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Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law

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MCKAYE NEUMEISTER

Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law

ABSTRACT. The rise of the modern national security state has been accompanied by a vast expansion of executive power. Congress’s strongest check against unilateral presidential action—the power of the purse—has so far been ineffective in combating this constitutional imbalance. But developments in legislative standing doctrine may make it possible for congressional plaintiffs to challenge executive violations of the Appropriations Clause. Those evolutions could enable Congress to use the Appropriations Clause to reassert its role in national security decision making and restore the constitutional balance the Framers crafted.

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INTRODUCTION

Since the Founding, war has changed. The national security challenges we face as a nation today are beyond the comprehension of the Framers. Yet the text of the Constitution remains the same. While Congress has the formal authority to be a significant force in national security policy making, military conflicts do not occur within the Constitution’s battle lines any longer. Instead, in the modern era, the President has the ability to initiate military conflicts without prior congressional authorization. Congress is left playing catch-up, attempting to regulate military operations already underway. The war power has thus shifted from Congress to the President, and congressional attempts to constrain the President often go unheeded. As Professors Bruce Ackerman and Oona Hathaway have observed, “[t]here is a pressing need for institutional reform that allows Congress to restore our endangered balance of powers” in war making.

For such reform to succeed, it must leverage the most significant weapon in Congress’s arsenal: the power of the purse. Because Congress can no longer control the use of military force by declining to declare war, the appropriations power is likely Congress’s strongest tool to influence national security decision making. However, the power of the purse is not functioning as the strong check the Framers envisioned. This Note explores a new tool that Congress can use to

1. See Douglas L. Kriner, After the Rubicon: Congress, Presidents, and the Politics of Waging War 39 (2010) (“On parchment at least, Congress has more than enough tools at its disposal to serve as a strong check on presidential power in the military arena.”).
2. See Louis Fisher, Presidential War Power, at xiv (3d ed. 2013) (“President Bill Clinton used military force repeatedly without ever seeking authority from Congress, intervening in Iraq, Somalia, Haiti, Bosnia, Sudan, Afghanistan, and Yugoslavia.”).
4. See Fisher, supra note 2, at 291 (“The drift of the war power from Congress to the President after World War II is unmistakable . . . . That is not the framers’ model.”).
6. Ackerman & Hathaway, supra note 3, at 458.
7. 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, 195 (2004) (“[T]he spending power has become Congress’s primary tool in influencing military and, to a large degree, foreign policy decisions.”); see also Fisher, supra note 2, at 298 (“Congressional (and public) control would be greatly strengthened if tied to the power of the purse.”).
reassert its constitutional role in the conduct of war, and in national security more generally: Appropriations Clause litigation.

While focused on issues of national security and foreign affairs, this Note also considers the benefits of Appropriations Clause litigation for the separation of powers generally. The power of the purse is one of Congress’s core checks on the executive branch, but it is not used as often or as effectively as it could be.⁸ The threat of litigation is an important way to give the appropriations power more bite. And in doing so, it could reduce interbranch friction regarding the branches’ respective roles in national security, since the appropriations dispute acts as a proxy for deeper interbranch disagreements.⁹ The clarity that the Appropriations Clause provides could also bring some stability to courts’ inconsistent separation-of-powers jurisprudence.¹⁰ Even if the litigation does not succeed, legislators’ collective decision to sue can signal to their most important audiences—the President, agencies, the courts, and the public—that Congress is serious about protecting both its policy priorities and its power over the federal treasury.

Part I examines the appropriations power, its original understanding, and modern issues with its application. Part II asks whether national security appropriations litigation is a desirable innovation, concluding that it could help Congress reassert its role vis-à-vis the Executive in funding national security and war making. Part III assesses the doctrinal possibility and political feasibility of Appropriations Clause litigation as a congressional tool. Part IV examines the mechanics of an Appropriations Clause lawsuit in the national security context, addressing the major hurdles to the success of such litigation. This Part then ties these hurdles back to the Supreme Court’s adoption, during and after the Vietnam War, of a restrictive and waning view of its own role in separation-of-powers disputes. Part V explores the benefits that Appropriations Clause litigation can provide Congress, in terms of both intra- and interbranch relations, even if the litigation does not succeed. Part VI addresses possible critiques of the national security Appropriations Clause litigation strategy. Finally, this Note

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⁹ This Note focuses on Congress’s role vis-à-vis the Executive in appropriating for and shaping “national security” as a whole. I treat war powers, and the constitutional conflict about the proper role of the political branches in war making, as a subset of “national security.” This broader category also includes issues pertaining to domestic security, terrorism, and foreign relations, among others. Notwithstanding my broader focus, I often specifically invoke war powers in this Note because they provide sharp examples of conflicts between Congress and the Executive in the national security arena, which are often played out through disputes over appropriations.

¹⁰ On the courts’ inconsistency, see, for example, M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. PA. L. REV. 603, 609-10 (2001).
concludes that appropriations-focused national security litigation could succeed in the courts, and in doing so could aid Congress in reclaiming its constitutional role, thereby resetting the balance of power.

I. THE MODERN IMBALANCE IN NATIONAL SECURITY POWERS AND THE WEAKENED POWER OF THE PURSE

The power of the purse, as originally understood and applied, served as a real check on the President's national security activities. As Ackerman and Hathaway observe, the power of the purse was “once a highly effective mechanism for forcing the president to operate within congressional limits.” However, “Congress has failed to adapt this power to meet modern challenges,” and as a result the purse strings are no longer as effective as they once were.

The declining power of the appropriations power is attributable to shifts in both budget practice and the political environment. The modern structure of national security funding—consisting of lump-sum appropriations, as well as flexible tools like transfer and reprogramming authority (discussed below)—gives the President significant discretion in how military funds are spent. As a result, when Congress wants to exercise its appropriations power in this context, it faces an “uphill battle” and must often resort to concessions and compromise. This Part examines the early history of Congress's appropriations power in national security, the modern state of this power, and failed attempts to resurrect Congress's waning role. In light of history, modern practice, and failed attempts at reform, Appropriations Clause litigation provides a new tactic that could help resurrect Congress's appropriations power in the national security context.

A. The Evolution of the Appropriations Clause: From the Framing to the Present

The appropriations power is not what it once was. Congress effectively managed the national security purse strings in the early days of the Republic, just as the Constitution intended. The Framers envisioned the power of the purse 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."\textsuperscript{15} The power of the purse had great import in the national security context, conceived as the best means to "prevent the executive from misusing the sword."\textsuperscript{16} Confirming this view, Thomas Jefferson famously wrote: "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."\textsuperscript{17}

To effectuate the use of the purse strings as a check on the Executive, early appropriations were specific and narrow. Consequently, "they gave Congress significant control over military action. Indeed, a single chamber of Congress could then prevent the initiation or continuation of a military conflict by refusing to fund the war."\textsuperscript{18} For example, during the first major military action under the Constitution—a conflict between the militia and Indian tribes from 1789-91—Congress exercised very strict control via appropriations, specifically appropriating "everything from the precise numbers of troops to their allotted daily rations"\textsuperscript{19} and salaries.\textsuperscript{20} Each time President Washington sought to launch a new campaign or raise more troops for the effort, he had to return to Congress for authorization and appropriations.\textsuperscript{21}

If a true emergency arose for which there were no appropriations, the practice that developed early in American history was for Presidents to act first and then seek an ex post, retroactive appropriation from Congress as soon as possible.\textsuperscript{22} Congress would then have the option of approving the appropriation or

\textsuperscript{15} The Federalist No. 58, at 357 (James Madison) (Clinton Rossiter ed., 2003); see William C. Banks & Peter Raven-Hansen, National Security Law and the Power of the Purse 172 (1994) (noting that there was "no dissent to Madison's characterization of the appropriation power . . . and repeated affirmation during the ratification debates that this power had particular force in national security").

\textsuperscript{16} Banks & Raven-Hansen, supra note 15, at 30; see also id. at 27 (noting a "widely shared assumption" among the Framers "that the people could risk vesting war powers and the command of a standing army in the president because Congress retained control of the means of war").

\textsuperscript{17} Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 The Papers of Thomas Jefferson 392, 397 (Julian P. Boyd ed., 1958) (footnote omitted).

\textsuperscript{18} Ackerman & Hathaway, supra note 3, at 477.

\textsuperscript{19} Id. at 478.

\textsuperscript{20} Id. at 480.

\textsuperscript{21} Id. at 480-81.

\textsuperscript{22} See Banks & Raven-Hansen, supra note 15, at 37-38; Fisher, supra note 2, at 203; Lucius Wilmerding, Jr., The Spending Power: A History of the Efforts of Congress To Control Expenditures 19 (1943) ("The high officers of the government, and a fortiori the President, have a right, indeed a duty, to do what they conceive to be indispensably necessary for
subjecting the President to political retribution if it deemed the expenditure unnecessary.23 Throughout American history, Presidents have followed this practice of spending unauthorized funds and seeking ex post congressional appropriations as soon as possible.24

Early practice around national security appropriations thus displayed a reciprocal dynamic. Congress appropriated narrowly to exert control over war making. And even where the President withdrew unappropriated funds, he invariably sought ex post authorization from Congress and risked the mantle of unconstitutional action if Congress refused to appropriate the funds. Modern appropriations, however, are no longer so narrow and specific. The President no longer needs to seek congressional appropriations before launching a military campaign, and Presidents have sufficient contingency and transferable funds already appropriated to respond to any emergency.25 Congress’s modern implementation of the Appropriations Clause in general has been a history of “efforts to assert legislative control over government spending” that have “not always been thorough and consistent.”26

Today, national security appropriations take the form of “lump sums for broad categories.”27 The Armed Services Committee reaches these lump-sum figures by adding up lists of itemized expenditures for specific objects, but those

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the public good, provided always that they submit their action to Congress to sanction the proceeding.”). But see NLRB v. Noel Canning, 134 S. Ct. 2550, 2610 (2014) (Scalia, J., concurring) (“[A] natural disaster might occur to which the Executive cannot respond effectively without a supplemental appropriation. But in those circumstances, the Constitution would not permit the President to appropriate funds himself. See Art. 1, § 9, cl. 7.”). 23. See Kate Stith, Congress’ Power of the Purse, 97 YALE L.J. 1343, 1351-52 (1988).

24. See also Gerhard Caspar, Appropriations of Power, 13 U. ARK. L. REV. 1, 20 (1990) (noting that even Robert Gallatin, the first major opponent of lump sum national security appropriations, acknowledged that the Secretary of War could spend beyond the contingency appropriations in the event of “pressing necessity”). For example, after the British attacked an American frigate in 1807, President Jefferson authorized spending for military provisions in the absence of an appropriation from Congress, and asked Congress when it next convened for an appropriation to cover the expenditures. See id. at 21-22. Similarly, President Lincoln directed the Secretary of the Treasury to withdraw two million dollars in unappropriated funds for requisitions to prepare the military and the navy in advance of the Civil War. See WILMERDING, supra note 22, at 14. And President Grant used up all regular appropriations to put the navy on “war footing” in preparation for war with Spain, which Congress subsequently approved and appropriated four million dollars to cover. Id. at 16.

25. Ackerman & Hathaway, supra note 3, at 482 (“As the federal government became more complex and extensive, Congress gradually gave up the detailed budgetary oversight that it held at the Founding.”).


27. BANKS & RAVEN-HANSEN, supra note 15, at 50.
itemizations are not legally binding. These broad appropriations “giv[e] the [P]resident immense discretion to reallocate funds from one activity to another.” Beyond the discretion to spend within the broad categories, the use of contingency funds and emergency spending, as well as of reprogramming and transfer authority, has given the Executive broad modern power over how appropriations are used.

Reprogramming funds within a particular account may require “reporting to and sometimes prior approval by [congressional] committees” depending on the amount to be reprogrammed and the object, but “[t]he thresholds do permit considerable reprogramming without committee knowledge.” Reprogrammed funds are often used to carry out unfunded national security objectives. For example, the relevant oversight committee approved reprogramming of appropriations between missions to fund the operation that culminated in the Bin Laden raid. And reprogrammed funds “were used to station troops in Honduras [in the 1980s] and to construct permanent bases there without authorization for military construction,” for the benefit of the Contras.

Transfer authority—the ability to move funds between appropriations accounts—is another source of executive discretion that blunts the force of the appropriations power. The Department of Defense (DOD) is given transfer authority in its annual appropriations act, and “transfer authority abuses are fairly common.” The President can also transfer funds among agencies under the

28. Id.
29. Ackerman & Hathaway, supra note 3, at 491.
30. BANKS & RAVEN-HANSEN, supra note 15, at 175. Notably, emergency spending was used to initially finance Operation Desert Shield. Id. at 72.
31. Id. at 76.
32. For example, President Reagan “routinely used the reprogramming authority to fund Central American projects that Congress had not approved.” KOH, supra note 5, at 131.
33. Greg Miller, CIA Spied on bin Laden from Safe House, WASH. POST (May 6, 2011), http://www.washingtonpost.com/world/cia-spied-on-bin-laden-from-safe-house/2011/05/05/AFXbG31F_story.html [http://perma.cc/ZUW7-54RD]. While notification and reprogramming approval may appear to be a partial congressional check on national security appropriations, these do not compensate for loss of the power of the purse as a check. For example, only the relevant oversight committee must approve the reprogramming, and there is potential for committee capture and easy acquiescence. Cf. Heidi Kitrosser, Congressional Oversight of National Security Activities: Improving Information Funnels, 29 CARDOZO L. REV. 1049, 1079 (2008) (discussing the complexities of involving multiple committees in national security matters).
34. BANKS & RAVEN-HANSEN, supra note 15, at 77.
35. Id.
Economy Act of 1932. The President has used transfers to circumvent congressional limits on funding in the past. For instance, President Nixon used DOD transfers to continue bombing Cambodia after the withdrawal of troops from Vietnam; and, after the Boland Amendment prohibited funding the Contras, President Reagan transferred equipment from DOD to the CIA to give to the Contras anyway. Broad appropriations categories, combined with expansive authority to transfer and reprogram funds between programs, mean that Congress is effectively excised from influencing how national security funds are spent.

The recent intervention in Libya typifies how the appropriations power has left Congress unable to check zealous presidential intervention. In that case, President Obama initiated military operations without congressional authorization or appropriations. Although the House voted overwhelmingly against supporting the mission, it was unable to muster a successful vote to cut off funding. This situation demonstrates the modern difficulties preventing Congress from effectively exercising its power of the purse in national security. First, broad defense appropriations "allowed Administrations to deploy forces into regions of potential conflict without advance funding approval from Congress." Indeed, President Obama funded the entire operation in Libya out of existing appropriations, without requiring a new appropriation from Congress. In this scenario, congressional inaction is not sufficient to prevent military intervention, contrary to the Framers' plan, a majority of one house is no longer sufficient to prevent funding an operation. A majority of the House questioned the

36. Id. at 78.
37. Id.
39. Ackerman & Hathaway, supra note 3, at 477 (quoting STEPHEN DAGGETT, CONG. RESEARCH SERV., MEMORANDUM: BUDGETING FOR WARS IN THE PAST 1 n.1 (Mar. 27, 2003)).
40. Cf. BANKS & RAVEN-HANSEN, supra note 15, at 180 (noting that Presidents have a "rich menu of discretionary spending authorities" and "[b]y picking from this menu presidents have successfully stretched the law instead of breaking it").
42. See Louis Fisher, Historical Survey of the War Powers and the Use of Force, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 11, 23-24 (Gary M. Stern & Morton H. Halperin eds., 1994) (noting that the "congressional power of the purse" is "most potent when the President is seeking funds. But when Congress is attempting to use an appropriations bill to terminate funding, the President may veto that bill and force Congress to locate a two-thirds majority in each House for an override").
President’s initiation of operations without authorization, and refused to authorize the action in Libya. Their opposition would have been enough to prevent the operation in the system designed by the Framers, but it was insufficient in our modern system where the burdens have been redistributed.

Congress could still have prohibited the expenditure of appropriations for combat activities in Libya, but opponents were not able to get support for this measure, as the political pressures on Congress to support military operations in progress made such a prohibition functionally impossible. Members of Congress are often unwilling to pay the “high . . . political price” of being “accused of abandoning the troops in the field.” Even if Congress were willing to risk political suicide, it would need two-thirds of each house to pass a funding restriction over a President’s veto. The difficulty of meeting this threshold puts the President in a strong bargaining position, enabling her to extract concessions and compromises and to weaken even the modest funding restrictions Congress tries to impose.

