

THE YALE LAW JOURNAL

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.

AUTHOR. Yale Law School, J.D. 2017. Thanks to Oona Hathaway for her feedback and encouragement, and to Neal Katyal for his guidance and support. I am also grateful to Noah Lindell, Urja Mittal, Adrienne Lee, Andrea Levien, Rebecca Ojserkis, and Theodore Rostow for their helpful conversations and support in the development of this piece. Additional thanks to Max Siegel for his insightful comments and editorial suggestions, as well as to Anthony Sampson, Arjun Ramamurti, and all the editors of the *Yale Law Journal* for their careful editing. All arguments and errors in this Note are my own.



NOTE CONTENTS

INTRODUCTION	2515
I. THE MODERN IMBALANCE IN NATIONAL SECURITY POWERS AND THE WEAKENED POWER OF THE PURSE	2517
A. The Evolution of the Appropriations Clause: From the Framing to the Present	2517
B. Failed Attempts To Correct the Imbalance Through Congressional Litigation	2523
1. War Powers Litigation	2523
2. National Security Litigation: Intelligence and Funding	2525
II. THE NORMATIVE CASE FOR CONGRESS LITIGATING ITS PURSE STRINGS	2528
III. REASSERTING CONGRESS'S ROLE IN NATIONAL SECURITY THROUGH APPROPRIATIONS CLAUSE LITIGATION	2532
A. The (Short) History of Congressional Appropriations Clause Claims	2532
B. Appropriations Clause Challenges and Political Will	2535
C. Potential Applications	2539
IV. THE MECHANICS OF APPROPRIATIONS CLAUSE LITIGATION IN THE NATIONAL SECURITY CONTEXT	2543
A. Jurisdictional and Threshold Issues	2545
1. Standing	2545
2. Ripeness	2550
3. Mootness	2552
4. Political Question Doctrine	2554
B. Merits	2557
1. How To Establish that Funds Were Not Appropriated	2557
2. Constitutional Dispute	2560
3. Relief	2564
C. Appropriations Clause Suits and the Separation of Powers	2568



V. BENEFITS INDEPENDENT OF SUCCESS	2571
A. Encouraging Narrow Appropriations	2571
B. Acting as a Signaling Device	2574
C. Preventing an Assumption of Acquiescence	2578
VI. THE CASE AGAINST THE CLAUSE: RESPONDING TO THE MAIN CRITIQUES OF THIS CONGRESSIONAL STRATEGY	2579
CONCLUSION	2583

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,¹ 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.² Congress is left playing catch-up, attempting to regulate military operations already underway.³ The war power has thus shifted from Congress to the President,⁴ and congressional attempts to constrain the President often go unheeded.⁵ 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.⁶

For such reform to succeed, it must leverage the most significant weapon in Congress's arsenal: the power of the purse.⁷ 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.").
 3. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 495-96 (2011).
 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.").
 5. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 38 (1990) ("Even a glimpse of recent history [in national security affairs] reveals a consistent pattern of executive circumvention of legislative constraint in foreign affairs that stretches back to the Vietnam War and persists after the Iran-contra affair.").
 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

8. JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 3, 45 (2017).

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."¹¹ However, "Congress has failed to adapt this power to meet modern challenges,"¹² 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"¹³ and must often resort to concessions and compromise.¹⁴ 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

11. Ackerman & Hathaway, *supra* note 3, at 450.

12. *Id.*

13. *Id.* at 486.

14. See KOH, *supra* note 5, at 133.

grievance, and for carrying into effect every just and salutary measure.”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.”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.”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.”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 al[l]otted daily rations”¹⁹ and salaries.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.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.²² Congress would then have the option of approving the appropriation or

-
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”).
 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”).
 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).
 18. Ackerman & Hathaway, *supra* note 3, at 477.
 19. *Id.* at 478.
 20. *Id.* at 480.
 21. *Id.* at 480–81.
 22. See BANKS & RAVEN-HANSEN, *supra* note 15, at 37–38; FISHER, *supra* note 2, at 293; 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

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. I, § 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").

26. Stith, *supra* note 23, at 1396.

27. BANKS & RAVEN-HANSEN, *supra* note 15, at 50.

itemizations are not legally binding.²⁸ These broad appropriations “giv[e] the [P]resident immense discretion to reallocate funds from one activity to another.”²⁹ 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.³⁰

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.”³¹ Reprogrammed funds are often used to carry out unfunded national security objectives.³² For example, the relevant oversight committee approved reprogramming of appropriations between missions to fund the operation that culminated in the Bin Laden raid.³³ 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.³⁴

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.”³⁵ 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 1932.³⁶ 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.³⁷ 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.³⁸ 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.”³⁹ Indeed, President Obama funded the entire operation in Libya out of existing appropriations, without requiring a new appropriation from Congress.⁴⁰ In this scenario, congressional inaction is not sufficient to prevent military intervention;⁴¹ contrary to the Framers’ plan, a majority of one house is no longer sufficient to prevent funding an operation.⁴² A majority of the House questioned the

36. *Id.* at 78.

37. *Id.*

38. See Jennifer Steinhauer, *House Spurns Obama on Libya, but Does Not Cut Funds*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/us/politics/25powers.html> [<http://perma.cc/79W4-3CGM>].

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”).

41. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 297 (1996).

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.⁴³ 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,⁴⁴ as the political pressures on Congress to support military operations in progress made such a prohibition functionally impossible.⁴⁵ Members of Congress are often unwilling to pay the "high . . . political price" of being "accused of abandoning the troops in the field."⁴⁶ 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.⁴⁷ 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.⁴⁸

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,⁴⁹ but it is unable to use its constitutional power to keep chained or completely recall the

43. See Steinhauer, *supra* note 38.

44. *Id.*

45. Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1831 (2006); see also Jack Goldsmith, *The Potential Relevance of OLC's Kosovo-War Powers Resolution Opinion to the Syria Debate*, LAWFARE (Sept. 2, 2013, 9:33 AM), <http://www.lawfareblog.com/potential-relevance-olcs-kosovo-war-powers-resolution-opinion-syria-debate> [<http://perma.cc/4YXG-ZYGU>] (explaining that "declining appropriations could be viewed as 'not supporting the troops in battle'").

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.⁵⁰ 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.”⁵¹ 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.⁵² 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.⁵³ 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.”⁵⁴ The first such lawsuit was a challenge to the Vietnam War, brought in 1972.⁵⁵ 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.

52. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* 4-5 (2007).

53. See Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 106 n.209 (1992).

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)).

