

2019

Constitutional Law: Funding Restrictions and Separation of Powers

Zachary S. Price

Follow this and additional works at: <https://repository.uchastings.edu/judgesbook>



Part of the [Constitutional Law Commons](#), and the [Judges Commons](#)

Recommended Citation

Price, Zachary S. (2019) "Constitutional Law: Funding Restrictions and Separation of Powers," *The Judges' Book*: Vol. 3 , Article 8.
Available at: <https://repository.uchastings.edu/judgesbook/vol3/iss1/8>

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in The Judges' Book by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Constitutional Law:*Funding Restrictions and Separation of Powers*¹

Zachary S. Price

Congress's "power of the purse"—its authority to deny access to public funds—is one of its most essential constitutional authorities. In our era of political polarization, that power has also emerged as a recurrent source of bare-knuckle inter-branch conflict. In recent years, the federal government has "shut down" repeatedly as political disagreements between Congress and the executive branch prevented enactment of new appropriations to keep federal agencies running past the expiration of prior appropriations. Congress also has sought to thwart key presidential objectives—such as President Obama's campaign pledge to close the Guantanamo Bay prison and President Trump's pledge to build a border wall—through funding restrictions, and presidents have at times claimed statutory or constitutional authority to circumvent such restrictions.

These conflicts raise an important and under-theorized separation-of-powers question: To what degree, if at all, may Congress employ its power over appropriations to prevent or control how presidents exercise their constitutional executive authorities? Could Congress, for example, condition appropriations on the President's issuance of a particular pardon? Could Congress prevent or require investigation and prosecution of particular federal offenses through appropriations restrictions, notwithstanding the president's responsibility to "take Care that the Laws be faithfully executed"? Or could it prevent or require a particular use of military force even though the Constitution makes the president "Commander in Chief" of the armed forces?

Presidents, legislators, and courts have articulated divergent positions on these questions. President Trump, for example, asserted authority in a signing statement to disregard a provision barring use of Justice Department appropriations to prosecute state-authorized medical-marijuana businesses, yet Congress asserted the opposite view by repeatedly enacting the provision in question.

This chapter offers a summarized analysis of this question. Concretely, it argues that the answers to the questions above on the pardon power, law enforcement, and military force are no, yes, and yes,

1. Summarized and excerpted from Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357 (2018).

respectively. It also defends Congress's authority to restrict prisoner transfers out of Guantanamo Bay and limit marijuana enforcement. The key to analyzing all these questions, the chapter argues, is to distinguish between executive powers that are "resource-independent" and those that are instead "resource-dependent." Resource-independent powers, which include the pardon power as well as the veto, appointment authority, and supervisory control over the military, may at least theoretically be exercised by the president personally and therefore may not be controlled through restricted or conditional appropriations. Resource-dependent powers, by contrast, which include law enforcement and affirmative use of military force, depend on congressional appropriations for their exercise and may therefore be controlled by limits Congress enacts in appropriations statutes.

Framing the Problem

Congress's "power of the purse," once described by the great scholar Edward Corwin as "the most important single curb" on presidential authority,² is the basic constitutional principle that the people's representatives in Congress control both public revenue and public expenditure. The Constitution expressly grants Congress the authority to "lay and collect Taxes, Duties, Imposts and Excises" and "to borrow Money on the credit of the United States." It also grants Congress power "to pay the Debts and provide for the common Defense and general Welfare of the United States," to "raise and support Armies," and to "provide and maintain a Navy," although no army appropriation may exceed two years in duration and Congress must provide for a regular accounting of public expenditures. The Constitution makes these congressional powers exclusive. The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Money thus may flow neither in to nor out from the public purse without advance congressional approval by statute.

Historically, this power over appropriations played a key role in Anglo-American constitutional development. Through control over appropriations, the British Parliament extracted constitutional concessions from the crown. Colonial legislatures followed suit with respect to royal governors; indeed, royal efforts to cut governors loose from local purse strings provided one impetus for the American

2. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 134 (13th ed. 1975).

Revolution. Given this background, the Framers naturally recognized legislative control over government finance as a key check on the other branches. In the Federalist No. 58, James Madison described Congress's power of the purse as "the most complete and effectual weapon with which any constitution can arm the representatives of the people." He also called it "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 congressional authority is no less important today. Through accumulated statutory delegations and accreted executive practice, the executive branch today often holds significant power to take action or set policy in the first instance, in areas ranging from regulatory policy to law enforcement to foreign affairs. Against this background, congressional authority over appropriations remains an important back-end constraint on the Executive. If it disapproves of executive actions or policy, it might override or limit the president's choices by denying government funds in the next annual appropriation.