Overall, the power of the purse has transformed from a robust ex ante legal check on unilateral executive action to a hobbled ex post political tool. Congress may influence war making more informally, through political pressure, but it is unable to use its constitutional power to keep chained or completely recall the

43. See Steinhauer, supra note 38.
44. Id.
46. Ackerman & Hathaway, supra note 3, at 450; see Yoo, supra note 41, at 298 (noting that during the Bosnian operation, the House failed to cut funding and ultimately “passed a resolution opposing President Clinton’s policy, but supporting the troops”).
47. See Ackerman & Hathaway, supra note 3, at 486 (discussing the “uphill battle” of overcoming the veto); see also id. at 490 (discussing President Clinton’s threats to veto congressional funding cut-offs regarding the Kosovo operation).
48. See supra note 14 and accompanying text; see also Koh, supra note 5, at 133 (“Even when Congress has successfully forced the president to the bargaining table . . . the president has usually been able to demand concessions or future support in exchange for agreeing to modify his conduct.”).
49. Kriner, supra note 1, at 148–51 (discussing congressional opposition during the Iraq war).
dog of war. As Douglas Kriner has written, "in almost every case of interbranch conflict over military policy, the power of the purse has proven to be a blunt instrument whose costs, both strategic and political, have virtually precluded its successful use." This is a far cry from the constitutional distribution of war powers that the Framers envisioned and employed.

B. Failed Attempts To Correct the Imbalance Through Congressional Litigation

Congress has occasionally sought to reassert its proper role. However, attempts to correct this imbalance over the past forty years have been unsuccessful. The adoption of the War Powers Resolution (WPR) failed to revive Congress's constitutional role in war making. Alternatively, individual members of Congress have sought to vindicate Congress's role in national security by seeking judicial redress in specific disputes with the Executive. The rejection of these lawsuits demonstrates that judicial redress—in the forms sought by members of Congress thus far—has been insufficient to correct the imbalance in the separation of powers. However, it demonstrates that members of Congress are eager to seek judicial redress. Appropriations Clause litigation presents a new strategy that legislators could use to reassert their constitutional prerogative.

1. War Powers Litigation

"The phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers . . . is a recent one." The first such lawsuit was a challenge to the Vietnam War, brought in 1972. Members of Congress have since brought twelve separate lawsuits, claiming that the Pres-

50. See id. at 148 ("[I]n none of the 122 major uses of force analyzed . . . [by Kriner] did Congress successfully exercise its power of the purse or the War Powers Resolution to compel the president to end a military engagement against his will.").
51. Id. at 41.
54. Id. at 73 (quoting Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1984) (Bork, J., dissenting), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987)).
ident unconstitutionally exercised war powers without congressional authorization. None have reached the merits.\textsuperscript{56} Courts have dismissed these lawsuits on various procedural grounds: the political-question doctrine,\textsuperscript{57} equitable discretion,\textsuperscript{58} ripeness,\textsuperscript{59} standing,\textsuperscript{60} and mootness.\textsuperscript{61}

The most recent of these suits, \textit{Kucinich v. Obama}, provides a good example of the judicial barriers to congressional war powers litigation. In \textit{Kucinich}, ten members of the House sued President Obama, arguing that the President's military involvement in Libya without authorization from Congress violated both

\begin{thebibliography}{9}
\bibitem{56} \textsc{Fisher}, supra note 2, at 302 ("In recent decades, federal courts have consistently refused to reach the merits in war power cases.").
\bibitem{58} See \textsc{Crockett}, 720 F.2d 1355; \textsc{Lowry v. Reagan}, 676 F. Supp. 333 (D.D.C. 1987) (dismissing a lawsuit in which 110 members of the House of Representatives argued that the President was required to file a WPR report following military actions in the Persian Gulf); \textsc{Conyers v. Reagan}, 578 F. Supp. 324 (D.D.C. 1984) (dismissing a lawsuit by eleven members of the House of Representatives who challenged the military invasion of Grenada).
\bibitem{59} See \textsc{Bush v. Doe}, 323 F.3d 133, 134 (1st Cir. 2003) (dismissing a lawsuit brought by twelve members of the House, among others, to prevent the President from initiating war with Iraq due to a lack of ripeness); \textsc{Dellums v. Bush}, 752 F. Supp. 1141, 1149-52 (D.D.C. 1990) (denying a preliminary injunction sought by fifty-four members of Congress to prevent the President's impending attack on Iraq).
\bibitem{60} See \textsc{Campbell v. Clinton}, 203 F.3d 19, 20 (D.C. Cir. 2000) (dismissing, for lack of standing, a lawsuit brought by thirty-one members of Congress arguing that the U.S. involvement in the Kosovo intervention violated the War Powers Clause and WPR); Holtzman, 484 F.2d at 1315 (giving instructions to the district court to dismiss a lawsuit brought by a member of the House and others to stop the U.S. bombing of Cambodia for lack of standing, among other reasons); \textsc{Kucinich v. Obama}, 821 F. Supp. 2d 110, 112 (D.D.C. 2011) (holding that ten members of the House did not have standing to argue that the President's military involvement in Libya violated the War Powers Clause); \textsc{Gravel}, 347 F. Supp. at 9 (dismissing a lawsuit brought by over twenty members of Congress seeking to stop the Vietnam war for lack of standing).
\bibitem{61} See \textsc{Conyers v. Reagan}, 765 F.2d 1124, 1129 (D.C. Cir. 1985) (dismissing an appeal brought by members of Congress surrounding their lawsuit to stop the invasion of Grenada as moot).
\end{thebibliography}
REVIVING THE POWER OF THE PURSE

the War Powers Clause of the Constitution and the WPR. The plaintiffs asked the court to declare that the “military operations in Libya constitute[d] a war for the purposes of Article I” and were therefore “unconstitutional absent a declaration of war from Congress.” The legislators further requested that the court declare “unconstitutional the policy of the Administration that the President may use previously appropriated funds to support ‘an undeclared war,’” and asked for an injunction “suspending all U.S. military operations in Libya absent a declaration of war from Congress.” The district court dismissed the case, holding that the plaintiffs did not fit into the “very limited circumstances in which a member of Congress might successfully assert legislative standing.” Kucinich is a prime example of a pervasive trend in congressional litigation: courts are eager to do anything in their power to prevent such suits from reaching the merits. But courts have eagerly blocked congressional lawsuits against the president in other contexts, as well – as we will see.

2. National Security Litigation: Intelligence and Funding

Congressional plaintiffs have also brought lawsuits against the Executive that did not involve war powers. Although the constitutional imbalance between the President and Congress is most glaring in the war-powers context, it also affects national security policy more generally. Members of Congress have occasionally sought to address that imbalance through litigation.

Congressional plaintiffs have brought a number of lawsuits against the Executive touching upon national security, intelligence, and disclosure. In a FOIA challenge involving top-secret nuclear test information, congressional plaintiffs lost on the merits. In two challenges to the legality of intelligence activity, and in a challenge to executive nondisclosure agreements that prevented federal

63. Id. at 113.
64. Id. at 114.
65. Id. at 116.
66. See EPA v. Mink, 410 U.S. 73 (1973) (denying an attempt by members of Congress to force the government to produce top-secret information about an underground nuclear test under FOIA).
67. See United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1382 (D.C. Cir. 1984) (finding lack of standing where a member of Congress and others challenged the legality of Executive Order No. 12333, which established an intelligence gathering framework); Harrington v. Bush, 553 F.2d 190, 199 (D.C. Cir. 1977) (finding that a member of the House lacked standing in a lawsuit to enjoin the CIA from engaging in illegal activities).
employees from communicating secret information to Congress, the court found that congressional plaintiffs lacked standing.

Another set of lawsuits brought by congressional plaintiffs against the Executive falls under the general category of national security funding. Four of these lawsuits were dismissed for lack of standing. In addition, one war-powers lawsuit involved a claim that the President violated explicit appropriations restrictions against aiding the Nicaraguan Contras, but this claim was dismissed as moot because the annual appropriations act involved had lapsed. Significantly, it appears that only one national security challenge brought by a congressional plaintiff was raised directly under the Appropriations Clause. This was Harrington v. Schlesinger, in which four members of Congress alleged that U.S. involvement in Vietnam after 1973 violated two explicit appropriations restrictions and the Appropriations Clause. The Fourth Circuit held that the congressmen could not "claim dilution of their legislative voting power because the legislation they favored became law," and therefore they did not have standing. The court reasoned that the congressmen could seek "legislative resolution" of their claims, and implied that the fact "that the Congress has done nothing suggests that the Executive's interpretation of the statutes is in agreement with the


69. For example, in United Presbyterian Church in the U.S.A. v. Reagan, the D.C. Circuit held that a congressman's argument that his "powers as a legislator have been diminished" by the illegality of an executive order constituted a "generalized grievance." 738 F.2d at 1381-82.

70. See Harrington, 553 F.2d at 199 (finding that a member of the House lacked standing in a lawsuit to enjoin the CIA from engaging in illegal activities); Harrington v. Schlesinger, 528 F.2d 455, 456 (4th Cir. 1975) (dismissing, for lack of standing, a lawsuit brought by four members of Congress alleging that the U.S. involvement in Vietnam after 1973 violated two appropriations restrictions and the Appropriations Clause); Spence v. Clinton, 942 F. Supp. 32, 36-38 (D.D.C. 1996) (finding that forty-one members of Congress did not have standing at the time of the case to argue that the President violated the Ballistic Missile Defense Act and refused to spend funds on a specific missile system in violation of the Defense Appropriations Act); Nat'l Fed'n of Fed. Emps., 688 F. Supp. at 679-80 (finding that seven members of Congress lacked standing to sue to enforce an appropriations restriction prohibiting the President from using federal employee nondisclosure agreements to prevent Congress from receiving classified information, though the court ultimately ruled the restriction unconstitutional).


72. 528 F.2d at 456.

73. Id. at 459.
congressional intent.\textsuperscript{74} As will be discussed later, these standing and acquiescence arguments are among the more common barriers to judicial review of national security issues, but a determined Congress or congressional chamber can surmount them.

Congressional plaintiffs have also brought a number of challenges against executive treaty-making activities. These have been squarely rejected for presenting nonjusticiable political questions\textsuperscript{75} or for lack of standing.\textsuperscript{76} Similarly, congressional plaintiffs have brought a number of challenges to executive actions regarding foreign aid. These have been dismissed under equitable discretion doctrine,\textsuperscript{77} for lack of standing,\textsuperscript{78} for presenting a nonjusticiable political question,\textsuperscript{79} or for mootness.\textsuperscript{80}

The prevalence of these lawsuits demonstrates that congressional plaintiffs seek to vindicate Congress's constitutional role in national security, beyond the most visible conflicts regarding war powers. Although no case has succeeded on the merits, such lawsuits may serve as useful prequels to an Appropriations Clause challenge. As the foregoing Section demonstrates, the range of national security issues that Appropriations Clause lawsuits could affect is much broader than the core war-making power. Indeed, an Appropriations Clause suit could be deployed in a variety of contexts that reflects the many ways in which the President wields disproportionate weight in the military arena.

\textsuperscript{74} Id.

\textsuperscript{75} See Dole v. Carter, 569 F.2d 1109, 1110 (10th Cir. 1977) (rejecting a senator's challenge to the President's unilateral attempt to return a World War II relic to Hungary as a treaty requiring the advice and consent of the Senate); Kucinich v. Bush, 236 F. Supp. 2d 1, 14-18 (D.D.C. 2002) (dismissing an action brought by thirty-two members of the House challenging the unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty); Cranston v. Reagan, 611 F. Supp. 247, 254 (D.D.C. 1985) (finding nonjusticiable the claim by three members of Congress who argued that the nuclear treaty with Sweden violated the Atomic Energy Act).

\textsuperscript{76} Kucinich, 236 F. Supp. 2d at 4-12.

\textsuperscript{77} Dornan v. U.S. Sec'y of Def., 851 F.2d 450, 451 (D.C. Cir. 1988) (rejecting the claim of sixteen members of Congress who sought to prevent the Executive from complying with Boland amendments); Helms v. Sec'y of the Treasury, 721 F. Supp. 1354, 1359 (D.D.C. 1989) (rejecting the claims of six members of Congress who sought to challenge the Executive's inclusion of Namibia as a target for anti-apartheid sanctions).

\textsuperscript{78} Dornan, 851 F.2d at 451; Burton v. Baker, 723 F. Supp. 1550, 1554 (D.D.C. 1989) (holding that four House members had no standing when they challenged a "side agreement" between the Executive and legislative leadership regarding appropriated funds to be spent in humanitarian aid to Nicaragua).

\textsuperscript{79} Burton, 723 F. Supp. at 1554.

\textsuperscript{80} Burke v. Barnes, 479 U.S. 361, 362-63 (1987) (rejecting as moot a challenge by thirty-three House members, with the Senate and Bipartisan Leadership Group of the House as intervenors, to the President's pocket veto of bill regarding military aid to El Salvador).
II. THE NORMATIVE CASE FOR CONGRESS LITIGATING ITS PURSE STRINGS

Thus far, legislative reform and attempts to appeal to the judiciary have not succeeded in correcting the constitutional national security imbalance. An Appropriations Clause case could more effectively vindicate the vision that the Framers intended and prevent the accretion of disproportionate power to the Executive. Such a suit would proceed in two steps. First, Congress would appropriate funding for national security, either attaching an explicit restriction stating that no funds are being appropriated for purpose \( x \), or appropriating in narrow categories such as to make clear through its omission that purpose \( x \) has not been funded. Then, when the Executive pursues \( x \) by withdrawing and spending funds that have been appropriated for another activity, Congress — or one chamber thereof — would pass a resolution to bring a lawsuit against the Executive for violating the Appropriations Clause. Specifically, the lawsuit would allege that the President violated the Constitution by “draw[ing]” money “from the Treasury” not “in Consequence of Appropriations made by Law.” Congressional Appropriations Clause litigation has the opportunity to serve as a beneficial tool for reinforcing the appropriations power in national security. The use — or merely the threatened use — of these lawsuits could revive Congress’s biggest check on Executive war making and increase Congress’s political bargaining power in national security policy making.

Appropriations litigation, first and foremost, can help reassert Congress’s constitutional role in national security disputes. “The multiple constitutional prerequisites for government activity” — such as the necessity of congressional appropriation before undertaking an action — “are checks upon the exercise of government power, reflecting the foundational decision that the exercise of such power should be deliberate and limited.”

Though modern presidential spending discretion in national security means that appropriations are no longer prerequisites for a specific activity, judicial review can reinvigorate appropriations as an ex post check on executive overreach. As both Founding-era thinking and early practice indicate, such a check would create political and legal accountability that is currently lacking in national security policy making.

The Supreme Court recently reiterated in Zivotofsky ex rel. Zivotofsky v. Kerry that “many decisions affecting foreign relations” — including the appropriations

82. Stith, supra note 23, at 1347.
83. See supra notes 15-24 and accompanying text.
required to carry out those decisions—"require congressional action." 84 Repudiating the broad delegation of power to the Executive articulated in United States v. Curtiss-Wright Export Corp., 85 the majority clarified that "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." 86 The dissenting Justices went even further in their defense of Congress's role in the separation of powers. 87 For these sentiments to have any effect, the President must be made to abide by Congress's appropriations decisions. After all, as Chief Justice Roberts noted in his Zivotofsky dissent, "the President's power reaches 'its lowest ebb'" under the traditional Youngstown framework "when he contravenes the express will of Congress." 88 By enabling Congress to enforce its appropriations power, the courts can help "restore the balance of power" 89 in the national security context. 90

Appropriations litigation can also help redistribute the burdens of making war and funding national security actions, so as to be more faithful to the Constitution. The constitutional text and history suggest that a majority of either house of Congress is sufficient to reject the decision to declare war, 91 or reject an appropriation to fund a war. However, with the President's spending discretion and ability to begin a conflict without congressional authorization, Congress essentially requires a veto-proof two-thirds majority in each house to defund an

84. 135 S. Ct. 2076, 2087 (2015).
85. 299 U.S. 304 (1936).
86. Zivotofsky, 135 S. Ct. at 2090.
87. Id. at 2113 (Roberts, C.J., dissenting) ("Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs . . . . I write separately to underscore the stark nature of the Court's error on a basic question of separation of powers."); id. at 2126 (Scalia, J., dissenting) ("International disputes about statehood and territory are neither rare nor obscure . . . . A President empowered to decide all questions relating to these matters, immune from laws embodying congressional disagreement with his position, would have uncontrolled mastery of a vast share of the Nation's foreign affairs.").
88. Id. at 2113 (Roberts, C.J., dissenting).
89. Meyer, supra note 53, at 106-07 (advocating in favor of expanded congressional standing to help vindicate the separation of powers generally and "contain [the modern] enhancement of executive power in areas arguably allocated elsewhere by the Constitution").
90. Andrew D. LeMar, Note, War Powers: What Are They Good for?: Congressional Disapproval of the President's Military Actions and the Merits of a Congressional Suit Against the President, 78 IND. L.J. 1045, 1067 (2003) ("Congress must turn to the judiciary in order to regain the war-making powers that Presidents have taken from it over the past six decades."); see also Koh, supra note 5, at 223 ("If anything, meaningful judicial review is even more constitutionally necessary in foreign affairs than in domestic affairs.").
91. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . [t]o declare War." (emphasis added)).
unauthorized war. A congressional Appropriations Clause lawsuit—requiring only a majority of one house to authorize suit—vindicates the original constitutional distribution of burdens and power. The great gulf between the interbranch cooperation prescribed by the Constitution and the current reality of unilateral executive action in this area means that Appropriations Clause lawsuits would be particularly valuable in national security and foreign-relations cases.

