

Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse

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The “takings” bills now moving through Congress contain a new method for funding private takings claims brought against the federal government. Previously, constitutionally-based claims were paid either from a permanently-appropriated, government-wide “judgment fund” on an entitlement basis or from specifically earmarked funds. Under a new “claims-on-agency-appropriations” approach, statutorily-based takings claims will affect directly on agencies’ personnel funds—even if the agency in question is fulfilling its legally mandated mission. In the light of possible executive branch counterresponses, Professor Tiefer examines the separation of powers implications of this new mechanism with regard to three interests: faithful execution of the laws; public fiscal control; and compensation of private claims. He concludes that the courts should let interbranch conflicts triggered by the new mechanism be resolved by the political processes that operate within the arena of the fiscal constitution.

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Introduction

A new approach for restraining government agencies has emerged in the “takings” bill moving through Congress: charging private claims against agency appropriations. Under current law, the government pays for private claims made pursuant to the Fifth Amendment’s Takings Clause¹ out of government-wide funds specifically intended to pay such claims. In contrast, the new bill’s “Source of Payments” provision would require agencies to redeem those claims from the limited funds available for their personnel and workplace expenditures.²

To date, the debate over the takings bill has focused on the expansion of claims. Yet the new approach of internalizing claims to agencies’ personnel funds has an independent significance. Takings claims would no longer have a diffuse impact on the fisc as a whole, but would operate with an *in terrorem* effect on particular agencies. Performing their mission legally and soundly would not preserve agencies from such “claims-on-agency-appropriations.”³ By enlarging the scale of claims, the proposed legislation raises the stakes still further—for wetlands regulation alone, the Congressional Budget Office has estimated that new claims would reach \$10-15 billion.⁴

Given today’s anti-government and anti-regulatory political spirit, the concept of charging agency appropriations for private claims could take on a life of its own. Congress might constrain any controversial federal regulatory,

1. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation . . .”).

2. The “Source of Payments” provision specifies that “[a]ny payment made under this section to an owner . . . shall . . . be made from the annual appropriation of the agency whose action occasioned the payment . . .” H.R. 925, 104th Cong., 1st Sess. § 5(f), 141 CONG. REC. H2639 (daily ed. Mar. 3, 1995). For a description of the bill and its progress, see *infra* Section I.A.

3. See *infra* Section I.C.

4. See *infra* text accompanying note 128.

litigating, or law enforcement agency that affects the private sector.⁵ Enactment of such a claims-on-agency-appropriations approach fortifies the legislative branch in separation of powers struggles against the executive branch; rearranges the implementing structure of the Appropriations Clause⁶ and the power of the purse; reorients the boundary between agency decision-making and privately-initiated litigation; and reopens the uncertainty surrounding the judiciary's supervision of public budgets.

Emergence of this new legislative strategy calls for preliminary mapping of uncharted portions of the "dark continent" or "hidden side" of the fiscal constitution.⁷ Section I examines the takings bill's strategy. It contrasts the bill's system of charging private claims against agency operating funds with prior legislated systems for paying constitutional takings from entitlement or earmarked funds. These earlier mechanisms satisfied the interests of private claimants, and did not interfere with execution of the laws.

The legal literature on interbranch "purse" struggles, as well as the author's experience as the Solicitor of the House of Representatives,⁸ suggest that the development of a novel strategy by one branch will typically elicit a counterresponse from the other. Section II explores how the executive branch will respond so as to blunt the impact of the legislature's new approach and shift the issue back into the political processes that historically resolve disputes over Appropriation Clause implementation.

5. For example, newly-created claims might be made payable from the operational appropriations of regulatory agencies such as the Environmental Protection Agency or the Food and Drug Administration; litigating agencies such as the Department of Justice's Civil Rights Division (for example, where the Division secures compliance with what is subsequently, statutorily deemed a "reverse discrimination" plan), or Antitrust Division (for example, where the Division "interferes" with mergers); or law enforcement agencies such as the Bureau of Alcohol, Tobacco, and Firearms (for example, where the Bureau limits the exercise of newly-legitimated firearms possession rights).

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

7. ALLEN SCHICK & ROBERT KEITH, MANUAL ON THE FEDERAL BUDGET PROCESS 115 (Congressional Research Service, 1982) [hereinafter 1982 CRS BUDGET MANUAL] ("hidden side"); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 643 (1988) ("dark continent") (quoting *Oversight on the Impoundment Control Process: Hearing Before the Task Force on Enforcement, Credit, and Multiyear Budgeting of the House Comm. on the Budget*, 97th Cong., 2d Sess. 180 (1982) (testimony of Professor Allen Schick)).

8. As Solicitor of the House of Representatives, the author personally represented the House of Representatives in a number of separation of powers cases with "purse" aspects, including briefs on the merits and on petitions for *certiorari* in several Supreme Court cases. *See, e.g.,* American Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) (vacating ruling that limitation in appropriation bill unconstitutional), *dismissed on remand*, 732 F. Supp. 13 (D.D.C. 1990) (failure to state cause of action); *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986) (upholding the Competition in Contracting Act challenged as unconstitutional by the President), *cert. dismissed*, 488 U.S. 918 (1988); *see also* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 849-919, 921-1010 (1989) (describing the budget and appropriations processes).

The executive response will invoke an important “lump-sum” principle of appropriations and government contracts law, under which agency heads enjoy discretion in allotting agency appropriations. If an agency allots only a limited sum for claims, claimants will ask the courts or Congress to make the agency reallocate more money for their claims. Section II also discusses the ordinary arguments over legislative interpretation that each side will employ, and then addresses structural issues of deeper significance. The Article concludes by discussing the prospects of success for this executive branch response and the value of understanding this often-overlooked aspect of the fiscal constitution.

I. The Fiscal Constitution and Claims on Appropriations

A. *The Fiscal Constitution and Constitutional Takings*

An examination of how the existing legislated system for paying for constitutional takings fits into the fiscal constitution provides a basis for analyzing the proposed claims-on-agency-appropriations approach.⁹ The fiscal constitution is the legal structure that governs all official activity relating to spending, borrowing, and taxing. It consists of constitutional provisions such as the Appropriations Clause, which dictates that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,”¹⁰ together with the framework of implementing statutes and internal procedures within each branch. These latter range from the original 1791 law that chartered the Treasury Department to the ever-evolving congressional budget and appropriations processes.¹¹ A diverse variety of issues concerning the fiscal constitution has been discussed in recent years.¹²

9. For uses of the term “fiscal constitution,” see Kenneth Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977) and Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1363-64 (1988). See also Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 70-74 (1983) (discussing the constitutional significance of early fiscal statutes).

10. U.S. CONST. art. I, § 9, cl. 7. For comprehensive overviews of Appropriations Clause implementation, see WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994) and LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* (1975).

11. TIEFER, *supra* note 8, at 849-919 (budget process) and 921-1010 (appropriations process).

12. See generally Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456 (1987); Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162; Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419 (1994); Wm. Bradford Middlekauff, Note, *Twisting the President’s Arm: The Impoundment Control Act*

The Takings Clause of the Fifth Amendment states: “[N]or shall private property be taken for public use, without just compensation.”¹³ Although that clause appears to mandate that money be spent for any valid constitutional takings claim, the Appropriations Clause constitutionally precludes money being spent except if, when, and to the extent that, “Appropriations Made by Law” say so. As the Supreme Court has noted, even when a federal court finds a constitutional taking, if the Congress will not appropriate funds for payment, “No Money shall be drawn from the Treasury,” and federal officials cannot pay that judgment.¹⁴

Accordingly, Congress has established two different legislated systems to pay constitutional takings claims. The first is somewhat analogous to the new takings bill; it pays for “inverse condemnations,” or constitutional takings that occur as incidents of non-acquisitive governmental action. An example would be a peacetime maneuver of the armed forces that mistakenly occupied and destroyed private facilities. The second system pays for “condemnations,” or constitutional takings that occur as purposeful acquisitions of property.

For inverse condemnations, the government pays out of the “judgment fund,” as it generally does for tort claims.¹⁵ Until 1956, Congress enacted appropriations specifically to pay such claims. Under that system, Congress could decline to make appropriations available to pay claims, although it rarely used that option.¹⁶ Then, in a postwar consolidation of government accounting and claims-handling systems, Congress provided that a variety of judgments, including inverse condemnation claims, would receive payment by a legislated “entitlement” system. Contrary to a simple understanding, the Appropriations Clause allows “Appropriations made by Law” to extend beyond annual appropriations to cover legislation establishing long-term or “permanent” authority for spending. Such “permanent appropriations,” or “entitlements,”

as a Tool for Enforcing the Principle of Appropriation Expenditure, 100 YALE L.J. 209 (1990).

13. U.S. CONST. amend. V.

14. *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962). For an example of the absence of an enactment pursuant to the Appropriations Clause precluding the finding of a taking, see *Hooe v. United States*, 218 U.S. 322, 333 (1920); Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 PUB. CONT. L.J. 155, 168-73 (1979) (discussing *Hooe* and progeny). The courts do give special consideration to particular problems like attempted congressional withdrawal of appropriations earlier available to satisfy a judgment, or appropriations constitutionally required for the operation of the courts themselves. See generally Jonathan Bunge, *Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee*, 55 U. CHI. L. REV. 237 (1988); Marc S. Mayerson, *Executability of Article III Judgments and the Problem of Congressional Discretion: United States v. Board of Education of Chicago*, 35 DEPAUL L. REV. 51 (1985).

15. “Inverse condemnation judgments are generally paid from the judgment appropriation, except where actions of an agency have, either intentionally or unintentionally, ‘forced’ the landowner to sue and the result would be a clear augmentation of the agency’s land acquisition appropriations.” 66 Comp. Gen. 157 (1986).

