

CRS Report for Congress

Congressional Authority To Limit U.S. Military Operations in Iraq

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Summary

On October 16, 2002, President Bush signed the Authorization for Use of Military Force against Iraq Resolution of 2002. Since the March 2003 invasion of Iraq, Congress has enacted appropriation bills to fund the continuation of the Iraq war, including military training, reconstruction, and other aid for the government of Iraq. The situation in Iraq has focused attention on whether Congress has the constitutional authority to legislate limits on the President's authority to conduct military operations in Iraq, even though it did not initially provide express limits. Specifically under consideration is whether Congress may, through limitations on appropriations, set a ceiling on the number of soldiers the President may assign to duty in Iraq.

It has been suggested that the President's role as Commander-in-Chief of the Armed Forces provides sufficient authority for his deployment of additional troops, and any efforts on the part of Congress to intervene could represent an unconstitutional violation of separation-of-powers principles. While even proponents of strong executive prerogative in matters of war appear to concede that it is within Congress's authority to cut off funding entirely for a military operation, it has been suggested that spending measures that restrict but do not end financial support for the war in Iraq would amount to an "unconstitutional condition." The question may turn on whether the President's proposal is a purely operational decision committed to the President in his role as Commander-in-Chief, or whether congressional action to prevent the proposal's carrying out is a valid exercise of Congress's authority to allocate resources using its war powers and power of the purse.

This report provides background and discusses constitutional provisions allocating war powers between Congress and the President. It presents an historical overview of relevant court cases followed by some examples of measures enacted by Congress to restrict military operations. The report includes a discussion of possible alternative avenues to fund operations in the event Congress were to restrict appropriations for the war in Iraq. Finally, the report provides a brief analysis of arguments that might be brought to bear on the question of Congress's authority to limit the availability of troops to serve in Iraq, and concludes that, although not beyond debate, such a restriction appears to be within Congress's authority to allocate resources for military operations.

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Congressional Authority To Limit U.S. Military Operations in Iraq

President Bush's announced plan to increase the number of troops participating in military operations in Iraq has raised questions regarding Congress's authority to limit or possibly terminate the U.S. military role in Iraq. It has been suggested that the President's role as Commander-in-Chief of the Armed Forces provides sufficient authority for his deployment of additional troops, and any efforts on the part of Congress to intervene could represent an unconstitutional violation of separation-of-powers principles. While even proponents of strong executive prerogative in matters of war appear to concede that it is within Congress's authority to cut off funding entirely for a military operation, it has been suggested that spending measures that restrict but do not end financial support for the war in Iraq would amount to an "unconstitutional condition."¹ The question may turn on whether the President's proposal is a purely operational decision committed to the President in his role as Commander-in-Chief, or whether congressional action to prevent the carrying out of the proposal is a valid exercise of Congress's authority to allocate resources using its war powers and power of the purse.

Background

On October 16, 2002, Congress passed and President Bush signed the Authorization for Use of Military Force against Iraq Resolution of 2002.² While the President noted he had sought a "resolution of support" from Congress to use force against Iraq, and appreciated receiving that support, he also stated that:

...my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to

¹ See, e.g., David B. Rivkin Jr. and Lee A. Casey, *What Congress Can (And Can't) Do on Iraq*, WASH. POST (Jan. 16, 2007) at A19; see also Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291(2006)(predicting arguments that would be made to oppose congressional funding restrictions).

² P.L. 107-243; 116 Stat. 1498. For more background, see CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Richard F. Grimmett and Jennifer K. Elsea.

aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution.³

The President indicated he would continue to consult with Congress and to submit written reports to Congress every 60 days on matters relevant to the resolution to use force,⁴ which authorizes the President to use the armed forces of the United States

as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The statute required certain conditions to be met prior to the initiation of military operations and made periodic reports to Congress mandatory, but did not set a timetable or any criteria for determining when to withdraw troops from Iraq. It appears to incorporate future UN Security Council resolutions concerning Iraq that may be adopted by the Security Council as well as those adopted prior to its enactment, effectively authorizing military force not only to compel disarmament but to carry out other functions necessary for achieving the goals adopted or that may be adopted by the Security Council. Thus, it appears that the resolution authorizes force deemed necessary by the President for so long as Iraq poses a continuing threat to the United States and the U.S. military presence is not inconsistent with relevant U.N. resolutions.

The resolution does not itself stipulate limitations with respect to the amount of force that may be used or the resources that may be expended to accomplish the authorized objectives; however, Congress may set limits by means of legislation or the budgeting process. The Department of Defense has some latitude regarding how it allocates funds for various operations, and may have additional statutory authority to obligate funds without prior express authorization from Congress.

Constitutional Provisions

At least two arguments support the constitutionality of Congress's authority to limit the President's ability to increase troop levels in Iraq. First, Congress's constitutional power over the nation's armed forces provides ample authority to legislate with respect to how they may be employed. Under Article I, § 8, Congress has the power "To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence," "To raise and support Armies," "To provide and maintain a Navy," "To make Rules for the Government and Regulation of the land and naval Forces," and "To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and War," and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ..." as well as "all other Powers vested by this Constitution in the Government of the United States,

³ See President's Statement on Signing H.J.Res. 114, Oct. 16, 2002, *available at* [<http://usinfo.state.gov/dhr/Archive/2003/Oct/09-906028.html>].

⁴ *Id.*

or in any Department or Officer thereof.” The power “To Declare War” has long been construed to mean not only that Congress can formally take the nation into war but also that it can authorize the use of the armed forces for military expeditions that may not amount to war.⁵ While a restrictive interpretation of the power “To declare War” is possible, for example, by viewing the Framers’ use of the verb “to declare” rather than “to make”⁶ as an indication of an intent to limit Congress’s ability to affect the course of a war once it is validly commenced,⁷ Congress’s other powers over the use of the military would likely fill any resulting void.