Furthermore, these lawsuits could also improve the balance of power among the branches as a general matter. As discussed in Part IV, because Appropriations Clause litigation is based on a provision that is unusually clear by constitutional standards, it could spur targeted judicial involvement in interbranch disputes. It could thereby help defuse conflicts between Congress and the President that might otherwise escalate. The breadth and clarity of the appropriations power makes it perhaps the most potent of a larger suite of tools with which Congress can exert its authority against the other branches. The clause both vests Congress with the power to appropriate and "ensur[es] that the money [is] actually spent for the purposes for which it was appropriated." Congress can use this power generally—depriving the executive branch of the means to do its work—or specifically—affecting particular policies through riders. Indeed, the Appropriations Clause allows Congress to invade what would otherwise be the President's exclusive power to execute the law. Instead of asking, in the abstract, whether the Executive has the authority under the Constitution to engage in a particular activity, a court can focus on the simpler question of whether Congress has appropriated funds for that activity.

To think of this in more familiar terms: if Congress is right in arguing that it has not appropriated funds for the Executive's actions, or that an appropriations rider prohibits funds from being spent on those actions, then any Appro-
The Appropriations Clause case will be funneled into category three of the tripartite *Youngstown* framework. Because the President's activity is "incompatible with the expressed . . . will of Congress," the President's "power is at its lowest ebb." A congressional decision to sue would throw Congress's disapproval into starker relief, sharpening the conflict and ensuring that appropriations litigation would take place in category three. Under the *Youngstown* framework, the President would only be able to win such a suit if she acts under a power that is "both 'exclusive' and 'conclusive' on the issue" in dispute—a claim that "must be 'scrutinized with caution.'" And as the Court noted in *Zivotofsky*, even when a President successfully proves that she has exclusive authority over a particular power, Congress can still use the Appropriations Clause to shape many of the President's policy decisions under that power. Most cases, therefore, will be rather clear cut: the courts will not need to sift out the two branches' substantive powers, and will be able to rule for Congress on the constitutional question. Appropriations Clause lawsuits, therefore, could simplify and help resolve otherwise intractable separation-of-powers disputes. In the context of this more limited and concrete legal question, the judiciary may be more willing to intervene on Congress's side in constitutional disputes between the political branches.

The possibility of an Appropriations Clause lawsuit is also valuable if the trend of executive accretion of national security power at the expense of Congress continues. This kind of lawsuit will become increasingly valuable if the constitutional imbalance in power increases. Under the current state of our politics, it is not impossible to imagine an imperial unitary executive with a robust belief in an inherent executive spending authority winning the presidency and blatantly disregarding Congress's appropriations limits.

Such a President may spend without appropriation in violation of the Constitution if he lacks political hope of persuading Congress to vote in his favor, or is willing to act in the face of potential political retribution. Or he may act

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101. *See id.* at 2087.


103. See Ackerman & Hathaway, *supra* note 3, at 508.
when he mistakenly believes—or wants to believe\textsuperscript{104}—that he has the authority to make national security expenditures without congressional approval. In these circumstances, only adjudication will allow Congress to exercise its appropriations power to check executive war making and unilateral national security policy making. A robust Appropriations Clause could thus strengthen Congress’s constitutional hand in dealing with the Executive generally. But leaving aside potential benefits for the separation-of-powers jurisprudence, at the very least these lawsuits could help Congress reassert its constitutional role in national security.

\textbf{III. REASSERTING CONGRESS’S ROLE IN NATIONAL SECURITY THROUGH APPROPRIATIONS CLAUSE LITIGATION}

This Part examines the feasibility of adjudicating a suit based on the Appropriations Clause, and the possibility of its being invoked by Congress. There have been recent signs that courts are willing to entertain Appropriations Clause suits, and Congress has become active in its attempts to create and enforce funding limits on the President’s national security activities. Both the legal feasibility and the political possibility of a suit are illustrated in the context of a real-life national security hypothetical: the transfer of detainees from Guantanamo.

\textit{A. The (Short) History of Congressional Appropriations Clause Claims}

The possibility of a separation-of-powers claim under the Appropriations Clause is not a novel proposition. In the 1970s, individual members of Congress and citizens brought a slew of lawsuits challenging the United States’ involvement in the Vietnam War. In one lawsuit, \textit{Harrington v. Schlesinger}, individual legislators and other citizens alleged that President Nixon violated the Appropriations Clause by funding military actions in Vietnam after a statutory funding cut-off date set by Congress.\textsuperscript{105} However, the court held that the individual members of Congress and citizens lacked standing to challenge the legality of the executive actions.\textsuperscript{106} After \textit{Harrington}, the Appropriations Clause lay

\begin{itemize}
  \item \textit{See} Richard D. Rosen, \textit{Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse}, 155 MI\textsc{I}. L. REV. 1, 13 (1998) ("To operational lawyers, the proposition that presidential spending authority exists independent of Congress is particularly alluring.").
  \item 528 F.2d 455, 456 (4th Cir. 1975).
  \item \textit{Id.} at 458-59.
\end{itemize}
dormant as a basis for litigation against the Executive until recently revived by Congress and criminal defendants.

In one recent act of resuscitation, the District Court for the District of Columbia held that a house of Congress could sue the Executive for violations of the Appropriations Clause. In *U.S. House of Representatives v. Burwell*, the House as an institution sued departments and officials within the executive branch, alleging that those entities were withdrawing and spending unappropriated funds to pay certain cost-sharing offsets under the Affordable Care Act (ACA). The district court denied the government’s motion to dismiss the Appropriations Clause claim, holding that the House had standing to pursue the claim and that it was justiciable. In May 2016, the district court issued a decision on the merits, holding that the executive-branch agencies and officers had been violating the Appropriations Clause because the ACA did not permanently appropriate the funds at issue. Though *Burwell* was not resolved by the D.C. Circuit because the parties reached a settlement, it is nevertheless significant as the first

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107. 130 F. Supp. 3d 53, 53 (D.D.C. 2015). I served as a law clerk on the D.C. Circuit while the appeal in this case was pending. I had no involvement in the matter during my clerkship, and the opinions expressed herein are entirely my own.

108. Id. at 74-75.

109. Id. at 79-81.


Notably, the settlement agreement asked the district court to vacate its injunction issued on the merits. But it did not ask for vacatur of the decision finding that the House had standing and that the case was justiciable; instead, it merely waived the parties’ right to argue that the decision had preclusive effect. *U.S. House of Representatives v. Hargan*, No. 16-5202 (D.C. Cir. Dec. 15, 2017) (settlement agreement). Thus, even after the settlement, the district court’s procedural decision will stand as persuasive precedent in future cases. Moreover, the
Appropriations Clause lawsuit authorized by a body of Congress.\textsuperscript{112} Perhaps more importantly, the district court’s finding that the legislative plaintiffs were not barred by the various justiciability doctrines hints at a potential shift in the jurisprudential landscape that would allow more legislative suits. Sweeping language in the decision recognized the constitutional significance of the Appropriations Clause\textsuperscript{113} and acknowledged that Congress has no legislative recourse where the President misappropriates funds.\textsuperscript{114} Those developments suggest that a legislative Appropriations Clause suit is a live possibility for both Congress and the courts.

While Burwell is the most prominent successful Appropriations Clause claim against the Executive, it is not the only one. In United States v. McIntosh, the Ninth Circuit recently held that criminal defendants could challenge the use of federal funds to prosecute them for marijuana crimes in violation of a congressional appropriations restriction.\textsuperscript{115} If third parties like the defendants in McIntosh can use the Appropriations Clause to challenge fundamental executive powers—prosecutorial discretion and enforcement of federal law—then Congress, the body imbued with power by the Appropriations Clause, should be able to use the clause to effectuate its role in our tripartite federal system. As will be

\textsuperscript{112} See Burwell, 130 F. Supp. 3d at 69 ("[N]o case has decided whether this institutional plaintiff has standing on facts such as these."). Westlaw indicates that only 268 cases in federal courts have cited the Appropriations Clause. See Westlaw, http://next.westlaw.com (last visited Feb. 3, 2018) (click "Statutes & Court Rules," then "U.S. Constitution," then “Article I, Section 9, Clause 7," then “Citing References”; choose “Cases” and filter by “Federal”). Only one lawsuit brought by individual members of Congress has directly alleged a violation of the Appropriations Clause. See Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975). The past lawsuits against the Executive authorized by a body of Congress have all involved committees’ subpoena and investigatory powers. See Alissa M. Dolan & Todd Garvey, Cong. Research Serv., R42454, CONGRESSIONAL PARTICIPATION IN ARTICLE III COURTS: STANDING TO SUE n1 (Sept. 4, 2014), http://www.fas.org/sgp/crs/misc/R42454.pdf [http://perma.cc/GK32-WYAS] ("[A]ll of the available cases regarding congressional institutions asserting an institutional injury have dealt with judicial enforcement of a subpoena.").

\textsuperscript{113} Burwell, 130 F. Supp. 3d at 71 ("[T]he constitutional structure would collapse, and the role of the House would be meaningless, if the Executive could circumvent the appropriations process and spend funds however it pleases."); id. at 73.

\textsuperscript{114} Id. at 73 (noting that the "the authority trespassed" here "is not statutory; it is constitutional" and Congress does not have "the authority to repeal or amend the terms of Article I, § 9, cl. 7").

\textsuperscript{115} 833 F.3d 1163, 1174 (9th Cir. 2016).
discussed in further detail later, a congressional suit would also show that Congress intended not to appropriate for the challenged activity, which could in turn make it easier for third parties to argue that point in their own cases. The partial success of these suits, and Burwell in particular, will signal to interested members of Congress that Appropriations Clause claims are judicially viable. Members of Congress that have sought relief through individual lawsuits in the past could then attempt to secure judicial resolution by framing a national security dispute as an Appropriations Clause violation.116

B. Appropriations Clause Challenges and Political Will

Beyond the emerging legal viability of these lawsuits, history demonstrates that they are also politically feasible. Of course, it is easy to imagine conditions under which Congress would be unlikely to muster the political will to pass appropriations restrictions or a resolution to sue the President for violating them. For example, if Congress is attempting to stop an existing military operation—such as in Libya in 2011—it may be particularly likely to fail.117 Additionally, in times of unified government, the congressional majority would likely be hesitant to challenge the President of its own party.

At other times, though, the possibility of Appropriations Clause lawsuits is much more apparent. In times of divided government, Congress has strong political incentives to oppose the President with all of the tools at its disposal.118 Over the last four decades, individual members of Congress have demonstrated their willingness to seek judicial resolution of war powers and foreign affairs disputes;119 and with the emerging viability of institutional Appropriations Clause


117. See Steinhauer, supra note 38.


appropriations restrictions as well.123 Consolidated Appropriations Acts contain numerous other national security-related claims, they could seek congressional resolutions to pursue them. Indeed, on numerous occasions, houses of Congress have voted to institutionally oppose the executive branch in court.120

Congress has proven itself willing to oppose executive action by flexing its power of the purse in the national security context. In the 2016 Consolidated Appropriations Act, for instance, Congress passed a large number of appropriations restrictions dealing with a variety of national security issues.121 Indeed, Congress routinely enacts identical appropriations restrictions in its annual appropriations bills. From at least 2012 onwards, for instance, every annual consolidated appropriations act has barred “funds made available by this Act” from being “used in contravention of the War Powers Resolution.”122 The annual consolidated appropriations acts contain numerous other national security-related appropriations restrictions as well.123

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Furthermore, since 2014, these acts have more specifically limited presidential prerogatives to engage in specified military excursions in Syria.\textsuperscript{124} Since 2015, the exact same restriction has been enacted with respect to Iraq.\textsuperscript{125} And there are numerous additional national security appropriations restrictions enacted each year, ranging from weapons\textsuperscript{126} and intelligence issues\textsuperscript{127} to military-base strength\textsuperscript{128} and aid to foreign forces.\textsuperscript{129}

Because Congress engages with appropriations every year, it has frequent opportunities to insert restrictions in anticipation of a conflict with the Executive. Yearly appropriations also mean that Congress can be highly responsive to potential military excursions. Congress can thus enact a restriction when overseas tensions begin, before they fully escalate into a conflict. For example, the repeat provision prohibiting funds from being spent on hostilities in Syria\textsuperscript{130} was re-enacted in the annual 2016 appropriations bill passed in December 2015, after tensions began in the region but more than a year before President Trump decided to engage in hostilities with the Syrian government.\textsuperscript{131}

\textsuperscript{124} Act of 2017 § 9019, 131 Stat. at 292; Act of 2016 § 9019, 129 Stat. at 2397; Act of 2015 § 9014, 128 Stat. at 2300 (providing that "[n]one of the funds made available by this Act may be used with respect to Syria in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.), including for the introduction of United States armed or military forces into hostilities in Syria, into situations in Syria where imminent involvement in hostilities is clearly indicated by the circumstances, or into Syrian territory, airspace, or waters while equipped for combat, in contravention of the congressional consultation and reporting requirements of" the WPR); Act of 2014 § 9015, 128 Stat. at 150.


\textsuperscript{126} Act of 2017 § 8019, 131 Stat. at 250 (demilitarizing "M-1 Carbines, M-1 Garand rifles, M-14 rifles, .22 caliber rifles, .30 caliber rifles, or M-1911 pistols"); id. § 8077, 131 Stat. at 265 (prohibiting funds for "research, development, test, evaluation, procurement or deployment of nuclear armed interceptors of a missile defense system").

\textsuperscript{127} Act of 2015 § 8128, 128 Stat. at 2283 (prohibiting the use of funds by the NSA to target U.S. persons and acquire their electronic communications under FISA); Act of 2013 § 8123, 127 Stat. at 327 (prohibiting funds in contravention of acts "relating to sharing classified ballistic missile defense information with Russia").

\textsuperscript{128} Act of 2015 § 8125, 128 Stat. at 2283 (specifying force structure at "Lajes Field, Azores, Portugal").

\textsuperscript{129} Act of 2017 § 8131, 131 Stat. at 276 (prohibiting funds to be used "to provide arms, training, or other assistance to the Azov Battalion" in Ukraine).

\textsuperscript{130} Act of 2016 § 9019, 129 Stat. at 2397.

Beyond Congress's demonstrated ability to enact appropriations restrictions, legislators have started to evince a commitment to changing how wars are funded and to reasserting Congress's role in authorizing military involvement abroad. There is growing discomfort on both sides of the aisle with wars being funded through the amorphous overseas contingency operations account, and with the President's ability to carry out new unauthorized operations through the framework of the antiquated 2001 Authorization for the Use of Military Force (AUMF). This is demonstrated by numerous co-sponsored efforts to reform the WPR, prohibit expenditures for military action in the absence of congressional authorization, prevent the expansion of troops into Syria, and enact a new AUMF. While most of these have not been

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passed into law, they nonetheless signal that legislators of both parties are ready to change the way that wars are funded.

Even members of a President's political party may often disagree with the Executive's position on national security issues, particularly when the actions stop short of full-fledged armed conflict. For example, in July 2017, the Republican-led Congress imposed sanctions on Russia against President Donald Trump's wishes. That bipartisan effort passed by a veto-proof majority in both houses. And, as will be explored further below, Congress prevented President Obama from closing or transferring prisoners out of Guantanamo throughout his presidency, even when Democrats controlled one or both chambers. When members of Congress develop a bipartisan consensus on a question of national security, they have shown themselves willing to oppose a President who does not buy into that consensus.

