

# Congress' Power of the Purse

Kate Stith†

*In view of the significance of Congress' power of the purse, it is surprising that there has been so little scholarly exploration of its contours. In this Article, Professor Stith draws upon constitutional structure, history, and practice to develop a general theory of Congress' appropriations power. She concludes that the appropriations clause of the Constitution imposes an obligation upon Congress as well as a limitation upon the executive branch: The Executive may not raise or spend funds not appropriated by explicit legislative action, and Congress has a constitutional duty to limit the amount and duration of each grant of spending authority. Professor Stith examines forms of spending authority that are constitutionally troubling, especially gift authority, through which Congress permits federal agencies to receive and spend private contributions without further legislative review. Other types of "backdoor" spending authority, including statutory entitlements and revolving funds, may also be inconsistent with Congress' duty to exercise control over the size and duration of appropriations. Finally, Professor Stith proposes that nonjudicial institutions such as the General Accounting Office play a larger role in enforcing and vindicating Congress' power of the purse.*

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† Associate Professor of Law, Yale Law School. B.A. 1973, Dartmouth College; M.P.P., 1977; J.D. 1977, Harvard University. Previous versions of this Article were presented at the Yale Law School Faculty Workshop and the Law and Economics Workshop of the University of Toronto, Faculty of Law. The author thanks the members of each workshop for their comments. I am especially grateful for the advice and comments of colleagues who read early drafts of portions of the Article: Bruce Ackerman, Akhil Amar, Owen Fiss, Paul Gewirtz, Joseph Goldstein, Paul Kahn, Harold Koh, Jerry Mashaw, George Priest, Roberta Romano, and Peter Schuck.

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*The covert program of support for the Contras evaded the Constitution's most significant check on Executive power: the President can spend funds on a program only if he can convince Congress to appropriate the money.<sup>1</sup>*

*Among the duties—and among the rights, too—of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse.<sup>2</sup>*

The Constitution places the power of the purse in Congress: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."<sup>3</sup> This empowerment of the legislature is at the foundation of our constitutional order. Yet there has been virtually no sustained legal scholarship that addresses the constitutional function and significance of Congress' power of the purse, explains how Congress' exclusive power of appropriation relates to other constitutional powers of Congress and the President, or considers the proper arenas in which the appropriations requirement might be construed and enforced.<sup>4</sup> Nor has it previously been proposed that Congress itself might violate the appropria-

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1. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT, S. REP. NO. 100-216, H.R. REP. NO. 100-433, 100th Cong., 1st Sess. 18 (1987) [hereinafter IRAN-CONTRA REPORT].

2. 19 ANNALS OF CONG. 1330 (1809) (remarks of Rep. J. Randolph).

3. U.S. CONST. art. I, § 9, cl. 7.

4. A thoughtful consideration of some of these issues is L. FISHER, *PRESIDENTIAL SPENDING POWER* (1975); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 257 (2d ed. 1988) (noting dearth of scholarship concerning constitutional constraints on executive spending power). The most thorough account of the early struggles between Congress and the Executive over control of the fisc is L. WILMERDING, *THE SPENDING POWER* (1943).

tions clause by failing to exercise effective control over federal expenditures.<sup>5</sup>

The present inquiry may be summarized as follows. The Constitution presupposes a distinction between the public sphere and the private sphere and permits expansion of the public sphere only with legislative approval. The appropriations requirement both reflects and implements these fundamental constitutional choices. In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government.

From this understanding of the structural function of appropriations, we may derive two governing principles: first, a *Principle of the Public Fisc*, asserting that all monies received from whatever source by any part of the government are public funds, and second, a *Principle of Appropriations Control*, prohibiting expenditure of any public money without legislative authorization. The two principles are complementary: The Public Fisc principle defines all federal receipts, while the Appropriations Control principle defines all lawful federal expenditures.

These two principles impose powerful limitations on the executive branch. Agencies and officials of the federal government may not spend monies from any source, private or public, without legislative permission to do so. Even where unauthorized spending by the Executive would impose no additional obligation on the Treasury—because it is made with private or other non-governmental funds—the Constitution prohibits such spending if it is not authorized by Congress. All federal receipts must be “deposited,” at least figuratively, into the Treasury, and all spending in the name of the United States must be pursuant to legislative appropriation.

The Principles of the Public Fisc and of Appropriations Control also impose an obligation on Congress itself. Congress has not only the power but also the duty to exercise legislative control over federal expenditures. If Congress permits the Executive access to the public fisc without effective appropriations control, then the Executive alone defines the scope and character of the public sphere, especially in areas that inherently require significant executive discretion. Congress abdicates, rather than exercises, its power of the purse if it creates permanent or other open-ended spending authority that effectively escapes periodic legislative review and limitation. Accordingly, I propose that not every legislative grant of spending

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5. Students of the Constitution have generally assumed that Congress has exclusive authority to construe and implement the appropriations clause and thus have not considered the possibility that Congress itself may violate the clause. See, e.g., E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 133–34 (14th ed. 1978); 1 W. WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES* 105 (2d ed. 1929). But see *CONSTITUTIONAL CONTROVERSIES* 95 (R. Goldwin, W. Schambra & A. Kaufman eds. 1987) (suggestion by author that certain aspects of legislative budget practice are “not in keeping with at least the spirit of the appropriations clause”).

authority necessarily qualifies as an "Appropriation[ ] made by Law" under the Constitution.

Under present practice, Congress creates many forms of spending authority outside of the legislative appropriations process, many of which are open-ended as to amount or time.<sup>6</sup> Not all of this spending is constitutionally suspect, for Congress may effectively limit spending authority through substantive legislation and periodic review, even when the form of the authority is open-ended. In determining whether a grant of spending authority is a constitutional appropriation, it does not matter whether Congress uses the word "appropriate." What matters is whether Congress in fact determines how much funding for a government activity is "appropriate."

Section I develops a general theory of Congress' appropriations power and proposes that the Principles of the Public Fisc and of Appropriations Control are implicit in our constitutional order. Section II examines how Congress has construed and implemented the appropriations requirement in two framework statutes first enacted in the nineteenth and early twentieth centuries: the Miscellaneous Receipts statute<sup>7</sup> and the Anti-Deficiency Act.<sup>8</sup> Section III argues that, in certain circumstances, legislation granting permanent or indefinite spending authority outside of legislative appropriations control is inconsistent with the basic constitutional obligations of Congress. Section IV suggests why the judicial branch may not be the proper arena for enforcement of the appropriations clause, especially against Congress, and proposes that Congress clarify and strengthen the role of institutions such as the General Accounting Office in implementing Congress' power of the purse.

## I. THE CONSTITUTIONAL LAW OF APPROPRIATIONS

### A. *The Constitutional Prerequisites for Federal Government Activity*

The Constitution postulates a limited federal government that is, for the most part, legislatively authorized. This postulate embodies a foundational value choice that permeates our constitutional structure.<sup>9</sup> In the absence of legislation, there would be few federal institutions or activities.<sup>10</sup>

Moreover, the Constitution's enumeration of legislative powers in section 8 of article I and elsewhere<sup>11</sup> imposes both substantive and proce-

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6. See *infra* notes 173-77 and accompanying text.

7. 31 U.S.C. § 3302(b) (1982).

8. 31 U.S.C. §§ 1341-1351 (1982).

9. See generally Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 490-504 (1954). Cf. S. WOLIN, *POLITICS AND VISION* 290, 302, 353-54 (1960) (limited political realm is fundamental premise of modern Western thought).

10. The Constitution creates few government institutions directly and imposes (or presumes the necessity of) few governmental obligations requiring expenditure, at least outside the area of foreign affairs. See *infra* notes 31-32 and accompanying text.

11. Although article I, section 8 is the primary source of Congress' legislative power, other provisions contain additional grants of power. See U.S. CONST. art. III, § 2, cl. 2 (power to regulate

dural limitations upon enlargement of the federal sphere. Not only must Congress' acts be affirmatively permitted by the Constitution (the substantive limitation), but, further, they must be in the form of legislation (the procedural limitation).<sup>12</sup> In combination with article II, the enumerated legislative powers define the potential governing authority of the operating branch of the federal government—the executive branch.<sup>13</sup> Except where the Constitution grants powers and duties directly to the President,<sup>14</sup> executive governing authority<sup>15</sup> must be created by legislation. The multiple constitutional prerequisites for government activity are checks upon the exercise of government power, reflecting the foundational decision that the exercise of such power should be deliberate and limited.<sup>16</sup>

The concept of a "limited" federal government does not mean that the size of the federal government must be small or that Congress and the Executive must limit their exercise of constitutional power; it means, more fundamentally, that the federal government is a defined set of activities constituting a subset of all activities within the polity.<sup>17</sup>

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appellate jurisdiction of the Supreme Court); *id.* art. IV, § 1 (power to implement full faith and credit clause); *id.* art. IV, § 3 (power to admit new states); *id.* art. V (role in ratification of constitutional amendments); *see also id.* amends. XIII, XIV, XV, XIX, XXIII, XXIV, XXVI (power to implement rights guaranteed).

12. Legislation requires "bicameralism" and "presentment." *See INS v. Chadha*, 462 U.S. 919, 945-51 (1983).

13. In referring to the executive branch as the "operating" branch, I mean simply that it is the branch that is active, performing operations in the name of the government. The legislative branch and article III courts also exercise government power, of course, but Congress and the courts necessarily delegate to others the power to implement their exercises of power. Although all three branches are part of the United States government, only the executive branch has the "sword" necessary for enforcement of federal law. *See also infra* note 197 ("executive branch" includes federal agencies that are not under presidential control).

14. *See, e.g., infra* note 32. In contrast to the forthright and wide-ranging enumeration of legislative powers in article I, the enumeration of presidential powers in article II is remarkably vague and emphasizes the formal, almost ceremonial, aspects of presidential leadership.

15. *See U.S. CONST.* art. II, § 1, cl. 1 ("executive Power"); *id.* art. II, § 3 (faithful execution clause). The faithful execution clause should not be understood as a separate grant of power to the President. *See infra* note 37 and accompanying text.

16. Article III review also provides a check on government action, though it is not a *prerequisite* to action. The concomitant commands of the Constitution that government activity be undertaken by an elected President upon authorization of a representative Congress, but that government action be reviewable by an appointed judiciary, are fully consistent under either of two approaches. First, from a purely behavioral perspective, the judiciary may be viewed as simply another check upon the exercise of power by the operating branch of the government. *See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 449, 453, 462, 552 (1969). Alternatively, from the perspective of democratic theory, if there are erroneous or invalid assertions of popular will, *see K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); W. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982); Coleman & Ferejohn, *Democracy and Social Choice*, 97 *ETHICS* 7, 19-20 (1986), the judiciary may be available to correct these mistakes.

17. The conception of federal activity in the structure of the original Constitution is related to, though not necessarily the same as, the conception of "state action" in the first eight and the Fourteenth and Fifteenth Amendments to the Constitution. *See also U.S. CONST.* art. I, § 9 (discussed *infra* note 28 and accompanying text); *id.* amends. XIX, XXIV, XXVI. Both the idea of a limited federal government and the "state action" requirement reflect constitutional circumscription of government and imply that not every social condition in the polity is, for constitutional purposes, a governmental policy. However, the two conceptions are not precisely equivalent, for they perform different

Implicit in the decision to establish a "limited" federal government, capable of growing only by incremental, deliberate, and coordinated decisions of the political branches, is a view of government action somewhat at odds with the contemporary inclination to treat failure to act as a species of action.<sup>18</sup> The Constitution's *grant* of power to Congress to alter the social and economic relations of the polity by legislation does not by itself accomplish any such alteration. It is not enough that Congress and the President are vested with the power to act; in order to alter or reshape the polity, they must *exercise* this power.<sup>19</sup>

An additional obstacle to enlargement of the national government is that federal action usually costs money, and financing of any such action must be constitutionally authorized. The Constitution does not require that all forms of national governance involve activity by the executive branch; Congress may exercise its constitutional powers in ways other than creating executive authority to act in the name of the United States.<sup>20</sup> However, all activity of the executive branch—all actions undertaken by and in the name of the United States government—must be authorized and paid for pursuant to the Constitution.

#### B. *The Place of Congress' Power To appropriate in the Structure of the Constitution*

While section 8 of article I enumerates the powers of the legislative branch, the appropriations clause in section 9 is not a grant of power. Rather, the appropriations clause affirmatively obligates Congress to exercise a power already in its possession.

Congress' power to appropriate originates in article I, section 8. The concept of "necessary and proper" legislation to carry out "all . . . Powers vested by this Constitution in the Government of the United States" includes the power to spend public funds on authorized federal activities.<sup>21</sup>

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constitutional functions. In particular, the "state action" requirement under the Fourteenth Amendment and elsewhere defines the scope of individual liberties; the concept of federal activity in the original Constitution is a corollary of the presumed primacy of non-federal activity.

18. See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 501-04 (1987).

19. That our constitutional structure postulates private and state activity as primary, and federal activity as secondary, does not deny that Congress and other political institutions may be held politically accountable for their failure to exercise power, as well as for their exercise of power. Cf. *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637, 1648 (1987) and cases cited therein (discussing "dormant" commerce power of Congress under U.S. CONST. art. I, § 8, cl. 3). Nor does the distinction deny that there may be some instances in which the structural provisions of the Constitution require Congress or the federal government to act. See, e.g., *infra* note 31 (census).

20. Congress has constitutional power to govern by means that involve no cost to the federal government and no federal government action. For instance, federal legislation may require payment of taxes to state institutions, or require state institutions to regulate various forms of private activity (e.g., pollution).

21. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819) (necessary and proper clause grants Congress discretion to choose any appropriate means of exercising its powers); see also *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 143 (1971) ("[T]he affirmative

Article I, section 8 also grants Congress the obverse power: the power to prevent the spending of any public funds except as authorized by Congress. That is, even if there were no appropriations clause in the Constitution, Congress would have the power to enact a statutory "appropriations clause," worded exactly the same as the clause in article I, section 9, making Congress' appropriations power exclusive. If Congress could not prohibit the Executive from withdrawing funds from the Treasury, then the constitutional grants of power to the legislature to raise taxes<sup>22</sup> and to borrow money<sup>23</sup> would be for naught because the Executive could effectively compel such legislation by spending at will. The "legislative Powers" referred to in section 8 of article I would then be shared by the President in his executive as well as in his legislative capacity.

Since legislative appropriations power is rooted in article I, section 8, we may infer that a primary significance of the appropriations clause in section 9 lies in what it takes away from Congress: the option *not* to require legislative appropriations prior to expenditure. If the Constitution thus strictly forbids "executive appropriation" of public funds,<sup>24</sup> the exercise by Congress of its power of the purse is a structural imperative.<sup>25</sup>

The placement of the appropriations requirement in section 9 of article I, rather than in section 8, supports the understanding that it is not a grant of affirmative power,<sup>26</sup> or an expansion of other congressional powers,<sup>27</sup> but is, rather, a condition or limitation on the exercise of legislative

power of Congress—indeed, the power to which the phrase 'appropriation made by law' has reference—is the enumeration of powers in section 8, of course, of article I . . .") (statement of Prof. Alexander Bickel); 1 W. WILLOUGHBY, *supra* note 5, at 98; cf. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102, 116-18 (necessary and proper clause includes legislative power to limit "ancillary" constitutional powers vested in President).

22. U.S. CONST. art. I, § 8, cl. 1.

23. *Id.* art. I, § 8, cl. 2.

24. Inasmuch as "executive appropriation" would render Congress' other fiscal powers meaningless, it might be argued that even in the absence of the appropriations clause, Congress could not permit "executive appropriations." Under this view, the appropriations clause is a form of "clear statement" confirming the implicit constitutional command that only Congress (with the President in his legislative capacity) may appropriate federal funds. Cf. *McCulloch v. Maryland*, 17 U.S. at 420-21 (even without necessary and proper clause, Congress could enact all laws necessary and proper; the clause is simply a clear statement of this power).

25. Structural analysis may yield other constitutional imperatives as well. See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). See also Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 46, 48 (system of constitutional checks and balances depends on Congress' role as main policy-maker); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (structure of Constitution vests Congress, not Supreme Court, with ultimate authority for federal intervention in state government).

26. Cf. *McCulloch v. Maryland*, 17 U.S. at 419-20 (placement of necessary and proper clause at end of article I, section 8 confirms that it is grant of power to Congress, not limitation on that power).

27. In this respect, the appropriations clause is structurally different from the necessary and proper clause, which by "[i]ts terms purport[s] to enlarge . . . the powers vested in the government." *Id.* at 420. Congress' power to appropriate is an aspect of its authority to enact necessary and proper legislation to effectuate various constitutional powers; the appropriations requirement, on the other

power.<sup>28</sup> The Constitution's appropriations requirement is not only a condition *precedent* to executive branch action, but also a condition *subsequent* to general legislative directives. Because of the appropriations requirement, it is not enough for Congress to direct federal agencies to produce a better world; nor is it enough for Congress to list the authorized activities in which the executive branch of the government may engage. For the executive branch to act to achieve the ends of government identified by Congress, Congress must affirmatively authorize the funds to do the job.

Although the Constitution's appropriations requirement is not a typical grant of authority to the legislative branch, we may nonetheless usefully conceive of it as a "power." The requirement of legislative control over federal funds is a source of congressional authority over the operating arm of the federal government. This authority, which Congress *must* exercise over federal entities and activities, is analogous to the conditional spending power that Congress *may* exercise over states and other nonfederal entities pursuant to the Constitution's general welfare clause.<sup>29</sup> In each case, the ability to place conditions on the use of money authorized to be spent is a source of power over the recipient.

Limits on Congress' appropriations power derive from limitations on, and obligations of, the government expressed elsewhere in the Constitution. Thus, the First Amendment imposes a limitation upon the exercise of all government powers,<sup>30</sup> including Congress' appropriations power. Significantly, Congress is obliged to provide public funds for constitution-

hand, is a limitation on all federal power.

28. Other limitations on congressional power in article I, section 9 are the proscriptions against bills of attainder and ex post facto laws. U.S. CONST. art. I, § 9, cl. 3; *see also* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 225-29 (1985) (discussing limitations in section 9 of article I). Even when recognizing that the rest of article I, section 9 limits legislative power, commentators have summarily asserted that the appropriations clause limits only executive power. *See, e.g.*, 1 W. WILLOUGHBY, *supra* note 5, at 104-06; E. CORWIN, *supra* note 5, at 133-37.

I do not place primary significance on the placement of the appropriations requirement in section 9; this placement is but one aspect of the structural argument presented here. *See supra* text accompanying notes 9-25 (structural premises of Constitution); *supra* text accompanying notes 21-29 (relationship between power to appropriate and other legislative powers); *infra* text accompanying notes 30-38 (relationship between Congress' power to appropriate and President's constitutional powers); *infra* text accompanying notes 63-65 (relationship between statement and accounts clause and appropriations clause). Placement of the appropriations requirement in section 9 is consistent, however, with the dual intent of the framers both to limit the power of the executive branch and to restrain the federal government as a whole. *Cf.* G. WOOD, *supra* note 16, at 157 (discussing framers' mistrust of executive); *id.* at 376 (mistrust of government).

29. The term "spending power" as used in Supreme Court jurisprudence refers to legislative power to spend for the general welfare and common defense enumerated in article I, section 8. *See, e.g.*, *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 15-18 (1981), *modified on other grounds*, 465 U.S. 89 (1984). The appropriations requirement pertains to any expenditure of federal funds, whether the expenditure is made pursuant to the "spending power" or any other constitutional power. Commentators sometimes confuse the two terms, using the term "spending power" to mean "appropriations power," and vice-versa. *See, e.g.*, 1 W. WILLOUGHBY, *supra* note 5, at 98-99, 104-05.

30. *See Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976) (per curiam).



ally mandated activities—both obligations imposed upon the government generally<sup>31</sup> and independent constitutional activities of the President. For instance, in the area of foreign affairs, Congress itself would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties.<sup>32</sup> Although Congress holds the purse-strings, it may not exercise this power in a manner inconsistent with the direct commands of the Constitution.<sup>33</sup>

At the same time, the appropriations clause enjoins the President to spend funds in the name of the United States only as appropriated by Congress. Even where the President believes that Congress has transgressed the Constitution by failing to provide funds for a particular activity, the President has no constitutional authority to draw funds from the Treasury to finance the activity.<sup>34</sup> Spending in the absence of appropriations is *ultra vires*. Of course, where an emergency exists, the President might decide that principles more fundamental than the Constitution's appropriations requirement justify spending.<sup>35</sup> The constitutional processes

31. Some constitutional obligations directly compel the expenditure of money, such as the requirement of a periodic census. *See* U.S. CONST. art. I, § 2, cl. 3. Other constitutional provisions may be construed to require expenditure of public funds in particular situations. The equal protection clause, for instance, may require the government to expand the scope of a statutory entitlement, *see, e.g.,* *Califano v. Wescott*, 443 U.S. 76 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977), at least until and unless Congress amends the entitlement to avoid the equal protection violation. *See also* *Milliken v. Bradley*, 433 U.S. 267 (1977) (state ordered to pay cost of education improvement program).