16. Note, 46 HARV. L. REV. 677, 685-86 & n.63 (1933) (citing examples).

are typically not limited in amount or duration.¹⁷ For example, Social Security payments and interest on the National Debt both come from permanent appropriations.¹⁸

In 1956, following the model of other entitlements, Congress enacted a permanent appropriation, the "judgment fund," to pay for judgments on a variety of claims below a ceiling of \$100,000.¹⁹ In 1977, it removed the \$100,000 ceiling.²⁰ Satisfaction of these claims is no longer subject to an annual appropriation, nor does payment reduce the availability of appropriations for any other purpose, such as agency personnel.²¹ In other words, payment of inverse condemnation claims is now mandatory or "uncontrollable."²²

By contrast, Congress funds condemnations through annual appropriations. Typically, it funds large-scale condemnations, such as the acquisition of land to expand a national park or forest, through a separate appropriation dedicated largely or wholly to that kind of object. For example, Congress will give the Park Service an appropriation to be spent predominantly on land acquisitions. This appropriation may be general, giving the Park Service discretion as to which parks to expand, or it may be "earmarked," meaning that it specifies particular sums for particular park expansions. Under either mechanism, Park Service condemnations trigger judicial proceedings to value the acquired land, and can only proceed to completion when appropriations are available to pay for the land.²³ When Congress makes a

17. See Stith, *supra* note 7, at 607; Stith, *supra* note 9, at 1378-81.

18. See Stith, *supra* note 7, at 605 (citing the permanent appropriation for interest on the national debt, 31 U.S.C. § 3123); *id.* at 607 & n.91 (citing, *inter alia*, the permanent appropriation for social security payments, 42 U.S.C. §§ 401-33).

19. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 569 (1962). Original provision for the judgment fund was codified at 31 U.S.C. § 724(a) (1958) (current version at 31 U.S.C. § 1304(a) (1994)).

20. OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-5* (1st ed. 1982) [hereinafter *APPROPRIATIONS PRINCIPLES 1982*] (discussing Pub. L. No. 95-26, 91 Stat. 96 (1977) (codified at 31 U.S.C. § 1304(a)(1) (1994))).

21. Congress and the agencies that implement the Appropriations Clause have taken care to keep the two paths for paying takings claims separate. Claimants can only tap the judgment fund to pay for judgments "not otherwise provided for." 31 U.S.C. § 1304(a)(1) (1994). Land acquisitions are deemed "otherwise provided for" by the system previously described. *APPROPRIATIONS PRINCIPLES 1982, supra* note 20, at 12-19.

22. Federal officials pay funds out of Treasury spending accounts when authorized to do so by different kinds of enactments. From some of the Treasury spending accounts, payment is authorized by discretionary annual appropriations; from some accounts for "entitlements," payment does not receive or require discretionary authorization by annual appropriations and is considered, by contrast, mandatory or "uncontrollable." For the basic distinction, see TIEFER, *supra* note 8, at 850-51. Regarding entitlements, see generally A.C. Pritchard, *Government Promises and Due Process: An Economic Analysis of the "New Property"*, 77 VA. L. REV. 1053 (1991).

23. When Congress makes a specific or earmarked appropriation for acquisition of land for a specified purpose, and that appropriation is "exhausted," the agency cannot condemn any

general appropriation for all land acquisition by an agency whose mission involves considerable acquisition, the agency divides up (or “allots”) the appropriation, thus deciding which lands to acquire within the terms of the overall spending ceiling. While appropriations limit what the agency can do, the acquisition funds are separate from or sufficient to cover the agency’s operational personnel and workplace expenses.²⁴

B. *Takings Bill Claims*

The Republican majority in the 104th Congress has advanced the claims-on-agency-appropriations approach as an innovative means to restrain federal agencies. Although our focus is on this funding strategy, it is worth delineating at the outset the new statutory private claims funded under such a strategy. In brief, these claims were developed by a recent “property rights movement,” which contends that the federal government should provide more compensation to private property owners for the negative impacts of regulation than the courts hitherto have required pursuant to the Takings Clause.²⁵ Before finding a constitutional taking, the Supreme Court has maintained a distinction between government actions readily found compensable, such as taking title or physically intruding on property, and mere agency regulation, which is seldom found compensable. While takings jurisprudence is changing, complex, and sometimes inconsistent, the courts usually require a property to suffer a near total loss of economic value before finding a constitutional taking by federal

more land. Thus, when Congress put a ceiling on the prices that could be paid to acquire land for the National Arboretum, and the jury in a condemnation proceeding found the land condemned for that purpose to have a higher value than that ceiling, the Comptroller General declared that the judgment could not be paid and title to the land could not be taken. 10 Comp. Gen. 418 (1931).

24. See OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, H.R. Doc. No. 2, 103d Cong., 1st Sess. app. at 726 (1993) [hereinafter *FY 1994 Budget*] (Land and Water Conservation Fund).

25. For a description of the component groups of the property rights movement, see *Fighting to Keep U.S. Rules from Devaluing Land*, N.Y. TIMES, Jan. 9, 1995, at A1; Margaret Kriz, *Land Mine*, NAT’L J., Oct. 23, 1993, at 2531. For takings arguments by the leading legal scholar sympathetic to the property rights movement, see RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

agency regulation.²⁶

In recent years, the Supreme Court has expanded the constitutional rights of property owners affected by local land use restrictions,²⁷ but has not matched this with any increase in the rights of property holders affected by federal regulatory agency action. The Reagan and Bush administrations issued an Executive Order and a set of Department of Justice guidelines designed to promote greater agency consideration of regulation's negative impact on property values.²⁸ These guidelines, however, mostly influenced agency procedures rather than markedly altering the scope and formula of claims. Moreover, neither the case law nor the Executive Order could change the funding mechanism for private claims, leaving intact the existing system of paying constitutional claims out of funds specifically dedicated for such purposes. Thus, neither development has restrained federal agencies through their operating budgets.

In contrast, the 104th Congress' new approach would have a powerful effect on federal agency regulation. The new takings bills establish a novel scope and formula for claims, for which the House-passed version, H.R. 925,²⁹ may serve as a model; for all pertinent purposes, the Senate-considered version, S. 605, tracks the House-passed version.³⁰

26. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992); *Penn Central Transp. v. New York City*, 438 U.S. 104, 130-31 (1978). For an introduction to the voluminous literature on constitutional takings, see CONGRESSIONAL RESEARCH SERVICE, 102ND CONG., 1ST SESS., *WHEN THE UNITED STATES TAKES PROPERTY: LEGAL PRINCIPLES* (1991) (prepared by Robert Meltz); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993); Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

27. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

28. Exec. Order No. 12,630, 3 C.F.R. § 554 (1988), reprinted in 5 U.S.C. § 601 (1994). See Kirsten Engle, *Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulations*, 14 VT. L. REV. 213 (1989); Jerry Jackson & Lyle Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulations*, 18 ENVTL. L. REP. (ENVTL. L. INST.) 10,463 (Nov. 1988); James McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 ENVTL. L. REP. (ENVTL. L. REP.) 10,474 (Nov. 1988).

29. Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess., 141 CONG. REC. H2639 (1995) (enacted). The House Committee on the Judiciary and the House Committee on Agriculture held hearings on the bill in February, 1995. *Regulatory Takings and Property Rights: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) [hereinafter *Regulatory Takings and Property Rights*]; *Hearings on Consideration of Private Property Rights Protection and Relevant Legislation Pending Before the 104th Congress: Subcomm. on Resource Conservation, Research and Forestry of the House Comm. on Agriculture*, 104th Cong., 1st Sess. (1995). The Judiciary Committee reported the bill that month. H.R. REP. NO. 46, 104th Cong., 1st Sess. 14 (1995).

30. The Omnibus Property Rights Act, S. 605, 104th Cong., 1st Sess. (1995), 141 CONG. REC. S19,250 (1995) (sponsored by Senate Majority Leader Robert Dole). Two Senate Committees held hearings on takings bills. *Hearings Before the Sen. Comm. on the Judiciary*, 104th Cong.,

Pursuant to the House takings bill, “[t]he Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more.”³¹ An “agency action” includes the denial or conditioning of a permit application.³² Thus, when a developer’s property value diminishes twenty percent or more because the Army Corps of Engineers has denied or conditioned a wetlands-filling permit, the developer has a private claim, and the “Federal Government” shall provide compensation. The House bill limits its reach to “specified regulatory laws,” primarily those covering wetlands and endangered species protection; the Senate approach applies more broadly.³³

Since property owners who suffer inverse condemnation, or condemnation, already have guaranteed compensation rights and procedures, the bill’s principal beneficiaries are property owners who suffer regulatory impacts that are not now constitutionally compensable.³⁴ Bill proponents urge that statutory compensation in such cases will discourage regulatory excess, treat owners more fairly, and ensure economically efficient property use. They also analogize regulatory takings to cost externalization: just as private enterprise should internalize costs imposed on the property of others, agencies should internalize negative regulatory impacts imposed on private property.³⁵

Environmentalist opponents of the legislation point to the discrepancy between constitutional and the new “statutory” takings.³⁶ They warn that providing compensation for relatively small impacts on property value will deter the government from appropriate regulatory action, license damage to the environment, and provide owners with a windfall. The bill’s opponents further argue that the social justification of government regulatory action as well as uncompensated positive impacts on property value, defeat the economic argument for compensating property holders for regulatory costs.

1st Sess. (Apr. 6 & Oct. 18, 1995), announced in 141 CONG. REC. D495 (daily ed. Apr. 6, 1995), D1218 (daily ed. Oct. 18, 1995); *Hearings Before the Sen. Comm. on Environment and Public Works*, 104th Cong., 1st Sess. (June 27 and July 12, 1995), announced in 141 CONG. REC. D 792 (daily ed. June 27, 1995), D842 (daily ed. July 12, 1995). For an editorial reaction to the Senate Judiciary Committee action, see *Congress and the Environment*, WASH. POST, Jan. 2, 1996, at A14.

31. H.R. 925, § 3(a).

32. *Id.* § 10(3). The bill defines a use of property as “limited by an agency action” if “a particular legal right to use that property no longer exists because of that action.” *Id.* § 10(2).

33. H.R. 925, § 10(3); S. 605, § 203(1)-(2).

34. Proponents’ arguments can be found throughout the hearings and debates on the bill, see *supra* notes 29-30, and in the scholarly literature, see *supra* note 26.

35. For a comparison between agency functioning and private enterprise functioning made in support of privatization, see Michal L. Tingle, *Privatization and the Reagan Administration: Ideology and Application*, 6 YALE L. & POL’Y REV. 229 (1988).

36. The arguments can be found throughout the hearings and debates on the bill just cited, see *supra* notes 29-30, and in the scholarly literature, see *supra* note 26.

