sup>196</sup>

Congress's first option under this act is to prosecute the appropriate members of the executive branch. Such prosecutions, however, are subject to the President's power to pardon.<sup>197</sup> Assuming that the President will have ordered any action taken in violation of the Anti-Deficiency Act, any sanctions imposed by the Act will be ineffectual.

A more functional variation of this method involves the use of a special prosecutor. Congress could instruct the Attorney General to appoint a special prosecutor to investigate allegations of executive branch violations of appropriations riders. While this method has been stigmatized by its prior use in only drastic circumstances,<sup>198</sup> it could be used effectively by a Congress willing to make a firm stance on less momentous issues. If Congress is willing to take an even stronger position it could, theoretically, resort to the impeachment process.<sup>199</sup>

In addition to openly adversarial methods, Congress could resort to the more subtle political processes contemplated by the Constitution. For example, Congress could diminish appropriations for the relevant agency or department for the next fiscal year. Congress could engage in the largely token and ineffectual practice of decreasing the funds available to the offending agency or department by an amount equal to that expended in the current fiscal year on the unauthorized activity, an approach similar to that discussed in connection with funding for the National Endowment for the Arts. As a more drastic measure, Congress could curtail the Executive's funds so severely that the Executive would be forced to abandon the offending activity. This approach lacks the necessary specificity, however, and could provide no guarantee that the Ex-

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196. *Id.*

197. U.S. CONST. art. 2, § 2, cl. 1.

198. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 666 (1987) (controversy arising out of allegations of mismanagement of the Environmental Protection Agency).

199. Of course, it is unlikely that Congress could garner the popular support necessary for successful impeachment of a President charged with violating any but the most fundamental funding limitation. The process of impeachment depends on the support of the electorate, and such support would not be forthcoming when the President has violated, say, a limitations rider dealing with the repayment of Merchant Marine subsidies. A second potential problem with this approach is that grounds for impeachment are limited to "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. This second problem, however, may be met with the observance that unauthorized expenditures constitute violations of the Anti-Deficiency Act, 31 U.S.C. § 1350 (1982), and are punishable by fines of up to \$5,000 and imprisonment of up to two years. As Mr. Sidak notes, "[C]ertainly, the President's intentional violation of the Act could constitute a 'high Crime' subjecting the President to the risk of impeachment." Sidak, *supra* note 4, at 1241.

ecutive would not continue to engage in the offending activities. In addition, the use of this method will result in the curtailment of many desirable activities.

Congress could also rely on the election process to remove an errant President from office. The opposing party could campaign on a platform calling for respect for congressional directives. The obvious problem with this approach is that, like resort to the impeachment process, it depends on public understanding of, and support for, a Congress whose views on an obscure and technical subject have been disobeyed. Presidential elections, however, rarely hinge on singular issues, especially issues that many voters would regard as insignificant.

In addition to these direct methods, Congress could rely on the less direct, but more effective, use of private actions. Unlawful executive spending might injure private parties who can satisfy current standing requirements. Although the courts have universally rejected taxpayer suits, unauthorized expenditure of funds by the Executive might give rise to much more specific injuries. For example, a member of the armed forces serving in an undeclared war might have standing to challenge the expenditure of funds in that context.<sup>200</sup> This method, however, will not always be available to Congress.

If Congress chooses to prosecute under the Anti-Deficiency Act, if it requests a special prosecutor, or if it relies on private suits to achieve executive compliance with limitation riders, a definitive ruling on the permissibility of the funding limitation at issue will emerge from the controversy. In all three cases, a court will decide the question. In an area where the provisions of the Constitution are so ill-defined and so difficult to enforce, such a result would improve the orderly operation of the government.

Finally, Congress could refrain from enacting substantive legislation through the use of appropriations riders. This simple option seems to have escaped Congress's attention, but it would be the most effective solution. In every case where Congress has attempted to control the executive branch through the use of such riders, it could have accomplished the same end by directly enacting substantive legislation. In cases where this results in an unconstitutional exercise of legislative authority, the courts will strike down the legislation. But when Congress desires to engage in a legitimate exercise of legislative authority, there is no reason

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200. See, e.g., *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (members of armed services have standing to challenge Vietnam War, but Congress authorized or ratified executive actions).

why it should not utilize the more straightforward method of enacting substantive legislation.

Such an approach would have some drawbacks. There will surely be pieces of legislation that would pass through Congress largely unconsidered in the form of appropriations riders, but that would not survive the heightened scrutiny of the authorization process. Similarly, there will doubtless be pieces of legislation that, in the form of appropriations riders, would be signed into law by a President whose administration was in dire need of funding, but that would otherwise be vetoed. Neither of these results should be considered undesirable. Legislation that cannot survive on its own merit should not be forced on an unknowing Congress or an unwilling President.

### Conclusion

Congress's power to appropriate — or withhold — money for the operations of the other two government branches is one of its most potent weapons. It is a useful weapon with which to ward off a despotic Executive. Nevertheless, it can be, and often is, abused. This Article has asked whether there are any constitutional limitations, grounded in the notion of separation of powers, on Congress's ability to effectuate substantive policy changes through limitation riders on appropriations bills, and has arrived at a number of conclusions.

First, in many situations, Congress's ability to legislate through the use of appropriation riders is subject only to the specific constitutional safeguards that circumscribe all government action. Second, Congress may not interfere with the Executive's ability to execute the law. Appropriations riders that attempt to influence executive discretion in the area of law enforcement prevent the executive branch from carrying out its constitutionally mandated activities. Third, in the realm of foreign relations, Congress is limited to doing what it does best, and must not attempt to interfere when the President is better situated and equipped to assess all relevant options. Finally, Congress should avoid enacting substantive policy changes through appropriations riders. When Congress chooses to legislate in this manner, the President should refuse to abide by funding limitations he or she considers to be unconstitutional. In this way the two branches will arrive at a confrontation where the question of the constitutionality of the appropriations rider at issue will receive a definitive answer.

