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Constitutional Guidance for Lawmakers

They Can't Spend What You Don't Approve: Rethinking the Appropriations Clause

Separation of powers, though never mentioned by name in the Constitution, is one of the key principles that undergirds the government created by the Framers. For the concept to have any teeth in it, the Framers realized the need to go beyond a mere distribution of powers among the three branches of government. James Madison famously warned in Federalist *No. 48 of the inadequacy of mere "parchment barriers." Each branch of government must therefore also be granted powers that will allow it to check the other two branches. It is in this spirit that we should understand the Appropriations Clause. Although it appears in the section of the Constitution restricting the powers of Congress, it in fact functions as a key legislative check on the executive. The President and those acting under executive authority can spend only what Congress permits them to spend. This essay is adapted from* The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"No 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."
— Article I, Section 9, Clause 7

The Appropriations Clause is the cornerstone of Congress's "power of the purse." It assigns to Congress the role of final arbiter of the use of public funds. The source of Congress's power to spend derives from Article I, Section 8, Clause 1. The Appropriations Clause provides Congress with a mechanism to control or to limit spending by the federal government. The Framers chose the particular language of limitation, not authorization, for the first part of the clause and placed it in Section 9 of Article I, along with other restrictions on governmental actions to limit, most notably, executive action.

The Virginia Plan offered at the opening of the Constitutional Convention did not contain an appropriations clause, although the plan did refer, albeit indirectly, to Congress's authority under the Articles of Confederation to appropriate public funds. The Appropriations Clause first appeared at the Convention as part of a proposed division of authority between the House and the Senate. A part of that proposal declared that all

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bills raising or appropriating money—"money bills"—were to originate in the House, and were not subject to alteration or amendment in the Senate. Further, no money could be drawn from the "public Treasury, but in pursuance of appropriations to be originated in the House of Representatives." The Convention rejected both the provision vesting exclusive control of money bills in the House of Representatives (resolved in Article I, Section 7, Clause 2) and the associated appropriations clause. Late in the Convention, the Committee of Eleven, appointed to consider unresolved parts of the Constitution, offered a compromise to permit the Senate to amend or concur in amendments of money bills, provided that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Convention incorporated the proposal, resulting, with only minor changes made by the Committee of Style and Arrangement, in the final language of the first part of the Appropriations Clause.

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In *The Federalist* No. 58, James Madison described the centrality of the power of the purse's role in the growth of representative government and its particular importance in the Constitution's governmental structure:

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

Under the Articles of Confederation, under which Congress possessed the power to appropriate, there was no independent executive authority. With the creation of an executive under the Constitution, the Founders decided, in the words of Justice Joseph Story in *Commentaries on the Constitution of the United States*, "to preserve in full vigor the constitutional barrier between each department...that each should possess equally...the means of self-protection." An important means of self-protection for the legislative department was its ability to restrict the executive's access to public resources "but in Consequence of Appropriations made by Law." Justice Story continues:

> And the [legislature] has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation and the property of the people. It can grant or withhold supplies; it can levy or withdraw taxes; it can unnerve the power of the sword by striking down the arm that wields it.

The second part of the clause, the "Statement and Account" provision, resulted from an amendment offered by George Mason of Virginia in the final days of the Convention. Mason proposed that "an Account of the public expenditures should be annually published." Questions concerning the wisdom and practicality of this proposal led to the adoption of an amendment, offered by James Madison, to substitute the less-demanding "from time to time" for "annually." This "would enjoin the duty of frequent publication," Madi-

son argued, "but leave enough to the discretion of the legislature." The requirement for a "Statement and Account," said Justice Story, makes Congress's responsibility as guardian of the public treasure "complete and perfect" by requiring an account of receipts and expenditures "that the people may know what money is expended, for what purposes, and by what authority." Today, the "discretion of the legislature" is a "plenary power to exact any reporting and accounting [the Congress] considers appropriate in the public interest." *Richardson v. United States* (1974).

The courts have consistently recognized the primacy given to Congress by the Appropriations Clause in allocating the resources of the Treasury. As the Supreme Court declared in *Cincinnati Soap Co. v. United States* (1937), the Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department." It means simply that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." In *United States v. MacCollom* (1976), the Court articulated an "established rule" that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

The power reserved to Congress by the Appropriations Clause is "a most complete and effectual weapon" because "any exercise of the power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Office of Personnel Management v. Richmond* (1990). *See also Knote v. United States* (1877). For example, because public funds may only be paid out of the Treasury "according to the letter of the difficult judgments reached by Congress," private litigants may not use equitable principles of estoppel to require the payment of benefits for which there is no appropriation. *Office of Pers. Mgmt. v. Richmond*. Similarly, a court may no more order the obligation or a payment of funds for which there is no appropriation, *Reeside v. Walker* (1850), than it may make or order an appropriation. *Rochester Pure Water District v. United States Environmental Protection Agency* (1992); *National Ass'n of Regional Councils v. Costle* (1977).

Congress has broad authority to give meaning to the Appropriations Clause. As a technical matter, Congress regularly enacts statutes, specifically styled as appropriations acts, of varying types, durations, and effect. To satisfy the Appropriations Clause, however, Congress need do no more than enact a law expressly directing a payment out of a designated fund or source in the Treasury. As the Court of Claims explained, an appropriation is "per se nothing more than the legislative authorization prescribed by the Constitution for money to be paid out at the Treasury." *Campagna v. United States* (1891).

Congress also may, and does, adjust, suspend, or repeal various provisions of law through appropriations acts. *United States v. Dickerson* (1940); *Robertson v. Seattle Audubon Society* (1992); *United States v. Bean* (2002). The Supreme Court has insisted, however, that Congress must clearly articulate its purposes when it uses the appropriations process to adjust, suspend, or repeal other provisions of law. *United States v. Will* (1980). Nevertheless, Congress has "wide discretion... in prescribing details of expenditures," *Cincinnati Soap Co. v. United States* (1937), and indeed has a long and consistent practice of setting conditions on the expenditure of appropriations. One particularly noteworthy example was the Boland Amendments of the 1980s, which limited the use of appropriated funds by any agency or entity of the United States involved in intelligence activities to support the Nicaraguan insurgency against the Sandinista regime.

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There are limits to the length to which Congress may go in its exercise of the appropriations power. Congress's power, in this respect, like all of its other pow-

ers, is subject to the Bill of Rights and other constraints in the Constitution. Congress may not, for example, in the guise of appropriating, subject named individuals to bills of attainders explicitly prohibited by the Constitution. *United States v. Lovett* (1946). It may not preclude or direct an act in derogation of an individual's First Amendment rights. *Legal Service Corp. v. Velasquez* (2001). Similarly, just as a presidential pardon may not effect payment of a claim out of the Treasury barred by act of Congress, *Hart v. United States* (1886), or permit the recovery of the proceeds of confiscated property deposited in the Treasury, *Knote v. United States*, the Congress cannot, through a rider in an appropriations act, impair the express and enumerated power of the President to grant pardons. *United States v. Klein* (1871).

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