Secondly, Congress has virtually plenary constitutional power over appropriations that is not qualified with reference to its powers in section 8. Article I, § 9 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” It is well established, as a consequence of these provisions, that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress”⁸ and that Congress can specify the terms and conditions under which an appropriation may be used,⁹ so long as it does not impose an unconstitutional condition on the use of the funds.¹⁰

On the executive side, the Constitution vests the President with the “executive Power,” Article II, § 1, cl. 1, and appoints him “Commander in Chief of the Army and Navy of the United States,” *id.*, § 2, cl. 1. The President is empowered, “by and with the Advice and Consent of the Senate, to make Treaties,” authorized “from time to time [to] give to the Congress Information on the State of the Union, and [to] recommend to their Consideration such Measures as he shall judge necessary and expedient,” and bound to “take Care that the Laws be faithfully executed.” *Id.*, § 3. He is bound by oath to “faithfully execute the Office of President of the United States,” and, to the best of his “Ability, preserve, protect and defend the Constitution of the United States.” *Id.*, § 1, cl. 8.

⁵ *Bas v. Tingy*, 4 U.S. 37 (1800).

⁶ The Framers’ decision to substitute “declare” for “make” has generally been interpreted to allow the President the authority to repel sudden attacks. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 318-19 (rev. ed. 1937)(explanation of James Madison and Elbridge Gerry on their motion to amend text).

⁷ *C.f.* John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1669-71 (2002)(arguing that “to declare” means to formally recognize rather than to authorize or commence).

⁸ *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

⁹ *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). For a scholarly treatment of the Appropriations Clause, see Kate Stith, *Congress’ Power of the Purse*, 97 YALE L. J. 1343 (1988).

¹⁰ *United States v. Klein*, 80 U.S. (8 Wall.) 128 (1872) (holding invalid an appropriations proviso that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); *United States v. Lovett*, 328 U.S. 303 (1946)(invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).

It is clear that the Constitution allocates powers necessary to conduct war between the President and Congress. While the ratification record of the Constitution reveals little about the meaning of the specific war powers clauses, the importance of preventing all of those powers from accumulating in one branch appears to have been well understood,¹¹ and vesting the powers of the sword and the purse in separate hands appears to have been part of a careful design.¹²

It is generally agreed that some aspects of the exercise of those powers are reserved to the Commander-in-Chief, and that Congress could conceivably legislate beyond its authority in such a way as to intrude impermissibly into presidential power. The precise boundaries separating legislative from executive functions, however, remain elusive. There can be little doubt that Congress would exceed its bounds if it were to confer exclusive power to direct military operations on an officer other than the President, or to purport to issue military orders directly to subordinate officers. At the same time, Congress's power to make rules for the government and regulation of the armed forces provides it wide latitude for restricting the nature of orders the President may give. Congress's power of appropriations gives it ample power to supply or withhold resources, even if the President deems them necessary to carry out planned military operations.¹³

The Commander-in-Chief Clause

Early in the nation's history, the Commander-in-Chief power was understood to connote "nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy."¹⁴ Concurring in that view in 1850, Chief Justice Taney stated:

[The President's] duty and his power are purely military. As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.¹⁵

¹¹ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 7 (2d ed. 2004)(noting that allocation of war powers to Congress was a break with monarchical theories, under which all such powers belonged to the executive); *id.* at 8-12.

¹² See WILLIAM C. BANKS AND PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 27-32(1994).

¹³ For a discussion of theories asserting the presidential prerogative to spend without appropriations when necessary for military operations, see generally Colonel Richard D. Rosen, *Funding "Non-traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998); see also Major Brian A. Hughes, *Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand*, 2005-AUG ARMY LAW. 1 (describing how fiscal law constrains military spending, sometimes impeding military operations).

¹⁴ *The Federalist*, No. 69 (Alexander Hamilton).

¹⁵ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

This formula, taken alone, provides only an approximate demarcation of the line separating Congress's role from the President's. Advocates of a strong role for Congress might characterize a legislative effort to limit the number of troops available in Iraq as placing troops "by law" under the President's command, while proponents of a strong executive would likely view it as a limitation on the President's ability to "employ them in the manner" he sees fit. With respect to the latter argument, however, it should be noted that the particular question before the *Fleming* Court did not call into question the extent to which Congress could restrict the manner of employing troops once placed at the command of the President.

Other early cases demonstrate Congress's authority to restrict the President's options for the conduct of war. In *Little v. Barreme*,¹⁶ Chief Justice Marshall had occasion to recognize congressional war power and to deny the exclusivity of presidential power. There, after Congress had authorized limited hostilities with France, a United States vessel under orders from the President had seized a United States merchant ship bound from a French port, allegedly carrying contraband material. Congress had, however, provided by statute only for seizure of such vessels bound to French ports.¹⁷ Upholding an award of damages to the ship's owners for wrongful seizure, the Chief Justice said:

It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.¹⁸

Accordingly, the Court held, the President's instructions exceeded the authority granted by Congress and were not to be given force of law, even in the context of the President's military powers and even though the instructions might have been valid in the absence of contradictory legislation.

In *Bas v. Tingy*,¹⁹ the Court looked to congressional enactments rather than plenary presidential power to uphold military conduct related to the limited war with France. The following year, in *Talbot v. Seeman*,²⁰ the Court upheld as authorized by Congress a U.S. commander's capture of a neutral ship, saying that "[t]he whole powers of war being, by the constitution of the United States, vested in congress, the

¹⁶ 6 U.S. (2 Cr.) 170 (1804).

¹⁷ 1 Stat. 613 (1799).

¹⁸ 6 U.S. (2 Cr.) at 177-178.

¹⁹ 4 U.S. (4 Dall.) 37 (1800).

²⁰ 5 U.S. (1 Cr.) 1, 28 (1801).

acts of that body can alone be resorted to as our guides in this inquiry.” During the War of 1812, the Court recognized in *Brown v. United States*,²¹ that Congress was empowered to authorize the confiscation of enemy property during wartime, but that absent such authorization, a seizure authorized by the President was void.