55. *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972); see Meyer, *supra* note 53, at 73.

ident unconstitutionally exercised war powers without congressional authorization. None have reached the merits.⁵⁶ Courts have dismissed these lawsuits on various procedural grounds: the political-question doctrine,⁵⁷ equitable discretion,⁵⁸ ripeness,⁵⁹ standing,⁶⁰ and mootness.⁶¹

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

-
56. FISHER, *supra* note 2, at 302 ("In recent decades, federal courts have consistently refused to reach the merits in war power cases.").
 57. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (dismissing a lawsuit by twelve members of the House of Representatives who challenged the aid given to Nicaraguan Contras); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam) (dismissing a lawsuit by twenty-nine members of Congress who challenged military assistance to El Salvador as violation of war powers); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (dismissing a lawsuit by thirteen members of the House of Representatives who challenged the Vietnam War); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (dismissing a lawsuit by a member of Congress who challenged bombings in Cambodia); *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973) (dismissing a lawsuit by four members of the House of Representatives who challenged the bombings in Cambodia); *Gravel*, 347 F. Supp. 7 (dismissing a lawsuit by two senators and twenty members of the House of Representatives who challenged the constitutionality of the Vietnam War).
 58. See *Crockett*, 720 F.2d 1355; *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); *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).
 59. See *Doe v. Bush*, 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); *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).
 60. See *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); *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); *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).
 61. See *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).

the War Powers Clause of the Constitution and the WPR.⁶² 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.”⁶³ 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.”⁶⁴ 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.”⁶⁵ *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.⁶⁶ In two challenges to the legality of intelligence activity,⁶⁷ and in a challenge to executive nondisclosure agreements that prevented federal

62. *Kucinich*, 821 F. Supp. 2d at 112-13.

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,⁶⁸ the court found that congressional plaintiffs lacked standing.⁶⁹

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.⁷⁰ 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.⁷¹ 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.⁷² 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.⁷³ 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

68. *Nat’l Fed’n of Fed. Emps. v. United States*, 688 F. Supp. 671, 679-80 (D.D.C. 1988) (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), *vacated sub nom.* *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153 (1989).

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).

71. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (dismissing as moot a claim by twelve members of the House challenging U.S. aid to Nicaraguan contras).

72. 528 F.2d at 456.

73. *Id.* at 459.

congressional intent.”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 questions⁷⁵ or for lack of standing.⁷⁶ Similarly, congressional plaintiffs have brought a number of challenges to executive actions regarding foreign aid. These have been dismissed under equitable discretion doctrine,⁷⁷ for lack of standing,⁷⁸ for presenting a nonjusticiable political question,⁷⁹ or for mootness.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.

74. *Id.*

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).

76. *Kucinich*, 236 F. Supp. 2d at 4-12.

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).

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).

79. *Burton*, 723 F. Supp. at 1554.

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.”⁸¹ 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.”⁸² 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.⁸³

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

81. U.S. CONST. art. I, § 9, cl. 7.

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.⁹² 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,⁹³ 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.⁹⁴ 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.”⁹⁵ Congress can use this power generally—depriving the executive branch of the means to do its work—or specifically—affecting particular policies through riders.⁹⁶ Indeed, the Appropriations Clause allows Congress to invade what would otherwise be the President’s exclusive power to execute the law.⁹⁷ 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-

92. FISHER, *supra* note 2, at 301 (reasoning that a one-house majority to veto a war “is the correct principle; the requirement of a two-thirds majority in each House [to override a presidential veto] is constitutionally excessive”).

93. Compare U.S. CONST. art. I, § 9, cl. 7 (“No money shall be drawn from the treasury, but in consequence of appropriations made by law.”), with U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States.”).

94. CHAFETZ, *supra* note 8, at 45.

95. *Id.* at 56.

96. *Id.* at 66–67.

97. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1963–64 (2011).

priations Clause case will be funneled into category three of the tripartite *Youngstown* framework.⁹⁸ Because the President's activity is "incompatible with the expressed . . . will of Congress," the President's "power is at its lowest ebb."⁹⁹ 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.'"¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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,¹⁰³ or is willing to act in the face of potential political retribution. Or he may act

98. See Bob Allen & Sarah Miller, *The Constitutionality of Executive Spending Powers* 5 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 38, 2008), http://www.law.harvard.edu/faculty/hjackson/ConstitutionalityOfExecutive_38.pdf [<http://perma.cc/T9DM-KVKZ>].

99. *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637-38 (1952) (Jackson, J., concurring)).

100. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting *Youngstown*, 343 U.S. 638 at 637-38 (Jackson, J., concurring)).

101. See *id.* at 2087.

102. See generally J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (laying out a theory of the President's implied spending power in the absence of appropriations).

103. See Ackerman & Hathaway, *supra* note 3, at 508.

when he mistakenly believes – or wants to believe¹⁰⁴ – 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.

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.

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, *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.¹⁰⁵ However, the court held that the individual members of Congress and citizens lacked standing to challenge the legality of the executive actions.¹⁰⁶ After *Harrington*, the Appropriations Clause lay

104. See Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 13 (1998) ("To operational lawyers, the proposition that presidential spending authority exists independent of Congress is particularly alluring.").

105. 528 F.2d 455, 456 (4th Cir. 1975).

106. *Id.* at 458-59.

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 off-sets under the Affordable Care Act (ACA).¹⁰⁷ The district court denied the government's motion to dismiss the Appropriations Clause claim, holding that the House had standing to pursue the claim¹⁰⁸ and that it was justiciable.¹⁰⁹ 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.¹¹⁰ Though *Burwell* was not resolved by the D.C. Circuit because the parties reached a settlement,¹¹¹ it is nevertheless significant as the first

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.

110. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

111. The case was held in abeyance with the change of administrations. *U.S. House of Representatives v. Hargan*, No. 16-5202 (D.C. Cir. Dec. 5, 2016) (holding case in abeyance). In August 2017, the D.C. Circuit allowed seventeen states and the District of Columbia to intervene in defense of the ACA, though the abeyance continued. *U.S. House of Representatives v. Hargan*, No. 16-5202 (D.C. Cir. Aug. 1, 2017) (granting motion for leave to intervene). In October 2017, the administration officially decided to stop paying the cost-sharing subsidies. Press Release, Dep't Health and Human Serv., Trump Administration Takes Action To Abide by the Law and Constitution, Discontinue CSR Payments (Oct. 12, 2017), <http://www.hhs.gov/about/news/2017/10/12/trump-administration-takes-action-abide-law-constitution-discontinue-csr-payments.html> [<http://perma.cc/3PLZ-VXBF>]. In December 2017, the parties informed the D.C. Circuit that they had reached a settlement. *U.S. House of Representatives v. Hargan*, No. 16-5202 (D.C. Cir. Dec. 15, 2017) (joint report by the parties). And in May 2018, the D.C. Circuit granted the parties' joint motion to dismiss the appeal and remand for the district court to adopt the settlement. *U.S. House of Representatives v. Azar*, No. 16-5202 (D.C. Cir. May 16, 2018) (dismissal order).