Understanding Congress's appropriations power as a structural check on the executive, however, masks an important conceptual puzzle. Our Constitution, unlike Britain's, generally does not allow leveraged adjustment of relative interbranch authorities through ordinary legislation; it instead fixes in place certain authorities for each branch. From that point of view, using appropriations power to constrain executive authorities could violate the Constitution, but by the same token an unfettered presidential authority to disregard appropriations restraints could eliminate an important legislative check on executive policy. This problem emerged early in the country's history in debates over appropriations for treaty obligations, yet it has received insufficient sustained scholarly consideration.

Resource-Independent Powers

Distinguishing between executive authorities that are "resource-independent" and those that are "resource-dependent" can yield a coherent and normatively satisfying framework that accords not only with the constitutional text and structure but also with the broad contours of historical practice. Resource-independent powers are those that are at least theoretically costless: Presidents in principle may exercise them personally, keeping their own counsel and using only

their own salary or other personal resources. The key examples here are the powers to veto legislation, grant clemency, appoint and remove officers, issue lawful commands to the military, demand written opinions from department heads, and recommend legislation.

The key characteristic of these powers, again, is their notional costlessness. In a celebrated essay from 1976, Charles Black asked himself, “To what state could Congress, without violating the Constitution, reduce the President?” His answer: “I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer the mail; that is where one appropriation bill could put him, at the beginning of a new term. . . . But he was still vetoing bills.”³ Black’s observations capture the veto’s fundamental independence from public resources provided for its support. But other executive powers have the same qualities. Even the enfeebled president that Black imagined could also issue pardons, send nominees to the Senate, fire executive officers who displeased him, issue lawful military commands, and try his or her hand at drafting legislation, among other things.

Insofar as they are not dependent on congressional appropriations to exercise these powers, presidents also should not be bound by appropriations restrictions on how those powers are exercised. Accordingly, direct conditions on resource-independent powers are *per se* invalid. Congress may not prevent particular exercises of these powers by denying appropriations for them; nor may it condition funds for the White House or executive agencies on the president exercising or not exercising these powers in a particular way. Indeed, in at least some cases, giving effect to such appropriations provisions would profoundly distort the constitutional structure. On some level, for example, the veto and pardon powers are executive checks on legislative authority. It would make no sense if Congress could control those powers’ exercise through appropriations legislation.

The question becomes more complicated with respect to what I call “indirect conditions.” What if Congress does not directly restrict the exercise of resource-independent powers, but instead attempts to manipulate their exercise through selective provision of staff support and other resources? A version of this problem arose during the Obama Administration when Congress denied funds for a White House “Climate Change Czar.” Although President Obama objected to this provision on constitutional grounds, he appears to have complied with it in practice. A more routine version of this problem arises when

3. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 L. & CONTEMP. PROBS. 87, 89 (1976).

Congress attempts to prevent or require drafting of legislation by executive agencies. The executive branch views such legislation, too, as unconstitutional because it limits presidential authority to recommend to Congress “such Measures as [the president] shall judge necessary and expedient.”⁴

Contrary to some executive branch assertions, such indirect restraints on resource-independent powers are unconstitutional only in narrow circumstances. As a general matter, Congress holds broad authority to structure the executive branch and direct greater resources to some functions than others. Nevertheless, by analogy to certain “unconstitutional conditions” case law, including the Supreme Court’s decision in *NFIB v. Sebelius* that the Affordable Care Act’s Medicaid expansion was unconstitutionally coercive,⁵ the article argues that some constraints on executive branch funding and personnel may unduly manipulate executive judgments that properly belong to the president alone.

Specifically, the article argues that Congress may not provide close advisers to the president while preventing use of such advisers for particular narrow purposes, such as granting particular categories of pardons or coordinating administrative actions with respect to some particular narrow policy goal, such as mitigating climate change or improving energy-independence. By this standard, the Climate Change Czar provision approached the constitutional line but did not cross it, given that the president could readily pursue the same policy goals using other, more general-purpose White House personnel. With respect to other executive personnel, an appropriations restriction could likewise violate the Constitution if it prevented the president from employing the most natural officer for a particular purpose. The executive branch has thus been correct to disregard legislation that, for instance, prevents the EPA from assisting in drafting new environmental legislation, but it does not follow that the president may employ whomever he chooses within the executive branch to assist with constitutional tasks such as recommending legislation or vetting particular pardons.

4. See *Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. (Aug. 25, 2016).

5. 567 U.S. 519, 577–78 (2012).