32. *See* U.S. CONST. art. II, § 3 (presidential power to receive ambassadors); *id.* art. II, § 2, cl. 2 (presidential power to make treaties).

Another example is the President's pardon power, *id.* art. II, § 2, cl. 1. Congress' power over appropriations does not allow Congress to deny or to direct the pardon power. *Compare* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871) (Congress may not interfere with pardon power) *with* *Hart v. United States*, 118 U.S. 62 (1886) (pardon authority does not alter power of Congress subsequently to refuse appropriations to pay debts to persons pardoned).

33. *See* *United States v. Lovett*, 328 U.S. 303, 313-14 (1946) (Congress cannot enact bills of attainder through appropriations legislation); *see also* 41 Op. Att'y Gen. 507 (1960); 41 Op. Att'y Gen. 230 (1955); 4 Op. Off. Legal Counsel 731 (1980) (all stating that Constitution prohibits Congress from exercising appropriations power in a manner that violates other constitutional requirements); *cf.* *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (*per curiam*) (even where Congress has plenary legislative authority, it cannot exercise that authority so as to offend some other constitutional restriction).

34. If a court determines that Congress' failure to provide funds is unconstitutional, one would expect Congress to abide by this judicial decision and appropriate funds accordingly. If Congress fails to do so, however, a court has no more constitutional authority than does the President to mandate withdrawal from the Treasury. *See* *Reeside v. Walker*, 52 U.S. (11 How.) 272, 290-91 (1850); *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 589 (D.C. Cir. 1977). On the other hand, federal courts have constitutional authority to direct state fiscal operations in order to effectuate federal constitutional guarantees. *See, e.g.,* *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (affirming district court order enjoining local authorities to issue bonds and increase property tax levies to pay for desegregation remedies); *Frug, The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978) (discussing power of federal courts to require expenditures by states); *see also id.* at 750 (suggesting that judicial power stops short of enjoining Congress to appropriate).

35. For instance, at the outbreak of the Civil War, President Lincoln authorized the expenditure of two million dollars in public funds in advance of appropriations. "For this action there was no warrant whatever in law, but by taking it and other actions like it Lincoln conceived himself to have saved the government from overthrow." L. WILMERDING, *supra* note 4, at 14. As Wilmerding explains:

There are certain circumstances which constitute a law of necessity and self-preservation and

for resolving such situations, as well as cases where Congress fails to appropriate money for an inherent executive activity, are political.<sup>36</sup>

Although Congress may not completely frustrate the exercise of the President's constitutional duties, this is but a marginal circumscription of Congress' power over the purse and its other legislative powers. The President's duty to execute<sup>37</sup> subconstitutional law (i.e., treaties and statutes) is subject to plenary legislative regulation. Congress retains significant constitutional power to constrain the President through appropriations limitations as long as these constraints do not prevent the Executive from fulfilling indispensable constitutional duties.<sup>38</sup>

### C. *The Constitutional Function of "Appropriations"*

Generally, an appropriation is thought of as the specification of an amount of money for a federal agency or activity, while the range of actions on which the money may be spent is defined in other legislation<sup>39</sup> (or in conditions or "riders"<sup>40</sup> in appropriations bills themselves). This is an accurate description of legislative practice, but it obscures the importance of the power of the purse. The "Appropriations" required by the Constitution are not only legislative specifications of money *amounts*, but also legislative specifications of the *powers*, *activities*, and *purposes*—what we may call, simply, "objects"—for which appropriated funds may be used. Whether the constitutional demand for legislative authorization of public expenditure stems primarily from concerns with corruption or negligence in public expenditure, or from a political fear or distrust of an Executive

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which render the *salus populi* supreme over the written law. The officer who is called to act upon this superior ground does indeed risk himself on the justice of the controlling powers of the Constitution, but his station makes it his duty to incur that risk.

*Id.* at 12.

36. Political processes contemplated by the Constitution include elections and impeachment proceedings. *See also* 41 Op. Att'y Gen. 507, 526 (1960) ("Conceivably, under [the appropriations clause] Congress could refuse to appropriate any funds at all to implement legislation, however essential the appropriation might be for the country's welfare. The remedy in such a case would be political.").

37. U.S. CONST. art. II, § 3. *See* Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59, 90 (1983) (probable purpose of faithful execution clause was not to expand presidential power but "to rule out any power for him to . . . suspend . . . the execution of the laws").

38. *See* Van Alstyne, *supra* note 21, at 119 (Congress has sole power under necessary and proper clause "to determine and to make provision for incidental (but not indispensable) powers . . . in the executive [branch]"); C. BLACK, *supra* note 25, at 79-90 (discussing congressional power to limit executive power by enacting legislation).

39. *See* U.S. GEN. ACCOUNTING OFFICE, OFFICE OF GEN. COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-11 to 2-13, 2-22 to 2-25, 2-38 to 2-44 (1982) [hereinafter GAO PRINCIPLES]. Often the other legislation is organic or enabling legislation that creates a federal agency or a new federal activity. *Id.* at 2-11. *See, e.g., infra* note 43 (Comprehensive Employment and Training Act of 1973); *infra* note 44 (Domestic Volunteer Service Act of 1973). Such organic legislation is sometimes referred to by the somewhat misleading label "appropriation authorization." *See infra* note 135.

40. The term "rider" usually refers to nongermane conditions in appropriations legislation, *see* B. GROSS, *THE LEGISLATIVE STRUGGLE* 221 (1953), and thus has a negative connotation, *see, e.g.,* *Bengzon v. Secretary of Justice*, 299 U.S. 410, 415 (1937).

not subject to this check by Congress, the appropriations requirement ensures that the legislature in deciding the size and content of the federal budget decides also the size and content of the federal government.<sup>41</sup>

All appropriations thus may be conceived of as lump-sum grants with "strings" attached. These strings, or conditions of expenditure, constitute legislative prescriptions that bind the operating arm of government. Occasionally, conditions may be stated in an appropriations statute itself. For instance, an appropriations act may provide that "[n]o part of any appropriation contained in this Act shall be used . . . for publicity or propaganda purposes . . . ."<sup>42</sup> Alternatively, the appropriations act may require that the recipient federal agency allocate the amount appropriated among certain activities or in accordance with certain conditions.<sup>43</sup> Often, the appropriations act explicitly incorporates other legislation, notably substantive legislation creating particular federal agencies or programs or granting particular agency powers.<sup>44</sup> Moreover, all appropriations legislation effectively incorporates the prescriptions of statutes of general applicability.<sup>45</sup>

The concept of "appropriations" as developed through the centuries in England<sup>46</sup> and as adopted by the colonies<sup>47</sup> encompassed dual limitations on both amount and object. Legislative supremacy over the public fisc implies "the right to specify how appropriated moneys shall be spent,"<sup>48</sup>

41. The effective reach of federal governance depends on the range of activities funded by a particular appropriation. If authorized to do so, for instance, the Executive may by regulation impose significant out-of-pocket costs on private entities or state governments. But any executive activity itself costs money—including promulgation of regulations, imposition of fees, or oversight of state enforcement. If Congress does not authorize promulgation of regulations, a federal agency may not use them to expand the reach of its regulatory power.

42. Department of Labor and Health, Education, and Welfare Appropriations Act, fiscal year 1979, Pub. L. No. 95-480, § 407, 92 Stat. 1589 (1978).

43. See, e.g., Act of Oct. 1, 1981, Pub. L. No. 97-51, § 101(a)(1), (3), 95 Stat. 958, 958-59 (1981) (expired Nov. 20, 1981), *incorporating* H.R. REP. NO. 251, 97th Cong., 1st Sess. 2-3 (1981) (continuing appropriation for Department of Labor "for expenses necessary to carry into effect the Comprehensive Employment and Training Act of 1973, . . . . *Provided*, That no funds from any other appropriation shall be used to provide meal services at or for Job Corps centers.").

44. For an example, see the fiscal year 1977 appropriation for ACTION, Departments of Labor and Health, Education and Welfare Appropriations Act, 1977, Pub. L. No. 94-439, 90 Stat. 1418, 1434 (1976) ("For expenses necessary for ACTION to carry out the provisions of the Domestic Volunteer Service Act of 1973, as amended, \$108,200,000.").

45. See, e.g., *TVA v. Hill*, 437 U.S. 153, 174-88 (1978) (appropriation of funds for projects is subject to all generally applicable legislation, including Endangered Species Act).

46. See T. TASSWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 192, 217 (10th ed. 1946) (Parliamentary attempts to restrain "King's prerogative" to spend at will).

47. L. LABAREE, *ROYAL GOVERNMENT IN AMERICA* 269-305 (1930); V. BROWNE, *THE CONTROL OF THE PUBLIC BUDGET* 16 (1949).

48. R. BERGER, *EXECUTIVE PRIVILEGE* 113 (1974) (citing 2 H. HALLAM, *CONSTITUTIONAL HISTORY OF ENGLAND* 357 (1884)). That appropriations may be spent only on the objects for which they are appropriated is a fundamental underpinning of our democratic order. There were early impeachments of officials in England for misapplication of appropriated funds. See *STAFF OF THE IMPEACHMENT INQUIRY*, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT* 5, 7 (Comm. Print 1974); R. BERGER, *IMPEACHMENT* 70-71 (1973) (citing 1 HOWELL'S *STATE TRIALS* 89 (1816) (impeachment of King's Chancellor, 1386); 8 HOWELL'S *STATE TRIALS* 127 (1816) (impeachment of Treasurer of Navy,

which takes on added significance in a separation-of-powers regime. Our Constitution adopts this conception of appropriations. As Alexander Hamilton explained, "no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed."<sup>49</sup> The "extent" or amount of funding modifies and shapes the "object" funded.<sup>50</sup> One of the earliest statutes enacted by Congress to implement the appropriations clause<sup>51</sup> explicitly codifies this concept of object limitations on appropriations. The present codification of that legislation requires that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."<sup>52</sup> Another statute codifies the concept that appropriations must be spent within the time period specified by Congress.<sup>53</sup>

The specification of object and time limitations, as well as an amount limitation, for each appropriation assures that the public fisc will not be obligated without legislative authorization *and* that there will be a legislative authorization for all activity undertaken in the name of the United States. The amount limitation of an appropriation thus may reflect more than a budget constraint; it may reflect Congress' estimation of the object's value at a given time<sup>54</sup> or Congress' determination that additional financing from the public fisc is not desirable.<sup>55</sup>

1680)).

49. "Explanation," Nov. 11, 1795, in 8 A. HAMILTON, WORKS 122, 128 (H.C. Lodge ed. 1885) (emphasis in original). The quoted statement is from Hamilton's response to an anonymous open letter criticizing his performance as Secretary of the Treasury. See CONTROL OF FEDERAL EXPENDITURES, A DOCUMENTARY HISTORY 130 n.62 (F. Powell ed. 1939); see also THE FEDERALIST NO. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961) ("The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.").

50. Since the First Congress, appropriations acts have always incorporated or specified particular object limitations; Congress has never simply enacted a gross expenditure ceiling. Although the first general appropriations bill broke down the total sum (\$639,000) into only four line-items, Act of Sept. 29, 1789, 1 Stat. 95, "[t]his early dependence upon the Treasury [to allocate the amount appropriated] seems to have arisen because of the unpreparedness and lack of time on the part of the members [of the First Congress]." V. BROWNE, *supra* note 47, at 35. See *infra* Section III for further analysis of Congress' obligation to define both object and amount.

51. Act of March 3, 1809, 2 Stat. 535. This statute was enacted largely in response to the argument, first pressed by Alexander Hamilton and later renewed by members of President Jefferson's Cabinet, that the Executive was not bound by every detail in the legislative breakdown of aggregate appropriation amounts. See L. WILMERDING, *supra* note 4, at 22-23, 73-76. No one, however, suggested that the President could disregard all object limitations. See *id.* at 20-49.

52. 31 U.S.C. § 1301(a) (1982). The Anti-Deficiency Act also embraces the principle of object limitation. See *infra* note 157.

53. 31 U.S.C. § 1502 (1982). The Constitution specifically provides that the duration of army appropriations must be limited to two years, U.S. CONST. art. I, § 8, cl. 12; the general concept of some time limitation is implicit in the concept of "Appropriations," in order to make the specification of object and amount meaningful. From the First Congress, operating funds have usually been appropriated annually.

54. When Congress appropriates a sum for a particular government agency or activity, it may not merely be saying, "This is all the public fisc can afford at this time." Rather, it may be saying, "This is all the activity is worth," or "Government action costing any more is not socially desirable at this time."

55. Congress may choose to govern in ways that do not involve federal financing or activity by the operating arm of the federal government, see *supra* note 20 and accompanying text. For instance, Congress might require private companies to provide health insurance for all employees rather than

Despite the several structural prerequisites for federal action and the financing of that action,<sup>56</sup> the federal budget has grown faster than the nation's population or aggregate economy.<sup>57</sup> The growth in the federal establishment itself has been much slower.<sup>58</sup> Since the mid-20th century, federal purchases of goods and services have barely increased as a percentage of gross national product,<sup>59</sup> and the federal workforce has grown at a far lower rate than either gross national product or total federal spending.<sup>60</sup> While any system of popular control over the purse may tend toward growth in spending and budget deficits,<sup>61</sup> it is arguable that a different constitutional structure—without a separation between executive power and spending authority—might have led to an even larger federal establishment and a larger federal claim on the nation's productive capacities. Moreover, as this Article later suggests, some of the recent growth in federal spending may have been accomplished not *because of* Congress'

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underwrite such insurance from the public fisc. Or Congress might eliminate Social Security and instead require employers or employees to create and contribute to private retirement accounts which would yield exactly the same distribution of benefits as Social Security provides. *See also* Hart, *supra* note 9, at 525–30 (discussing ways Congress can use state law to accomplish federal objectives).

56. In addition to the requirement of legislative appropriations, there are other structural prerequisites for growth of the federal government. *See supra* text accompanying notes 9–16.

57. *See* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1989, Historical Tables, Table 1.2 (1988) [hereinafter 1989 BUDGET] (federal outlays as percentage of gross national product grew from approximately 10% in 1940 to approximately 23% in 1987). *Compare id.* Historical Tables, Table 6.1 (total federal outlays in constant dollars increased ten-fold since 1940) with ECONOMIC REPORT OF THE PRESIDENT FOR 1988, Table B-30 (1988) (showing approximately 85% increase in population since 1940). *See generally* L. KIMMEL, FEDERAL BUDGET AND FISCAL POLICY: 1789–1958 (1959).

58. *See* ECONOMIC REPORT OF THE PRESIDENT FOR FISCAL YEAR 1988, Table B-40 (1988) (total number of federal employees increased three-fold since 1940). In recent years the bulk of the growth in the federal budget has been in income transfer programs. *See* 1989 BUDGET, *supra* note 57, Historical Tables, Table 16.1 (showing domestic transfer payments grew from less than one-fifth of total federal spending in 1951 to nearly two-fifths of total federal spending in 1987).

59. *See* 1989 BUDGET, *supra* note 57, Historical Tables, Table 16.2 (federal purchases of goods and services was 8.2% of gross national product in 1951, and 8.5% in 1987).

60. *Compare* ECONOMIC REPORT OF THE PRESIDENT FOR FISCAL YEAR 1988, Table B-40 (1988) (showing approximately 50% growth in federal workforce between 1951 and 1987) with *id.* Table B-2 (gross national product in constant dollars increased by over 200% during same period) and 1989 BUDGET, *supra* note 57, Historical Tables, Table 6.1 (total federal outlays in constant dollars increased by 250% during same period).

61. Some public choice theorists argue that the requirement of legislative appropriations does not effectively check either growth in expenditure or growth in budget deficits. *See, e.g.,* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH (T. Borchering ed. 1977); J. BUCHANAN & R. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES 173–76 (1977). However, the factual premises of these arguments—that prior to the modern era there was a “moral” prescription for balanced budgets, and that in the modern era there has been continual, significant growth in total spending and total government debt—have been questioned. *See* Stein, *The Decline of the Budget-Balancing Doctrine*, in FISCAL RESPONSIBILITY IN CONSTITUTIONAL DEMOCRACY, 35–53 (J. Buchanan & R. Wagner eds. 1978) (no greater balanced-budget doctrine before 1929 than after); Eisner & Pieper, *A New View of the Federal Debt and Budget Deficits*, 74 AM. ECON. REV. 11 (1984) (real value of net debt has declined since World War II); Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 622–23 nn. 184–86 (1988).

power of the purse, but *in contravention of* Congress' constitutional responsibility to exercise control over federal expenditures.<sup>62</sup>

#### D. *The Principles of the Public Fisc and of Appropriations Control*

As shown above, appropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities. If the Executive could avoid limitations imposed by Congress in appropriations legislation—by independently financing its activities with private funds, transferring funds among appropriations accounts, or selling government assets and services—this would vitiate the foundational constitutional decision to empower Congress to determine what actions shall be undertaken in the name of the United States.

Federal agencies may not resort to nonappropriation financing *because their activities are authorized only to the extent of their appropriations*. Accordingly, without legislative permission, a federal agency may not resort to private funds to supplement its appropriations because it has no authority to engage in the additional activity on which it would spend the private funds. This restriction applies even where the nonappropriated funds would be used to finance activities resembling or duplicating activities that are underwritten with appropriated funds.

Similarly, the appropriations requirement prohibits the executive branch from transferring funds from one "object" of appropriation to another. A transfer of funds simultaneously increases the budget of one activity and decreases that of another, thus violating the terms of both appropriations. Similarly, an agency may not sell government assets or government goods and services and finance additional activities with the proceeds; such sales would contravene both the terms of the original appropriation and the terms of the appropriation for the activity on which the proceeds of the sale would be spent.

These conclusions derived from the Constitution's appropriations clause may be summarized in two governing principles. First, the *Principle of the Public Fisc*: All funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets—are public monies, subject to public control and accountability. This principle implies that all monies received by the United States are in "the Treasury," to use the language of the Constitution. "The Treasury" includes not only tax receipts, but also any borrowing on the credit of the United States and proceeds from the sale of government goods and services and gifts to the government. Second, the *Principle of Appropriations Control*: All expenditures from the public fisc must be made pursuant to a constitutional "Appropriation[ ] made by

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62. See *infra* text accompanying notes 195–206 (various forms of "backdoor" spending may represent abdication of Congress' power of the purse).

Law.” Together, the two principles prescribe that there may be no spending in the name of the United States except pursuant to legislative appropriation.

So understood, the Constitution’s appropriations requirement complements the companion “Statement and Account” requirement, placed in the same clause of the Constitution, which provides that “a regular Statement and Account of the Receipts and Expenditures of all *public Money* shall be published from time to time.”<sup>63</sup> Both clauses make Congress accountable to the public for all federal spending. The appropriations requirement mandates that government expenditure be authorized by legislative action. The statement and account requirement provides a means of enforcing the requirement that spending be duly authorized. The appropriations clause uses the phrase “Money . . . drawn from the Treasury,” while the statement and account clause uses the phrase “Receipts and Expenditures of public Money.” If there could be “public Money” that is not deposited in “the Treasury” prior to expenditure, then the scope of these complementary constitutional provisions<sup>64</sup> would differ. As a matter of textual coherence, the two phrases should be regarded as synonymous.<sup>65</sup>

As a consequence of the appropriations requirement, all “production” of government must be pursuant to legislative authority, even where the additional production is financed with donations and thus appears costless to the Treasury.<sup>66</sup> The requirement of legislative appropriation is not limited to occasions when Congress has invoked the taxing power or other

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63. U.S. CONST. art. I, § 9, cl. 7 (emphasis added).

64. The complementary nature of the two requirements is indicated not only by their placement and wording but also by their broader functions. Without statement and account review, executive agencies could evade the object and amount limitations of appropriations. See 19 ANNALS OF CONG. 1330-31 (1809) (“[U]nless the House examine if the amount of appropriation is exceeded by the expenditure; or if it be misapplied, that is, if money appropriated for one object be expended for another; unless we do this, sir, our control over the public purse is a mere name—an empty shadow.”) (statement of Rep. J. Randolph); see also L. WILMERDING, *supra* note 4, at 199 *passim* (“The Effort to Control After Expenditure”).

It may be noted that at the Constitutional Convention of 1787, the appropriations requirement was initially considered in tandem with revenue-raising provisions. It was originally proposed on July 3, 1787, that both revenue and expenditure bills be initiated in the House. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 523 (M. Farrand ed. 1911). However, the appropriations requirement was soon separated from the provision requiring that tax bills originate in the House (now U.S. CONST. art. I, § 7, cl. 1). The statement and account clause was not proposed until September 14, 1787; as initially proposed by George Mason, it would have provided that “an Account of the public expenditures should be annually published.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618-19 (M. Farrand ed. 1911). Madison does not record any discussion of why the statement and account clause was subsequently appended to the appropriations requirement in section 9. *Id.* at 619.

