

“Protecting Congress’s Power of the Purse and the Rule of Law”

Hearing Before the House Budget Committee

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Chairman Yarmuth, Ranking Member Womack, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the scope and implications of the congressional power of the purse. My name is Josh Chafetz, and I am a Professor of Law at Cornell, and for the current semester a Visiting Professor of Law at the University of Texas. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. Much of my testimony today will draw on research conducted for my book, *Congress’s Constitution: Legislative Authority and the Separation of Powers*, published in 2017 by Yale University Press, and I have appended a chapter from that book to this testimony.

CONSTITUTIONAL AUTHORITY

Let me begin by laying out the constitutional provisions relevant to Congress’s power of the purse. First, there is the Article I, sec. 9, cl. 7 Appropriations Clause: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This provision was designed to make it absolutely clear that Congress is the principal decisionmaker for how money will be spent. The president may appoint the Secretary of the Treasury (with the advice and consent of the Senate), but the Secretary is constitutionally forbidden from disbursing a single dime unless he or she can point to some enacted law authorizing the expenditure.

The Appropriations Clause is paired with the Statement and Account Clause: “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” This provision is both public-facing and Congress-facing—that is, it aims both to ensure that the public can understand how its money is spent and to ensure that Congress can monitor expenditures for compliance with appropriations statutes and, more broadly, with the expectations that members had when they drafted and voted for those statutes.

Third, there is the Article I, sec. 7, cl. 1 Origination Clause: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.” In other words, although revenue-raising bills go through the normal lawmaking process involving bicameralism and presentment, they have to take a more specific path than other sorts of bills: they must begin in the House. This was a reflection of the fact that the House is closer to the people than the Senate is. The House has much shorter terms; Representatives have fewer constituents than Senators (in all but a few states); and the entire

House is up for election at the same time. Moreover, until the ratification of the Seventeenth Amendment in 1913, only Representatives were directly elected by the people. The Origination Clause thereby gives the body most immediately responsive to the people the primary responsibility over taxation, by requiring that all revenue-raising proposals begin in the House of Representatives. Although it is not in constitutional text, there is a longstanding tradition that the House also originates general appropriations measures, for similar reasons.¹

The final relevant piece of constitutional text is the Article I, sec. 8, cl. 12 provision that “The Congress shall have Power ... To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.” This was meant to prevent a standing army from threatening the liberty of the citizens: if money could not be appropriated for more than two years—that is, a single Congress—then the people, by voting in a new House majority, could defund an oppressive military.

HISTORICAL BACKGROUND

These constitutional provisions were not drafted on a blank slate. They were, instead, the fruits of hard-won experience, especially under the British Crown. Many of Parliament’s fights with the Crown, especially in the tumultuous seventeenth century, were centrally concerned with the interconnected powers to raise and spend money. Parliamentary consent was necessary for taxation, and if Parliament was going to hand over money to the Crown, it was going to demand a say in how that money was spent. Thus, as early as the thirteenth century, parliamentary grants of revenue came with appropriations provisions.²

This was especially salient to members of Parliament because the need for taxation most frequently arose in connection with war. The threat to subjects’ purses was thus coupled with the threat to their liberties posed by the raising of an army. A great many of the fights between the first two Stuart monarchs—James I and Charles I—and their Parliaments were occasioned by their desire to raise money to engage in foreign adventuring.³ Indeed, Charles I’s attempts to raise revenue *without* parliamentary authorization were significant landmarks on the road to the English Civil War, which ultimately led to his deposition and execution.

After the Restoration of the monarchy in 1660, there was a brief flowering of trust in the Crown, but war once again brought issues of taxing and spending to the fore. By 1665, when Charles II was seeking additional funds to fight the Second Anglo-Dutch War, provisions were inserted in the revenue legislation specifying that the money was only to be spent on the war and requiring detailed records open to public inspection.⁴ Many subsequent revenue bills in Charles’s reign had still more restrictive appropriations, and in 1667 Parliament even created what we would today call an independent auditing board, tasked with inspecting the books of royal officials and ensuring that money was being properly spent.⁵ In the 1670s and 1680s, two high-ranking royal

¹ See JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49, at 49 (2007).

² JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 46 (2017).

³ *Id.* at 46-47.

⁴ Taxation Act, 17 Car. 2, c. 1, §§ 5, 7 (1665).

⁵ See CHAFETZ, *supra* note 2, at 48-49. For the independent auditing board, see Account of Public Moneys Act, 19 & 20 Car. 2, c. 1 (1667).

officials—the Earl of Danby and Sir Edward Seymour—were impeached by the House of Commons, and in both cases the articles of impeachment specified that they had spent funds in a manner contrary to that specified by Parliament. In particular, both were accused of moving money around so as to maintain a standing army on English soil for longer than authorized by Parliament. Danby spent five years imprisoned in the Tower of London.⁶

When Charles II died in 1685, his brother James II came to the throne. In less than a year, he had thoroughly alienated Parliament, and he ensured that it did not meet again after November 1685. In 1688, he was overthrown in the Glorious Revolution.⁷

The Glorious Revolution is generally remembered as a turning point in the rise of parliamentary supremacy in England, but it is important to note that budgetary mechanisms played a key role in Parliament’s consolidation of power. The 1689 Bill of Rights specifically criticized James II for “Levying Money for and to the Use of the Crowne, by pretence of Prerogative for other time and in other manner than the same was granted by Parlyament,” and it went on to declare that such behavior was illegal.⁸ But this was not just an empty statement of principle: Parliament also took away nearly all of the Crown’s sources of revenue that lasted either for the life of the monarch or in perpetuity, and it largely replaced them with annual appropriations.⁹ The great English historian George Macaulay Trevelyan explained the significance thus: “[T]he Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament.... Every year, [William III] and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a quid pro quo in return for supply.”¹⁰ Moreover, post-Revolution Parliaments regularized the practice of specifically appropriating the funds that it granted to the Crown.¹¹ These were among the most important mechanisms in enabling the eighteenth-century rise of parliamentary sovereignty, cabinet government, and ministerial responsibility to Parliament—that is, the beginning of the democratization of the English and British constitutions.

This was not ancient history to the American founding generation. The eighteenth-century colonial legislatures, elected by the colonists but frequently at odds with governors and other officials appointed in London, looked to the seventeenth-century struggles between Parliament and the Stuart Crown as precedents.¹² Colonial assemblies generally appropriated funds in great detail and maintained substantial auditing powers. When the assemblies were displeased with

⁶ CHAFETZ, *supra* note 2, at 49-50. Technically, Danby was imprisoned on an attainder arising out of the same complaints, rather than the impeachment. Seymour was spared punishment when Charles dissolved Parliament before the Lords could vote on his impeachment.

⁷ *Id.* at 50-51.

⁸ 1 W. & M., sess. 2, c. 2, § 1, cl. 4 (1689); *id.* § 2, cl. 4.

⁹ CHAFETZ, *supra* note 2, at 51.

¹⁰ G.M. TREVELYAN, THE ENGLISH REVOLUTION, 1688-1689, at 96 (1965).

¹¹ CHAFETZ, *supra* note 2, at 51-52.

¹² See CHAFETZ, *supra* note 2, at 4-5; JACK P. GREENE, NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 189-99 (1994); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 20 (1996); JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 29 (1989). For specific colonial examples, see, e.g., WARREN M. BILLINGS, A LITTLE PARLIAMENT: THE VIRGINIA GENERAL ASSEMBLY IN THE SEVENTEENTH CENTURY 36-38 (2004); DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 55 (2005).

the behavior of royal officials, they frequently withheld or diminished their salaries. In 1751, the South Carolina House of Commons refused to pay the rent on the governor's house after he had exercised the royal veto one too many times.¹³

The assemblies understood that tugging on the purse strings was one of their most potent weapons. In response, London began paying some royal judges' salaries out of imperial revenues, which became one of the complaints lodged by the rebellious colonists in the Declaration of Independence. The King, they complained, "had made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." The assemblies were upset that the Crown was paying its own judges, because the power to pay—or to withhold payment—is the power to influence, if not control, and the assemblies wanted that power for themselves.

When it came time for the newly independent states to draft their own constitutions, they opted for powerful legislatures and weak governors.¹⁴ Unsurprisingly, then, legislatures were given significant control over revenue and appropriations. As the constitutional scholar Gerhard Casper put it, the early republican state constitutions "confirm our understanding that during the founding period, money matters were primarily thought of as a legislative prerogative."¹⁵

This was the background against which the constitutional provisions laid out above were drafted and ratified in 1787-88. The political elites of the founding generation were drawing on over two centuries of Anglo-American constitutionalism surrounding money matters, constitutionalism that encompassed a number of conflicts with which educated politicians of the day were intimately familiar. And even though the Constitution created an executive more powerful than any state executive at the time, it nevertheless evinced an unmistakable desire to keep budgetary matters firmly under legislative control.¹⁶

Indeed, the fact that Congress—and in particular the House of Representatives—would control the flow of money into and out of government coffers was the strongest Federalist response to Anti-Federalist arguments that the presidency was too powerful. When Patrick Henry worried in the Virginia ratifying convention that "Your President may easily become king. . . . The army is in his hands, and . . . the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master,"¹⁷ Madison answered by pointing to the fact that "[t]he purse is in the hands of the representatives of the people. They have the appropriation of all moneys."¹⁸ Hamilton likewise told the New York ratifying convention that "where the purse is lodged in one branch, and the sword in another, there can be no danger."¹⁹ Indeed, throughout the ratification

¹³ CHAFETZ, *supra* note 2, at 53-55.

¹⁴ See CHAFETZ, *supra* note 2, at 94-95; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 149 (rev. ed. 1998).

¹⁵ Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L. REV. 1, 8 (1990).

¹⁶ See CHAFETZ, *supra* note 2, at 56-57.

¹⁷ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 58-59 (Jonathan Elliot ed., 2d ed. 1907).

¹⁸ *Id.* at 393.

¹⁹ 2 *id.* at 349.

debates, we see the Federalists using congressional control over appropriations as a rejoinder to fears about presidential military might.²⁰

Once the Constitution was ratified and the new national government was up and running, the earliest Congresses made clear that they understood themselves to have special responsibility for matters of the purse. When it came time to set up the first three departments, two of them—Foreign Affairs and War—were expressly denominated “Executive department[s],” and their organic statutes specified that their heads were to carry out orders from the president.²¹ By contrast, the organic act for the Treasury Department did *not* refer to it as an “executive” department. Moreover, the act says nothing about taking direction from the president, but it does create specific reporting requirements to Congress.²² In short, the Treasury was understood as being not simply a creation of Congress, but a continuing arm of Congress.²³

What’s more, although the Constitution does not specify the *timeframe* for appropriations (except in the case of army appropriations), Congress’s practice from the very beginning has been to appropriate annually, as a way of maintaining ongoing granular control of how money is spent. The first appropriations statute was extremely brief—it simply divided the \$639,000 federal budget into four categories and provided no further specification.²⁴ But as nascent partisan competition picked up beginning in the mid-1790s, appropriations got more detailed, and the House, at Jeffersonian financial expert Albert Gallatin’s suggestion, created the Ways and Means Committee to lessen the House’s dependence on the Treasury for financial expertise.²⁵

In the nineteenth century, Congress passed two important statutes in response to significant threats to its power of the purse. The first is the Miscellaneous Receipts Statute, first passed in 1849,²⁶ which required (with some exceptions) that all money coming into the federal government be deposited in the Treasury. This was meant to ensure that executive officials could not maintain slush funds from which they controlled expenditures. Once the money is deposited in the Treasury, it is subject to the Appropriations Clause’s prohibition on its being withdrawn except “in Consequence of Appropriations made by Law.”

The second important statute is the Antideficiency Act, first passed in 1870.²⁷ The passage of the Antideficiency Act was prompted by the practice of “coercive deficiencies”: situations in which government departments would create obligations in excess of appropriations and thereby pressure Congress to make good on the department’s promises. The Act not only prohibited

²⁰ See Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 78-83 (1998) (collecting examples).

²¹ An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789); An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, 1 Stat. 49 (1789).

²² An Act to Establish the Treasury Department, ch. 12, §§ 1-4, 1 Stat. 65, 65-66 (1789).

²³ See CHAFETZ, *supra* note 2, at 58.

²⁴ Appropriations Act, ch. 23, 1 Stat. 95, 95 (1789).

²⁵ CHAFETZ, *supra* note 2, at 58-59.

²⁶ Ch. 110, § 1, 9 Stat. 398, 398-99 (1849). The current version is codified at 31 U.S.C. § 3302(b).

²⁷ Ch. 251, § 7, 16 Stat. 230, 251 (1870); Ch. 1484, § 4, 33 Stat. 1214, 1257-58 (1905). The current version is codified at 31 U.S.C. §§ 1341-42, 1349-50, 1517.

coercive deficiencies, it also forbade government officials from accepting any voluntary service not authorized by statute, except “for emergencies involving the safety of human life or the protection of property.”²⁸ An officer or employee of the government who violates the Antideficiency Act is subject to both administrative discipline (including possible termination)²⁹ and—uniquely among the fiscal statutes—criminal prosecution.³⁰

In the early twentieth century, Congress changed course somewhat. In a recognition of the budgetary imperatives of the growing administrative state, the Budget Act of 1921³¹ centralized budgetary authority in the executive, with the creation of the Budget Bureau in the Treasury Department (later moved into the Executive Office of the President and renamed the Office of Management and Budget (OMB)). At the same time, it created a partial congressional counterweight with the General Accounting Office (later renamed the Government Accountability Office (GAO)). Roughly contemporaneous cameral resolutions gave exclusive jurisdiction over appropriations legislation to the Appropriations Committees.³² Even with these counterweights, however, the 1921 Act has been understood as ushering in a period of “presidential dominance” of the budget process,³³ a period that lasted for half a century.

In the aftermath of Nixon-era abuses of the process, the Budget Act of 1974³⁴ (signed by President Nixon less than a month before his resignation) created a number of new counterweights to executive-branch budgetary authority: it created this Committee and its Senate counterpart; it created the Congressional Budget Office (CBO); and it established the “orthodox” process of budget resolutions structuring the appropriations process. Each of these can be understood as congressional capacity-building meant to blunt some of the executive advantage in budgeting, such that, post-1974, it is no longer the case that the White House dominates the budget process.³⁵

Finally, the Impoundment Control Act of 1974 was passed as part of that year’s Budget Act.³⁶ Responding to the explosive growth in policy impoundments under Nixon,³⁷ the Act laid out tight controls on both rescissions and deferrals of spending by the White House.³⁸ Congress’s meaning was clear: when it appropriates money, that money is to be spent for the purposes for which it was appropriated, and presidents’ ability to thwart those purposes by simply refusing to spend the money should be severely limited.

²⁸ 31 U.S.C. § 1342.

²⁹ *Id.* § 1349(a).

³⁰ *Id.* § 1350.

³¹ Budget and Accounting Act, Pub. L. No. 67-13, 42 Stat. 20 (1921).

³² See CHAFETZ, *supra* note 2, at 63.

³³ ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 14-18 (3d ed. 2007).

³⁴ Budget Act, Pub. L. No. 93-344, 88 Stat. 297 (1974).

³⁵ See CHAFETZ, *supra* note 2, at 63-64; SHICK, *supra* note 33, at 18-20.

³⁶ Pub. L. No. 93-344, §§ 1001-17, 88 Stat. 297, 332-39 (1974), *codified at* 2 U.S.C. §§ 681-88.

³⁷ See Allen Schick, *Whose Budget? It All Depends on Whether the President or Congress Is Doing the Counting*, in *THE PRESIDENCY AND THE CONGRESS: A SHIFTING BALANCE OF POWER* 96, 103 (William S. Livingston et al. eds., 1979).

³⁸ See CHAFETZ, *supra* note 2, at 64-66.

CONTEMPORARY CONCERNS

The power of the purse is tremendously important. From Parliament's struggles against the Stuart monarchs to the colonial assemblies' tussles with royal governors to debates over the direction of policy in today's administrative state, the power of the purse allows legislators to play a central role in governance. Crucially, the power of the purse is not just about taxing and spending. It also gives Congress a potent tool that it can use to secure policy concessions from the executive in collateral areas.

But the fact that the tool remains as potent as ever does not mean that it is always used to maximum effect. In particular, let me suggest six ways in which I think Congress may not currently be using its power of the purse as effectively as possible.

First, I'd like to suggest that, in conflicts with the executive, greater—and perhaps more regularized—use be made of provisions zeroing out funding for some specific office or even salary. It is unclear to me why the House would want to pay the salary of someone whom it has held in contempt and who has refused to purge that contempt. Indeed, I'd suggest that the standing rules of the House incorporate a provision providing a point of order against any appropriations bill that provides a salary to any executive officer who is currently in contempt of Congress. Of course, we all know that points of order can be waived, but they also have an anchoring effect.

Second, I would suggest that appropriations bills contain *non-severability* clauses. As it stands now, if the Office of Legal Counsel decides that a rider in an appropriations bill is unconstitutional, then the executive considers itself free to spend the appropriated funds without the restriction imposed by the rider.³⁹ In effect, the OLC's determination acts as a *de facto* line-item veto of the rider alone. A non-severability clause would significantly up the cost to the executive of making this determination: it would, in effect, say, "You can decide that this rider is unconstitutional, but in that case you lose the appropriation to which it was attached, as well." (On a related note, albeit one that is not budget-specific, I would recommend that OLC be required to disclose more of its work product and to do so in a more timely fashion, so that Congress and the public have adequate notice of such decisions.)