Though fascinating, this takings debate is collateral to whether takings claims are paid from an agency's operating funds or from customary judgment funds dedicated to paying claims against the federal government. As its most innovative feature, H.R. 925 has takings claims met by the "annual appropriation of the agency whose action occasioned the payment or judgment."³⁷ This is a previously untapped source, traditionally stable and limited in size, that serves to pay primarily for agency personnel and secondarily for workplace services, such as transportation, field office rent, communications, utilities, and office equipment and supplies.

The claims-on-agency-appropriations approach consciously and expressly eschews both current systems for paying constitutional takings claims.³⁸ Neither takings bill suggests payment of claims from the judgment fund. On the contrary, H.R. 925 insists that the obligation of payment be "subject to the availability of appropriations,"³⁹ and when asked about this provision, the bill's floor manager confirmed that "it is our intention . . . not to create an uncontrollable entitlement [N]o—I do not believe that the 'judgment fund' would be an available source of payment as a result of a court order."⁴⁰ As this comment indicates, if the new approach were to pay claims on an entitlement basis from the judgment fund, the elected branches would no longer control the extent of new spending.⁴¹ The claims-on-agency-appropriations approach consequently retains elected branch control through the separate processes of appropriations enactment and allotment, thus intimating the shape of a possible executive branch counterresponse.⁴²

37. H.R. 925, § 6(f). Its Senate counterpart requires "[a]wards of compensation . . . whether by judgment, settlement, or administrative action, [to] be promptly paid out of currently available appropriations supporting the activities giving rise to the claim for compensation." S. 605, § 204(f).

38. In many other regards, however, bill proponents have eagerly analogized statutory "takings" claims to Fifth Amendment constitutional "takings." For example, the House committee report on H.R. 925 compared the new statutory right to compensation with the Federal Circuit's recent decision holding denial of a wetlands mining permit to be a constitutional taking. *See* H.R. REP. NO. 46, *supra* note 29, at 9 (1995) (citing *Loveladies v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (permit denial eliminated over 99% of the economically valuable use of the land at issue)). Such a constitutional taking claim would be paid, as an inverse condemnation, out of the judgment fund.

39. H.R. 925, § 7.

40. 141 CONG. REC. H2509 (daily ed. Mar. 2, 1995) (statement of Rep. Canady).

41. *See supra* note 22.

42. *See infra* Section II.

C. *Comparing the Claims-on-Agency-Appropriations Approach for Paying for Statutory Takings with Existing Approaches for Paying for Constitutional Takings*

While the specific effect of the new claims-on-agency-appropriations strategy on individual agencies has not received extensive legal analysis, its general nature is no surprise to either opponents or proponents. At House hearings on H.R. 925, Professor Peter Byrne, an opponent of the bill, testified that “the absence of any special fund from which to pay compensation under [the bill] contradicts any claim that its primary goal is compensation [E]ach agency would forfeit the means for carrying out its mission”⁴³ An Army Corps of Engineers official with wetlands responsibility similarly commented: “The payment would come from the agency budget. It’s clearly intended to punish a federal agency for any action that would inconvenience any property owner to the slightest degree.”⁴⁴

Conversely, proponents defended the bill as a way to persuade agencies to change their implementation of the law, and thereby keep claims from cutting into the agency’s budget. The direct effect on agency personnel, far from being denied, was much-touted as a means to change agency behavior. Indeed, proponents did not publicly discuss the possibility that agencies would incur claims that would completely exhaust their funds, rather than change their behavior to avoid such claims. A key bill supporter told the House that “we see compensation as a stick that forces the government to make the right decision, not the bureaucratic frivolous decision that can be made with no compensation.”⁴⁵ Both sides thus recognized the significance of the new system’s not merely shifting costs between private property owners and the government as a whole, but instead impacting directly on the personnel funds of particular agencies.

Neither side, however, devoted much attention to existing systems for paying constitutional claims or to the interests they serve. With both sides focused on the scope and formula of new claims, the impact on the various interests underlying the fiscal constitution, although recognized, did not receive systematic analysis. In this context, the fiscal constitution serves and

43. *Regulatory Takings and Property Rights*, *supra* note 29 (testimony of Professor Peter Byrne of Georgetown University Law School).

44. Transcript of Discussion Before the Energy, Environment and Natural Resources Section of the Federal Bar Association 19 (March 7, 1995) (unpublished) (remarks by Lance Wood of the Army Corps of Engineers). Mr. Wood disclaimed speaking in any official capacity. Representative Vento, another bill opponent, after noting that “the cost would be \$10 to \$15 billion,” said, “if your goal is to stop the implementation of these laws, then you do not [need to] worry about that, because [under the bill] there is not any money. Then you can stop [the implementation].” 141 CONG. REC. H2547-48 (daily ed. Mar. 2, 1995).

45. 141 CONG. REC. H2540 (daily ed. Mar. 2, 1995) (statement of Rep. Fields).

coordinates three distinct interests, each primarily the responsibility of a different branch of government, and each therefore possessing a distinct constitutional root: (1) execution of laws by the executive branch under Article II; (2) public fiscal control by the legislative branch under Article I; and (3) private compensation, adjudicated by the federal judiciary under Article III. Analyzing these interests separately serves to sharpen the comparison between established approaches and the new claims-on-agency-appropriations funding mechanism .

1. *Faithful Execution of the Laws*

The execution of laws by the executive branch receives its textual expression in the Faithful Execution Clause,⁴⁶ and follows necessarily from the structure of the governmental system. Departments and agencies, created and granted authority in order to execute the law, are given stability and security in performing their sometimes controversial missions by the established legislated systems for paying constitutional takings claims. Indeed, execution depends on Congress providing a legislated system of funding; departments and agencies cannot execute more law than available appropriations will fund.⁴⁷ Without appropriations, federal officials can do little or nothing; they cannot even receive their own salary. Ultimately, in the absence of funds, they must be furloughed or terminated.

Through the two current legislated systems for paying constitutional takings claims, Congress allows agencies to execute their legal responsibilities without operational instability or insecurity. Whatever private claims are successfully brought will be funded from the judgment fund or earmarked appropriations, not the agencies' funds for personnel. These systems completely insulate agencies from the fiscal impact of constitutional takings suits. For example, how much funding the Army has for its personnel depends only on how much Congress votes in its Army personnel appropriations and on how the Army allots these, not on the nature or extent of private claims.⁴⁸

In contrast, under the claims-on-agency-appropriations approach, an agency's personnel funds are no longer beyond the reach of takings claims. The House taking bill's focus on wetlands regulation makes the Corps of Engineers a proper illustration for this mechanism. For Fiscal Year 1994, the Corps received an operating appropriation of \$101 million for wetlands

46. U.S. CONST. art. II, § 3. For the clause's history, see Tiefer, *supra* note 9, at 90.

47. See Devins, *supra* note 12, at 471-74.

48. In special circumstances, such as contractor claims pursuant to the Contract Disputes Act, Pub. L. No. 95-563, 92 Stat. 2383 (1978) (codified at 41 U.S.C. § 601 (1982)), payments may come out of the judgment fund and then be reimbursed from appropriations.

regulation.⁴⁹ Over two-thirds of that sum goes to personnel compensation, personnel benefits, and personnel-related charges (e.g., the agency's matching payments into health and retirement funds) for approximately 1,300 professional and other employees.⁵⁰ Constitutional takings claims for wetlands regulation have not come out of such an account.

As reflected in the legislative⁵¹ and administrative⁵² history of the Gramm-Rudman-Hollings Act, agencies typically have some potential to absorb cuts in workplace services, but thereafter, they have to resort to personnel furloughs. Through this new approach, therefore, Congress adds a potent new weapon for shaping executive branch activity to an arsenal that already includes amending the law, changing the charter of the regulatory agency, adding an amendment regarding regulatory policy to the agency's appropriation, or conducting oversight through reports or hearings.⁵³ It can even modify how an agency acts by cutting its appropriation, though this tool is so blunt Congress uses it infrequently.⁵⁴

Under the new approach, activities that generate claims deplete agency operating funds. Not only does this result suggest to the agency that, in some general sense, it should perform a restrained version of its statutory mission, but it constitutes a direct threat to agency officials. Sizable reductions in agency operating funds reduce funds for personnel, thus lessening the assistance agency employees provide senior agency officials, and ultimately will threaten officials' own salaries and jobs. Bill proponents, of course, may believe that agencies have strayed so far from a "proper" role that such an

49. Energy and Water Appropriations Act, Pub. L. No. 103-316, tit. 2, 108 Stat. 1710 (1994).

50. The basic budget document for the preceding year estimated FY 1994 personnel at 1,317, personnel compensation at \$54,404,000, and benefits at \$10,900,000. *See FY 1994 Budget*, *supra* note 24, app. at 518.

51. During the 1980s, the Gramm-Rudman-Hollings Act threatened to require agencies to cut ("sequester") their spending by uniform and fairly limited percentages. Pub. L. No. 99-177, tit. 2, 99 Stat. 1038 (1985). The conference committee report urged personnel not be laid off until other methods of reducing fiscal obligations had been exhausted, thus recognizing what would happen—layoffs—once an agency had its general appropriations reduced past a certain point. *See* Stith, *supra* note 7, at 642 (citing H.R. CONF. REP. NO. 433, 99th Cong., 1st Sess. 94 (1985), reprinted in 1985 U.S.C.C.A.N., 1011-12).

52. The Office of Management and Budget and Congressional Budget Office urged program managers "not to resort to personnel furloughs until other methods of achieving savings prove insufficient, such as reducing spending for travel, printing, supplies, and other services." *Id.* at 642-43 (quoting OFFICE OF MANAGEMENT & BUDGET & CONGRESSIONAL BUDGET OFFICE, SEQUESTRATION REPORT FOR FY 1986, 51 Fed. Reg. 1918, 1936 (1986)).

53. *See* Devins, *supra* note 12, at 460-61.