65. Equivalent coverage of the two clauses does not, by itself, necessarily imply that both include all public spending. For instance, the coverage of each might be limited to monies raised from taxes and government borrowing. However, the statement and account clause refers broadly to “*expenditures* of public Money” (emphasis added). It would be strange indeed if the Constitution required an accounting of only some expenditures by the executive branch.

66. The appropriations requirement thus encompasses all donated funds that are spent in the name of the United States, even if the funds are transferred directly from the private donor to the third party.

coercive powers. The appropriations requirement implements not only the idea of "no taxation without representation," but also the foundational premise of a federal government which is limited to constitutionally authorized activities.

Although absolute, the constitutional Principles of the Public Fisc and of Appropriations Control are inherently limited in scope. First, they encompass only monies which, pursuant to positive law, belong to the United States.<sup>67</sup> Under our constitutional order, Congress may not dispose of funds that are not funds of the United States.<sup>68</sup> There are many ways, of course, in which monies might become part of the public fisc.<sup>69</sup>

Second, and related, the principles apply only to spending undertaken in the name of the United States<sup>70</sup>—federal expenditures themselves, not consequential expenditures by third parties of monies originally provided by the federal government. Thus, the initial payment of federal grant funds from the United States to a recipient must be authorized by an appropriation from Congress, but no appropriation is required in order for the recipient to spend the funds (in accordance with the terms of the federal grant). The recipient is using funds provided by the federal government; but the funds are no longer part of the public fisc, and the recipient is not acting in the name of the federal government.<sup>71</sup>

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67. For instance, overpayment of federal income taxes results in money being physically received by the United States which does not legally belong to it; consequently, overpayments may be refunded without appropriation. See 13 Op. Att'y Gen. 439 (1871). Thus, although Congress has enacted a permanent appropriation for refund of amounts erroneously deposited to the Government, see 31 U.S.C. § 1322 (1982), it need not have done so. See also 4 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* 112-56 (1981). Similarly, funds held by the United States in escrow or in other trust arrangements in the course of litigation do not belong to the United States. See 60 Comp. Gen. 15, 26 (1980) ("Moneys properly held by a Federal agency in a trust capacity are not required to be deposited as miscellaneous receipts of the Treasury."). The public fisc is not implicated in these circumstances.

Conversely, the Principle of Appropriations Control does not require reappropriation of amounts refunded to a federal agency by a third party where the initial agency expenditure was erroneous or illegal, as, for instance, where a federal contractor refunds amounts mistakenly overpaid by a federal agency. See GAO PRINCIPLES, *supra* note 39, at 5-66.

68. Although it may be difficult in a particular case to determine whether monies are part of the public fisc, the problem is not unusual or necessarily difficult to solve. Indeed, a comparable determination must be made in all prosecutions under 18 U.S.C. § 641 (1982), which broadly prohibits all forms of theft of any "money, or thing of value of the United States" (emphasis added). See also Indictment—Count 2, United States v. Poindexter, No. 88-0080 (D.D.C. filed Mar. 16, 1988) (alleging violation of 18 U.S.C. § 641) (copy on file with author).

69. For instance, Congress may enact a tax statute, raising revenue through legal coercion. Or a private entity may voluntarily transfer monies to the United States in the form of a gift. The United States may receive funds from the sale of government goods and services or pursuant to a contract between the government and a private entity. The government also may invest public funds (pursuant to appropriation) in capital assets; the return on such investments belongs to the United States. Under the Principle of the Public Fisc and the Principle of Appropriations Control, all such monies may be spent only as authorized by legislation.

70. Although it may sometimes be a close factual question whether funds are being spent "in the name of the United States," this question, like that at *supra* note 68, is not novel or incomprehensible. See *infra* note 93.

71. Thus, if a recipient of federal funds violates the terms of his federal grant in spending the funds, it would not be proper to charge the recipient with theft from the government under 18 U.S.C. § 641 (1982), see *supra* note 68, unless the requisite criminal intent was formed prior to receipt of the



These two inherent limitations of the Principles of the Public Fisc and of Appropriations Control reflect the constitutional premise of limited government.<sup>72</sup> "The Treasury" does not consist of all potential government revenue—any more than the "federal government" consists of all potential exercise of government power. Rather, "the Treasury"—or "public Money," to use the term in the statement and account clause—consists only of those resources which, through constitutional processes, have been transferred to the government.

Hence when the government foregoes opportunities to obtain additional taxes, gifts, or other funds for the public fisc, Congress need not appropriate (or, for that matter, keep a statement and account of) these foregone government revenues. Just as congressional inaction may be as effective a method of governing as the affirmative exercise of congressional power through legislation,<sup>73</sup> so also "tax expenditures"<sup>74</sup> may allocate resources and affect income distribution in the same manner as direct spending. While as a matter of policy Congress may want to treat tax expenditures as equivalent to government spending,<sup>75</sup> the Constitution does not require any such treatment. The *creation* of a tax "loophole" is often a legislative act under article I.<sup>76</sup> But the actual *funds* constituting "tax expenditures" never belong to the United States, and the actual expenditure of these funds is accomplished by private persons or nongovernment entities and not in the name of the United States.<sup>77</sup>

The scope of the appropriations requirement would be much larger if the Constitution were based not on the premise of limited government but on the opposite premise—that all activity has political and governmental origins unless Congress decides otherwise. Under the latter premise, all resources would belong to the government until and unless the government transferred resources to nongovernment entities. The status of tax

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funds. Of course, depending on the terms of the grant, the recipient might be prosecuted for fraud or some other crime.

72. See *supra* text accompanying notes 9–19.

73. See also *supra* note 19 (as political or policy matter Congress' failure to act may be considered equivalent to congressional action).

74. See Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); 1989 BUDGET, *supra* note 57, at 6d-9 ("Tax expenditures are defined as amounts attributable to provisions of the Federal income tax laws that allow a special exclusion, exemption, or deduction from gross income or that provide a special credit, a preferential rate of tax, or a deferral of tax liability."). See generally M. GRAETZ, *FEDERAL INCOME TAXATION* 40–56 (2d ed. 1988).

75. See *infra* note 264.

76. Because tax expenditures are defined as deviations from a comprehensive income base, and the original personal income tax law enacted by Congress was largely comprehensive, most tax expenditures have been, as a factual matter, enacted by Congress—just as spending legislation is enacted. See M. GRAETZ, *supra* note 74, at 53 ("tax expenditures can be eliminated in two ways—by either repealing the tax expenditure or repealing the tax").

77. Similarly, the costs imposed by government regulation on nongovernmental entities do not fall within the appropriations clause, though as a matter of policy Congress may wish to treat them as if they did. See R. LITAN & W. NORDHAUS, *REFORMING FEDERAL REGULATION* 133–58 (1983) (discussion of "regulatory budget").

expenditures—indeed, of all foregone revenues—would be very different.<sup>78</sup> That tax expenditures are not subject to the requirement of appropriations control is not an oversight of the framers, revealing a failure to understand the concepts of opportunity costs and indirect subsidy; rather, it is a direct consequence of a fundamental tenet of our constitutional order.

### E. *The Power To Deny Appropriations*

The genius of regulating executive branch activities by limitations on appropriations is that these limitations can be bureaucratically<sup>79</sup> and contemporaneously enforced without the need for litigation or after-the-fact congressional investigations in every case.<sup>80</sup> Appropriations limitations constrain every government action and activity and, assuming general compliance with legislative prescriptions, constitute a low-cost vehicle for effective legislative control over executive activity. Should the Executive choose to ignore congressional declarations of policy, Congress may enact purse-string limitations.<sup>81</sup>

Historically, however, Congress has been reluctant to use appropriations control to limit federal activities in certain sensitive areas.<sup>82</sup> Only since World War II has Congress consistently enacted appropriations limitations as a means of controlling some aspects of foreign policy.<sup>83</sup> During

78. Similarly, if all action in the polity were considered to be, as an original matter, the action of the government (until and unless the government decided differently), then the "state action" requirement would have a very different constitutional significance. Cf. S. WOLIN, *supra* note 9, at 353-54 (contrasting liberal societies in which the "private" sphere is primary with totalitarian societies in which the government seeks "to render the political factor all-pervasive and the ultimate referent of existence").

79. I refer to accounting and budgeting officials within federal agencies, as well as to the Office of Management and Budget, which oversees allocation of appropriations and budget development in the executive branch. See generally F. MOSHER, *A TALE OF TWO AGENCIES* 99-123 (1984). Oversight of executive compliance with appropriations limitations is provided, to a degree, by the General Accounting Office. See *infra* text accompanying notes 226-47.

80. Of course, enforcement in any system will inevitably be imperfect and incomplete, and, as the Iran-contra hearings of 1987 demonstrate, misuse of government funds may occur. See IRAN-CONTRA REPORT, *supra* note 1, at 405-07 (violations of "Boland Amendment"); *id.* at 411-14 (unauthorized use of donated funds). It is interesting to note, however, that the activities managed by Lt. Col. Oliver North were conducted *outside* the bureaucratic channels of the CIA and, to the extent that proceeds from the sale of government assets were used, they were first "laundered." See IRAN-CONTRA REPORT, *supra* note 1, at 31-58 (explaining how in face of "Boland II" the CIA ceased contra-aid efforts and "[t]he NSC staff [took contra policy] underground," *id.* at 31); see also *id.* at 117-36 (chapter entitled "Keeping 'USG Fingerprints' Off the Contra Operation: 1984-1985"); *id.* at 137-53 (chapter entitled "Keeping 'USG Fingerprints' Off the Contra Operation: 1986").

81. See, e.g., Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1865 ("Boland I" prohibiting CIA use of appropriated funds "for the purpose of overthrowing the Government of Nicaragua"); Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 ("Boland II" prohibiting the CIA, Department of Defense "or any other agency or entity of the United States involved in intelligence activities" from spending "funds available" in support of the contras).

82. For an examination of legislative failure to control executive activity in foreign affairs in general, and the Iran-contra affair in particular, see Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

83. See generally Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS 145 (1953). The most common examples are in the area of foreign aid, enacted

the Vietnam War, Congress cut off funds for Cambodian operations<sup>84</sup> only after a statutory "declaration of policy"—*not* tied to continued funding—had failed to achieve that end.<sup>85</sup>

The "object" limitation used in the Cambodian situation (and used a decade later to constrain United States involvement in support of the armed Nicaraguan opposition, or *contras*) is especially powerful: the denial of *any* appropriated funds for a specific purpose.<sup>86</sup> Generally, a complete denial provides that no appropriated funds may be used for an activity that otherwise would be a proper object of expenditure from a lump-sum appropriation for the agency.<sup>87</sup> Where Congress thus denies appropriations, the denial is not merely a determination that the public fisc cannot afford spending any money on that activity. By such appropriations legislation, Congress decides that, under our constitutional scheme, for the duration of the appropriations denial, the specific activity is no longer within the realm of authorized government actions.

This legislative action denies the Executive all means of engaging in the prohibited activity because employee salaries and other overhead costs are almost invariably paid out of appropriated funds.<sup>88</sup> When government employees act on behalf of the United States, they are subject to every limitation that applies to appropriated funds. In principle, a government employee acting in an official capacity—including the President—may not spend one minute to make one phone call to solicit private funds (for use

pursuant to Congress' general "spending power." See *supra* note 29 and accompanying text; see, e.g., Mutual Security Act of 1954, Pub. L. No. 83-665, ch. 937, § 105(b)(1), 68 Stat. 832, 835; Foreign Aid Assistance Act of 1961, Pub. L. No. 87-195, § 620, 75 Stat. 444-45; Foreign Assistance Act of 1963, § 301(e), Pub. L. No. 88-205, 77 Stat. 386 (codified as amended at 22 U.S.C. § 2370(a)(2) (1982) (first Hickenlooper Amendment)).

84. See Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134.

85. See Act of Nov. 17, 1971, Pub. L. No. 92-156, § 601(a), 85 Stat. 423, 430 (Mansfield Amendment); see also Pub. L. No. 92-156, § 501(a), 85 Stat. 423, 427 (1971) (Fullbright proviso declaring, *inter alia*, that "nothing contained in this section shall be construed to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of United States Forces from Southeast Asia . . ."). The history and relationship of these provisions is discussed in Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 ST. LOUIS U.L.J. 1 (1973); Note, *Presidential Power to Make War*, 7 IND. L. REV. 900 (1974).

86. See *supra* note 81 ("Boland" amendments). It has been argued, however, that "Boland II," cutting off appropriated funds for the *contras*, did not by its terms encompass the National Security Council in the White House. See IRAN-CONTRA REPORT, *supra* note 1, at 489-99 (Minority Report). Where the intent is to deny all funds for a particular object, it would be desirable not to include unnecessary descriptive language (which may be construed as terms of limitation), such as Boland II's reference to agencies "involved in intelligence activities."

87. See, e.g., 5 Op. Off. Legal Counsel 180 (1981) (antilobbying restriction in appropriations for Community Services Agency (CSA) prohibits all such activity by CSA, even though in absence of such restriction, lobbying would be, under CSA's organic legislation, an authorized activity). See also *infra* note 95.

88. The administrative costs of nearly every government activity and agency are funded in one of the thirteen appropriations bills enacted each year. See S. COLLENDER, *THE GUIDE TO THE FEDERAL BUDGET* 44 (1987 ed.). Moreover, there are statutes that prohibit augmentation of employee salaries with outside funding. See, e.g., 18 U.S.C. § 209 (1982) (prohibiting all supplementation of government employee's salaried compensation for his government activity). In addition, a provision of the Anti-Deficiency Act prohibits uncompensated service by government employees. See *infra* note 150; *infra* text accompanying notes 147-52.

of the government or directly for a third party) for an activity explicitly denied appropriated funds.<sup>89</sup>

Even where Congress grants authority to an agency to spend donations or other receipts not deposited first in the Treasury,<sup>90</sup> that authority is not sufficient to permit continuation of an activity which has been denied all appropriated funds. Pursuant to the terms of the congressional action denying appropriations, an agency may not use donated funds to engage in a prohibited activity if any appropriated funds (including funds for employee salaries) would be expended in administering the donated funds.<sup>91</sup> Quite simply, the letter of the appropriation limitation applies to every penny of appropriations. Unless Congress clearly intends to permit continued use of gift funds for an activity explicitly denied "appropriated" funds, an agency has no authority to invoke its gift authority to avoid such object restrictions on its appropriations.

This is not an exaltation of form over substance; the form (an appropriations limitation) and the substance (a limitation on executive authority) are entirely congruent. Suppose, for instance, that Congress enacts an appropriation for the Department of Health and Human Services (HHS) which provides that "no funds appropriated herein" may be used for family planning programs or activities. This provision would prohibit HHS employees from administering or otherwise supporting the now-unauthorized family planning activity.<sup>92</sup> Although an employee of HHS perhaps could raise private funds for family planning programs by making a few phone calls, the employee is prohibited from doing these things while acting in his or her official capacity.<sup>93</sup>

In sum, there is no de minimis exception to appropriation limitations, just as there is no de minimis exception to the constitutional appropriations requirement. Appropriations for federal agencies, like conditions in

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89. As previously noted, Congress may itself violate the Constitution by failing to provide funds for presidential activities independently authorized by the Constitution. A presidential claim of such a violation, however, does not give the President constitutional authority to spend in the absence of appropriation. See *supra* text accompanying notes 34-38.

90. See *infra* text accompanying notes 124-34.

91. Where Congress has authorized a revolving fund for a particular activity, see *infra* text accompanying notes 114-21, it is possible that all employees are paid from the revolving fund account, rather than from annual appropriations. Nonetheless, because revolving funds are a form of "permanent appropriation," see *infra* text accompanying notes 167-72, a legislative prohibition on use of any appropriations for an activity encompasses monies in revolving funds. The so-called "non-appropriated fund" doctrine under the Tucker Act, 28 U.S.C. §§ 1491-1508 (1982), see *infra* note 169, is misleading to the extent it suggests otherwise.

92. The example given involves a domestic activity for which the President is given no constitutional responsibility beyond executing the law.

93. Whether an employee is acting in his capacity as an employee may be a difficult question, but it certainly is not an unanswerable one. Relevant considerations might be whether an employee undertakes the activity during office hours, uses official stationery (purchased with appropriated funds), identifies himself or herself as a government employee, or makes representations purporting to act on behalf of the United States. Such determinations must routinely be made in conflict-of-interest and other cases. See, e.g., 1 Op. Off. Legal Counsel 20 (1977).

spending programs for nonfederal entities,<sup>94</sup> are important sources of regulatory authority because the expenditure of any and all monies is conditioned upon compliance with prescribed policy. Where Congress prohibits use of any appropriated funds for an activity,<sup>95</sup> the Executive simply has no authority to finance the prohibited activity with either private or public funds.<sup>96</sup> By placing the power of the purse in Congress, the Constitution makes Congress accountable for the actions of the operating branch of the federal government.

## II. APPROPRIATIONS CONTROL: THE LEGISLATIVE FRAMEWORK

To a large extent, Congress' implementation of the appropriations requirement is consistent with the constitutional theory developed in Section I. Two types of legislation reveal Congress' historic understanding of the constitutional significance of legislative appropriations: particular appropriations statutes (or other legislation creating spending authority), and what may be termed "framework" statutes. This Section examines the latter. Framework statutes do not themselves grant spending authority; rather, they establish broadly applicable and usually process-oriented standards and rules. These general statutes provide the operational and definitional framework for the enactment and expenditure of appropriations and govern both the legislative appropriations process and the expenditure process within federal agencies.<sup>97</sup> Without an understanding of these framework statutes,<sup>98</sup> appropriations acts and other specific funding provisions cannot be properly interpreted or applied.

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94. See *supra* text accompanying note 29.

95. Is failure to appropriate any money the same as an explicit denial of appropriations? The answer is "no" if the unmentioned activity is nonetheless within the terms of activities that *are* funded. There is no need for Congress to list every activity that might conceivably be within "support for families," for example. However, failure to list and fund an activity is the same as explicitly denying funding for it if the unmentioned activity does not fall within other activities that are funded. For instance, if Congress simply did not mention family planning activities in the budget of HHS, any government support for such activities would be prohibited unless some other funded activity (such as "support for families") encompasses family planning programs. Obviously, the scope of funded activities is an issue of statutory interpretation.

96. See also Tribe, *Reagan Ignites a Constitutional Crisis*, N.Y. Times, May 20, 1987, A31, col. 2 (Boland amendment applies to "government revenues devoted to paying the salaries and expenses of intelligence operatives whenever their actions—such as the solicitation of contributions—[would aid the contras].").

97. Kenneth Dam has identified two such framework statutes as constitutional with a small "c". See Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 272, 278–82 (1977) (discussing Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.) and Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 298 (codified as amended in scattered sections of 1, 2, & 31 U.S.C.)).

98. In addition to the legislation that Dam has identified and the statutes discussed in text, I include as framework legislation other provisions that define terms used in appropriations acts, *see, e.g.*, 31 U.S.C. § 1511(a) (1982) (defining "appropriations"); that set forth rules of construction, *see, e.g.*, 31 U.S.C. § 1301(d) (1982) (providing that law may be construed as appropriation or permission to obligate United States contractually "only if the law specifically states that an appropriation is made or that such a contract may be made"); that limit the conditions under which an appropriation may be legally obligated and spent, *see, e.g.*, 31 U.S.C. § 1501 (1982) ("Documentary evidence re-

Two framework statutes originally enacted in the 19th and early 20th centuries—the Miscellaneous Receipts statute<sup>99</sup> and the Anti-Deficiency Act<sup>100</sup>—are especially important in ascertaining Congress' historical understanding and application of the appropriations requirement. Like the earliest framework statute, which mandated that appropriated funds be spent only on the "objects" for which the funds were appropriated,<sup>101</sup> the Miscellaneous Receipts statute and the Anti-Deficiency Act addressed a chronic problem Congress faced throughout the 19th century: ensuring that executive agencies did not obligate the public fisc except in the amounts appropriated by Congress.<sup>102</sup>

The general requirement in the Miscellaneous Receipts statute that any agent of the United States "receiving money for the Government from any source" shall deposit the funds into the Treasury<sup>103</sup> articulates the Principle of the Public Fisc: All monies of the federal government must be claimed as public revenues, subject to public control through constitutional processes. The Anti-Deficiency Act, on the other hand, articulates the Principle of Appropriations Control: No public funds may be expended except pursuant to legislative appropriations. As presently codified, the primary prohibition of the Anti-Deficiency Act makes it unlawful for a federal agency to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation . . . ."<sup>104</sup> These statutory assertions of the two constitutional principles are limited by certain open-ended statutory exceptions to the requirement of the Miscellaneous Receipts statute and by narrow application of the prohibitions of the Anti-Deficiency Act.

#### A. *The Miscellaneous Receipts Statute and Its Exceptions*

The Act of March 3, 1849 provided that all funds "received from customs, from the sales of public lands, and from all miscellaneous sources,

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quirement for Government obligations"); or that cancel spending authority, *see, e.g.*, Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (to be codified as amended in 1987 in scattered sections of 2, 31 and 42 U.S.C.) ("Gramm-Rudman-Hollings" law). The historical development of the legal framework governing enactment and administration of appropriations is examined in Stith, *supra* note 61.