Third, I would suggest the addition of criminal penalties to the Impoundment Control Act, just as they already exist in the Antideficiency Act. This would signal that illegal impoundments are not some minor foible; they are a serious threat to the separation of powers, and an official—whether the Director of OMB or the president herself—who makes use of them is in peril of future prosecution.

Fourth, speaking of the Antideficiency Act, I would propose tightening the language surrounding the acceptance of voluntary services. In particular, OLC and OMB have interpreted "emergencies involving the safety of human life or the protection of property" *extremely*

³⁹ For published examples of OLC deciding just that, see, e.g., Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C., 2011 WL 4503236 (Sept. 19, 2011); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009).

capaciously.⁴⁰ The effect has been that, during lapses in appropriations, the executive can manipulate which government employees show up to work—either lessening the pain and thereby strengthening the president’s ability to hold out for his preferred outcome, or concentrating the pain in certain highly visible ways designed to make Congress look bad. Diminishing executive discretion in this area should be an important goal for Congress.

Fifth, both houses of Congress should engage in some serious capacity building. Recall that creating capacity within Congress was central to everything from early interbranch conflict in the 1790s to the creation of GAO in 1921 to many of the reforms in the 1974 Act. Without the capacity to find facts and conduct investigations on its own, Congress is necessarily at the mercy of what information the executive branch chooses to share; without the capacity to stage effective presentations of the information at its disposal, Congress is necessarily at a disadvantage vis-à-vis the executive with regard to public persuasion.⁴¹ And yet congressional capacity—as measured by the number of member and committee staff, the number of staff at nonpartisan institutions like CBO, GAO, and the Congressional Research Service, staff tenure in office, and staff pay—has been in decline for decades.⁴² Increasing congressional capacity across the board was a major recommendation of the American Political Science Association Task Force on Congressional Reform (on which I served),⁴³ and I believe it would pay significant dividends in strengthening Congress’s power of the purse, in particular.

Finally, I would argue for a return to the orthodox budgeting process—which is to say, the budget process as outlined by a combination of the 1921 and 1974 Acts. That process—and especially the 1974 components—was designed to make Congress an effective counterweight to the executive, and in particular to allow Congress to instantiate its policy views into law via the budget process. The turn away from budget resolutions and the full suite of appropriations bills, and toward continuing resolutions and omnibus bills, deprives Congress of the full benefit of the expertise and deliberation that happen in this Committee and the Appropriations Committee and makes it harder to use the process to press for meaningful policy change. I would add that the sometimes-expressed desire to move to two-year budget resolutions is not, in my view, an improvement. It would simply deprive Congress of an important lever of power in half of all years.

⁴⁰ See Auth. to Employ the Servs. of White House Office Emps. During an Appropriations Lapse, 19 Op. O.L.C. 235, 235 (1995); Auth. for the Continuance of Gov’t Functions During a Temp. Lapse in Appropriations, 5 Op. O.L.C. 1, 11–12 (1981).

⁴¹ On the importance of Congress’s institutional tools of public persuasion, see Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. (forthcoming 2020), available at <https://ssrn.com/abstract=3546976>.

⁴² See Josh Chafetz, *Delegation and Time ... And Staff*, REGULATORY REV. (Mar. 4, 2020), <https://www.theregreview.org/2020/03/04/chafetz-delegation-time-staff/>; Josh McCrain, *Congressional Staff Salaries Over Time* (May 31, 2017), <http://joshuamccrain.com/index.php/2017/05/31/congressional-staff-salaries-over-time/>; R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44682, STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006-2016 (2016); R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44688, CONGRESSIONAL STAFF: CRS PRODUCTS ON SIZE, PAY, AND JOB TENURE (2016); MOLLY REYNOLDS ET AL., BROOKINGS INST., VITAL STATISTICS ON CONGRESS ch. 5 (Mar. 2019), available at <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>.

⁴³ AM. POL. SCI. ASS’N TASK FORCE ON CONGRESSIONAL REFORM, TASK FORCE REPORT 8-16 (2019), available at <https://www.apsanet.org/Portals/54/APSA%20RPCI%20Congressional%20Reform%20Report.pdf?ver=2020-01-09-094944-627>.

What these five proposals have in common is that they do not aim to achieve any particular substantive goals. Rather, they aim at strengthening Congress *as an institution* by allowing and encouraging it to use the power of the purse to fuller effect. In doing so, they allow it to more fully inhabit the role that it was meant to play in our constitutional order.

Thank you.

JOSH CHAFETZ

Congress's Constitution

LEGISLATIVE AUTHORITY AND
THE SEPARATION OF POWERS

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The Power of the Purse

IT MAY APPEAR ODD TO BEGIN THE DISCUSSION of specific congressional powers with the power of the purse, given that this book focuses on mechanisms that are available to individual houses or members of Congress. After all, the power of the purse is exercised via legislation,¹ which requires both bicameralism and presentment.² These are among the more specific and determinate of constitutional provisions. But notice the converse of this fact: if directing money to be spent requires the concurrence of the House, the Senate, and the president (or sufficiently large House and Senate supermajorities),³ then either the House or the Senate, acting alone, can withhold money. Of course, this is true of any bill—the House and Senate are each absolute vetogates to the passage of legislation.⁴ But appropriations laws are different in that their passage is necessary to the continued functioning of the entire government. An annual budget process guarantees that, every year, each house of Congress has the opportunity to give meaningful voice to its priorities and its discontentments. As we shall see in this chapter, this tool has been underappreciated and, perhaps, underutilized.

Historical Development

Annual legislative appropriations have their roots in English parliamentary practice and became entrenched in the aftermath of the 1688–1689 Glorious Revolution. Before that, parliamentary control over appropriations had been sporadic, at best. As Maitland put it, “[T]hroughout the Middle Ages the king’s revenue had been in a very true sense the king’s revenue, and parliament had

but seldom attempted to give him orders as to what he should do with it.”⁵ This was in large part because most of the Crown’s revenue at that point came from what Blackstone termed “ordinary” sources—that is, either those sources of revenue that have “subsisted time out of mind in the crown; or else [have] been granted by parliament, by way of purchase or exchange for such of the king’s inherent hereditary rights.”⁶ Blackstone identified eighteen revenue sources that had traditionally been the Crown’s, including everything from ecclesiastical revenues to rents on the king’s demesne lands to feudal dues to custody of the persons and lands of idiots and lunatics.⁷ Extraordinary revenue, by contrast, consisted of various forms of taxation.⁸ The principle of parliamentary consent to taxation harkens back at least to Magna Carta’s requirement that any general aid be levied only by common counsel,⁹ and the requirement of consent by the Commons in particular dates back at least to the mid-fifteenth century.¹⁰ But the need for extraordinary revenue for a long time arose only in extraordinary circumstances—most commonly in wartime.

So long as Crown revenues came primarily from money due the king in his own person—that is, from ordinary sources—Parliament had little claim to dictate how it was to be spent. But as early as the thirteenth century, the nascent parliamentary body¹¹ asserted the right to appropriate extraordinary revenue;¹² in other words, if they were going to have to pay taxes, the magnates were going to have some say as to how those taxes would be spent.¹³ As Simon Payling has noted, it would be a mistake to view these medieval appropriations as evincing a right “of free refusal. For just as the representative nature of the Commons gave it this right of assent, the Crown had the right to demand a share of its subjects’ goods in times of common necessity.”¹⁴ It is, nevertheless, telling that, when asked to hand over money to the Crown, Parliament in the later Middle Ages not infrequently specified how that money was to be spent.¹⁵ To take just one example, in 1425 Parliament granted Henry VI certain extraordinary revenues “for the defense of the said Roialme of England”; in case that wasn’t clear enough, after specifying the revenues granted, the law repeats the stipulation: “The whiche grauntes of subsidies be made by the seid Commens, on the conditions that folwith. That is to sey, that it ne no part therof be beset ne spendid to no othir use, but oonly in and for the defense of the seid Roialme.”¹⁶

Under the Tudors, Parliament was far more deferential to royal authority over expenditures—in Maitland’s words, it “hardly dared to meddle with such matters.”¹⁷ But, as with so many other constitutional principles, conflict returned

with the ascent of the Stuarts.¹⁸ This was in no small part due to what Conrad Russell—speaking literally—called “the poverty of the Crown.”¹⁹ As Russell noted, the financial system facing Charles I on the eve of the Civil War “was, in essentials, that of the fourteenth century.”²⁰ But, by the seventeenth century, the king’s ordinary revenues were no longer even remotely sufficient to cover the normal costs of royal governance.²¹ And the policies of the first two Stuart kings did not help: James I’s “inability to manage money was notorious both in Scotland and in England,”²² and Charles I began his reign with a series of expensive and unnecessary foreign policy adventures, each of which ended poorly.²³ This put Charles, especially, at the mercy of Parliament for the granting of extraordinary revenues; the combination of newfound parliamentary assertiveness²⁴ and Charles’s intransigence and remarkable “ability to rub people up the wrong way”²⁵ made it that much harder for him to get what he wanted out of Parliament. When Parliament refused to grant him supply or demanded too many concessions for doing so, he resorted to prerogative taxation—that is, essentially, collecting extraordinary revenues *without* parliamentary authorization. This, of course, further enraged an already alienated Parliament, reinforcing a vicious cycle that led to the Civil War and, ultimately, to Charles’s beheading.²⁶

The Commonwealth accustomed people to the idea of “national finances managed by a parliamentary committee,”²⁷ and so it is not entirely surprising to see the practice of specific appropriations attached to large grants of supply pick up steam after the Restoration. Although, as Maitland notes, the practice was not invariably followed under Charles II,²⁸ the extent to which it was followed was remarkable. Several of the monarchy’s “ordinary” sources of revenue (in the Blackstonian sense of the word) were abolished at the Restoration;²⁹ they were replaced with certain grants made to Charles II for life and others made to him and his heirs in perpetuity.³⁰ These grants, as was only natural, came with no strings attached; they were, after all, simply making up for lost sources of unencumbered revenue. But these grants were also indicative of the prevailing trust between the restored monarch and his Parliament³¹—with the exception of three grants of supply in 1660 that were intended to pay and decommission the bulk of the Republican army and navy,³² no grant of extraordinary supply between 1660 and 1665 came with any sort of appropriation.³³

As was so often the case with the Stuarts, it was the debts created by foreign entanglements that began to cause friction with Parliament. The outbreak of the

Second Anglo-Dutch War in 1665 “squandered” the “initial goodwill on the parts of both king and parliament,”³⁴ and this mistrust is apparent in the sudden profusion of specific appropriations provisions in revenue bills. Charles II first came to Parliament in late 1664 seeking the princely sum of £2.5 million to fight the war over two and a half years.³⁵ In the course of requesting the aid, he felt compelled to dismiss the “vile Jealousy, which some ill Men scatter abroad . . . that, when you have given Me a noble and proportionable Supply for the Support of a War, I may be induced by some evil Counsellors . . . to make a sudden Peace, and get all that Money for My own private Occasions.”³⁶ This time, a majority of the House of Commons believed him—he was narrowly voted the funds he sought, without any specific appropriations attached.³⁷ But it seems the suspicion did not fully disappear; when in 1665 he sought and received an additional £1.25 million for the war, a clause was inserted in the revenue-raising legislation providing that “noe moneyes levyable by this Act be issued out of the Exchequer dureing this Warr but by such Order or Warrant mentioning that the moneyes payable by such Order or Warrant are for the service of Your Majestie in the said Warr respectively.”³⁸ Indeed, to make sure that the appropriation was adhered to, the act also required specific and meticulous recordkeeping³⁹ and insisted that the records be open for public inspection.⁴⁰ The next year, when it was clear that yet more money was needed for the war, Parliament passed a poll tax containing not only a specific appropriation of the funds for the war,⁴¹ and a right of anyone considering lending money to the Crown to inspect the books,⁴² but also a specific limitation: “[T]hirty thousand pounds and noe more of the money to be raised by this Act may be applyed for the payment of His Majesties Guards.”⁴³ This limitation was important—Charles’s personal guard was the first royal standing army in England,⁴⁴ and it was created not by statute but by royal prerogative (the first standing army in England was, of course, Cromwell’s New Model Army, parts of which were reformed into Charles’s guard).⁴⁵ Once Charles’s initial honeymoon period wore off, the maintenance of this force became a significant source of friction between the king and his people.⁴⁶ Indeed, the fear of a standing army under royal command was so pervasive that Charles soon felt the need to address it head-on: in a speech proroguing Parliament in July 1667, “His Majesty further said, He wondered what One Thing He had done since His coming into *England*, to persuade any sober Person that He did intend to govern by a Standing Army; He said He was more an *Englishman* than so.”⁴⁷

Perhaps because of this widespread suspicion of Charles's motives, the only other two revenue bills passed during the war contained appropriations provisions as well.⁴⁸ In one of those acts, Parliament directed that a sizable chunk of the revenue raised be used to pay seamen's wages, and it threatened the treasurer of the navy with treble damages if he diverted any of that money to any other purpose.⁴⁹ And to make sure that the funds were being used as directed, Parliament passed a law creating what we might anachronistically call an independent auditing board, charged with looking over the books of all of the officials who had received funds earmarked for the war and ensuring that the money was spent properly.⁵⁰

Consistent with Patterson's observation that trust between king and Parliament was briefly "rebuilt" after the end of the Second Anglo-Dutch War,⁵¹ grants of supply in the early 1670s did not generally come with appropriations provisions.⁵² But the goodwill quickly dissipated, as a result of the Third Anglo-Dutch War and the fear that Charles was too friendly toward the French. Beginning again in 1677, nearly every grant of extraordinary revenue for the remainder of Charles II's reign came with an appropriating clause, an auditing provision to ensure that the appropriation was followed, and stiff penalties for any Crown official caught putting the money to any unsanctioned use.⁵³ Nor were these idle threats: in 1678, the House of Commons impeached the Earl of Danby, one of Charles's highest officials. There were six articles of impeachment, the second of which charged Danby as follows:

[H]e did design the Raising of an Army, upon Pretence of a War against the *French* King; and then to continue the same as a Standing Army within this Kingdom: And an Army being so raised, and no War ensuing, an Act of Parliament having passed to pay off and disband the same, and a great Sum of Money being granted for that End, he did continue this Army contrary to the said Act, and misemployed the said Money, given for disbanding, to the Continuance thereof; and issued out of his Majesty's Revenue divers great Sums of Money for the said Purpose; and wilfully neglected to take Security from the Paymaster of the Army, as the said Act required; whereby the said Law is eluded, and the Army is yet continued, to the great Danger and unnecessary Charge of his Majesty and the whole Kingdom.⁵⁴

In other words, Danby was charged with violating a specific appropriations provision, and with doing so in order to maintain a standing army on English soil. Before the Lords could vote on Danby's impeachment, Charles pardoned

him, which led to a debate in Parliament as to whether a royal pardon was effective against impeachments. While that debate was still ongoing, both houses passed a bill of attainder against Danby, upon which he was arrested; he spent the next five years in the Tower of London.⁵⁵ While he was there, another royal official, Sir Edward Seymour, was impeached. The first article charged him with violating a specific appropriation that certain money was to be used only to build and outfit naval vessels; Seymour instead, as treasurer of the navy, lent some of that money for the purpose of maintaining the standing army past the date at which Parliament had ordered it disbanded, “whereby the said Two several Acts were eluded.”⁵⁶ The second article against Seymour likewise charged him with violating a specific appropriation.⁵⁷ A snap dissolution of Parliament in January 1681 ended the proceedings against Seymour before the Lords could vote.⁵⁸

After this dissolution, Charles, fed up with parliamentary interference, ruled without Parliament, and therefore without any parliamentary taxation, for the rest of his reign.⁵⁹ The overall trend in Charles’s reign is clear: once the initial honeymoon period wore off around 1665, Parliament was largely unwilling to grant him additional money without specifying in some measure how it was to be used. In addition, Parliament got into the habit of providing monitoring mechanisms and penalties for disobedient royal officials.

When Charles’s brother James came to the throne in 1685, the “Loyal Parliament”—so called because it was dominated by those loyal to the new, Catholic monarch—quickly confirmed all of the same life grants (that is, the substitutes for old sources of ordinary revenue) that had been made to his brother.⁶⁰ Shortly thereafter, it also granted him temporary customs duties on wine and vinegar,⁶¹ tobacco and sugar,⁶² and various cloths and liquors.⁶³ Although the last of these grants was meant to aid James in suppressing the Monmouth Rebellion,⁶⁴ none of them contained an appropriations provision. After the rebellion was suppressed, James, having been made financially comfortable by Parliament,⁶⁵ indicated that he had no intention of disbanding the standing army under his control.⁶⁶ This, combined with his determination to dispense with the Test Act (which prevented Catholics from holding public office),⁶⁷ turned even many of the Tories in Parliament against him,⁶⁸ and in November 1685, the House of Commons voted not to take up the matter of supply for the Crown.⁶⁹ A week later, James prorogued Parliament;⁷⁰ although it technically remained in existence until July 1687, it never sat again. There were to be no more parliaments in James II’s brief reign.

