PUBLIC FUNCTIONS AND PRIVATE RESOURCES

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ABSTRACT

At the federal level, the boundary between public and private functions is under pressure. On top of longstanding trends toward privatizing government functions and running agencies like businesses, the second Trump administration has sought to enlist private resources more broadly for performing public functions. This Article for the Washington University Law Review*'s symposium on "Taxing, Spending, and the Constitution" outlines constitutional principles for assessing such actions. Building on prior work, it explains that presidents may seek outside assistance in exercising "resource-independent" powers, meaning powers like the veto and pardon authorities that do not depend on congressionally authorized resources in the first place. By contrast, they may not disregard legal limits on funding or use of outside resources for "resource-dependent" powers like use of military force, law enforcement, and administration of benefits.*

The Article defends this limit on presidential power as a matter of the Constitution's text and structure. It also discusses relevant historical examples, including disputes over foreign aid and informant rewards in the Washington administration, nineteenth-century controversies over law enforcement funding, the Iran-Contra scandal from the Reagan administration, recent funding restrictions on marijuana enforcement, and the general pattern of applicable opinions by courts, the Comptroller General, and the Justice Department. The Article applies this framework to defend three principles with contemporary relevance: (1) With respect to resource-dependent functions, presidents lack authority to disregard resource levels determined by law as either ceilings or floors; (2) when funds or other resources for resource-dependent functions come under presidential control, they thereby fall subject to legal limits on such resources; and (3) regulatory settlements should receive close scrutiny

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when they result in free services to the government or otherwise expand the government's capacity beyond what Congress authorized.

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INTRODUCTION

At the federal level, the boundary between public and private functions is under pressure. For some time, scholars have noted a trend toward privatizing government functions through reliance on contractors and other outside parties rather than government personnel; more recently, some have noted a tendency within the government itself to operate more like a business.[1] Now, as a feature of its broader push for "appropriations

1. *See, e.g.*, John D. Michaels, Essay, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 469–70 (2020) [hereinafter Michaels, *We the Shareholders*] (arguing that, as an aspect of an emerging "public capitalism," "[g]overnment is repositioning itself as a savvy market participant" and "using commercial rather than

presidentialism," meaning stronger executive control over spending,[2] the second Trump administration has sought to enlist private resources more broadly for performing public functions. By threatening civil rights investigations, revocation of security clearances, and cancellation of clients' government-related business, the administration induced major law firms to fund pro bono efforts for favored causes; several firms even provided free services to the Commerce Department.[3] By threatening federal funding, it induced universities to enter settlements including large payouts and other affirmative measures.[4] By threatening tariffs, it induced Japan to pledge $550 billion in presidentially directed investments in the United States.[5] By threatening regime change in Venezuela, it established U.S. custody over that country's oil revenues.[6] During a recent government shutdown, it apparently accepted a private donation for military salaries,[7] and as part of a White House renovation, President Donald Trump has sought private contributions for a new ballroom.[8]

These actions raise a set of important and insufficiently explored constitutional questions: Can presidents freely enlist private resources for

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just sovereign levers to advance its various aims"); JOHN D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 2 (2017) (discussing a trend "over the past thirty-odd years" of "disassociating government goods and services from the government, at least as it has been traditionally conceived and staffed"); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (noting "privatization's political and practical ubiquity" and "the extensive intermixing of public and private").

2. Matthew B. Lawrence, Eloise Pasachoff & Zachary S. Price, *Appropriations Presidentialism*, 114 GEO. L.J. ONLINE 1 (2025).

3. Mahira Dayal, *Simpson Thacher Lands Commerce Department Work After Trump Deal*, BLOOMBERG LAW (Nov. 5, 2025), https://news.bloomberglaw.com/business-and-practice/simpson-thacher-lands-commerce-department-work-after-trump-deal [https://perma.cc/9QHH-MHW8].

4. Bill Chappell, *Trump Has Sued Universities for Billions. Here's What the Strategy Tells Us*, NPR (Jan. 29, 2026), https://www.npr.org/2026/01/29/nx-s1-5559293/trump-settlements-colleges-universities [https://perma.cc/Z4AE-VXF4].

5. River Akira Davis & Ana Swanson, *Trump Hails Japan's First Batch of U.S. Investments*, N.Y. TIMES (Feb. 17, 2026), https://www.nytimes.com/2026/02/17/business/japan-trump-investments.html [https://perma.cc/N34M-4HVM]; *Fact Sheet: President Donald J. Trump Secures Unprecedented U.S.–Japan Strategic Trade and Investment Agreement*, WHITE HOUSE (July 23, 2025), https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-president-donald-j-trump-secures-unprecedented-u-s-japan-strategic-trade-and-investment-agreement/ [https://perma.cc/8D3E-XSL6].

6. Scott R. Anderson & Alex Zerden, *Unpacking the Trump Administration's Plans for Venezuela's Oil Revenue*, LAWFARE (Feb. 2, 2026), https://www.lawfaremedia.org/article/unpacking-the-trump-administration-s-plans-for-venezuela-s-oil-revenue [https://perma.cc/7Y88-ZF6C].

7. Gram Slattery & Jarrett Renshaw, *Trump Says Private Donor Gave $130 Million to Cover Military Pay During Shutdown*, REUTERS (Oct. 23, 2025), https://www.reuters.com/world/us/trump-says-private-donor-gave-130-million-cover-military-pay-during-shutdown-2025-10-23/ [https://perma.cc/HW2H-E2YZ].

8. *See* Jonathan Edwards & Dan Diamond, *Trump Fought to Keep the Ballroom Fundraising Contract Secret. Here's What's in It.*, WASH. POST (Apr. 21, 2026), https://www.washingtonpost.com/politics/2026/04/21/trump-ballroom-donor-deal/ [https://perma.cc/47YF-VX48] (discussing arrangements to fund the ballroom construction through contributions to the nonprofit Trust for the National Mall).

performing public functions? If they do, can they thereby evade statutory limits and conditions on public funds and property? And by threatening regulatory action, can executive officials extract whatever spending or other commitments they like from regulated parties? Building on prior work,[9] this symposium Article argues that, for the most important executive functions, the answer to all these questions is "no," though getting to that result requires differentiating between two types of executive power.

As I have argued elsewhere, some of the President's constitutional powers are "resource-independent."[10] At least in principle, presidents can perform these functions on their own; examples include exercising the veto, pardoning crimes, recommending legislation, recognizing foreign states, and appointing and removing officers.[11] Because these powers do not depend on congressionally afforded resources in the first place, presidents hold a constitutional prerogative to disregard funding limitations and conditions that seek to control how they exercise them. As two justices once put it, Congress cannot thwart the President's pardon power by denying funds for pens and paper.[12] For the same reason, presidents also hold constitutional authority to seek outside support and assistance for these functions. If presidents wish to accept voluntary help in vetting pardons, developing legislative recommendations, or selecting nominees for federal offices, Congress lacks the authority to stop them.[13]

This prerogative, however, extends only to powers that the President in principle can exercise personally. In contrast, the big-ticket items in the executive toolkit—administering and enforcing laws, dispensing government benefits (including foreign aid), and employing military force—are resource-dependent: They exist only insofar as Congress provides resources for them.[14] Congress may therefore limit the available resources for these functions or impose conditions on their use, as indeed it regularly does. As a necessary corollary, moreover, Congress may also deny access to outside assets if it chooses. For example, Congress may limit enforcement of certain laws to public officials and then limit the budget available for that activity; as Justice Brett Kavanaugh put it in his dissent from a recent decision overturning some of President Trump's tariffs, Congress could "limit the President's tariffs" or other such laws "by not approving annual appropriations necessary for the Executive Branch to

9. *See* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357 (2018).
10. *Id.* at 361, 389–93.
11. *Id.*
12. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring).
13. *See infra* Section I.C.
14. Price, *supra* note 9, at 361–62, 418–20.

continue to implement" them.[15] By the same token, Congress may allow gifts to augment agency budgets for some purposes but not others. Because legal limitations on spending are constitutionally valid for resource-dependent functions, presidents and other executive officials cannot circumvent them by enlisting outside resources instead. Once such resources come under the executive branch's control, they likewise fall subject to the legal requirements and conditions that govern executive resources.

By virtue of these constitutional principles, presidents cannot constitutionally circumvent statutory limits on dispensing foreign aid or domestic welfare by having private parties donate to presidentially controlled accounts, nor may they circumvent legal limits on attacking particular countries or enforcing certain laws by enlisting private soldiers or prosecutors instead. To be sure, private parties may sometimes play such roles. Though current law generally requires public enforcement of federal criminal statutes, private criminal prosecution was widespread at the Founding (and to some extent since),[16] and private causes of action remain a central mechanism for enforcing many laws.[17] The Constitution even contemplates the use of privateers—essentially, licensed pirates—in military conflicts.[18] Yet such options are available only insofar as Congress allows them. Because these functions are resource-dependent, Congress may dial up or down the resources available for enforcing certain laws, affording certain benefits, or undertaking certain military strikes, and it can also control how such powers are exercised by imposing funding conditions, limitations, and mandates.[19] In these areas, the executive branch cannot defy legal limits on its own capacity by unilaterally enlisting outside help instead.