Appropriations Clause lawsuits are thus feasible under many circumstances—particularly in times of divided government and outside the context of ongoing military operations—because Congress has demonstrated that it possesses the political will and appropriations tools to oppose the Executive. Congress has been increasingly engaged in a robust bipartisan debate over its proper role in authorizing and funding national security measures, and has begun flexing its muscles vis-à-vis the President. Appropriations Clause litigation provides another vehicle for Congress to exercise its authority after appropriations are made. Moreover, the ex post threat of litigation would strengthen Congress's bargaining position and encourage the expanded enactment of appropriations restrictions in the first place.

C. Potential Applications

Assuming that congressional Appropriations Clause lawsuits are both legally feasible and politically possible, it still remains to be shown how they could be applied in practical terms. In terms of constitutional policy, these suits have the potential to vindicate separation-of-powers principles and reassert Congress's

141. See infra notes 148-159 and accompanying text.
proper constitutional role in the national security context.\(^{142}\) However, in order for Congress to bring such claims in the first instance, these suits must also have useful concrete applications.

There are various circumstances in which Congress could assert its authority through Appropriations Clause litigation to influence national security policy making. For example, appropriations litigation could effectuate congressional national security policy by enabling judicial enforcement of appropriations restrictions already in place,\(^ {143}\) such as the Leahy Amendments.\(^ {144}\) The Leahy Amendments prohibit the use of appropriations "for any training, equipment, or other assistance for the members of a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights."\(^ {145}\) Lawsuits to enforce the Leahy laws directly would face substantial obstacles in the courts due to concerns about sovereign immunity, standing, and the political question doctrine.\(^ {146}\) However, congressional plaintiffs would avoid sovereign immunity concerns and have a greater chance of surpassing other procedural hurdles by arguing that any funds spent in violation of the Leahy Amendments were not appropriated, and therefore were spent in violation of the Constitution.

Another potential application of Appropriations Clause litigation would be to vindicate Congress's interpretation of the 2001 AUMF. Assume the President and Congress disagree over whether to interpret the AUMF as authorizing the use of force against ISIL.\(^ {147}\) In light of this dispute, Congress could enact an appropriations restriction prohibiting the use of funds to combat ISIL until an ISIL-specific authorization for the use of military force is enacted. Should the President disregard this restriction, Congress could bring an Appropriations Clause action to vindicate its position.

The transfer of five Guantanamo detainees in exchange for the release of Sgt. Bowe Bergdahl provides an even more concrete example. When President Obama was elected in 2008, he pledged to shut down the detention facility at

\(^{142}\) See infra Part VI.

\(^{143}\) See supra notes 121-131 and accompanying text.


\(^{145}\) Act of 2014 § 8057(a)(1).


\(^{147}\) The assumption should not be all that difficult to conjure. See, e.g., Letter from Senators Tammy Baldwin & Brian Schatz to President Barack Obama (Dec. 5, 2014) ("[W]e do not believe that you possess sufficient authority to undertake the current U.S. military campaign against ISIL.").
Guantanamo Bay, Cuba within his first year in office. His campaign promise, however, faced significant opposition in Congress, including from members of his own party. Asserting a contrary policy position on this national security issue, Congress countered President Obama's proposed closure with its purse power, passing a series of appropriations restrictions to block construction of an alternative detainee facility, and to prevent the transfer of detainees into the United States or to other countries without following notification and certification procedures. Though President Obama contested the legality of these restrictions, they nonetheless stymied his effort to close Guantanamo.

However, President Obama did not entirely abide by these restrictions. The Taliban held Bergdahl captive for five years in Afghanistan, until five Taliban detainees at Guantanamo were exchanged for his release. That is to say, President Obama secretly transferred five Guantanamo detainees from the facility, without properly notifying Congress thirty days in advance, in violation of section 1035(d) of the National Defense Authorization Act of 2014, and section

148. Herszenhorn, supra note 139153.


8111 of the Department of Defense Appropriations Act of 2014.\textsuperscript{153} And by spending $988,400\textsuperscript{154} to effectuate the transfer, contrary to an express appropriations restriction, the Executive also violated the Appropriations Clause.\textsuperscript{155}

Faced with this blatant statutory and constitutional violation, Congress had two potential responses: impeachment or political shaming. Though a few legislators floated the idea of impeachment,\textsuperscript{156} such a severe sanction for saving the life of a U.S. serviceman was not politically feasible. Congress therefore chose less formal means of opposition. Legislators held hearings and made public statements.\textsuperscript{157} The Government Accountability Office issued a legal opinion concluding that the Executive had violated section 8111 and the Antideficiency Act,\textsuperscript{158} and the House voted 249-163 (with 22 Democrats in favor) in a non-binding resolution to condemn the illegality of the transfer.\textsuperscript{159} Those soft measures marked the end of Congress’s objections: a fairly clear constitutional violation,
nullifying Congress's strongest power in the national security arena, turned into another instance of the Executive's accretion of power.

However, Congress had a third choice: an Appropriations Clause suit against the President. The House, which had just passed a condemnatory resolution and which boasted a Republican majority that deeply opposed the President's Guantanamo policy, likely had the political will to pass a resolution to sue the President for violating the Appropriations Clause. The House could have sought a declaratory judgment of unconstitutionality and an injunction against any such future detainee transfers. And Congress's constitutional authority over national security funding would have possibly been vindicated, instead of eroded.

IV. THE MECHANICS OF APPROPRIATIONS CLAUSE LITIGATION IN THE NATIONAL SECURITY CONTEXT

Appropriations Clause litigation by congressional plaintiffs admittedly faces special hurdles in the national security context. In previous lawsuits involving Members of Congress challenging the President on matters of national security, courts have employed standing doctrine, the political question doctrine, mootness, and ripeness to avoid reaching the merits. Should a court reach the merits in such a dispute, it would be faced with the question of whether the President's expenditure was nonetheless constitutional because Congress's refusal to appropriate for a certain object violated the President's inherent discretionary power. This Part explores the requirements an Appropriations Clause lawsuit must satisfy and explores the affirmative steps Congress must take in order for these lawsuits to succeed, both at the jurisdictional stage and on the merits.

Even when examining the mechanics of Appropriations Clause lawsuits, broader issues of separation of powers remain. Many scholars claim that courts tend to give the political branches broad leeway in separation-of-powers disputes, particularly on foreign affairs and on national security issues. On this view, courts are often wary of wading into disputes between the branches in such

160. See FISHER, supra note 2, at 302; Harold Hongju Koh, Judicial Constraints: The Courts and War Powers, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR, supra note 42, at 121, 122 ("[P]articularly after the Vietnam War . . . the federal courts have adopted an increasingly deferential attitude toward presidential warmaking.").

161. See U.S. CONST. art. II, § 2, cl. 1 (Commander in Chief clause); id. art. II, § 1, cl. 1 (Executive Vesting clause).

sensitive policy areas. They would therefore hesitate to entertain Appropriations Clause challenges involving national security if they believe it would overstep their role to do so.

However, courts have not shied away from confronting the Executive when national security interferes with constitutional rights or powers, even during wartime. As Louis Fisher notes: “A close examination of judicial rulings over the last two centuries reveals that the automatic association of war power with the political question category is a misconception. Not only did courts decide war power issues, they sometimes spoke against the authority of the president.”\textsuperscript{163} Indeed, from a historical point of view, the frequent invocation of procedural roadblocks in the early Vietnam era was an aberration, rather than the rule.\textsuperscript{164}

Furthermore, the judiciary appears to have regained its earlier willingness to hear national security cases. At the height of the War on Terror, the Supreme Court took four major cases from Guantanamo Bay detainees challenging their detentions and ruled against the Government each time.\textsuperscript{165} In \textit{Boumediene v. Bush}, the Court rejected claims that it should stay out of the political branches’ way when dealing with issues of terrorism, even amidst an ongoing conflict. It stated that while “proper deference must be accorded to the political branches” in this area, “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times.”\textsuperscript{166} More generally, the Court has been aggressive in defining the powers of its sister branches, whether over immigration,\textsuperscript{167} the recognition of foreign countries,\textsuperscript{168} the making of recess appointments,\textsuperscript{169} the imposition of good-cause requirements on presidential appointments,\textsuperscript{170} or the question of whether congressional involvement can maintain Article III adversity when the President refuses to defend a law against a private lawsuit.\textsuperscript{171}

Lower courts have taken this message to heart in the recent battles over President Trump’s executive order temporarily banning travel from specified countries. While according some deference to the Executive, courts adjudicating these

\textsuperscript{164} Id. at 484, 493.
\textsuperscript{166} Boumediene, 553 U.S. at 796, 798.
\textsuperscript{167} E.g., Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).
\textsuperscript{169} E.g., NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).
\textsuperscript{171} E.g., United States v. Windsor, 133 S. Ct. 2675 (2013).
claims have asserted their role in determining constitutional questions. Sensitivity about intruding into interbranch disputes, and into national security decision making, will always cause courts to think carefully before moving to the merits in these cases. But deciding whether an action is constitutional is “a familiar judicial exercise,” and “courts cannot avoid their responsibility merely” because a case involves national security. And, whatever the courts’ views on handling separation-of-powers cases writ large, Appropriations Clause lawsuits provide a particularly clear and convenient way to resolve disputes between the political branches. The clarity with which Congress could frame the problem in an appropriations bill and the fact that such a suit would involve basic statutory interpretation make those suits especially conducive to judicial review.

A. Jurisdictional and Threshold Issues

Before a court can reach the merits of an Appropriations Clause claim, it must have jurisdiction. Congressional plaintiffs may have to prove that they have standing, that the case is ripe, that the case is not moot, and that the political question doctrine does not apply. If one house or the entire Congress authorizes suit and follows certain procedures, an Appropriations Clause case should clear these hurdles.

1. Standing

The first specific hurdle to Appropriations Clause challenges is standing. One house of Congress could have standing to seek redress of an institutional injury, though a lawsuit brought by both houses would have the greatest chance of success, and a suit by individual members would almost surely fail.

A number of scholars and judicial opinions have debated the contours of legislative standing, and have reached some consensus about the scope of the


174. See supra notes 93-101 and accompanying text.

doctrine. First, as *Raines v. Byrd* clearly establishes, individual members of Congress do not have standing to pursue a separation-of-powers claim. In contrast, Congress should have standing to sue over institutional injuries if both houses voted to jointly bring the suit. In separation-of-powers cases, the President's failure to follow constitutional legislative processes inflicts a particularized injury on Congress as an institution. Recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court determined that a state legislature challenging the creation of an independent redistricting commission in the state had standing as "an institutional plaintiff asserting an institutional injury": the legislature believed the Constitution gave it "primary responsibility" for redistricting, and the initiative requiring the use of an independent commission "would 'completely nullif[y]' any vote by the Legislature ... purporting to adopt a redistricting plan." While the Court was careful not to decide the question in the case of Congress, this recent opinion augurs well for congressional standing when a unified governmental institution brings suit. The Court has never outright held that Congress can sue the President, but the Court's cases have "clearly implied" that Congress has standing to sue when the executive branch allegedly intrudes on core legislative authority. This is particularly so when both houses of Congress have explicitly authorized suit, since that places the official imprimatur of the legislative branch on the action.

A greater difficulty lies in determining whether a single house or committee would have standing to bring a separation-of-powers suit in the appropriations context. The Court has not had to deal with such cases, so we must rely on the reasoning of the few cases it has decided, as well as the decisions of lower courts and the views of legal academics. Some scholars argue that Appropriations Clause cases can only be brought— if at all— by both houses of Congress, because

177. See Blumoff, supra note 175, at 311-12, 340-41; Hall, supra note 175, at 29-30; Mank, supra note 175, at 149. However, the doctrine of legislative standing may continue to develop to allow suits by groups of individual members of Congress, particularly where they represent a substantial voting bloc. For example, in June 2017 a group of 196 members of Congress filed a suit against President Trump alleging violations of the Emoluments Clause. Complaint, Blumenthal v. Trump, No. 17-cv-01154-EGS (D.D.C. June 14, 2017). Such lawsuits give the courts an opportunity to further develop this doctrine in a way that may make future appropriations litigation more feasible.
178. See Blumoff, supra note 175, at 341; Hall, supra note 175, at 28; see Mank, supra note 175, at 166.
179. 135 S. Ct. 2652, 2663-65 (2015) (alteration in original) (citation omitted).
180. Id. at 2665 n.12.
181. Mank, supra note 175, at 188-89 (emphasis added) (footnote omitted).
182. Ariz. State Legislature, 135 S. Ct. at 2664; Blumoff, supra note 175, at 309.
the appropriations power is vested in the entire Congress, not its constituent parts. Others contend that one house can bring suit because the appropriations "process is a core institutional power of Congress and of the House of Representatives in particular, where appropriation bills are supposed to originate." The case law suggests that even a single chamber could bring a suit. First, there is *Raines v. Byrd* itself. *Raines* read a prior case, *Coleman v. Miller*, as holding that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." Each house of Congress must vote to authorize appropriations. Therefore, each house would have had to pass any appropriations bill that would have allowed the President to spend the misappropriated funds. By spending the money anyway, the President acts as though a piece of legislation—to which each house's assent is separately required—has gone into effect when it has not. Each house therefore suffers an institutional injury when the President removes money from the Treasury without the approval of both chambers. This is the paradigmatic injury that legislative standing cases like *Raines* and *Coleman* have recognized as sufficient to bring suit: by violating the funding restrictions that their votes were necessary to put in place, the President would be "completely nullifying" the legislators' votes.

Lower court cases likewise suggest that a house of Congress or its authorized representative can establish standing to vindicate Congress's appropriations power. In *United States v. AT&T*, the D.C. Circuit determined that a single house of Congress had standing to assert an institutional injury, and could authorize a single Member or Committee to sue on its behalf. A number of other cases, including *Senate Select Committee on Presidential Campaign Activities v. Nixon*,

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183. See Hall, supra note 175, at 42.
184. See Mank, supra note 175, at 188.
186. *United States v. Windsor*, 133 S. Ct. 2675, 2713 (2013) (Alito, J., dissenting) ("Just as the state-senator-petitioners in *Coleman* were necessary parties to the [child labor constitutional] amendment's ratification, the House of Representatives [i]s a necessary party to [any appropriation's] passage; indeed, the House's vote would have been sufficient to prevent [the appropriation's] repeal if the [President] had not chosen to execute that repeal [by violating the appropriations statute].").
189. 498 F.2d 725 (D.C. Cir. 1974).
Committee on Oversight and Government Reform v. Holder, 90 Committee on Judiciary v. Miers, 9 and House of Representatives v. Department of Commerce, 92 have allowed congressional committees to sue to vindicate Congress's institutional interest in enforcing its own subpoenas against the Executive.

These cases provide ample support for a house of Congress—as opposed to the individual legislators in Raines—to obtain standing following a transgression of specific appropriations. They also rebut the argument that Congress cannot bring Appropriations Clause cases because appropriations violations do not result in a permanent loss of legislative power. Just as Congress has standing to enforce individual subpoenas even though refusal to comply with a single subpoena does not eliminate Congress's subpoena power, Congress has standing to sue over individual Appropriations Clause violations despite its continuing power to pass other appropriations.

A third set of cases, dealing with prudential standing, also hints at Congress's ability to maintain lawsuits against the Executive. For instance, in INS v. Chadha, both houses of Congress voted in separate resolutions to intervene to defend the constitutionality of the legislative veto. In response to the claim that the suit did not meet Article III's "case or controversy" requirement, because the INS agreed with Chadha that the legislative veto was unconstitutional, the Court said that the intervention of both houses of Congress placed "the concrete adversity" required under Article III "beyond doubt." Any prudential concerns about jurisdiction, the Court held, were likewise dispelled "by inviting and accepting briefs from both Houses of Congress." Similarly, in United States v. Windsor, the House Bipartisan Legal Advisory Group (BLAG) voted to intervene on behalf of the House once the Executive announced that it would no longer defend the Defense of Marriage Act (DOMA). The Court asked the parties to brief the question of whether BLAG had standing to appeal the Second Circuit's
decision striking down DOMA. It ultimately determined that the Executive had standing, and therefore did not reach the question in regard to BLAG. However, to reach this conclusion the Court first held that "BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." While these cases did not directly deal with Article III standing, they strongly suggest that the Court recognizes that one or both houses may have sufficient interest in preserving Congress’s legislative prerogative to justify continuing otherwise dubious lawsuits against the executive branch.

Furthermore, any opposition to congressional standing to bring separation-of-powers lawsuits in the national security context is likely premised on the assumption that, even if courts are unavailable as a forum, Congress still has the "power of the purse to protect its options." This rationale is premised on Congress’s being able to use the other tools at its disposal—especially appropriations—to resolve the interbranch conflict. But when the Executive violates the Appropriations Clause, nullifying the purse power, litigation may provide the only means for Congress to vindicate its constitutional role.