And then, of course, came the second deposition of a Stuart monarch in as many generations. Afterward, a large part of Parliament's goal in stitching together the Revolution Settlement was to ensure that monarchs would no longer feel free to rule without Parliament. To this end, Parliament attacked, among other things, what were seen as two mutually reinforcing pillars of monarchical authority in Restoration England: royal revenues and royal control over a standing army. The Bill of Rights specifically criticized James II both for "Levying Money for and to the Use of the Crowne, by pretence of Prerogative for other time and in other manner then the same was granted by Parlyament" and for "raising and keeping a Standing Army within this Kingdome in time of Peace without Consent of Parlyament."⁷¹ The Bill of Rights went on to prohibit both of these things, as well as to require the calling of frequent parliaments.⁷²

But even before the passage of the Bill of Rights, Parliament had begun to take more concrete steps to put these principles into action. First, it took away almost all of the remnants of the Crown's ordinary revenue. It began by repealing the hearth tax, which had been perpetual, and replacing it with an annually granted land tax.⁷³ Grants of tonnage and poundage and duties on woolen cloth, which had been granted for life, were now granted for only four years.⁷⁴ Only a relatively small amount of revenue was granted William and Mary for life or longer.⁷⁵ The importance of this move to annual appropriations cannot be overstated. Blackstone described the loss of the Crown's ordinary revenue as "fortunate[] for the liberty of the subject,"⁷⁶ and Trevelyan explains why: "[T]he Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament. William had no large grant made him for life. Every year he and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a quid pro quo in return for supply."⁷⁷ That is to say, the granting of revenue only for a short duration not only forced the regular calling of parliaments—something all four of the Stuart monarchs had tried, at one time or another, to do without—but also forced regular negotiation with Parliament, and those negotiations often led to concessions.

Moreover, after the Revolution, it became common practice (as it had been during much of Charles II's reign) for Parliament to specifically appropriate the funds that it raised for the Crown, and to threaten severe punishments upon any royal official using the funds for any other purpose.⁷⁸ Indeed, as Gill has noted, it was shortly after the Revolution that a proto-annual budget made its first

appearance, a natural outgrowth of the new royal need for annual parliamentary grants.⁷⁹ And this proto-budget as passed by Parliament was not always identical to the budget the Crown requested.⁸⁰ Moreover, throughout the reigns of William and Mary and of Anne, Parliament regularly created Commissions of Public Accounts, staffed by members of Parliament, to look into how the Crown was spending appropriated funds.⁸¹

The second, and related, key element of the Revolution Settlement for our purposes was parliamentary control over the military. As we have already seen, there was deep suspicion of standing armies on English soil, and many of the Restoration fights over finance were intimately bound up with fights over a standing army. Thus, in the Mutiny Act, which created a criminal offense of mutiny against the army, Parliament provided that the penalties would sunset within a year.⁸² Subsequent Mutiny Acts followed suit every year for nearly two centuries.⁸³ Each year, the monarchs were thus faced with a tripartite choice: they could disband the standing army; they could call a Parliament that year; or, if they did neither of those, they would run the risk of soldiers deserting without fear of consequence. If they chose either to disband the army or to call a Parliament, then they would be adequately constrained in their exercise of power.

What both of these elements of the Revolution Settlement have in common is their creation of an annual baseline. They did not require the monarch to call annual Parliaments, but they did make it very difficult for the monarch to exercise power without the aid of Parliament. The Revolutionary doctrine of parliamentary supremacy and the accompanying eighteenth-century rise of cabinet government and ministerial responsibility to Parliament⁸⁴ were the consolidation of these gains, and they inaugurated the modern British political system. But even after the advent and consolidation of parliamentary supremacy, Parliament continued to appropriate funds “with great minuteness,”⁸⁵ and violations of those appropriations are criminally punishable.⁸⁶ As Maitland put it, drawing together once again the two threads we have been discussing, “[E]ven at a pinch money appropriated to the navy cannot be applied to the army.”⁸⁷ While monarchs would continue to—and indeed still today continue to—have certain sums appropriated to their personal and household use (long called the “civil list,” and recently renamed the “Sovereign Grant”), these sums are granted by Parliament and are distinct from, and cannot be supplemented by, other taxpayer revenue.⁸⁸ The Revolution Settlement made clear that just as

Parliament must consent to the raising of funds so too it must consent to how, specifically, they are to be spent.

As we saw in the Introduction, seventeenth-century relations between Crown and Parliament made a big impression on the American colonists. It is, then, unsurprising that, in conjunction with the taxation power,⁸⁹ the colonial assemblies asserted a robust power of appropriation over all of the tax revenue they raised.⁹⁰ Indeed, despite the “extensive precautions” that officials in London took “to prevent that power from falling into the hands of the lower houses,”⁹¹ Jack Greene found that, by the middle of the eighteenth century, the appropriations power wielded by the lower houses of colonial assemblies was “greater even than that of the British House of Commons.”⁹² This was because the colonial assemblies, in addition to strictly appropriating funds, maintained a substantial auditing power.⁹³

Indeed, some colonial assemblies even successfully asserted the right to appropriate money without the approval of the royal governor or his council.⁹⁴ Consider the “Wilkes Fund Controversy” in South Carolina. In 1769, that colony’s House of Commons voted a £1,500 grant to the Society of the Gentlemen Supporters of the Bill of Rights in London.⁹⁵ The society was what we would today call a legal defense fund for John Wilkes,⁹⁶ who was a major thorn in the side of the London government and a cause célèbre among English radicals and American colonists alike (and who is discussed in greater detail in chapter 7).⁹⁷ When imperial authorities got word of the grant, they immediately instructed the royal governor in South Carolina to withhold royal assent from any revenue bill that did not specifically appropriate the money that it raised to *local* matters (that is, not funding enemies of the ministry in London); they also instructed that all revenue bills were to contain a provision levying significant penalties upon the treasurer if he disbursed any further money on the authority of the lower house alone.⁹⁸ The South Carolinians were outraged and responded with both a formal protest from the Commons and an increase in pro-Wilkes editorials and demonstrations.⁹⁹ The Commons also issued a report rejecting the instruction that money could be appropriated only to local purposes.¹⁰⁰ The resulting impasse between the assembly and royal officials consumed South Carolina politics until the breakout of the Revolution mooted the point.¹⁰¹ Indeed, so all-consuming was the controversy that “[n]o annual tax bill was passed in South Carolina after 1769 and no legislation at all after February 1771. For all practical purposes royal government in South Carolina broke

down four years earlier than it did in any of the other colonies.”¹⁰² It is important to note the radicalism of the colonists’ claim here: the Crown had not claimed any right to appropriate money on its own, nor had it denied that the assembly could attach detailed appropriations provisions to its revenue bills. The principle of legislative appropriation was sufficiently firmly established by this point that no one dared to deny it. All the Crown had insisted was that the consent of the governor and the council was *also* necessary in order to appropriate money. It was the lower house’s resistance to *sharing* its appropriating power that brought the functions of the South Carolina colonial government to a halt and caused an early end to royal authority in the colony.

Moreover, it was not simply in the granting of appropriations that colonial assemblies clashed with royal officials. The assemblies were also prepared to withhold funds when they did not like the direction of royal government. As early as the late 1670s, “foot-dragging on appropriations and other bills became a favored tactic in the burgesses’ struggles” with royal governors in Virginia.¹⁰³ In 1685, in the midst of a conflict with royal governor Baron Howard of Effingham over the details of an urban development bill, the House of Burgesses refused to pass an appropriations bill in an attempt to force Effingham’s hand. The governor responded by proroguing the assembly.¹⁰⁴ Similarly, in 1720 the Massachusetts assembly, in the course of a fight with Crown officials in the colony, refused appropriations for the customary celebrations of the king’s birthday, accession, and coronation. Perhaps more cruelly, in Herbert Osgood’s telling, “[t]he semi-annual appropriation of the governor’s salary was postponed until the close of the session and then it was reduced by one hundred pounds, though the depreciation of the currency in which it was paid was already great and was steadily increasing. The small grant to the lieutenant governor was also cut down to such an insignificant sum that he returned it in disgust.”¹⁰⁵ Two years later, when the commanding officer of the royal army in the colony did not follow the Massachusetts assembly’s orders, it refused to vote him any pay and thereby “compelled his discharge.”¹⁰⁶ In 1734, the South Carolina House of Commons, angry that the royally appointed chief justice had sided with the royally appointed governor in a dispute with the legislature, provided no salary at all for the chief justice.¹⁰⁷ The only response available to the Crown in such circumstances was to find another way to pay its officers—in 1735, the Crown began paying the chief justice’s salary out of its own funds.¹⁰⁸ Indeed, in order to avoid assembly domination of Crown officials, the Crown

used imperial revenues to pay its officers in a number of colonies,¹⁰⁹ leading to the Declaration of Independence's complaint that the king "has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."¹¹⁰ Even so, the colonial assemblies pulled what purse strings they did have: in 1751, the South Carolina House of Commons refused to pay the rent on the governor's house "because he had vetoed several of its favorite bills."¹¹¹ This use of the appropriations power to withhold the salaries or perks of royal officials was a strategy employed by assemblies across a number of colonies throughout the colonial period.¹¹² The power of colonial assemblies to appropriate—including their power to *refuse* to appropriate—thus provided significant leverage in policy disputes.

The Continental Congress under the Articles of Confederation had neither an executive to speak of (the "president" being nothing more than the presiding officer of the Congress)¹¹³ nor much by way of revenue (it could only requisition money from the states, not levy taxes itself, and the states proved stingy).¹¹⁴ Nevertheless, the Articles specifically allocated to Congress the power to appropriate money "for defraying the public expenses," so long as the delegations from at least nine states approved the appropriation.¹¹⁵ And, indeed, we see the Congress appropriating specific sums for everything from buying "good musquets"¹¹⁶ to reimbursing for troops' clothing that was "taken by the enemy"¹¹⁷ to building "a fœderal town."¹¹⁸

At the time the American Constitution was drafted, seven state constitutions contained explicit provisions requiring appropriations by the legislature,¹¹⁹ and nine states (including four that did not explicitly require legislative appropriations) provided that the state treasurer would be appointed by the legislature.¹²⁰ Given that the governments of Connecticut and Rhode Island were still operating under their seventeenth-century royal charters, this means that only one state that drafted a constitution between independence and the drafting of the federal Constitution, Georgia, did not include some explicit mechanism of legislative control over appropriations. The Georgia Constitution did, however, provide that "[e]very officer of the State shall be liable to be called to account by the house of assembly."¹²¹ And when constitutional revisions in the late 1790s made the office of the Georgia governor more powerful, an explicit appropriations provision was added to the 1798 state constitution.¹²² Gerhard Casper, summarizing the early republican state constitutions as a whole, concluded that they "confirm our understanding that during the founding period

money matters were primarily thought of as a legislative prerogative.¹²³ On the specific issue of appropriating the salaries of state officers, the states were split: some, like Massachusetts and South Carolina, required fixed salaries for both the governor and judges;¹²⁴ other states had no such provision. New Hampshire, in adjacent provisions, drew a clear distinction between the two types of office: “Permanent and honorable salaries shall be established by law for the justices of the superior court,”¹²⁵ but “[t]he president and council shall be compensated for their services from time to time by such grants as the general court shall think reasonable.”¹²⁶

As we have seen, it was a favorite practice of the Stuart monarchs to rule without Parliament whenever they came to find parliamentary interference with their plans tiresome. In addition to the English Bill of Rights’ requirement of frequent parliaments, the post-Revolutionary Parliament also kept the Crown dependent by moving much more heavily toward annually granted and specifically appropriated supply. The U.S. Constitution adopts a similar set of strategies. In place of the English Bill of Rights’ admonition that “parliaments ought to be held frequently,”¹²⁷ the American Constitution substitutes the more specific requirement that Congress assemble at least once per year.¹²⁸ The desire to control how money is spent, which we saw growing during the late Stuart period, coming to maturity in the eighteenth century, and asserted emphatically in colonial and early republican America, found its expression in the requirement—wholly uncontroversial at the Constitutional Convention¹²⁹—that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”¹³⁰ The concern with auditing the books is familiar, too; it had been clear for centuries that appropriations were ineffectual without some means of ensuring that the money was actually spent for the purposes for which it was appropriated. The Constitution also speaks to the issue of governmental officials’ salaries: it prohibits presidential salaries from being altered during a presidential term, judicial salaries from being diminished, and (in an amendment proposed in 1789 but not ratified until 1992) congressional salaries from “varying” until after the next election,¹³¹ but it does not otherwise prevent officers’ salaries from being reduced.

The Constitution moreover evinces discomfort with standing armies, a discomfort which we saw as early as the reign of Charles II and which appears

in the Declaration of Independence and in the republican constitutions of both Maryland and Virginia.¹³² Although the duration of most appropriations is not limited, the Constitution does specify that “no Appropriation of Money” for the purpose of “rais[ing] and support[ing] Armies . . . shall be for a longer Term than two Years.”¹³³ This is, in some sense, a parallel to what the English Parliament accomplished with the Mutiny Act: if the king or the president wants to keep a standing army in the field, he will have to negotiate with Parliament or Congress about it on a regular basis.¹³⁴ And, like the Mutiny Act, the American Constitution is concerned specifically with *armies*, not navies. Hence, the neighboring clause, which allows Congress to “provide and maintain a Navy,” places no time limit on naval appropriations.¹³⁵ The Third Amendment, which forbids the nonconsensual peacetime quartering of “Soldier[s],” not sailors, evinces a similar concern.¹³⁶ The reason sounds in domestic liberties: standing armies could be used to oppress the people and rule with an iron fist. In contrast, the navy was traditionally understood to face outward, serving to defend the political community from external threats and, less exaltedly, to engage in imperial expansion. In Blackstone’s words, the navy serves as “the floating bulwark of the island . . . from which, however strong and powerful, no danger can ever be apprehended to liberty.”¹³⁷ Madison, writing as Publius, echoed the sentiment, insisting that “our situation bears [a] likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties.”¹³⁸

Indeed, the separation of purse and sword was the Federalists’ strongest rejoinder to Anti-Federalist fears of a tyrannical president. When Patrick Henry worried that “Your President may easily become king. . . . The army is in his hands, and . . . the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master,”¹³⁹ Madison answered by pointing to the fact that “[t]he purse is in the hands of the representatives of the people. They have the appropriation of all moneys.”¹⁴⁰ Hamilton likewise told the New York ratifying convention that “where the purse is lodged in one branch, and the sword in another, there can be no danger.”¹⁴¹ Indeed, throughout the ratification debates, we see the Federalists’ using congressional control over appropriations as a rejoinder to fears about presidential military might.¹⁴²

Once the Constitution was ratified, one of the first tasks of the new Congress was setting up the three major departments of government—those of foreign

affairs, war, and the treasury. As Casper has noted, the Treasury was singled out for special treatment.¹⁴³ The organic statutes for both the Foreign Affairs Department and the War Department explicitly termed them “Executive department[s],” provided that the secretary was to carry out “such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States,” and created only a skeletal organization, consisting of a secretary and a chief clerk.¹⁴⁴ The organic statute for the Treasury Department, by contrast, did not refer to it as an “executive” department and specifically provided for the appointment of a comptroller, an auditor, a treasurer, a registrar, and an assistant to the secretary, in addition to the secretary himself.¹⁴⁵ Most strikingly, the duties of these various officers mention nothing about taking direction from the president; however, the duties of both the secretary and the treasurer specifically require them to report to the houses of Congress.¹⁴⁶ The First Congress, in Casper’s words, seems to have viewed the secretary of the treasury as “an indispensable, direct arm of the House in regard to its responsibilities for revenues and appropriations.”¹⁴⁷

Notwithstanding the fact that the text of the Constitution allows for indefinite appropriations in all contexts other than the army, the practice from the beginning of the Republic has largely been one of annual appropriations. The nation’s very first appropriations bill authorized the expenditure of sums not exceeding \$639,000 “for the service of the present year.”¹⁴⁸ Subsequent early appropriations bills followed suit.¹⁴⁹ These earliest appropriations laws, which essentially tracked estimates submitted to Congress by Treasury Secretary Alexander Hamilton,¹⁵⁰ were very brief and not very specific. Indeed, the first one divided that \$639,000 into only four categories: the civil list (not more than \$216,000), the War Department (not more than \$137,000), the discharging of “warrants issued by the late board of treasury” (not more than \$190,000), and pensions to invalids (not more than \$96,000).¹⁵¹ The second annual appropriations act, for 1790, introduced several innovations. Although it once again divided the total (just over \$394,000) into broad categories (this time, only three: the civil list, the War Department, and invalid pensions), it incorporated by reference Hamilton’s estimates, so that, for example, the civil list appropriation reads: “A sum not exceeding one hundred and forty-one thousand, four hundred and ninety-two dollars, and seventy-three cents, for defraying the expenses of the civil list, as estimated by the Secretary of the Treasury, in the statement annexed to his report made to the House of Representatives on the ninth day of January

last. . . .”¹⁵² The law also provided President Washington with a slush fund—up to \$10,000 “for the purpose of defraying the contingent charges of government”—but required that he report how he spent that money to Congress at the end of the year.¹⁵³