While this congressional authority over resource-dependent executive powers has always been important, it is particularly central to checks and balances following twentieth-century developments in federal administration and national security policy.[20] As I have also discussed

15. Learning Res., Inc. v. Trump, 146 S. Ct. 628, 693 (2026) (Kavanaugh, J., dissenting).

16. *See, e.g.*, Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89, 92 (2024) ("[T]he government has never had total control over criminal law enforcement.").

17. *See, e.g.*, Nitisha Baronia, Jared Lucky & Diego A. Zambrano, *Private Enforcement at the Founding and Article II*, 114 CALIF. L. REV. 131 (2026); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235 (2018); *cf.* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014) (discussing arrangements that give public agencies financial incentives for enforcement).

18. U.S. CONST. art. I, § 8, cl. 11.

19. Price, *supra* note 9, at 418–20.

20. *Id.*

elsewhere, Congress used to constrain the executive branch in many cases by determining in advance the scope of legal authorizations but then selectively ratifying and indemnifying any unlawful executive actions after the fact.[21] Today, by contrast, presidents often hold substantial power of initiative due to broad statutory delegations and expansive understandings of executive military and foreign affairs authorities.[22] In this context, Congress's control over resources—its authority to limit or deny new appropriations for presidential initiatives—is often its central means of shaping government policy.[23] It should not be surprising, therefore, that presidents are seeking not only greater control over public expenditures but also greater freedom to expand their capacity with private resources.[24] Indeed, the latter problem could grow worse if austerity due to ballooning government debt and constrained finances shrinks the official resources available for executive functions.

In prior work, I have outlined the constitutional distinction between resource-independent and resource-dependent executive powers.[25] I also employed this framework to critique presidents' increasingly adventurous assertions of constitutional authority to defy limits and conditions in appropriations statutes and other laws governing public resources.[26] This symposium Article explores the framework's implications for executive use of outside resources. Reflecting on the second Trump administration's innovations, it advances three main arguments.

First, when the functions at issue are resource-dependent, presidents lack authority to disregard resource levels determined by law. Accordingly, presidents lack any unilateral constitutional authority to dismantle government capacities and agencies, cancel foreign aid and other spending, or transfer resources between agencies. Such actions are lawful only insofar as they comport with applicable appropriations laws and other statutes, and by the same token private contributions may expand government resources for such functions only insofar as applicable laws allow.[27]

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21. Zachary S. Price, *Effectuating Congress's Power of the Purse*, 79 FLA. L. REV. (forthcoming 2027) (manuscript at 44–47, 53), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6194119 [https://perma.cc/4DRH-KDNG].

22. *Id.* (manuscript at 10, 16, 53).

23. Zachary S. Price, Symposium Essay, *Trumpian Impoundments in Historical Perspective*, 78 STAN. L. REV. ONLINE 19, 22 (2025); Price, *supra* note 9, at 367–68. For my discussion of the historical linkage between an effective power of the purse and the development of a powerful federal military and administrative state, see Price, *supra* note 21 (manuscript at 71–75).

24. Such efforts, again, are just one component of a broader push for stronger executive control over spending. For an account of that broader trend, see Lawrence, Pasachoff & Price, *supra* note 2.

25. Price, *supra* note 9, at 361–62.

26. *Id.* at 373–78.

27. *See infra* Section III.A.

Second, when funds or other resources for resource-dependent functions come under presidential control, they thereby fall subject to legal limits on such resources, whether or not Congress originally provided the money or assets. Presidents may not circumvent legal restrictions on foreign or domestic government aid by employing outside gifts, captured foreign assets, or contributions to presidentially controlled accounts. Once the President controls such funds or assets, they become government resources subject to legislative direction, not private resources beyond Congress's purview.[28]

Finally, recognizing the resource-dependence of key executive functions may help sharpen critiques of what Steven Solomon and David Zaring have called "transactional administration."[29] As one aspect of this emerging practice, the executive branch sometimes threatens penalties or other adverse consequences, perhaps even in legally questionable ways, with the goal of inducing settlements that achieve regulatory goals while circumventing normal administrative procedures.[30] As Solomon and Zaring observe, regulating through deals in this and other ways may circumvent required procedures and limit public input and oversight.[31] As a further problem, however, this technique also may effectively expand the government's capacity beyond what Congress authorized—especially if the resulting deals secure free services for the government or other large contributions to the executive branch. Transactional administration is thus a challenge not only to administrative regularity but also to Congress's authority over government resources and executive policy.[32]

To develop this analysis, Part I of this Article explains the distinction between resource-dependent and resource-independent powers and advances a structural argument for applying it to the use of outside resources for government functions. Part II then discusses illustrative episodes from across American history. Although only some of these examples involved

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28. *See infra* Section III.B.

29. Steven Davidoff Solomon & David Zaring, *Transactional Administration*, 106 GEO. L.J. 1097, 1100 (2018).

30. *See* David Pozen, *Regulation by Deal Comes for Higher Ed*, BALKINIZATION (July 23, 2025), https://balkin.blogspot.com/2025/07/regulation-by-deal-comes-to-higher-ed.html [https://perma.cc/T79L-K7ZG] (discussing the second Trump administration's inducement of a settlement with Columbia University through unlawful funding cutoffs).

31. Solomon & Zaring, *supra* note 29, at 1102–03, 1132–34; *see also* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009) (discussing similar strategies of "regulation by deal" in response to the 2008 financial crisis); *cf.* Michaels, *We the Shareholders*, *supra* note 1, at 531 (observing that "the protocols surrounding government market participation are in many respects (and at least for the time being) less onerous than those surrounding the design and implementation of command-and-control regulations, tax-and-transfer welfare programs, and even privatization and outsourcing initiatives").

32. *See infra* Section III.C.

the use or attempted use of outside resources, they document a general pattern of respecting Congress's authority over resource-dependent powers across a wide range of situations—from diplomatic and law enforcement efforts during George Washington's presidency, to law enforcement controversies in the nineteenth century, to the Iran-Contra scandal of the 1980s, to post-1990s debates over federal marijuana enforcement and more routine controversies over administrative policies from the past half century. Part III then turns to recent controversies, employing the framework developed in Parts I and II to analyze uses of private resources for public functions. In doing so, Part III advances the three key claims just described: that resource levels are binding for resource-dependent executive functions; that resources under presidential control are subject for that reason to applicable legal restraints; and that transactional administration threatens Congress's power of the purse. The Article ends with a conclusion summarizing its argument and highlighting the importance of maintaining the executive branch's dependence on congressionally controlled resources for key functions.

I. RESOURCE-DEPENDENCE AND EXECUTIVE POWER

A. The Constitutional Text

The U.S. Constitution assigns Congress the power of the purse, meaning the power to control government spending. It does so most specifically through the Appropriations Clause, which dictates that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[33] Yet other provisions reinforce the same principle.

For instance, among its enumerated powers, Congress holds authority to regulate the "Property of the United States," to "raise and support Armies" and "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces."[34] In addition, by requiring presidents to "take Care that the Laws be faithfully executed,"[35] Article II obligates them to effectuate spending mandates as well as limitations.[36] And by framing this command indirectly—requiring presidents to ensure faithful execution and not to execute the laws themselves—the Constitution recognizes that presidents will discharge this responsibility through other

33. U.S. CONST. art. I, § 9, cl. 7.
34. *Id.* art. I, § 8.
35. *Id.* art. II, § 3.
36. *See* Price, *supra* note 23, at 21–22.

offices established and funded by Congress.[37] The same goes for the military: By making the President commander-in-chief but giving Congress responsibility for raising armies and providing a navy, the Constitution renders presidential military power dependent on Congress's provision of military resources for presidents to command.[38] The Constitution even makes plain that use of private resources in military conflicts requires congressional authorization: Congress, not the President, has authority to "grant Letters of Marque and Reprisal," meaning essentially licenses for private vessels to attack and capture enemy ships as "privateers" during a conflict.[39]

As a matter of the Constitution's plain text, then, Congress has authority over the federal government's funds and property. Yet the President has constitutional powers too—powers that presidents have sometimes claimed give them authority to employ either public or private resources without regard to Congress's enactments.

B. *Internal Resources*

Although Congress's power over resources gives it leverage over the executive branch, presidents for that reason have long sought to loosen Congress's reins. Presidents have thus claimed broad power to disregard limits and conditions on government funding based on putative constitutional prerogatives. President Trump, for example, implied in a 2017 signing statement that he was not bound by a ban on employing funds to prosecute certain marijuana offenses,[40] President Barack Obama indicated in a 2011 signing statement that he had constitutional concerns about a provision denying funding for any White House "Assistant to the President for Energy and Climate Change" (a position colloquially known as the "climate czar"),[41] and presidents from both parties have ignored

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37. Price, *supra* note 9, at 438.

38. *Id.* at 427; *see also* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 146 (2020) ("Both [the Take Care and Commander-in-Chief Clauses] place the President at the head of a hierarchical system, the substance of which is entirely within congressional control.").

39. For elaboration of the points in this paragraph, see Price, *supra* note 9, at 426–30, 438–40. On the role of privateers in framing-era military conflicts, see Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMANS. 1, 15–22 (2007).

40. Presidential Statement on Signing the Consolidated Appropriations Act, 2017, 2017 DAILY COMP. PRES. DOC. 312 (May 5, 2017) (indicating that he would "treat th[e] provision consistently with [his] constitutional responsibility to take care that the laws be faithfully executed").