The onset of the Civil War provided some grist for later assertions of unimpeded presidential prerogative in matters of war. In the *Prize Cases*,²² the Supreme Court sustained the blockade of Southern ports instituted by President Lincoln in April, 1861, at a time when Congress was not in session. Congress had at the first opportunity ratified the President’s actions,²³ so that it was not necessary for the Court to consider the constitutional basis of the President’s action in the absence of congressional authorization or in the face of any prohibition. Nevertheless, the Court approved the blockade five-to-four as an exercise of presidential power alone, on the basis that a state of war was a fact and that, the nation being under attack, the President was bound to take action without waiting for Congress.²⁴ The case has frequently been cited to support claims of greater presidential autonomy by reason of his role as Commander in Chief.

However, it should be recalled that where Lincoln’s suspension of the Writ of Habeas Corpus varied from legislation enacted later to ratify it, the Court looked to the statute²⁵ rather than to the executive proclamation²⁶ to determine the breadth of its application.²⁷ The Chief Justice described the allocation of war powers as follows:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President....²⁸

²¹ 12 U.S. (8 Cr.) 110 (1814).

²² 67 U.S. (2 Bl.) 635 (1863).

²³ 12 Stat. 326 (1861)(ratifying all “acts, proclamations, and orders” done by the President “respecting the army and navy ... and calling out or relating to the militia”).

²⁴ 67 U.S. (2 Bl.) at 668 (“[The President] does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority.”). The minority argued that only congressional authorization could stamp an insurrection with the character of war. Later, a unanimous Court adopted the majority view. *The Protector*, 79 U.S. (12 Wall.) 700 (1872).

²⁵ Act of March 3d, 1863, 12 Stat. 755 (authorizing the suspension of habeas corpus, but with limitations in Union States to those held as prisoners of war; all others were to be indicted or freed.)

²⁶ Proclamation of September 15, 1863, 13 Stat. 734 (suspending habeas corpus with respect to those in federal custody as military offenders or “as prisoners of war, spies, or aiders and abettors of the enemy”).

²⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

²⁸ *Id.* at 139 (Chase, C.J., concurring).

The Chief Justice described the Commander-in-Chief power as entailing “the command of the forces and the conduct of campaigns,”²⁹ but nevertheless agreed that military trials of civilians accused of violating the law of war in Union states were invalid without congressional approval, despite the government’s assertion that the “[Commander in Chief]’s power to make an effectual use of his forces [must include the] power to arrest and punish one who arms men to join the enemy in the field against him.”³⁰

The expansion of presidential power related to war, asserted as a combination of Commander-in-Chief authority and the President’s inherent authority over the nation’s foreign affairs, began in earnest in the twentieth century. In *United States v. Curtiss-Wright Export Corp.*,³¹ the Supreme Court confirmed that the President enjoys greater discretion when acting with respect to matters of foreign affairs than may be the case when only domestic issues are involved. In that case, Congress, concerned with the outside arming of the belligerents in the war between Paraguay and Bolivia, had authorized the President to proclaim an arms embargo if he found that such action might contribute to a peaceful resolution of the dispute. President Franklin Roosevelt issued the requisite finding and proclamation, and Curtiss-Wright and associate companies were indicted for violating the embargo. They challenged the statute, arguing that Congress had failed adequately to elaborate standards to guide the President’s exercise of the power thus delegated.³² Justice Sutherland concluded that the limitations on delegation in the domestic field were irrelevant where foreign affairs are involved, a result he based on the premise that foreign relations is exclusively an executive function combined with his constitutional model positing that internationally, the power of the federal government is not one of enumerated but of inherent powers, emanating from concepts of sovereignty rather than the Constitution. The Court affirmed the convictions, stating that:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often

²⁹ *Id.* at 139 (“Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity...”).

³⁰ *Id.* at 17 (government argument).

³¹ 299 U.S. 304 (1936).

³² The Supreme Court had recently held that the Constitution required Congress to elaborate standards when delegating authority to the President. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.³³

The case is cited frequently to support a theory of presidential power not subject to restriction by Congress, although the case in fact involved an exercise of authority delegated by Congress. *Curtiss-Wright* remains precedent admonishing courts to show deference to the President in matters involving international affairs, including by interpreting ambiguous statutes in such a manner as to increase the President's discretion.³⁴ The case has also been cited in favor of broad presidential discretion to implement statutes related to military affairs.³⁵ To the extent, however, that Justice Sutherland interpreted presidential power as being virtually plenary in the realms of foreign affairs and national defense, the case has not been followed to establish that Congress lacks authority in these areas.

The constitutional allocation of war powers between the President and Congress, where Congress had not delegated the powers exercised by the President, was described by Justice Jackson, concurring in the *Steel Seizure Case*³⁶:

The Constitution expressly places in Congress power "to raise and support Armies" and "to provide and maintain a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement....

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him any army or navy to command.

The Jackson opinion is commonly understood to establish that whatever powers the President may exercise in the absence of congressional authorization, the President may act contrary to an act of Congress only in matters involving exclusive presidential prerogatives.³⁷

³³ 299 U.S. at 319-20.

³⁴ See *Haig v. Agee*, 453 U.S. 280, 291, 293-294 & n. 24, 307-308 (1981); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (construing treaty and statutory provisions as not limiting presidential discretion in interdicting refugees on high seas in the light of the President's "unique responsibility" in foreign and military affairs, citing *Curtiss-Wright*).

³⁵ See *Loving v. United States*, 517 U.S. 748 (1996).

³⁶ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952).

³⁷ Justice Jackson's concurrence took note of the fact that *Curtiss-Wright* did not involve a case in which the President took action contrary to an act of Congress. *Id.* at 635-36 &n.2.