54. For example, during the Reagan Administration, congressional critics of the Federal Trade Commission and Legal Services Corporation failed to cut the agencies' appropriations substantially. Though they had sufficient political support to attach language to their appropriations precluding the use of funds for specific controversial activities, critics could not force the blunter step of cutting the agency's general appropriation and thereby triggering personnel furloughs. *See* 1981 CONG. Q. ALMANAC 366-67.

approach is the only means to bring about “true” enforcement of the laws. If the original intent of statutes like the Clean Water and Endangered Species Acts involved far smaller negative impacts on private property, then only an unprecedented scale of incentives, applying personally to agency officials, will restore faithful execution.

Regardless of proponents’ precise intentions, the new strategy reorients the boundary between government and private power. In the past, private litigation only affected an agency when courts reversed agency action. So long as an agency acted legally, private suits could have no effect. Even when agencies lost, they could thereafter follow the courts’ rulings and suffer nothing more than a change of course. A judicially-enforced requirement to include cost-benefit analysis in an agency’s decision-making, for example, could be met without operating directly on officials’ personal sense of security. Traditionally, the law blocked private claims directly against agency officials. The extensive case law regarding official immunity of executive branch officials recites the discouraging effect on government activity were such officials not immune from personal suit.⁵⁵ Since constitutional claims were paid out of dedicated funds, their payment did not concern officials personally.

Under the suggested approach, if agency activity produced private litigation, then an agency would be constrained by more than the desirability of steering a course the courts would uphold. Agencies would be restrained by the new approach’s *in terrorem* effect, particularly when the direct impact on agency personnel funds is coupled with the indiscriminate nature of the standard for takings-type claims. As with Fifth Amendment claims, the standard for statutory takings claims depends only on having an impact on private property, without regard to whether the agency decision is legal and sound. In other words, an agency could pursue its mission with great attention to legality and policy soundness, but if its actions were to have impacts of the specified kinds, it would face private claims, thus threatening its personnel. Private claimants would thus acquire the power previously blocked by the doctrine of official immunity, namely the power to deter officials from certain agency actions by directly affecting their offices and their salaries—regardless of whether what they do is right.

Like the apocryphal self-protective banker who only lends to individuals upon proof they do not need the money, the agency head would only take action upon assurance that private interests would not respond with claims. Ironically, the leverage granted by the bill to private individuals claiming a

55. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Barr v. Mateo*, 360 U.S. 564 (1959). Similarly, the case law about appellate reviewing courts not intruding into the mental processes of administrators recognizes the distracting effect of private parties being permitted to cross-examine officials with burdensome tools of discovery. See *Heckler v. Chaney*, 470 U.S. 821, 829-33 (1985).

statutory taking would be denied to private individuals who experience constitutional violations, such as a violation of First or Fourth Amendment rights. When a private party sues successfully on a constitutional tort theory, her claim is paid from a judgment fund without reducing agency appropriations and directly affecting agency employees. Agency employees would apparently be far more strongly deterred from offending property rights protected by the statute than from violating individual rights assured in the Constitution.

2. *Control of the Public Fisc*

The Appropriations Clause makes public fiscal control one of the paramount interests of the fiscal constitution—arguably the single greatest tool in democratic control of government.⁵⁶ When legislated systems provide for public fiscal control, they provide a degree of accountability by elected officials to the public for spending decisions. The public, through its representatives, must consent to how it will be governed.

Public control acts differently for agency operating accounts and for the separate accounts that handle large and fluctuating outgoing payments, like those for procurement, grants, transfer payments to individuals, and claims. As for agency operating accounts, Congress and the Executive decide these in an elaborate system, discussed below, that uses lump-sum appropriations, agency allotments, and multiple channels of political interaction to determine the particular object of agency funds.⁵⁷

Not paying for inverse condemnations or acquisitive condemnations from agency personnel funds allows the appropriations process to set an annual level of agency appropriations that is typically fairly stable. When Congress votes the same \$101 million for the Corps of Engineers each year, it can expect a particular level of agency operations, such as a particular rate of processing of permit applications, comparable to previous years. Members of Congress have the power to vote for a smaller amount and to shift the savings to some dedicated purpose, but in doing so they take political responsibility for the consequences of reducing an agency's budget and hence its operations.

56. John McHenry, one of the Framers, said of the clause:

When the Public Money is lodged in its Treasury there can be no regulation more consistent with the Spirit of Economy and free Government that it shall only be drawn forth under appropriation by Law and this part of the proposed Constitution could meet with no opposition as the People who give their Money ought to know in what manner it is expended.

3 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 144 (1911) (quoted in Sidak, *supra* note 12, at 1176).

57. *See infra* Sections II.A, II.C. For example, the elected branches decide through these processes on the particular objects of Army personnel spending. The public decision-making interest has been paramount in the context of war powers and foreign affairs. WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 181 (1994).

As for the separate accounts that handle outgoing payments, Congress and the agencies may, or may not, provide close public fiscal control. The elected branches can employ discretionary annual appropriations to decide how much property and which property to condemn. The courts simply determine the value of condemned property. The elected branches may, however, give up this close fiscal control by making the object of payment an entitlement. For inverse condemnations, the judgment fund, like other entitlements, functions as a blank check beyond congressional or agency control. Congress has, however, established strong budget procedures checking the enactment of new entitlements. It was this budget system that identified earlier versions of the wetlands takings bill as creating a new entitlement of \$10-15 billion. These early drafts were checked pending development of the claims-on-agency-appropriations approach.⁵⁸

In contrast, the charging of agency appropriations for such claims radically alters the politics of controlling agency operations. Until now, adjustments in agency funding occurred through political processes that normally implement the Appropriations Clause: enactment of each year's lump-sum appropriations, allocation, and reprogramming, followed by a similar cycle the next year. Under the new approach, adjudication of private claims also affects the amount of funds left for other objects of funding. If claims are trivial compared to what agency appropriations normally fund, namely personnel and workplace costs, this effect would not matter.⁵⁹ Under the new approach, however, claims might be nontrivial, and, in some cases such as

58. As noted in the H.R. 925 House Judiciary Committee report's dissenting section, "[a] 1992 assessment by the Congressional Budget Office of a related bill, H.R. 1330, which would have required compensation by the U.S. Army Corps of Engineers for actions affecting wetlands, estimated these costs at between \$10 and \$15 billion." H.R. REP. NO. 46, *supra* note 29, at 14 (section of "Dissenting Views" signed by 12 Representatives). The majority portion of the report offered no conflicting view as to the cost of compensation. There were differences among H.R. 1330, the committee-reported bill, and the bill the House passed, such as the shift in the threshold percentage of loss needed for a compensable claim from ten percent in the committee-reported bill to twenty percent in the House-passed bill. Thereafter the Congressional Budget Office did not make any estimate pertinent to the House-passed bill.

The estimate for H.R. 1330 is so high because of the extent of protected wetlands: in the lower 48 states, wetlands were estimated in 1988 at approximately 100 million acres, and there is also extensive acreage in Alaska. A sizeable part of Louisiana is privately-owned wetland subject to Corps of Engineers permitting requirements pursuant to the Clean Water Act. Such wetlands often have limited uses if not filled in, but if the government permitted filling, the land could then be developed and would have the market value of non-wetlands. Thus, Corps of Engineers regulators may be seen as significantly affecting the market value of the nation's vast privately-held wetlands acreage. For general background on the wetlands issue, see CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY 78-80* (1994).

59. When the claims are trivial, a claims-on-agency-appropriations approach would have no more effect than a law that slightly increased personnel or workplace costs, like a new law imposing training obligations on agencies or making them pay limited amounts to make their facilities accessible to the disabled.

wetlands regulation, enormous.⁶⁰

Hence, the locus of decision-making about certain agencies' activity would shift away from the usual political processes to the private claims process. An agency trying to keep its funds from absorption by private claims would view the private claims process as crucial. Like an enterprise with far more debts than credits, the need to avoid illiquidity would guide its every move. Presidential and congressional directives on policy would matter significantly less were private claimants, particularly interests which could aggregate large claims,⁶¹ to hold the agency's funds in their pocket.⁶² Given this threat, the Executive is likely to develop strategies to counter the effects of the claims—on—agency—appropriations approach.⁶³

3. *Availability of Private Compensation*

The two existing legislated systems provide full protection, in different ways, for private claimants' interests pursuant to the Takings Clause. By making "inverse condemnations" an entitlement, Congress guaranteed private claimants full and universal payment; and by paying for "condemnations" out of earmarked spending funds, Congress provided that private claimants would keep their property unless the appropriation, as divided up by the agency, satisfied the private claim as valued by the condemnation adjudication.

In contrast, under the claims-on-agency-appropriations approach, while the bill does give a statutory takings claimant more than he or she has under current law (which gives him neither a claim nor funding for a claim), the bill very distinctly does not assure payment. Moreover, the bill does not provide that lack of payment bars the impact-generating regulatory action from

60. Note in this context that Social Security and Medicare payments, the Interior Department land acquisition payments, or the Pentagon's weapons procurement payments—none traditionally funded from personnel accounts—overshadow the salaries of government employees who process the decisions for those payments. In general, few federal government employees simply produce services themselves, like medical personnel or teachers, in a way that makes personnel costs a large proportion of what their operation produces or affects. Rather, since the agency personnel operate payment, acquisition, or regulatory systems, not production systems for personal services, personnel costs are usually much smaller in scale than what the agency processes or affects, while private claims correspond, in some proportion, to what is processed or affected.

61. Although proponents of a claims-on-agency-appropriations approach point to the plight of smallholders for whom negative regulatory impacts cause hardship, the statute would give power to those claimants who have large claims or can combine to orchestrate the aggregation of large claims, thus threatening agency funds. With regard to wetlands, for example, given the regulators' enormous claims exposure in Louisiana, an association of Louisiana developers able to generate and recover claims larger than the Corps' personnel funds would have nearly as much capacity to control the Corps as the creditors committee of a bankrupt private enterprise. *See supra* note 58.

62. Wetlands regulators, for example, would have to rule out completely policies that might generate sizable claims, however strongly in furtherance of wetlands law and executive policy.

63. *See infra* Section II.

proceeding to completion. Rather, what a private claimant receives will depend on the availability of appropriations. Since bill proponents could not give the security of entitlement funding without a politically unpalatable acknowledgment of increased government spending, they left new claimants only the right to obtain payment from available appropriations. As Section II shows, this points to the executive branch's possible counterresponse.