41. Presidential Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DAILY COMP. PRES. DOC. 263 (Apr. 15, 2011); *see also* DAVID E.

funding restrictions on "conduct of diplomacy."[42] In a prior article, I defended such objections with respect to laws that limit, control, or manipulate the exercise of resource-independent executive authorities.[43] At the same time, I argued that Congress holds near plenary authority to control resource-dependent powers through funding limits and conditions.[44]

This distinction matters because fitting Congress's power of the purse together with executive constitutional prerogatives presents an interpretive puzzle—one that the framers seem not to have anticipated.[45] To be sure, the framers recognized the structural importance of legislative authority over resources. Expressing an intuitive model of interbranch relations based on English history, James Madison wrote in the Federalist No. 58 that "[t]he purse" was "that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government."[46] Yet this model of Congress's power of the purse—viewing it as an all-purpose instrument for degrading executive prerogatives—does not make sense in the U.S. context.

As Madison well understood, the British system lacked any written constitution and thus developed constitutional constraints through Parliament's extraction of cumulative concessions from the Crown. The U.S. system, however, is different: Powers assigned to the President or judiciary are not "overgrown prerogatives" for Congress to "reduc[e]" as it chooses; they are instead fixed features of the governmental order, designed in part to keep Congress itself in check.[47] As one Representative put it in a 1796 House debate, "supplies and grievances have been for centuries [in England] a measure of compromise and the mode by which the Commons have accumulated powers and checks against a throne."[48] By contrast, in the United States, "we see in the powers of this House, not the spoils of contest, not the trophies of repeated victory over the other branches of the

BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW 66–73, 77–79 (2015) (discussing Obama's signing statement and noting popular references to this position as the "'Energy Czar' or 'climate czar'"); Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL'Y 219, 225 (2010) (discussing presidents' use of "czar" positions to coordinate policy from the White House).

42. *See, e.g.*, Prohibition of Spending for Engagement of the Off. of Sci. & Tech. Pol'y with China, 35 Op. O.L.C. 116, 116 (2011).

43. Price, *supra* note 9, at 361.

44. *Id.* at 361–62.

45. *Id.* at 370–73.

46. THE FEDERALIST NO. 58, at 297–98 (James Madison) (Ian Shapiro ed., 2009).

47. *Id.*; Price, *supra* note 9, at 372–73.

48. 5 ANNALS OF CONG. 684, 699 (1796) (statement of Rep. William Vans Murray).

Government, but a specific quantum of trust placed in our hands, to be exercised for the people agreeably to the Constitution."[49]

A plenary authority to defeat presidential powers by denying funds for them could thus undermine the separation of powers that the Constitution aims to fix in place. Consider, for example, legislation forbidding any use of funds to veto bills, pardon criminals, recommend legislation, demand opinions from department heads, receive foreign ambassadors, appoint or remove officers, or issue lawful military commands. Would such legislation bind the President? What if Congress conditioned funding for the government as a whole, or for central presidential priorities, on the President not exercising these powers? As a matter of constitutional structure, such measures should not be effective. Extending Congress's power of the purse so broadly would eliminate key features of the separation of powers system, collapsing presidential power into an all-encompassing legislative authority over resources. To avoid that outcome, presidents must hold authority to disregard some funding limits and conditions (as they have in fact repeatedly done).[50]

This theory, however, only works for some presidential powers—namely, those that do not depend on congressional appropriations to begin with (apart from the President's constitutionally guaranteed salary). The powers listed in the last paragraph are resource-independent: Presidents in principle can exercise them on their own, without any staff or executive branch apparatus at all.[51] By contrast, other powers of far greater consequence—the power to enforce federal laws, deploy military force, or dispense benefits and foreign aid—are resource-dependent: They cannot meaningfully be exercised without substantial capacities and resources.[52] The President might ride out in his personal vehicle, handcuffs or shotgun in hand, aiming to take on lawbreakers and military enemies, but he would not get very far in either case.[53] For these functions, the President needs resources over which Congress, by virtue of the provisions discussed earlier, holds authority. As a result, Congress can effectively control the exercise of these powers: It can impose limits, conditions, and mandates on the resources it makes available. Even more clearly, Congress can control the availability and allocation of public benefits, including foreign aid. Such resources are unambiguously treasury funds that can only be "drawn" according to "appropriations by law," and by the same token, statutory

49. *Id.*
50. *See* Price, *supra* note 9, at 389–93.
51. *Id.*
52. *Id.* at 417–20.
53. *Id.* at 418.

commands regarding their provision are laws whose faithful execution the President must ensure.[54]

In my earlier work, I elaborated on these points, explaining in greater detail what sorts of funding restrictions and conditions are binding on the executive branch. In doing so, I rebutted competing accounts that either exaggerated or minimized Congress's power. On the one hand, a classic 1988 article by Kate Stith recognized the centrality of congressional control over government funds but missed the importance of resource-dependence.[55] Thus, despite recognizing that defeating presidential authorities like the pardon power would be unconstitutional, Stith advanced only the unsatisfactory remedy that Congress holds a duty to provide funds for such tasks.[56] At the other extreme, Gregory Sidak has argued that presidents hold a constitutional prerogative to employ at least some "minimally necessary" amount for all executive functions, including law enforcement and warfare, without regard to legislative limits and conditions.[57] Some have gone even further and suggested that presidents hold authority to spend more or less as they choose on at least some executive functions such as law enforcement.[58] These arguments, however, overlook the President's legal and practical dependence on congressionally authorized resources for key functions—a dependence whose binding force presidents across American history have recognized, as we shall see.[59] In contrast to these competing proposals, my article offered an account that comports with sound structural inferences from the Constitution as well as the broad contours of historical practice.

54. *See* Price, *supra* note 23, at 21 ("[A]n impoundment prerogative is at odds with the formal constitutional text and structure."). As discussed below, diplomacy is an important edge case when it comes to funding conditions and restrictions. *See infra* notes 64–69 and accompanying text; *see also* Price, *supra* note 9, at 449–50.

55. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345, 1350–52 (1988) (noting that "Congress is obliged to provide public funds for constitutionally mandated activities").

56. *Id.* at 1350–51, 1351 n.32, 1362 ("Even where the President believes that Congress has transgressed the Constitution by failing to provide funds for a particular activity, the President has no constitutional authority to draw funds from the Treasury to finance the activity."); *see also* Price, *supra* note 9, at 379–80 (critiquing this view).

57. J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1194 ("[T]he President has an implied power to incur claims against the Treasury to the extent minimally necessary to perform his duties and exercise his prerogatives under article II.").

58. *See, e.g.*, Daniel Martin, Note, *The Duty to Appropriate: Why Congress Has a Constitutional Obligation to Fund Criminal Law Enforcement*, 106 CALIF. L. REV. 511, 538 (2018) ("Congress may not use appropriations bills to interfere with the President's criminal law enforcement efforts."); Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 458 (1992) ("[A]ppropriations riders must not interfere with the President's duty to uphold the law.").

59. *See infra* Part II; Price, *supra* note 9, at 380–81.

Recent events, however, have added a further wrinkle to this debate: What if presidents seek to circumvent funding limits and conditions not through constitutional objections but instead by enlisting outside resources?

C. Outside Resources

1. The Constitutional Framework

As my article suggested but did not explore in depth, limits on such use of outside resources should in fact follow as a necessary corollary of Congress's authority over resource-dependent executive powers.[60]

To be sure, one could understand the "treasury" in the Appropriations Clause more narrowly: The clause might refer only to the literal bank account holding federal tax receipts and deposits. Given Congress's access through taxation to far greater sums than any private party could muster, that understanding would even carry some bite: It would limit executive officials to private resources for functions that Congress did not support.

Understanding the Appropriations Clause this way would nevertheless make little sense. For one thing, if the Appropriations Clause were just an accounting requirement—a limit applicable only to funds in some particular bank account—then presidents could easily evade it by keeping funds elsewhere. Furthermore, conceptually, any money or assets under government control form part of the nation's treasure and should therefore fall within the Appropriations Clause's scope, whether or not they are deposited in the literal "treasury."[61] Indeed, any narrower view would undermine the clause's structural purpose of conditioning certain executive functions on continued legislative support.[62] Accordingly, to quote Saikrishna Prakash, the Appropriations Clause "would be toothless if one could stash money outside the Treasury and evade the obligation that

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60. *See* Price, *supra* note 9, at 427, 438–39 (arguing that Congress has "sole control" over military resources and that Congress's power of the purse assures it "continuing control" over law enforcement).

61. *See* Stith, *supra* note 55, at 1345.

62. *Id.* at 1345, 1396; *see also* THE FEDERALIST NO. 58, *supra* note 46, at 298 (James Madison) ("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."); *cf.* Bridget A. Fahey & Raul Castro Fernandez, *The Structural Law of Data*, 93 U. CHI. L. REV. 67, 98 (2026) (characterizing the Appropriations Clause as establishing "a punishing default, and a burdensome altering rule," by providing that "[a]bsent affirmative appropriations by Congress, the government is—by default—disabled from expending funds").

Congress must appropriate prior to expending funds."[63] That clause, not to mention related legislative authorities over government property, military assets, and other government resources, must extend equally to government activities and expenditures supported with outside receipts and donations.