For a house of Congress to bring a future Appropriations Clause suit in a national security dispute, it would likely have to pass a resolution similar to that authorizing suit in Burwell. Doing so would raise the prospect of an institutional injury and lay the groundwork for the legislators to claim standing to sue the President. Addressing the standing question, then, should ultimately be the same in the context of national security appropriations as in agency appropriations or investigatory powers and subpoena enforcement. The cases addressed above demonstrate that a single house has a colorable standing argument on the basis of an appropriations violation. As the next Section argues, though, there

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199. Id.
200. Id. at 2686-88.
201. Id. at 2688.
203. Of course, another option is impeachment. But where appropriations misconduct has become standard executive practice in the national security space, impeachment may have become too blunt a tool to be politically and constitutionally feasible to redress this constitutional injury.
205. Cf. Dornan v. U.S. Sec’y of Def., 851 F.2d 450, 451 (D.C. Cir. 1988) (noting that the courts have "not sharply defined how Congress as an institution claims its standing in an appropriate case," but implying that institutional standing for Congress is more likely than standing for individual members of Congress).
might be other benefits to both houses' suing together through a joint resolution.

2. Ripeness

To reach the merits, a dispute must also have crystallized, or ripened, into one "fit[...]

one "fit[...]

for judicial decision." Although suit by one house alone may have sufficient standing, both houses of Congress may need to bring suit together to show that Congress fully opposes the President's expenditure of unappropriated funds and thereby establish ripeness. In this case, the House and the Senate would only be able to bring an Appropriations Clause challenge together through passing a concurrent resolution.

While all of the jurisdiction and justiciability doctrines could create problems for national security plaintiffs, ripeness poses a particular hurdle to an Appropriation Clause suit. In Goldwater v. Carter, for example, a few members of Congress challenged the President's unilateral termination of a treaty. Justice Powell would have dismissed the case as unripe, reasoning that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority" and the branches reach "a constitutional impasse." Following Justice Powell's "constitutional impasse" requirement, courts have dismissed claims brought by congressional plaintiffs against the Executive where Congress as a body has not already taken action against the President. Relatively, courts have been hesitant to find a case ripe when key factual questions remain unanswered. Most recently, in Doe v. Bush, the First Circuit ruled that a lawsuit by twelve members of the House, seeking to prevent the President from

207. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) (affirming dismissal because "no gauntlet has been thrown down here by a majority of the Members of Congress"); Dellums v. Bush, 752 F. Supp. 1141, 1151 (D.D.C. 1990) ("[I]t is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.").
209. Id. at 996.
210. See Dellums, 752 F. Supp. at 1149-52 (finding a challenge of fifty-four members of Congress to the President's imminent attack on Iraq to be unripe); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987) (noting the lack of ripeness under Goldwater within a discussion of remedial discretion); Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982) (noting a lack of "constitutional impasse"), aff'd, 720 F.2d 1355 (D.C. Cir. 1983); see also Sanchez-Espinoza, 770 F.2d at 210 (Ginsburg, J., concurring) ("I would dismiss the 'war powers clause' claim for relief asserted by the congressional plaintiffs as not ripe for judicial review.").
starting a war against Iraq, was unripe because at the time "[m]any important
questions remain[ed] unanswered about whether there w[ould] be a war, and,
if so, under what conditions." If the courts are convinced that political or fac-
tual predicates are underdeveloped, they might refuse to hear a case for ripeness
reasons.

In an Appropriations Clause lawsuit, Congress can control the factual pred-
icates to adjudication. If Congress passes an explicit restriction on appropri-
tions, the President disregards the restriction, and congressional plaintiffs sue,
the layers of speculation that doomed the *Doe* case will be cleared away. Con-
curring in *Sanchez-Espinoza v. Reagan*, then-Judge Ginsburg specifically
acknowledged the "power of the purse" as a "formidable weapon[]" by which a
majority of Congress could "throw[] down" the "gauntlet" to create a ripe dis-
pute. Therefore, an action pursuant to Congress’s appropriations power
would constitute an “asserti[on] . . . [of] constitutional authority,” the violation
of which constitutes a “constitutional impasse.” Congress need not take a fur-
ther contrary action in the face of presidential overreach; the original funding
restriction means that the branches have all acted.

The political predicates necessary for adjudication will also be satisfied if a
majority of both houses of Congress brings suit. One court, in *Dellums v. Bush*,
specifically contemplated that plaintiffs must “be or represent a majority of the
Members of the Congress” in order to avoid a dismissal on ripeness grounds.

The presence of a majority of both houses as plaintiffs would indicate that Con-
gress as a body views the President’s actions as unconstitutional. Ultimately, if
Congress takes the necessary steps to assert its appropriations power, “ripeness
should not pose a major barrier to judicial review” in Appropriations Clause
cases.

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212. However, if congressional plaintiffs alleged an Appropriations Clause violation on the basis
that narrowly appropriated funds did not include this activity—rather than an explicit re-
striction—ripeness may present an issue. See infra text accompanying notes 259-262. In this
situation, Congress might have to pass a joint resolution to the effect that the President is
spending unappropriated funds in order for the dispute to be ripe. See *Crockett*, 558 F. Supp.
at 899 (reasoning that if Congress passed a resolution regarding war powers that the Presi-
dent ignored, there would be a “constitutional impasse appropriate for judicial resolution”).

213. *Sanchez-Espinoza*, 770 F.2d at 211 (Ginsburg, J., concurring).


3. Mootness

Even if a court makes it past questions of standing and ripeness, some suits—especially longer-running ones—may be moot. Mootness can prevent judicial adjudication of interbranch national security disputes because the challenged executive activity may cease before the courts can act. For example, in Conyers v. Reagan eleven members of the House of Representatives challenged the invasion of Grenada in October 1983 as a violation of the War Powers Clause. The district court dismissed on grounds of equitable discretion, and the congressional plaintiffs appealed. However, by the time the D.C. Circuit decided the dispute, the conflict had ended: all combat troops had been withdrawn from Grenada, and only a small training contingent remained. The D.C. Circuit held that claims for both declaratory and injunctive relief were moot. Appropriations Clause lawsuits alleging that the President is spending unappropriated funds to engage in a military action may end up suffering the same mootness problem as Conyers.

Furthermore, Appropriations Clause cases may face another mootness issue: the annual expiration of appropriations. In Sanchez-Espinoza v. Reagan, twelve members of the House challenged executive aid to the Nicaraguan Contras, arguing in part that the President violated the Boland Amendment, a restriction on providing funds to the Contras that was included in the Fiscal Year 1983 appropriations bill. However, because the appropriations bill expired at the end of 1983, and the plaintiffs sought only prospective relief, the D.C. Circuit dismissed the claim as moot.

These applications of mootness might pose a problem for Appropriations Clause litigation that seeks to end a short military operation. However, extended conflicts or non-war powers disputes will not suffer this problem. Additionally,
there are two other ways that mootness might be avoided. First, plaintiffs could attempt to structure an argument for declaratory judgment in such a way as to avoid mootness. For example, in Mitchell v. Laird the D.C. Circuit suggested that "a declaratory judgment respecting past action" might avoid mootness, because "plaintiffs have a duty under the Constitution to consider whether defendants in continuing the hostilities did commit high crimes and misdemeanors so as to justify an impeachment." Similarly, legislators might argue that they suffer a continuing injury when the Executive spends in violation of an appropriations restriction. The President's past action of withdrawing funds in violation of the Constitution institutionally injured Congress, and Congress has an ongoing duty to assess whether those actions are unconstitutional (and hence impeachment-worthy), with which courts can assist through a declaratory judgment.

Second, even if courts do not view Appropriations Clause violations as continuing injuries, such cases could fall within the "capable of repetition, yet evading review" exception to mootness. This doctrine allows suits to proceed when a case would otherwise be declared moot, if: (1) the challenged action is by nature too short-lived to allow for full litigation before the action ends, and (2) there is a reasonable expectation that the same plaintiff will be subject to the same action again. The D.C. Circuit refused to use this exception in Conyers, because wars are not inherently so short that litigation cannot be completed before they end. However, many national security matters begin and end within a much tighter timeframe than protracted conflicts. The transfer of prisoners from Guantanamo in exchange for Sergeant Bergdahl, for instance, occurred in secret and in a matter of days; no lawsuit could have occurred quickly enough to prevent the President from expending unappropriated funds before the expenditure occurred. And, given President Obama's known dislike of Guantanamo and the possibility that the ongoing wars in Iraq and Afghanistan could generate more prisoner swaps, it was reasonable to think that the President might transfer more detainees out of Guantanamo in the future. Therefore, if Congress had sued President Obama for unconstitutionally using funds in the Bergdahl exchange, it may well have avoided a mootness finding. When similar immediate and clandestine actions occur as part of a broader program, normal lawsuits can operate against the program as long as it still exists. But when they occur as a

224. 488 F.2d 611, 613 (D.C. Cir. 1973).
series of one-off incidents, the capable of repetition but evading review doctrine could render them justiciable.

Though Appropriations Clause lawsuits may not be able to prevent expenditures for a military operation that has already ended, congressional plaintiffs may still be able to vindicate their constitutional interests by bringing a claim for retrospective relief (such as reimbursement) that would not be moot. In order to avoid the mootness issue specific to annual appropriations, congressional plaintiffs would have to rely on narrowly structured appropriations, rather than on an overt restriction that would expire in a year; and the plaintiffs would have to argue that the appropriations did not provide funds for the action at issue. Alternatively, Congress could pass substantially similar restrictions every year, and plaintiffs could thereby plead an ongoing violation. Or Congress could simply attempt to pass a more permanent restriction.

Ultimately, the Supreme Court has cautioned that “[t]he burden of demonstrating mootness ‘is a heavy one.’”22 The Executive could have trouble meeting that burden in at least some Appropriations Clause cases if Congress legislates strategically.

4. Political Question Doctrine

The political question doctrine may pose a more significant problem for Appropriations Clause suits in the national security context than the core justiciability doctrines. Many interbranch national security disputes involving the War Powers Clauses have been found to present nonjusticiable political questions.23 However, given the Supreme Court’s renewed willingness to resolve constitutional claims on national security issues, a congressional Appropriations Clause suit could overcome the political question doctrine if the courts recognize the clear-cut statutory and constitutional questions such a case would present.

Courts have declined to resolve national security suits on various political-question rationales. In Crockett v. Reagan, for instance, twenty-nine members of Congress challenged military assistance in El Salvador as a violation of the WPR and the War Powers Clause.231 The district court rejected the Executive’s argument that the case presented a political question because it involved “potential judicial interference with executive discretion in the foreign affairs field” or “the

230. See supra note 57.
apportionment of power between the executive and legislative branches.”

Nevertheless, the district court held that the case presented a nonjusticiable political question because the court “lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador.” The D.C. Circuit affirmed the decision.

Courts considering War Powers challenges have also dismissed on the basis of the political question doctrine when they determine that they should not “substitute [their] judgment for that of the President, who has an unusually wide measure of discretion in” foreign affairs. And they have found nonjusticiable political questions where adjudication would risk “the potentiality of embarrassment . . . from multifarious pronouncements by various departments on one question.”

However, as noted above, these instances of judicial reticence form a minority of national security cases. Most of the time, courts have been willing to decide separation-of-powers disputes on security matters. In Baker v. Carr, for instance, the Court surveyed its foreign affairs and duration-of-hostilities cases to develop the contours of the modern political question doctrine. The Court concluded that, when “clearly definable criteria for decision may be available” — even in national security cases — “the political question barrier falls away.” This has proven true over time: the Court has repeatedly been willing to decide the merits of cases that subject the security decisions of the political branches to constitutional scrutiny.

232. Id. at 898.

233. Id.

234. Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (per curiam); see also Sanchez-Espi-noza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (holding that dismissal of the War Powers claim at issue was required by Crockett); Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973) (finding a nonjusticiable political question in part because the case involved “questions of fact involving military and diplomatic expertise not vested in the judiciary”).

235. Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973); see Holtzman, 484 F.2d at 1310.


237. See infra note 240 and accompanying text.


239. Id. at 214.

Furthermore, the recent revival of judicial involvement in this area has led courts to address even core war-making issues. For instance, a more recent War Powers case in which the political question issue was addressed took a different tone than prior cases. In *Dellums v. Bush*, the district court determined that the case did not present a political question, reasoning that courts are not prohibited from determining whether the country is at “war” simply because the determination involves foreign affairs. The district court noted that “courts have historically made determinations about whether this country was at war.” Therefore, even the central determination of whether the country is engaged in ongoing hostilities is susceptible to judicial resolution.

Whatever the status of other national security questions, an Appropriations Clause lawsuit could fare better than a War Powers lawsuit. Instead of being directed at the existence or imminence of a “war,” a famously difficult question to resolve, an Appropriations Clause challenge would involve a “pure question[] of constitutional interpretation, amenable to resolution by” the courts, for which there are clearly “manageable standards” for adjudication. Indeed, courts have some experience adjudicating Appropriations Clause disputes. These cases involve statutory interpretation and “constitutional review of Executive actions,” applying standards with which courts are very “familiar.”

The political question doctrine, therefore, is not the imposing barrier it might seem to be. The Supreme Court has become more muscular in brushing aside political question claims in national security cases over the past two decades, returning to its pre-Vietnam Era norm. Most recently, in *Zivotofsky v. Kerry*, the Court reiterated that “[n]o policy underlying the political question doctrine suggests that Congress or the Executive can decide the constitutionality of a

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242. Id.; see also Koh, supra note 5, at 220 (observing that federal courts since the Founding have “reviewed the legality of military seizures, presidential orders in wartime, retaliatory strikes, covert actions, executive agreements, and treaty interpretation”).
244. Id. (internal quotation marks omitted) (quoting Powell v. McCormack, 395 U.S. 486, 548-49 (1969)).
245. See, e.g., Nevada v. Dep’t of Energy, 400 F.3d 9, 13, 15 (D.C. Cir. 2005) (determining whether a particular statute constituted a “continuing appropriation,” and whether funds from a general account may be appropriated for a specific purpose).
246. Burwell, 130 F. Supp. 3d at 80 (“[T]he mere fact that the House of Representatives is the plaintiff does not turn this suit into a non-justiciable ‘political’ dispute.”); cf. Meyer, supra note 53, at 118 (“[T]he courts are surely no less able to read and interpret the constitutional text in many congressional cases than when they interpret other broad or ambiguous constitutional provisions.”).
statute.” The same holds true for the constitutionality of executive actions that conflict with the appropriations power. The courts’ “duty will sometimes involve the ‘[r]esolution of litigation challenging the constitutional authority of one of the three branches,’ but courts cannot avoid their responsibility merely ‘because the issues have political implications.’” Judges “have repeatedly recognized” through the years that “the constitutionally mandated function of the judiciary is at least as important, and, in [some judges’] view even more important, in times of national emergency than in ordinary times.” Though issues of constitutional conflict and executive deference may arise at the merits stage in these cases, they should not prevent Appropriations Clause cases from reaching the merits.

B. Merits

On the merits, an Appropriations Clause suit presents one main factual question and one main legal question. Factually, the court will have to determine whether the President spent funds that were not appropriated. Legally, the court will have to determine whether the President violated the Constitution, or had the inherent authority to spend funds under Article II.

1. How To Establish that Funds Were Not Appropriated

It would be easiest for congressional plaintiffs to succeed on the first, factual question if Congress had previously passed a restriction on appropriations, prohibiting spending for a particular object. Such a restriction would constitute a “complete denial provid[ing] that no appropriated funds may be used for an activity that otherwise would be a proper object of expenditure from a lump-sum

248. Id. at 196 (alteration in original) (quoting Chadha, 462 U.S. at 943).
250. See infra Section V.B.
251. See, e.g., Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 30, 87 Stat. 714, 732 (“No funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operations by the United States in or over Vietnam, Laos, or Cambodia.”); see also BANKS & RAVEN-HANSEN, supra note 15, at 172 (“From colonial America we inherited not only a tradition of specific national security appropriations, but also the restrictive appropriation rider—a substantive legislative amendment or provision tacked onto a military appropriation, forcing the executive to take the bitter with the sweet.”); id. at 54 (noting that such appropriation restrictions “have become almost routine” after the Vietnam War).
appropriation for the agency." Under this scenario, the court would engage in
straightforward statutory interpretation to determine whether the restriction
constituted a decision not to appropriate the funds that the President ultimately
spent. Congress would have the greatest success if the restriction employed were
broad and simple.