Presidents from Truman to Bush II have claimed independent authority to commit U.S. armed forces to involvements abroad absent any Congressional participation other than consultation and after-the-fact financing. In 1994, for example, President Clinton based his authority to order the participation of U.S. forces in NATO actions in Bosnia-Herzegovina on his “constitutional authority to conduct U.S. foreign relations” and as his role as Commander in Chief,³⁸ and protested efforts to restrict the use of military forces there and elsewhere as an improper and possibly unconstitutional limitation on his “command and control” of U.S. forces.³⁹ Ever since Congress passed the War Powers Resolution over President Nixon’s veto, all Presidents have regarded it as an unconstitutional infringement on presidential powers.⁴⁰

³⁷ (...continued)

Curtiss-Wright, he said

involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated legislative powers to the President. Much of the Court’s opinion is *dictum*, but the *ratio decidendi* is contained in the following language:

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President’s action - or, indeed, whether he shall act at all - may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie v. Hare*, 239 U.S. 299, 311 , ‘As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*’ (Italics supplied [by Justice Jackson]) *Id.*, at 321-322.

That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

³⁸ 30 WEEKLY COMP. PRES. DOC. 406 (March 2, 1994).

³⁹ See Interview with Radio Reporters, 1993 PUB. PAPERS 1763-64; see also FISHER, *supra* note 11, at 184.

⁴⁰ P.L. 93-148, 87 Stat. 555, codified at 50 U.S.C. § 1541 *et seq.* See CRS Report RL33532, (continued...)

In the context of the “Global War on Terror,” President Bush has claimed that his commander-in-chief authority entails inherent authority with respect to the capture and detention of suspected terrorists, authority he has claimed cannot be infringed by legislation.⁴¹ In 2004, the Supreme Court avoided deciding whether Congress could pass a statute to prohibit or regulate the detention and interrogation of captured suspects, which the Administration had asserted would unconstitutionally interfere with core commander-in-chief powers, by finding that Congress had implicitly authorized the detention of enemy combatants when it authorized the use of force in the aftermath of the September 11, 2001, terrorist attacks.⁴² However, the Supreme Court in 2006 invalidated President Bush’s military order authorizing trials of aliens accused of terrorist offenses by military commission, finding that the regulations promulgated to implement the order did not comply with relevant statutes.⁴³ The Court did not expressly pass on the constitutionality of any statute or discuss possible congressional incursion into areas of exclusive presidential authority, which was seen by many as implicitly confirming Congress’s authority to legislate in such a way as to limit the power of the Commander in Chief.⁴⁴

Use of the Power of the Purse To Restrict Military Operations

Congress has used its spending power to restrict the deployment and use of the armed forces in the past.⁴⁵ In 1973, for instance, after other legislative efforts failed

⁴⁰ (...continued)

The War Powers Resolution: Presidential Compliance, by Richard F. Grimmett.

⁴¹ See Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress’s Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183 (2004)(arguing that President Bush’s claims with respect to Congress’s lack of power to legislate in matters related to the conduct of the war represent an expansion over prior administrations’ claims).

⁴² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

⁴³ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

⁴⁴ The Court adopted Chief Justice Chase’s formulation for allocating war powers, *see id.* at 2773, and Justice Jackson’s framework for determining separation-of-powers disputes between the President and Congress, *see id.* at 2774 n.24 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. The Government does not argue otherwise.”)(citation omitted).

⁴⁵ For examples of such measures and a discussion of the context in which they were enacted, see CRS Report RS20775, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments*, by Richard F. Grimmett and CRS Report RL33803, *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, by Amy Belasco, Lynn J. Cunningham, Hannah G. Fischer, and Larry A. Niksch. See also, e.g., Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM.J.INT’L L. 758 (1989), and Charles Tiefer, *Can Appropriations Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT’L L. 291 (2006).

to draw down U.S. participation in combat operations in Indochina,⁴⁶ Congress effectively ended it by means of appropriations riders prohibiting use of funds. Section 307 of the Second Supplemental Appropriations Act for Fiscal Year 1973, P.L. 93-50 (1973), stated that, “None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose.” Section 108 of the Continuing Appropriations Resolution for Fiscal Year 1974, P.L. 93-52 (1973), provided that, “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.” A year later, Congress passed an authorizing statute, section 38(f)(1) of the Foreign Assistance Act of 1974, P.L. 93-559 (1974), which set a total ceiling of United States civilian and military personnel in Vietnam of 4,000 six months after enactment and a total ceiling of 3,000 within one year of enactment.

A provision of an authorization act, section 404 of the International Security Assistance and Arms Export Control Act of 1976, P.L. 94-329 (1976), comprehensively prohibited using funds for military and paramilitary operations in Angola. It stated that:

Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting, augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola, unless and until Congress expressly authorizes such assistance by law enacted after the date of enactment of this section.

This section added that if the President determined that the prohibited assistance to Angola should be furnished, he should submit to the Speaker of the House and the Senate Committee on Foreign Relations a report describing recommended amounts and categories of assistance to be provided and identities of proposed aid recipients. This report also should include a certification of his determination that furnishing such assistance was important to U.S. national security interests and an unclassified detailed statement of reasons supporting it.

Section 109 of the Foreign Assistance and Related Programs Appropriations Act for Fiscal Year 1976, P.L. 94-330 (1976), signed the same day as P.L. 94-329, provided that, “None of the funds appropriated or made available pursuant to this act shall be obligated to finance directly or indirectly any type of military assistance to Angola.”

⁴⁶ See P.L. 91-672, § 12, 84 Stat. 2053 (repealing Gulf of Tonkin Resolution); P.L. 92-156, § 601(a), 85 Stat. 423, 430 (Mansfield Amendment); *see also* P.L. 92-156, § 501(a), 85 Stat. 423, 427 (1971) (Fullbright proviso).