That said, applying this principle once again requires distinguishing between executive powers that do and do not depend on congressionally controlled resources in the first place. Congress need not provide public support for the President's resource-independent functions. It could, if it chose, eliminate the President's staff, abolish the Pardon Attorney, and sell the White House china (or even the White House itself).[64] But denying funding in these ways would distort the constitutional structure if it meant that the President could not recommend legislation, pardon offenders, or receive foreign ambassadors. Thus, insofar as these functions do not ultimately depend on congressionally afforded resources for their exercise—presidents could perform them on their own—Congress cannot prevent the President from getting outside help instead.

In fact, those providing such help might sometimes hold a constitutional right to do so. At least with respect to matters such as pardons and legislative recommendations, offering advice and guidance to the President might amount to petitioning the government for a redress of grievances in a manner protected by the First Amendment.[65] At any rate, again, presidents in practice have disregarded some limits and conditions on funding for resource-independent functions, and they have also sometimes accepted

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63. Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 998 (2025); *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 72 (1991) ("If government could be funded without statutory action, then the system of representative government would be circumvented."). As Margaret Lemos and Guy-Uriel Charles have observed, financing government functions with gifts may also distort government priorities and produce public confusion about the level of capacity that given levels of taxation can support. Margaret H. Lemos & Guy-Uriel Charles, *Public Programs, Private Financing*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 137, 155–57, 158–59 [hereinafter Lemos & Charles, *Public Programs*]; *see also* Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to the Government*, 106 CALIF. L. REV. 1129, 1134 (2018) (noting that gifts may "pull[] government officials into projects they would not otherwise pursue" and "paper over the government's weaknesses").

64. *See* Price, *supra* note 9, at 407; *cf.* Charles L. Black, Jr., *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87, 89 (observing that Congress, "without violating the Constitution," could reduce the President to "a man living in a modest apartment, with perhaps one secretary to answer the mail; that is where one appropriation bill could put him, at the beginning of a new term"). My article argued that a certain narrow category of funding limitations on support for resource-independent presidential powers could be unduly manipulative and thus unconstitutional. Price, *supra* note 9, at 407–13.

65. *See* U.S. CONST. amend. I.

outside advice and assistance.[66] They have even employed, with some regularity, unofficial diplomatic envoys.[67] Though this practice may be questionable given the Constitution's express requirement of Senate confirmation for ambassadors,[68] it is most plausibly lawful if diplomatic communication can be understood as resource-independent.[69]

On the other hand, the resource-dependence of other executive powers—those the President cannot exercise personally—means that Congress can place limits on those resources and, as a necessary backstop, preclude reliance on outside funds and assets as a workaround. Accordingly, in exercising resource-dependent powers like law enforcement and warfare, presidents can go outside the available public resources only to the extent that applicable statutes allow. That does not mean that private resources are necessarily unavailable. Again, enforcement of certain federal laws through private suits is entirely routine,[70] and the Constitution's oblique reference to privateers implies that private parties may sometimes perform even military functions.[71] Such resources, however, are available only insofar as applicable statutes allow their use.

As a constitutional matter, then, the provisions discussed earlier give Congress, not the President alone, the power to authorize, limit, or prohibit, as it chooses, the use of private resources for resource-dependent executive functions. As a necessary corollary, when private resources fall under presidential control, they become part of the government's resources, and in consequence they fall subject to legal limits on resources for public functions. The President cannot evade legal prohibitions on the use of force by raising a private army, nor can he enforce a law or regulation despite a denial of appropriations by deputizing private prosecutors instead.

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66. *See* Price, *supra* note 9, at 391 & n.133 (noting that "the president need not rely entirely on public appropriations to obtain advice and assistance in exercising" resource-independent powers and observing that "[p]residents have long claimed authority to seek counsel from anyone they choose, whether within the government or outside it"); *see also infra* notes 253–57 and accompanying text (discussing examples in which presidents defied funding conditions targeting resource-independent powers); EDWARD S. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS 74 (Richard Loss ed., 1976) (discussing presidents' historical use of outside advisers).

67. *See* Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 908–10 (2019) (describing presidents' recurrent use of "irregular agents" for diplomacy).

68. *See id.* at 915; U.S. CONST. art. II, § 2.

69. For my discussion of diplomacy's tenuousness as a resource-independent power, see Price, *supra* note 9, at 454–58. For a critique of this claimed presidential power and its expansive application by the executive branch, see generally Jean Galbraith, *The Runaway Presidential Power over Diplomacy*, 108 VA. L. REV. 81 (2022).

70. *See supra* note 17 and accompanying text.

71. *See supra* note 18 and accompanying text.

2. *Governing Statutes and Cases*

This understanding is not only conceptually sound but also reflected in government practice, as evidenced by key statutes and settled legal understandings. Most concretely, since 1849, the Miscellaneous Receipts Act has provided explicitly that, absent some statutory exception, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[72] Although the Constitution should require as much anyhow, a federal statute thus makes clear that any funds received by the government belong to the "treasury" and are accordingly subject to legal limits on expenditure of treasury funds. In opinions by courts, the Attorney General, and the Comptroller General (a congressional officer who polices spending compliance), all three branches have recognized that this law reflects and reinforces Congress's constitutional authority to regulate use of public funds.[73]

By virtue of this same statute and the constitutional understanding it reflects, any gifts received by federal officials likewise become part of the "treasury," meaning the government's overall resources, and thus again fall subject to legal limits on use of government funds and property. According to the Supreme Court, accepting gifts in general is permissible; the federal government holds inherent authority to receive donations.[74] But such donations belong to the United States as a whole, not any particular officer or agency.[75] Accordingly, specific agencies may receive gifts only if they have statutory authority to do so, and employing those gifts likewise

72. 31 U.S.C. § 3302(b).

73. *See, e.g.*, Scheduled Airlines Traffic Offs., Inc. v. Dep't of Def., 87 F.3d 1356, 1361 (D.C. Cir. 1996) (characterizing the Act as "deriv[ing] from and safeguard[ing] a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that '[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law'"); Effect of 31 U.S.C. § 484 on the Settlement Auth. of the Att'y Gen., 4B Op. O.L.C. 684, 685 (1980) (observing that "[t]he Constitution commits to the legislative branch of government control over public expenditures" and characterizing the Act as a statute "designed to ensure that congressional prerogatives under this constitutional scheme are not diminished by executive action"); 2 OFF. OF GEN. COUNSEL, U.S. GEN. ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-168 to -169 (3d ed. 2006) [hereinafter 2 PRINCIPLES OF APPROPRIATIONS LAW] (observing that the Act's "effect . . . is to ensure that the executive branch remains dependent upon the congressional appropriations process" and that the law, "[v]iewed from this perspective, . . . emerges as another element in the statutory pattern by which Congress retains control of the public purse under the separation of powers doctrine").

74. United States v. Burnison, 339 U.S. 87, 90 (1950) ("Uninterrupted usage from the foundation of the Government has sanctioned [acceptance of gifts by the United States].").

75. 2 PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 73, at 6-222; *see also* Lemos & Charles, *Public Programs*, *supra* note 63, at 152 ("the default rule under federal law is that donors may not earmark gifts for particular purposes"); Erika Lietzan, *User Fee Programs*, 76 ADMIN. L. REV. 375, 396–97 (2024) (discussing related rules for fees collected by agencies).

requires legal authorization.[76] If an agency receives contributions and employs them itself without legal authority, it has violated the miscellaneous receipts statute by failing to deposit the funds in the treasury.[77] In the spending law argot, it has impermissibly "augmented" its appropriations by spending more than Congress provided.[78] At the same time, to the extent they have expended donated funds without authorization, responsible officials have also violated the Anti-Deficiency Act (ADA), a penal statute that forbids spending or even "obligating" (that is, committing to spend) funds without a supporting appropriation.[79]

When it comes to labor and services rather than funds or property, similar principles apply, albeit with some confusing wrinkles. To begin with, a statute forbids government personnel from accepting any outside compensation for performance of their government duties.[80] An obvious anticorruption measure, this law prevents private parties from directly funding government services.[81] In addition, since 1884, the Anti-Deficiency Act has barred the government from accepting "voluntary services."[82] According to a counterintuitive interpretation of this language accepted by both the executive branch and the Comptroller General, this prohibition applies only to voluntary services undertaken with an expectation of future compensation, not truly gratuitous services.[83] In other words, based on the law's legislative history, both political branches have read the term "voluntary services" to apply only when the services in question may establish a legal or moral obligation on the government's part to provide future remuneration.[84] Although this reading limits the voluntary services prohibition's scope, the provision, when it does apply, extends the ADA's restrictions beyond just spending or obligating funds to accepting voluntary work as well.