99. Act of Mar. 3, 1849, ch. 110, 9 Stat. 398 (codified as amended at 31 U.S.C. § 3302(b) (1982)).

100. Act of Mar. 3, 1905, ch. 1484 § 4, 33 Stat. 1214, (codified as amended at 31 U.S.C. §§ 1341-1351 (1982)). Although the Anti-Deficiency Act as such was not enacted until the early 20th century, the rule against deficiencies was contained in several 19th century statutes. *See infra* notes 137-38.

101. Act of Mar. 3, 1809, 2 Stat. 535 (current version codified at 31 U.S.C. § 1301(a) (1982)). *See supra* text accompanying note 52.

102. *See generally* L. WILMERDING, *supra* note 4. Wilmerding gives due recognition to the Anti-Deficiency Act as an assertion of legislative control over spending. The significance of the Miscellaneous Receipts statute has not been widely understood, however; Wilmerding does not cite or allude to it.

103. 31 U.S.C. § 3302(b) (1982).

104. 31 U.S.C. § 1341(a)(1)(A) (1982).

for the use of the United States, shall be paid into the treasury of the United States . . . .”<sup>105</sup> Because it encompassed all receipts, the statute took on the unfortunately bland and unrevealing name of the “Miscellaneous Receipts” statute. As now codified in section 3302 of title 31 of the United States Code (“Money and Finance”), the statute provides that any “official or agent of the Government receiving money for the Government from any source shall deposit the money into the Treasury . . . .”<sup>106</sup>

Pursuant to the requirements of the Miscellaneous Receipts statute, all funds belonging to the United States—received “for the use of the United States” or “for the Government”—are part of the public fisc. All such funds must be deposited into the federal Treasury, from there to be appropriated by law.<sup>107</sup> Thus, for example, an agency may not circumvent legislative control by obtaining federal receipts directly from a tax collector. Moreover, an agency may not augment its appropriations with contributions from nongovernmental entities or with other nonappropriated funds. Any such monies received by an agency must be deposited into the Treasury.<sup>108</sup> The general requirement of the Miscellaneous Receipts statute thus both articulates and enforces<sup>109</sup> the Principle of the Public Fisc.

The most important aspect of the Miscellaneous Receipts statute, how-

105. 9 Stat. 398 (emphasis added). This provision was recodified as section 3617 of the Revised Statutes of 1873, with the language abbreviated to refer to funds “received from whatever source for use of the United States . . . .” See *supra* note 103; *infra* note 106 (current codification).

106. 31 U.S.C. § 3302(b) (1982) (emphasis added). The term “for the use of the United States” was shortened to “for the Government” as part of an effort to “eliminate unnecessary words.” See *id.* reporter’s notes.

Subsection (a) of § 3302, which requires that such funds be held safely prior to deposit into the Treasury, uses the term “public money” rather than “money for the Government.” This subsection is derived from a provision enacted prior to the original Miscellaneous Receipts statute, Act of Aug. 6, 1846, ch. 90, § 6, 9 Stat. 59, 60, and apparently uses the term “public money” synonymously with the term “money for the Government” in the Miscellaneous Receipts provision. See also *supra* text accompanying notes 63–65 (term “public Monies” in Constitution’s statement and account clause appears synonymous with term “Money . . . drawn from the Treasury” in Constitution’s appropriations clause).

107. See CONG. GLOBE, 30th Cong., 1st Sess. 475 (1848) (“This bill sought simply to put all the money into the public treasury, and draw it from the public treasury by law, according to the requirements of the Constitution, so as to get rid of the difficulty of spending two or three millions without authority of law, as we now did.”) (remarks of Rep. Toombs).

108. That the Miscellaneous Receipts statute requires funds to be deposited with other revenues in the Treasury (for disposition by Congress) rather than credited directly to an agency’s appropriations account (thereby being available for agency expenditure) is explained in a 1916 opinion by the predecessor to the Comptroller General, the Comptroller of the Treasury:

[The Miscellaneous Receipts statute] does not mean that the moneys are to be added to a fund that has been appropriated from the Treasury and may be in the Treasury or outside. It seems to me that it can only mean that they shall go into the general fund of the Treasury which is subject to any disposition which Congress might choose to make of it . . . . If Congress intended that these moneys should be returned to the appropriation from which a similar amount had once been expended it could have been readily so stated . . . .

22 Comp. Dec. 379, 381 (1916), quoted in GAO PRINCIPLES, *supra* note 39, at 5-64.

109. The Miscellaneous Receipts statute provides two types of civil penalties for its violation: removal from office and forfeiture of the improperly deposited funds. See 31 U.S.C. § 3302(d) (1982). Although the statute does not itself provide criminal penalties for its violation, there is a general criminal prohibition on theft of government funds. 18 U.S.C. § 641 (1982), discussed at *supra* note 68; cf. 31 U.S.C. § 1350 (1982) (criminal penalties for violation of Anti-Deficiency Act).

ever, may not be its general requirement that all public funds be deposited into the Treasury, but rather the exceptions to this requirement that Congress has enacted from time to time. These statutory exceptions expressly permit particular federal agencies to receive and spend funds from private and other nongovernment sources, rather than deposit them into the Treasury for subsequent appropriation by Congress. There are three major types of legislation that create exceptions to the general requirement of the Miscellaneous Receipts statute: first, legislation that allows agencies to retain certain "collections"; second, legislation that permits agencies to create certain "revolving funds"; and, third, legislation that grants certain agencies "gift authority."

Congress permits some agencies that collect fees or otherwise obtain receipts in the course of their activities to retain and spend such collections (sometimes referred to as "reimbursements")<sup>110</sup> without any further legislative process.<sup>111</sup> The collections are credited not to any receipt account of the federal government, but rather, directly to the agency's appropriations account.<sup>112</sup> These funds typically are available for spending by the agency in addition to whatever funds Congress appropriates for the agency's activities, though Congress may in the annual appropriations act for the agency limit the total amount of spending that can be financed by collections.<sup>113</sup>

Revolving funds are a species of collection authority. Most revolving funds sustain enterprises of the government which are commercial in nature, such as loan programs. Generally, the initial capital contribution for a revolving fund is made by appropriation; thereafter, continuing provi-

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110. The Office of Management and Budget refers to these receipts as "offsetting collections credited to appropriation or fund accounts" (as opposed to being credited to a government receipt account). See 1989 BUDGET, *supra* note 57, at 6e-14 to 6e-15. The GAO refers to these funds as "reimbursements." See 62 Comp. Gen. 70, 73 (1982) ("Reimbursements are sums received as a result of commodities sold or services furnished either to the public or to another Government account, which are authorized by law to be credited directly to a specific appropriation.").

111. Many agencies have authority to charge fees where services inure to the benefit of particular recipients. See Independent Offices Appropriation Act of 1952, 31 U.S.C. § 9701 (1982); *New England Power Co. v. Federal Power Comm'n*, 467 F.2d 425, 428 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974); see also 48 Comp. Gen. 24 (1968) (broadly construing user charges statute). Additionally, there are special authorizations to collect fees. See, e.g., 19 U.S.C. § 1451 (1982) (Customs Service may charge for certain services). Sometimes the statutory authorization permits such fees to be credited directly to an agency's appropriation account; at other times the receipts must be deposited as miscellaneous receipts. Compare 38 U.S.C. § 5009 (1982) (VA may retain parking fees) with 10 U.S.C. § 2667 (1982) (Department of Defense must deposit lease receipts in Treasury).

112. See 1989 BUDGET, *supra* note 57, at 6e-15 ("The outlays of the appropriations or fund account are quantified as disbursements less offsetting collections."). This treatment is to be contrasted with the treatment of most receipts of the government. All tax revenues of the federal government and certain other receipts, including off-shore oil royalties, are credited to receipt accounts and hence must be appropriated before being spent. See *id.* at 6e-14 to 6e-15 ("Governmental Receipts" and most "Offsetting Receipts" are credited to receipt accounts).

113. *Id.* at 6e-15 ("[Offsetting collections credited to appropriations or fund accounts are] available to [be spent] for the purpose of the account without further action by the Congress. However, it is not unusual for the Congress to enact limitations on the obligations that can be financed by these collections.").



sion of the service or activity is financed by income generated by the activity itself.<sup>114</sup>

Revolving funds and other types of collections have been legislatively authorized to support various activities since the earliest years of the nation.<sup>115</sup> A number of revolving funds were created during and immediately after the First World War to avoid the delay and uncertainty of the legislative appropriations process.<sup>116</sup> During the New Deal era, creation of these funding mechanisms (and, often, creation of government corporations to administer the funded activities) increased markedly.<sup>117</sup> These new agencies of government outside the ambit of appropriations control have been compared to "medieval kings, [who] 'lived of their own.'"<sup>118</sup> Although many revolving funds and other government enterprises with collection authority have been established,<sup>119</sup> including several large off-budget public enterprises,<sup>120</sup> the gross magnitude of such collections immediately available for expenditure is difficult to determine.<sup>121</sup>

114. See GAO PRINCIPLES, *supra* note 39, at 5-75; 1989 BUDGET, *supra* note 57, at 6c-14 to 6c-15 (all laws creating revolving funds authorize crediting collections directly to expenditure accounts).

115. The first permanent revolving fund was for the operation of the Post Office. See Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. The original Miscellaneous Receipts statute expressly preserved this revolving fund. See Act of Mar. 3, 1849, ch. 110, 9 Stat. 398. Special reference to the Post Office was deleted in subsequent codifications. Another early revolving fund was established by Act of Mar. 3, 1828, ch. 101, 4 Stat. 131 (authorizing President to dispose of surplus ships and to apply proceeds to build vessels "which have been, or may be, authorized to be built"); see also Act of Aug. 10, 1846, ch. 178, § 5, 9 Stat. 102, 104 (creating revolving fund from bequest of James Smithson) (current codification at 20 U.S.C. § 53 (1982)).

116. See, e.g., Act of July 9, 1918, ch. 143, 40 Stat. 845, 850 ("proceeds of any [sale of war supplies] shall be deposited to the credit of that appropriation out of which [the property was bought]"); Transportation Act of 1920, ch. 91, 41 Stat. 456, 459 (permitting ICC to establish revolving fund); Act of Mar. 21, 1918, ch. 25, § 12, 40 Stat. 451, 457-58 (creating revolving fund to finance railroads temporarily placed under federal control). Secretary of the Treasury Carter Glass noted that such funding mechanisms contained no amount limitation. Glass complained that they were therefore largely subject to executive rather than legislative control. See DEPARTMENT OF THE TREASURY, ANNUAL REPORT 126 (1919).

117. See generally A. WALSH, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS 26-36 (1978); L. WILMERDING, *supra* note 4, at 187-95.

118. L. WILMERDING, *supra* note 4, at 187; see also R. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 615-36 (1974). Moses developed public corporations as entities with "not only the powers of a large private corporation but some of the powers of a sovereign state . . . a new, fourth branch [of government] . . . that would . . . in significant respects, be independent of the other three." *Id.* at 623-24. The key to Moses' power was his independence from state and city appropriations processes. "If he wanted to remake the city, it was clear, he was going to have to do the job without its money. But if he was to keep the authorities' revenues, keep them indefinitely, he would have the money." *Id.* at 620.

119. Some of these are quite large—such as the Federal Deposit Insurance Corporation; others are small—such as revolving fund financing of commissaries at military bases. Most direct loan programs of the federal government are financed as revolving funds. See GAO PRINCIPLES, *supra* note 39, at 5-75.

120. See 1989 BUDGET, *supra* note 57, app. pt. IV (showing receipts and outlays for "government-sponsored enterprises," including Student Loan Marketing Association, Federal National Mortgage Association, Farm Credit Administration banks, and Federal Home Loan banks).

121. There is no separate, comprehensive listing of all revolving funds and other activities with collection authority, either in the President's budget documents or in congressional budget documents. In both sets of documents all such programs are interspersed among budget data pertaining to other government activities. See *id.* app. pt. I (showing net collections and certain revolving fund receipts interspersed among annual appropriations and other sources of spending authority); S. DOC. NO. 21,

The third and most recent form of statutory exception to the general requirement that all public funds be deposited to the Treasury is agency "gift authority." Congress need not enact legislation in order for the United States government as a whole ("the Treasury") to receive gifts, for the government has inherent authority to accept voluntary donations from private entities.<sup>122</sup> In any event, the Miscellaneous Receipts statute confirms that such gifts must be received on behalf of the government as a whole, not on behalf of any one agency or any particular government activity. Under the Miscellaneous Receipts statute, even conditional contributions to the United States (donations made for specific government activities, or in-kind gifts that by their terms may not be resold) must be deposited in the Treasury. In turn, legislative authorization is required before the gift may be "drawn from the Treasury" and spent on its intended governmental activity.<sup>123</sup>

In this century, and especially since the New Deal, Congress has granted statutory "gift authority" to many federal agencies.<sup>124</sup> Under such a statute, the agency is not required to deposit conditional gifts (gifts earmarked for the general purposes or a specific purpose of the agency) in the Treasury. Instead, the agency may spend these sums (within the terms of the gift) without further legislative authorization. The terms of gift authority vary—sometimes allowing for acceptance of any gift,<sup>125</sup> at other times allowing for acceptance of only certain types of gifts.<sup>126</sup> In all cases, the gift authority allows the agency to spend contributions, in addition to

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98th Cong., 1st Sess. pts. II & III, at 999-1024 (1985) (listing all "permanent appropriations" for fiscal years 1983 and 1984).

122. See *United States v. Burnison*, 339 U.S. 87, 90 (1950) ("Uninterrupted usage from the foundation of the Government has sanctioned [acceptance of donations]."). See generally Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432-37 (1987) (government as corporation with attendant powers).

123. See H.R. REP. NO. 2019, 83d Cong., 2d Sess. 1-2 (1954) (citing Miscellaneous Receipts statute):

Under existing law, the Government is authorized to accept unconditional donations, and money so received is covered into the Treasury of the United States and used for the general expenses of the Government. However, the acceptance of gifts conditioned upon their use for a specified purpose is not permitted because all money received by the Treasury Department, whether in cash or in the form of property which has been converted into cash, must be covered into the miscellaneous receipts account to await appropriation by the Congress.

*Id.*

124. See *Story v. Snyder*, 184 F.2d 454, 461-63 (D.C. Cir.) (Appendix listing grants of gift authority), *cert. denied*, 340 U.S. 866 (1950); Letter from Comptroller General to Chairman, Subcomm. on Limitations of Contracted and Delegated Authority, U.S. Senate Comm. on Judiciary: Review of Federal Agencies' Gift Funds (Sept. 24, 1980) [hereinafter GAO Letter] (unpublished report showing gift authority of 41 federal agencies) (copy on file with author).

Apparently, the most complete listing of gift funds is that in budget data published by Congress each year. See S. DOC. NO. 21, *supra* note 121, at 1011 (showing permanent appropriations of all "trust funds," including gift accounts; noting that the "amounts shown are estimated and are thus subject to revision as better data become available during the fiscal year").

125. See, e.g., Public Health Service Act, ch. 373, 58 Stat. 682, 709, § 501(a)-(b) (1944) (codified at 42 U.S.C. § 300cc(a)-(b) (1982)) (granting Public Health Service authority to receive donations and to expend them "in the operation of the Service and the performance of its functions.").

126. See generally 46 Comp. Gen. 689, 689-91 (1967).

separately appropriated funds, rather than depositing the contributions into the Treasury as miscellaneous receipts.<sup>127</sup>

Perhaps the most open-ended grant of gift authority is the statute relating to gifts made to aid the defense activities of the government. Enacted temporarily in 1942,<sup>128</sup> and reenacted as permanent legislation in 1954, this statute authorizes the Secretary of the Treasury to "accept or reject on behalf of the United States any gift of money or other intangible personal property made on condition that it be used for a particular defense purpose."<sup>129</sup> The legislation then directs that the Secretary of the Treasury "shall from time to time pay the money in such special account to such of the various appropriation accounts as in his judgment will best effectuate the intent of the donors . . . ."<sup>130</sup>

This statute appears to have been the first instance in which Congress granted permission for the executive branch to receive and spend conditional gifts with respect to a core government activity such as national defense. Previously, Congress had created gift funds for only a few specialized activities, such as support for the Library of Congress.<sup>131</sup> Money contributed for other governmental purposes simply remained "in trust" until Congress enacted legislation permitting its expenditure.<sup>132</sup> Since the early 1950's, however, Congress has granted to many agencies the authority to receive conditional gifts and to spend these on authorized purposes of the agency without further legislative action.<sup>133</sup> Indeed, at least one

127. In 1980 the GAO provided an in-depth accounting of gift revenues of 41 federal agencies. The GAO reported that the total of gift revenues in fiscal year 1979 amounted to just over \$26 million. However, the report did not claim to be a comprehensive or thorough analysis of all gifts received by the United States, because of the many different statutory authorizations to receive gifts, the different reporting requirements in the various statutes, and the fact that Congress has not sought to exercise comprehensive oversight. See GAO Letter, *supra* note 124; see also *infra* note 163.

128. See Second War Powers Act of 1942, ch. 199, § 1101, 56 Stat. 176, 183-84.

129. 50 U.S.C. § 1151 (1982).

130. 50 U.S.C. § 1154 (1982). In 1946 Congress enacted a similar provision for gifts "for the benefit of the Department [of State]." Foreign Service Act of 1946, § 1021, 60 Stat. 999, 1031 (codified as amended at 22 U.S.C.A. § 2697 (West Supp. 1988)); see also *infra* notes 163 & 203.

131. Act of Mar. 31, 1925, ch. 423, 43 Stat. 1107 (codified as amended at 2 U.S.C. §§ 154-163 (1982)) (permitting Trust Fund Board of Library of Congress to accept gifts for Library); see also Act of July 16, 1935, ch. 375, § 2, 49 Stat. 477 (trust fund for national parks), *repealed by* Pub. L. No. 90-209, § 2, 81 Stat. 656 (1967); Act of July 9, 1941, ch. 284, § 5, 55 Stat. 581, 581-82 (trust fund for National Archives); Act of Nov. 7, 1941, ch. 469, § 2, 55 Stat. 760, 760-61 (trust fund for Saint Elizabeths Hospital in Washington, D.C.), *repealed by* Pub. L. No. 98-621, 98 Stat. 3380 (1984). These statutes permitted gifts conditioned on their use for the particular purpose of the trust fund; the donors could not further condition their gifts on specific items or activities within the purpose of the trust fund.

132. See 11 Comp. Gen. 355, 356 (Mar. 19, 1932) (bequest to naval hospital cannot be used without specific statutory authorization). *But see* Varney v. Warehime, 147 F.2d 238 (6th Cir.), *cert. denied*, 325 U.S. 882 (1945) ("trust funds" received by agency need not be deposited into Treasury) (decision criticized *infra* note 144). In addition, the Comptroller General and the Attorney General have issued numerous opinions holding that the government cannot accept gifts which require appropriations to maintain. See, e.g., 10 Comp. Gen. 395 (1931) (no authority to accept memorial); 21 Op. Att'y Gen. 537 (1897) (no authority to accept Catholic chapel for West Point); 30 Op. Att'y Gen. 527 (1916) (no authority to accept gift of President Cleveland's birthplace).

133. See *supra* note 127; Op. Comp. Gen. B-149711 (Aug. 20, 1963) (listing statutory authorizations to accept gifts) (unpublished opinion), *cited in* GAO PRINCIPLES, *supra* note 39, at 5-83; see

agency—the United States Information Agency—is explicitly authorized to solicit funds from nongovernmental entities and to spend them for particular purposes without further appropriation by Congress.<sup>134</sup>

The statutory authorizations<sup>135</sup> for collections, revolving funds, and acceptance of conditional gifts set the operative contours of the Miscellaneous Receipts statute. Section III considers whether these legislative exceptions to the requirements of the Miscellaneous Receipts statute deviate from the constitutional Principle of the Public Fisc.

## B. *The Anti-Deficiency Act*

While the Miscellaneous Receipts statute defines the scope of the public fisc, the Anti-Deficiency Act defines the scope of public expenditure. The two major provisions of this Act—the rule against deficiencies and the rule against voluntary service—were enacted in response to federal agencies incurring “coercive” deficiencies and thereby circumventing amount limitations in appropriations legislation.<sup>136</sup>

### 1. *The Rule Against Deficiencies*

Congress first enacted legislation prohibiting expenditures in excess of appropriations in 1820.<sup>137</sup> While that statute applied only to major federal agencies, a broader prohibition, applicable to all federal agencies, was

also 31 U.S.C. § 1321(a) (1982) (listing “trust funds”).

One statute permits the Secretary of the Treasury to receive donations made for the express purpose of reducing the national debt. Although such gifts are nominally “conditional,” their effect is the same as unconditional gifts; such funds are simply a form of miscellaneous receipts. See 31 U.S.C. § 3113 (1982).