In the 1980s, various versions of the Boland Amendment were enacted to prohibit using funds for various military activities in or around Nicaragua.⁴⁷ For example, section 8066 of the Department of Defense Appropriations Act included in the Continuing Appropriations Resolution for Fiscal Year, 1985, P.L. 98-473, 98 Stat. 1935 (1984), for example, stated that: “During Fiscal Year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose, or which would have the effect of supporting, indirectly or indirectly, military or paramilitary operation in Nicaragua by any nation, group, organization, movement or individual.” This provision stated that after February 28, 1985, the President could expend \$14 million in funds if the President made a report to Congress which specified certain criteria, including the need to provide further assistance for military or paramilitary operations prohibited by the Boland Amendment and if Congress passed a joint resolution approving such action.

In the 1990s, Congress enacted section 8151 of the DOD Appropriations Act for Fiscal Year 1994, P.L. 103-139 (1993), which approved using armed forces for certain purposes including combat in a security role to protect United Nations units in Somalia, but cut off funding after March 31, 1994, except for a limited number of military troops to protect American diplomatic personnel and American citizens unless further authorized by Congress. Section 8135 of the DOD Appropriations Act for Fiscal Year 2005, P.L. 103-335 (1994), provided that, “None of the funds appropriated in this act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994.” In title IX of the DOD Appropriations Act for Fiscal Year 1995, P.L. 103-335 (1994), Congress provided that, “No funds provided in this act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”

These examples reveal the approaches that Congress has employed to prohibit or restrict using military force. They have ranged from the least comprehensive “none of the funds appropriated in this act may be used” to the most comprehensive “notwithstanding any other provision of law, no funds may be used.” The phrase “none of the funds appropriated in this act” limits only funds appropriated and made available in the act that carries the restriction, but not funds, if any, that may be available pursuant to other appropriations acts or authorizing statutes. To restrict funds appropriated and made available not only in the act that carries the restriction, but also pursuant to other appropriations acts, Congress has used the phrase “none of the funds appropriated in this act or any other act may be used.” The most comprehensive restriction is “notwithstanding any other provision of law, no funds may be used.” This language precludes using funds that have been appropriated in any appropriations acts as well as any funds that may be made available pursuant to

⁴⁷ *E.g.*, P.L. 98-473, § 8066, 98 Stat. 1904, 1935 (1984); *see* 133 Cong Rec. 15664-15701 (June 15, 1987) (detailing various forms of the Boland Amendment that were enacted).

any authorizing statutes including laws that authorize transfers of appropriated or nonappropriated funds.⁴⁸

Procedural Considerations. There is a parliamentary impediment to including the phrases “none of the funds appropriated in this act or any other act may be used” or “notwithstanding any other provision of law, no funds may be used” in a general appropriations bill. House Rule XXI, clause 2, makes subject to a point of order language that changes existing law (i.e., legislation) in a general appropriation bill (i.e., one providing appropriations for several agencies). A bill that appropriates funds for a single purpose or a single agency is not a general appropriations bill to which this restriction applies. The intent of Rule XXI, clause 2 is to separate the authorizing and appropriating functions and place them in separate committees.

Nonetheless, a practice has developed that just as the House may decline to appropriate funds for a purpose that has been authorized by law, it may by limitation prohibit appropriating money in a general appropriations bill for part of a purpose while appropriating funds for the remainder of it. Such a limitation “... may apply solely to the money of the appropriation under consideration” and “... may not apply to money appropriated in other acts.”⁴⁹ Thus, the phrase “none of the funds appropriated *in this act* may be used” is not subject to a point of order, but the phrase “none of the funds appropriated *in this act or any other act* may be used” and the phrase “notwithstanding any other provision of law, no funds may be used” do not appear to qualify as permissible limitations in a general appropriations bill and would be subject to points of order under Rule XXI, clause 2 because they are considered legislation. To avoid a point of order, a limitation in a general appropriations bill may not impose new or additional duties on an executive official, may not restrict authority to incur obligations, and may not make an appropriation contingent upon (i.e., “unless” or “until”) the occurrence of an event not required by law.⁵⁰ If a Member raises a point of order that language in a general appropriations bill violates Rule XXI, clause 2, and the point of order is sustained by the chair, the legislative language is stricken.

Although legislation in a general appropriations bill is subject to a point of order under Rule XXI, clause 2, a restriction in a House rule is not self-enforcing. Consequently, legislation may be included in a general appropriations bill and become law if no point of order is raised, if a point of order is overruled, or if the House either suspends the rules or agrees to a special order known as a rule reported

⁴⁸ See, e.g., 31 U.S.C. chap. 15, subchap. III “Transfers and Reimbursements” for provisions that authorize transfers of funds, including the Economy Act, 31 U.S.C. §§ 1535 and 1536, which allows an agency to transfer funds to another agency if the receiving agency can provide or get by contract goods or services less expensively or more conveniently than the ordering agency can get goods or services by a contract with a commercial enterprise. Transfer authority also is included in some other provisions of the United States Code that apply to individual departments and agencies and sometimes in appropriations acts.

⁴⁹ See John V. Sullivan, House Parliamentarian, *Constitution, Jefferson’s Manual, and Rules of the House of Representatives One Hundred Ninth Congress*, H. DOC. 108-241, at § 1053 (2005).

⁵⁰ See *id.* at §§ 1053-57 for an explanation of limitations.

from the Committee on Rules that waives the point of order against including such legislation.⁵¹

Like House Rule XXI, clause 2, Senate Standing Rule XVI also prohibits including legislation in a general appropriations bill, but the Senate rule permits legislation to be included if it is germane to the subject matter of the bill under consideration. If a point of order that language constitutes legislation on an appropriations bill is raised, the proponent of the language may defend it by asserting that it is germane. The question of germaneness is not decided by the presiding officer; it is submitted to the Senate. If a majority of Senators vote that the language in question is germane, it remains in the bill and the point of order that it constitutes legislation is dismissed and is not presented to the presiding officer for a ruling. If a majority of the Senate votes that language is not germane, the presiding officer then rules on whether it constitutes legislation. If the point of order is sustained, the language is removed; if it is overruled, the language remains in the bill and can be enacted.⁵²

As mentioned earlier, the intent of these House and Senate rules is to separate authorizing and appropriating functions by constraining the bodies from enacting legislation in appropriations bills, but prohibiting use of funds for a purpose or purposes does not contravene the House or Senate rule provided that the prohibition applies only to funds appropriated in the bill being considered.