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.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 Clause¹¹³ and acknowledged that Congress has no legislative recourse where the President misappropriates funds.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.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

procedure followed by the House and the district court's opinion provide an important example of how Congress can pursue an Appropriations Clause lawsuit, and how a court could favorably adjudicate these claims. The case thus underscores the *possibility* of these lawsuits being successful.

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 11 (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.”).
113. *Burwell*, 130 F. Supp. 3d at 71 (“[The] 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.
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”).
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

116. See Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 281 (2001) (“[T]here will undoubtedly continue to be members of Congress who will take recourse to the courts.”).

117. See Steinhauer, *supra* note 38.

118. See, e.g., Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 297 (2008) (demonstrating that “interbranch tensions” and congressional investigations of the executive sharply increase in times of divided government).

119. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (challenging the President’s unilateral termination of a treaty); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (challenging the bombing in Cambodia during the Vietnam War); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (challenging military action in Libya).

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

120. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2103 (2015) (noting the U.S. Senate as *amicus curiae*); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *INS v. Chadha*, 462 U.S. 919, 922 (1983) (noting the appearance of the U.S. Senate and the U.S. House of Representatives).

121. For just some of the many restrictions enacted, see Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, §§ 8044, 8046, 8050, 8053, 8056, 8058, 8060, 8062, 8065, 8071, 8074, 8076, 8078-8081, 8106, 8122, 9007-9008, 9019, 129 Stat. 2242, 2362-2371, 2376, 2380, 2393, 2397 (2015).

122. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, § 8104, 131 Stat. 135, 271 (2017); Act of 2016 § 8106, 129 Stat. at 2376; Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 8116, 128 Stat. 2130, 2280 (2014); Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, § 8117, 128 Stat. 5, 132 (2014); Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6, § 8116, 127 Stat. 197, 326 (2013); Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 8129, 125 Stat. 786, 838 (2011).

123. Over the same period, every such act has prohibited any funds from being “expended for assistance to the Democratic People’s Republic of Korea unless specifically appropriated for that purpose.” Act of 2017 § 8045, 131 Stat. at 238; Act of 2016 § 8044, 129 Stat. at 2362; Act of 2015 § 8042, 128 Stat. at 2263; Act of 2014 § 8042, 128 Stat. at 115; Act of 2013 § 8042, 127 Stat. at 307; Act of 2012 § 8042, 125 Stat. at 816. Every act has prohibited funds for “international military education and training” and “peacekeeping operations” from being “used to support any military training or operations that include child soldiers.” Act of 2017 § 8088, 131 Stat. at 267; Act of 2016 § 8088, 129 Stat. at 2372; Act of 2015 § 8092, 128 Stat. at 2275; Act of 2014 § 8116, 128 Stat. at 132; Act of 2013 § 8115, 127 Stat. at 326; Act of 2012 § 8128, 125 Stat. at 838. And every act has prohibited any funds from being expended to “establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq” or Afghanistan, to “exercise United States control over any oil resource of Iraq,” or to violate any U.S. laws that implement the Convention Against Torture. Act of 2017 §§ 9007-9008, 131 Stat. at 289; Act of 2016 §§ 9007-9008, 129 Stat. at 2393; Act of 2015 §§ 9007-9008, 128 Stat. at 2298; Act of 2014 §§ 9007-9008, 128 Stat. 147-48; Act of 2013 §§ 9007-9008, 127 Stat. at 339; Act of 2012 §§ 9007-9008, 125 Stat. at 850.

Furthermore, since 2014, these acts have more specifically limited presidential prerogatives to engage in specified military excursions in Syria.¹²⁴ Since 2015, the exact same restriction has been enacted with respect to Iraq.¹²⁵ And there are numerous additional national security appropriations restrictions enacted each year, ranging from weapons¹²⁶ and intelligence issues¹²⁷ to military-base strength¹²⁸ and aid to foreign forces.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 Syria¹³⁰ 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.¹³¹

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.

125. Act of 2017 § 8115, 131 Stat. at 274; Act of 2016 § 8122, 129 Stat. at 2380; Act of 2015 § 8140, 128 Stat. at 2285.

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”).

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”).

128. Act of 2015 § 8125, 128 Stat. at 2283 (specifying force structure at “Lajes Field, Azores, Portugal”).

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).

130. Act of 2016 § 9019, 129 Stat. at 2397.

131. Dan Lamothe et al., *U.S. Strikes Syrian Military Airfield in First Direct Assault on Bashar al-Assad’s Government*, WASH. POST (Apr. 7, 2017), http://www.washingtonpost.com/world/national-security/trump-weighting-military-options-following-chemical-weapons-attack-in-syria/2017/04/06/oc59603a-1ae8-11e7-9887-1a5314b56a08_story.html [http://perma.cc/8SU4-7Z6S]. The 2016 restriction is still in force under the continuing appropriations acts

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,¹³² 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).¹³³ This is demonstrated by numerous co-sponsored efforts to reform the WPR,¹³⁴ prohibit expenditures for military action in the absence of congressional authorization,¹³⁵ prevent the expansion of troops into Syria,¹³⁶ repeal the 2001 AUMF,¹³⁷ and enact a new AUMF.¹³⁸ While most of these have not been

for FY2017. See Pub. L. No. 114-254, 114th Cong. (2016); Pub L. No. 114-223, 114th Cong. (2016).