One important consequence of this reading is that the ADA generally bars government personnel from working voluntarily during a funding lapse: "Non-essential" agency personnel (i.e., those who do not fall within

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76. 2 PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 73, at 6-222 to -223.
77. *Id.* at 6-170.
78. *Id.*
79. 31 U.S.C. §§ 1341–1342, 1350.
80. 18 U.S.C. § 209 (generally criminalizing, for both donor and recipient, the supplementation of government employees' salaries).
81. Exch. Nat'l Bank of Chi. v. Abramson, 295 F. Supp. 87, 89–90 (D. Minn. 1969) (noting that the "statute is designed to prohibit outsiders from supplementing a government employee's salary" and that "[t]he evils of such, were it permitted, are obvious").
82. 31 U.S.C. § 1342.
83. *See, e.g.*, Voluntary Servs.–Deputy Collector of Internal Revenue, 27 Comp. Gen. 131, 132–33 (1920); Emp. of Retired Army Off. as Superintendent of Indian Sch., 30 Op. Att'ys Gen. 51, 53–55 (1913).
84. *See Retired Army Off.*, 30 Op. Att'ys Gen. at 52–53, 55.

exceptions to the voluntary services prohibition) must stay home when time-limited agency appropriations expire without new funding.[85] Hence the phenomenon of government "shutdowns": Congress often appropriates funds only for one year (or some other period), but then when the fiscal year expires, agencies without current appropriations must halt non-excepted functions until Congress restores funding.[86]

At the same time, under this interpretation, if applicable statutes allow employment or consulting services without any fixed remuneration, then the voluntary services prohibition does not apply, and the government may accept voluntary labor so long as those offering it disclaim any expectation of compensation.[87] To that extent, as Stith noted in her article, the government has understood the ADA to establish an implicit gift authority with respect to services.[88] In addition, applicable statutes allow some, but not all, government personnel to waive compensation and perform government functions for free,[89] and Senate-confirmed officers incur a right to compensation by virtue of holding office, without regard to whether annual appropriations lapse.[90] Even for these personnel, however, as for those providing gratuitous services, the incidental expenses associated with their jobs—expenditures for pens, paper, computers, phones, and the like—still require appropriations from Congress and thus fall within legal limits on government spending and property.[91]

In all these ways, applicable statutes reflect and reinforce a constitutional understanding that Congress not only controls public resources but also holds authority to determine the availability of private resources for public functions. Of course, these laws might not determine the Constitution's

85. *See* Applicability of the Antideficiency Act upon a Lapse in an Agency's Appropriation, 4A Op. O.L.C. 16, 16 (1980) (adopting this interpretation). The statute provides an exception for emergencies affecting the safety of lives and property, 31 U.S.C. § 1342, terms construed broadly to allow many safety-related and law enforcement functions to continue, albeit without payment to the employees in these roles until after the funding lapse ends. *See* Zachary S. Price, *Government "Shutdowns" and the U.S. Constitution*, VERFASSUNGSBLOG (Oct. 8, 2025), https://verfassungsblog.de/government-shutdowns-and-the-u-s-constitution/ [https://perma.cc/L5MS-C4X5] (discussing these principles).

86. Price, *supra* note 85.

87. 2 PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 73, at 6-97, 6-110 (deeming the ADA inapplicable "where acceptance of services without compensation is specifically authorized by law, and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment").

88. Stith, *supra* note 55, at 1372–73.

89. *See Retired Army Off.*, 30 Op. Att'ys Gen. at 55–56.

90. *See* Participation in Cong. Hearings During an Appropriations Lapse, 19 Op. O.L.C. 301, 301 (1995) (observing that these officers are "entitled to their salaries by virtue of the office that they hold and without regard to whether they perform any services during the period of appropriations lapse").

91. Stith, *supra* note 55, at 1361–62.

meaning in practice if the executive branch routinely ignored them, and presidents, again, have sometimes gone outside public resources in performing resource-independent functions.[92] Applying the same logic, presidents have also sometimes disregarded manipulative conditions and constraints on use of public resources for those functions.[93] With respect to resource-dependent functions, however, no such consistent practice has developed. On the contrary, as we shall now see, presidents have generally respected Congress's constitutional authority over resources even during periods when the statutory structure just described was less developed and executive officials exercised greater flexibility in anticipating congressional funding choices.

II. HISTORICAL ILLUSTRATIONS

Beyond inferences from applicable statutes and the formal constitutional text and structure, the broad contours of historical practice confirm the principles just outlined. The fit, to be sure, is imperfect: There have inevitably been violations, and debatable practices have developed in some areas (particularly conduct of diplomacy). Nevertheless, the outcomes of past appropriations battles have by and large conformed to the understandings outlined in Part I.

Having previously made a systematic case for this view,[94] I will limit myself here to some illustrative examples, including a few that involved attempted use of outside resources to evade legal limits on government funds. In addition, although the same principles apply to the use of military force (as explained in my earlier article),[95] I limit myself here to examples involving aid or law enforcement, the functions most relevant to current controversies. Even with those caveats, and though hardly an exhaustive survey, the examples discussed here show a pattern of compliance in significant episodes from across American history. Indeed, they show a pattern straddling eras with markedly different assumptions about the degree of discretion involved in enforcing laws and the degree of authority that executive officials could presume in anticipating congressional spending. This brief historical survey thus suggests a substantial correlation between government practice and the separation of powers framework just described.

92. *See supra* note 66; Price, *supra* note 9, at 391 & n.133 (noting historical support for this view).

93. *See* Price, *supra* note 9, at 407–13 (discussing examples and offering a limited defense of this practice).

94. *See generally id.*

95. *Id.* at 427–32.

A. Two Framing-Era Disputes

Two examples from George Washington's presidency, one involving law enforcement and the other foreign aid, suggest framing-era acceptance of congressional control over resources for these functions.

1. Law Enforcement Rewards and Foreign Ransoms

The law enforcement example involves efforts to prevent counterfeiting. In a March 1790 communication to the House of Representatives, Treasury Secretary Alexander Hamilton urged Congress to provide funds for "necessary" expenses that "fall under no stated head of expenditure."[96] As an example, Hamilton pointed to the need for rewards to help apprehend counterfeiters. "The apprehension and punishment of these persons," Hamilton wrote, "is, evidently, a matter of serious public concern," yet the absence of any appropriated funds for rewards presented a major difficulty for enforcement. "[T]he necessity of being able to offer rewards for that purpose, is apparent," Hamilton explained, "but the want of a provision for it is an impediment."[97]

In urging Congress to appropriate funds for rewards (as indeed it eventually did),[98] Hamilton presumed that only Congress could provide resources for law enforcement functions, even those whose "necessity" he considered "apparent." Hamilton elsewhere advocated flexible construction of appropriations laws because, as he put it, "[t]he business of administration requires accommodation to so great a variety of circumstances, that a rigid construction would in countless instances arrest the wheels of Government."[99] But simply expending funds for a reward, or even diverting them from other accounts, was a bridge too far.

Washington's negotiations with the so-called Barbary Powers in North Africa demonstrate the same point, this time with respect to foreign aid. In a report to the House and Senate a few months later (in December 1790 for the House and January 1791 for the Senate), Secretary of State Thomas Jefferson provided background information about these Barbary states' practice of capturing vessels in the Mediterranean and holding their crews

96. Alexander Hamilton, Additional Estimates for 1790 (Mar. 2, 1790), *in* 1 AMERICAN STATE PAPERS: FINANCE 38 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

97. *Id.*

98. *See* LUCIUS WILMERDING, JR., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 23 (1943) (noting later appropriation).

99. Alexander Hamilton, *Explanation*, DAILY ADVERTISER (N.Y.) (Nov. 11, 1795), *reprinted in* 19 THE PAPERS OF ALEXANDER HAMILTON 400, 405 (Harold C. Syrett ed., 1973); *see also* Price, *supra* note 21 (manuscript at 22–23) (discussing Hamilton's views).

hostage (or enslaving them) so as to extract either ship-specific ransoms or broader peace settlements.[100] Outlining the United States's main options, Jefferson walked through the benefits and costs of paying ransoms, attempting "to obtain peace by purchasing it," or "repel[ling] force by force."[101] "Upon the whole," he concluded, "it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce."[102] Whatever the choice, moreover, Congress would need to provide the necessary funds. "If war," Jefferson wrote, Congress "will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers."[103] Likewise, "[i]f tribute or ransom, it will rest with them to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage."[104]

Much as Hamilton recognized that only Congress could provide funds for whistleblower rewards, Jefferson here presumed that only Congress could provide funds for a military buildup or payments to foreign sovereigns, notwithstanding the President's authority to command the military and conduct foreign relations. In practice, furthermore, the Washington administration followed through on this theory. As one scholar recounts, "The instructions the administration unilaterally chose to give the commissioners [representing the United States] were carefully framed in accordance with the stipulated monetary limitations."[105] Then, when a diplomatic representative, conducting negotiations from afar in an era without rapid communication, agreed to a settlement with Algiers in 1795 that required further funds, the administration sought Senate ratification of the agreement and asked Congress to appropriate additional money.[106]

Thus, in two areas of core executive authority—enforcement of federal law and the conduct of foreign relations—the very first presidential administration recognized Congress's authority to determine whether and to what extent resources were available to accomplish presidential objectives.

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100. Thomas Jefferson, Mediterranean Trade (Dec. 28, 1790), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 104 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).

101. *Id.* at 104–05.

102. *Id.* at 105.

103. *Id.*

104. *Id.*

105. GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 63–64 (1997).

106. *Id.* at 60–61.