Though an explicit restriction on funding would make it easiest for congres-
sional plaintiffs to succeed in appropriations litigation, this method could also
present some difficulties. First, Congress must have already passed the re-
striction—if it has not done so by the time the President begins spending, there
may be a significant gap in time before congressional plaintiffs could bring an
Appropriations Clause lawsuit. Second, appropriations restrictions are subject
to presidential veto, meaning that any restriction with which the President disa-
grees would need support from a two-thirds majority in each house. As dis-
cussed above, however, Congress successfully passes multiple appropriations re-
strictions in every appropriations bill, in advance of their actually being
violated. If Congress continues this practice and tries to anticipate potential
national security issues in advance, express appropriations restrictions would be
a viable basis for an Appropriations Clause suit. And unlike a standalone re-
striction passed in direct anticipation of litigation, a restriction included in must-
pass annual funding bills would be far more likely to avoid the President’s veto
pen.

Alternatively, Congress could argue that existing appropriations do not cover
the President’s activities. However, in the modern history of appropriations,
Congress “has by statute or by acquiescence left broad presidential discretion to
finance activities for which it has not made specific appropriation.” Thus, in

252. Stith, supra note 23, at 1361.
253. Id. at 1361 n.86 (noting the argument that the second Boland amendment “did not by its terms
encompass the National Security Council in the White House” and opining that “[w]here the
intent is to deny all funds for a particular object, it would be desirable not to include unnec-
essary descriptive language (which may be construed as terms of limitation)”; see also KOH,
supra note 5, at 129 (“When, as in the case of the Boland amendments, the language of the
restriction becomes more or less inclusive over time, executive officials can claim that the pro-
vision’s vagueness impairs their ability to determine whether particular activities are pro-
scribed.”).
254. See KOH, supra note 5, at 131.
255. See supra notes 130-131 and accompanying text (Syria); supra notes 149-155 and accompanying
text (Bergdahl).
256. See Stith, supra note 23, at 1363 n.95 (“Is failure to appropriate any money the same as an
explicit denial of appropriations? The answer is ‘no’ if the unmentioned activity is nonetheless
within the terms of activities that are funded.”).
257. BANKS & RAVEN-HANSEN, supra note 15, at 170; see supra Section I.A.
order to succeed on this argument, Congress would first have to reform the structure of its national security appropriations. As Banks and Raven-Hansen contend, “Congress has lacked the will, or—given the obscure nature of the customary and statutory authority for the discretion—the knowledge to eliminate” Presidents’ latitude in national security spending.258

For congressional plaintiffs to successfully argue that a presidential action exceeded the statutory mandate, Congress would have to curtail presidential discretion and move from lump-sum appropriations back to a system of more specific appropriations. One means of accomplishing this could be to incorporate “line itemization and specific descriptions of spending objectives”—informal controls that are used in the determination of national security appropriations259—into appropriations statutes themselves. Congress has successfully done this before: in the 1991 and 1992 DOD Appropriations Acts, Congress provided that “classified spending restrictions” that laid out the budget specifications for secret or black budget programs in a committee report “shall have the force and effect of Law.”260 In addition to incorporating committee itemization and descriptions into appropriations statutes—in effect creating “smaller buckets”—Congress would have to scale back or explicitly restrict emergency or contingency funds. In light of bipartisan opposition to the use of these contingency funds, and growing bipartisan efforts to assert Congress’s role in national security,261 this reform is becoming increasingly possible.

Should Congress successfully undertake these reforms, congressional plaintiffs may be able to establish that existing appropriations did not appropriate funds for expansive executive excursions. This would mean that Congress would not have to amass the political will to pass a new express funding restriction in anticipation of litigation. Consequently, the President would have one less opportunity to stymie the suit through her veto power. A reformation of the structure of national security appropriations, reversing decades of modern practice, would likely be more difficult to accomplish than one explicit funding restriction, which Congress is already in the habit of enacting. However, political will seems to be amassing in favor of a new national security appropriations

258. Id. at 175.

259. Id. at 63.


261. See supra notes 132131-138 and accompanying text.
scheme. And once in place, it would enable congressional plaintiffs to seek adjudication of appropriations violations as soon as the President exceeds her statutory prerogative.

Under this narrow appropriations framework, congressional plaintiffs would argue that—although not specifically denied funding—the President's activity was "with[out] the terms of activities that [we]re funded." Though a more difficult exercise of statutory interpretation than that accompanying an "explicit restriction," it is by no means beyond the competency of the courts.

2. Constitutional Dispute

In addition to the factual question—whether unappropriated funds were spent—the court must resolve the legal dispute—whether the President violated the Constitution in spending unappropriated funds, or whether the restriction itself was unconstitutional. Congress does not have unbounded authority to oversee the Executive through appropriations. For example, "Congress is obliged to provide public funds for constitutionally mandated activities." Additionally, Congress cannot use appropriations restrictions to unduly interfere with the President's constitutional powers. For national security purposes, the power of Congress is limited "in the degree to which it can interfere with the commander in chief's power to control military strategy."

The Supreme Court has never conclusively resolved the question of whether an appropriations restriction unconstitutionally interferes with the President's national security powers. At least one lower court, however, has held that the President's constitutional authority over national security constrains Congress's ability to restrict funding. In National Federation of Federal Employees v. United

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262. Stith, supra note 23, at 1363 n.95 (emphasis omitted).
263. See, e.g., Nevada v. Dep't of Energy, 400 F.3d 9, 15 (D.C. Cir. 2005) (adjudicating whether funds appropriated in a general account could be spent for a specific purpose).
264. BANKS & RAVEN-HANSEN, supra note 15, at 144 ("Congress may not use national security appropriations to accomplish what it may not constitutionally do directly.").
265. Stith, supra note 23, at 1350-51 ("For instance, in the area of foreign affairs, Congress itself would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties.").
266. Ackerman & Hathaway, supra note 3, at 457; see BANKS & RAVEN-HANSEN, supra note 15, at 150 ("[T]here is a broad scholarly consensus that Congress may not interfere with the president's day-to-day command of an authorized war or defense against sudden attack.").
States, Congress prohibited the use of funds to enforce federal employee nondisclosure agreements that prevented Congress from receiving classified national security information.268 The district court struck down this appropriations restriction, ruling that it unconstitutionally infringed on the President’s authority over national security information as “head of the Executive Branch and as Commander in Chief.”269 However, “[i]n spite of the importance of the constitutional question whether [the restriction] impermissibly intrudes upon the Executive’s authority to regulate the disclosure of national security information,” the Supreme Court remanded without expressing an opinion because the controversy became moot.270 Federal Employees has left “unclear how far Congress may go in exercising or enforcing its appropriations power to constrain the [P]resident’s authorities in foreign affairs.”271 But it suggests that Congress may face some limits in reining in the President.

In adjudicating a national security appropriations dispute on the merits, congressional plaintiffs will face similar arguments in favor of presidential discretion. For example, the Executive may argue that “the President has an implied power to incur claims against the Treasury to the extent minimally necessary to perform his duties and exercise his prerogatives under article II.”272 This claim of an inherent spending power, through widely criticized,273 might make a congressional suit more difficult. The Executive may argue, as former Attorney General William Barr has, that “Congress ‘ultimately only has the power to provide a lump sum’ for the constitutional activities of the president,”274 and that any further restrictions are an inherent violation of presidential discretion. Particularly if congressional plaintiffs are relying on a narrow-appropriations theory, rather than an explicit restriction, the Executive could also urge the courts to


270. Garfinkel, 490 U.S. at 158.

271. KOH, supra note 5, at 129.

272. Sidak, supra note 102, at 1194.

273. See BANKS & RAVEN-HANSEN, supra note 15, at 166-68; Stith, supra note 23, at 1352.

apply language from *United States v. Curtiss-Wright*,275 "as a canon of deferential statutory interpretation,"276 to conclude that the presidential activity was within the ambit of the funding outlay.277

The courts would ultimately have to balance the Executive's arguments about its constitutional powers over national security278 against the congressional plaintiffs' arguments about the constitutional powers of Congress over national security and appropriations.279 "To determine the constitutionality of a restrictive national security appropriation," courts would likely "weigh the extent to which the restriction prevents the president from accomplishing constitutionally assigned functions against the need for the same restriction to promote objectives within the authority of Congress."280

The outcome of this constitutional analysis will depend on the object of the appropriations restriction.281 For example, appropriations restrictions directed at national security issues apart from war making are unlikely to "prevent[] the president from accomplishing constitutionally assigned functions." Consider Leahy vetting: the Leahy Amendments prohibit the use of appropriations to train foreign security forces who have committed human rights violations. It is highly unlikely that a President could allege that this vetting process prevents her from "accomplishing constitutionally assigned functions," so as to outweigh Congress's appropriations power and policy objectives. Therefore, courts should find

275. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("[C]ongressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction [in foreign affairs] which would not be admissible were domestic affairs alone involved.").

276. KOH, supra note 5, at 138.

277. But see Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (cutting back on the *Curtiss-Wright* doctrine of executive deference in foreign affairs, reasoning that "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue").

278. See U.S. CONST. art. II, § 2, cl. 1 (Commander-in-Chief clause); id. art. II, § 1, cl. 1 (Executive Vesting clause); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1851) ("[T]he President 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.").

279. See supra Section I.A.


281. See id. at 148-57 (concluding that, under the separation of powers analysis, the 1984 Boland amendment and the 1973 funding cutoff to the Vietnam War are constitutional, whereas the 1970 restriction on the introduction of ground troops into Laos and Thailand would be unconstitutional).
that such appropriations restrictions are within the constitutional authority of Congress.

Cutting off funding for a war presents a closer question. Consider for example Congress’s attempt to prevent funds from being spent on a military conflict in Syria. It directly juxtaposes Congress’s power to declare war and to appropriate for the army and navy against the executive’s Commander-in-Chief power. Nonetheless, Congress would have a strong argument that declining to appropriate for military action in Syria does not “prevent[] the president from accomplishing constitutionally assigned functions.” Declining to appropriate funds for a military conflict in its entirety does not unduly interfere with the President’s prerogative as Commander-in-Chief. Congress is merely keeping chained the “Dog of war,” not attempting to control troop movements on the battlefield. An appropriation restriction does not actually bar the President from pursuing a military effort; rather, she must go through the process of consulting with Congress and obtaining authorization and specific appropriations for this particular conflict. And requiring the President to follow this dialogic process is consistent with the distribution of constitutional war powers and burdens designed by the Framers. An attempt to exert more granular control—such as by prohibiting a raid on a specific stronghold—would cross the line into impermissibly commandeering the Commander-in-Chief power. But by declining to appropriate at a broad level, Congress is merely exercising its constitutional prerogative to determine when funds can be released from the treasury. Therefore, where Congress is restricting appropriations that do not involve war powers, or that involve high-level, general funding for a conflict, it could succeed in establishing that the restriction is within its constitutional authority and does not unduly impinge upon the President’s constitutional authority.

282. See supra note 124.
283. Jefferson, supra note 17, at 397.
284. Because battlefield commands clearly fall within the ambit of the Commander-in-Chief Clause, whereas the ability to authorize military action in a particular theater can arguably fall at least in part within Congress’s power under the Declare War Clause, it is likely that the former but not the latter would be seen as a situation “where the Constitution by explicit text commits the power at issue to the exclusive control of the President,” and thus where the courts “have refused to tolerate any intrusion by the Legislative Branch.” Pub. Citizen, 491 U.S. at 485 (Kennedy, J., concurring in the judgment).
3. Relief

Should congressional plaintiffs win on the merits, either declaratory or injunctive relief may be available. A declaratory judgment in this context would state that Congress had not appropriated certain funds, but that by engaging in certain conduct the President was drawing unappropriated funds from the Treasury in violation of Article I, Section 9, Clause 7. This remedy would essentially formalize the signaling function of these lawsuits: it communicates that the President is violating the Constitution, and provides a focal point for the political response of Congress and the public. Although there is no enforcement mechanism by which courts can carry out their mandate against the Executive, Presidents nearly always obey court orders due to their "moral force" and the "significant political cost" of disobeying. And just as the shame of norm violation induces agencies to comply with court orders to avoid contempt findings, the political shame and pressure of rule-of-law norms give declaratory judgments of unconstitutional executive action their potent effect. The threat of this ex post pronouncement of guilt would strengthen Congress’s position ex ante, and make Presidents less willing to risk an Appropriations Clause suit by violating funding restrictions.

The second type of relief a court could order is a negative injunction. In Dellums v. Bush, Judge Greene declared that, "in principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization." Professor Harold Koh has opined that Dellums "clearly la[ide] the groundwork for future requests for injunctive relief." An injunction would apply equally to an Appropriations Clause lawsuit, in which the practical effect of blocking expenditures may be to cut off a war or to end a particular government program. For example, the Burwell court issued a decision on the merits of the House’s Appropriations Clause claim in May 2016, holding that the Affordable Care Act did not permanently appropriate the reimbursement funds at issue. To enforce its decision, the court “enjoin[ed] the use of unappropriated monies to fund reimbursements

owed to insurers under Section 1402" of the Act. That Burwell enjoined the administration from acting based on Congress's refusal to make annual appropriations only strengthens the case for the availability of injunctive relief in cases in which Congress continues to reauthorize the same annual appropriations restrictions. Presidential transgressions of Congress's repeated funding preferences would bolster the case for judicial resolution via an injunction. Habitual presidential overreach would be proof that the interbranch conflict was unsolvable in the political sphere—precisely the cases where judicial resolution is appropriate.

There is some doubt as to whether an injunction could be entered directly against the President for Appropriations Clause violations. The Supreme Court stated in 1866 that the courts lack jurisdiction over requests to "enjoin the President in the performance of his official duties," although they may entertain suits to enjoin the performance of a "purely ministerial act." Subsequent cases have reaffirmed this conclusion. There might be an argument that the simple act of withdrawing funds from the Treasury—separate from executive decision making that the funds should be spent on a specific policy objective—should be considered a "ministerial" act. Regardless, an injunction could certainly be entered against the Secretary of the Treasury or the Secretary of Defense. Furthermore, if an injunction were entered against a President or cabinet members but the President persisted in violating the court order, although the court likely could not "imprison the President for contempt," it could order other officials "to behave as though the President had obeyed the original injunction" and then punish them for contempt.

291. Id.
292. Id. at 174-75.
295. See Mississippi, 71 U.S. at 498-99.
296. See Franklin, 505 U.S. at 802 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) to show that the Court held President Truman's action unconstitutional and enjoined the Secretary of Commerce); Hawaii, 859 F.3d at 788 (upholding the constitutionality of an injunction against the Secretary of Homeland Security and the Secretary of State); Int'l Refugee Assistance Project, 857 F.3d at 605-06 (holding that the District Court abused its discretion by including President Trump in its preliminary injunction).
297. Siegel, supra note 286, at 1690. But see Parrillo, supra note 287, at 739-57 (noting that courts have the power to imprison agency officials for contempt in principle but seldom exercise it).
A third potential form of relief, beyond negative injunctions or declaratory judgments, is reimbursement via affirmative injunction. The argument for such relief stems from the nature of the injury: the President has allegedly spent money from the Treasury that Congress did not appropriate. As Congress is the keeper of the purse, the President must return what was taken without its permission. In the event that an affirmative injunction claim for reimbursement succeeds, the President would have to find funds to “return” to that Treasury account—perhaps from national security contingency funds—and those funds would be impounded for the rest of the fiscal year. The possibility of this remedy is supported by a proposal from Professor Nicholas Parrillo, who posits that contempt fines against agencies can likely be paid out from agency appropriations rather than from the general governmental Judgment Fund.298 Similarly, a contempt fine against the Secretary of Defense for violating a court order barring him from using unappropriated funds could be paid out from general defense appropriations. And if judgments in the form of contempt fines can be paid from appropriations, it is possible that judgment in the form of an affirmative injunction could require reimbursement of misspent funds, in the form of ordering impoundment of equivalent funds from a contingency account. If the Executive then runs out of funds due to this reimbursement, it would have to return to Congress to request further appropriations—as the Constitution required in the first instance.

Importantly, as the preceding discussion shows, a house of Congress would not have to settle for a political remedy for an Appropriations Clause violation. That is critical given that a suit would only arise when the political branches are at an impasse. Normally, under the equitable-remedial discretion doctrine, “[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, the court should exercise its equitable discretion to dismiss the legislator’s action.”299 Courts have previously used this doctrine to dismiss national security lawsuits brought by congressional plaintiffs.300 Those courts reasoned that a lawsuit was

298. See Parrillo, supra note 287, at 735-39.
inappropriate where congressional plaintiffs could instead resort to "appropriations legislation, independent legislation or even impeachment." However, in *Dellums v. Bush*, a district court reasoned that, where cutting off funding or impeachment is "politically or practically" unavailable, these legislative remedies could not serve as the basis for an exercise of remedial discretion.