132. Stephanie Condon, *Pentagon "Slush Fund" Pays for ISIS Airstrikes, Irking Some in Congress*, CBS NEWS (Oct. 3, 2014, 6:00 AM), <http://www.cbsnews.com/news/pentagon-slush-fund-pays-for-isis-airstrikes-irking-some-in-congress> [<http://perma.cc/QGE2-UZCE>].
133. Jake Miller, *John Boehner "Happy" To Have Congress Vote on Anti-ISIS Mission*, CBS NEWS (Sept. 28, 2014, 5:53 PM), <http://www.cbsnews.com/news/john-boehner-happy-to-have-congress-vote-on-anti-isis-mission> [<http://perma.cc/V2F4-NT26>].
134. War Powers Amendments of 2017, H.J. Res. 75, 115th Cong. (2017), <http://www.congress.gov/115/bills/hjres/75/BILLS-115hjres75ih.pdf> [<http://perma.cc/T798-9V7U>].
135. Reclamation of War Powers Act, H.R. 1448, 115th Cong. (2017), <http://www.congress.gov/bill/115th-congress/house-bill/1448/text> [<http://perma.cc/4US7-EWNU>] (prohibiting funds from being "expended for introduction of the Armed Forces into hostilities . . . in the absence of— (A) a declaration of war; (B) specific statutory authorization; or (C) a national emergency").
136. Prohibit Expansion of U.S. Combat Troops into Syria Act, H.R. 1473, 115th Cong. (2017), <http://www.congress.gov/bill/115th-congress/house-bill/1473/cosponsors?q=%7B%22search%22%3A%5B%22fund+war+appropriations%22%5D%7D&r=62> [<http://perma.cc/ZJ4L-CKDV>] (indicating that the bill had thirty-three co-sponsors).
137. Brian Bender & Jennifer Scholtes, *House Panel Votes To Force New Debate on Terror War*, POLITICO (June 29, 2017, 12:48 PM), <http://www.politico.com/story/2017/06/29/congress-vote-authorize-war-islamic-state-240095> [<http://perma.cc/7RDF-NBBR>] (discussing the success of the amendment to repeal the 2001 AUMF before the House Appropriations committee by an overwhelmingly bipartisan vote); Sheryl Gay Stolberg, *Senate Rejects Bipartisan Effort To End 9/11 Military Force Declaration*, N.Y. TIMES (Sept. 13, 2017), <http://www.nytimes.com/2017/09/13/us/politics/senate-rejects-rand-paul-effort-to-end-military-force-declaration.html> [<http://perma.cc/4G5E-X8XG>] (discussing the failure of Senate and House efforts).
138. Charlie Savage, *Senators Wrestle with Updating Law Authorizing War on Terrorist Groups*, N.Y. TIMES (June 20, 2017), <http://www.nytimes.com/2017/06/20/us/politics/aumf-war-military-congress.html> [<http://perma.cc/5PFD-5G3N>] (discussing, among other efforts, the Authorization for Use of Military Force Against al-Qaeda, the Taliban, and the Islamic State of Iraq and Syria, S.J. Res. 43, 115th Cong. (2017)).

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.¹³⁹ 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.¹⁴⁰ And, as will be explored further below,¹⁴¹ 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

139. See, e.g., David M. Herszenhorn, *Democrats in Senate Block Money To Close Guantánamo*, N.Y. TIMES (May 19, 2009), <http://www.nytimes.com/2009/05/20/us/politics/20detain.html> [<http://perma.cc/DJ2R-DKP3>].

140. Peter Baker & Sophia Kishkovsky, *Trump Signs Russian Sanctions into Law, with Caveats*, N.Y. TIMES (Aug. 2, 2017), <http://www.nytimes.com/2017/08/02/world/europe/trump-russia-sanctions.html> [<http://perma.cc/RF62-Z5NY>]; see Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

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.

144. Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006); Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, § 8057, 128 Stat. 5, 118-19 (2014).

145. Act of 2014 § 8057(a)(1).

146. Nathanael Tenorio Miller, Note, *The Leahy Law: Congressional Failure, Executive Overreach, and the Consequences*, 45 CORNELL INT’L L.J. 667, 692 (2012).

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.¹⁴⁸ 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.¹⁴⁹ Though President Obama contested the legality of these restrictions,¹⁵⁰ 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.¹⁵¹ 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 2014,¹⁵² and section

148. Herszenhorn, *supra* note 139153.

149. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, §§ 8103-8105, 129 Stat. 2242, 2376 (2015); Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, §§ 8112-8114, 128 Stat. 2130, 2280 (2014); Act of 2014, §§ 8110-8112, 128 Stat. at 131; Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6, §§ 8109-8111, 127 Stat. 197, 323 (2013); Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, §§ 8119-8121, 125 Stat. 786, 833 (2011); Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, §§ 1112-1114, 125 Stat. 38, 114 (2011); Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 532, 123 Stat. 3033, 3156 (2009).

150. Statement on Signing the National Defense Authorization Act for Fiscal Year 2014, 2013 DAILY COMP. PRES. DOC. 876 (Dec. 26, 2013) (contending that transfer funding restrictions “violate[] constitutional separation of powers principles”).

151. Dan Lamothe, *The Bowe Bergdahl Case, Explained*, WASH. POST (Dec. 14, 2015), <http://www.washingtonpost.com/news/checkpoint/wp/2015/12/14/how-to-catch-up-on-the-bowe-bergdahl-case> [<http://perma.cc/C2DD-L6Y5>].

152. National Defense Authorization Act of 2014, Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013).

8111 of the Department of Defense Appropriations Act of 2014.¹⁵³ And by spending \$988,400¹⁵⁴ to effectuate the transfer, contrary to an express appropriations restriction, the Executive also violated the Appropriations Clause.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,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.¹⁵⁷ The Government Accountability Office issued a legal opinion concluding that the Executive had violated section 8111 and the Antideficiency Act,¹⁵⁸ and the House voted 249-163 (with 22 Democrats in favor) in a non-binding resolution to condemn the illegality of the transfer.¹⁵⁹ Those soft measures marked the end of Congress's objections: a fairly clear constitutional violation,

153. Pub. L. No. 113-76, § 8111 (2014) (“None of the funds appropriated or otherwise made available in this Act may be used to transfer any individual detained at United States Naval Station Guantanamo Bay, Cuba to the custody or control of the individual’s country of origin, any other foreign country, or any other foreign entity except in accordance with section 1035 of the National Defense Authorization Act for Fiscal Year 2014.”).

154. Memorandum from Susan A. Poling, Gen. Counsel, Gov’t Accountability Office, to Sen. Mitch McConnell, at 3 (Aug. 21, 2014), <http://www.gao.gov/assets/670/665390.pdf> [<http://perma.cc/NH95-ZN24>].

155. See David Bernstein, *Revisiting the Illegal Bowe Bergdahl Swap: Undermining Congress’s “Power of the Purse,”* WASH. POST: VOLOKH CONSPIRACY (Dec. 10, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/10/revisiting-the-illegal-bergdahl-swap-undermining-congress-power-of-the-purse> [<http://perma.cc/GAU7-34Q5>]; Jack Goldsmith, *One or Two Other Statutes the President Likely Disregarded in The Bergdahl Deal*, LAWFARE (June 2, 2014), <http://lawfareblog.com/one-or-two-other-statutes-president-likely-disregarded-bergdahl-deal-updated> [<http://perma.cc/3VAF-6DQT>] (noting that the President’s actions transferring Guantanamo detainees in exchange for Bergdahl, in addition to violating several statutes, “might also have violated Article I, § 9, cl. 7 of the Constitution”).