2. *Reconciling these Examples with Anticipatory Spending*

These examples are all the more telling because in other instances nineteenth-century presidents and executive officials did spend money without an appropriation in ways that superficially contradicted the principle of resource-dependence. In particular, in a practice that came to be called the "coercive deficiency," executive officials often exhausted their appropriations prematurely and spent or obligated funds on their own initiative while counting on Congress to make up the shortfall after the fact.[107] In other words, officials created a "deficiency" in their accounts and requested new funding to plug the gap, yet Congress felt "coerced" in considering the new request because denying the funds could mean halting agency operations until new appropriations materialized or, in some cases, jilting constituents expecting payment.[108]

The very same documents discussed earlier provide examples of this phenomenon. In his report requesting appropriations for anti-counterfeiting rewards, Hamilton noted that, because certain "commissioners of loans" had more work to do after funding for their salaries expired, the Treasury Department continued their employment without pay, "subject to the discretion of the Legislature, in respect to compensation."[109] Similarly, in the document advocating flexible construction of appropriations laws, Hamilton explained that the Treasury regularly provided advances for goods and services and even salaries, sometimes before the applicable appropriations took effect, provided it "appeared safe and expedient to do so."[110] The administration's dealings with the Barbary Powers arguably reflected the same pattern too. As noted, although the administration instructed its diplomats to adhere to Congress's directions, the administration's negotiator on the spot ended up agreeing to a payoff that required additional appropriations.[111] On a much grander scale, President Washington did the same thing in suppressing the "Whiskey Rebellion" (a violent tax revolt in Western Pennsylvania in 1794): He employed funds unlawfully from regular military accounts so as to raise a militia to suppress the rebellion while Congress was out of session.[112]

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107. The classic study of this practice is WILMERDING, *supra* note 98. The term "coercive deficiency," however, appears in earlier congressional debates. *See, e.g.*, 40 CONG. REC. 1274 (1906) (statement of Rep. Lucius Littauer) [https://perma.cc/9EQE-BS5X] (observing that 1905 ADA amendments aimed "to put an end to this system of coercive deficiencies").

108. Price, *supra* note 21 (manuscript at 24–26).

109. Hamilton, *supra* note 96.

110. Hamilton, *supra* note 99, at 402.

111. CASPER, *supra* note 105, at 60–61.

112. *See* Price, *supra* note 21 (manuscript at 18).

At least during certain periods, this sort of anticipatory spending became a routine feature of nineteenth-century governance.[113] Nevertheless, those like Sidak who invoke such examples to support a constitutional prerogative to spend without appropriations are mistaken.[114] To begin with, although spending down existing funds and incurring obligations in anticipation of future appropriations always violated the spirit of the Appropriations Clause, its legality was somewhat ambiguous before 1870: Earlier statutes were not as squarely restrictive as the Anti-Deficiency Act of that year, and even then the statute remained relatively toothless until 1905 when Congress added penalties for violations.[115]

As a constitutional matter, furthermore, nineteenth-century officials who overspent or incurred deficiencies respected Congress's ultimate authority over resources insofar as they recognized that only Congress could actually resolve the shortfall.[116] Indeed, in some cases, officials risked personal liability, or at least the loss of out-of-pocket expenditures, if Congress failed to ratify their actions with a subsequent appropriation.[117] George Washington himself modeled this posture for later officials. Following the Whiskey Rebellion, Washington reported his actions to Congress and sought legislative blessing. "[O]n you, gentlemen," Washington implored, "and the people by whom you are deputed, I rely for support."[118] Likewise, in a less dramatic example, Washington reported to Congress in 1792 that, in connection with efforts to release seamen impressed into the British Navy, the State Department had made expenditures "for which no provision has been made in law."[119] Confessing this illegality, Washington implored Congress to "do thereon what you shall find to be right."[120]

113. *Id.* (manuscript at 25–29).

114. *See, e.g.*, Sidak, *supra* note 57, at 1188–89 (defending such a prerogative); Martin, *supra* note 58, at 535 (arguing that when Congress denies funds to enforce a law, the President may "determine that it [is] her constitutional duty to continue prosecuting federal criminal law and force Congress into a political response").

115. *See* Price, *supra* note 21 (manuscript at 35–36).

116. *Id.*

117. *See, e.g.*, Mark Thomas, *Rehabilitating the Comptroller General as a Check on Appropriations Presidentialism* 20–21 (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5342970 [https://perma.cc/4PJP-9MN5] (discussing officers' personal liability, during a later period, for unlawful expenditures of treasury funds); 15 ANNALS OF CONG. 1018–19 (1800) (discussing a naval officer who apparently employed his own funds to complete some partially constructed marine barracks).

118. 4 ANNALS OF CONG. 791 (1794).

119. George Washington, Impressed American Seaman (Feb. 8, 1792), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 100, at 131.

120. *Id.* Hamilton's November 1791 request for 1792 appropriations included some $50,000 for deficiencies, indicating that the government had overspent during the prior year. CASPER, *supra* note 105, at 83.

As Josh Chafetz has observed, in these and other related examples, Washington and other officials did not "claim[] to be acting legally."[121] Instead, they "acknowledge[d]" their actions' illegality and "sought post hoc congressional authorization."[122] To that extent, these actions respected, and indeed reinforced, Congress's ultimate authority to control resource-dependent executive powers.

B. *Some Nineteenth-Century Controversies*

These patterns continued in later nineteenth-century examples. Whereas today executive officials presume broad discretion in enforcing federal laws, presidents in this period understood the Take Care Clause (correctly) to impose some obligation to effectuate Congress's enactments.[123] In keeping with this view, and in part because constraints on obligating funds without an appropriation were not yet firmly in place, presidents during this period sometimes suggested that they could enforce laws without regard to limits on funding and enforcement capacity.[124] Yet no clear practice of doing so seems to have developed, and some authoritative sources such as Attorney General opinions rejected it.[125]

After discussing the legal framework reflected in Attorney General opinions, this section briefly describes three debates from different presidential administrations—those of James Monroe, Millard Fillmore, and Rutherford Hayes. It uses these examples to illustrate how resource-dependence operated in practice under nineteenth-century administrative arrangements.

1. *The Legal Framework*

As we saw, nineteenth-century officials regularly created "coercive deficiencies": They would spend down their accounts prematurely and obligate funds that exceeded their appropriations, counting on Congress to

121. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 59 (2017).

122. *Id.*; *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, 103 (1998) (observing that presidents "have recognized the extra-constitutional nature of their expenditures, returning to Congress for the appropriations required to cover their spending").

123. *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 716–42 (2014) (discussing evidence of a limited understanding of enforcement discretion in the early Republic).

124. *See infra* Section II.B.2.

125. *See infra* Section II.B.1.

provide the necessary sums after the fact.[126] In this context, officials charged with enforcing the law might take steps they considered necessary to fulfill their duties, even if doing so meant creating such a deficiency. Indeed, presidents might have thought that their duty to ensure faithful execution of the law required their subordinates to do no less.

Even in this context, however, Attorneys General recognized, at least obliquely, that enforcement activities were ultimately resource-dependent: Congress could constitutionally limit them if it wished. Thus, for example, Attorney General Felix Grundy observed in an 1839 opinion that the Appropriations Clause is "an explicit inhibition upon the President and all others to draw from the treasury any portion of public money, until Congress shall have directed it to be done."[127] In his view, the Clause "clearly indicates that Congress shall also declare the uses to which the money to be drawn from the treasury is to be applied," so "[w]henever [the President] applies it without the directions of Congress expressed in some legislative act, or against such directions, he assumes upon himself a power not conferred by the constitution."[128]

Four years later, a different Attorney General similarly suggested that Congress could disable government functions by denying funds for them. According to this opinion, the President could, by virtue of his responsibility for faithful execution of the law, appoint agents to undertake certain investigations.[129] Nevertheless, under applicable laws, he could not pay them without an appropriation specifically providing the necessary funds.[130] "Congress," Attorney General John Nelson wrote, "may . . . indirectly limit the exercise of this power [to appoint investigators] by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy."[131] In effect, without the necessary appropriations, the law left "unimpaired" the President's power of appointment while at the same time "discountenanc[ing] its ordinary execution."[132] According to Nelson, "even in [cases] of the most pressing urgency, in which the executive departments might feel that the best interests of the country called

126. *See supra* Section II.A.2.
127. Transfer of Specific Appropriations of House of Representatives to Contingent Fund, 3 Op. Att'ys Gen. 442 (1839).
128. *Id.* at 443.
129. Exec. Power of Appointment, 4 Op. Att'ys Gen. 248 (1843).
130. *Id.*
131. *Id.*
132. *Id.* at 249.

for the exercise of the appointing power, a resort to Congress for the means of compensating the appointees would be indispensable."[133]

A third opinion from 1860—albeit one sometimes blamed (inaccurately) for limiting President James Buchanan's authority to resist southern states' secession[134]—addressed related points about the relationship between means and ends in performing executive functions. "Where the law directs a thing to be done without saying how, that implies the power to use such means as may be necessary and proper to accomplish the end of the legislature," Attorney General Jeremiah Black wrote. "But where the mode of performing a duty is pointed out by statute, that is the exclusive mode, and no other can be followed."[135] By the same token, Black went on, "[i]f . . . an act of Congress declares that a certain thing shall be done by a particular officer, it cannot be done by a different officer. The agency which the law furnishes for its own execution must be used to the exclusion of all others."[136] In this reasoning, the Attorney General recognized Congress's authority to structure the executive branch by prescribing different offices' authorities and capacities.[137] Though focused on questions of legal authority rather than resources, this analysis necessarily implies that resource limitations on particular offices may likewise impede full enforcement of particular laws.