134. 22 U.S.C. § 2455(f) (1982) (“Foreign governments, international organizations and private individuals, firms, associations, agencies, and other groups shall be encouraged to participate . . . and to make contributions of funds, property, and services which the President is authorized to accept, to be utilized to carry out the purposes of this chapter.”).

135. The reader should not be confused by the term “authorization.” That term means, simply, permitted by legislation. The term “authorized” does not refer to so-called “appropriation authorizations,” which are a particular form of legislation having little to do with “Appropriations” under the Constitution. An agency’s authority to spend is limited to the amount appropriated, not the amount in any “appropriation authorization” act. These “appropriation authorizations” are enacted pursuant to internal House and Senate rules which require that no money be appropriated which is not previously denoted in “appropriation authorization” legislation. See W. BROWN, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 398, 96th Cong., 2d Sess. 528-44 (1981) (Rule XVI(2)); SENATE COMM. ON RULES AND ADMIN., SENATE MANUAL, S. DOC. NO. 1, 96th Cong., 1st Sess. 14-15 (1979) (Rule XVI (2)). Thus, the money amounts in “appropriation authorizations” are communications from Congress to Congress itself, not to the federal agency receiving money. See GAO PRINCIPLES, *supra* note 39, at 2-11 to 2-13.

136. The term “coercive” apparently refers to agencies effectively “coercing” Congress into enacting supplemental appropriations to cover the deficiencies incurred. See L. WILMERDING, *supra* note 4, at 137; 59 Comp. Gen. 369, 372 (1980). The term is misleading to the extent it suggests coercion by operation of law. See *infra* text accompanying notes 158-62. Recent framework legislation addresses the obverse issue: ensuring that executive agencies expend all public funds appropriated. See *infra* note 241.

137. Act of May 1, 1820, ch. 52, § 6, 3 Stat. 567, 568 (“[N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment. . . .”).

enacted in 1870,<sup>138</sup> and was reenacted, with criminal penalties, as the primary prohibition of the Anti-Deficiency Act of 1905. Both the 1870 and the 1905 statutes made it unlawful for any federal agency to spend in excess "of appropriations made by Congress."<sup>139</sup> The present codification of the Anti-Deficiency Act in title 31 of the United States Code makes it unlawful for "[a]n officer or employee of the United States . . . [to] make or authorize an expenditure or obligation exceeding an amount available in an appropriation . . . ."<sup>140</sup> The next sentence of the current codification specifically prohibits government contracts in advance of appropriations "unless authorized by law."<sup>141</sup>

The anti-deficiency rule thus prevents unfunded monetary liabilities beyond the amounts Congress has appropriated. For instance, one common 19th-century abuse which the rule against deficiencies was designed to prevent was the borrowing of funds by federal agencies (without legislative permission) in anticipation of future appropriations.<sup>142</sup> When the Executive borrowed beyond amounts actually appropriated, Congress enacted supplemental appropriations in order to repay the amounts borrowed.<sup>143</sup> By prohibiting federal agencies from *obligating* federal funds beyond the amounts appropriated, the rule against deficiencies ensures that Congress'

138. Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 ("[I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.").

139. *Id.* The Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257-58 provided: "No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriation unless such contract or obligation is authorized by law."

140. 31 U.S.C. § 1341(a)(1) (1982). The criminal penalty is codified at 31 U.S.C. § 1350 (1982). Apparently, there have been no prosecutions under this provision, but it has clearly had an *in terrorem* effect. *See, e.g.,* N.Y. Times, Sept. 30, 1980, A18, col. 1 (quoting federal official's comment on Congress' failure to enact new fiscal year appropriations: "[T]o permit continued government operations is really a very serious situation—a violation of the Antideficiency Act, a criminal act. The consequences are awesome."). It was reported that the Independent Counsel investigating the Iran-contra affair considered charging violations of the Anti-Deficiency Act. *See* Crovitz, *Walsh Is Above the Law*, Wall St. J., Mar. 15, 1988, at 34, col. 4; *see also* IRAN-CONTRA REPORT, *supra* note 1, at 412-14 & 412 n.\*\* (suggesting that certain contra-aid activity violated Anti-Deficiency Act). The indictment, however, contains no such charge. *See* Indictment, *United States v. Poindexter*, No. 88-0080 (D.D.C. filed Mar. 16, 1988) (copy on file with author); *see also supra* note 68.

141. 31 U.S.C. § 1341(a)(1)(B) (1982) provides: "[A government employee may not] involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

142. *See* 17 ANNALS OF CONG. 852 (1807) (remarks of Rep. J. Randolph):

[W]here a head of department wants money, purchases may be made upon credit, with an understanding at the banks and with the purchaser that the notes are issued for the service of Government. . . . Here, although the money has gone out of the bank, it is, in legal phrase still in the Treasury, until Congress meet and pass an appropriation law, when having been paid to take up the notes it marches again out in official costume and parade.

143. *See* 59 Comp. Gen. 371, 372 (1980) ("The Anti-Deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations. . . . The Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse. . . .").

power of the purse will not be undermined by unauthorized prior obligations of the Executive.

Remarkably, however, the full implications of the anti-deficiency rule have not been explicitly acknowledged by Congress, executive agencies, or scholars. The rule articulates the Principle of Appropriations Control, prohibiting *any* expenditure beyond the amounts appropriated, even when the unauthorized expenditures do not require supplemental appropriations.<sup>144</sup> Yet both the Attorney General and the Comptroller General—in advisory opinions concerning the legality of proposed federal expenditures<sup>145</sup>—usually have relied on the Anti-Deficiency Act for the proposition that federal officials may not impose future obligations on the Treasury of the United States in excess of the amounts appropriated by Congress. They have generally relied on the Miscellaneous Receipts statute for the proposition that public officials may not, without legislative permission, fund government activities through private funds or receipts from the conversion of government goods and services.<sup>146</sup>

## 2. *The Rule Against Voluntary Service*

The second major prohibition of the Anti-Deficiency Act proscribes “voluntary service” on behalf of the government. Originally enacted in 1884 and reenacted as part of the Anti-Deficiency Act of 1905, the present codification provides that federal agencies may not accept “voluntary service for the Government” or employment of “personal service in excess

144. Only one authority has been found that clearly denies this understanding. See *Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir.), *cert. denied*, 325 U.S. 882 (1945). This unpersuasive opinion asserts that the appropriations clause and, by inference, the Anti-Deficiency Act encompass spending only from monies “arising from taxes, customs, etc.” and not fees or assessments imposed pursuant to the federal government’s regulatory power (much less gifts to the government). See also Lacovara, *A Watergate Counsel Reflects: What Laws Apply to Iran Deal?*, *Legal Times*, Feb. 23, 1987, at 15, col. 3 (“it would be a stretch” to apply Anti-Deficiency Act, because diverting proceeds of Iran arms sales to contras did not create new monetary obligation on Treasury).

145. The Attorney General’s obligation to render legal opinions to the President derives from article II, § 2 of the Constitution. Since the Judiciary Act of 1789, § 35, 1 Stat. 92, the Attorney General has been authorized to give opinions to the President and the heads of executive departments. See 28 U.S.C. §§ 511-512 (1982). Traditionally, certain formal opinions signed by the Attorney General had been published in *Opinions of the Attorney General*. Between 1977 and 1981, many opinions signed only by the Assistant Attorney General for the Office of Legal Counsel were also published, along with Attorney General opinions, in *Opinions of the Office of Legal Counsel*; a volume containing 1982 opinions was published in mid-1988. See also *infra* text accompanying notes 219-25.

Comptroller General opinions may be issued at the request of executive officials, private claimants, or others, including, perhaps most notably, Members of Congress. See GAO PRINCIPLES, *supra* note 39, at 1-3 to 1-5. The most significant of these are published in *Decisions of the Comptroller General*. See also *infra* text accompanying notes 234-39.

146. See, e.g., 17 Op. Att’y Gen. 592 (1883); 59 Comp. Gen. 294 (1980); 46 Comp. Gen. 1, 3 (1967); cf. 5 Op. Off. Legal Counsel 126 (1981) (Reagan Administration could use private donations to supplement appropriated funds for presidential transition activities; opinion did not cite either Anti-Deficiency Act or Miscellaneous Receipts statute). One of the few opinions to recognize the relevance of the rule against deficiencies to augmentation of appropriations with donations is 15 Op. Att’y Gen. 209 (1877), discussed *infra* note 161 and accompanying text.

of that authorized by law” except in emergencies involving loss of human life.<sup>147</sup>

Both the Comptroller General and the Attorney General have given this provision a curious construction. They have concluded that the relevant legislative history shows that Congress’ concern was not with voluntary service to the government per se, but, on the contrary, with the possibility that uncompensated services might ultimately be treated as creating a right to receive payment or otherwise result in subsequent demands for payment from Congress.<sup>148</sup>

As a result of this interpretation, a statute that appears to prohibit employment of persons without appropriations to pay them has been used as authority for the proposition that *truly* voluntary service, with no right or expectation of repayment, is indeed permissible.<sup>149</sup> Thus, for example, when Congress fails to enact annual appropriations acts prior to the start of the fiscal year, government employees may not continue to work (except in cases of emergency) because it is expected that Congress will eventually appropriate funds to compensate the employees.<sup>150</sup> On the other hand, where a volunteer cannot plausibly support a subsequent demand for compensation—such as where the volunteer in writing releases the government from any such obligation—the Anti-Deficiency Act’s prohibition on voluntary service is deemed not to apply.<sup>151</sup> In effect, the voluntary service prohibition has been treated as a form of gift authority; that is, as another exception to the Miscellaneous Receipts statute, allowing “receipt” (and expenditure) of in-kind services where the service is deemed to be truly gratuitous.<sup>152</sup>

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147. 31 U.S.C. § 1342 (1982). The original voluntary services prohibition was enacted as a rider to an urgent supplemental appropriations bill, Act of May 1, 1884, ch. 37, 23 Stat. 15, 17 (1884) (“hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in . . . emergency . . .”). When reenacted as part of the Anti-Deficiency Act of 1905, the prohibition on voluntary service was stated as follows: “Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving loss of human life or the destruction of property.” Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257.

148. See, e.g., 5 Op. Off. Legal Counsel 1, 8 (1981); 4 Op. Off. Legal Counsel 16, 17 (1980); *infra* note 149.

149. See, e.g., 26 Comp. Gen. 956, 958 (1947); 54 Comp. Gen. 560 (1975); 30 Op. Att’y Gen. 51 (1913).

150. See 5 Op. Off. Legal Counsel 1 (1981).

151. See GAO PRINCIPLES, *supra* note 39, at 5-31 to 5-33 (1982).

152. But see Crovitz, *supra* note 140 (suggesting that uncompensated legal services provided by Professor Laurence Tribe for independent counsel investigating Iran-contra affair violated Anti-Deficiency Act’s rule against voluntary service). If Professor Tribe’s services were clearly intended to be gratuitous, there was no violation of the rule against voluntary service under the prevailing interpretation of that rule.

C. *The Anti-Deficiency Act and the Principle of Appropriations Control*

Although the major problem that Congress addressed in the Anti-Deficiency Act was unauthorized obligation of future Treasury receipts—and the Attorney General and Comptroller General have relied on the Act only to prohibit such unauthorized obligation—the plain terms of the Act broadly codify the Principle of Appropriations Control, just as the Miscellaneous Receipts statute enacts the Principle of the Public Fisc.

As first enacted, the rule against deficiencies made it unlawful “for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year . . . .”<sup>153</sup> The prohibition on expenditure absent an appropriation could not be clearer. The present codification of the anti-deficiency rule, though possibly less precise, is equally susceptible to a broad interpretation prohibiting all nonappropriated spending. The first sentence of the Anti-Deficiency Act now makes it unlawful to “make or authorize an expenditure or obligation exceeding an amount available in an appropriation.”<sup>154</sup>

The “unless authorized by law” proviso in the anti-deficiency rule relates not to the general prohibition on expenditures beyond appropriations; it refers, instead, to the redundant though less inclusive prohibition stated in the second sentence of the Act, which bars federal officers from “involv[ing]” the United States in contract obligations beyond the amounts already appropriated—“unless authorized by law.”<sup>155</sup> Thus, the proviso in the rule against deficiencies simply recognizes that Congress itself may permit agencies to *obligate* the Treasury (though not to withdraw funds from the Treasury) in excess of appropriations in selected circumstances. Recognizing that Congress may authorize federal officials to enter into contracts on behalf of the United States does not in any way dilute the Principle of Appropriations Control stated in the first sentence of the Anti-Deficiency Act, that no federal official or employee may obligate or spend funds in excess of amounts sanctioned by Congress.

Similarly, the naked words of the rule against voluntary service would appear to prohibit all donated personal service to the government except to the extent authorized by Congress (or as necessary in an emergency). Like the rule against deficiencies, the prohibition on voluntary service would appear to be a part of a larger Principle of Appropriations Control. The government cannot accept unauthorized voluntary service because all resources available for government activity—all factors of production in the business of “producing” federal government activity—must be author-

153. See *supra* note 138.

154. See *supra* note 140.

155. See *supra* note 141 (present codification); *supra* note 139 (second clause of Anti-Deficiency Act of 1905).



ized by Congress. Indeed, this second prohibition of the Anti-Deficiency Act appears to state, with respect to personal service, both the Principle of the Public Fisc and the Principle of Appropriations Control. By its nature, personal service is simultaneously a "receipt" which is not monetary, much less deposited to the Treasury, and an "expenditure" which is not appropriated by Congress. The prohibition on voluntary service would appear to prohibit unauthorized receipt and expenditure of donated personal service.

Although the Anti-Deficiency Act articulates a principle—the Principle of Appropriations Control—that is broader than the particular concern that led to its enactment,<sup>156</sup> this principle is in no way inconsistent with the special concern which prompted the statute's enactment. "Coercive" deficiencies occurred during the 19th century because Congress failed to ensure that legislative appropriations were a substantive and procedural check upon activity by the operating branch of government. Hence the Anti-Deficiency Act quite properly states a general requirement of legislative control over appropriations—that the Executive spend only in the amounts and only for the objects legislatively authorized.<sup>157</sup> In enacting the Anti-Deficiency Act, Congress recognized that the threat to constitutional values is the same whether or not the unauthorized spending requires liquidating appropriations by future Congresses. An examination of the nature of "coercive" deficiencies reveals that they are but one consequence of a failure to abide by the Constitution's command that legislative appropriations precede spending in the name of the United States.

For the most part, these deficiencies were not legally coercive, but merely "morally" coercive or politically coercive. An *unauthorized* promise to pay government funds in excess of appropriations generally would not be enforceable against the United States. Thus, if an agency spent or obligated an appropriations account beyond the amount authorized by law, the United States would not be legally bound to cover the deficiency.<sup>158</sup> Nor does the United States have a legal obligation to repay amounts in excess of the amount Congress has authorized it to borrow.

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156. The Miscellaneous Receipts statute likewise articulates a principle—the Principle of the Public Fisc—broader than the concerns that apparently prompted its enactment. The statute requires that gifts as well as other receipts of the government be deposited in the Treasury, but there is no indication in the legislative history that the Congress which originally enacted the requirement had a particular concern with gifts.

157. Even the Comptroller General has recognized that the Anti-Deficiency Act prohibits expenditure in some cases where "coercive deficiencies" are not threatened. *See* 63 Comp. Gen. 422 (1984) (Anti-Deficiency Act prohibits excess expenditure in any one appropriation account that is accomplished by transferring appropriated funds from another account).

158. *See, e.g.*, 59 Comp. Gen. 369 (1980) (no legal obligation). As a general rule, the sovereign is not bound by the unauthorized acts of its agent. *See, e.g.*, *Heckler v. Community Serv. of Crawford County, Inc.*, 467 U.S. 51, 60 n.11 (1984); *Schweiker v. Hansen*, 450 U.S. 785, 788–90 (1981) (*per curiam*); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947); *Phelps v. Federal Emergency Management Agency*, 785 F.2d 13, 17–19 (1st Cir. 1986); *Cinciarelli v. Reagan*, 729 F.2d 801, 807–08 (D.C. Cir. 1984); *National Treasury Employees Union v. Reagan*, 663 F.2d 239, 249 (D.C.

Nonetheless, as early Congresses well recognized, even in the absence of any legal obligation, Congress was constrained by "moral" considerations to fund virtually all appropriation deficiencies.<sup>159</sup> Persons contracting with a United States government official purporting to represent the United States expect to be compensated.<sup>160</sup> Similarly, when persons lend money to the government, they expect to be paid, even if they have no "right" to repayment. Indeed, even when a private person provides personal services or funds to the government, knowing that there exists no legal authority to require that he be compensated, he may plausibly expect the next Congress to appropriate funds necessary to reimburse him. As the Attorney General explained in 1877, "voluntary contribution[s]" for a government purpose "would seem to bear too much the aspect of a contract . . . [and] would certainly place the Government . . . under the strongest moral obligation to use every . . . effort that the donors or lenders should be reimbursed by Congress."<sup>161</sup> The moral and political expectations of repayment which the prohibitions of the Anti-Deficiency Act seek to prevent cannot be revoked or waived, for they are not legal in nature.<sup>162</sup>

Moreover, even where monetary reimbursement is neither contemplated nor politically possible (because, for instance, the donor clearly forsakes repayment), Congress or government officials may feel obliged to offer the donor nonmonetary consideration.<sup>163</sup> The dangers of corruption, conflict-of-interest, favoritism, and undue discrimination in government adminis-

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Cir. 1981); *Doe v. Civiletti*, 635 F.2d 88, 96 (2d Cir. 1980). There is no suggestion in these cases that the concept of "apparent authority" would qualify the general rule. See also Fenster & Voltz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 PUB. CONT. L.J. 155 (1979). But see 4 Op. Off. Legal Counsel 16, 19 (1980) (suggesting, with no citations or explanation, that even where Congress has failed to enact new fiscal year appropriations, apparent authority of government officials is basis for contract liability).

159. See, e.g., 15 ANNALS OF CONG. 1063 (1806) ("those who disburse the money, are like a saucy boy who knows that his grandfather will gratify him, and over-runs the sum allowed him at pleasure") (remarks of Rep. J. Randolph); 35 ANNALS OF CONG. 816 (1819) ("[W]here is the difference between drawing money from the Treasury, and making an unauthorized expenditure, which imposes on Congress a moral obligation to appropriate money to pay it? The difference, he said, was in name only.") (account of remarks of Rep. Clay); 1 J. SHERMAN, RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET: AN AUTOBIOGRAPHY 155 (1895) ("Another abuse by the executive departments was the habit of making contracts in advance of appropriations, thus, without law, compelling Congress to sanction them or violate the public faith."); 39 CONG. REC. 3687 (1905) ("Under the law they can make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them.") (remarks of Rep. Hemenway).

160. See, e.g., 59 Comp. Gen. 369, 372 (1980) (United States might have a "moral" commitment to cover deficiency incurred by Australia pursuant to cooperative agreement).

161. 15 Op. Att'y Gen. 209, 211 (1877). This opinion relied on the early (1870) version of the Anti-Deficiency Act to advise against acceptance of donations for the Army when Congress failed to enact military appropriations in a timely manner.

162. See also *United States v. Realty Co.*, 163 U.S. 427, 437-40 (1896) (affirming that Congress has power to appropriate money for payment of claims which the federal government is morally but not legally obligated to pay).

163. See Investigation of the U.S. Ambassador to Switzerland, Subcomm. on Int'l Operations, Comm. on Foreign Affairs, House of Rep., 100th Cong., 1st Sess. (Mar. 10, 1987) (hearings concerning allegations of abuse and conflict of interest in solicitation and use of gift funds by Ambassador); N.Y. Times, Jan. 8, 1987, A12, col. 4 (quoting State Department concern that "some contributors may have felt that their donations might entitle them to some special benefits").

tration are exacerbated where people may do "favors" for the government, or for particular agencies; indeed, these dangers may be especially great where the circumstances of the "favor" preclude open and explicit repayment.<sup>164</sup>

The special concerns of Congress to avoid unfunded liabilities and to control deficiencies in appropriation accounts should not obscure the fact that in enacting the Anti-Deficiency Act Congress both articulated and implemented the constitutional principle that all expenditure from the public fisc—whatever the source of monies—should be subject to congressional control through appropriations made in legislation. Any unauthorized government spending changes the boundaries of the federal government without the legislative action mandated by the Constitution.

### III. THE MEANING OF "APPROPRIATIONS" UNDER THE CONSTITUTION

Together, the Principles of the Public Fisc and of Appropriations Control give meaning to the Constitution's appropriations requirement. The first principle defines the public fisc—the "Treasury" to which the constitutional provision makes reference—as encompassing all funds received by the United States. The second principle prohibits expenditure from the public fisc (thus broadly defined) except pursuant to legislative appropriation.

We have seen that these two foundational constitutional principles are reflected in legislation: the Miscellaneous Receipts statute and the Anti-Deficiency Act. Whether particular legislative grants of spending authority comport with the Constitution's appropriations requirement depends on how faithful Congress itself has been to the norms it has faithfully articulated in these two framework statutes. Are statutory exceptions to the Miscellaneous Receipts requirement—statutes delegating authority to federal agencies to spend collections or donations—best understood as deviations from constitutional principles, or simply as unusual applications of these principles? Are some "appropriations" so open-ended as to defy, rather than effectuate, the Principle of Appropriations Control?