156. See Jonathan Capehart, *Bergdahl and the GOP’s Predictable Impeachable Offense*, WASH. POST (June 3, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/06/03/bergdahl-and-the-gops-predictable-impeachable-offense> [<http://perma.cc/9TXY-RE3C>].

157. See *The Bergdahl Exchange: Implications for U.S. National Security and the Fight Against Terrorism: Hearing of the H. Foreign Affairs Comm. J. Subcomm.*, 113th Cong. (June 18, 2014), <http://foreignaffairs.house.gov/hearing/joint-subcommittee-hearing-the-bergdahl-exchange-implications-for-u-s-national-security-and-the-fight-against-terrorism> [<http://perma.cc/ZQC4-37HX>].

158. See Memorandum from Susan A. Poling, *supra* note 154, at 1.

159. Associated Press, *U.S. House Condemns Obama for “Illegal” Bowe Bergdahl Prisoner Swap*, GUARDIAN (Sept. 9, 2014), <http://www.theguardian.com/world/2014/sep/09/us-house-obama-bowe-bergdahl-illegal-swap> [<http://perma.cc/W8NU-86DL>].

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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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).

162. See, e.g., Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 GEO. J.L. & PUB. POL'Y 1, 33-34 (2015); Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 12 (2017); Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1908 (2015).

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.”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.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.¹⁶⁵ In *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.”¹⁶⁶ More generally, the Court has been aggressive in defining the powers of its sister branches, whether over immigration,¹⁶⁷ the recognition of foreign countries,¹⁶⁸ the making of recess appointments,¹⁶⁹ the imposition of good-cause requirements on presidential appointments,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.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

163. Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466, 469 (2005).

164. *Id.* at 484, 493.

165. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

166. *Boumediene*, 553 U.S. at 796, 798.

167. *E.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

168. *E.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

169. *E.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

170. *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

171. *E.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013).

claims have asserted their role in determining constitutional questions.¹⁷² 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.¹⁷³ 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.¹⁷⁴ 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,¹⁷⁵ and have reached some consensus about the scope of the

172. See, e.g., *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (Mem.) (2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590 (4th Cir.) (en banc), *vacated as moot*, 138 S. Ct. 353 (Mem.) (2017); *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir.), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (Mem.) (2017).

173. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

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

175. See, e.g., Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 307-22 (1991); Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1 (2016); Bradford C. Mank, *Does a House of Congress Have Standing Over Appropriations? The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141 (2016).

doctrine. First, as *Raines v. Byrd* clearly establishes,¹⁷⁶ individual members of Congress do not have standing to pursue a separation-of-powers claim.¹⁷⁷ In contrast, Congress should have standing to sue over institutional injuries if both houses voted to jointly bring the suit.¹⁷⁸ 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."¹⁷⁹ While the Court was careful not to decide the question in the case of Congress,¹⁸⁰ 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."¹⁸¹ 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.¹⁸²

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

176. 521 U.S. 811, 830 (1997).

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.¹⁸³ 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.”¹⁸⁴

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.”¹⁸⁵ 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.¹⁸⁶ 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 nullif[ying]” the legislators’ votes.¹⁸⁷

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.¹⁸⁸ A number of other cases, including *Senate Select Committee on Presidential Campaign Activities v. Nixon*,¹⁸⁹

183. See Hall, *supra* note 175, at 42.

184. See Mank, *supra* note 175, at 188.

185. *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

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].”).

187. *Raines*, 521 U.S. at 823.

188. *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976); see also *U.S. House of Representatives v. Burwell*, No. 14-1967, 2015 WL 5294762, at *10 (D.D.C. Sept. 9, 2015) (citing *AT&T*).

189. 498 F.2d 725 (D.C. Cir. 1974).

Committee on Oversight and Government Reform v. Holder,¹⁹⁰ *Committee on Judiciary v. Miers*,¹⁹¹ and *House of Representatives v. Department of Commerce*,¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ 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 adverse-ness" required under Article III "beyond doubt."¹⁹⁶ Any prudential concerns about jurisdiction, the Court held, were likewise dispelled "by inviting and accepting briefs from both Houses of Congress."¹⁹⁷ 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).¹⁹⁸ The Court asked the parties to brief the question of whether BLAG had standing to appeal the Second Circuit's

190. 979 F. Supp. 2d 1 (D.D.C. 2013).

191. 558 F. Supp. 2d 53 (D.D.C. 2008).

192. 11 F. Supp. 2d 76, 85 (D.D.C. 1998).

193. *Burwell*, 130 F. Supp. 3d at 80 n.29 (D.D.C. 2015) ("While there is no precedent for this specific lawsuit, the rights of the House as an institution to litigate to protect its constitutional role has been recognized in other contexts in the 20th century and its institutional standing was most specifically foreseen, if not decided, in *Raines* and *Arizona Legislature*." (citations omitted)).

194. Hall, *supra* note 175, at 41-42.

195. *INS v. Chadha*, 462 U.S. 919, 930 n.5 (1980).

196. *Id.* at 939.

197. *Id.* at 940.

198. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

decision striking down DOMA.¹⁹⁹ It ultimately determined that the Executive had standing, and therefore did not reach the question in regard to BLAG.²⁰⁰ However, to reach this conclusion the Court first held that “BLAG’s sharp adversarial presentation of the issues satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”²⁰¹ 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.”²⁰² 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.²⁰³

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*.²⁰⁴ 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.²⁰⁵ 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

199. *Id.*

200. *Id.* at 2686–88.

201. *Id.* at 2688.

202. Blumoff, *supra* note 175, at 350.

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.

204. U.S. House of Representatives v. *Burwell*, 130 F. Supp. 3d 53, 63 (D.D.C. 2015); *see also* DOLAN & GARVEY, *supra* note 112, at 14.

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[] . . . for judicial decision."²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ 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."²⁰⁹

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.²¹⁰ Relatedly, 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

206. *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003).

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.").

208. 444 U.S. 996, 997 (1979) (Powell, J., concurring).

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.”²¹¹ If the courts are convinced that political or factual predicates are underdeveloped, they might refuse to hear a case for ripeness reasons.