By the time we get to the mid-1790s, increasing tensions between the nascent Federalist and Jeffersonian factions led to an increase in the specificity of appropriations legislation.¹⁵⁴ In 1793, Representative William Branch Giles of Virginia introduced a series of resolutions censuring Hamilton for alleged violations of specific appropriations provisions.¹⁵⁵ The resolutions were handily defeated; it was not clear that Hamilton actually had violated the terms of the appropriations, and even if he had, the offense was minor—even Albert Gallatin, the staunch Republican financial expert, later wrote that Hamilton’s transgression had been “rather a want of form than a substantial violation of the appropriation law.”¹⁵⁶ Gallatin, however, remained a strong champion of legislative control over appropriations. As a freshman representative in 1795, he successfully pressed the House to lessen its reliance on the secretary of the treasury by establishing a Committee on Ways and Means that could develop its own expertise over matters of taxing and spending.¹⁵⁷ He also fought, with some success, for more specific and restrictive language in appropriations laws.¹⁵⁸ Gallatin would go on to be the United States’ longest-serving secretary of the treasury, holding the post for the entire Jefferson administration and most of the Madison administration. In 1809, Gallatin helped shepherd through Congress a law specifying that all warrants drawn upon the Treasury “shall specify the particular appropriation or appropriations to which the same shall be charged” and that “the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other.” The sole exception was a provision allowing the president, during a congressional recess and only upon the application of a department head, to move money appropriated for one purpose to another purpose within the same department.¹⁵⁹

It is true that some presidents, starting with George Washington in his response to the Whiskey Rebellion in 1794, have spent money without congressional appropriations in response to emergencies. But, as Richard Rosen has noted, the presidents who have done so have not claimed to be acting legally. Rather, they acknowledged their actions to be *ultra vires*, justified only by necessity, and they sought post hoc congressional authorization. Moreover,

they have faced serious congressional scrutiny and criticism when they have done so.¹⁶⁰

The nineteenth century would see two significant framework statutes meant to consolidate congressional control over appropriations.¹⁶¹ The 1849 Miscellaneous Receipts Statute requires, with some exceptions, that all money coming into the federal government be paid into the Treasury,¹⁶² so that departments could not place incoming funds into special accounts beyond congressional control. In 1870, in response to an increase in “coercive deficiencies”—situations in which an executive department created obligations in excess of appropriations, thus putting substantial moral pressure on Congress to make good on the departments’ promises¹⁶³—Congress passed the Anti-Deficiency Act, which made it illegal for “any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.”¹⁶⁴ In response to continuing evasions, the 1905 Anti-Deficiency Act expanded the prohibition to “any contract *or obligation* for the future payment of money in excess of . . . appropriations.” It prohibited any governmental department from accepting any voluntary service not authorized by law, except “in cases of sudden emergency involving the loss of human life or the destruction of property.” It also required agencies to apportion their appropriations over the course of the year so as to prevent them from spending all of their money at the beginning of the year and then coming to Congress for more. Finally, it provided that any officer violating the act’s terms would be summarily removed from office and could face fines or imprisonment.¹⁶⁵

From this historical sketch up to the beginning of the twentieth century, we can trace a few enduring themes in the battle for appropriations power. First, and most basically, is the question of *who* has the power to determine how public moneys will be spent. The Revolution Settlement cemented the transfer of that power from the Crown to Parliament in the mother country; appropriations control became a bone of contention between the Crown and the restive North American colonies in the eighteenth century; and the Constitution, in no uncertain terms, requires that appropriations be made by law. Even so, we have seen political contention over how specific those appropriations should be. And this leads us to the second theme: *What* exactly is contained in the appropriations power? Should appropriations statutes simply provide broad outlines and sum totals, or should they involve minute details? Should military expenditures

be treated differently from other types? And how intermingled should appropriations decisions be with substantive policy decisions? In particular, we have seen a variety of different approaches to the question of the extent to which it is permissible to reduce or zero-out an official's salary. Finally, there is the question of *when* appropriations happen. As we have seen, when the Crown's "ordinary" sources of revenue covered the vast majority of its expenses, appropriations were infrequent. Hereditary sources of revenue provided no opportunity for parliamentary involvement, and life grants did not provide much more. The shift to regular appropriations—beginning in earnest during the Restoration, accelerating dramatically after the Glorious Revolution, and always the case in the United States—was a significant one, but (with the exception of spending on the army) the U.S. Constitution is silent on the duration of appropriations.

Each of these issues has been the subject of significant constitutional contention because, as we shall see in the remainder of this chapter, each has wide-ranging constitutional implications.

The Structural Significance of Annual Appropriations

Consider first the timing of appropriations. Specific annual appropriations serve much the same function as sunset provisions in substantive legislation: both reset the legislative baseline.¹⁶⁶ Consider the following simple example: At time t_1 , Congress passes a law delegating a certain amount of power to an executive-branch agency. If that law has no sunset provision, then, in order to take that power back at time t_2 , Congress would need to pass a second law—which, of course, would require either presidential concurrence or two-thirds supermajorities in both chambers.¹⁶⁷ But the t_1 law empowers executive-branch actors (that is, the administrative agency) and thereby empowers the president, so it is unlikely that the president would consent to giving that power back. Under this scenario, Congress is likely stuck with the t_1 law. But now imagine that Congress had included a sunset provision, so that at t_2 , the delegation ceases to have any legal force. Inaction now favors congressional power; only if the House, Senate, and president once again agree to delegate the power will the executive be able to exercise it at t_2 . This, of course, is precisely why Parliament in 1689 included a sunset clause in the Mutiny Act, and it is why Congress in 2001 included a sunset provision in the PATRIOT Act.¹⁶⁸ (It also explains why the Bush administration opposed the PATRIOT Act's sunset provision.)¹⁶⁹

An appropriations provision can be understood simply as a specific delegation of spending authority. A long-term or indefinite appropriation significantly increases executive power. So long as the president is happy with the appropriation, she need only veto any attempt to change it. An annual appropriation, however, resets to zero in the absence of congressional action and thereby forces the president to negotiate with Congress each year, just as post-Glorious Revolution monarchs were forced to negotiate annually with Parliament. Thus, the larger the percentage of the budget that is subject to annual appropriations, the more bargaining chips Congress has at its disposal.

It is, then, interesting to note that the percentage of the federal budget subject to annual appropriations has been steadily declining for some time. The federal budget now consists of two essential components: mandatory spending and discretionary spending. Mandatory spending (also called “direct spending”) “involves a binding legal obligation by the Federal Government to provide funding for an individual, program, or activity.”¹⁷⁰ Once mandatory spending has been authorized, “eligible recipients have legal recourse to compel payment from the government if the obligation is not fulfilled.”¹⁷¹ Mandatory spending is precisely that spending that does not require annual appropriations. It is authorized in perpetuity, unless a new law is passed revoking it. The major elements of mandatory spending are entitlements and interest payments on debt.¹⁷² All other spending—including the funding for all federal agencies—is discretionary¹⁷³ and requires annual appropriations. For the 2016 fiscal year, 69 percent of the federal budget consisted of mandatory spending,¹⁷⁴ reflecting a long-running trend of growth in the percentage of the federal budget devoted to mandatory spending.¹⁷⁵ In other words, for 69 percent of the federal budget, Congress has ceded the institutional advantage of annual appropriations¹⁷⁶ and surrendered the institutional gains of 1689.

Moreover, even in the realm of discretionary spending, Congress has ceded the first-mover advantage to the president. As we have seen, in the earliest years of the Republic, Congress heavily deferred to Hamilton’s spending priorities and estimates. But with the rise of partisan competition, the House began to take a more active, specific role, including the 1809, 1849, and 1870 statutes discussed above. Indeed, when President Taft in 1912 submitted a proposed budget to Congress, Congress simply ignored it and went about preparing its own budget.¹⁷⁷ But the growth of the regulatory state put pressure on the fragmented manner in which Congress went about budgeting,¹⁷⁸ and the era of

“legislative dominance” of the budget process¹⁷⁹ came to an end shortly after World War I. Under the 1921 Budget and Accounting Act,¹⁸⁰ the president kicks off the annual appropriations process by submitting a budget proposal to Congress.¹⁸¹ Of course, Congress could always depart from the president’s proposal, but it is nevertheless the president’s proposal that serves as the starting point for negotiation and therefore exerts a disproportionate impact on the subsequent process.¹⁸² Furthermore, the 1921 act created the Budget Bureau in an effort to foster administrative coordination and centralization in budgetary matters. Although the Budget Bureau was initially located in the Treasury Department, its leadership from the beginning reported directly to the president.¹⁸³ When the Executive Office of the President was created in 1939, the bureau was moved into it,¹⁸⁴ and in 1970, it was renamed the Office of Management and Budget (OMB).¹⁸⁵ Throughout its history, the bureau/OMB has proven remarkably effective in centralizing and consolidating presidential control over the various component parts of the administrative state.¹⁸⁶ Congress was not wholly inattentive to the ways in which the 1921 act empowered the president: the act also created the General Accounting Office (GAO) as an independent agency headed by the comptroller general with the authority to investigate the receipt and spending of federal funds and report to both the president and Congress.¹⁸⁷ Moreover, at almost exactly the same time, both houses gave exclusive jurisdiction over appropriations legislation to their Appropriations Committees, thus creating a single power base in each chamber with appropriations expertise that might push back against the White House.¹⁸⁸ Still, the overall effect of these measures was clearly to inaugurate an era of “presidential dominance” of the budget process.¹⁸⁹

In the mid-1970s, in the context of the Watergate scandal and the deepening distrust of the presidency it engendered, Congress began to push back against this executive budgetary dominance. A series of minor challenges—including exempting certain agencies from OMB review and instead having them send their budget requests directly to Congress, successfully pressuring the White House to turn over raw estimates in addition to a completed budget proposal, and requiring Senate confirmation of OMB leadership¹⁹⁰—were prelude to the more sweeping changes in the Budget Act of 1974, signed into law less than a month before Nixon’s resignation.¹⁹¹ This act created the Budget Committees in both houses of Congress, as well as the Congressional Budget Office, in an attempt to provide counterweights to budget expertise at OMB. It also created

the process by which the two houses pass a Budget Resolution to guide the appropriations process—a counterweight to the budget proposal submitted by the president.¹⁹² Several subsequent statutes have created procedural mechanisms designed to limit budget deficits, but the essential structure of the budget process remains that of the combined 1921 and 1974 acts.¹⁹³

The other big budgetary fight leading up to the 1974 act was over “impoundment,” the refusal by the president to spend appropriated funds. Of course, Congress has the ability to authorize the expenditure of “up to” a certain amount, and, as we have seen, the nation’s earliest appropriations bills authorized the expenditures of “sum[s] not exceeding” certain amounts for certain purposes. (Indeed, the example that is sometimes cited as the first instance of impoundment—President Jefferson’s 1803 announcement to Congress that he would not spend an appropriated \$50,000 for gunboats on the Mississippi because the recent “favorable and peaceful turn of affairs” rendered them unnecessary¹⁹⁴—was in fact an instance of presidential adherence to an appropriation authorizing the expenditure of “a sum not exceeding fifty thousand dollars” for the purchase of “a number not exceeding fifteen gun boats.”)¹⁹⁵ But what about when the statute does not include such permissive language? Presidents had long taken the position that, in the words of Judson Harmon, attorney general to Grover Cleveland, appropriations are “not mandatory to the extent that you are bound to expend the full amount if the work can be done for less.”¹⁹⁶ Such “routine impoundments” have generally been uncontroversial.¹⁹⁷

More controversial have been “policy impoundments”—refusals to spend appropriated funds because the president disagrees with the policies to be pursued by such expenditures. Policy impoundments did not begin in any significant degree until World War II; Presidents Franklin Roosevelt, Truman, Eisenhower, Kennedy, and Lyndon Johnson all made use of them to a limited extent.¹⁹⁸ But there is consensus among observers that the Nixon administration engaged in the practice on such an expanded scale as to constitute a difference in kind, not simply in degree.¹⁹⁹ Allen Schick estimates that Nixon impounded approximately \$18 billion,²⁰⁰ and he was frequently unable to convince Congress to come to an agreement to cancel the appropriations.²⁰¹ Several would-be recipients of impounded funds filed lawsuits, and in 1975 the Supreme Court, in *Train v. City of New York*, unanimously held that the Environmental Protection Agency was required to disburse the full amount authorized under the Federal Water Pollution Control Act Amendments of 1972, notwithstanding

the president's order to the agency's administrator to disburse less money.²⁰² A series of lower-court decisions, dealing with impoundment of other funds, likewise found the impoundments impermissible.²⁰³

Congress also reacted swiftly. Title X of the 1974 Budget Act, commonly known as the Impoundment Control Act,²⁰⁴ created two tightly controlled kinds of impoundment authority: rescission, which meant that the president did not wish to spend the funds at all, and deferral, which meant that he wanted to delay spending them. In both cases, the president was required to send a message to Congress laying out his reasons and supporting evidence. For rescissions, the funds could then be withheld for forty-five days; if at the end of that period both houses had not passed a "rescission bill"—that is, a joint resolution rescinding the spending in accordance with the president's wishes—then the president was obligated to spend the funds.²⁰⁵ Deferrals were automatically effective, but the funds had to be released if either house adopted a resolution of disapproval.²⁰⁶ In the aftermath of the Supreme Court's decision in *INS v. Chadha*,²⁰⁷ invalidating legislative vetoes (about which, more in a few pages), a court held that the entire section of the act dealing with deferrals was invalid.²⁰⁸ Congress soon amended the statute to allow for deferrals without the possibility of congressional override, but only in three tightly constrained situations: "to provide for contingencies"; "to achieve savings made possible by or through changes in requirements or greater efficiency of operations"; or "as specifically provided by law."²⁰⁹ When its procedural ability to check deferrals was removed, Congress therefore responded by creating tighter substantive constraints on the deferral mechanism.

The Impoundment Control Act's checks have generally been effective, with studies finding that presidents have largely adhered to the act's requirement to report impoundments and that presidents have released funds when required to.²¹⁰ Moreover, presidential rescission proposals have been routinely rebuffed—between January 1983 and January 1989, Congress rejected 76 percent of Reagan's rescission requests, accounting for 98 percent of the funds that Reagan sought to impound.²¹¹ Even under unified government, rescission bills were no guarantee—Congress refused to pass them 29 percent of the time during the Carter administration (accounting for 31 percent of the funds that Carter sought to impound), despite Democratic control of both houses.²¹² A detailed study of rescission requests during the first year and a quarter of the act's existence—which was also the first year and a quarter of the Ford administration, with both

houses of Congress under Democratic control—found that Congress generally approved “routine rescissions involving no change in government policy,” while generally rejecting those that sought to accomplish some other policy objective.²¹³ Thus, the impoundment control provisions of the 1974 act, like its provisions structuring the congressional budget process, have been at least somewhat successful in their aim to counterbalance and constrain executive budgetary authority, as it had been growing since the 1921 act. (Whether they are successful in controlling deficits is another matter. In an attempt to reduce the deficit in the mid-1990s, the Republican-controlled Congress passed, and President Clinton signed into law, an enhanced presidential rescission power, the line-item veto.²¹⁴ Two years later, the Supreme Court struck it down.)²¹⁵ As several commentators have noted, the creation of these counterweights has “institutionalized and expanded budgetary conflict.”²¹⁶ And this increased budgetary capacity gives Congress more power to affect non-fiscal policy.

Spending Authority as Substantive Authority

Indeed, it is a mistake to think about the congressional power of the purse solely in terms of Congress’s power to determine spending levels. Control over spending also provides Congress with significant leverage to use in negotiations over other policies, leverage that we have already seen Parliament and colonial assemblies put to good use. Madison, writing as Publius, had such leverage in mind when he wrote that the “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”²¹⁷ As Charles Black colorfully put it, “[B]y simple majorities, Congress could . . . reduce the president’s staff to one secretary for answering social correspondence, and . . . , by two-thirds majorities, Congress could put the White House up at auction.”²¹⁸ Along the same lines, Congress could presumably eliminate the salaries of judicial clerks and secretaries or even (most cruelly of all) cut the Supreme Court’s air conditioning budget.²¹⁹ Indeed, as we have seen, refusing to pay the salaries of Crown officers and judges was a venerable tradition in the American colonies. The president himself,²²⁰ like federal judges,²²¹ is protected against salary diminution, but the Constitution

provides no other government official such protection, nor does it explicitly protect any other form of spending.