Because an appropriations act generally funds programs for a fiscal year, each provision contained in the act is presumed to be in effect only until the end of the fiscal year. “A provision contained in an annual appropriation act is not to be construed as permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity or if the provision is of a general character bearing no relation to the object of the appropriation.... The most common word of futurity is ‘hereafter’ and provisions using this term have often been construed to be permanent.”⁵³ Other words of futurity include “after the date of approval of this act,” “henceforth,” and specific references to future fiscal years.⁵⁴

While including a word or words of futurity has the effect of making a provision extend beyond the fiscal year covered by an appropriations act, such a provision would constitute legislation that would appear to be subject to a point of order under House Rule XXI, clause 2 and Senate Standing Rule XVI during congressional

⁵¹ *Id.* at § 1058.

⁵² Floyd M. Riddick, Senate Parliamentarian Emeritus, and Alan S. Frumin, Senate Parliamentarian, *Riddick’s Senate Procedure: Precedents and Practices*, S. DOC. 101-28, at 101 et seq. (1992).

⁵³ GOVERNMENT ACCOUNTABILITY OFFICE, OFFICE OF GENERAL COUNSEL, I PRINCIPLES OF APPROPRIATIONS LAW 2-34 (3d ed. 2006) (footnotes omitted).

⁵⁴ *Id.* at 2-36.

consideration. If the parliamentary impediments can be overcome, however, such legislation may be enacted and become valid law.

Availability of Alternative Funds. A fundamental principle in appropriations law is that appropriations may not be augmented with funds from outside sources without statutory authority.

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.⁵⁵

While no statute in precise terms expressly prohibits augmenting appropriations, the concept is based on some appropriations laws. The Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), requires that a government official who receives money for the government from any source must deposit it in the U.S. Treasury as soon as practicable without deduction for any charge or claim. Under the Purpose Statute, 31 U.S.C. § 1301, appropriated funds may be used only for the purposes for which they are appropriated. A criminal provision, 18 U.S.C. § 209, prohibits supplementing the salary of an officer or employee of the government from any source other than the United States government.⁵⁶

An example of a statute permitting gift funds from other countries to finance a war is section 202 of the Continuing Resolution for Fiscal Year 1991, P.L. 101-403 (1990), passed before the first Gulf war. Section 202 added a new section 2608 to title 10 of the United States Code to authorize any person, foreign government, or international organization to contribute money or real or personal property for use by the Department of Defense. However, before the Department of Defense could spend the funds, they had to be first appropriated by Congress.

The Purpose Statute states that funds may be used only for purposes for which they have been appropriated; by implication it precludes using funds for purposes that Congress has prohibited. When Congress states that no funds may be used for a purpose, an agency would violate the Purpose Statute if it should use funds for that purpose; it also in some circumstances could contravene a provision of the Antideficiency Act, 31 U.S.C. § 1341. Section 1341 prohibits entering into obligations or expending funds in advance of or in excess of an amount appropriated unless authorized by law. If Congress has barred using funds for a purpose, entering

⁵⁵ GOVERNMENT ACCOUNTABILITY OFFICE, OFFICE OF GENERAL COUNSEL, II PRINCIPLES OF APPROPRIATIONS LAW, 6-162 (3d ed. 2006).

⁵⁶ *Id.* at 6-163.

into an obligation or expending any amount for it would violate the Act by exceeding the amount — zero — that Congress has appropriated for the prohibited purpose.⁵⁷

To determine whether an agency has violated the Antideficiency Act, it would be necessary to review the language in an appropriations act or authorizing statute that includes a prohibition on using funds for a specific purpose. If an appropriations act prohibits using funds “in this act” for a purpose, for example, expending any amount from that act for the prohibited purpose would appear to contravene the Antideficiency Act because Congress has appropriated zero funds for it. Entering into obligations or expending funds, if any, that may be available from a different appropriations act or other fund for that purpose, however, would not appear to be prohibited by the Antideficiency Act; an agency would be able to use funds from sources other than the appropriations act that contains the prohibition or limitation.

Violating the Antideficiency Act would be significant because it has notification and penalty provisions not found in the Purpose Statute. The Purpose Statute does not expressly provide for penalties; it generally is enforced by imposing administrative sanctions on the officer or employee who violates the statute.⁵⁸ The Antideficiency Act, by contrast, contains a provision that not only provides for administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office, 31 U.S.C. § 1349, but also one that requires an immediate report of a violation to the President and Congress, 31 U.S.C. § 1351. Moreover, the Antideficiency Act has a criminal penalty provision: Section 1350 of title 31 provides that an officer or employee who “knowingly and willfully” violates the Act “shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” Although the Act has a criminal provision, no one appears to have been prosecuted or convicted for violating it.⁵⁹ Another criminal provision, 18 U.S.C. § 435, not part of the Antideficiency Act, makes punishable by a fine of \$1000, imprisonment of not more than one year, or both, knowingly contracting to erect, repair, or furnish any public building or for any public improvement for an amount more than the amount appropriated for that purpose.