There are several reasons why judicial—as opposed to political—resolution is appropriate for national security appropriations violations. First, the availability of appropriations legislation is itself considered a reason to exercise equitable discretion; however, if this check on executive behavior has failed, that is evidence that political resolution is not forthcoming. Impeachment, on the other hand, is too extreme to be a realistic step that must be exhausted before bringing suit. Second, the concept of equitable discretion does not cleanly apply when there are institutional plaintiffs, because such cases do not involve an individual who could seek relief from "his fellow legislators." If the entire Congress is aggrieved, there is not an intrabranch remedy available. Third, *Burnwell* indicates that the courts are less likely to (and should not) apply equitable-remedial discretion in the Appropriations Clause context. In its motion to dismiss, the Government invoked equitable discretion, arguing that the District Court

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303. *Meyer*, supra note 53, at 91 n.139 ("[W]ere the President to refuse to obey legislation denying funds or troops to a particular war effort, the courts may again be faced with the question of whether individual members of Congress could sue or whether they should muster the necessary members to pass further legislation or to impeach.").
304. See THE FEDERALIST NO. 58, supra note 15, at 357.
305. See Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 577, 601 (2017) (arguing that judicial resolution is often more inappropriate than the exercise of a "political weapon" like impeachment because as a weapon it is "too strong" and not every inter-branch dispute is "political in nature"); Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1305 (2017) ("[G]iven the high political costs, Congress should reserve impeachment for truly egregious conduct. Impeachment should not be the congressional response to a sincere presidential belief . . . ."); Bethany R. Pickett, *Note, Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 467 (2016) ("[T]he President may be a popular president whose performance is exemplary in every other area. Judicial intervention is preferable to impeachment because it addresses the President's particular area of wrongdoing, instead of broadly attacking the President . . . ." (footnote omitted)).
Court should make the House pursue "legislative means available to counter the Executive Branch."307 The court rejected this argument in a footnote, reasoning that "the constitutional violation of which the House complains has the collateral effect of disarming the most potent of those legislative means."308 Appropriations Clause violations, in other words, are different: Congress has already exhausted its most potent political tool short of impeachment, and can therefore seek judicial relief where it might not be able to otherwise.

C. Appropriations Clause Suits and the Separation of Powers

As we have now seen, congressional Appropriations Clause suits have a good chance of making it past the procedural hurdles that have stymied prior lawsuits attempting to correct presidential overreach in the national security sphere. And, if preceded by strategic legislating, such suits have an even better chance of succeeding on the merits. This outcome would be entirely consistent with— and, indeed, could help streamline—the Supreme Court’s framework for assessing separation-of-powers challenges. As discussed earlier, if Congress were to clearly and narrowly appropriate funds for national security purposes, or to expressly prohibit an expenditure, then a presidential action in violation of those restrictions would fall into Youngstown’s category three, where executive power is at its “lowest ebb.”309 As Justice Jackson recognized in Youngstown, appropriation of funds—even regarding national security—is a power the Constitution commits wholly to Congress: “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.”310 A congressional appropriations restriction on specific national security spending is the paradigmatic exercise of congressional authority that Justice Jackson recognized in Youngstown. If Congress could establish that it exercised this power, presidential action to the contrary would violate the separation of powers, as squarely dictated by Justice Jackson’s canonical Youngstown concurrence.

It is true that Appropriations Clause lawsuits combine separation of powers and national security, two areas of traditional judicial abdication. But, ironically,
Appropriations Clause lawsuits are likelier to succeed than many other separation-of-powers or national security cases. Unlike many other provisions of the Constitution, the Court has recognized that the Clause involves a "straightforward and explicit command." 311 This gives the judiciary an easily administrable test for the familiar judicial exercise of constitutional interpretation. 312

Just as importantly, the Court has noted that the Appropriations Clause was designed "as a restriction upon the disbursing authority of the Executive department," 313 its very purpose is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good." 314 In so doing, the Clause prevents the Executive from replacing Congress's judgment with its own. The D.C. Circuit has also recognized that the Clause is "particularly important as a restraint on Executive Branch officers," and has called it "a bulwark of the Constitution's separation of powers among the three branches." 315 It would be ironic for the courts to invoke the separation of powers as a reason to avoid adjudicating straightforward disputes under a constitutional provision so precisely designed to empower one branch and rein in another.

This last point hints at the broader theoretical issues that Appropriations Clause litigation implicates. The courts have developed each of the procedural roadblocks discussed above in the national security context because they held a particular view of the separation of powers and of the judiciary's role. The view the courts developed was an understandable one. As seen throughout this Part, many of the cases that triggered restrictive procedural rules involved individual draftees or members of Congress trying to get courts to declare the existence or the conduct of a military action unconstitutional—requests almost uniquely designed to provoke judicial recoil. To prevent abuse of the judicial forum, the courts adopted a more restrictive attitude toward their own role vis-à-vis the other branches. This attitude was unusual as a historical matter 316 and reached beyond what was necessary to rein in frivolous cases.

313. Cincinnati Soap, 301 U.S. at 321.
314. Richmond, 496 U.S. at 428 (emphasis added).
316. See supra text accompanying notes 163-164.
More recently, however, the courts have returned to a more robust vision of the judicial role in both separation-of-powers\textsuperscript{317} and national security\textsuperscript{318} disputes. Bringing suits under the Appropriations Clause could both reinforce and shape this trend. In discussing the Executive's decision to decline to defend statutes, for instance, the Court in \textit{Windsor} sounded a larger theme about the importance of adjudication in interbranch conflicts. "[W]hen Congress has passed a statute and a President has signed it," the Court said, "it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress'[s] enactment solely on its own initiative and without any determination from the Court."\textsuperscript{319} The President's failure to follow congressional appropriations is exactly the sort of unilateral nullification about which the \textit{Windsor} Court cautioned. Judicial engagement with Appropriations Clause lawsuits is thus a natural outgrowth of the Court's developing view of the separation of powers. But because they involve relatively narrow disputes over whether certain expenditures were authorized, such suits can actually help courts minimize the interbranch friction that might otherwise grow without intervention.

To see why this is so, consider Justice Scalia's dissent in \textit{Windsor}. The dissent advocated for a restrictive view of congressional standing, based on the Vietnam-era conception of the courts' role. Rather than look to the courts, Justice Scalia said, Congress should confront the President politically—through "the elimination of funding," among other methods.\textsuperscript{320} The problem with this logic, however, is that it provides no answer to the inevitable follow-up question: what happens if the President ignores Congress's funding command? To the extent the restrictive view of judicial power provides an answer to this question, that answer is to tell Congress to take even more extreme measures: to deny all funding to the Executive, refuse to confirm presidential appointments,\textsuperscript{321} or even impeach the President.

To be fair, Justice Scalia seemed to realize the herculean nature of this task.\textsuperscript{322} But a majority on the current Court, as well as in the lower courts, appears to

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  \item \textsuperscript{318} \textit{Windsor}, 133 S. Ct. 2076; \textit{Clinton}, 566 U.S. 189; cases cited supra note 165.
  \item \textsuperscript{319} \textit{Windsor}, 133 S. Ct. at 2688.
  \item \textsuperscript{320} Id. at 2705 (Scalia, J., dissenting).
  \item \textsuperscript{321} Id. ("Nothing says 'enforce the Act' quite like '... or you will have money for little else.'").
  \item \textsuperscript{322} Id. ("And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only

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recognize that the judiciary need not totally abandon the field—even in national security cases. After all, Congress cannot use its appropriations power to confront the President, as Justice Scalia suggested, if the President thinks she can simply transfer funds to evade Congress's prescriptions. The Burwell court recognized this catch-22: "The political tug of war anticipated by the Constitution depends upon Article I, § 9, cl. 7 having some force." By abstaining, as the restrictive view of the judiciary would require, the courts would either consign Congress to passing toothless appropriations restrictions or encourage the political branches to needlessly escalate their battles. Appropriations Clause lawsuits between Congress and the President would funnel otherwise intractable debates over national security powers into narrower, justiciable disputes over funding, while giving legal teeth to the power of the purse.

V. BENEFITS INDEPENDENT OF SUCCESS

Even if an Appropriations Clause suit does not reach and succeed on the merits, the very initiation of national security appropriations litigation could positively influence behavior in three ways: (1) by encouraging narrower appropriations; (2) by acting as a signaling device; and (3) by rebutting any claim that Congress has consented to the Executive's attempts to distort or ignore their appropriations restrictions. Thus, while a successful suit would have the most impact, the benefits of a suit could accrue even if courts reject the suit for one of the reasons that have knocked out legislative suits in the past.

A. Encouraging Narrow Appropriations

As discussed above, the first step in Congress's bringing an Appropriations Clause suit would be for legislators to pass a narrow appropriations bill or an appropriations restriction. The potential to bring lawsuits on a theory of narrow appropriations could incentivize Congress to appropriate narrowly in the first instance, in case the need for adjudication should arise. Those narrower national security appropriations would independently promote good governance. By limiting presidential spending discretion, and ensuring that the President

323. See supra notes 163-171 and accompanying text.
325. Or at the very least, to codify by reference committee reports with specified anticipated expenditures, to selectively enforce them if violated. See BANKS & RAVEN-HANSEN, supra note 15, at 65.
does not have unbridled control over appropriated funds to start an unauthorized military conflict, the Executive is faced with a clearer choice: seek appropriations from Congress, or unconstitutionally spend unappropriated funds. Structuring the President's decision in this fashion would offer a powerful incentive for the Executive to spend within constitutional bounds. One might question why this is relevant if the remedy to any potential violation is absent—that is, if an Appropriations Clause suit could be dismissed on justiciability grounds. However, there are various informal tools that Congress could leverage that an Appropriations Clause suit would bring into sharper relief. The full panoply of methods of congressional control are only available, though, if legislators circumscribe the wide berth that the current appropriations process grants the President; even the possibility that legislators could use narrowed appropriations in a suit would incentivize this critical first step.

It might seem that narrowing its appropriations could in itself solve Congress's problem, and obviate the need for Appropriations Clause lawsuits. However, the very threat of litigation—either by Congress itself or by third parties directly subject to the Executive's actions—is still an important backstop, in case the Executive does not respect the narrowed appropriations. There are two situations in which this may occur. The President or a cabinet secretary may refuse to abide by Congress's will and interpret the relevant statute to have made the appropriation in question.326 This divergence of interpretations occurred recently in House of Representatives v. Burwell: the Secretary of Health and Human Services inferred, from “extra-textual” evidence, that appropriations were available to reimburse insurers under the Affordable Care Act. The district court found that Congress did not appropriate those funds and that the appropriation was thus unconstitutional.327 Similarly, after Congress passed the Rohrabacher-Farr Amendment—which prohibited the use of federal funds to prevent states from implementing medical marijuana laws—the Obama Administration read the rider to prohibit only actions against states themselves, rather than against medical marijuana providers or buyers.328 Congress demanded an investigation

326. This statutory interpretation may either be a good faith dispute between branches over the meaning of the text, or a less-than-good-faith interpretation motivated by the policy preferences of the branches.


of this "tortuous twisting of the text," but was unsuccessful in changing the Administration's mind until the courts agreed with Congress in multiple challenges brought by criminal defendants.\(^{329}\)

Alternatively, the President could try to ignore a narrow appropriation by claiming that it violates one of her exclusive and enumerated powers. This occasionally occurs with respect to appropriations unrelated to national security. For instance, once the courts rejected the Obama Administration's narrow reading of the Rohrabacher-Farr Amendment, Congress reauthorized the rider, and President Donald Trump issued a signing statement saying he would "treat this provision consistently with [his] constitutional responsibility to take care that the laws be faithfully executed."\(^{330}\) Attorney General Jeff Sessions then sent a letter to Congress, arguing that the rider interfered with the President's authority to enforce the Controlled Substances Act.\(^{331}\) Such constitutional claims are particularly likely to be made in the areas of foreign affairs and national security because of the historical assignment of executive primacy in those areas. For instance, President George W. Bush objected to an appropriations rider prohibiting the use of funds to cooperate with the International Criminal Court: in a signing statement, President Bush said he would only apply the rider when it was "consistent with [his] constitutional authority in the area of foreign affairs."\(^{332}\) As discussed in Section III.C, President Obama violated the terms of another appropriations rider by using government funds to remove prisoners from Guantanamo, and argued that his inherent executive powers gave him freedom to arrange prisoner transfers.\(^{333}\)

Particularly in national security situations, then, Presidents are often tempted to push their powers to the constitutional boundary. In the appropriations context, this manifests in the argument that Presidents have the inherent authority to transfer or spend funds in furtherance of their foreign affairs and

\(^{329}\) Id.; see United States v. McIntosh, 853 F.3d 1163, 1176-77 (9th Cir. 2016).


defense policies—even when Congress has expressly forbidden the use of funds for the Presidents' activities. Unitary executivists contend that the President must be allowed to fully exercise these powers, despite Congress's appropriations authority. The threat of a lawsuit, even one that might well fail, generates political and legal risk that may be necessary to force the Executive into compliance with lawful congressional appropriations. And the possibility of using such lawsuits as a tool would give Congress an extra incentive to appropriate more narrowly at the outset.

B. Acting as a Signaling Device

Second, the possibility of a lawsuit can serve as a valuable signal from Congress. Congress can use its powers—including both its appropriations and oversight authority—to signal its priorities to the Executive and the judiciary. Approving lawsuits to enforce their appropriations riders, even if those lawsuits are not successful, would serve as a powerful warning to the President, agencies, the public, and even other members of Congress that appropriations restrictions must be taken seriously, and that a coordinate branch of government believes that the President is exceeding his constitutional authority.

The threat of an Appropriations Clause lawsuit in itself may be an effective tool by which Congress can influence presidential action. As it stands, the President may face political consequences or potential impeachment for violating the Appropriations Clause, but these can be difficult swords for Congress to wield without public awareness and support. The formal potential for judicial enforcement of the Appropriations Clause adds a weapon to the congressional arsenal. Even if actual legal consequences were unlikely, the President would have a stronger incentive to comply with congressional national security actions when Congress signaled that it wanted to limit executive spending power and that it would seek judicial redress to enforce those limits. For example, “President Bush sought congressional approval only weeks after the court ruled in *Dellums v. Bush*” that a challenge to the Iraq War was not ripe, instead of risking that the lawsuit could ripen and congressional plaintiffs could be granted an injunction. The signal to the President is made all the stronger if Congress both appropriates narrowly and takes formal legal means to enforce appropriations.

334. See, e.g., Sidak, *supra* note 102, at 1194.
REVIVING THE POWER OF THE PURSE

While those signals are noisier when Congress is successful in court, they are nonetheless present even before a court hears the suit.

Similarly, although the War Powers Resolution (WPR) has proven legally unenforceable in practice, and Presidents have uniformly contested its constitutionality, it has nevertheless influenced political norms. Presidents often provide disclosures to Congress consistent with the WPR, and executive branch officers are frequently called upon to offer explanations of how executive actions were consistent with the WPR—requests with which they routinely comply. The WPR has not proven itself the strong legal tool envisioned, but it is nonetheless a potent political tool; it assists Congress in forcing the Executive to offer reasoned explanations for its unilateral war making, and brings separation-of-powers principles to the political fore in every such disagreement. The threat of even unsuccessful Appropriations Clause lawsuits would have the same effect. They would help tilt the political balance in favor of Congress, highlight executive malfeasance, and buttress norms of executive accountability in the appropriations space.