It is certainly not unknown for Congress to attach specific riders to appropriations measures forbidding the use of funds for specific purposes. As one observer complained at the end of the Reagan administration, “Congress discovered that it could intimidate the executive branch by uttering again and again the same seven words, ‘Provided, that no funds shall be spent. . . .’”²²² Of course, this “discovery” was hardly new to the 1980s—Congress had been prohibiting the use of funds for specific purposes (including for specific salaries) since the early days of the Republic. For example, an 1810 law, signed by President Madison, provided that certain diplomatic officials, in order to be entitled to their salary, had to have been confirmed by the Senate, even though no substantive legislation actually *required* that these officials be confirmed by the Senate.²²³ Such provisos, whether dealing with salaries or other forms of spending, became increasingly popular as the bureaucracy grew.²²⁴ Indeed, this power has on occasion been used to zero-out the salaries of specific officials or categories of officials.²²⁵ To take just one small example, an 1869 law provides that “no salary shall hereafter be allowed the marshal at” the Bangkok consulate.²²⁶ Critics of the practice charge that it violates separation-of-powers principles by allowing Congress to interfere in the internal functioning of the executive or judicial branches,²²⁷ but these criticisms presuppose that the allocation of power to each branch is static and predetermined. Understanding the interbranch allocation of powers as something that is continually being worked out through constitutional politics, by contrast, brings us to a very different view of Congress’s authority to zero-out specific programs or officials’ salaries: it is simply another one of the tools by which Congress can press for decision-making authority in substantive areas. (The Supreme Court weighed in on this topic in the 1946 case of *United States v. Lovett*,²²⁸ striking down a provision forbidding the use of any government funds to pay the salaries of three named individuals who some members of Congress believed were Communist “subversives.” Emphasizing that this was no “mere appropriation measure” and that the plaintiffs had been singled out “because of what Congress thought to be their political beliefs,”²²⁹ the Court held the provision to be an unconstitutional bill of attainder. Given the traditional scope of the congressional power of the purse, *Lovett* is most sensibly read as a narrow decision pushing back against the McCarthyite punishment of individuals for political beliefs unrelated to the

scope of their government duties, not as a broader limitation on Congress's power to attach defunding riders to appropriations bills.)²³⁰

Of course, perhaps Charles Black was wrong—perhaps simple majorities could not reduce the president's staff to a single social secretary because the president would veto any such appropriations bills. There would be an element of perversity in that: by doing so, the president would shut down (at least part of) the government, thereby reducing his staff to zero (or, more precisely, to only those personnel deemed "essential" and thus allowed to donate their time under the Anti-Deficiency Act).²³¹ But he would be banking on winning the ensuing public relations struggle, thereby forcing Congress (eventually) to back down and restore his full staff. Perhaps a president would even be willing to veto an appropriations bill simply because it zeroed-out the salary of one of his favored subordinates. After all, government shutdowns and near shutdowns are not entirely unknown in our system of government, with various policy disagreements motivating budgetary standoffs. For instance, after the 1878 elections gave Democrats control over both houses of Congress for the first time since the Civil War, they insisted on appropriations riders repealing Reconstruction-era laws protecting the exercise of the franchise and therefore the political power of the freedmen (and hence the Republicans) in the South.²³² President Hayes vetoed four separate appropriations bills in his insistence not to accept the riders.²³³ The Democrats had miscalculated, however, and Hayes's public standing grew with each veto.²³⁴ Eventually, the Democrats gave in and passed appropriations bills without the offending riders, with only days to spare before a shutdown. (Indeed, one part of the government did shut down—Hayes's final veto in the conflict was of a rider-laden appropriations bill for federal marshals, and Congress adjourned without passing a clean one.)²³⁵ Although Hayes kept his promise to serve only one term, the conflict worked to the Republicans' advantage, with Garfield winning the presidency in 1880 and Republicans retaking control of both houses.

More recently, the federal government has shut down eighteen times since 1976, with some shutdowns as brief as a day and one as lengthy as three weeks.²³⁶ In 1995 and 1996, the federal government shut down twice—once for less than a week and then again for three weeks—when President Clinton and the Republican-controlled Congress (led by Speaker Newt Gingrich) were unable to agree on a budget.²³⁷ While Congress was the clear institutional loser in the 1995–1996 government shutdowns,²³⁸ it would be a mistake (albeit a

common mistake)²³⁹ to infer from this example that Congress inevitably loses out in government shutdowns. The lesson of 1995–1996 was, rather, that a government shutdown throws interbranch conflict into sharp relief, increasing the public salience—and therefore the political stakes—of the fight. This dynamic presents both opportunities and pitfalls for Congress and the president alike. As Leon Panetta, the White House chief of staff during the 1995–1996 shutdowns, put it, “[I]t was a day-to-day crisis, and you never quite knew what the hell was going to happen.”²⁴⁰ A historian of the period concurs: “It was a high-risk gamble for both sides. No one really knew how the public would react.”²⁴¹ Indeed, news accounts during the shutdowns made it clear that the president was at risk both of losing in the public arena and of losing enough Democratic votes in Congress that his veto could no longer be sustained.²⁴² But, as several commentators have noted, Gingrich made both tactical mistakes, such as personalizing the fight and thereby appearing petty,²⁴³ and strategic ones, such as overreading his mandate to press for conservative fiscal policy.²⁴⁴ Had he been more skilled, or had Clinton been less so, we might well remember the 1995–1996 budget showdown as a win for Congress. But to the extent that Congress internalizes the narrative that it is bound to lose any budget showdown with the White House, it correspondingly lessens its bargaining power.

Indeed, the contrast between two recent budget showdowns pitting the Obama administration and the Democratic-controlled Senate against the Republican-controlled House of Representatives is illuminating. The 2010 midterm election was a good one for the Republican Party, giving it control of the House by a comfortable margin and significantly narrowing the margin in the Senate; President Obama referred to it as a “shellacking” for Democrats.²⁴⁵ House Republicans, led by Speaker John Boehner, claimed a mandate for a decidedly more conservative agenda than had predominated over the previous two years.²⁴⁶ Because no budget for fiscal year 2011 had ever been completed, the government was being funded by a series of short-term continuing resolutions.²⁴⁷ This meant that the new Republican House majority had an early crack at the budget.

By credibly threatening to allow the government to shut down, the House Republican leadership was able to bargain for a great deal of what it wanted.²⁴⁸ Not only did House Republicans successfully negotiate for more than \$38 billion in spending cuts that were opposed by the White House, they also used their budget power as leverage to achieve changes they sought in areas as

diverse as environmental law, education policy, and abortion access.²⁴⁹ They even took the opportunity to intervene in a separation-of-powers controversy, prohibiting the expenditure of funds for certain White House “czars.”²⁵⁰ Clearly, the House in this instance was able to use its power of the purse as a potent weapon in interbranch struggle.

By contrast, the 2012 election was a good one for the Democrats. Obama was handily reelected, and, despite having to defend more seats than the Republicans, the Democrats increased their margin in the Senate. Although they did not retake the House, they narrowed the Republicans’ margin of control.²⁵¹ Because of the centrality of fiscal issues in the campaign, Democrats could plausibly claim a mandate for their positions on taxing and spending.²⁵² Indeed, in the immediate aftermath of the election, the lame-duck Congress passed a fiscal compromise that was largely favorable to Democratic priorities.²⁵³ But as the next Congress progressed, Republicans became emboldened and sought to use the threat of a government shutdown as leverage in an attempt to secure significant changes in, if not outright repeal of, the Affordable Care Act. This time, Obama and Senate Democrats refused to compromise, and the government shut down on October 1, 2013. The Affordable Care Act was indeed unpopular, but even before the shutdown began, polls showed Americans overwhelmingly opposed shutting down the government in an attempt to secure changes to the law.²⁵⁴ The shutdown hurt the approval ratings of everyone involved, but congressional Republicans bore the brunt of it, with their poll numbers continuing to slide throughout the sixteen-day shutdown.²⁵⁵ With the stock market taking a hit²⁵⁶ and key conservative interest groups and opinion leaders abandoning the Republican position,²⁵⁷ House Republicans backed down and reopened the government almost entirely on Democrats’ terms.²⁵⁸ Presumably eager to avoid making the same tactical mistake again—and eager to focus on issues more advantageous to them, especially the glitch-laden launch of the Affordable Care Act’s website—Republicans agreed in December 2013 to a two-year budget resolution with spending levels above the previous baseline, precisely the sort of deal that they had previously resisted.²⁵⁹ In late 2015, with Republicans in control of both houses of Congress, they again agreed to a two-year budget resolution with higher spending levels.²⁶⁰

So, what was the difference between 2011, when Republicans used their control of the House to win both their preferred spending levels and significant changes in a variety of substantive policy fields, and 2013, when their effort to

use budgetary power to secure changes in the healthcare law backfired, forcing them to back off their healthcare demands *and* agree to higher levels of spending? In both cases, the Republicans controlled only the House, with the Senate and the presidency in Democratic hands. But, of course, the political contexts were quite different. The 2010 election was, in large part, a repudiation of the previous two years of unified Democratic government. Had the Republicans successfully used the two intervening years to build trust with the voters, they might have captured unified government themselves in 2012. But they did not; instead, the pendulum swung back toward the Democrats. Little wonder, then, that Republicans were able to get a better deal in the politically friendly climate of 2011 than in the politically hostile one of 2013. And by injudiciously picking a budgetary fight over the Affordable Care Act in 2013, the House not only harmed its ability to get what it wanted in the present, it also created a political dynamic in which its best move was to agree to a series of *two-year* budget resolutions, thereby surrendering some of the power that comes with the annual budget process in even-numbered years (although, of course, the crafting of the individual appropriations bills remained an annual affair).

The crucial lesson of these budget fights is not that the president always wins; as 2011 showed, he does not. The lesson is that who wins—which is to say, who has more say in determining the government's spending levels and priorities, and who is able to leverage that budgetary power to gain power over other policy areas—is significantly affected by the artfulness with which the various actors engage in the public sphere. And the artfulness with which political actors exercise the power that they do have, in turn, significantly affects their future public-sphere engagements.

Of course, none of this is limited to the power to *shut down* the government—that is simply the limiting case. The power of the purse is continually exercised in small-bore ways as well, and there, too, the purse strings come with significant substantive power. Although modern appropriations bills usually allocate lump sums to various agencies and departments, those appropriations bills are generally “accompanied by detailed committee reports giving the specific amounts the department or agency should spend on each program within the budget account.”²⁶¹ Given that the appropriations committees retain the power to specify detailed spending levels in the statutory language itself—and given that they retain the power to drastically cut those spending levels in

future years or to attach unpleasant riders—the departments and agencies “treat those committee reports as the equivalent of legislation.”²⁶² As Democratic representative (and chairman of the House Appropriations Committee) David Obey put it in 2009, “For any administration to say, Well, we will accept the money, but ignore the limitations is to greatly increase the likelihood that they will not get the money.”²⁶³ (This was especially noteworthy because the administration that Obey and a number of Democratic colleagues were implicitly threatening was that of a fellow Democrat, Barack Obama.)²⁶⁴ When agencies do wish to “reprogram” funds (in other words, spend funds in ways that are consistent with the legislation but inconsistent with the committee report), they generally report to the relevant appropriations subcommittee and receive permission to do so.²⁶⁵ Moreover, when Congress wishes to express its displeasure about an agency’s performance, a not-so-gentle tug on the purse strings can be quite effective—in fiscal years 2014 and 2015, the budget of the Internal Revenue Service was slashed, which was clearly meant to convey congressional (and especially House Republican) displeasure at the agency’s enhanced scrutiny of the tax-exempt status of certain political groups.²⁶⁶

Such pressures seem generally effective: there is a growing body of evidence suggesting that the federal bureaucracy is broadly responsive to congressional preferences.²⁶⁷ As Morris Fiorina provocatively put it, “Congress controls the bureaucracy, and Congress gives us the kind of bureaucracy it wants.”²⁶⁸ And budgets are one (although, as later chapters indicate, certainly not the only one) of the primary mechanisms by which Congress both directly controls and, perhaps more importantly, signals its priorities to bureaucratic agencies.²⁶⁹ Indeed, the desire to signal to an agency that congressional appropriators intend to keep a close eye on some particular policy area is likely responsible for the continuing popularity of “legislative vetoes,” provisions in delegating legislation that authorize one house of Congress (or sometimes both houses acting jointly, but without presentment to the president) to override some type of agency action. The Supreme Court held legislative vetoes unenforceable in the 1983 case *INS v. Chadha*.²⁷⁰ Nevertheless, between 1983 and 1999, Congress passed more than four hundred laws containing provisions authorizing legislative vetoes.²⁷¹ As Lou Fisher noted in the classic study of this phenomenon, although presidents routinely denigrate legislative-veto provisions in signing statements, “agencies have a different attitude. They have to live with their

review committees, year after year, and have a much greater incentive to make accommodations and stick by them. . . . Agencies cannot risk . . . collisions with the committees that authorize their programs and provide funds."²⁷² Indeed, as Jessica Korn has noted, when Reagan administration officials initially took *Chadha* as an indication that they could ignore appropriations directives contained in committee reports (but not statutory language), threats from Congress to tie the administration's hands more explicitly forced them to beat a hasty retreat.²⁷³ Nor is this budgetary pressure limited to the executive branch: Eugenia Toma's research suggests both that Congress uses the Supreme Court's budget to signal approval or disapproval of the general thrust of the Court's rulings and that the Court responds to these signals by bringing its decisions more in line with Congress's wishes.²⁷⁴

Furthermore, it is not simply the fact or the level of funding that is important; the form that funding takes also has important substantive implications. As Nick Parrillo has meticulously demonstrated, the long nineteenth century saw a large-scale transformation in official compensation, from a fee- and bounty-driven model to a salary model.²⁷⁵ Broadly speaking, this development has two important implications for congressional power. First, the shift from fees paid by the recipients of government services to salaries meant a greater level of congressional control over government officials. After all, pulling the purse strings is only effective to the extent that the officials in question are paid out of the relevant purse; to the extent that they were paid by the recipients of their services, they naturally tended to take a customer-service attitude rather than an attitude governed by congressional priorities—and this was even more so when fees were not only paid by the recipients of government services but actually *negotiated* between the recipient and the provider.²⁷⁶ Salarization allowed Congress, using precisely the types of mechanisms discussed in this chapter, to exert greater control. Second, and relatedly, the transition from fees and bounties to salaries had the effect of shifting officials' priorities, even when the fees and bounties had been paid by Congress all along. Thus, as Parrillo notes, the late nineteenth-century transition of federal prosecutors from a system of fees for trial (with a bonus for convictions) to a salary incentivized prosecutors to exercise more discretion, allowing some petty illegalities to go unpunished.²⁷⁷ Even holding amounts constant, the form of payment was intentionally used as a tool to influence how prosecutors went about their duties.

Funding, and Defunding, the Military

Finally, let us return briefly to a theme that has run throughout this chapter: the connection between the power of the purse and one of the most potent substantive powers, that of the sword. We have seen the two bound tightly together in the constitutional imagination from the Restoration through the Revolution Settlement, into the New World, and in the constitutional ratification debates. It is worth contemplating briefly the ways in which they interact today.

In 2004, Secretary of Defense Donald Rumsfeld remarked, “You go to war with the Army you have, not [necessarily] the Army you might want or wish to have at a later time.”²⁷⁸ What Rumsfeld might have added is that, in many circumstances, the president’s decision whether or not to go to war in the first place as well as her decision about what sort of war to prosecute are made in light of the military she has. And, of course, what kind of military she has is a function of the sort of military that Congress chooses to fund. For instance, a Congress that wants to curtail the military’s nuclear capacities can refuse to fund them, as Congress did in 2004 when it eliminated funding for a nuclear bunker-busting bomb, known as the Robust Nuclear Earth Penetrator.²⁷⁹ Likewise, a Congress that wanted to limit presidents’ ability to project American power overseas could choose to reduce or eliminate funding for things like aircraft carriers and long-range bombers.²⁸⁰ Future presidents’ decisions about whether or not to initiate a conflict, and how to do so, would be made in the shadow of those past appropriations decisions.

Once a conflict has been initiated, we frequently hear claims that the presidential decision to send troops into the field essentially forces Congress to fund the operation. But despite this conventional wisdom, Congress has, in fact, repeatedly used its power of the purse to end, limit, or forestall military action. As public opinion began to turn against the Vietnam War, Congress enacted two such restrictions. First, the 1971 Cooper-Church Amendment provided that no funds could be used “to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.”²⁸¹ And the 1973 Case-Church Amendment—which passed with veto-proof, bipartisan majorities in both houses—effectively cut off all funding for the war: “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by

United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.²⁸² Nixon, despite resisting the amendments, complied with them.²⁸³ Likewise, the Byrd Amendment in 1993 forbade the use of any funds for security operations in Somalia after March 31, 1994, and required that the troops currently engaged there be under the command of American officers.²⁸⁴ President Clinton complied with the requirement, withdrawing U.S. troops in early March 1994. In the Obama administration, Congress repeatedly frustrated the president's goal of closing the detention camp at Guantanamo Bay Naval Base by forbidding the expenditure of any funds to transfer or release into the United States any prisoner held at the camp who is not a U.S. citizen.²⁸⁵ Similarly, Congress has since 1986 routinely included an appropriations rider forbidding the payment of direct assistance to any foreign government whose elected head of state has been deposed in a military coup.²⁸⁶ A recent study suggests that post-Cold War administrations have generally, albeit imperfectly and grudgingly, complied with this restriction.²⁸⁷ And the existence of the restriction has posed problems when administrations do not want to comply: after the Egyptian coup in 2013, the Obama administration attempted to avoid the restriction by not making any formal declaration that a coup had occurred. The result was "extensive, and critical, media coverage," which eventually pressured the administration into partial, but meaningful, compliance.²⁸⁸

Of course, sometimes such funding restrictions are outright ignored. Despite the sweeping language of the Boland Amendments prohibiting the use of funds to support the Nicaraguan Contras,²⁸⁹ the Reagan administration did indeed arrange to provide funds to the Contras. But the political fallout was severe, with the Iran-Contra scandal dominating the last two years of the Reagan administration in ways that had collateral consequences for other aspects of Reagan's agenda, such as the Bork nomination, discussed in chapter 1. Indeed, as Mariah Zeisberg has persuasively argued, a more deft handling of the scandal and resulting hearings by congressional Democrats might well have resulted in impeachment proceedings.²⁹⁰ The Boland Amendments' specific prohibition on funding the Contras raised the political stakes, and the Reagan administration's flouting of that prohibition forced it to pay a significant price.