Finally, an opinion from 1877, in a very different political context, directly addressed the question of extending public functions with private resources. With partisan control of the federal government divided between the Democrat-controlled House of Representatives and the new Republican President Rutherford Hayes, Congress adjourned in March of that year without appropriating funds for the army beyond June.[138] As discussed further below, congressional Democrats later clashed repeatedly with Hayes over resources for federal law enforcement; in effect, Democrats aimed to

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133. *Id.*; *see also* Comp. of Laborers in the Exec. Dep'ts, 9 Op. Att'ys Gen. 117, 121 (1857) (concluding that appropriations statutes could limit laborers' salaries even when different "salary laws" provided for greater compensation because "the salary laws . . . must be so confined in their operation as not to interfere with the proper execution of the laws appropriating money for the hire of laborers").

134. As Judge David Barron has recounted, the opinion's author, Attorney General Jeremiah Black, made clear that federal officials could defend federal installations. DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 119–21, 123, 128–29 (2016). He even took steps to ensure that military officers could hold Fort Sumter, the installation in South Carolina that rebel forces eventually attacked, following Abraham Lincoln's inauguration, in the first battle of the Civil War. *Id.* at 123–25, 132.

135. Power of the President in Executing the Laws, 9 Op. Att'ys Gen. 516, 519 (1860).

136. *Id.*

137. For discussion of this idea's historical prevalence even in the military context, see Zachary S. Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491 (2021).

138. BROOKS D. SIMPSON, THE RECONSTRUCTION PRESIDENTS 173–74, 214 (1998); Support of the Army, 15 Op. Att'ys Gen. 209, 209 (1877).

render federal civil rights laws and voting protections a "dead letter"[139] in former Confederate states where white supremacists were seeking to displace racially egalitarian Reconstruction-era governments.[140] At the start of his term, given the impending funding lapse in 1877, the President asked whether funds "furnished by individual contribution" could provide "means for the payment and support of the Army."[141]

Attorney General Charles Devens essentially answered "no." Private parties, he reasoned, could not circumvent the lapse in appropriations by contributing to the treasury, because then any withdrawals would constitute a use of treasury funds without any supporting appropriation.[142] Curiously, Devens seemed not to recognize that the miscellaneous receipts statute, if not the Constitution itself, would dictate the same result even if funds were not deposited in the literal treasury.[143] Nevertheless, Devens got to the correct answer. Direct payments to the army, he reasoned, even if made with no assurance from "the Executive authority that they shall be repaid," "would seem to bear too much the aspect of a contract."[144] Hence, the contributions "would certainly place the Government, receiving such funds and disbursing them for the necessary purposes of its administration, under the strongest moral obligation to use every proper and reasonable effort that the donors or lenders should be reimbursed."[145] Accordingly, "[t]he transaction would be subject to criticism as an attempt to do indirectly that which Congress should have provided for by positive appropriation."[146]

In all these examples, nineteenth-century Attorney General opinions recognized that Congress could restrict the government's enforcement capacities through appropriations limits. The law at the time did not necessarily require government operations to cease during a funding lapse, as in contemporary shutdowns; that result arises from the 1884 "voluntary

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139. Rutherford B. Hayes, Veto Message (June 23, 1879), *in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4493, 4495 (James D. Richardson ed., 1897) [hereinafter COMPILATION MPP].

140. HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 158 (2001); SIMPSON, *supra* note 138, at 220–26.

141. *Support of the Army*, 15 Op. Att'ys Gen. at 209.

142. *Id.*

143. *Cf.* Sergeant Richard P. Stevenson, 62 Comp. Gen. 39 (1982) (concluding that the miscellaneous receipts statute required a serviceman to deliver to the treasury certain fees he received in return for jury service performed while not in leave status).

144. *Support of the Army*, 15 Op. Att'ys Gen. at 211.

145. *Id.*

146. *Id.*; *see also* Rutherford B. Hayes, Special Session Message (Oct. 15, 1877), *in* 9 COMPILATION MPP, *supra* note 139, at 4404 ("The adjournment of the last Congress without making appropriations for the support of the Army for the present fiscal year has rendered necessary a suspension of payments to the officers and men of the sums due them for services rendered after the 30th day of June last.").

services" prohibition and other later changes to the law of official compensation.[147] Furthermore, as we saw, executive officials often created "coercive deficiencies" by exhausting or exceeding their appropriations and asking Congress for more money.[148] Nevertheless, authoritative opinions recognized that Congress ultimately had authority to dial enforcement activities up or down due to those functions' resource-dependence.

2. *Resource Constraints on Enforcing a Slave Trade Ban, the Fugitive Slave Act, and Reconstruction-Era Voting Protections*

Three controversies from markedly different points in the nineteenth century show these same constitutional principles operating reasonably well in practice as well as theory.

a. James Monroe's Claimed Power to Transfer Naval Funds

First, in 1819, Congress enacted new restrictions on the slave trade and piracy and charged the navy with enforcing them.[149] Although Congress did not specifically appropriate funds to strengthen naval enforcement capacity, President Monroe and the Navy Secretary directed the repair and outfitting of ships to serve this purpose. To do so, they ran down existing funds, creating a substantial deficiency for the remainder of the year, and also transferred funds from existing balances left over from appropriations in prior years.[150] As a defender in Congress later put it, the President "assumed

147. 31 U.S.C. § 1342; Act of May 1, 1884, ch. 37, 23 Stat. 17; Applicability of the Antideficiency Act upon a Lapse in an Agency's Appropriation, 4A Op. O.L.C. 16 (1980) (interpreting ADA to require cessation of agency functions during a lapse in appropriations). As noted earlier, under executive branch opinions, the ADA does not prevent officers from working during a funding lapse if they are Senate-confirmed or otherwise earn their salaries by virtue of their status, without regard to whether they perform any duties. *See supra* notes 87–90 and accompanying text. Before 1953, this understanding applied generally to officers, but a statute that took effect that year established that most officers earn compensation only in return for actual work. *See* Auth. to Emp. White House Offs. Exempt from the Ann. & Sick Leave Act During Appropriations Lapse, 35 Op. O.L.C. 40, 40–41, 43 (2011).

148. *See supra* Section II.A.2.

149. Act of Mar. 3, 1819, ch. 75, 3 Stat. 510 (providing, among other things, that "the President of the United States be, and hereby is, authorized and requested to employ so many of the public armed vessels, as, in his judgment, the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations"); Act of Mar. 3, 1819, ch. 101, 3 Stat. 532 (providing that the President is "authorized, whenever he shall deem it expedient, to cause any of the armed vessels of the United States, to be employed" to patrol for ships engaged in the illegal slave trade and "to instruct and direct the commanders of all armed vessels of the United States, to seize, take, and bring into any port of the United States, all ships or vessels of the United States, wheresoever found," that violated acts of Congress forbidding that trade).

150. H.R. DOC. NO. 16-10, at 4 (1819); 35 ANNALS OF CONG. 805, 807–08 (1819) (statement of Rep. Samuel Smith).

a responsibility" for implementing the new laws even though those laws' "framers [had] supplied no means, made no appropriation, to enable the President to fit, arm, and man the vessels intended for that service."[151] Lacking any "means in his power, except those under the general appropriation bill [for the navy]," to enforce these statutes, the President nonetheless "obeyed the laws, no doubt under a well-founded confidence that Congress would appropriate the money necessary to carry into effect their own acts."[152] From that point of view, the Monroe administration's actions reflected a strong sense that the Take Care Clause obligates presidents to ensure enforcement of federal laws, even if doing so requires repurposing funds or taking other steps to ensure adequate enforcement capacity. As the Navy Secretary put it, "the duty [to enforce the new laws] being made imperious, every exertion was promptly used to execute the duty imposed upon the Executive."[153]

When reported to Congress, however, the administration's fiscal maneuvers prompted considerable debate and controversy. Back in 1795, Congress had enacted a provision requiring the return to the treasury of unexpended balances after two years.[154] In 1809, another statute granted the President authority to transfer funds during a congressional recess between different "branch[es] of expenditure" within a department's appropriations.[155] The executive branch, it turned out, had long followed a peculiar interpretation of these statutes that largely stripped them of force for the navy: It understood balances to fall outside the 1795 statute so long as they had been shifted from the general treasury to naval accounts—even if the U.S. Treasurer continued to hold the sums in question as the Navy Department's "agent."[156] With funds preserved in naval accounts in this way, presidents could then meet immediate needs, as they perceived them, by shifting sums from past appropriations, even if those appropriations were more than two years old and even if they allocated the money in question to different purposes.[157]

In response to this revelation, Congress enacted new restrictions on transfers and use of surplus funds.[158] In floor debates, moreover, legislators decried the executive branch's effective circumvention of statutory limits

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151. 35 ANNALS OF CONG. 805, 808 (1819) (statement of Rep. Samuel Smith).
152. *Id.*
153. H.R. DOC. NO. 16-10, at 4.
154. *See* WILMERDING, *supra* note 98, at 83 (discussing this background); Act of Mar. 3, 1795, ch. 45, § 16, 1 Stat. 433, 437–38.
155. *See* WILMERDING, *supra* note 98, at 83 (discussing statutes); Act of Mar. 3, 1809, ch. 28, 2 Stat. 535, 535–36.
156. *See* WILMERDING, *supra* note 98, at 83–98 (discussing this practice and the resulting debate).
157. *Id.*
158. Act of May 1, 1820, ch. 52, 3 Stat. 567.