338. See HOWELL & PEVEHOUSE, supra note 52, at 4.


341. One might wonder why the President, having defied Congress’s will in spending unappropriated funds, would not similarly defy the judiciary. But the President’s relationships with the two branches are different in this regard, both theoretically and practically. At a theoretical level, a President may spend funds that Congress believes it had not appropriated, not necessarily out of malevolence, but rather because the executive branch has a colorable legal argument that the President does in fact have the power to spend the money, based either on an interpretation of the appropriations statute or on a constitutional argument that Congress cannot tie its hands. See, e.g., Maura Dolan, Judge Refuses To Block Trump’s Order To End Obamacare Subsidies, L.A. TIMES (Oct. 25, 2017), http://www.latimes.com/local/lanow/la-me-in-states-healthcare-lawsuit-20171024-story.html [http://perma.cc/K79W-XRU5] (“The Obama administration decided that the language of the law constituted a so-called permanent appropriation, which allowed it to make the payments without further congressional action . . .”). If the courts decide the legal issue in Congress’s favor, the President loses her main defense and will face both internal ethical pressure and external political pressure to comply. On a practical level, Presidents have nearly always complied with court orders in cases in which the President’s legal interpretations clashed with those of Congress or another political
Moreover, if Appropriations Clause lawsuits are even partially successful, Congress could gain greater leverage against the President. For instance, suppose a district court decides an Appropriations Clause case in Congress's favor, but on appeal the decision is reversed. If the appeals court does not reverse on the merits, Congress would still have a favorable district court decision with which to confront the President—an opinion from a neutral party that Congress’s view of the issue is correct. Alternatively, suppose that a court sides with Congress in an Appropriations Clause case but determines that an injunction would be inappropriate. Assuming that Article III case-or-controversy requirements were met, the court could still grant Congress a declaratory judgment. This would not directly force the President to change course, but would strengthen Congress's hand in its political battle with the Executive. And in either of these cases, if the President still refused to comply with Congress's appropriations decision, the lawsuits and any court determinations could become evidence of separation-of-powers violations that Congress could rely on in impeachment proceedings. The first article of impeachment against Andrew Johnson, for instance, accused him of violating his constitutional duty to see that the laws be faithfully executed because he dismissed his Secretary of War without senatorial authorization in violation of the Tenure of Office Act. A judicial declaration that a President has violated an appropriations law would provide a stronger argument for impeachment based on a Take Care Clause infraction than did Congress's say-so alone in the Johnson impeachment trial.

These signaling functions, while most directly useful in relation to the President, can also shape agency behavior. Agencies pay close attention to Congress's budgets and the priorities they express. Congress tends to provide lump-sum

branch official—even when the cases were both notable and controversial. See, e.g., John P. MacKenzie, Court Orders Nixon To Release Tapes, WASH. POST (July 25, 1974), http://www.washingtonpost.com/politics/court-orders-nixon-to-yield-tapes-president-promises-to -comply-fully/2012/06/04/gJQAZSWo4V_story.html [http://perma.cc/SF69-SEGN] (noting that President Nixon promised to hand over Watergate tapes to an independent prosecutor after having claimed executive privilege); President Bush and Japanese Prime Minister Koizumi Participate in a Joint Press Availability, OFF. PRESS SECRETARY, WHITE HOUSE (June 29, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060629-3.html [http://perma.cc/7W69-XGK9] (showing that President Bush reacted to the decision in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), which held that military commissions were not authorized by Congress and thus could not try terrorists, by stating that he would work with Congress to authorize such commissions).


payments in its budgets and does not allow legislation in the text of an appropriations bill. However, House and Senate rules require that Congress issue reports with descriptions of any policy changes in appropriations bills, and agencies treat these reports as though they are legislation. Agencies also tend to—as but do not always—ask for permission from appropriations subcommittees before spending funds for purposes for which they were not appropriated. Any decision Congress makes regarding appropriations, then, signals to agencies that Congress cares about the policy at issue and provides agencies with guidance about how funds are to be spent. Agencies will pay close attention to any appropriation that Congress deems important enough to file suit in order to enforce. Recalcitrant cabinet secretaries, lacking the democratic mandate that helps inure the President to congressional criticism, may fall in line to avoid both the burden of the suits themselves and the inevitable political fallout that they now know will come if they maintain their existing interpretations of the appropriations.

Beyond the executive branch, Congress may wish to signal its priorities to the public. Members of Congress often act with an eye toward re-election, and the political fortunes of both parties and individual members hinge on the signals they send to the electorate about their activities. Congress’s appropriations decisions indicate its policy priorities; members must both appropriate consistently with the priorities on which they ran and show the public that they did so. Successful lawsuits do both of these things. Even unsuccessful lawsuits, however, would signal to the public that legislators are fighting for the same policies the majority party promised it would enact. This is a particularly powerful form of what David Mayhew terms “position taking”—the phenomenon by which members of Congress are rewarded merely for taking positions. Unsuccessful lawsuits would function much like the “message bills” that are commonly introduced, without much chance of passage, to signal a legislator’s
priorities to her constituents. A president's repeated violations of specific appropriations could become fodder for congressional and presidential campaigns alike. This makes it more likely that the substance of the appropriations restrictions themselves will be respected.

Finally, Congress can send internal signals through Appropriations Clause lawsuits. The decision to engage in a series of lawsuits would inevitably affect how individual members approach the appropriations process. The suits would likely raise the profile of legislators who introduced the riders involved, and perhaps of the members who sponsored the riders or pushed to file the cases. Legislators may therefore be tempted to make policy through the appropriations process to a greater degree than they currently do. And if enough individual members start paying attention to the appropriations process as a way to make national security policy, they may see the benefit to banding together—which could lead to collective efforts by Congress to vindicate its institutional efforts in this area. In all of these ways, Appropriations Clause lawsuits could be an effective political tool for Congress to signal its positions to the Executive, the people, and its own members.

C. Preventing an Assumption of Acquiescence

Third, and relatedly, even unsuccessful suits would serve a broader separation-of-powers goal: combating the inference of congressional acquiescence to the accretion of executive power. In his Youngstown concurrence, Justice Frankfurter explained the significance of historical gloss in the national security context, positing that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President." Historical practice remains an important factor in separation-of-powers jurisprudence. In NLRB v. Noel Canning, the Court interpreted the Recess Appointments Clause as conferring more executive power based in part on the Senate's history of confirming


355. NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014); see also Dames & Moore v. Regan, 453 U.S. 654, 676-83 (1981) (holding that, although Congress had not authorized President Carter to dismiss certain claims against Iran in the wake of the Iranian hostage crisis, prior congressional acquiescence rendered the actions constitutional).
presidential appointments in certain circumstances. The Court took the same
tack the next year for the recognition power in Zivotofsky.

Courts could infer similar legislative acquiescence if Presidents ignore ap-
propriations restrictions without any congressional response. To a judicial ob-
server, congressional inaction in the face of executive overstepping could suggest
that Congress approved of the transgressions. A practice of congressional res-
olutions to pursue Appropriations Clause lawsuits—even if such lawsuits will
not obtain success on the merits—would strongly combat the appearance of con-
gressional acquiescence in executive appropriations misconduct. Narrowed ap-
propriations could set the stage for a challenge by either legislators or a plaintiff
with less significant justiciability concerns. When a case later arises in which
courts can adjudicate the constitutionality of executive national security misap-
propriations, Congress’s strongest-intended check will not fall victim to the
courts’ assumptions about what Congress might think of the President’s actions.

Overall, through encouraging more careful appropriations ex ante, recal-
ibrating the political calculus, and combatting any inference of acquiescence,
Congress would restore some of its constitutional power over national security
appropriations by the mere threat of Appropriations Clause litigation, even if a
suit never reaches the merits. All of these would also be valuable in the event that
justiciability doctrine changes to permit more latitude in legislator-initiated
suits, or if a third party that clears the jurisdictional hurdles emerges.

VI. THE CASE AGAINST THE CLAUSE: RESPONDING TO THE MAIN
CRITIQUES OF THIS CONGRESSIONAL STRATEGY

Given the historical interest that members of Congress have shown in pur-
suing national security lawsuits, and the model presented in Burwell, it is possi-
ble that courts will face more Appropriations Clause national security litigation
in the future. Congress’s use of this tool can be criticized on grounds of its wis-
dom, effectiveness, and appeal to partisanship. But ultimately these challenges
fail to grasp the extent of the problem posed by the modern imbalance in the
separation of powers, and the targeted nature of the solution that Appropriations
Clause litigation provides. Overall, the use of such lawsuits by Congress could

to rule out a particular statutory application, while in others Congress’ silence signifies merely
an expectation that nothing more need be said in order to effectuate the relevant legislative
objective.”).
serve as an effective aid in recalibrating the imbalance of power and asserting its constitutional role in war making and national security.

First, the specter of the robed, faceless, unelected judge ordering the President to withdraw troops from combat evokes, for many, a deep-seated discomfort. The traditional critique of judicial involvement in the war powers context resembles the arguments for applying the political question doctrine: judges lack the competence to analyze the relevant facts and decide what are essentially policy questions, particularly where national security is at stake.

These arguments against judicial involvement in foreign affairs and national security have been heavily criticized, and are particularly inapplicable in the context of Appropriations Clause litigation. Judges have historically been involved in questions of national security, the separation of powers, and the Appropriations Clause. The relevant factual questions are well within judicial competence; they require courts to answer whether Congress appropriated funds, and whether the President spent funds in violation of those restrictions. Deciding an appropriations challenge would not be tantamount to making policy: Congress made its policy determination by choosing to restrict funding, but the courts are needed to prevent unconstitutional actions in contravention of that policy.

Arguments against judicial involvement in national security appropriations disputes rely heavily on the status quo, equating judicial abstention with neutrality and judicial involvement with activism and bias. But neutrality is not nec-

359. FISHER, supra note 2, at 303.
361. Id. at 48-50.
362. Id. at 50-58.
363. See Koh, supra note 160, at 122-25.
364. KOH, supra note 5, at 220; see also supra Section III.A (arguing that it is possible that Congress could bring an Appropriations Clause claim).
necessarily neutral. Judicial abdication in these questions heavily favors the Executive. To insist that courts stay out of these disputes is to argue that Presidents should always have the last say, unless Congress pursues impeachment. But this position is entirely inconsistent with Congress's constitutional authority over appropriations and war making, as envisioned by the Framers. The ability to keep leashed the dog of war was intended to be one of Congress's most effective checks on unbridled executive war making. To decline to adjudicate these disputes would be tantamount to cutting the leash.

Second, critics of national security appropriations litigation may contend that if a single house of Congress had standing to sue the President for any alleged appropriations misstep, these suits would be too easy to institute, resulting in "congressional end-runs around the legislative process and threaten[ing] to involve the courts in virtually every political dispute." Because it is easier to get a majority of one house to vote to bring a lawsuit than to get a veto-proof two-thirds majority in each house to pass or repeal a law over a presidential veto, these suits might function as a bad faith means of congressional opposition.

Ultimately, however, Appropriations Clause suits are unlikely to be a frequent recourse. First, floods of litigation have not accompanied at least some past expansions of legislative standing, despite similarly calamitous predictions. Second, Appropriations Clause lawsuits are not "end-runs around the legislative process" in the traditional sense because they already involve a completed legislative process—the appropriations bill at issue has been passed, and congressional plaintiffs can only seek judicial redress of its unconstitutional violation. Third, appropriations challenges are not "too easy" to bring. Individual members would not be able to seek redress of the institutional injury without authorization from at least a majority of one house of Congress. Either Congress would have to pass ex ante framework legislation authorizing individual members to bring appropriations challenges, or individual members would need to seek authorization via resolution for each lawsuit. Similarly, congressional plaintiffs would need either to point to an explicit restriction that was violated or to have


368. Meyer, supra note 53, at 67 (discussing the possibility of congressional lawsuits generally to help correct the imbalance in constitutional powers).

369. Id. at 115 ("No flood of litigation followed Coleman v. Miller, despite Justice Frankfurter's similarly expressed fear . . .").
previously restructured national security appropriations in order to argue in the
future that spending for a certain ‘activity’ did not fit within narrow appropri-
tions categories. The legislative activity that this would require would likely
weed out frivolous claims. 370

But even if appropriations litigation only occurs in the most extreme circum-
stances—when a President engages in national security decisions so objectiona-
ble that her own party is willing to oppose it—that is enough of an application
for these lawsuits to be an effective and useful tool. Even in these limited circum-
stances, Appropriations Clause litigation would vindicate the constitutional pre-
rogatives of Congress as an institution. And correcting the institutional imbal-
ance of power that has developed between the political branches, contrary to
constitutional design, is precisely the goal that the Appropriations Clause can
help to serve.

A final critique of Congress’s use of appropriations litigation is that it will
limit presidential discretion in the conduct of national security. 371 If Congress
only seeks to bring appropriations litigation in response to violations of explicit
restrictions, presidential flexibility in national security spending would continue
unaffected. However, if Congress recognizes the usefulness of such litigation, it
could potentially remove presidential spending discretion and narrowly appro-
priate in order to bring appropriations litigation for illegally transferring funds
between the narrow appropriations categories. In this scenario, Congress would
have limited presidential discretion, and—critics would argue—removed the
President’s ability to respond quickly and flexibly to a national security crisis.

However, this argument ignores the history of appropriations and presiden-
tial emergency action. In the past, when the President was faced with an emer-
gency, she was expected to convene Congress immediately to appropriate funds,
or to take on the risk of spending unappropriated funds and asking Congress to
sanction the act as soon as possible. 372 The President would still have that option
if Congress returned to a structure of narrow, specific national security appro-
priations. In the case of a true emergency, the President can respond; but she
assumes the risk that Congress will not affirmatively sanction the expenditure

370. See supra Section I.B.
371. Which of course assumes that presidential discretion is a good thing. See, e.g., BANKS & RA-
VEN-HANSEN, supra note 15, at 180 (opining that discretionary spending authority "gives the
president intended and, in our view, often desirable flexibility").
372. See supra Section I.A. The War Powers Act also recognized the existence of true emergencies
for which pre-consultation would not be possible. 50 U.S.C. § 1542 (2012) ("The President in
every possible instance shall consult with Congress before introducing United States Armed
Forces into hostilities . . ." (emphasis added)).
after the fact. 373 This system properly places the burden on the President, because the Constitution intends that the President should try to avoid those risks by seeking political approval and appropriations before acting.

To the extent some effects of appropriations litigation may be undesirable, it is simply the price we must pay “for our system of checks and balances.” 374 Although the price sometimes seems “exorbitant to many,” on balance it is desirable to fortify legislative powers against executive encroachment, because though a “kindly President” may overstep the separation of powers today, there is no telling how “another President might use the same power” tomorrow. 375

CONCLUSION

Over the past four decades, members of Congress have attempted to use the judiciary to vindicate Congress’s constitutional war powers. Though this series of lawsuits has failed repeatedly to reach the merits, Appropriations Clause litigation offers hope for those seeking to help Congress reclaim its constitutional role in national security. By pursuing lawsuits authorized by a majority of a house of Congress claiming that the President spent unappropriated funds in violation of the Appropriations Clause, congressional plaintiffs could have a greater chance of reaching and succeeding on the merits in national security disputes.

The biggest hurdle for national security appropriations litigation is getting to the merits. Historically, lawsuits brought by members of Congress generally, 376 national security lawsuits against the Executive, 377 and lawsuits regarding “executive compliance with appropriations limitations” 378 have all had a difficult time reaching resolution the merits. Once one of these suits reaches the merits, however, it stands a fair chance of success, if preceded by proper legislative action. In order to make a claim for violation of an explicit denial of appropriations, Congress must have passed such a restriction. And in order to proceed on a theory of violation of narrow appropriations, Congress must limit executive

373. Of course, in a true emergency Congress is unlikely to sanction the President with a lawsuit for failing to seek pre-approval, because this would be politically inexpedient.
375. Id. at 633-34.
376. Meyer, supra note 53, at 75 (“The courts have reached the merits in only eight of the more than forty lawsuits in which members of Congress were plaintiffs.”).
377. See Fisher, supra note 2, at 302.
378. Stith, supra note 23, at 1387 (“Often, however, when faced with an issue of executive compliance with appropriations limitations, courts have declined to decide cases on the merits.”).
discretion in national security expenditures and appropriate in smaller buckets. If Congress can establish the factual predicate—that the President spent unappropriated funds—it must succeed in arguing that its constitutional authority over appropriations trumps the President’s constitutional authority over the national security object in dispute. Given the strong original understanding of the appropriations power, and the scholarly consensus about its breadth, courts should rule for congressional plaintiffs in Appropriations Clause stand-offs, as long as the appropriation restriction at issue did not usurp the President’s Commander-in-Chief authority. Should Congress include restrictions under its authority to declare war—for example, those that prevent the use of funds to expand the theatre of an existing conflict—courts should find that the legislation abided constitutional boundaries.

Judicial review of Appropriations Clause violations in the national security context would help reinforce both Congress’s purse power and its war power. A sensible use of the judicial forum could help the courts meet the goal set by Justice Breyer: to “assure constitutional accountability, even of the president and even in time of war or national emergency.” A more robust role for the courts in this form of separation-of-powers dispute could result in a much-needed recalibration of the constitutional balance of powers in the national security sphere.

379. See supra Section I.A.
380. See supra notes 9493-97 and accompanying text.
381. Cf. NANCY STAUDT, THE JUDICIAL POWER OF THE PURSE 67-68 (2011) (arguing that, where the President supports increased national security spending and military operations and Congress opposes it, “judges are likely to prioritize congressional views in this particular context” when making decisions with fiscal consequences).