In other respects, however, Congress has used its power of the purse in ways that foster the expansion of executive military power. As Fisher has demonstrated, secret funding for the intelligence community has grown explosively since World War II, in some tension with the Constitution's requirement that a

“Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”²⁹¹ Under the Central Intelligence Act, the CIA, with the approval of OMB, is authorized to take money from other government agencies for its own purposes.²⁹² The result is doubly misleading: Congress (and the public) can only guess at the scope of the intelligence budget, and the budgets of other agencies appear inflated because some of the money appropriated to them is subsequently funneled to the intelligence agencies.²⁹³ In the aftermath of revelations that U.S. intelligence agencies have been carrying out a massive domestic surveillance program,²⁹⁴ Congress may wish to reconsider the budgetary latitude that those agencies have been given. As we have seen, pulling the purse strings tighter has been an effective means of reining in executive power throughout Anglo-American constitutional history.

The aim of this chapter has been to survey the extent of the authority available to Congress under the rubric of “the power of the purse.” By tracing the historical development of this power, we’ve been able to see the ideas and goals that have motivated it and to get a sense of what makes its use in a given context efficacious or inefficacious. Some developments—like the increasing percentage of the budget devoted to mandatory spending, certain ill-conceived budgetary showdowns, and the growth of the secret intelligence budget—have diminished congressional power. Others—like more opportunely timed budgetary showdowns, the development of budgetary expertise and institutions in Congress, and the pushback against impoundment—have increased congressional power. Crucially, as stressed in part I of this book, sensitivity to political context, to how certain actions will play out in the public sphere, is crucial to understanding and anticipating the effects of any given exercise of the power of the purse. The growth of mandatory spending may curtail congressional power, but that certainly does not mean that an indiscriminate slashing of entitlements will redound to Congress’s benefit. Budget brinkmanship by House Republicans was so successful in 2011 that it won them a wide range of changes in substantive law, but similar brinkmanship in 2013 was such a failure that their best move was to agree to a two-year budget resolution, thus preemptively giving up that source of leverage the following year. And the success (from Congress’s point of view) of the Cooper-Church, Case-Church, and Byrd amendments does not mean that Congress will inevitably come out smelling like roses when it cuts off funds for military conflicts. The relevant factor in all of these cases is

the politics of the day, and how well the houses and members of Congress are able to use these tools to engage in the public sphere. Like all potent tools, the power of the purse can be used well or poorly.

Moreover, the highly potent versions of these powers, although attention grabbing, are the limiting cases. But while government shutdowns, or even the zeroing-out of some particular program or salary, may be rare, the existence of those extremes—and the ability of Congress plausibly to threaten to go to those extremes—means that all other interbranch bargaining takes place in their shadow. The power of the purse, we have seen, can cast a very long shadow.

Chapter 3. The Power of the Purse

1. See U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . .”).
2. See *id.* § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President. . .”).
3. See *id.* (providing that a two-thirds vote in each house can override a presidential veto).
4. On the concept of “vetogates,” see William N. Eskridge Jr., *Vetogates*, *Chevron Preemption*, 83 *Notre Dame L. Rev.* 1441, 1444–48 (2008). I refer to bicameralism and presentment as *absolute* vetogates because, unlike some of the items to which Eskridge points (e.g., substantive congressional committees, the House Rules Committee, and conference committees), they are not simply major legislative chokepoints, but are, in fact, hardwired constitutional requirements that cannot be circumvented.
5. F. W. Maitland, *The Constitutional History of England* 309 (H. A. L. Fisher ed., 1908). Kantorowicz locates the seeds of English modernity in the growing recognition of “the difference between the king as a personal liege lord and the king as the supra-individual administrator of a public sphere—a public sphere which included the fisc that ‘never died’ and was perpetual because no time ran against it.” Kantorowicz puts the genesis of that recognition in the thirteenth century. Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* 191 (rev. ed. 1997). But it was still quite a bit longer—a bit more than four centuries, in fact—until the publicness of the public fisc became fully dominant over the private revenues of the king-as-liege-lord.
6. William Blackstone, 1 *Commentaries* *271; see also Maitland, *supra* note 5, at 433–34.
7. See generally William Blackstone, 1 *Commentaries* *272–96.
8. *Id.* at *297 (“[E]xtraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies. . .”).
9. See J. R. Maddicott, *The Origins of the English Parliament, 924–1327*, at 119–26 (2010); Maitland, *supra* note 5, at 66–68.
10. See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* 69 (1999).
11. For an excellent, detailed history of the development of Parliament in its earliest years, see Maddicott, *supra* note 9. For an extremely abbreviated summary, see Josh Chafetz, “*In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation*”: *Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 *Yale J.L. & Human.* 181, 183–85 (2013).
12. See Maddicott, *supra* note 9, at 108, 182.
13. See *id.* at 182 (“Behind appropriation lay the view that taxes should be spent on the purposes for which they had been granted. . .”).
14. Simon Payling, *The Later Middle Ages*, in *The House of Commons: Seven Hundred Years of British Tradition* 48, 51 (Robert Smith & John S. Moore eds., 1996).
15. See Maitland, *supra* note 5, at 184 (noting several instances of this in the fourteenth century and that it “continued with increasing elaboration under the Lancastrian kings”); Theodore F. T. Plucknett, *Taswell-Langmead’s English Constitutional History, from the Teutonic Conquest to the Present Time* 160, 169, 186 (11th ed. 1960).
16. 4 *Rot. Parl.* 302 (1425).

17. Maitland, *supra* note 5, at 309. This calls upon the traditional idea of “Tudor despotism”—the cowing of Parliament by the Tudor monarchs. As I have argued elsewhere, the picture is somewhat more complicated than that; while the Crown certainly maintained the upper hand in matters of state throughout the Tudor period, innovations in parliamentary procedure in the late Tudor period paved the way for parliamentary pushback against the Stuart monarchs. See Chafetz, *supra* note 11, at 188–95. But issues of taxing and spending were among those great matters of state in which the Tudors can rightly be said to have, in Wallace Notestein’s memorable phrase, held “the whip hand.” Wallace Notestein, *The Winning of the Initiative by the House of Commons* 13 (1926).
18. See, e.g., Chafetz, *supra* note 11, at 195–201 (tracing the Stuart reaction against the innovations in parliamentary procedure made in the late Tudor period and the parliamentary attempts to hold firm to their institutional gains).
19. Conrad Russell, *The Causes of the English Civil War* 161–84 (1990).
20. *Id.* at 166.
21. See Conrad Russell, *King James VI & I and His English Parliaments* 16–18 (Richard Cust & Andrew Thrusch eds., 2011) (noting England’s precarious financial situation upon James I’s ascension).
22. Russell, *supra* note 19, at 171.
23. See Josh Chafetz, *Impeachment and Assassination*, 95 Minn. L. Rev. 347, 369–83 (2010).
24. See generally Chafetz, *supra* note 11.
25. Russell, *supra* note 19, at 185.
26. I have traced this vicious cycle in some detail in Chafetz, *supra* note 23, at 369–84; Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1100–16 (2009).
27. Maitland, *supra* note 5, at 310; see also Plucknett, *supra* note 15, at 428 (“The complete authority exercised by the commons, during the late Civil War and Commonwealth, over the whole receipts and expenditure of the national treasury had accustomed the House to regulate the disbursement of the sums which they granted. . .”).
28. See Maitland, *supra* note 5, at 310 (“This precedent [of specific appropriations] was followed in some, but not all, . . . cases under Charles II.”).
29. See Tenures Abolition Act, 12 Car. 2, c. 24 (1660); see also Maitland, *supra* note 5, at 434–35.
30. See Subsidy Act, 12 Car. 2, c. 4 (1660) (life grant); Excise Act, 12 Car. 2, c. 23 (1660) (life grant); Tenures Abolition Act, 12 Car. 2, c. 24, § 14 (1660) (perpetual grant); Arrears of Excise Act, 13 Car. 2, stat. 1, c. 13 (1661) (perpetual grant); Taxation Act, 14 Car. 2, c. 10 (1662) (perpetual grant); Wine Licenses Act, 22 & 23 Car. 2, c. 6 (1670) (perpetual grant).
31. See Annabel Patterson, *The Long Parliament of Charles II*, at 5 (2008) (noting the “joyful subservience” of Parliament to the new monarch upon the Restoration).
32. Taxation Act, 12 Car. 2, c. 9 (1660); Taxation Act, 12 Car. 2, c. 20 (1660); Taxation Act, 12 Car. 2, c. 27 (1660). On the disbanding of the Republican army generally, see Joyce Lee Malcolm, *Charles II and the Reconstruction of Royal Power*, 35 Hist. J. 307, 315–17 (1992).

33. See Taxation Act, 12 Car. 2, c. 21 (1660); Taxation Act, 12 Car. 2, c. 29 (1660); An Act for a Free and Voluntary Present to his Majesty, 13 Car. 2, stat. 1, c. 4 (1661); Taxation Act, 13 Car. 2, stat. 2, c. 3 (1661); Taxation Act, 15 Car. 2, c. 9 (1663); Taxation Act, 16 & 17 Car. 2, c. 1 (1664).
34. Patterson, *supra* note 31, at 89.
35. See *id.* at 73–74.
36. 11 H.L. Jour. 625 (Nov. 24, 1664).
37. Taxation Act, 16 & 17 Car. 2, c. 1 (1664); see also 8 H.C. Jour. 568 (Nov. 25, 1664) (noting the narrow, 172 to 102, vote in favor of granting the funds).
38. Taxation Act, 17 Car. 2, c. 1, § 5 (1665).
39. *Id.* (requiring “That there be provided and kepte in His Majestyes Exchequer (to witt) in the Office of the Auditor of the Receipt one Booke or Register in which Booke or Register all Moneyes that shall be paid into the Exchequer by this Act shall be entered [& registered] apart and distinct from the Moneyes paid or payable to Your Majestie on the before mentioned Act and from all other Moneyes or Branches of Your Majesties Revenue whatsoever[.] And that alsoe there be one other Booke or Registry provided or kepte in the said Office of all Orders and Warrants to be made by the Lord Treasurer and Under Treasurer or by the Comissers of the Treasury for the time being for payment of all and every Summe and summes of money to all persons for moneyes lent Wares or Goods bought or other payments directed by His Majestie relateing to the service of this Warr.”) (first alteration in original indicating interlineation on the parliamentary roll).
40. *Id.* § 7 (providing that any person willing to lend money to the Crown is to have “accesse unto and [the right to] view and peruse all or any of the said Bookes for their Information of the state of those Moneyes”).
41. Taxation Act, 18 & 19 Car. 2, c. 1, § 33 (1666).
42. *Id.* § 34.
43. *Id.* § 31.
44. See Brian Harwood, *Chivalry & Command: 500 Years of Horse Guards* 37–39 (2006); Clifford Walton, *History of the British Standing Army* 1–14 (London, Harrison & Sons 1894).
45. See John Childs, *The Army of Charles II*, at 13–20 (1976).
46. When Clarendon was impeached in 1667, the first proposed article of impeachment charged that he “designed a Standing Army to be raised, and to govern the Kingdom thereby.” 9 H.C. Jour. 16 (Nov. 6, 1667). This article, however, did not pass the House of Commons.
47. 12 H.L. Jour. 114 (July 29, 1667). For an account of the rumors that were swirling at the time to the effect that Charles meant to rule by standing army, see Patterson, *supra* note 31, at 78–80.
48. Taxation Act, 18 & 19 Car. 2, c. 13, § 6 (1667); Taxation Act, 19 & 20 Car. 2, c. 6, §§ 23–25 (1668).
49. Taxation Act, 18 & 19 Car. 2, c. 13, §§ 10–11 (1667).
50. Accounts of Public Moneys Act, 19 & 20 Car. 2, c. 1 (1667).
51. Patterson, *supra* note 31, at 89.
52. See Taxation Act, 22 Car. 2, c. 3 (1670); Taxation Act, 22 Car. 2, c. 4 (1670); Taxation Act, 25 Car. 2, c. 1 (1672). A counterexample can be found in Taxation Act, 22 & 23 Car.

- 2, c. 3, § 51 (1670) (appropriating the supply for repayment of debts and “other the occasions aforesaid,” which presumably refers to the broad statement of purposes set out in section 1 of the act).
53. Taxation Act, 29 Car. 2, c. 1, §§ 35, 39, 43–47 (1677); Taxation Act, 29 & 30 Car. 2, c. 1, §§ 58, 61–66, 68 (1678); Taxation Act, 30 Car. 2, c. 1, §§ 15, 19, 22–23, 74 (1678); Billeting Act, 31 Car. 2, c. 1, §§ 21–22 (1679). One customs duty statute from this period was only partially appropriated, Taxation Act, 29 Car. 2, c. 2, §§ 4–8 (1677) (setting aside one-fifth of the raised funds as security for loans to the Crown), and another customs duty statute made no appropriation at all, Taxation Act, 30 Car. 2, c. 2 (1678).
54. 9 H.C. Jour. 562 (Dec. 21, 1678).
55. Mark Knights, *Osborne, Thomas, First Duke of Leeds (1632–1712)*, Oxford Dict. Nat’l Biog. (2008), <http://www.oxforddnb.com/view/article/20884>.
56. 13 H.L. Jour. 724 (Dec. 21, 1680).
57. *Id.*
58. D. W. Hayton, *Seymour, Sir Edward, Fourth Baronet (1633–1708)*, Oxford Dict. Nat’l Biog. (2009), <http://www.oxforddnb.com/view/article/25162>.
59. See Plucknett, *supra* note 15, at 438.
60. See Revenue Act, 1 Jac. 2, c. 1 (1685).
61. Taxation Act, 1 Jac. 2, c. 3 (1685).
62. Taxation Act, 1 Jac. 2, c. 4 (1685).
63. Taxation Act, 1 Jac. 2, c. 5 (1685).
64. *Id.* § 1.
65. It is worth noting that this financial comfort was not primarily due to the few extraordinary grants that Parliament had made him; rather, it was primarily due to economic developments that greatly increased the value of the perpetual grants to the Crown that had been made at the Restoration in lieu of the more traditional sources of ordinary revenue. See Steve Pincus, *1688: The First Modern Revolution* 160 (2009).
66. See Maitland, *supra* note 5, at 328 (finding that “James seems to have had above 16,000 men”); Plucknett, *supra* note 15, at 440 (putting the number of regular troops at James’s command at “about 20,000”); see also Pincus, *supra* note 65, at 181–83 (discussing James’s determination to maintain a standing army).
67. See 9 H.C. Jour. 755–56 (Nov. 9, 1685) (reprinting James’s speech to the houses of Parliament announcing his intention to dispense with the Test Act); Plucknett, *supra* note 15, at 440–43.
68. See Pincus, *supra* note 65, at 182 (“Many English people loathed and feared James II’s modern army. Within months the new standing army had become a national grievance.”).
69. 9 H.C. Jour. 757 (Nov. 13, 1685).
70. 9 H.C. Jour. 761 (Nov. 20, 1685).
71. Bill of Rights, 1 W. & M., sess. 2, c. 2, § 1, cl. 4–5 (1689).
72. *Id.* § 2, cl. 4, 6, 13.
73. The hearth tax had been granted to Charles II, his “Heires and Successors.” Taxation Act, 14 Car. 2, c. 10, § 1 (1662). It was repealed by Hearth Money Act, 1 W. & M., c. 10 (1689). The land tax—which was originally a general property tax but was quickly limited to real property to ease enforcement—was inaugurated in Taxation Act, 1 W. &

M., c. 20 (1689); *see also* Taxation Act, 4 W. & M., c. 1 (1692); Taxation Act, 5 W. & M., c. 1 (1693); etc. The land tax took on its final form as a tax on real property only—the form that it was to maintain throughout the eighteenth century—early in the reign of Queen Anne. *See* Land Tax Act, 2 & 3 Ann., c. 1 (1703); Land Tax Act, 3 & 4 Ann., c. 1 (1704); etc.

Historians have written incisively about the political economy arguments attending the shift from a hearth tax to a land tax. *See, e.g.*, Pincus, *supra* note 65, at 384–85; Colin Brooks, *Public Finance and Political Stability: The Administration of the Land Tax, 1688–1720*, 17 *Hist. J.* 281 (1974). For our purposes here, however, it is the *duration* of the tax that is more interesting than its form—after all, the perpetual hearth tax could have been replaced with a perpetual land tax. (Indeed, this is precisely what Pitt’s government did at the end of the eighteenth century. Perpetual Land Tax Act, 38 Geo. 3, c. 60 (1798).) Parliament’s choice to make it a one-year grant from the Glorious Revolution through the end of the eighteenth century is clearly, in itself, meant to be a form of parliamentary control over the government.