As shown in Section III-A, the prevailing understanding would treat all legislative grants of spending authority as "Appropriations" under the Constitution. Section III-B suggests why this formalistic approach is inadequate. Open-ended permission to spend, without further legislative control, dilutes the Principle of the Public Fisc and the Principle of Appropriations Control. Not every creation of spending authority qualifies, *ipso facto*, as an "Appropriation[ ] made by Law" under the Constitution.

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164. See e.g., IRAN-CONTRA REPORT, *supra* note 1, at 391 (referring to testimony of Robert McFarlane, former National Security Adviser, that accepting gifts of foreign money to fund Nicaragua 'contras' "opened the door to expectations of secret return favors").

### A. *Legislative Permission as "Appropriation"*

When Congress establishes an exception to the general requirement of the Miscellaneous Receipts statute that any agent of the federal government "receiving money for the Government from any source" shall deposit the money into the Treasury, it usually includes language purporting to "appropriate" the funds at issue. For instance, the legislation granting the Secretary of the Treasury discretion to supplement appropriations with conditional gifts for defense purposes<sup>165</sup> declares that: "*such money is appropriated* and shall be available for expenditure for the purposes of the appropriation to which [it is] paid."<sup>166</sup> Some revolving fund legislation uses appropriation language,<sup>167</sup> and legislative permission to expend fees and other receipts also often uses the term "appropriation."<sup>168</sup> Under prevailing practice, the use of the word "appropriation" is not necessary, as long as it is clear Congress intends to permit or prescribe expenditure; the Attorney General has held that legislation creating a revolving fund constitutes permission to spend the receipts of that fund.<sup>169</sup>

Under this approach, whenever Congress authorizes an agency to receive and expend gifts, fees, or other payments—in addition to the

165. See *supra* notes 129–30 and accompanying text.

166. 50 U.S.C. § 1154 (1982) (emphasis added); see also 22 U.S.C.A. § 2696(d) (West Supp. 1987) (providing that gifts accepted for benefit of State Department, see *supra* note 130, "are hereby appropriated"); 31 U.S.C. § 1321 (1982) (providing that "[a]mounts accruing to these [specified trust] funds . . . are appropriated to be disbursed in compliance with the terms of the trust").

167. See, e.g., 40 U.S.C. § 756(c) (1982) (monies received by the General Services Administration General Supply Fund "are reappropriated for the purposes of the fund"); Act of July 9, ch. 143, 40 Stat. 850 (1918) ("[funds received] shall immediately become available for the purposes named in the original appropriation").

168. See, e.g., 31 U.S.C. § 1321 (1982) (permanent "appropriat[ion]" of certain trust fund receipts).

169. See, e.g., 33 Op. Att'y Gen. 316, 319–20 (1922) (ICC may spend monies paid by railroads under Transportation Act of 1920, ch. 91, § 422(10), 41 Stat. 456, 490); 51 Comp. Gen. 506 (1972) (Smithsonian Institution may spend commercial revenues received pursuant to 20 U.S.C. § 53 (1982), see *supra* note 115).

The understanding that revolving funds are in fact "appropriated" funds is not entirely consistent with a curious jurisdictional rule of the Court of Claims and successor courts, known as the "non-appropriated fund" doctrine. Under this doctrine, money claims against self-sustaining government instrumentalities (e.g., revolving funds) may not be maintained under the Tucker Act, 28 U.S.C. §§ 1491–1508 (1982), where the organic legislation creating the instrumentality does not contemplate appropriations funding. See *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976). The basis for the "non-appropriated fund" doctrine apparently is that where Congress provides for an instrumentality to be self-sustaining, it does not contemplate the United States paying money damages (under the Tucker Act) in connection with the operations of the instrumentality. Yet if Congress considers even self-sustaining funds to have been "appropriated" for purposes of the Anti-Deficiency Act and the Constitution's appropriations clause, then the "non-appropriated" fund doctrine is at best a misnomer and at worst an unjustifiable limitation on damage claims against the government. See also *United States v. General Elec. Corp.*, 727 F.2d 1567, 1570 (Fed. Cir. 1984); *L'Enfant Plaza Property, Inc. v. United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (suggesting weak doctrinal basis of non-appropriated fund doctrine and limiting its application to revolving funds for which "Congress is [] statutorily prohibited from appropriating funds"). Of course, any such statutory prohibition is of elusive significance, since Congress can ignore it and appropriate funds anyway. Cf. Stith, *supra* note 61, at 623–25 (strategy of Gramm-Rudman-Hollings was to make similar statutory prohibition enforceable outside of Congress).

agency's specific appropriations—the legislative authorization constitutes what is known as a “permanent”<sup>170</sup> and “indefinite”<sup>171</sup> appropriation. The expenditure of such fees or contributions, supplementing the agency's annual appropriations, does not violate the Anti-Deficiency Act's prohibition on spending “exceeding” appropriations<sup>172</sup> because the excess funds are treated as having been permanently appropriated by the legislation authorizing the agency to spend them.

There exist permanent or indefinite appropriations for a wide range of governmental expenditures, quite apart from revolving funds, gifts and other exceptions to the Miscellaneous Receipts statute. For instance, payment of interest on the national debt has been permanently and indefinitely appropriated since 1847;<sup>173</sup> statutory entitlement programs are generally funded by permanent appropriations of trust fund or general Treasury receipts;<sup>174</sup> various contract obligations (for instance, for housing subsidies) are also paid by permanent, indefinite appropriations.<sup>175</sup> Moreover, much indefinite or long-term spending authority is enacted outside the legislative appropriations process—often referred to as “backdoor” spending.<sup>176</sup> In total, over half of the spending authority in the annual federal budget derives from legislation, including permanent appropriations, enacted by previous Congresses.<sup>177</sup>

Where Congress creates backdoor spending authority, the significant legislative act is not the nominal “appropriations” language authorizing withdrawal from the Treasury. Although Congress nominally may “appropriate” interest payments on the national debt, entitlement benefits,

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170. See GAO PRINCIPLES, *supra* note 39, at 2–5 (1982) (permanent appropriation is “a ‘standing’ appropriation, which, once made, is always available for specified purposes and does not require repeated action by the Congress to authorize its use”). Of course, a “permanent” appropriation is only as permanent as legislation can be—until Congress repeals or modifies it.

171. Where no maximum amount is stated, an appropriation (whether or not “permanent”) is termed “indefinite,” meaning that it is of an unspecified amount. See U.S. GEN. ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 43 (3d ed. 1981) [hereinafter GAO GLOSSARY]. An appropriation may be both permanent and indefinite.

172. 31 U.S.C. § 1341(a)(1)(A) (1982), quoted at *supra* text accompanying note 140.

173. Act of Feb. 9, 1847, ch. 7, 9 Stat. 123 (current version at 31 U.S.C. § 3123 (1982)).

174. See, e.g., 42 U.S.C. §§ 401–423 (1982) (Social Security).

175. See, e.g., 31 U.S.C. §§ 1301, 1305 (1982) (housing payments). There also is a permanent, indefinite appropriation for intelligence activities, 50 U.S.C. § 403f(a) (1982), although in practice intelligence appropriations are subjected to periodic review and limitation, see *Halperin v. CIA*, 629 F.2d 144, 160 (D.C. Cir. 1980).

176. See GAO GLOSSARY, *supra* note 171, at 40. The term “backdoor” spending usually encompasses, in addition to entitlements, borrowing authority (permission for agency to spend funds borrowed from the public or from the Treasury), contract authority (permission for the agency to enter contracts in advance of appropriations, as explicitly permitted by the Anti-Deficiency Act), and credit authority (permission to guarantee or insure loans). See *id.*; 2 U.S.C. §§ 651(c), 652 (Supp. 1986). Exceptions to the requirements of the Miscellaneous Receipts statute—collection, revolving fund, and gift authority—as well as other forms of permanent spending authority are also “backdoor” in the sense that they provide funding outside of annual appropriations acts. Cf. H. LEONARD, CHECKS UNBALANCED (1986) (discussing forms of “quiet spending” by government, especially unrecorded future monetary obligations such as public pensions, loan guarantees, and depreciation).

177. See 1989 BUDGET, *supra* note 57, at 6g-17 (showing amounts of budget authority available without further action by Congress); *id.* at 6d-2 (similar).

and contract payments, the fiscally determinative variables are the size of the federal debt, the eligibility rules and benefit levels of entitlements, and the amount of contract obligations.<sup>178</sup> Congress itself recognizes as much. In all of these instances, it is fair to say that the actual "appropriations"—whereby Congress formally grants permission to pay out federal funds from the Treasury—are regarded by Congress as perfunctory, ministerial acts.<sup>179</sup> When Congress decides the substantive contours of the backdoor spending program, it decides, to a large extent,<sup>180</sup> the proper funding level of the program. Indeed, in the case of statutory entitlement programs, even where Congress has not provided for a permanent appropriation—and instead, formally enacts a new appropriation each year—internal congressional rules and practice treat such appropriations as predetermined and mandatory.<sup>181</sup>

Thus, the constitutional function of "Appropriations made by Law" is performed, if at all, at the creation of the backdoor spending program. Even if Congress imposes no explicit amount or time limitations on backdoor spending authority, it is possible that Congress implicitly performs its appropriations function. For instance, at the time it enacts an exception to the general requirement of the Miscellaneous Receipts statute, Congress may be able to predict with a high degree of certainty the expected size or funding level of the collection or gift account. Even if an accurate estimate cannot be made, it is possible that creation of collection or gift authority is a considered legislative judgment that the size of the particular activity should be dependent upon the success of the activity in the market or in attracting donors.

Nonetheless, it is doubtful that every creation of permanent, indefinite, or backdoor spending authority performs the function of an "Appropriation[ ] made by Law" under the Constitution. The only way to subject collections, revolving funds, and gifts to full appropriations control would

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178. See, e.g., H.R. REP. NO. 803, 98th Cong., 2d Sess. 8 (1983) (proposing "that permanent indefinite appropriations be enacted" for certain housing subsidy payments; noting that while "[n]ormally, an appropriation is the primary means of Congressional control over [ ] total obligations . . . this concept of control is not relevant since the housing payments appropriation represents only the cash necessary to make payments for contractual obligations previously authorized").

179. These appropriations are often referred to as "liquidating" appropriations. See Stith, *supra* note 61, at 606.

180. Even where Congress sets the benefit levels and eligibility criteria for an entitlement program, it does not explicitly decide either the maximum or minimum spending level for the program. For instance, how much money will be spent under a program for federal supplementation of unemployment insurance depends upon the unemployment rate. Additionally, an administering agency may retain various types of discretion which affect the scope of the program. See Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 914, 917 (1984).

181. See STAFF OF HOUSE COMM. ON THE BUDGET, 99TH CONG., 2D SESS. THE CONGRESSIONAL BUDGET PROCESS: A GENERAL EXPLANATION 163-64 (Comm. Print 1986) [hereinafter BUDGET PROCESS]; 1989 BUDGET, *supra* note 57, at 2b-16 to 2b-19.

be to require the agency to debit all of these receipts against the amount of spending authority periodically appropriated by Congress.<sup>182</sup>

In fact, any funding mechanism outside the purview of the legislative appropriations process<sup>183</sup> may allow governmental activities to continue without periodic legislative review and redetermination, and provides procedural and political protection for future funding,<sup>184</sup> which explains why program advocates seek these forms of funding.<sup>185</sup> Of course, the true ("opportunity") cost of any permanent, indefinite, or backdoor spending authority is no different from the cost of an annual appropriation.<sup>186</sup> But particularly to the extent a program is self-sustaining—as a revolving fund or through gifts or other collection authority—Congress may operate (as a matter of policy or of psychology) under the illusion that funding for the activity does not affect other budgetary decisions, and that the present Congress is neither responsible nor accountable for the program.

### B. *Constitutional Limits on Spending Authority*

If an indispensable function of appropriations under the Constitution is to ensure that Congress has approved the authorized contours of government activity, then Congress must clearly define the spending authority it grants to government agencies<sup>187</sup>—whether the spending authority is in the form of an exception to the Miscellaneous Receipts statute,<sup>188</sup> in the form of entitlements or other conventional "backdoor" spending legislation,<sup>189</sup> in other forms outside the appropriations process,<sup>190</sup> or in the leg-

182. Congress has generally failed to impose such control on gift authority. See GAO LETTER, *supra* note 124; GAO PRINCIPLES, *supra* note 39, at 5-83; *infra* note 267. However, Congress does enact limitations on amount for some types of collection authority. See *supra* note 113.

183. In addition to backdoor spending authority, see *supra* note 176, "secret" appropriations for weapons programs also evade full legislative review and accountability. These programs allegedly have grown eightfold during the 1980's. See Weiner, *A Growing "Black Budget" Pays For Secret Weapons, Covert Wars*, Phil. Inquirer, Feb. 8, 1987, at 1, col. 1; Morrison, *Pentagon's Top Secret "Black" Budget Has Skyrocketed During Reagan Years*, NAT'L J., Mar. 1, 1986, at 492; see also *infra* notes 201 & 272 and accompanying text.

184. See generally A. WALSH, *THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS* (1978); J. BENNETT & T. DILORENZO, *UNDERGROUND GOVERNMENT* (1983) (complaining of loss of public control and accountability over self-sustaining public authorities); *supra* notes 117-18 and accompanying text.

185. See e.g., Wilson, *Broadcasters' Aid Hits Pothole*, NAT. J., Dec. 19, 1987, at 3219 (discussing efforts of national broadcast entities to convince Congress to create new trust fund with permanent appropriation).

186. For instance, where an offsetting collection is retained for expenditure by the collecting program, it is not available for other programs or available to reduce the federal deficit.

187. Cf. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *FPC v. New England Power Co.*, 415 U.S. 345 (1974) (construing Independent Offices Appropriation Act of 1952, *supra* note 111, to limit agency's authority to impose fees for government services). But see *infra* notes 206-08 and accompanying text (proposed rule does not require reinvestigation of nondelegation doctrine).

188. For instance, a statute granting an agency gift authority, see *supra* text accompanying notes 124-34.

189. For instance, borrowing, contract, or credit authority, see *supra* notes 173-76 and accompanying text.

190. For instance, the permanent appropriations for payment of interest on the national debt, 31

islative form that Congress actually denominates an "appropriations act."<sup>191</sup> At the least, Congress' creation of expenditure authority should always be explicit,<sup>192</sup> and Congress should effectively place limits, implicitly or explicitly, on the amount and duration of the authority.

This does not mean that Congress may never enact an open-ended "appropriation" of funds. The *form* of spending authority, by itself, does not necessarily reveal whether it qualifies as an "Appropriation[]" under the Constitution. Indeed, a particular open-ended mechanism may be intrinsically related to the nature of the program being funded.<sup>193</sup> For example, Congress may decide that a particular governmental activity such as postal delivery should be self-sustaining and that its size should be determined by market forces. Or Congress may create a trust fund, from dedicated tax revenues, in order to achieve redistribution of income from particular taxpayers to particular spending beneficiaries.<sup>194</sup> Spending authority may likewise be open-ended for statutory entitlements, payment of interest on the national debt, and liquidation of obligations incurred under borrowing authority, contract authority, and credit authority. In each of these instances, the form of the actual legislative permission to draw funds from the Treasury is largely irrelevant, because the government's monetary obligation is based on previous legislative action. It is the underlying substantive legislation creating the entitlement or authorizing the executive branch to incur the obligation that constitutes the ultimate source of spending authority.<sup>195</sup> Such substantive, backdoor spending enactments are the real "Appropriations" for constitutional purposes and thus would be subject to the standards proposed here.

Backdoor spending is consistent with the constitutional norm requiring Congress to control the public fisc as long as Congress clearly defines the

U.S.C. § 3123 (1982), *see supra* note 173 and accompanying text, and for intelligence activities, 50 U.S.C. § 403f(a) (1982), *see supra* note 175.

191. Under present practice, Congress enacts thirteen regular appropriations bills each year; in four of the last five years, however, all thirteen acts have been enacted in one piece of omnibus legislation. In addition to covering the administrative expenses of all governmental agencies, the thirteen annual appropriations acts include all funding for most discretionary federal expenditure programs. Congress also enacts "supplemental" appropriations during each fiscal year. *See BUDGET PROCESS, supra* note 181, at 10-14, 163.

192. This proposal calls for, in effect, a "clear statement" requirement. Congress has already imposed such a requirement on direct appropriations from the Treasury. *See* 31 U.S.C. § 1301(d) (1982) ("A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . .") (emphasis added).

193. *Cf. Freedman, Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 315 (1978) (constitutional nondelegation principle means that Congress must not abdicate its constitutional powers, but congressional delegation is proper if instrumental to legislative policy decision); S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 41 (1975) (Congress may delegate where delegation is proper "instrument of decision" rather than "substitute for decision.").

194. *See* 42 U.S.C. §§ 401-423 (1982 & Supp. 1986) (Social Security trust fund). Other dedicated revenues may *match* taxpayers and beneficiaries. *See, e.g.,* 23 U.S.C. §§ 101-157 (1982) (highway trust fund).

195. *See supra* notes 178-81 and accompanying text.



activity being funded, provides a time limitation on the spending program, implicitly or explicitly decides the total amount of spending authority, and undertakes periodic legislative review. Under these conditions, appropriations perform their constitutional function. However, Congress renders meaningless the Principles of the Public Fisc and of Appropriations Control if it creates spending authority without amount or time limitations and fails to subject such authority to periodic legislative review.<sup>198</sup>

It is especially important that Congress impose amount and time limitations on spending authority in those areas where the Executive<sup>197</sup> has significant authority to define government policy and has significant discretion in deciding the means of policy implementation. Here the "object" specifications in appropriations are necessarily broad; thus, the "amount" and "time" limitations on appropriations are the primary legislative check upon federal action. In the areas of foreign affairs<sup>198</sup> and federal prosecution,<sup>199</sup> it is generally conceded that Congress cannot closely circumscribe agency powers and the strategies of government policy, much less the particulars of government action. Those who execute the law in these areas must exercise significant discretion. In all such areas of significant execu-

196. See *supra* text accompanying notes 41-55. A time limitation means that spending authority should not be permanent, but the limitation need not be one fiscal year, as has been the usual practice when time limitations are imposed, see *supra* notes 53 & 101. Biennial, triennial, or quintennial budgeting may effectively assert legislative control over spending, except that appropriations for the army must be renewed every two years, see *supra* note 53.

197. I use the term "Executive" to refer to whatever agencies of government have been charged, by the Constitution and by Congress, with executing the law. Every such "executive" agency need not be headed by persons removable by the President. See generally Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787 (1987) (arguing that Constitution permits Congress to create executive agencies with substantial autonomy).

198. See, e.g., *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979). The Constitution's explicit limitation of army appropriations to two years' duration, art. I, § 8, cl. 12, is evidence that the framers recognized the especially vital role of appropriation limitations in areas of inherent presidential authority.

199. Recent separation of powers cases have repeatedly asserted that prosecution is a core "executive" function. See, e.g., *Morrison v. Olson*, 108 S. Ct. 2597, 2620-22 (1988); *id.* at 2626-27 (Scalia, J., dissenting); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Batchelder*, 442 U.S. 114, 125-26 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974). This characterization is misleading. The Constitution makes no mention of federal prosecution except indirectly in the Fifth Amendment's requirement of grand jury indictment. In addition, prosecutors perform many functions that closely resemble and are related to those of the courts. See *Morrison v. Olson*, 108 S. Ct. at 2614 n.20, 2620-21. See generally Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 YALE L.J. 1692, 1692, 1704-11 & n.55 (1978). In any event, there is no warrant to assume that the exercise of federal prosecutorial authority must be a *presidential* activity, as contrasted with the exercise of federal pardon authority, which the Constitution specifically places in the hands of the President. Indeed, Congress has created several "independent" agencies with important law enforcement and prosecutorial functions, including the Federal Trade Commission and the Securities and Exchange Commission.