The Antideficiency Act prohibits entering into obligations or expending funds in advance of or in excess of an amount appropriated *unless authorized by law*. One law that authorizes entering into obligations in advance of appropriations is the Feed and Forage Act. Also referred to as Revised Statute 3732, the Feed and Forage Act is part of and an express exception to the Adequacy of Appropriations Act, 41 U.S.C. § 11. Section 11 generally states that no government contract or purchase may be made unless it is authorized by law or is under an appropriation adequate to its fulfillment. The Feed and Forage Act exception authorizes the Department of Defense and the Department of Transportation⁶⁰ with respect to the Coast Guard when it is not operating as service in the Navy to make contracts in advance of

⁵⁷ *Id.* at 6-62.

⁵⁸ *Id.* at 6-78.

⁵⁹ *Id.* at 6-141.

⁶⁰ 6 U.S.C. § 468 transfers the Coast Guard to the Department of Homeland Security, but a corresponding change to 41 U.S.C. § 11 has not been enacted.

appropriations for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies. Obligations entered into pursuant to Feed and Forage Act authority must not exceed the necessities of the current year. The Secretary of Defense and the Secretary of Transportation immediately must advise Congress of the exercise of this authority and report quarterly on the estimated obligations incurred pursuant to it.⁶¹ Although the Feed and Forage Act authorizes *entering into obligations* such as contracts, *actual expenditures* are not permitted pursuant to this authority until Congress appropriates the necessary funds.⁶²

Analysis and Conclusion

Much of the debate over war powers has taken place in the context in which a President has initiated the use of military force with ambiguous or no congressional authorization, which is not the case here. There is no obvious reason, however, to suppose that Congress's constitutional power to limit hostilities depends on whether the hostilities were initiated with Congress's express approval at the outset.⁶³ Likewise, it does not seem reasonable to suggest that Congress's authority to limit the scope of hostilities may be exercised validly only at the initiation of hostilities, without opportunity for changing course once troops are engaged.

In modern times, federal courts have been reticent to decide cases involving war powers on the merits,⁶⁴ including those involving appropriations measures.⁶⁵ However, in discussing whether a particular challenge raises non-justiciable questions as involving matters textually committed to the political branches by the Constitution,⁶⁶ courts have generally reiterated the understanding of a shared

⁶¹ See LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 238-247 (1975) for an explanation of the Feed and Forage Act.

⁶² See Secretary of Defense (Comptroller), *Budget Execution Flexibilities, Fiscal Year 2005* (2004), available at [http://www.dod.mil/comptroller/execution/Final_Budget_Execution.pdf].

⁶³ See Tiefer, *supra* note 1, at 310-12 (outlining possible arguments for differentiating between authorized and unauthorized wars).

⁶⁴ See Jonathan L. Entin, *The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate*, 47 CASE W. RES. L. REV. 1305 (1997)(explaining paucity of court decisions regarding war powers).

⁶⁵ See Stith, *supra* note 9, at 1387 (noting that courts have declined to enforce executive compliance with appropriations limitations, "particularly in areas where the Executive's constitutional are significant").

⁶⁶ *Baker v. Carr*, 369 U.S. 186, 211-12 (1962) (noting that justiciability of a foreign affairs matter is determined "in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action"); *Powell v. McCormack*, 395 U.S. 486, 521 (1969)(making "a textually demonstrable constitutional commitment of the issue to a coordinate political department" the dominant factor for determining justiciability).

allocation of war powers.⁶⁷ That is, it is generally agreed that Congress cannot “direct campaigns,” but that Congress can regulate the conduct of hostilities, at least to some degree, and that Congress can limit military operations without the risk of a presidential veto simply by refusing to appropriate funds.

In 1970, in response to a challenge related to the Vietnam conflict, a federal district court⁶⁸ expanded on the theme of congressional authority, with particular reference to Congress’s appropriations power:

The power to commit American military forces under various sets of circumstances is shared by Congress and the Executive.... The Constitutional expression of this arrangement was not agreed upon by the Framers without considerable debate and compromise. A desire to facilitate the independent functioning of the Executive in foreign affairs and as commander-in-chief was tempered by a widely shared sentiment opposing the concentration of unchecked military power in the hands of the president. Thus, while the president was designated commander-in-chief of the armed forces, Congress was given the power to declare war. However, it would be shortsighted to view Art. I, § 8, cl. 11 as the only limitation upon the Executive’s military powers.... [I]t is evident that the Founding Fathers envisioned congressional power to raise and support military forces as providing that body with an effective means of controlling presidential use thereof. Specifically, the House of Representatives ... was viewed by the Framers as the bulwark against encroachment by the other branches. In *The Federalist* No. 58 (Hamilton or Madison), we find:

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse — that powerful instrument by which we behold in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

⁶⁷ *Massachusetts v. Laird*, 451 F.2d 26, 31-32 (1st Cir. 1971) (“The Congress may without executive cooperation declare war, thus triggering treaty obligations and domestic emergency powers. The executive may without Congressional participation repel attack, perhaps catapulting the country into a major conflict. But beyond these independent powers, each of which has its own rationale, the Constitutional scheme envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities.”). Another court found justiciable the question of whether military operations were constitutional, proclaiming the test to be “whether there is any action by the Congress sufficient to authorize or ratify the military activity in question,” *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971). The same court, however, found a determination of the effects of Congress’s repeal of the Gulf of Tonkin Resolution to be a non-justiciable political question. *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied* 405 U.S. 979 (1972).

⁶⁸ *Davi v. Laird*, 318 F.Supp. 478, 480 (W.D. Va. 1970).

Despite Congress's well-established authority over appropriations, it has been argued that the power of the purse cannot be wielded in such a way as to fetter the discretion of the Commander in Chief.⁶⁹ Congress's power of the purse is subject to the same constitutional restrictions as any other legislative enactment, including those that affect allocation of powers among the three branches.⁷⁰ That is, Congress cannot use appropriations measures to achieve unconstitutional results, although it might, in some circumstances, achieve a similar result simply by failing to appropriate money.⁷¹ The doctrine of "unconstitutional conditions," most frequently applicable to laws conditioning benefits for states or private citizens on their relinquishment of constitutional rights, is said to apply as well to legislation authorizing presidential action.⁷² This notion, however, adds little to the analysis. Congress has ample constitutional authority to enact legislation that restricts the scope of military operations. If Congress can enact a limitation on the conduct of military operations directly, it can do so through appropriations. The larger question remains whether the limitation enacted amounts to an unconstitutional usurpation of the actual conduct of war.