74. Taxation Act, 2 W. & M., c. 4, § 1 (1690). As Gill notes, these were “the mainsprings of government finance.” Doris M. Gill, *The Treasury, 1660–1714*, 46 *Eng. Hist. Rev.* 600, 610 (1931).
75. *See, e.g.*, Taxation Act, 2 W. & M., c. 3 (1690).
76. William Blackstone, 1 *Commentaries* *296.
77. G. M. Trevelyan, *The English Revolution, 1688–1689*, at 96 (1965).
78. *See* Maitland, *supra* note 5, at 310, 433; Plucknett, *supra* note 15, at 428; *see also* Gerhard Casper, *Appropriations of Power*, 13 *U. Ark. Little Rock L. Rev.* 1, 4 (1990).
79. *See* Gill, *supra* note 74, at 610–22.
80. *See id.* at 614–20.
81. Clayton Roberts, *The Growth of Responsible Government in Stuart England* 261 (1966).
82. 1 W. & M., c. 5, §§ 2, 8 (1689).
83. *See, e.g.*, Mutiny Act, 2 W. & M., sess. 2, c. 6 (1690); Mutiny Act, 4 W. & M., c. 13 (1692); *see also* Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice Since 1689 Especially in North America* 8 & n.9 (1967) (noting that, “[e]xcept only during the years 1698–1702, an annual Mutiny Act was always in force” between 1688 and 1879).
84. *See* Roberts, *supra* note 81, at 245–378; Basil Williams, *The Whig Supremacy, 1714–1760*, at 30–40 (rev. C. H. Stuart, 2d ed. 1960).
85. Maitland, *supra* note 5, at 385.
86. *Id.* at 446.
87. *Id.* at 446 n.1; *see also* A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 203 (Liberty Fund 1982) (8th ed. 1915) (“[N]ot a penny of revenue can be legally expended except under the authority of some Act of Parliament.”).
88. Maitland, *supra* note 5, at 310 (“Before the end of William’s reign, a certain annual sum is assigned to the king for his own use; we begin to have what is afterwards called a civil list; the residue of the money is voted for this purpose and for that—so much for the navy, so much for the army.”); *see also id.* at 435 (referring to this process as “the gradual separation of . . . the king’s private pocket-money from the national revenue”); William Blackstone, 1 *Commentaries* *321–22 (describing the civil list).

89. See Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689–1776*, at 51 (1963).
90. *Id.* at 87–107.
91. *Id.* at 87.
92. *Id.* at 107.
93. *Id.*
94. See *id.* at 88, 90, 96, 98, 102.
95. Jack P. Greene, *Bridge to Revolution: The Wilkes Fund Controversy in South Carolina, 1769–1775*, 29 *J. Southern Hist.* 19, 20–21 (1963).
96. *Id.* at 20.
97. On Wilkes’s fights with both houses of Parliament, see Josh Chafetz, *Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* 155–58 (2007); for a discussion of American colonial lionization of Wilkes, see Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 *Wm. & Mary Q.* 373 (1963); for a discussion of Wilkes as a libertarian hero, see Chafetz, *supra* note 23, at 389–90 & n.334; for a full account of Wilkes’s life, see Arthur H. Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (2006).
98. Greene, *supra* note 95, at 26.
99. *Id.* at 26–28.
100. *Id.* at 28–29.
101. *Id.* at 26–50.
102. *Id.* at 52.
103. Warren M. Billings, *A Little Parliament: The Virginia General Assembly in the Seventeenth Century* 183 (2004).
104. *Id.* at 187–88.
105. 3 Herbert L. Osgood, *The American Colonies in the Eighteenth Century* 156–57 (1958).
106. See Everts Boutell Greene, *The Provincial Governor in the English Colonies of North America* 191–92 (1966).
107. 4 Osgood, *supra* note 105, at 123.
108. More precisely, it charged the salary to the quit-rent fund. *Id.* at 124. On the survival of this feudal charge on land in the American colonies, see Beverley W. Bond Jr., *The Quit-Rent System in the American Colonies*, 17 *Am. Hist. Rev.* 496 (1912).
109. See Greene, *supra* note 89, at 129–47.
110. Declaration of Independence, para. 11 (1776).
111. Greene, *supra* note 89, at 138.
112. See Greene, *supra* note 106, at 173–75 (giving further examples).
113. Articles of Confederation, art. 9, § 5.
114. *Id.* art. 8; see also E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776–1790*, at 220–50 (1961); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 275–96, 337–42 (1979).
115. Articles of Confederation, art. 9, §§ 5–6.
116. 4 *Journals of the Continental Congress* 223 (Mar. 21, 1776) (appropriating \$12,000 for that purpose).
117. 7 *id.* at 294 (Apr. 23, 1777) (appropriating “115 30/90 dollars” for that purpose).

118. 27 *id.* at 704 (Dec. 23, 1784) (appropriating up to \$100,000 for that purpose).
119. Del. Const. of 1776, art. 7 (The president “may draw for such sums of money as shall be appropriated by the general assembly, and be accountable to them for the same. . . .”); Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. 11 (“No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer’s notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.”); N.H. Const. of 1784, pt. 2, Executive, para. 14 (“No monies shall be issued out of the treasury of this state, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurers’ notes, or for the payment of interest arising thereon) but by warrant under the hand of the president for the time being, by and with the advice and consent of the council, for the necessary support and defence of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.”); N.C. Const. of 1776, art. 19 (“[T]he Governor, for the time being, shall have power to draw for and apply such sums of money as shall be voted by the general assembly, for the contingencies of government, and be accountable to them for the same.”); Penn. Const. of 1776, Frame of Gov’t, § 20 (The president and council “may draw upon the treasury for such sums as shall be appropriated by the house [of representatives]. . . .”); S.C. Const. of 1778, art. 16 (providing “that no money be drawn out of the public treasury but by the legislative authority of the State”); Vt. Const. of 1786, ch. 2, § 11 (The governor and council “may draw upon the Treasurer for such sums as may be appropriated by the House of Representatives.”). An earlier Vermont republican constitution contained a similar provision. *See* Vt. Const. of 1777, ch. 2, § 18.
120. Md. Const. of 1776, art. 13; Mass. Const. of 1780, pt. 2, ch. 2, § 4, art. 1; N.H. Const. of 1784, pt. 2, Secretary, Treasurer, Commissary-General, &c., para. 1; N.J. Const. of 1776, art. 12; N.Y. Const. of 1777, art. 22; N.C. Const. of 1776, art. 22; Penn. Const. of 1776, Frame of Gov’t, § 9; S.C. Const. of 1778, art. 29; Va. Const. of 1776, para. 17. Vermont had an elected treasurer, but if no candidate received a majority, then the legislature appointed one. Vt. Const. of 1786, ch. 2, § 10.
121. Ga. Const. of 1777, art. 49.
122. Ga. Const. of 1798, art. 1, § 24. *See also* Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 *Mil. L. Rev.* 1, 62–64 (1998) (noting the pattern that, when governors became stronger, state constitutions became more explicit about legislative control over appropriations).
123. Casper, *supra* note 78, at 8; *see also* Rosen, *supra* note 122, at 57 (“Late eighteenth century Americans unquestionably understood that the powers to tax and spend were legislative, not executive, powers.”).
124. Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. 13; S.C. Const. of 1778, art. 37.
125. N.H. Const. of 1784, pt. 2, Executive, para. 17.
126. *Id.* para. 16.
127. Bill of Rights, 1 *W. & M.*, sess. 2, c. 2, § 2, cl. 13 (1689).
128. *See* U.S. Const. art. I, § 4, cl. 2; *id.* amend. XX, § 2.

129. See Rosen, *supra* note 122, at 69–73.
130. U.S. Const. art. I, § 9, cl. 7.
131. *Id.* art. II, § 1, cl. 7 (presidential salaries); *id.* art. III, § 1 (judicial salaries); *id.* amend. XXVII (congressional salaries).
132. See Declaration of Independence, para. 13 (1776) (complaining that the king “has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures”); Md. Const. of 1776, Dec. of Rts., art. 26 (“[S]tanding armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature.”); Va. Const. of 1776, Bill of Rts., § 13 (“[S]tanding armies, in time of peace, should be avoided, as dangerous to liberty; and . . . in all cases the military should be under strict subordination to, and governed by, the civil power.”).
133. U.S. Const. art. I, § 8, cl. 12.
134. Hamilton, writing as Publius, made this point explicit when he noted that building an army “so large as seriously to menace” the liberties of the people would take a great deal of time. Given the requirement of biennial congressional elections and the prohibition on military appropriations lasting for more than two years, he thought it improbable that an oppressive standing army could be constructed. *The Federalist No. 26*, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
135. U.S. Const. art. I, § 8, cl. 13.
136. *Id.* amend. III.
137. William Blackstone, 1 *Commentaries* *405.
138. *The Federalist No. 41* (James Madison), *supra* note 134, at 260–61.
139. 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 58–59 (Jonathan Elliot ed., 2d ed. 1907).
140. *Id.* at 393.
141. 2 *id.* at 349.
142. See generally Rosen, *supra* note 122, at 78–83.
143. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239–42 (1989); see also House Comm. on House Admin., *History of the United States House of Representatives, 1789–1994*, H.R. Doc. No. 103-324, at 23–24 (1994).
144. An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789); An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, 1 Stat. 49 (1789).
145. An Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).
146. *Id.* §§ 2, 4, 1 Stat. at 65–66.
147. Casper, *supra* note 143, at 241; see also Ralph Volney Harlow, *The History of Legislative Methods in the Period before 1825*, at 132–33 (1917) (“It seems evident that [in creating the Treasury] Congress planned to create an agent, not for the executive, but for itself.”).
148. Appropriations Act, ch. 23, 1 Stat. 95, 95 (1789).
149. See, e.g., Invalid Pensioners Act, ch. 24, 1 Stat. 95, 95 (1789); Appropriations Act, ch. 4, 1 Stat. 104, 104 (1790); Appropriations Act, ch. 6, 1 Stat. 190, 190 (1791); Appropriations Act, ch. 3, 1 Stat. 226, 226 (1791).
150. See Casper, *supra* note 78, at 10.
151. Appropriations Act, ch. 23, 1 Stat. 95, 95 (1789).

152. Appropriations Act, ch. 4, § 1, 1 Stat. 104, 104 (1790).
153. *Id.* § 3, 1 Stat. at 105.
154. See Casper, *supra* note 78, at 12–14 (tracing this process).
155. See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 165–67 (1997); Casper, *supra* note 78, at 14–15.
156. Albert Gallatin, *A Sketch of the Finances of the United States* (1796), in 3 *The Writings of Albert Gallatin* 69, 111 (Henry Adams ed., Philadelphia, J. B. Lippincott & Co. 1879). As David Currie explains it, for Hamilton to have followed Giles’s understanding of the law “would apparently have required him to transport one sum of money home from Europe and another back to take its place.” Currie, *supra* note 155, at 166.
157. See Raymond Walters Jr., *Albert Gallatin: Jeffersonian Financier and Diplomat* 88–89 (1957); Norman K. Risjord, *Partisanship and Power: House Committees and the Powers of the Speaker, 1789–1801*, 49 *Wm. & Mary Q.* 628, 640–43 (1992).
158. See Casper, *supra* note 78, at 16–17.
159. An Act Further to Amend the Several Acts for the Establishment and Regulation of the Treasury, War, and Navy Departments, ch. 28, § 1, 2 Stat. 535, 535–36 (1809). See also Noble E. Cunningham Jr., *The Process of Government under Jefferson* 114–17 (1978) (describing Gallatin’s role in the passage of this legislation and its place in his larger financial thinking).
160. See generally Rosen, *supra* note 122, at 103–10.
161. For extensive analyses of these statutes and their modern forms, see Kate Stith, *Congress’ Power of the Purse*, 97 *Yale L.J.* 1343, 1363–77 (1988).
162. Miscellaneous Receipts Statute, ch. 110, § 1, 9 Stat. 398, 398–99 (1849).
163. See Stith, *supra* note 161, at 1371–72.
164. Appropriations Act, ch. 251, § 7, 16 Stat. 230, 251 (1870).
165. Anti-Deficiency Act, ch. 1484, § 4, 33 Stat. 1214, 1257–58 (1905) (emphasis added).
166. Rebecca Kysar has attacked sunset provisions on a number of fronts. See Rebecca M. Kysar, *Lasting Legislation*, 159 *U. Pa. L. Rev.* 1007, 1051–65 (2011). The merits of Kysar’s particular attacks are beyond the scope of this chapter, but it should be noted that none of her arguments addresses the separation-of-powers implications of sunset provisions, which are my focus here.
167. See U.S. Const. art. I, § 7, cl. 2.
168. See USA PATRIOT Act, Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295 (2001) (“[T]his title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.”). As Republican Representative Dan Lungren put it, “An integral aspect of the logic of sunsets was that they would entail a vigorous exercise of the oversight function of Congress. . . . The pendency of an expiration date provides additional incentives for the exercise of oversight and scrutiny.” Daniel E. Lungren, *A Congressional Perspective on the Patriot Act Extenders*, 26 *Notre Dame J.L. Ethics & Pub. Pol’y* 427, 432 (2012).
169. See Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 *Geo. Wash. L. Rev.* 1145, 1172, 1178–79 (2004) (noting that the Bush administration preferred a bill lacking a sunset clause).
170. Staff of S. Comm. on the Budget, 105th Cong., *The Congressional Budget Process: An Explanation* 5 (Comm. Print 1998); see also Allen Schick, *The Federal Budget: Politics*,

Policy, Process 57 (3d ed. 2007) (“Direct spending is not controlled by annual appropriations but by the legislation that establishes eligibility criteria and payment formulas, or otherwise obligates the government.”).

171. Staff of S. Comm. on the Budget, *supra* note 170, at 5.
172. *See id.* at 5–6, 56.
173. *See id.* at 6 (“Most of the actual operations of the Federal Government are funded by discretionary spending.”).
174. *See* Office of Mgmt. & Budget, *Budget of the U.S. Government, Fiscal Year 2017*, at 120 tbl.S-4 (2016) (recording that, for fiscal year 2016, total spending was projected to be \$3.952 trillion, of which \$2.727 trillion would go to mandatory spending and net interest).
175. *See* Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 *Harv. J. on Legis.* 297, 314 (1998) (noting the considerable growth in mandatory spending since the 1960s).
176. *See* Alan L. Feld, *The Shrunken Power of the Purse*, 89 *B.U. L. Rev.* 487, 492 (2009) (noting that the prevalence of “permanent fiscal legislation limits Congress’s ability to review and change priorities through the appropriation process”).
177. *See* Louis Fisher, *Constitutional Conflicts between Congress and the President* 195 (5th ed. 2007).
178. Allen Schick, *Whose Budget? It All Depends on Whether the President or Congress Is Doing the Counting*, in *The Presidency and the Congress: A Shifting Balance of Power* 96, 97 (William S. Livingston et al. eds., 1979).
179. Schick, *supra* note 170, at 10–14.
180. Pub. L. No. 67-13, 42 Stat. 20.
181. 31 U.S.C. § 1105(a) (2006) (“On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year.”).
182. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *Stan. L. Rev.* 573, 589 (2008) (noting the “first-mover advantage [that] . . . accrues from the President’s ability to propose an initial budget”); *see also* Fisher, *supra* note 177, at 195, 199 (noting the executive-empowering features of the 1921 act); Schick, *supra* note 170, at 14 (suggesting that the 1921 act ushered in an era of “presidential dominance” of the budget process).
183. Budget and Accounting Act of 1921 §§ 207–17, 42 Stat. at 22–23.
184. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 *St. Louis U. L.J.* 931, 945–46 (1999).
185. Fisher, *supra* note 177, at 196.
186. *See generally* Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2272–2319 (2001); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *Yale L.J.* 2182 (2016).
187. Budget and Accounting Act of 1921 §§ 301–17, 42 Stat. at 23–27.
188. *See* Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* 89–94 (2001).
189. *See* Schick, *supra* note 170, at 14–18.
190. *See* Schick, *supra* note 178, at 99–100.