Nonetheless, as in areas in which the President has inherent authority, federal prosecution is not generally susceptible to legislative direction or specification of the particulars of government action. Significant legislative prescription of the exercise of prosecutorial discretion would raise serious due process concerns. See also U.S. CONST. art. II, § 9, cl. 3; Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 347 (1962) ("The bill of attainder clause . . . is a broad prohibition . . . [which] tells legislatures that they . . . must leave the job of application [of legislative mandates] to other tribunals.").

tive discretion rooted in the structure or the values of the Constitution,<sup>200</sup> the Executive bears primary responsibility for determining how and where to assert a federal presence. If Congress creates spending authority which is open-ended with respect to amount and duration—such as revolving funds, gift authority, and other permanent and indefinite appropriations,<sup>201</sup> it effectively concedes any role in defining and constraining executive—that is, governmental—action.<sup>202</sup>

Where broad executive discretion is inherent in our constitutional scheme, the most questionable form of spending authority is open-ended authority to receive and spend donations and gifts.<sup>203</sup> As long as the executive agency is prepared to accept the donation,<sup>204</sup> Congress loses effective control over the contours of authorized government activity. Where a donor conditions a gift broadly—for instance, for the defense of the United States—the recipient federal agency is able to direct the supplemental funds to activities that might not have garnered congressional approval. Where the donor specifically conditions the gift—for instance, for defense in the Persian Gulf—the donor may effectively specify the objects of government expenditure. In either event, where Congress cannot significantly

200. Where executive discretion is traceable not to the terms, structure or values of the Constitution, but to the efficient performance of a task initiated by Congress (e.g., postal regulation or space exploration), clear legislative limitation and periodic review of spending authority may not be as constitutionally critical—because Congress also exercises complete constitutional control in defining and regulating the “object” being funded.

201. See, e.g., 50 U.S.C. § 403f(a)(1982) (permanent, indefinite appropriation for intelligence activities, see *supra* note 175). Likewise, the “secret” appropriations for confidential weapons programs, discussed *supra* note 183, evade full periodic review by Congress, though they are not permanent and indefinite in form. The Constitution surely permits Congress to arrange its appropriation processes so as to protect national security, and indeed Congress has done so since the early days of the nation. See, e.g., Act of July 1, 1790, 1 Stat. 128, 129 (1790); Act of Feb. 9, 1793, 1 Stat. 300, 301, current version codified at 31 U.S.C. § 3526(e) (1982); see also *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980). It has been alleged, however, that in recent years there has been tremendous growth in the “black” military budget with little or no legislative review. See Weiner, *supra* note 183; see also U.S. GEN. ACCOUNTING OFFICE, SPECIAL ACCESS PROGRAMS 6-7 (1988) (unclassified summary) [hereinafter GAO SPECIAL ACCESS PROGRAM STUDY] (GAO is unable to determine total amount of secret weapons funding since 1981 or total number of secret weapons programs).

202. See IRAN-CONTRA REPORT, *supra* note 1, at 411-14 (noting loss of legislative control where Executive resorts to non-government funds for covert activities); see also SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES S. REP. NO. 755, 94th Cong., 2d Sess., Book 1, at 205 (1976) (“Church Committee Report”) (“It has been feared that their profits [from private revolving fund operations] were used to provide secret funding for covert operations, thus avoiding scrutiny by the Executive and the Congress through a ‘backdoor’ funding process.”).

203. See, e.g., 50 U.S.C. §§ 1151-1154 (1982) (gifts for defense purposes); 22 U.S.C. § 2455(f) (1982) (contributions received by the United States Information Agency); 22 U.S.C.A. § 2697 (West Supp. 1988) (gifts for the benefit of the State Department). After allegations of misuse of certain contributions, see *supra* note 163, the State Department’s gift authority was amended in 1987 to prohibit expenditures “for representational purposes at United States missions except in accordance with the conditions that apply to appropriated funds.” Act of Dec. 22, 1987, Pub. L. No. 100-204, § 125, 101 Stat. 1331, 1341 (amending 22 U.S.C. § 2697(b)); see also *supra* note 164.

204. It seems elementary that government officials, when offered an opportunity to increase their budgetary resources, can be expected usually accept the offer. See generally BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH (T. Borchert ed. 1977).

circumscribe an agency's purposes and powers, to allow the agency to spend all contributions would be to permit private power, subject only to executive discretion,<sup>205</sup> to influence the contours of government and government policy.<sup>206</sup> In areas of significant executive authority, the receipt and expenditure of money that is not deposited into "the Treasury" and drawn therefrom according to criteria set forth in legislation is especially incompatible with constitutional principles.

The norms proposed here imply neither reinvigoration of the "nondelegation doctrine,"<sup>207</sup> nor specific, "line-item" appropriations legislation.<sup>208</sup> The constitutional prerequisites for government action do not require detailed legislative direction regarding every executive expenditure and action.<sup>209</sup> Nor does the Constitution prohibit Congress from ever relying on

205. The executive check may be especially inadequate in sensitive areas of inherent executive authority because ordinary bureaucratic control procedures within the executive branch may be lacking. *See* IRAN-CONTRA REPORT, *supra* note 1, at 117-53; *supra* note 163 (concerning possible misuse of gift funds in State Department); *supra* note 202 (quoting from Church Committee Report); Weiner, *supra* note 183 ("black budget" may be far more vulnerable than the rest of the defense budget to shoddy work, inflated bills and outright fraud by contractors"); GAO SPECIAL ACCESS PROGRAM STUDY, *supra* note 201, at 7-9 (concluding that Pentagon's oversight procedures are inadequate).

206. Of course, if all contributions to the government are subjected to appropriations control, this might simply result in potential donors making contributions directly to nongovernmental entities engaged in the target activity. This result is constitutionally permissible, as long as the contributions are in fact made to nongovernmental entities and are not spent in the name of the United States. *See also supra* text accompanying notes 88-96 (government agents may not solicit contributions for nongovernmental activity where all appropriations are denied). The Principles of the Public Fisc and of Appropriations Control have limits; they apply, by definition, only to monies belonging to the United States and to expenditures in the name of the United States. *See supra* text accompanying notes 67-70. If Congress wishes to regulate private spending of private funds, it has means of doing so—for instance, its regulation of foreign trade and its indirect circumscription of private spending through tax exemptions and preferences.

207. Judicial enforcement of a broad nondelegation principle, *see* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), has been long dormant, though there has been occasional judicial reference to the concept. *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (plurality opinion); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-44 (1981) (Rehnquist, J., dissenting); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). For scholarly commentary proposing its revival, *see* S. BARBER, *supra* note 193, at 36-51; J. ELY, *DEMOCRACY AND DISTRUST* 133-34 (1980); Gewirtz, *supra* note 25, at 49-65; McGowan, *Congress, Courts and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); *see also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 86 (1986) (urging greater judicial scrutiny of legislative process in order to promote neo-Madisonian values); T. LOWI, *THE END OF LIBERALISM* 97-126 (2d ed. 1979) (analyzing growth of regulatory authority in twentieth century).

208. In previous eras, this type of legislation was a common, if not fully effective, way in which the Congress regulated executive expenditure. *See generally* Stith, *supra* note 61, at 609-12; L. FISHER, *supra* note 4, at 36-38, 59.

209. The argument presented here is consistent with broad legislative delegation (or definition) of agency powers and authorized "objects." *See also* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORGAN. 81, 86-87, 95-99 (1985) (arguing that far from diluting accountability, delegation to administrative agencies enhances accountability). The norms proposed here relate only to legislative grants of spending authority, not to the creation or regulation of executive agency powers. Indeed, this argument is fully compatible with broad delegations to executive agencies not only where constitutionally required, but also in areas where Congress has plenary regulatory power. Moreover, the proposed general requirements of clear statement and explicit or implicit time and amount limitation are not the sorts of issues that Congress is less well equipped to address than administrators. Most importantly, unlike the general "nondelegation" doc-

volunteers or gifts, or from ever letting the executive branch or the market determine the quantity of a government service. But the foundational constitutional decisions to create a limited federal government<sup>210</sup> and to empower Congress to regulate the activities of the government, especially by requiring legislative appropriations,<sup>211</sup> do ordain that Congress should not lightly accede to effective executive control over the size, scope, and character of federal action. Where Congress fails to provide a clear statement of the activity or object being funded and fails to impose effective limitations on the amount and the duration of the appropriation, it has abdicated one of its principal constitutional responsibilities.

#### IV. ENFORCING THE APPROPRIATIONS REQUIREMENT

The previous Sections have proposed that the appropriations requirement is a prescription directed to Congress as well as a limitation on the Executive. The Executive violates the Principle of Appropriations Control and the Principle of the Public Fisc if it spends funds not appropriated by Congress. Congress may transgress the constitutional norm if it legislates permanent or other open-ended spending authority, particularly in areas where the executive branch has significant discretion in defining the objects of expenditure.

The question thus arises how the Principles of the Public Fisc and of Appropriations Control may be enforced, against the executive branch and, when appropriate, against Congress. As explained in this concluding Section, the courts cannot be expected to bear all, or even most, of this enforcement responsibility. Rather, Congress itself must identify institutions and procedures to vindicate its constitutional power of the purse.

##### A. *Enforcement Against the Executive*

It is true, of course, that the Constitution places responsibility for appropriations in the legislative branch,<sup>212</sup> but it sometimes falls to the courts to play a role in implementing the constitutional requirement by enforcing against the Executive the limitations that Congress has placed on spending authority. If Congress specifies that only a certain sum may be spent on a certain item, or that no funds may be spent on some other item, the courts may be available to determine authoritatively whether the

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trine, judicial enforcement is not necessarily contemplated. See *infra* text accompanying notes 248–58.

210. See *supra* text accompanying notes 9–19.

211. See *supra* text accompanying notes 24–33.

212. See *Reeside v. Walker*, 52 U.S. (11 How.) 272, 290–91 (1850); *Hart's Case*, 16 Ct. Cl. 459, 484 (1881) (“[A]bsolute control of money of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.”), *aff'd*, 118 U.S. 62 (1886); cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“textually demonstrable constitutional commitment of the issue to a coordinate political department . . .”).

operating branch of government has complied with the specified limitations.<sup>213</sup>

Often, however, when faced with an issue of executive compliance with appropriations limitations, courts have declined to decide cases on the merits,<sup>214</sup> particularly in areas where the Executive's constitutional powers are significant.<sup>215</sup> Even where private parties have an interest or incentive to sue to enforce compliance with spending limitations,<sup>216</sup> they may be held not to have "standing" to bring suit.<sup>217</sup> Conversely, where private parties would have standing to challenge executive compliance with most federal appropriation limitations,<sup>218</sup> they may choose not to do

213. See, e.g., *TVA v. Hill*, 437 U.S. 153 (1977) (holding that appropriations for TVA were subject to limitations in Endangered Species Act); *UAW v. Donovan*, 746 F.2d 855, 859-63 (D.C. Cir. 1984) (holding that appropriations legislation gave Secretary of Labor discretion to allocate lump-sum appropriation among various training programs), *cert. denied*, 474 U.S. 825 (1985); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510-11 (D.C. Cir. 1984) (en banc) (holding "adjudicable" a claim that Executive usurped Congress' constitutionally granted powers of law-making and appropriation by operating camp in Honduras for training Salvadoran soldiers), *vacated and remanded*, 471 U.S. 1113 (1985) (for reconsideration in light of subsequent appropriations legislation and withdrawal of U.S. military from plaintiff's land); *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977) (holding that Secretary of Transportation had not fully complied with appropriations limitations).

214. See, e.g., *Phelps v. Reagan*, 812 F.2d 1293 (10th Cir. 1987) (taxpayer lacks standing to challenge use of appropriated funds for appointment of ambassador to Vatican); *Dickson v. Ford*, 521 F.2d 234 (5th Cir.) (per curiam) (taxpayer lacks standing to challenge President's power under Emergency Security Assistance Act of 1973 to spend appropriated monies in support of Israel), *cert. denied*, 424 U.S. 954 (1975).

215. See *Goldwater v. Carter*, 444 U.S. 996, 1002-03 (1979) (plurality opinion); see also *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (holding, inter alia, that challenge to Vietnam War is not justiciable), *cert. denied*, 416 U.S. 936 (1974); *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194 (3d Cir.) (extension of diplomatic relations to Vatican not subject to judicial review), *cert. denied*, 107 S. Ct. 314 (1986); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (challenge by member of Congress to military assistance to El Salvador is nonjusticiable), *cert. denied*, 467 U.S. 1251 (1984).

216. Recipients of federal funds do not necessarily have an incentive to challenge the Executive's failure to comply with appropriations limitations on those funds. Hence many suits challenging the constitutionality or legality of federal expenditure programs have been brought by competitors of recipients, by persons claiming that they too should have received funds, by persons claiming "taxpayer standing," by persons claiming indirect harm as a result of the federal program, or by members of Congress opposed to the program. See *supra* note 215; *infra* notes 218, 251-52.

217. In order to have standing in an article III court, a plaintiff must be able to show injury-in-fact that is a result of the contested action and that is judicially redressable. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); see, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1971) (environmental suit in which plaintiffs' interests were found too general, attenuated, or vague to confer standing); *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986) (similar), *cert. denied*, 107 S. Ct. 1624 (1987); *Enos v. Marsh*, 769 F.2d 1363 (9th Cir. 1985) (similar); *Animal Lovers Volunteers Ass'n v. Weinberger*, 765 F.2d 937 (9th Cir. 1985) (similar); see also *infra* note 256.

218. There are various circumstances in which persons and entities injured by federal spending programs may have standing to challenge the legality of particular expenditures by the Executive. See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515-20 (D.C. Cir. 1984) (en banc) (United States citizen who owns land in Honduras has standing to challenge United States government's use of his property for training camp), *vacated and remanded on other grounds*, 471 U.S. 1113 (1985); *B.K. Instruments Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983) (disappointed bidders have standing to challenge federal contract bids); *Spencer, White, & Prentis, Inc. v. EPA*, 641 F.2d 1061 (2d Cir. 1981) (same); *Hayes Int'l Corp. v. McLucas*, 509 F.2d 247 (5th Cir.) (same), *cert. denied*, 423 U.S. 864 (1975); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) (same); see also *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978);

so. Moreover, judicial enforcement may not be the most efficient or effective way of ensuring compliance with legislative conditions in federal spending programs.

Even where courts may not be available to construe and enforce appropriations limitations, constitutional theory regarding legislative appropriations is not a mere academic exercise. Congress and the executive branch order their affairs and assert their claims to competence based upon their understanding of evolving constitutional norms. In particular, the Attorney General from time to time renders formal opinions<sup>219</sup> interpreting appropriations limitations or analyzing the constitutional spending prerogatives of the President.<sup>220</sup> These opinions have not simply or invariably supported the claims of the Executive; they have at times rejected agency claims of authority and resolved competing claims of authority.<sup>221</sup> Except for the Comptroller General, federal officers have been reluctant to challenge Attorney General opinions.<sup>222</sup> Though Attorney General opinions do not have the effect or authority of judicial decisions, "[p]ractice makes it clear that they are considered to be much more than merely advisory and, as a consequence, they are of great practical force in providing rules of operation for administrative officers."<sup>223</sup> The opinions have played a critical role in developing the law in areas commonly addressed by

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United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Oregon Envtl. Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987); Montgomery Envtl. Coalition v. Costle, 646 F.2d 568 (D.C. Cir. 1980).

219. See *supra* note 145.

220. For instance, in the five volumes of Department of Justice opinions issued between 1977 and 1981, see *supra* note 145, there were 27 opinions directly pertaining to the legality of proposed expenditures. See 1-4 Op. Off. Legal Counsel (1977-1981).

221. See, e.g., 15 Op. Att'y Gen. 209 (1877) (denying executive authority to supply army with private funds where Congress has failed to appropriate funds); 4 Op. Off. Legal Counsel 16 (1980) (Federal Trade Commission must shut down where Congress has failed to enact timely appropriation); 5 Op. Off. Legal Counsel 1 (1981) (where Congress has failed to enact appropriations prior to start of new fiscal year, most but not all operations of affected agencies must cease); Office of Legal Counsel, Memorandum Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), quoted in J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 284 (1983) (memorandum of then-Assistant Attorney General Rehnquist concluding there is no inherent presidential authority to impound funds).

An especially interesting recent opinion of the Office of Legal Counsel concerned the constitutionality of an appropriation limitation (the so-called "Baxter Amendment") that sought to prevent the Department of Justice, through Assistant Attorney General Baxter, from making a particular anti-trust argument before the Supreme Court in a case in which the Department had already filed a brief making that argument. The Office of Legal Counsel refrained from asserting that this limitation was unconstitutional, though it hinted that the limitation could violate the President's duty to "execute" the law. Memorandum for William F. Baxter (Dec. 2, 1983) (copy on file with author).

222. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74 (2d ed. 1973); H. MANSFIELD, THE COMPTROLLER GENERAL 104 (1939) (Comptroller General "treated opinions of the Attorney General as a court does the precedents of a foreign jurisdiction; to be cited if he agreed with them, to be distinguished or disregarded if he did not"); see also *infra* text accompanying note 235.

223. Nealon, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U.L. REV. 825, 842 (1950); see also Rhodes, "Opinions of the Attorney General" Revived, 64 A.B.A.J. 1374, 1375 (1978).

courts,<sup>224</sup> as well as in circumstances where the controversy is nonjusticiable.<sup>225</sup>

Application and enforcement of the law governing appropriations is also a concern of the Comptroller General, who has an important advisory role in reviewing executive compliance with appropriations limitations and the lawfulness of proposed expenditures. The Comptroller General is uniquely independent from both the Executive and the leadership of Congress.<sup>226</sup> Until the Budget and Accounting Act of 1921 established the General Accounting Office (GAO), headed by the Comptroller General,<sup>227</sup> Congress had relied principally on the Department of the Treasury to review agency compliance with legislative appropriations limitations. From its inception in 1789,<sup>228</sup> the Treasury Department, unlike other executive agencies, had been invested with several special responsibilities to Congress.<sup>229</sup> The duties of special offices within the Treasury included independent audits of government programs and the exercise of independent judgment in disbursing or withholding funds.<sup>230</sup> However, by the early 20th century, it was apparent that the removal power of the

224. See H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 90 (1937); Nealon, *supra* note 223, at 834-47; P. BATOR et al., *supra* note 222, at 70-74.

225. See, e.g., *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (dismissing State of Hawaii's suit against United States because government had not consented to suit; opinion notes Attorney General's opinion on merits of suit).

226. The original 1921 legislation provided that the Comptroller General would be appointed by the President subject to confirmation by the Senate. In 1980, the appointment provision was amended to provide that the President must appoint a Comptroller General from a list of three persons provided by the Speaker of the House and the President pro tempore of the Senate; Senate confirmation is still required. 31 U.S.C. § 703(a)(1)-(3) (1982). The Comptroller General can be removed only by impeachment or "for cause" by joint resolution. *Id.* § 703(e)(1) (1982).

In *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), the Supreme Court characterized the Comptroller General as an official in the "legislative branch" because he is removable by legislation. *Id.* at 3191. At least as a matter of practice, however, the Comptroller General has enjoyed significant independence. See *id.* at 3123 (White, J., dissenting) ("The practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment."); *id.* at 3216 n.1 (Blackmun, J., dissenting) ("The Comptroller General is not Congress, nor is he a part of Congress; 'irrespective of Congress' designation, he is an officer of the United States, appointed by the President." (quoting *Buckley v. Valeo*, 424 U.S. 1, 128 n.165 (1976) (per curiam))); see also F. MOSHER, *supra* note 79, at 158 ("All of the comptrollers general have treasured and defended the independence of their office, not alone from the President but also from Congress itself.").

227. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

228. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

229. For instance, the statute creating the Treasury Department required the Secretary to respond to all congressional inquiries and to apprise Congress of his activities. See *id.* at 65-66. As one scholar has noted, "In contrast, the First Congress had placed a statutory injunction of obedience on the Secretaries of Foreign Affairs [Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28] and War [Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49] to 'perform and execute such duties as shall be enjoined or entrusted to [them] by the President of the United States.' It laid no such injunction of obedience upon the Secretary of the Treasury." Tiefer, *supra* note 37, at 72 (quoting Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28).

230. See Tiefer, *supra* note 37, at 70-76 and sources cited therein. The primary official in the Treasury charged with fiscal control was the Comptroller, "the great-grandparent of the modern Comptroller General." F. MOSHER, *THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT* 25 (1979).

President curtailed the effectiveness of these special Treasury offices in monitoring executive compliance with appropriations limitations.<sup>231</sup>

By transferring the federal auditing functions to an independent officer not answerable to the President and removable by legislation only for "cause,"<sup>232</sup> Congress sought better to ensure executive compliance with spending legislation.<sup>233</sup> The Comptroller General is empowered to review executive records and to exercise independent judgment in allowing or disallowing payment.<sup>234</sup> In exercising his authority to review federal spending, the Comptroller General performs quasi-executive and quasi-judicial functions by disapproving of payments which, under his interpretation of spending laws, are not authorized.<sup>235</sup> It is not clear whether Congress has intended that the Comptroller General's determinations bind the executive branch,<sup>236</sup> but in any event a GAO determination that proposed spending is not authorized may convince the executive branch to alter its spending plans.<sup>237</sup> While the judicial branch is not bound by GAO determinations as to the legality of executive spending,<sup>238</sup> these determinations have been accorded significant deference by the courts.<sup>239</sup>

Despite its considerable authority, the GAO does not at present ensure

231. See *id.* at 48-51 (explaining impetus for creation of General Accounting Office).

232. 31 U.S.C. § 703(e)(1) (1982); see also *supra* note 226.