II. Separation of Powers Counterresponse to Claims on Agency Appropriations

How the executive branch could or would parry the new strategy has received no analysis in legislative hearings and other discussions of the takings bill, nor in the scholarly literature. The unarticulated but generally-held assumption among proponents and opponents alike is that there is nothing the executive branch can do to prevent claims from being paid out of agencies' annual appropriations. In other words, when the bill makes the Corps of Engineers' \$101 million in its lump-sum appropriation available to satisfy payment of claims, it ineluctably makes the whole of that \$101 million available.

The most interesting part of controversies between the elected branches over the implementation of the Appropriations Clause has often been the counterresponse that follows a new move by one side. Thus, the Nixon Administration's assertion of impoundment power, the power to refuse to spend appropriated funds, prompted an elaborate new Congressional Budget and Impoundment Control Act.⁶⁴ Similarly, congressional use in the 1980s of legislative provisions in defense spending bills to affect national security policy triggered various responses by the Reagan and Bush Administrations, from sophisticated veto bargaining to narrow interpretation.⁶⁵ In such controversies, the fiscal constitution serves as the field for elected branch maneuvers. Analogously, the most significant aspect of Congress's developing the claims-on-agency-appropriations approach may be the Executive's response.

Suppose the executive branch uses its regular procedures to prevent the draining of agency operating funds. Upon the enactment of an appropriation bill subject to claims, an agency must, as a regular matter, set aside, or "allot," funds for its various objects. Assume, then, that an agency, either by itself or with the encouragement or direction of the President through the Office of Management and Budget, allots only a limited fund for claims payment—\$5 million of its total of \$101 million. By allotting the rest of its appropriation for other objects such as personnel costs, the agency makes that

64. See generally Middlekauff, *supra* note 12.

65. See TIEFER, *supra* note 58, at 46-50.

part unavailable for claims payment.

Would this constitute usurpation of the power of the purse by the Executive or violation of the new statute's command? Would the courts accept that a claimant with a valid claim could be frustrated and merely remitted to Congress for satisfaction? Does the answer come from ordinary legislative interpretation, or from some deeper analysis? Searching to understand how the debate proceeds in such a parry and thrust between Congress and the Executive leads to what the Supreme Court has alluded to as fundamental conceptual considerations "of peculiar importance . . . under our political and fiscal system"⁶⁶ This search requires synthesizing disparate areas of the law, starting with the "principle of lump-sum discretion" in the law of appropriations and government contracts, and continuing with issues of legislative interpretation and separation of powers.

A. *"Principle of Lump-Sum Discretion": Executive Branch Authority Over Allotment of Lump-Sum Appropriations.*

When the Appropriations Clause declares that no money shall come from the Treasury except pursuant to "Appropriations made by Law," it leaves open the question of who will exercise, and how, the power to decide the specific objects of spending. As Professor Stith has observed, "[t]he Constitution does not require any particular degree of specificity in appropriations language."⁶⁷ During the government's formative years, Jeffersonian philosophy,⁶⁸ in contrast to Hamilton's views,⁶⁹ limited the Executive role. Until well into the twentieth century, Congress followed the Jeffersonian lead in implementing the Appropriations Clause by drafting spending bills with numerous expressly detailed line items specifying the particular objects for which funds were

66. *Reeside v. Walker*, 52 U.S. (1 How.) 272, 291 (1850).

67. Stith, *supra* note 7, at 609.

68. As President, Jefferson insisted that "it would be prudent to multiply barriers against their dissipation [of public money] by appropriating *specific* sums to every *specific* purpose susceptible of definition; . . . [and by] circumscribing discretionary powers over money." Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 314, 317 (J. Richardson ed., 1897) (emphasis added). In practice, Jefferson was more flexible. As President, he spent unappropriated funds for munitions in 1807 during a crisis with Britain foreshadowing the War of 1812. ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 24 (1974).

69. Alexander Hamilton, who as the powerful and energetic first Secretary of the Treasury set up the nation's fiscal system, articulated the opposing position: "[N]othing is more wild or of more inconvenient tendency than to attempt to appropriate 'a specific sum for each specific purpose, *susceptible of definition*,' as [Jefferson] preposterously recommends." A. Hamilton, *Lucius Crassus, The Examination No. 11* (Feb. 3, 1802), *in* 25 THE PAPERS OF ALEXANDER HAMILTON 515 (H. Syrett ed. 1977).

available.⁷⁰ In response, agencies would overspend their detailed line items, “coercing” Congress to appropriate more money to cover the “deficiency” in their funds, thereby engendering the passage of bills understandably known as “coercive deficiency appropriations.”⁷¹

Those maneuvers shaped today’s system. With the expansion of the federal government in the early and mid-twentieth century, passage of a series of “framework” statutes for the fiscal constitution, notably, the Budget and Accounting Control Act of 1921⁷² and the Anti-Deficiency Act,⁷³ overhauled the old machinery and ended both detailed line itemization and coercive deficiency appropriations. These framework statutes created the Executive’s “allotment” power for breaking the lump sum down into the specific objects for which funds are available. The principle of lump-sum discretion became the dominant organizing principle for Appropriations Clause implementation. Congress shifted to enacting far more general line items in the appropriation bills, each of which would “fund each broadly defined federal program or activity in one lump sum, termed a budget ‘account.’”⁷⁴ The President’s annual proposed budget now includes a massive description of the various accounts, with Treasury identification numbers and object classifications.⁷⁵ Once Congress enacts the lump-sum appropriation for an agency’s operations, the agency head formally allots the lump sum. Each allotment is exclusively available for a particular object.⁷⁶ As discussed below, during the fiscal year, an agency can change its allotments by another power known as “reprogramming.”

It has become increasingly important that the Anti-Deficiency Act precludes not only obligations in excess of appropriations, but also obligations in excess of allotments.⁷⁷ To avoid a situation in which an agency can either

70. Stith, *supra* note 7, at 609-11; LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 59-63 (1975). See generally L. WILMERDING, *THE SPENDING POWER* (1943).

71. Fenster & Volz, *supra* note 14, at 160-62; Peter Raven-Hansen & William C. Banks, *From Viet Nam to Desert Shield: The Commander in Chief’s Spending Power*, 81 *IOWA L. REV.* 79, 110-11 (1995).

72. See Dam, *supra* note 9, at 272, 278-82; Stith, *supra* note 9, at 1363.

73. Fenster & Volz, *supra* note 14, at 162-66; Stith, *supra* note 9, at 1370-77.

74. Stith, *supra* note 7, at 611.

75. See UNITED STATES GENERAL ACCOUNTING OFFICE, *A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS* 35-39 (1981) [hereinafter *GAO GLOSSARY*] (defining “Appropriation (Expenditure), Receipt, and Fund Accounts”); OMB CIRCULAR A-34, *INSTRUCTIONS ON BUDGET EXECUTION* § 23 (rev. ed. Oct. 1994) (giving identification system that serves in standard forms submitted by all agencies and in President’s Budget).

76. Under the General Accounting Office’s definition, an “allotment” is “[a]n authorization by the head (or other authorized employee) of an agency to his/her subordinates to incur obligations within a specified amount.” *GAO GLOSSARY*, *supra* note 75, at 33. OMB CIRCULAR A-34, *supra* note 75, provides the government-wide guidance on the allotment process.

77. Specifically, the Anti-Deficiency Act requires the head of each executive agency to “prescribe by regulation a system of administrative control . . . designed to . . . restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of

coerce a deficiency appropriation to cover the excess outflow or be required to curtail operations, agencies have the power and the duty to allot funds so as to limit how much of an appropriation can be drained for any object.⁷⁸

In 1993, the Supreme Court reinforced and elaborated the “lump-sum discretion” principle at the heart of this twentieth century system. In *Lincoln v. Vigil*, the Court rejected a suit challenging the Indian Health Service’s decision to end the allotment from its lump-sum appropriation of funds for one particular object, a specific Indian health program. Despite numerous indications that Congress intended that the agency should continue to spend the appropriation on that program, the Court held that

[t]he allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.⁷⁹

The Court quoted with approval the fuller discussion in a classic 1984 D.C. Circuit opinion by then-Judge Scalia, *UAW v. Donovan*, that “[a] lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit.”⁸⁰

Thus, this lump-sum principle and the power of allotment, with which the claims-from-agency-appropriations strategy is about to clash, represent a fundamental doctrine in the law of appropriations and government contracts. Legally, they constitute the elected branches’ system for balancing centralization against decentralization, overall congressional direction against administrative discretion. While it would not be unconstitutional for Congress to resume specifying in individual appropriations how to spend subunits of the

the appropriation” 31 U.S.C. § 1514(a) (1988). A companion provision prohibits “an expenditure or obligation exceeding . . . the amount permitted by [those] regulations” 31 U.S.C. § 1517(a)(2) (1988).

78. The allotment power exists “not only to prevent the need for deficiency or supplemental appropriations, but to insure that there is no drastic curtailment of the activity for which the appropriation is made.” Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 73 (1978) (describing apportionment with regard to time, which serves same purposes as allotment with regard to object). Hopkins and Nutt usefully trace the history of effective compliance with the Anti-Deficiency Act up to the creation of OMB in the early 1970s and its issuance of the original Circular A-34 in 1976. *Id.* at 74.

79. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

80. *Id.* (quoting *United Automobile Workers v. Donovan*, 746 F.2d 855, 861 (1984) (Scalia, J.) (footnote omitted), *cert. denied*, 474 U.S. 825 (1985)).

lump sums and thereby reduce agency discretion, the huge scale of the budget and the impossibility of directing anything so large on an inflexible basis effectively requires lump-sum appropriating.⁸¹ The trillion-dollar annual federal budget already contains thousands of lump-sum accounts each containing on average hundreds of millions of dollars.

In the pertinent example, the appropriation for Corps of Engineers wetlands regulations consists of one line in an appropriation bill, the annual Energy and Water Appropriation Authorization for Fiscal Year 1995: "For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, \$101,000,000, to remain available until expended."⁸² That is all the appropriation bill says before going on to talk about other funds for other parts of the Corps of Engineers. The bill provides that \$101 million as one lump-sum appropriation, which goes into one Treasury account for one collection of missions of one agency. All formal power to decide on finer detail belongs, as a matter of the lump-sum principle and the law just described, to the allotment power of the Corps of Engineers.