In an Appropriations Clause lawsuit, Congress can control the factual predicates to adjudication. If Congress passes an explicit restriction on appropriations, the President disregards the restriction, and congressional plaintiffs sue, the layers of speculation that doomed the *Doe* case will be cleared away.²¹² Concurring 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 dispute.²¹³ 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.”²¹⁴ Congress need not take a further 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.²¹⁵ The presence of a majority of both houses as plaintiffs would indicate that Congress 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”²¹⁶ in Appropriations Clause cases.

211. *Doe v. Bush*, 323 F.3d 133, 139 (1st Cir. 2003).

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 restriction—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 President ignored, there would be a “constitutional impasse appropriate for judicial resolution”).

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

214. *Goldwater*, 444 U.S. at 996 (Powell, J., concurring).

215. *Dellums*, 752 F. Supp., at 1151.

216. Koh, *supra* note 160, at 124 (discussing the litigation of war powers disputes generally).

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.²¹⁷ 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.²¹⁸ The district court dismissed on grounds of equitable discretion, and the congressional plaintiffs appealed.²¹⁹ 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.²²⁰ The D.C. Circuit held that claims for both declaratory and injunctive relief were moot.²²¹ 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.²²² 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.²²³

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,

217. *See id.* at 125 (noting that because many Presidents have tried to keep unilateral military actions shorter than sixty days to avoid triggering the War Powers Resolution, many operations — like Libya (1986), Grenada, and Panama — are too short to be adjudicated).

218. 765 F.2d 1124, 1125-26 (D.C. Cir. 1985).

219. *Id.* at 1126.

220. *Id.*

221. *Id.* at 1127-28; *see also* Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. Oct. 17, 1988) (per curiam) (holding that the case presented a nonjusticiable political question and was moot on appeal).

222. 568 F. Supp. 596, 598 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (Scalia, J.). It appears that congressional plaintiffs structured this claim as a violation of the appropriations statute, not as a constitutional violation.

223. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210. (D.C. Cir. 1985).

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.”²²⁴ 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.²²⁵

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.²²⁶ 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.²²⁷ 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.²²⁸ 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).

225. See also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (granting a declaratory judgment of unconstitutionality in lieu of injunctive relief to remedy a separation of powers injury).

226. *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911).

227. See *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

228. *Conyers v. Reagan*, 765 F.2d 1124, 1129 (D.C. Cir. 1985); see *Campbell v. Clinton*, 203 F.3d 19, 33-34 (D.C. Cir. 2000) (Randolph, J., concurring).

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.’”²²⁹ 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.²³⁰ 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

229. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

230. See *supra* note 57.

231. *Crockett v. Reagan*, 558 F. Supp. 893, 895 (D.D.C. 1982).

apportionment of power between the executive and legislative branches.”²³² 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.”²³³ The D.C. Circuit affirmed the decision.²³⁴

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.²³⁵ And they have found nonjusticiable political questions where adjudication would risk “the potentiality of embarrassment . . . from multifarious pronouncements by various departments on one question.”²³⁶

However, as noted above,²³⁷ 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.²³⁸ The Court concluded that, when “clearly definable criteria for decision may be available” – even in national security cases – “the political question barrier falls away.”²³⁹ 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.²⁴⁰

232. *Id.* at 898.

233. *Id.*

234. *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (per curiam); *see also* *Sanchez-Espinoza 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.

236. *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)), *aff’d*, No. 87-5426 (D.C. Cir. 1988) (per curiam).

237. *See infra* note 240 and accompanying text.

238. *Baker*, 369 U.S. at 211-14.

239. *Id.* at 214.

240. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (detention of terrorist suspects); *United States v. District Court*, 407 U.S. 297 (1972) (executive intelligence gathering); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (prohibitions on publication of security secrets); *Kent v. Dulles*, 357 U.S. 117 (1958) (passport denial based on security determinations); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (domestic reach of war powers).

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.²⁴¹ The district court noted that “courts have historically made determinations about whether this country was at war.”²⁴² 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,²⁴³ for which there are clearly “manageable standards” for adjudication.²⁴⁴ Indeed, courts have some experience adjudicating Appropriations Clause disputes.²⁴⁵ These cases involve statutory interpretation and “constitutional review of Executive actions,” applying standards with which courts are very “familiar.”²⁴⁶

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

241. 752 F. Supp. 1141, 1146 (D.D.C. 1990).

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”).

243. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 79 (D.D.C. 2015).

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.”²⁴⁷ 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.’”²⁴⁸ 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.”²⁴⁹ Though issues of constitutional conflict and executive deference may arise at the merits stage in these cases,²⁵⁰ 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.²⁵¹ 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

247. 566 U.S. 189, 196–97 (2012) (second alteration in original) (quoting *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)).

248. *Id.* at 196 (alteration in original) (quoting *Chadha*, 462 U.S. at 943).

249. Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309, 1313 (2006).

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.”²⁵² 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.²⁵³

Though an explicit restriction on funding would make it easiest for congressional plaintiffs to succeed in appropriations litigation, this method could also present some difficulties. First, Congress must have already passed the restriction—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 disagrees would need support from a two-thirds majority in each house.²⁵⁴ As discussed above, however, Congress successfully passes multiple appropriations restrictions in every appropriations bill, in advance of their actually being violated.²⁵⁵ 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 restriction 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.²⁵⁶ 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.”²⁵⁷ 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 unnecessary 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 provision’s vagueness impairs their ability to determine whether particular activities are proscribed.”)).

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.

260. Pub. L. No. 101-511, § 8111(a), 104 Stat. 1856 (1990); BANKS & RAVEN-HANSEN, *supra* note 15, at 65; *see also* Stith, *supra* note 23, at 1353 (“Often, the appropriations act explicitly incorporates other legislation . . .”).

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.”²⁶² 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.²⁶³

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.²⁶⁴ For example, “Congress is obliged to provide public funds for constitutionally mandated activities.”²⁶⁵ 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.”²⁶⁶

The Supreme Court has never conclusively resolved the question of whether an appropriations restriction unconstitutionally interferes with the President’s national security powers.²⁶⁷ 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*

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.”).

267. David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 PEPP. L. REV. 685, 746 (2014).

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

268. *Nat'l Fed'n of Fed. Emps. v. United States*, 688 F. Supp. 671, 685 (D.D.C. 1988), *vacated sub nom.* *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989); see Pub. L. No. 100-202, § 630, 101 Stat. 1329, 1329-432 (1987).

269. *Nat'l Fed'n of Fed. Emps.*, 688 F. Supp. at 685 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988)).

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.