233. See Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C.L. REV. 1279, 1280-81 (1973).

234. See, e.g., 31 U.S.C. §§ 716-717 (1982) (GAO authority to investigate and analyze expenditures of public funds); 31 U.S.C. § 3523(a) (1982) ("Except as specifically provided by law, the Comptroller General shall audit the financial transactions of each agency."); 31 U.S.C. § 3526(a) (1982) ("The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government."); 31 U.S.C. § 3702(a) (1982) ("Except as provided . . . the Comptroller General shall settle all claims of or against the United States Government.").

235. In addition to after-the-fact audit or review, the Comptroller General may issue advance opinions on the legality of proposed expenditures. See, e.g., *Matter of Customs Serv. Reimbursement for Additional Personnel at Miami Int'l Airport*, 59 Comp. Gen. 294 (1980) (concluding that Customs Service has no authority to receive contributions from Miami area businesses to supplement slow and inadequate U.S. Customs services).

236. Compare *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 4 n.2 (1927), and *United States v. Standard Oil Co.*, 545 F.2d 624, 637-38 (9th Cir. 1976) with *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 11-12 (1972) (Douglas, J.).

In the Budget and Accounting Act of 1921, Congress provided that the Comptroller General's certification of appropriations balances would be binding on the executive branch. Budget and Accounting Act of 1921, ch. 18, § 304, 42 Stat. 20, 24. The present codification provides that "On settling an account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch . . .". 31 U.S.C. § 3526(d) (1982). It is by no means clear, however, that Congress intends the Comptroller General to have pre-audit certification authority. See generally F. MOSHER, *supra* note 230, at 209-14, 240-41.

In recently granting the Comptroller General authority to review the legality of government contract awards, Congress provided only that the Comptroller General could "recommend" agency action. 31 U.S.C. § 3554(b)(2) (1982 & Supp. 1986).

237. See F. MOSHER, *supra* note 230, at 298-304; Morgan, *supra* note 233, at 1291-95.

238. See *United States ex rel. Brookfield Constr. Co. v. Stewart*, 234 F.2d 94 (D.D.C. 1964); GAO PRINCIPLES, *supra* note 39, at 1-3 to 1-4; Morgan, *supra* note 233, at 1300-03.

239. See, e.g., *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1316 (D.C. Cir. 1971); *United States ex rel. Brookfield Constr. Co. v. Stewart*, 234 F. Supp. 94, 99-100 (D.D.C. 1964). But see also *Intercity Broadcasting v. Cardenas*, 554 F. Supp. 42, 47-52 (D.D.C. 1982).



or even seek to ensure executive compliance with all spending legislation. Its audit duties and capabilities are not comprehensive, and some federal agencies are outside its purview.<sup>240</sup> Moreover, the constitutionality of statutes authorizing the GAO to sue to enforce the Impoundment Control Act,<sup>241</sup> to subpoena agency files and to enforce these subpoenas in court,<sup>242</sup> and to stay award of a government contract following a protest to the Comptroller General<sup>243</sup> has been called into question by the Supreme Court's decision in *Bowsher v. Synar*.<sup>244</sup> In *Synar*, the court held that the Comptroller General is a "legislative" officer and thus may not have a role in enforcing the law.

Until Congress resolves the constitutional status of the GAO<sup>245</sup> and decides what role that agency should play in ensuring compliance with appropriations legislation, Congress cannot hope to develop a coherent strategy for implementing the constitutional principles governing

240. See F. MOSHER, *supra* note 230, at 298 (GAO audits each agency on "an infrequent spot-check basis"); F. MOSHER, *supra* note 79, at 153-62 (discussing shift in GAO activities since 1950); U.S. GEN. ACCOUNTING OFFICE, ANNUAL REPORT FOR FY 1984 app. 1 (GAO conducted fewer than 700 audits during 1984).

241. Congressional Budget and Impoundment Control Act of 1974, § 1016, 2 U.S.C. § 687 (1982) (amended 1984 and 1987). The Impoundment Control Act as a whole, 2 U.S.C. §§ 681-687 (1982 & West Supp. 1987), is a significant congressional effort to implement the Principle of Appropriations Control. The Act addresses the question whether the Executive may ever *not* spend funds which Congress has appropriated. The legislation answers that question by providing that Congress must approve proposed impoundments. See *New Haven v. United States*, 809 F.2d 900, 902-04, 906-08 (D.C. Cir. 1987); see also Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 754, 785 (amending 2 U.S.C. § 684 to delete provision for one-House veto of certain impoundments).

242. General Accounting Office Act of 1980, Pub. L. No. 96-226, § 102, 94 Stat. 312 (codified as amended at 31 U.S.C. § 716(b) (1982)).

243. Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2741(a) in part, 98 Stat. 494, 1200-01 (codified at 31 U.S.C. § 3553(c) (1982 & Supp. 1986)).

244. 478 U.S. 714 (1986).

245. Compare *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875, 885 (3d Cir. 1986) (pre-*Synar* holding that Comptroller General is not in legislative branch) with *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986) (post-*Synar* affirmance, holding that "de minimis" separation of powers violation may be ignored), *cert. granted*, 108 S. Ct. 1218 (1988). See generally Note, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539 (1987). See also Note, *supra* note 197, at 811 & n.154 (questioning constitutionality of Competition in Contracting Act in light of *Synar*).

Even before *Synar*, the Department of Justice challenged the constitutionality of these statutes. See *Staats v. Lynn*, No. 75-0551 (D.D.C. filed Apr. 15, 1975), discussed in Williamson, *The GAO Goes to Court: The Impoundment Case*, GAO REV., Spring 1976, at 55, 63 (noting that *Lynn*, only case in which GAO ever sued to enforce Impoundment Control Act prohibitions, was dismissed after impounded funds were released); H.R. REP. NO. 425, 96th Cong., 1st Sess. 7 (1979) (noting argument of Department of Justice that provisions of General Accounting Office Act of 1980 permitting judicial enforcement of information requests are unconstitutional "because that would constitute 'execution of the law' which neither the Congress nor the GAO as legislative bodies have the authority to perform"); President's Statement on signing H.R. 4170 into law, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984) (asserting that bid protest provisions of Competition in Contracting Act "would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch"). Compare OMB Bulletin No. 85-8 (Dec. 17, 1984) (directing heads of executive departments to disregard GAO claim of power to stay contracts under Competition in Contracting Act) with Gressman, *Take Care, Mr. President*, 64 N.C.L. REV. 381 (1986) (arguing that OMB directive is willful disobedience of law).

appropriations. Congress must decide whether the GAO's duties, in addition to investigating, reviewing, and reporting to Congress,<sup>246</sup> should include rendering either advisory or binding opinions to executive agencies, or bringing suits against the Executive. If Comptroller General determinations are to be binding on executive agencies, or if the Comptroller General is empowered to obtain judicial enforcement of appropriations limitations, Congress must, it appears, at least repeal the provision permitting legislative removal of the Comptroller General for cause.<sup>247</sup>

### B. *Enforcement Against Congress*

There has been no judicial enforcement of the Constitution's appropriations requirement against Congress itself. If, as the Supreme Court indicated a century ago, Congress has "absolute" authority to construe and to effectuate the appropriations requirement,<sup>248</sup> then a judicial challenge to the constitutional adequacy of legislation granting spending authority is doomed; every such enactment would be, by definition, a constitutional "appropriation."<sup>249</sup> In *United States v. Richardson*, a case involving appropriations for the CIA,<sup>250</sup> the Supreme Court asserted that Congress has "plenary" authority in implementing the companion "Statement and Account" clause.<sup>251</sup> Subsequently, the Court of Appeals for the District of Columbia Circuit relied on *Richardson* in dismissing for lack of standing another challenge involving CIA appropriations.<sup>252</sup> In the course of its opinion, the court suggested that Congress has "plenary" authority to interpret all of article I, section 9, clause 7, including the appropriations clause, and that the courts therefore have no power to consider the constitutional adequacy of spending legislation.<sup>253</sup>

Clearly the courts are not well situated to decide precisely how the appropriations requirement should be implemented—for instance, what role

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246. See also *infra* note 268 and accompanying text (role of GAO in helping Congress itself abide by appropriations requirement).

247. See *supra* note 232.

248. See cases cited *supra* note 212.

249. If Congress has plenary power to interpret a constitutional command, the command means only what Congress says it means. Cf. *Albernaz v. United States*, 450 U.S. 333, 344 (1981) (double jeopardy clause does not restrain legislative imposition of dual penalties; "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."); see also *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Rehnquist, J.); *Bishop v. Wood*, 426 U.S. 341 (1976) (employing similar reasoning with respect to property and liberty interests under due process clause).

250. See *supra* note 175.

251. *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) (5-4) ("It is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest.").

252. *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (congressman's challenge to CIA allegedly using its secret appropriations for unauthorized activities).

253. *Id.* at 194 n.7 (relying on *Hart's Case*, 16 Ct. Cl. 459, 484 (1881), *aff'd*, 118 U.S. 62 (1886); *United States v. Richardson*, 418 U.S. at 178 n.11); see also *Halperin v. CIA*, 629 F.2d 144, 154-62 (D.C. Cir. 1980) (holding that statement and account clause does not create judicially enforceable standard for disclosure of intelligence expenditures).

executive agencies should have in development of the budget, how specific appropriations should be, and what forms spending authority should take.<sup>254</sup> On the other hand, courts would appear to have both the capacity and the power to enforce the appropriation norms proposed here—that Congress provide a clear statement of object and that it limit the amount and duration of spending authority.<sup>255</sup> Nonetheless, courts may invoke prudential justiciability doctrines, such as “standing” requirements<sup>256</sup> and the political question doctrine,<sup>257</sup> to avoid consideration of the constitutional adequacy of appropriations legislation. There are strong prudential considerations for abstaining from addressing the adequacy of appropriations legislation absent conflict between the President and Congress.<sup>258</sup>

That courts may not have occasion in the near future to address the constitutional responsibilities of Congress under the appropriations clause does not mean that the issue may or should be ignored. The constitutional norms worthy of the attention of scholars and decisionmakers are not limited to those that might be articulated and enforced by the courts.<sup>259</sup>

254. For an examination of how Congress has filled in these interstices of the appropriations clause, see Stith, *supra* note 61.

255. The constitutional grant of the appropriations power to Congress need not imply that Congress has sole power to interpret the appropriations clause. Congress does not have sole power to interpret the enumerated powers of article I, section 8, or other limitations on Congress in article I, section 9. See *supra* note 28; cf. *Powell v. McCormack*, 395 U.S. 486, 518–48 (1969) (limits on Congress' power to construe and implement article I, section 5).

256. The requirements of the “standing” doctrine, see *supra* note 217, may not be met because there may not be an adequate judicial remedy for Congress' failure to exercise its control over the purse. Cf. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) (“citizenship” alone does not confer standing, absent concrete injury); *United States v. Richardson*, 418 U.S. 166, 174–80 (1974) (taxpayer has no standing to challenge implementation of statement and account clause). Akhil Amar has argued that the entire doctrine of “standing” is based on misconceptions about the constitutional function of courts. See Amar, *supra* note 122.

257. The political question doctrine, which the Supreme Court first articulated thoroughly in *Baker v. Carr*, 369 U.S. 186, 217 (1962), has been distilled to three inquiries: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?” *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring in judgment) (citations omitted).

258. See *Goldwater v. Carter*, 444 U.S. at 997 (Powell, J., concurring in judgment) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”); see also Elliott, *Regulating the Deficit after Bowsher v. Synar*, 4 YALE J. ON REG. 317, 332–36 (1987) (arguing that case was not “ripe” because Congress and the President were not in conflict); Note, *The Balanced Budget Amendment: An Inquiry Into Appropriateness*, 96 HARV. L. REV. 1600, 1612–19 (1983) (although neither standing nor political question doctrines prevent courts from hearing cases alleging violations of proposed balanced budget amendment, judicial enforcement of amendment would be disastrous); Bork, *Would a Budget Amendment Work?*, WALL ST. J., Apr. 4, 1979, at 20, col. 4 (similar).

259. See *Missouri, K. & T. Ry. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) (“it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts”); cf. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that constitutional norms are valued to their full conceptual limits independent of the extent of judicial enforcement); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 106, 175–77 (1976) (nonjudicial institutions may interpret demands of Constitution differently and more broadly than do courts); Brest, *A Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975) (Congress should give “great weight to” judicial interpretation of Constitution); Linde, *Judges, Critics,*

If these questions are indeed nonjusticiable, it is all the more important that the political branches fully articulate, in legislation, the constitutional norms applicable to Congress' exercise of the power of the purse. Moreover, Congress can and should develop additional institutional mechanisms to aid it in abiding by these norms in its spending legislation. The constitutional norms proposed in this Article—that legislative appropriations encompass a clear statement of object and be limited in amount and duration—provide a rule, a standard of injury, and a standard of remedy that are at least *legislatively* cognizable.

In fact, the most recent enactments governing the legislative budget process itself—the Congressional Budget and Impoundment Control Act of 1974<sup>260</sup> and the Gramm-Rudman-Hollings legislation<sup>261</sup>—reflect an understanding of the place of legislative appropriations in our constitutional order that is congruent with that proposed here: that appropriations control is both a critical constitutional limitation on the Executive and a constitutional duty of Congress.<sup>262</sup> Pursuant to these recent enactments, the Congressional Budget Office provides an estimate of the budgetary costs of all proposed legislation granting spending authority,<sup>263</sup> even in bills not denominated “appropriations acts” and even where the spending authority takes the form of an exception to the requirements of the Miscellaneous Receipts statute.<sup>264</sup> Under procedures devised in the 1974 Budget Act, amount and time limitations have been routinely enacted for some types of

and the Realist Tradition, 82 YALE L.J. 227 (1972) (criticizing idea that law is only what the judges say it is); see also Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 1, 23 (1986) (noting importance of “citizen participation in constitutional discourse and decisionmaking”); CONSTITUTIONAL CONTROVERSIES, *supra* note 5, at 95–96 (Rep. Panetta, discussing congressional budget procedures: “Ultimately, we have to be held accountable to the public. The public has to say whether we did or we didn’t do our job as the Constitution intended.”).

260. Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

261. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, amended by Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-199, 101 Stat. 754 (to be codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

262. See also CONSTITUTIONAL CONTROVERSIES, *supra* note 5, at 95–96 (Rep. Panetta suggesting that various types of backdoor spending “avoid the accountability that is the heart and soul of our democratic system”).

It has been suggested that the creation of sequestration authority under Gramm-Rudman-Hollings represents a movement away from legislative accountability because it delegates Congress’ appropriations power. See, e.g., *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 230 n.82 (1986). In fact, Gramm-Rudman-Hollings is an attempt to assert greater legislative control over the purse, and it limits the President’s allocational authority (in the event of a sequestration) more so than does conventional appropriations legislation. See Stith, *supra* note 61, at 643–50; see also *id.* at 660–61 & n.370 (explaining why Gramm-Rudman-Hollings is consistent with Congress’ special obligations under the appropriations clause).

263. See generally A. SCHICK, CONGRESS AND MONEY 131–65 (1980) (review of origins, structure, and functions of Congressional Budget Office prior to new duties imposed by Gramm-Rudman-Hollings).

264. Indeed, the 1974 Budget Act even requires that the President’s budget submission to Congress include a “tax expenditure” budget. 31 U.S.C. § 1105(a)(16)(1982). This list, however, is only informational; Congress does not appropriate tax expenditures. See also *supra* text accompanying notes 74–77.

collection authority,<sup>265</sup> and it is now procedurally difficult to establish new revolving funds. Other forms of backdoor spending authority, including new entitlement programs, have been subjected to much closer legislative scrutiny and control.<sup>266</sup>

Congress could do more. It could subject new gift authority to the same legislative scrutiny and control to which it now subjects other forms of permanent backdoor spending authority.<sup>267</sup> It could encourage or require the GAO to undertake a greater role in reviewing and proposing limitations on permanent and other open-ended authority.<sup>268</sup> It also could more fully implement the companion clause to the appropriations clause in the Constitution—the “Statement and Account” clause.<sup>269</sup> Neither presidential nor congressional budget documents set forth in a unified, easily ascertainable manner the amount of gifts, revolving fund receipts, or collections credited directly to appropriation accounts.<sup>270</sup> Nor does the federal budget reveal the long-term cost of new backdoor spending programs. In view of the constitutional importance of periodic legislative review and renewal of spending authority, Congress should be provided with complete information regarding obligations incurred under open-ended grants of spending authority. Finally, pursuant to the power of each House of Congress to determine its internal rules of procedure,<sup>271</sup> Congress could impose greater procedural limitations on all varieties of permanent, indefinite or other automatic spending authority.<sup>272</sup> While procedural limita-

265. See 1989 BUDGET, *supra* note 57, at 6e-15 (“it is not unusual for the Congress to enact limitations on the obligations that can be financed by these [collections credited to appropriation or fund accounts]”).

266. See 2 U.S.C.A. §§ 651-652 (West Supp. 1987). A summary of the changes wrought by the 1974 Budget Act and the original Gramm-Rudman-Hollings legislation is presented in BUDGET PROCESS, *supra* note 181.

267. The 1974 Budget Act specifically exempts gift authority from its major procedural limitations on new backdoor spending. See 2 U.S.C. § 651(d)(3)(B)(1982).

268. The GAO already has authority to conduct such reviews and periodically does issue analyses noting the gaps in legislative appropriations control. See, e.g., GAO Letter, *supra* note 124; COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS, FUNDING GAPS JEOPARDIZE GOVERNMENT OPERATIONS (1981); Letter from Comptroller General to Chairman, U.S. House Comm. on the Judiciary (Sept. 11, 1984) (concerning executive compliance with first “Boland Amendment” restricting aid to Nicaraguan contras) (copy on file with author). Gramm-Rudman-Hollings directs the GAO to undertake a long-term study of all permanent appropriations and backdoor spending. Pub. L. No. 99-177, § 214, 99 Stat. 1037, 1059 (1985) (codified at 2 U.S.C. § 654 (Supp. 1986)).

269. U.S. CONST. art. I, § 9, cl. 7; see *supra* notes 63-65 and accompanying text.

270. See 1989 BUDGET, *supra* note 57, app. pts. I & IV; S. Doc. No. 21, 98th Cong., 1st Sess. (1985) (“Appropriations, Budget Estimates, Etc.”); *supra* notes 121 & 124.

271. U.S. CONST. art. I, § 5.

272. The 1974 Budget Act, as amended by Gramm-Rudman-Hollings, requires Congress to consider all revenue and spending measures in relation to each other, makes creation of most new permanent funding mechanisms procedurally difficult, subjects most spending authority outside of appropriation acts to annual legislative control (“reconciliation”), creates new procedural requirements for consideration of all spending and revenue legislation, and imposes an overall deficit limitation on the federal budget. However, there remain procedural mechanisms to avoid these requirements. See, e.g., *supra* note 267. See generally BUDGET PROCESS, *supra* note 181; Stith, *supra* note 61, Parts II & IV.

Congress also has declined to establish, by statute or formal internal rule of each House, appropri-

tions on backdoor spending are enforceable only at the pleasure of each House, tough and clear rules disfavoring such spending mechanisms would underscore Congress' own commitment to meeting its appropriations obligations under the Constitution.

Although there is more to do, it is significant that the framework statutes governing federal spending themselves embody the principles implicit in the Constitution's appropriations requirement. The Miscellaneous Receipts statute<sup>273</sup> and the Anti-Deficiency Act<sup>274</sup> articulate, respectively, the Principle of the Public Fisc and the Principle of Appropriations Control, and thus hold that the Executive may not expend funds in the name of the United States except as appropriated by Congress. In other framework legislation, Congress has recognized its own, on-going obligation to limit the amount and duration of spending authority. Indeed, much of the history of Congress' implementation of the appropriations clause, from the earliest framework statutes<sup>275</sup> to the 1974 Budget Act and Gramm-Rudman-Hollings, has consisted of efforts to assert legislative control over government spending.<sup>276</sup> Unfortunately, these efforts have not always been thorough and consistent. Control of government expenditures is among Congress' most important and immutable rights. It is also among Congress' indispensable duties.

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tions control procedures for the growing "black" budget, *see supra* notes 183 & 201. *See generally* Maroni, *Special Access Programs and the Defense Budget: Understanding the "Black Budget"* (Congressional Research Service, Feb. 10, 1988). In 1987, Congress enacted legislation that may increase legislative oversight of secret weapons programs. National Defense Authorization Act, fiscal years 1988 & 1989, Pub. L. No. 100-180, §§ 1131-1133, 101 Stat. 1019, 1150-1153 (to be codified at 10 U.S.C. § 119).

273. *See supra* notes 105-35 and accompanying text.

274. *See supra* notes 136-64 and accompanying text.

275. The statement of Congressman John Randolph quoted in the title margin of this Article, recognizing both Congress' appropriations power and its appropriations "duty," was made as Congress was considering the Act of Mar. 3, 1809, 2 Stat. 535. This is the statute that I have identified as one of the earliest framework statutes, stating the principle that an appropriation may be spent only on the "objects" designated in the appropriation. *See supra* text accompanying note 51.

276. These efforts are explored in Stith, *supra* note 61, and L. WILMERDING, *supra* note 4.