191. Pub. L. No. 93-344, 88 Stat. 297.
192. On the 1974 act, see Fisher, *supra* note 177, at 202–04; Schick, *supra* note 170, at 18–20; Schick, *supra* note 178, at 104–08; Schickler, *supra* note 188, at 195–200; Staff of S. Comm. on the Budget, *supra* note 170, at 8–9.
193. On the subsequent statutes, see Fisher, *supra* note 177, at 204–06.
194. Thomas Jefferson, Third Annual Message to Congress (Oct. 17, 1803), in 1 *A Compilation of the Messages and Papers of the Presidents* 345, 348 (James D. Richardson ed., New York, Bureau of Nat'l Lit. 1897). For just a few examples referring to this as the first instance of impoundment, see, e.g., Arthur M. Schlesinger Jr., *The Imperial Presidency* 235 (1973); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 841 n.384 (2013); Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 159 (1972).
195. An Act to Provide Additional Armament, ch. 11, § 3, 2 Stat. 206, 206 (1803).
196. 21 Op. Att'y Gen. 414, 415 (1896).
197. See Wm. Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 Yale L.J. 209, 211 (1990) (“It makes little sense for Congress to challenge the executive when money is impounded because the original purpose of the appropriation no longer exists or because efficiencies can be achieved.”); see also Fisher, *supra* note 194, at 160 (noting that, when the president engages in such routine impoundments, “few legislators are likely to challenge him”).
198. See Schlesinger, *supra* note 194, at 236; Fisher, *supra* note 177, at 199–200.
199. See Schlesinger, *supra* note 194, at 237–38 (Nixon “embarked on an impoundment trip unprecedented in American history.”); Fisher, *supra* note 177, at 200 (“On an entirely different order were the impoundments carried out by the Nixon administration. They set a precedent in terms of magnitude, severity, and belligerence.”); Schick, *supra* note 178, at 103 (“Far from administrative routine, Nixon’s wholesale impoundments in late 1972 and 1973 were intended to rewrite national priorities at the expense of congressional power and preferences.”); Middlekauff, *supra* note 197, at 212 (“The Nixon Administration changed the unwritten rules of the impoundment battle.”).
200. Schick, *supra* note 178, at 103.
201. Middlekauff, *supra* note 197, at 212.
202. 420 U.S. 35 (1975).
203. See Fisher, *supra* note 177, at 200 (discussing these cases).
204. Pub. L. No. 93-344, §§ 1001–17, 88 Stat. 297, 332–39 (1974), *codified at* 2 U.S.C. §§ 681–88 (2006).
205. 2 U.S.C. § 683 (2006).
206. Impoundment Control Act § 1013, 88 Stat. at 334–35.
207. 462 U.S. 919 (1983).
208. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).
209. Pub. L. No. 100-119, § 206, 101 Stat. 754, 785–86 (1987), *as codified at* 2 U.S.C. § 684 (2006).
210. Middlekauff, *supra* note 197, at 218–19.

211. *Id.* at 219.
212. *Id.*
213. Schick, *supra* note 178, at 109–10.
214. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996).
215. *Clinton v. City of New York*, 524 U.S. 417 (1998).
216. Schick, *supra* note 170, at 19; *see also* Fisher, *supra* note 177, at 202.
217. *The Federalist No. 58* (James Madison), *supra* note 134, at 359.
218. Charles L. Black Jr., *The Working Balance of the American Political Departments*, 1 *Hastings Const. L.Q.* 13, 15 (1974).
219. Mike Dorf, who suggested the air conditioning hypothetical in conversation, is also the source of the hypothetical about cutting the salaries of judicial staff. *See* Michael C. Dorf, *Fallback Law*, 107 *Colum. L. Rev.* 303, 331 (2007). Dorf raises the possibility that such cuts would be an unconstitutional violation of a free-floating structural principle of judicial independence, but he does not take a position on the question. *See id.* at 331–32. *See also* Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 *Colum. L. Rev.* 501, 531 (2002) (“Congress may curtail the judiciary’s physical facilities and fringe benefits as it pleases; nothing in the Constitution would bar Congress from turning the Supreme Court building into a museum and sending the Justices to hear cases in, say, the basement of the Smithsonian.”).
220. *See* U.S. Const. art. II, § 1, cl. 7 (“The President shall . . . receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected. . . .”).
221. *See id.* art. III, § 1 (“The Judges, both of the supreme and inferior Courts . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).
222. J. Gregory Sidak, *The President’s Power of the Purse*, 1989 *Duke L.J.* 1162, 1162; *see also id.* at 1208–14 (giving specific examples from the appropriations legislation for fiscal year 1990).
223. Act of May 1, 1810, ch. 44, § 2, 2 Stat. 608, 608.
224. *See, e.g.*, 4 Asher C. Hinds, *Hinds’ Precedents of the House of Representatives of the United States* §§ 3681–86, 3699, 3917–26, 3942–46, 3948–54, at 449–53, 461–62, 617–21, 636–47 (1907) (giving examples from the late nineteenth and early twentieth-century House).
225. *See, e.g.*, L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 *J. Legis.* 221, 224–28 (2000) (giving several examples).
226. Consular and Diplomatic Appropriations Act, ch. 125, § 7, 15 Stat. 319, 322 (1869).
227. *See, e.g.*, Sidak, *supra* note 222, at 1202–43; Sutin, *supra* note 225, at 232–39, 255–58.
228. 328 U.S. 303 (1946).
229. *Id.* at 313–14.
230. Sai Prakash reads *Lovett* similarly. *See* Saikrishna Prakash, *Removal and Tenure in Office*, 92 *Va. L. Rev.* 1779, 1800–1801 (2006).
231. The current version of the Anti-Deficiency Act provides that “[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the

- protection of property.” 31 U.S.C. § 1342. “Essential” government personnel—that is, those deemed necessary to protect life or property—continue to report for work, even during government “shutdowns,” although they cannot be paid until the government reopens. The executive branch has interpreted “essential” government personnel expansively, but it is nevertheless the case that “shutdowns” have a pervasive impact on government operations. See Auth. to Employ the Servs. of White House Office Emps. During an Appropriations Lapse, 19 Op. O.L.C. 235, 235 (1995); Auth. for the Continuance of Gov’t Functions During a Temp. Lapse in Appropriations, 5 Op. O.L.C. 1, 11–12 (1981).
232. See Ari Hoogenboom, *Rutherford B. Hayes: Warrior and President* 392–94 (1995).
233. See *id.* at 396–402.
234. See *id.* at 399, 402.
235. *Id.* at 402.
236. For the first seventeen, see Sharon S. Gressle, *Shutdown of the Federal Government: Causes, Effects, and Process*, CRS Report for Cong. No. 98-844, at 6 (2001). For the eighteenth, see Jonathan Weisman & Ashley Parker, *Shutdown Is Over*, N.Y. Times, Oct. 17, 2013, at A1.
237. See generally Elizabeth Drew, *Showdown: The Struggle between the Gingrich Congress and the Clinton White House* 330–41, 355–67 (1996) (describing the shutdowns); Gressle, *supra* note 236, at 2–3 (same).
238. See Richard S. Conley, *President Clinton and the Republican Congress, 1995–2000: Political and Policy Dimensions of Veto Politics in Divided Government*, 31 Cong. & Presidency 133, 151 (2004) (“By early January 1996 it became clear that the public was beginning to ascribe far greater blame to the Congress than to the president for the policy confrontation and stalemate.”).
239. See, e.g., Chris McGreal, *Midterms 2010: Lessons of 1994*, Guardian (London), Nov. 4, 2010, at 13 (suggesting, based on the evidence of the 1995 shutdown alone and without regard to context, that the president enjoys a significant advantage in a budget shutdown); Steve Benen, *Norquist Thinks the GOP Will Win from Another Shutdown*, Wash. Monthly Pol. Animal Blog (Nov. 19, 2010), http://www.washingtonmonthly.com/archives/individual/2010_11/026718.php (noting that some Republicans “seriously believe that the public would credit Republicans for shutting down the government” and asking “whether Republican leaders are crazy enough to think this is a good idea”).
240. Jennifer Steinhauer, *Last Shutdown Is a Lesson Lost on Capitol Hill as a New Crisis Looms*, N.Y. Times, Sept. 29, 2013, at A18.
241. Steven M. Gillon, *The Pact: Bill Clinton, Newt Gingrich, and the Rivalry That Defined a Generation* 159 (2008).
242. See Ann Devroy & Eric Pianin, *Talks on 7-Year Balanced Budget ‘Goal’ Collapse*, Wash. Post, Nov. 18, 1995, at A1 (discussing the president’s slipping public approval ratings and the mounting pressure from House Democrats who “urg[ed] passage of a new continuing resolution and instruct[ed] the President to work with Congress to develop a seven-year balanced budget ‘without preconditions’”); Todd S. Purdum, *President and G.O.P. Agree to End Federal Shutdown and to Negotiate a Budget*, N.Y. Times, Nov. 20, 1995, at A1 (stating that, “[w]hile early public opinion polls” favored the president, “[t]he consensus on Capitol Hill was that Mr. Clinton would have had a

- hard time sustaining a veto if Democrats were given another chance to vote on” “a stopgap spending measure . . . that . . . included the goal of balancing the budget in seven years”). It is also worth noting that Clinton’s approval ratings did suffer in the shutdowns’ aftermath, although not as much as Congress’s did. See Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining before an Audience*, 45 Am. J. Pol. Sci. 100, 112 n.29 (2001).
243. During the shutdown, Gingrich publicly complained about the seating arrangements for a flight on Air Force One. Gillon, *supra* note 241, at 160. As Gillon notes, “Gingrich’s childish verbal tirade was a public relations disaster for the Republicans. Coming in the second day of the shutdown when public opinion was still malleable, it made the Republicans seem petulant and stubborn. . . .” *Id.*
244. See *id.* at 170 (“Gingrich could have declared victory at a number of points [during budget negotiations]. . . . [But] Gingrich misinterpreted the results of the 1994 election and oversold the revolution.”); Conley, *supra* note 238, at 151 (“[T]he Republican leadership had overestimated support for the Contract [with America] following the 1994 elections. . . .”).
245. Peter Baker & Carl Hulse, *The Great Divide: Obama and G.O.P.*, N.Y. Times, Nov. 4, 2010, at A1.
246. See Peter Baker, *Washington Worries about Its New Power Couple*, N.Y. Times, Nov. 10, 2010, at A24.
247. See Further Additional Continuing Appropriations Amendments, 2011, Pub. L. No. 112-8, 125 Stat. 34; Additional Continuing Appropriations Amendments, 2011, Pub. L. No. 112-6, 125 Stat. 23; Further Continuing Appropriations Amendments, 2011, Pub. L. No. 112-4, 125 Stat. 6; Continuing Appropriations and Surface Transportation Extension Act, 2011, Pub. L. No. 111-322, 124 Stat. 3518 (2010); Act of Dec. 18, 2010, Pub. L. No. 111-317, 124 Stat. 3454; Act of Dec. 4, 2010, Pub. L. No. 111-290, 124 Stat. 3063; Continuing Appropriations Act, 2011, Pub. L. No. 111-242, 124 Stat. 2607 (2010).
248. The final budget deal is embodied in Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38.
249. See Jennifer Steinhauer, *2011 Budget Bill with Cuts Is Approved by Congress*, N.Y. Times, Apr. 15, 2011, at A1 (spending cuts); Felicity Barringer & John M. Broder, *Congress, in a First, Removes an Animal from the Endangered Species List*, N.Y. Times, Apr. 13, 2011, at A16 (“A rider to the Congressional budget measure . . . dictates that wolves in Montana and Idaho be taken off the endangered species list. . . . The rider is the first known instance of Congress’ directly intervening in the list.”); Trip Gabriel, *Budget Deal Fuels Revival of School Vouchers*, N.Y. Times, Apr. 15, 2011, at A18 (noting that the budget deal included a provision financing school vouchers in Washington, D.C.); Editorial, *The Crisis Next Time*, N.Y. Times, Apr. 11, 2011, at A24 (noting that a provision in the budget deal prohibited the District of Columbia from spending any public money on abortion provision).
250. See James Risen, *Obama Takes on Congress over Policy Czar Positions*, N.Y. Times, Apr. 17, 2011, at A17. In a signing statement, President Obama suggested that this provision of the budget law may be an unconstitutional infringement of his inherent Article II powers. See *Statement on Signing the Department of Defense and Full-Year*

- Continuing Appropriations Act, 2011*, 2011 Daily Comp. Pres. Doc. 263 (Apr. 15, 2011). On the separation-of-powers tussle over “policy czars,” see generally Kevin Sholette, Note, *The American Czars*, 20 Cornell J.L. & Pub. Pol’y 219 (2010).
251. See Jackie Calmes & Peter Baker, *Back to Work: Obama Greeted by Looming Fiscal Crisis*, N.Y. Times, Nov. 8, 2012, at A1.
252. See *id.* (noting that “[i]f Mr. Obama got a mandate for anything,” it was for raising taxes on the wealthy).
253. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 Notre Dame L. Rev. 2065, 2068–72 (2013).
254. See Quinnipiac Univ. Polling Inst., *American Voters Reject GOP Shutdown Strategy 3–1*, Oct. 1, 2013, <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1958>.
255. See, e.g., *Republicans Lose Ground vs. Obama in the Shutdown Blame Game*, ABC News/Wash. Post Poll, Oct. 7, 2013, <http://www.langerresearch.com/uploads/1144a29TheShutdown.pdf>; Andrew Dugan, *Republican Party Favorability Sinks to Record Low*, Gallup, Oct. 9, 2013, <http://www.gallup.com/poll/165317/republican-party-favorability-sinks-record-low.aspx>; Scott Clement & Peyton M. Graighill, *Poll: Republicans Losing No-Win Game*, Wash. Post The Fix, Oct. 14, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/14/poll-republicans-losing-no-win-game/>.
256. See Assoc. Press, *Wall St. Climbs as Hopes for Détente on Debt Emerge*, N.Y. Times, Oct. 10, 2013, at B8.
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263. 155 Cong. Rec. H7907 (daily ed. July 9, 2009).
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269. On the importance of the budget as a signaling device, see Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 Am. Pol. Sci. Rev. 283 (1996); see also Note, *supra* note 267, at 1825–27 (noting that congressional budget control is accomplished through control of overall spending levels, earmarks and riders, and threats and signaling).
270. 462 U.S. 919 (1983).
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272. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 Law & Contemp. Probs. 273, 288 (Autumn 1993).
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274. Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. Legal Stud. 131, 136–46 (1991); Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 Int'l Rev. L. & Econ. 433, 439–44 (1996).

275. See generally Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (2013).
276. See *id.* at 76–78 (discussing the social and political justifications of negotiation in the late eighteenth century); *id.* at 80–110 (discussing attempts to maintain the fee system while banning negotiation).
277. *Id.* at 273–89.
278. Eric Schmitt, *Troops' Queries Leave Rumsfeld on the Defensive*, N.Y. Times, Dec. 9, 2004, at A1.
279. See Matthew L. Wald, *Nuclear Weapons Money Is Cut from Spending Bill*, N.Y. Times, Nov. 23, 2004, at A22.
280. David Mayhew has noted that, “[n]otwithstanding an occasional out-front hawkishness, as in 1898 vis-à-vis Spain, Congress, on occasions when it has differed with the presidency on foreign policy, has ordinarily leaned toward quietude and stasis.” In Mayhew’s view, Congress’s relative resistance to imperial adventuring explains the “relative lack of colonies that came to be physically possessed” by the United States. David R. Mayhew, *Congress as a Handler of Challenges: The Historical Record*, 29 Stud. Am. Pol. Dev. 185, 196–97 (2015). Of course, a resistance to permanent territorial acquisition is itself a limitation on future imperial adventuring.
281. Cooper-Church Amendment, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971).
282. Case-Church Amendment, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973).
283. On Nixon’s (and Kissinger’s) resistance to these measures, as well as their efficacy in reining in the president, see Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* 163–68 (2013); see also Thomas M. Franck & Edward Weisband, *Foreign Policy by Congress* 13–33 (1979); Amy Belasco et al., *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, CRS Report for Cong. No. RL33803, at 1–3 (2007); Rosen, *supra* note 122, at 93.
284. Byrd Amendment, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1418, 1476–77 (1993).
285. Recent Legislation, *National Defense Authorization Act for Fiscal Year 2013*, Pub. L. No. 112-239, § 1028, 126 Stat. 1632, 1914–17 (codified at 10 U.S.C. § 801 note (2012)), 127 Harv. L. Rev. 835, 835–37 (2013); Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. Times, Sept. 1, 2014, at A1.
286. On the history of this provision, see Note, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 Harv. L. Rev. 2499, 2502–03 (2014).
287. *Id.* at 2503–09.
288. *Id.* at 2508–09.
289. The strictest language is contained in the 1984 Boland Amendment, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984) (prohibiting “any . . . agency or entity of the United States involved in intelligence activities” from obligating or spending any funds “for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual”).
290. Zeisberg, *supra* note 283, at 190–93, 196–202, 211–17.

291. U.S. Const. art. I, § 9, cl. 7.
292. 50 U.S.C. § 3506(a)(1).
293. See Fisher, *supra* note 177, at 206–14; see also Franck & Weisband, *supra* note 283, at 115–16; Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act*, 47 Loy. U. Chi. L.J. 1, 3–59 (2015).
294. See Ron Wyden, Mark Udall & Martin Heinrich, *End the N.S.A. Dragnet, Now*, N.Y. Times, Nov. 26, 2013, at A25.

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4. See Theodore F.T. Plucknett, *Taswell-Langmead's English Constitutional History* 164–65 (11th ed. 1960).
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7. *Id.* at 191–92.
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9. Roberts, *supra* note 2, at 8.
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14. 3 William Blackstone, *Commentaries* *254–55.
15. See Roberts, *supra* note 2, at 1, 18; Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1100 (2009); William R. Stacy, *Impeachment, Attainder, and the ‘Revival’ of Parliamentary Judicature under the Early Stuarts*, 11 Parl. Hist. 40, 41–46 (1992).
16. See Chafetz, *supra* note 11, at 197–98.
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18. See Roberts, *supra* note 2, at 29.
19. *Id.* at 31.