274. BANKS & RAVEN-HANSEN, *supra* note 15, at 144 (quoting Panel Discussion, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 623, 631 (1990) (remarks of William Barr)).

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) (“[The 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.

280. BANKS & RAVEN-HANSEN, *supra* note 15, at 146 (relying on the standard set forth in Justice Kennedy’s concurrence in *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring)).

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.²⁸² 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,"²⁸³ not attempting to control troop movements on the battlefield.²⁸⁴ 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.²⁸⁵ A declaratory judgment in this context would state that 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.²⁸⁶ And just as the shame of norm violation induces agencies to comply with court orders to avoid contempt findings,²⁸⁷ 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.”²⁸⁸ Professor Harold Koh has opined that *Dellums* “clearly la[id] the groundwork for future requests for injunctive relief.”²⁸⁹ 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.²⁹⁰ To enforce its decision, the court “enjoin[ed] the use of unappropriated monies to fund reimbursements

285. Koh, *supra* note 160, at 124.

286. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1690 (1997).

287. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 777 (2018).

288. *Dellums v. Bush*, 752 F. Supp. 1141, 1149 (D.D.C. 1990).

289. Koh, *supra* note 160, at 122.

290. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

owed to insurers under Section 1402” of the Act.²⁹¹ 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.²⁹² 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 unresolvable 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.”²⁹³ Subsequent cases have reaffirmed this conclusion.²⁹⁴ 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.²⁹⁵ Regardless, an injunction could certainly be entered against the Secretary of the Treasury or the Secretary of Defense.²⁹⁶ 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.²⁹⁷

291. *Id.*

292. *Id.* at 174-75.

293. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498, 501 (1866).

294. See *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (Mem.) (2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.) (en banc), *vacated as moot*, 138 S. Ct. 353 (Mem.) (2017).

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.

299. *Dornan v. U.S. Sec’y of Def.*, 851 F.2d 450, 451 (D.C. Cir. 1988) (per curiam) (citation omitted).

300. See *id.*; *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (per curiam) (affirming dismissal of claim based on equitable discretion because “congressional plaintiff’s dispute is primarily with his or her fellow legislators”); *Lowry v. Reagan*, 676 F. Supp. 333, 337-39 (D.D.C. 1987), *aff’d on other grounds*, No. 87-5426 (D.C. Cir. Oct. 17, 1988); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), *aff’d on other grounds*, 765 F.2d 1124 (D.C. Cir. 1985); *United Presbyterian Church v. Reagan*, 557 F. Supp. 61, 64 (D.D.C. 1982), *aff’d on other grounds*, 738 F.2d 1375 (D.C. Cir. 1984) (challenging legality of E.O. 12333). *But see Dellums v. Bush*, 752 F. Supp.

inappropriate where congressional plaintiffs could instead resort to “appropriations legislation, independent legislation or even impeachment.”³⁰¹ 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.³⁰²

There are several reasons why judicial—as opposed to political—resolution is appropriate for national security appropriations violations.³⁰³ 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.³⁰⁴ Impeachment, on the other hand, is too extreme to be a realistic step that must be exhausted before bringing suit.³⁰⁵ 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.”³⁰⁶ If the entire Congress is aggrieved, there is not an intrabranched remedy available. Third, *Burwell* 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

1141, 1149 (D.D.C. 1990) (“A joint resolution counselling the President to refrain from attacking Iraq without a congressional declaration of war would not be likely to stop the President from initiating such military action if he is persuaded that the Constitution affirmatively gives him the power to act otherwise.”).

301. *Conyers*, 578 F. Supp. at 327.

302. *Dellums*, 752 F. Supp. at 1149.

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)).

306. *Dornan v. U.S. Sec’y of Def.*, 851 F.2d 450, 451 (D.C. Cir. 1988) (per curiam).

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,

307. Defendants’ Memorandum in Support of Their Motion to Dismiss the Complaint at 26, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 14-cv-01967-RMC).

308. *Burwell*, 130 F. Supp. 3d at 79 n.28.

309. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

310. *Id.* at 643-44 (“While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.”).

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 matter³¹⁶ and reached beyond what was necessary to rein in frivolous cases.

311. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)).

312. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

313. *Cincinnati Soap*, 301 U.S. at 321.

314. *Richmond*, 496 U.S. at 428 (emphasis added).

315. *U.S. Dep’t of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

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-powers³¹⁷ and national security³¹⁸ 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 *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."³¹⁹ The President's failure to follow congressional appropriations is exactly the sort of unilateral nullification about which the *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 *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.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,³²¹ or even impeach the President.

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

317. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

318. *Kerry*, 135 S. Ct. 2076; *Clinton*, 566 U.S. 189; cases cited *supra* note 165.

319. *Windsor*, 133 S. Ct. at 2688.

320. *Id.* at 2705 (Scalia, J., dissenting).

321. *Id.* ("Nothing says 'enforce the Act' quite like ' . . . or you will have money for little else.'").

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

recognize that the judiciary need not totally abandon the field—even in national security cases.³²³ 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.”³²⁴ 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.³²⁵ Those narrower national security appropriations would independently promote good governance. By limiting presidential spending discretion, and ensuring that the President

Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.”).

323. See *supra* notes 163-171 and accompanying text.

324. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 73 (D.D.C. 2015).

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.

327. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

328. See Christopher Ingraham, *Federal Court Tells the DEA To Stop Harassing Medical Marijuana Providers*, WASH. POST: WONKBLOG (Oct. 20, 2015), <http://www.washingtonpost.com/news/wonk/wp/2015/10/20/federal-court-tells-the-dea-to-stop-harassing-medical-marijuana-providers> [<http://perma.cc/74VM-H99>].

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*, 833 F.3d 1163, 1176-77 (9th Cir. 2016).

330. *Statement by President Donald J. Trump on Signing H.R. 244 into Law*, OFF. PRESS SECRETARY, WHITE HOUSE (May 5, 2017), <http://www.whitehouse.gov/the-press-office/2017/05/05/statement-president-donald-j-trump-signing-hr-244-law> [<http://perma.cc/L58Z-SLFP>].

331. See Christopher Ingraham, *Jeff Sessions Personally Asked Congress To Let Him Prosecute Medical-Marijuana Providers*, WASH. POST (June 13, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers> [<http://perma.cc/J48E-WFKP>].

332. George W. Bush, *Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002*, GOV’T PUBLISHING OFF. (Nov. 28, 2001), <http://www.gpo.gov/fdsys/pkg/PPP-2001-book2/pdf/PPP-2001-book2-doc-pg1458.pdf> [<http://perma.cc/7FQJ-H8TR>].