Some commentators agree that Congress has the authority to cut off funds for military operations entirely, but assert that a partial cut-off or limitation on the use of funds would amount to an unconstitutional condition by interfering with the President's authority to conduct battlefield operations.⁷³ There has been some

⁶⁹ See Rivkin and Casey, *supra* note 1; see also Rosen, *supra* note 13, at 14-18 (outlining theories but questioning their validity).

⁷⁰ *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803)(Congress may not enlarge the original jurisdiction of the Supreme Court); *United States v. Klein*, 80 U.S. (8 Wall.) 128 (1872) (Congress may not nullify effects of a presidential pardon or prescribe a rule of decision in a court case); *United States v. Lovett*, 328 U.S. 303 (1946)(Congress may not create a bill of attainder by means of an appropriations measure denying money to pay salaries of named officials); *Reid v. Covert*, 354 U.S. 1 (1957)(Congress may not displace judicial role by subjecting civilians to military courts-martial during time of peace); *INS v. Chadha*, 462 U.S. 919 (1983)(Congress may not invalidate executive decisions by one-house "legislative veto").

⁷¹ For example, in *United States v. Klein*, the Supreme Court invalidated a statute that prohibited the Court of Claims from receiving evidence of a presidential pardon in support of a claim against the government, finding the law interfered with the judicial power and the President's pardon power. However, the Court upheld a statute that prohibited payment of the same claims out of the Treasury. *Hart v. United States*, 118 U.S. 62 (1886). Congress's failure to appropriate funds for constitutionally mandated activities might itself be unconstitutional, but neither the courts nor the President would have the authority in such a case to mandate the expenditure of funds from the Treasury for the activity. See Stith, *supra* note 9, at 1351.

⁷² See, e.g., John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145 & n25 (1988)("Congress cannot condition funding or authority for the President to act in the foreign affairs arena upon the President's surrender of his own constitutionally grounded duties and privileges.").

⁷³ See Rivkin and Casey, *supra* note 1 ("Under our constitutional system ... the power to cut off funding does not imply the authority to effect lesser restrictions, such as establishing (continued...)

suggestion in the past that the President’s responsibility to provide for troops in the field justifies further deployments without prior authorization Congress,⁷⁴ with some arguing that the President has an independent implied spending power to carry out these responsibilities.⁷⁵ These arguments do not easily square with Congress’s established prerogative to limit the scope of wars through its war powers, and do not conform with Congress’s absolute authority to appropriate funds.

Congress has frequently, although not invariably, acceded to presidential initiatives involving the use of military force. While a history of congressional acquiescence may create a gloss on the Constitutional allocation of powers,⁷⁶ such a gloss will not necessarily withstand an express statutory mandate to the contrary. At any rate, it does not appear that Congress has developed a sufficiently consistent or lengthy historical practice to have abandoned either its war power or its authority over appropriations. Of course, the executive branch has objected to legislative proposals it views as intrusive into presidential power, including conditions found in appropriations measures.⁷⁷ And it remains possible to construe the function of “conducting military operations” broadly to find impermissible congressional interference in even the most mundane statutes regulating the armed forces. To date, however, no court has invalidated a statute passed by Congress on the basis that it impinges the constitutional authority of the Commander in Chief, whether directly or indirectly through appropriations. In contrast, presidential assertions of authority based on the Commander-in-Chief Clause, in excess of or contrary to congressional authority, have been struck down by the courts.⁷⁸

On the other hand, Presidents have sometimes deemed such limitations to be unconstitutional or merely precatory, and have at times not given them the force of law.⁷⁹ In other words, Administrations have relied on an argument based on the doctrine of “unconstitutional conditions” to justify the President’s authority to reject

⁷³ (...continued)

benchmarks or other conditions on the president’s direction of the war.”).

⁷⁴ See Tiefer, *supra* note 1, at 314-15 (describing Nixon Administration’s legal rationale for expanding the Vietnam conflict into Cambodia and Laos).

⁷⁵ See Rosen, *supra* note 13, at 14-18 (summarizing theories).

⁷⁶ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (executive agreements settling claims with Iran subsequent to the hostage crisis held to be within President’s power, in part because of unbroken historical practice of Congress acceding to Presidential settlement of foreign claims by executive agreement).

⁷⁷ See H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 565 -75 (1999)(surveying historical examples of disagreements involving commander-in-chief powers).

⁷⁸ See *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

⁷⁹ See Powell, *supra* note 77, at 552-53.

a limitation on national security spending while continuing to spend the funds.⁸⁰ Whether or not the President is constitutionally entitled to spend funds without adhering to relevant legislative conditions appears to be an issue unlikely to be resolved by the courts.

In sum, it seems that under the constitutional allocation of powers Congress has the prerogative of placing a legally binding condition on the use of appropriations to prevent the deployment of additional U.S. armed forces to Iraq. Such a prohibition seems directly related to the allocation of resources at the President's disposal, and would therefore not appear to interfere impermissibly with the President's ability to exercise command and control over the U.S. armed forces. Although not beyond question, such a prohibition would arguably survive any challenge as an incident both of Congress's war power and of its power over appropriations.

⁸⁰ See Tiefer, *supra* note 1, at 312 (providing examples of the “say no, but keep the dough” approach for circumventing appropriations limitations viewed as unconstitutional); Powell, *supra* note 77, at 553 (describing executive branch formula for determining the effect on an appropriation of an invalid condition to be based on “whether Congress’s main purpose in enacting the appropriation was to create a means of forcing the congressional policy embodied in the condition on the President”).