Resource-Dependent Powers

Other executive authorities have a completely different character. In particular, law enforcement and warfare are powers presidents cannot hope to exercise on their own. They are instead thoroughly dependent on resources—resources that the Appropriations Clause makes clear only Congress can provide. Even assuming doing so would be lawful, a president might ride out on her own, pistol or handcuffs in hand, but without support from armies or investigators, she would not accomplish much in terms of protecting the nation or redressing crime. In fact, the relevant constitutional provisions expressly recognize this resource-dependence. The Take Care Clause assigns responsibility for enforcing federal law to the president, but the Clause’s indirect formulation—obligating the president to “take Care that the Laws be faithfully executed,” not to execute them directly—contemplates that the president will be dependent on other officers to carry out this function. Likewise, the Commander in Chief Clause grants presidents power only insofar as Congress has given them something to command.

Given the president’s thorough-going dependence on appropriations to exercise these powers, it follows that Congress may impose whatever conditions it likes in appropriations legislation. Congress may, for example, as it routinely does, deny appropriations to enforce particular regulations or administrative understandings. By the same token, it may prevent enforcement of disfavored statutes, as it has done in recent years by barring use of Justice Department funds to prosecute state-authorized medical-marijuana distributors. President Trump’s signing statement suggesting otherwise was thus mistaken. Admittedly, like Trump, some historical presidents, including Rutherford Hayes and Ronald Reagan, have asserted instead that their responsibility to ensure faithful execution of the laws is independent of any congressional authority over resources. But in practice they have never meaningfully acted on this view. Historical practice thus powerfully confirms the structural inference that law enforcement authority is resource dependent and, as such, subject to plenary congressional control.

Much the same pattern applies to use of military force. Although presidents have sometimes asserted preclusive authority over troop dispositions and use of military force, they appear to have generally complied with express limitations on their deployment or use of the Armed Forces. In keeping with that practice, historic limitations on use of force in Southeast Asia at the close of the Vietnam War were generally valid. Likewise, legislation being considered in Congress

that would mandate continued deployments in Syria or South Korea would be binding on the executive branch.

The Hard Case of Diplomacy

A last hard question relates to presidential authority over foreign affairs. To be sure, some aspects of presidential foreign affairs authority may be easily classified. To the extent it is valid as a matter of first principles, the presidential authority to recognize foreign states, governments, and territory⁶ is resource independent and thus subject to the same analysis outlined above for the pardon and veto powers. In contrast, affirmative provision of foreign aid is clearly resource-dependent, some historic presidential assertions to the contrary notwithstanding.

The power that defies easy analysis is diplomacy, in the sense of actual diplomatic communication. As a matter of first principles, this power might properly be considered resource dependent: A president's power to communicate with foreign officials might be dependent on Congress's choice to provide ambassadors and other diplomatic resources. Longstanding practice, however, supports exclusive presidential authority over official diplomatic communications with foreign states. In keeping with that view, presidents have in fact defied appropriations limitations on diplomatic activity with some regularity.

Even granting this practice and the basic theory of presidential authority that underlies it, however, limiting principles applicable to indirect conditions on other resource-independent presidential powers should apply equally in this context. Accordingly, Congress may not preclude any use of the State Department or other government resources to make certain communications; nor may it prevent presidents from using the most natural official, such as the U.S. ambassador to a particular foreign state, from relaying the President's preferred view. It may, however, structure the overall diplomatic apparatus at a higher level of generality, providing more resources to some embassies and divisions than others, even if doing so has some effect on the ultimate diplomatic positions the president chooses to take.

6. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015).

Conclusion

Fitting constitutional executive authorities together with Congress's power over appropriations presents a structural puzzle that has received insufficient scholarly attention. Distinguishing between resource-independent and resource-dependent executive powers provides the proper means of resolving increasingly common interbranch conflicts over this question. Some executive powers are resource-independent and thus largely immune to congressional control through restricted or conditional appropriations. Others, most notably law enforcement and warfare, are resource-dependent and thus subject to near-plenary congressional control. Recognizing this distinction and its proper implications provides a coherent and satisfactory means of resolving recurrent disputes over relative congressional and executive constitutional authority with respect to government finance.

Current political polarization and animosity appears to give presidents powerful incentives to defy appropriations restrictions that thwart policy goals favored by their constituents. But we can ill-afford further erosion of this important constraint on executive governance. Recognizing the proper contours and limits of executive authority to defy appropriations restrictions may help sustain a meaningful system of checks and balances in the years ahead.