333. See *Statement on Signing the National Defense Authorization Act for Fiscal Year 2014*, *supra* note 150.

defense policies – even when Congress has expressly forbidden the use of funds for the Presidents’ activities. Unitary executives contend that the President must be allowed to fully exercise these powers, despite Congress’s appropriations authority.³³⁴ 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.³³⁵ 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.³³⁶ 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.

335. See, e.g., Charles M. Cameron & B. Peter Rosendorff, *A Signaling Theory of Congressional Oversight*, 5 GAMES & ECON. BEHAV. 44 (1993); Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUDS. 131, 131-32 (1991).

336. Meyer, *supra* note 53, at 75 n.47.

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,³³⁷ and Presidents have uniformly contested its constitutionality,³³⁸ it has nevertheless influenced political norms. Presidents often provide disclosures to Congress consistent with the WPR,³³⁹ 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.³⁴⁰ 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.³⁴¹

337. See *Crockett v. Reagan*, 558 F. Supp. 893, 898-901 (D.D.C. 1982); see also *supra* note 52 and accompanying text.

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

339. See, e.g., *Letter from the President—War Powers Resolution*, OFF. PRESS SECRETARY, WHITE HOUSE (June 13, 2016), <http://obamawhitehouse.archives.gov/the-press-office/2016/06/13/letter-president-war-powers-resolution> [<http://perma.cc/P4QA-SVK9>].

340. See, e.g., Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html> [<http://perma.cc/FSB9-PSS7>] (discussing the report provided to Congress after assertion of WPR violation, in which State Department Legal Advisor Harold Koh interpreted the definition of “hostilities” to exclude the Libya conflict).

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-ln-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.³⁴² 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.³⁴³ 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/gJQAZSwoIV_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).

342. See 28 U.S.C. § 2201 (2016); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010).

343. See *The Impeachment of Andrew Johnson (1868)*, SENATE HIST. OFF., U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm [<http://perma.cc/5HAN-GSRT>].

payments in its budgets³⁴⁴ and does not allow legislation in the text of an appropriations bill.³⁴⁵ However, House and Senate rules require that Congress issue reports with descriptions of any policy changes in appropriations bills,³⁴⁶ and agencies treat these reports as though they are legislation.³⁴⁷ Agencies also tend to – but do not always – ask for permission from appropriations subcommittees before spending funds for purposes for which they were not appropriated.³⁴⁸ 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.³⁴⁹ 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.³⁵⁰ 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.³⁵¹ 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.³⁵² Unsuccessful lawsuits would function much like the “message bills” that are commonly introduced, without much chance of passage, to signal a legislator's

344. CHAFETZ, *supra* note 8, at 71.

345. Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 458 n.12.

346. *Id.*

347. CHAFETZ, *supra* note 8, at 71-72.

348. *Id.* at 72.

349. *Id.*

350. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION*, at xv, 5-6 (2d ed. 2004).

351. See CHAFETZ, *supra* note 8, at 71.

352. MAYHEW, *supra* note 350, at xv, 61.

priorities to her constituents.³⁵³ 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.”³⁵⁴ Historical practice remains an important factor in separation-of-powers jurisprudence.³⁵⁵ 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

353. See, e.g., Jennifer Steinhauer, *Congress's Look-Good Season: Republicans Pursue Bills To Show Voters*, N.Y. TIMES (July 9, 2016), <http://www.nytimes.com/2016/07/10/us/politics/congress-republicans-pursue-bills.html> [<http://perma.cc/95J9-XL5H>].

354. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

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.³⁵⁶ The Court took the same tack the next year for the recognition power in *Zivotofsky*.³⁵⁷

Courts could infer similar legislative acquiescence if Presidents ignore appropriations restrictions without any congressional response. To a judicial observer, congressional inaction in the face of executive overstepping could suggest that Congress approved of the transgressions.³⁵⁸ A practice of congressional resolutions to pursue Appropriations Clause lawsuits – even if such lawsuits will not obtain success on the merits – would strongly combat the appearance of congressional acquiescence in executive appropriations misconduct. Narrowed appropriations 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 misappropriations, 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*, recalibrating 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 pursuing national security lawsuits, and the model presented in *Burwell*, it is possible 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 wisdom, 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

356. 134 S. Ct. at 2559, 2561–62, 2567, 2570–73.

357. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015).

358. *Cf. Burns v. United States*, 501 U.S. 129, 136 (1991) (“In some cases, Congress intends silence 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 competence³⁵⁹ to analyze the relevant facts³⁶⁰ and decide what are essentially policy questions,³⁶¹ particularly where national security is at stake.³⁶²

These arguments against judicial involvement in foreign affairs and national security have been heavily criticized,³⁶³ and are particularly inapplicable in the context of Appropriations Clause litigation. Judges have historically been involved in questions of national security,³⁶⁴ the separation of powers,³⁶⁵ and the Appropriations Clause.³⁶⁶ 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.

360. THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 46-48 (1992).

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).

365. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *INS v. Chadha*, 462 U.S. 919 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

366. *UAW v. Donovan*, 746 F.2d 855, 859-63 (D.C. Cir. 1984); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510-11 (D.C. Cir. 1984) (en banc), *vacated and remanded*, 471 U.S. 1113 (1985); *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977); Stith, *supra* note 23, at 1386-87 & n.213 (citing *TVA v. Hill*, 437 U.S. 153 (1977)).

essarily neutral. Judicial abdication in these questions heavily favors the Executive.³⁶⁷ 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.”³⁶⁸ 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.³⁶⁹ 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

367. KOH, *supra* note 5, at 219 (“[V]irtually all of the cases on foreign affairs allegedly decided under the [political question] ‘doctrine’ actually involved judicial determinations upholding executive decisions on the merits.” (citing Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 606 (1976)); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1313 (1988) (“[T]he Court has condoned executive initiatives in foreign affairs by refusing to hear challenges to the President’s authority.”)).

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 appropriations 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 circumstances – when a President engages in national security decisions so objectionable 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 circumstances, Appropriations Clause litigation would vindicate the constitutional prerogatives of Congress as an institution. And correcting the institutional imbalance 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 appropriate 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 presidential emergency action. In the past, when the President was faced with an emergency, 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 appropriations. 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 & RAVEN-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.

374. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (Douglas, J., concurring).

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,³⁷⁹ and the scholarly consensus about its breadth,³⁸⁰ 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.³⁸¹ 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.”³⁸² 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).

382. STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 193 (2011).