Only those unfamiliar with appropriations law will be surprised that an otherwise valid statutory claim might go unpaid, even if it matures into a judgment, when the statute makes the claim subject to the availability of a general appropriation and no funds are available from that appropriation. The Appropriations Clause, with its unique negative wording, exerts maximum force in precluding payment of otherwise valid claims that are subject to the availability of appropriations. In 1990, the Supreme Court reaffirmed its view, dating back almost a century and a half, that where a claim for money from the Treasury is made, "the Clause provides an explicit rule of decision 'However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.'"⁸³ Whether the claim goes through adjudication and becomes a judgment simply does not matter in this context; all that matters is the availability or unavailability of appropriated funds.

81. As recently noted, "it would be fanciful today to contemplate line item appropriations for a \$300 billion defense budget." Raven-Havens & Banks, *supra* note 71, at 99. "Congress usually appropriates funds in lump sum amounts The great majority of appropriations presently used for the procurement of supplies, services, research and development, ships, aircraft and missiles are general purpose appropriations." JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 35 (2d ed. 1986).

82. Appropriations for Energy and Water Development for Fiscal Year 1995, Pub. L. No. 103-316, 108 Stat. 1707 (1994).

83. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-25 (1990) (quoting *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851)); see PAUL M. BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1340 (2d ed. 1973) (noting that *Reeside* "held that mandamus would not lie to compel the Secretary of the Treasury to pay a judgment against the United States There being no appropriation out of which the judgment could be paid, the result was inescapable.").

Accordingly, appropriations and government contract law focus with rigorous precision on the fund from which a claim is potentially payable. A fund like an entitlement account or an earmarked appropriation guarantees payment solely to its particular type of dedicated object, while a fund that is a general lump-sum appropriation may pay its whole amount to some of its objects and not be available for others. Government contract law furnishes an invaluable insight into this unmapped terrain of Appropriation Clause implementation. The Supreme Court had long held that a contract in excess of available appropriations was a legal “nullity,” and that the government was therefore under “no legal obligation . . . to meet [the contract’s] obligations.”⁸⁴ Even when the contractor would otherwise have a valid claim, he cannot improve his position by calling his unsatisfied claim a constitutional taking, since the claim remains subject to appropriations.⁸⁵

Federal procurement agencies have consequently developed a type of standard contract clause that gives contractors notice that their claims cannot exceed the available agency-set allotment to their objects from a lump-sum appropriation.⁸⁶ In effect, the contractors receive binding notice that the agency’s allotments for objects other than theirs have become unavailable to them, just as if detailed line itemization for objects other than theirs, the legal forerunner to the allotment system, had made funds unavailable to them. The courts firmly uphold the agency’s power, by allotment reinforced with notice through these limitation clauses, to bar payments of otherwise valid claims out of lump-sum appropriations.⁸⁷ This allotment ceiling on the availability of funds has grown more important in this decade, as technical changes in government accounting have constrained end-runs around such ceilings.⁸⁸

Claimants with statutory “takings” claims could not take the Corps of

84. *Hooe v. United States*, 218 U.S. 322, 334 (1920); accord *Sutton v. United States*, 256 U.S. 575, 579 (1921); see *Fenster & Volz*, *supra* note 14, at 168-73.

85. *Hooe*, 218 U.S. at 335-36; see *Fenster & Volz*, *supra* note 14, at 170.

86. These contracts are known as either Limitations of Costs, Limitations of Funds, and Limitations of Government Obligation. Requirements are given at 48 C.F.R. § 32.704 (1994) and the text of the clause at 48 C.F.R. § 52.232-20 (1994). See generally W. NOEL KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL 247-49 (1990).

87. See, e.g., *Law Mathematics and Tech., Inc. v. United States*, 779 F.2d 675, 677 (Fed. Cir. 1985); *Hydrothermal Energy Corp. v. United States*, 26 Ct. Cl. 7, 11 (1992); James W. McBride, *Avoiding Anti-Deficiency Act Violations on Fixed-Price Incentive Contracts (The Hunt for Red Ink)*, ARMY LAW., June 1994, at 3, 16 n.139, 22-23 & n.187. “Nor may such [appropriated] funds be spent in excess of apportionments or administrative allocations.” JOHN W. WHELAN, CASES AND MATERIAL ON FEDERAL GOVERNMENT CONTRACTS 159 (2d ed. 1985) (citing Anti-Deficiency Act).

88. Congress abolished the “M account,” a device hitherto available for merging unspent defense funds and making them available to pay claims otherwise barred, causing the constraints by allotment to bite much harder. See Karen L. Manos, *The Antideficiency Act Without an M Account: Reasserting Constitutional Control*, 23 PUB. CONT. L.J. 337, 351-52 (1994); McBride, *supra* note 87, at 3-4.

Engineers' last penny if detailed line items for personnel were separate from those for claims. Allotment would produce the same situation. The Corps would say that it cannot pay out its whole lump-sum appropriation, or even a substantial fraction of it, early in the year to the private claimants that present themselves at that time. Congress does not write its lump-sum appropriation for the Corps with the intent that by generously satisfying some claimants early in the year the Corps can either close up shop or coerce a deficiency appropriation. Rather, in the modern system, what the lump-sum principle, the allotment power, and the framework Anti-Deficiency Act require the agency to do is to allot its lump-sum appropriation at the year's outset and then respond to any claims in excess of that allotment with the explanation that available funds are exhausted.

With this background, the analysis can now turn to the particularly interesting issues posed after an agency announces that its allotment is exhausted and remits a claimant to Congress, and the claimant instead goes to court urging his rights pursuant to a claims-against-agency-appropriations provision.

B. *Ordinary Legislative Interpretation*

A private claimant with an otherwise valid claim or judgment pursuant to the takings bill who has been turned away by an agency that has exhausted its limited allotment to pay such claims, will not always accept the agency's word as final.⁸⁹ When a claimant does not wish merely to wait and see if more funds will come in future years or to lobby Congress to fund claims sooner, she may turn to the courts. The clash will occur most starkly if she has obtained a judgment for a statutory "takings" claim and asks the court to execute the judgment by issuing an order to the defendant agency to take any steps necessary for funding to become available—including measures such as making funds available from a personnel allotment out of the same lump-sum appropriation.

Can claimants obtain a court-directed furlough in a federal agency? When such a claimant presents the issue to the court, and the agency answers, each side may argue ordinary issues of legislative interpretation regarding the meaning of the takings bill with respect to making payments subject to the availability of appropriations. The claimant may invoke the intent of the takings bill to protect her property rights, pointing to the express language in the bill requiring the agency to pay such judgments. In response, the agency may argue

89. The claimant may also seek relief from higher levels of the pertinent department, from the Department of Justice, or from the General Accounting Office. *See* Stith, *supra* note 9, at 1386-92 (discussing general role of courts, GAO, Justice Department, and the executive branch in enforcing fiscal constitution).

congressional intent in the enactment of a lump-sum appropriation without any separate line item or earmark, thereby leaving to the agency the task of allotting the funds to avoid coercive deficiencies. The claimant argues that appropriations are “available” unless the whole lump sum is exhausted; the agency responds that appropriations are “not available” if the pertinent allotment is exhausted.

Each side will employ some conventional arguments of the kind regularly considered in courses on legislative interpretation.⁹⁰ The claimant will pose the issue as a choice between the text of two enactments—an explicit substantive law (the takings bill) and a “silent” lump-sum appropriation provision—and ask the court to read the text⁹¹ of the two statutes to find that the appropriation provision has not “repealed” the takings bill. This approach favors the claimant, since courts usually will not find that any federal statute, substantive or otherwise, has been repealed by implication. Courts usually presume that provisions in appropriation bills, in particular, do not repeal substantive law,⁹² though they possess that capability.⁹³ Moreover, courts least wish to find repeal of a law by a lump-sum provision “silent” about that law. In the leading case of *TVA v. Hill*,⁹⁴ the Supreme Court upheld an injunction, pursuant to the Endangered Species Act, against completion of the Tellico Dam despite twelve years of Congressional lump-sum appropriations for the dam; silent appropriations did not repeal substantive laws.

The agency also has some conventional legislative interpretation points. It is not asking to repeal the takings bill, just to read the bill’s subjecting of claims to the availability of appropriations as consistent with the intent of the lump-sum appropriation that funds the agency’s mission. Thus, the agency emphasizes that its view reconciles two statutes, takings bill and appropriation, which is the preferred outcome when two statutes collide. It further argues that the appropriation came after the enactment of the takings bill, or was passed by the same Congress, giving weight to the intent of the Congress in passing the appropriation to fund the agency’s mission. It urges that deference is owed

90. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 947-50 (2d ed. 1994) (discussing interaction of appropriations statutes and substantive statutes); ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 819-20 (1995) (same); WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 679-90 (1993) (same).

91. See generally Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988); Frank Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL’Y 87 (1984); Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); William Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

92. See *United States v. Will*, 449 U.S. 200, 221-22 (1980).

93. See, e.g., *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 440-41 (1992); *United States v. Dickerson*, 310 U.S. 554, 555 (1940).

94. 437 U.S. 153 (1978).

to how the agency interprets such provisions, a point much in the agency's favor.⁹⁵ In addition, the agency may marshal some legislative history, discussed below, showing Congress' expectations that shortfalls in claims payment would be resolved politically, not judicially.⁹⁶

In addition to such arguments, a court using "dynamic interpretivism"⁹⁷ might look for appropriate values to infuse into an otherwise technical debate over conflicting interpretations of texts, legislative history, and interpretative canons. Environmentalist and property rights *amici* may enliven the debate. For example, environmentalists supporting the Corps' refusal to pay a claim after exhaustion of the allotment might point to the open-ended wording of the agency's mission statutes—in this example, the wetlands regulation provision of the Clean Water Act. They might argue that the agency's apparently conflicting directives—to pay claims and to regulate wetlands from a budget too limited to sustain both activities—open the door to important environmentalist public values or policies. On the other hand, the property rights movement might support the claimant with their own extensive set of values implicit in the takings bill: individual rights protected by the institution of property; property as the great tool for economic progress; and the Fifth Amendment's Takings Clause as the model for restraining the federal government by requiring it to pay the claims of private property owners.

Both the ordinary legislative interpretation arguments and the clash of values over takings are collateral to this Article. For present purposes, the pertinent issue does not merely involve particular provisions of law or particular policy disputes, but rather is a separation of powers conflict shaped by the past interaction of the two elected branches and the internal workings of each branch—in other words, a "structural"⁹⁸ context.

C. *The Fiscal Constitution and the Separation of Powers Dispute: Three Interests*

In particular, the context of the fiscal constitution means that the courts should not, and would not, resolve the separation of powers dispute by taking

95. See *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that if congressional intent is unclear, court should defer to agency's interpretation of statute, provided it is permissible statutory interpretation).

96. See *infra* text accompanying note 121.

97. See generally WILLIAM ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1992); RONALD DWORKIN, *LAW'S EMPIRE* (1983); William Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

98. The relevance of structural analysis is discussed in Stith, *supra* note 9, at 1349 & n.25. See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Herbert 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).

control of agency budgets. Rather, the courts would remit combatants to the political process, here, the unique annual political cycle of estimates, appropriations, allotment, reprogramming, and next year's estimates. Appreciating why the courts should do this necessitates analysis of structural considerations rather than ordinary legislative interpretation.

The fundamental Supreme Court decision on the Appropriations Clause, now 150 years old, emphasized that judicial withholding of an order against the Treasury followed from the nature of "our political and fiscal system."⁹⁹ Until deciding *Lincoln v. Vigil*¹⁰⁰ in 1994, the Supreme Court thereafter interpreted Appropriations Clause implementation as contemplating that political processes work their will. When then-Judge Scalia discussed the lump-sum discretion principle in *United Automobile Workers v. Donovan*, he returned to those political processes to explain why the agency head's decision to allot lump-sum appropriations so as not to make them available for the claimants' preferred objects was "committed to agency discretion."¹⁰¹ The nature of the allotment task for the agency head as described by Judge Scalia, "is an archetypically political task, involving the application of value judgments and predictions to innumerable alternatives," and therefore not a task with which the judiciary should interfere.¹⁰²

Recent significant scholarly analyses of a variety of major "purse" disputes, connected, like this one, to national controversies with constitutional roots, reflect the importance of a structural analysis beyond ordinary legislative interpretation. Since *New York v. United States*,¹⁰³ scholarly analyses have examined the scope for appropriations-based conditions impinging on state power.¹⁰⁴ Several leading authorities have debated the power of the provisions at the heart of the Iran-Contra scandal, namely the Boland Amendments, to annul appropriation bills prohibiting expenditures in support of the Nicaraguan contras.¹⁰⁵ Professor Devins analyzed the appropriations provisions in the background of the great *Bob Jones University v. United States*¹⁰⁶ decision denying tax exemptions to segregated schools.¹⁰⁷ The abortion controversy has necessitated similar analysis of fifteen years of appropriations provisions, from the earliest Hyde Amendment, to provisions

99. *Reeside v. Walker*, 52 U.S. 272, 291 (1851).

100. *Lincoln v. Vigil*, 508 U.S. 182 (1993).

101. *United Automobile Workers v. Donovan*, 746 F.2d 855, 862 (D.C. Cir. 1984) (citing 5 U.S.C. § 701(a)(2) (1988)), *cert. denied*, 474 U.S. 825 (1985).

102. *Id.* (quotation omitted).

103. 505 U.S. 144 (1992).

104. See generally Rosenthal, *supra* note 12.

105. See generally Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758 (1989); Sidak, *supra* note 12.

106. 461 U.S. 574 (1983).

107. Devins, *supra* note 12, at 495-97.

aimed at “gag rules” for physicians.¹⁰⁸ Like those controversies just cited, the dispute over the claims-on-agency-appropriations approach has the elected branches in major conflict, with constitutional issues from faithful execution to constitutional takings lurking in the background.

Accordingly, the dispute over whether to break the lump-sum discretion principle when faced with a claims-on-agency-appropriations provision calls for structural consideration of the three interests previously reviewed: (1) execution of the laws, (2) public fiscal control, and (3) private compensation.

1. *Faithful Execution of the Laws*

Judicial overriding of agency allotment decisions, forcing furloughs to pay claims, would both exceed the expected judicial role in execution of the laws and do so without the usual legislative accountability. Even in condemnation cases, the judiciary does not have any role so strongly affecting execution of the laws. For constitutional takings, agencies make the decision and take the actions that commit the Treasury to payment from a particular appropriation.¹⁰⁹ The courts cannot, and do not, obligate funds by judgment via either of the two routes for condemnations.¹¹⁰ The agency decides whether to obligate the funds, and the court merely values the condemned land.¹¹¹

The *Lincoln* Court held that “[l]ike the decision against instituting enforcement proceedings . . . an agency’s allocation of funds from a lump-sum appropriation requires ‘a complicated balancing of a number of factors which are peculiarly within its expertise.’”¹¹² The Court also stated that “the ‘agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.’”¹¹³

108. See, e.g., TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* 160 (1992); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 187 (3d ed. 1991); Devins, *supra* note 12, at 466-68, 485-87.

109. GAO GLOSSARY, *supra* note 75, at 68 (“Obligations incurred”); Manos, *supra* note 88, at 355-56.

110. “[L]and condemnation can proceed in one of two ways. The government can, under 40 U.S.C. § 258a, file a declaration of taking, in which event title vests immediately in the United States and the United States becomes irrevocably committed to pay the resulting judgment. Alternatively, the government can proceed without filing a declaration of taking (sometimes called a ‘complaint only’ condemnation), in which event the resulting judgment is merely a determination of just compensation. It does not obligate the United States and is essentially an offer which the government can accept (by tendering payment) or reject (by abandoning the proceeding).” 66 Comp. Gen. 157 (1986).

111. “In land condemnation proceedings, the appropriation is obligated when the request is made [by the acquiring agency] to the Attorney General to institute the proceedings.” II OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 7-37 (2d ed. 1992) [hereinafter *APPROPRIATIONS PRINCIPLES* (1992)].

112. 508 U.S. at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

113. *Id.* (quoting *Heckler*, 470 U.S. at 831-32).

Furthermore, the courts would hesitate to take upon themselves the responsibility for reducing an agency's ability to execute faithfully because of the claims-on-agency-appropriations approach. Such a ruling would be a fairly broad assertion of judicial power and would allow Congress to avoid most of the responsibility for the decision. An agency forced to pay claims with money allotted for personnel, and subsequently forced to lay off the personnel, might try to blame Congress publicly, and part of the public would agree. Still, members of Congress would likely respond they had not intended such layoffs but merely intended to get the "attention" of agency bureaucrats and force them to make "hard" choices—or, in other words, avoid actions that would generate claims. Members of Congress could denounce the agency layoffs while remaining critical of the agency actions. They would not have to take responsibility for the layoffs or the resulting agency slowdown or paralysis.

In contrast, the courts can require that Congress itself assume responsibility for changing or diminishing an agency's ability to execute the laws by reducing the agency's funds for its mission. As *Lincoln v. Vigil* noted, where "an agency's decision [was] to ignore congressional expectations," one reason the courts forego interfering in the agency decision is the alternative political remedy, namely, that the agency finds its decision "may expose it to grave political consequences."¹¹⁴ After all, Congress has an array of counterresponses to agencies that play the allotment card as their response to a claims-on-agency-appropriations approach. If Congress desired to act bluntly, it could simply reduce the next year's annual appropriation. For example, Congress might provide that the Corps of Engineers' wetlands regulatory program receive a lump-sum appropriation, not of \$101 million, but of \$81 million, and create a separate appropriated fund out of the reduced appropriation dedicated solely for paying claims.

In contrast to what would happen if the courts in a claims-on-agency-appropriations dispute forced the reallocation of agency funds, if Congress were to cut an agency appropriation and appropriate the difference for a separate fund, its members would take full political responsibility for the effect on execution of the laws. In voting for an earmark, members of Congress would be accountable for any ill effects of the corresponding reduction in the remaining portion of the general agency appropriation. If the agency suffered delay or failure in its mission—for example, if the Corps of Engineers, short on funds, furloughed employees and delayed its processing of permit applications—members of Congress would be on record as having specifically voted to reduce the agency's general appropriation, thereby directly causing

114. *Id.*

the problem.¹¹⁵ This public decision-making accountability induces caution in members of Congress. They vote with the awareness that acting against a controversial agency by cutting its personnel funds, while initially popular, could rapidly, and ironically, result in greater delays or a complete breakdown in agency review and granting of permits, thus tarnishing those members of Congress who aggravated the problem.

2. *Control of the Public Fisc*

More subtly, judicial overriding of the agency allotment would frustrate the second of the interests: public fiscal control. If a court breaks the lump-sum discretion principle and decides it can order the agency to spend more on private claims than it has allotted, the locus of decisionmaking shifts from the political to the judicial process. A court so ruling would ignore just how elaborately and interactively public decision-making processes function on what is the common grist for their mills—haggling over who gets how much money for what spending objects.

Looking again at those political processes, they start with the lengthy formulation of the President's Budget,¹¹⁶ with struggles over the request for each overall lump-sum appropriation for each particular account¹¹⁷ and the

115. Having private claimants tap an agency's general appropriation by court order would threaten to diminish its ability to accomplish its mission without members of Congress voting specifically for such a reduction. The floor debate on H.R. 925 did not include proponents expressly taking responsibility for a reduction in the Corps of Engineers' appropriation for operations. Proponents of the bill argued that the agencies would modify their behavior, or seek additional appropriations; neither text nor legislative history shows proponents viewing the statute as directing furloughs. If personnel defunding does occur, those voting for the bill may well note that they voted for the agency's appropriation when that appropriation bill came to the floor. Thus, such members "favored" giving the agency the funds to operate: if the agency instead engendered and paid private claims, and thereby drained its own appropriation, or a court ordered it to do so, that was the agencies' fault, not those who voted for its appropriation.

Agency supporters wishing to keep the agency functioning at its past level by appropriating an increased amount to deal with the pay-out for private claims would face an uphill battle in Congress. As in any attempt to increase an appropriation, they would face budget procedure problems, since the budget process currently disfavors appropriation increases. They would also have the political problems of arguing, in a time of limited resources and budget cuts, for an increase.

116. See generally AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (1984).

117. The object identification code in the annual President's budget for the lump sum for the Corps of Engineers is 96-3126-0-1-301. See FY 1994 BUDGET, *supra* note 24, app. at 518. For an explanation of what the digits mean—96 (Corps of Engineers), 3126 ("account number," or, more technically, appropriation basic account symbol), 0 (regular appropriation, not a supplemental), 1 (a general fund, not a trust fund), and 301 (the functional classification for Congressional budget purposes)—see ALLEN SCHICK ET AL., *MANUAL ON THE FEDERAL BUDGET PROCESS* 48 (Congressional Research Service rev. ed. 1991); OMB CIRCULAR A-34, *supra* note 75, at II-3.

schedules for each particular object.¹¹⁸ Congressional consideration of the appropriation bills then provides a further layer of public decision-making.¹¹⁹ The takings bill's history reflects a congressional anticipation that legislative power to make spending decisions either in supplemental current-year appropriations¹²⁰ or appropriations in following years¹²¹ provides a remedy for unsatisfied claims.

Even completion of the enactment process for the appropriation, followed by agency allotment, marks only a temporary break in the interactive political processes. During the following fiscal year, an agency head faced with an exhausted allotment may shift unused funds within the account from another object, using a device called "reprogramming."¹²² Agencies usually follow a serious process for reprogramming decisions, first making a tentative internal decision to increase funds for some object, obtaining approvals all the way up the administrative hierarchy to the cabinet level, then reporting that proposal to their appropriations subcommittees.¹²³ An agency head who makes both allotment and reprogramming decisions that give too little weight to congressional preference must anticipate that the following year he may suffer reductions in his appropriation or earmarks precluding his again exercising discretion.¹²⁴ The legislative history of the takings bill recognizes the

118. Pursuant to the Budget and Accounting Act of 1921, OMB and the President supervise and coordinate that process, before the President approves submission of his budget.

119. In a more delicate interaction, the appropriations committees in their hearings and reports, the House and Senate floors in their legislative history of the bill consideration, and the conference committee reports may signal Congressional preferences for different programs and activities than the agency had intended when it submitted its detailed budget justification for that overall lump-sum appropriation. See TIEFER, *supra* note 8, at 946-48 (President's budget and committee consideration).

120. S. 605 § 204(f) provides that "If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purposes."

121. On the House floor, the bill manager explained that "if [the agencies] impose costs [on property owners], to pay them they must come back to the Congress to seek the appropriation for that purpose. Ultimately, that decision does come back to the Congress." 141 CONG. REC. H2532 (daily ed. Mar. 2, 1995).

122. See *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 542 (Ct. Cl. 1980); *United States v. Board of Educ. of Chicago*, 621 F. Supp. 1296, 1374 (N.D. Ill. 1985); FISHER, *supra* note 67, at 75-98; APPROPRIATIONS PRINCIPLES (1992), *supra* note 111, at 2-25 to 2-28. For reprogramming and its relation to allotments, see *American Elec. Lab. v. United States*, 774 F.2d 1110, 1115 (Fed. Cir. 1985).

123. See, e.g., *Board of Educ.*, 621 F. Supp. at 1374 ("[T]he Secretary has a general policy of requesting committee approval for permission to reprogram He made such requests 18 times between 1979 and 1984, and was denied only 5 times Reprogramming is an integral part of the administrative process. Congress makes lump-sum appropriations, with non-binding 'line items,' so that the Executive Branch retains flexibility to tackle unforeseen situations").

124. Congress can earmark in the appropriation itself, or in other legislation. APPROPRIATIONS PRINCIPLES (1992), *supra* note 111, at 2-42; Louis Fisher, *The Authorization-*

significance of the reprogramming process.¹²⁵ Claimants remitted to Congress may influence these various interactions, much as they always have.¹²⁶ All this maneuvering comes under the heading of proper congressional counterresponse to agencies playing the allotment card, and has been anticipated in the bill's legislative history.¹²⁷ A court that intervened at the point of allotment's exhaustion would prematurely terminate these elaborate mechanisms for public fiscal control.

3. *Availability of Private Compensation*

As for the third interest, private compensation, it is true that judicial direction of agency reallocation would help the earliest claimants who receive additional funding on a first come, first served basis. Even for this private compensation interest, though, judicial direction would produce mixed blessings over time, for the claims that got served first would not be the last claims. The Corps of Engineers' \$101 million general appropriation for wetlands regulation, for example, is dwarfed by the Congressional Budget Office's estimate of between \$10 and \$15 billion in potential claims under the statute.¹²⁸

With Congress not providing more funding nor working out with an agency what funds to reprogram or categories of claims to defer, courts wresting responsibility from the elected branches would take upon themselves

Appropriation Process in Congress: Formal Rules and Informal Practices, 29 CATH. U. L. REV. 51, 65-67 (1979). The takings bill itself does not earmark. It neither sets aside funds for the purpose of paying claims, nor precludes the use of any funds for purposes other than paying claims.

125. After stating that funds would come from the agency's annual appropriation, the House bill notes:

For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.

H.R. 925, § 6(f).

126. Even today, claimants seeking private bill relief lobby Congress. Prior to the enactment of the Federal Tort Claims Act in 1947, tort claimants lobbied Congress. Much of the role of the Court of Claims revolved around claimants lobbying Congress, and Congress either referring particular claims to the Court of Claims, or establishing classes of jurisdiction for the Court of Claims to handle on its own.

127. Representative Tausin from Louisiana, author of the revised House takings bill, alluded to this process:

In fact, the legislation specifically says that the agency must provide money out of its own appropriated funds for the payment of these claims and give the agency the right to reprogram money within its budget to do that. If it does not do that, Congress, of course, has the authority to make sure it does the next time it visits this Congress.

141 CONG. REC. H2566 (daily ed. Mar. 2, 1995).

128. See *supra* note 58.

the problems implicit in private compensation provisions that, unlike the system for constitutional takings, do not provide access to the judgment fund. Under the bill, compensation is made available once negative regulatory impacts exceed a certain threshold, without discrimination between legal and illegal or sound and unsound agency decisions. Though they can expand the allotment for claims from limited appropriated funds, courts generally cannot fund all the claims, sort out categories of claims, nor prevent new claims being generated faster than old ones are settled.¹²⁹

Conversely, when the courts adhere to the lump-sum discretion principle, they leave Congress a way to serve the private compensation interest should it so determine. Congress can confer entitlement status on statutory takings claims,¹³⁰ as it has done with constitutional takings. In fact, however, Congress chose not to take this path so as to shelter the takings bill from political and procedural barriers disfavoring the creation of new entitlements.¹³¹

In sum, only political processes can successfully manage the implications of the claims-on-agency-appropriations approach for the three interests identified here—even that of satisfying private claims. Any court with

129. As shown in *City of Los Angeles v. Adams*, prioritizing claims against limited appropriated funds is a daunting task, best handled in the first instance by the agency in question, even if the court takes a supervisory role because of entitlement-type statute. 556 F.2d 40, 49-50 (D.C. Cir. 1977).

130. As Judge Scalia wrote: “An agency may, of course, be constrained to expend a certain portion of a lump-sum appropriation on a particular program because that program establishes a system of statutory entitlements over which the agency has no control.” *United Automobile Workers v. Donovan*, 746 F.2d 855, 861 n.5 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985).

131. When the CBO scored H.R. 925, it emphasized the statutory language making agency appropriations the source for any spending, and thus concluded that the bill did not provide for any direct spending at all:

Based on our analysis of the language of the bill and the legal practice governing payments for takings of private property, CBO estimates that enactment of the bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply. We have not yet completed our analysis of the costs of this legislation, which . . . would depend on the appropriation of the necessary amounts.

H.R. REP. NO. 46, *supra* note 29, at 8. Although it might seem ironic that a bill estimated to produce claims of \$10-\$15 billion, *see supra* note 58, “would not affect direct spending,” the distinction is the essential difference between a bill under which payment of claims is an entitlement, and a bill under which payment of claims is subject to appropriations.

A network of budget points of order, budget process political barriers, cautionary budget estimation procedures, and antipathetic political attitudes make it harder to enact new entitlements. Both chambers would subject such a bill to numerous budget-related points of order both for creating a new entitlement, which requires an elaborate budget process, and for creating new direct spending without an allocation from the annual budget. The budget committees would denounce creation of the new entitlement as destructive of the budget process in general and the budget for that year in particular. Individual members would rail against the bill as a budget-buster. In light of the anti-entitlement budget climate prevalent in the past decade, it is hardly surprising that proponents of the new strategy deliberately decided not to make private claims a new entitlement.

structural considerations in mind will steer the dispute into the appropriately political channels established for Appropriations Clause implementation disputes.

Conclusion

While “our political and fiscal system” has evolved considerably since 1851, when the Supreme Court used that term to describe the implementation of the Appropriations Clause, now, as then, the system serves the basic task of coordinating the operations of government. It does so not via escape from the political processes into the courts, but through the interaction of Congress and the Executive as they shape appropriation enactment, allotment, reprogramming, and subsequent cycles of appropriation enactment. For too long, the implementation side of the Appropriations Clause has been seen as mysterious. In reality, the modern system of federal funding focuses and resolves separation of powers issues through political innovation, maneuver, and compromise. Exploration of these processes reflects some of the extraordinary workings of our fiscal constitution.

While the novel claims-on-agency-appropriations approach is very attractive to Congress, it may elicit a response from the Executive employing the allotment power to remit unsatisfied claimants back to the legislature. If Congress can threaten agencies with claims exhausting their operating funds, agencies can respond by trying to shift the responsibility for choices among competing uses of scarce agency funds back to Congress. Congress can respond further by threatening earmarks or entitlement language that would take away agency discretion, and each side can await a judicial resolution. For their part, courts could choose a legislative interpretation on ordinary grounds. Mindful of structural considerations, however, they are best advised to use the lump-sum discretion principle to send the dispute back to the political arena.

In the long run, however the disputed claim demands of the late twentieth century are settled, their resolution will create a new system just as surely as the coercive deficiencies of the early twentieth century gave rise to the current system. The fiscal constitution never fully tames the innovations and maneuvers of a particular era. Rather, it refashions itself from each struggle for the next stage in its evolution.