on funding, as well as the broader practice of incurring coercive deficiencies.[159] Congress thus rejected any unilateral presidential authority to expand government law enforcement capacity, yet the administration seems not to have claimed such a power in the first place. On the contrary, as we saw, it employed a preexisting internal understanding of fiscal statutes to carry out its enforcement duties as completely as possible with available resources. To that extent, both branches in this episode seem to have accepted, as a constitutional matter, the ultimate resource-dependence of law enforcement. They wrangled instead over the degree of spending flexibility that the executive branch should enjoy by law in carrying out that function.

b. Millard Fillmore's Claimed Power to Use Military Force for Law Enforcement

The second example followed a similar, if somewhat more ambiguous, pattern. In the so-called Compromise of 1850, Congress enacted "an agonized set of trade-offs that temporized with the issue of slavery in the territories and included the notorious Fugitive Slave Act."[160] Having supported this compromise, President Millard Fillmore set about "overenforc[ing] the act's draconian provisions for returning runaway slaves,"[161] and in doing so he suggested that he held authority not only to deploy militia and military forces to aid federal law enforcement but also to disregard statutory limits on the use of such resources. Fillmore's assertions of this theory, however, were curiously hedged, and he seems ultimately to have relied principally on statutory rather than constitutional authorities, at least as he understood them.

In a key example from 1851, following the jailbreak of a man held in Boston as a fugitive from enslavement, Fillmore issued a proclamation "requiring and commanding all officers, civil and military, and all other persons, civil or military, who shall be found within the vicinity of this outrage, to be aiding and assisting by all means in their power in quelling this and other such combinations and assisting the marshal and his deputies in recapturing" the escapee.[162] Though the legal basis for this proclamation was unclear (as was the scope of its hedged language regarding "all means

159. *See* Price, *supra* note 21 (manuscript at 27).
160. HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 118 (2015).
161. *Id.*
162. Proclamation 56: Calling on Citizens to Assist in the Recapture of a Fugitive Slave Arrested in Boston, Massachusetts (Feb. 18, 1851), https://www.presidency.ucsb.edu/documents/proclamation-56-calling-citizens-assist-the-recapture-fugitive-slave-arrested-boston [https://perma.cc/H89C-NPYC].

in [federal officers'] power"), Fillmore evidently advanced a constitutional theory of presidential law enforcement power in earlier cabinet deliberations.

As he recounted in an October 1850 letter to Secretary of State Daniel Webster, the cabinet agreed at that point that, "when necessary," the President should "use the Military force in aid of the civil officer to execute the fugitive slave law."[163] "We were somewhat embarrassed," Fillmore noted, by legislation dating from 1807 and afterward that "would seem to imply that this [the use of military force for law enforcement] was a power to be conferred by Congress."[164] Yet Fillmore evidently rejected that view. "[A]fter a careful examination of the subject," he reported, "I came to the conclusion that it [ordering military aid to civil law enforcement] was an inherent Executive power enforced by the Constitution, when it made the President commander-in-chief of the Army and Navy, and required him to take care that the laws be faithfully executed."[165]

"In this"—apparently a reference to Fillmore's constitutional theory—Fillmore reported that "the whole Cabinet were not agreed."[166] Yet even the dissenters apparently accepted that when the commissioners charged with administering the act summoned a posse comitatus to help enforce it—something the statute expressly empowered them or their appointees to do[167]—then the posse could include members of the military.[168] Thus, in a sort of "mixture" of conflicting views, as one historian has observed, the cabinet resolved "to give authority to U.S. marshals and their deputies to call for troops when a district judge or justice of the Supreme Court 'should certify that in his opinion it was necessary.'"[169] In keeping with this conclusion, in an incident preceding the Boston conflict, Fillmore gave "direction . . . to the commanding officer of the Marines in Philadelphia" to assist the federal marshal there,[170] though these orders apparently applied only when the marshal "was unable to sustain the laws by the civil authority."[171]

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163. Letter from Millard Fillmore, President, to Daniel Webster, Sec'y of State (Oct. 28, 1850), *in* 1 PAPERS OF MILLARD FILLMORE 335 (Frank H. Severance ed., 1907).
164. *Id.* at 335–36.
165. *Id.* at 336.
166. *Id.*
167. Fugitive Slave Act of 1850, Pub. L. No. 31-60, § 5, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.
168. Letter from Millard Fillmore to Daniel Webster, *supra* note 163, at 336.
169. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878, at 129 (1988) (quoting Letter from Millard Fillmore to Daniel Webster, *supra* note 163, at 336).
170. *Id.*
171. Letter from Millard Fillmore to Daniel Webster, *supra* note 163, at 336.

Several months later, following the Boston proclamation, Fillmore floated his constitutional theory again.[172] Responding to a Senate query about whether any legal changes were required to help overcome resistance to the Fugitive Slave Act, Fillmore asked Congress to clarify that the applicable laws did not require issuing an advance proclamation before employing either the militia or military to aid in executing the law.[173] In the course of his analysis, he again appeared to suggest that requiring such a proclamation could be unconstitutional, at least as applied to the regular military. As he put it, "The power of the President under the Constitution, as Commander of the Army and Navy, is general, and his duty to see the laws faithfully executed is general and positive; and the [statute in question] ought not to be construed as evincing any disposition in Congress to limit or restrain this constitutional authority."[174] Fillmore thus hinted that the President holds a "general and positive" obligation to enforce federal laws, one that could justify disregarding at least some restraints on use of federal resources for that purpose.

As in his cabinet discussions, however, Fillmore advanced these bold claims only to qualify them. With respect to the militia, Fillmore implied that the statute was best read in any event as not requiring a proclamation with respect to law enforcement efforts; he noted only that it "created some doubt" about the question and should therefore be "modified" to avoid the practical and constitutional problems he identified.[175] Likewise, with respect to statutes governing the military, Fillmore argued only that they "ought not" be read to impose limitations, an oblique formulation implying ultimate congressional authority.[176] Here, too, he ultimately argued only that Congress should provide "greater certainty," not that the law necessarily required amendment.[177] And later in his analysis, Fillmore fell back on the same alternative theory from his cabinet meetings: He argued that "all citizens, whether enrolled in the militia or not, may be summoned as members of the *posse comitatus*, either by the marshal or a commissioner according to law, and that it is their duty to obey such summons."[178]

As concerns use of outside resources, moreover, Fillmore appeared to acknowledge that any constitutional authority he held with respect to the military extended only to forces that Congress in fact provided.

172. COAKLEY, *supra* note 169, at 130.

173. President Millard Fillmore, Message to the Senate (Feb. 19, 1851), *in* 6 COMPILATION MPP, *supra* note 139, at 2637, 2641.

174. *Id.* at 2641.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

"[P]robably," he wrote in advancing his theory of affirmative enforcement power, "no legislation of Congress could add to or diminish the power thus given [by the Take Care and Commander-in-Chief Clauses] but by increasing or diminishing or abolishing altogether the Army and Navy"—language recognizing obliquely that Congress could in fact disable his power by eliminating the military altogether.[179]

In sum, although Fillmore advanced a constitutional theory of "positive" presidential law enforcement power, he did not extend his theory beyond congressionally provided resources and, even as to those resources, he qualified his constitutional assertions with alternative statutory arguments, however strained. It is worth noting, too, that the Fugitive Slave Act, though repugnant in substance, expressly contemplated outside help for enforcement: It not only empowered enforcement officials to form posses but also directed that "all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid [that is, in posses], for that purpose."[180] Furthermore, Congress did nothing to suggest support for Fillmore's claimed prerogative to disregard resource constraints on law enforcement. On the contrary, the Senate committee charged with considering Fillmore's proposals reported back that "further legislation is not essential to enable the President to discharge, . . . with fidelity, his high constitutional duty to see that the laws are faithfully executed."[181] The committee did endorse the administration's view that the marshals could summon a posse including militia or regular military personnel, but in doing so it "simply did not comment on Fillmore's claim to inherent power under the Constitution to call on the Army and Navy to enforce federal laws without" regard to existing legal restrictions.[182] At the same time, one committee member issued a minority report rejecting Fillmore's constitutional theory.[183]

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179. *Id.* at 2640. In the same passage, Fillmore recognized still greater congressional authority over the militia. "The President," he wrote, "can not call the militia into service, even to execute the laws or repel invasions, but by the authority of acts of Congress passed for that purpose." *Id.*

180. Fugitive Slave Act of 1850, Pub. L. No. 31-60, § 5, 9 Stat. 462, 463, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

181. CONG. GLOBE, 31st Cong., 2d Sess. 828 (1851).

182. COAKLEY, *supra* note 169, at 130–31.

183. *Id.*; *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 991 (2008) ("[A]lthough it is difficult to know quite what to make of the Senate committee's silence on the constitutional question, the legislature's refusal to amend the statute surely does not suggest that Congress assented to Fillmore's suggestion of constitutional difficulties."). Three years later, during the presidency of Franklin Pierce, the Attorney General issued an opinion embracing the posse comitatus theory, and a large contingent of militia and regular forces assisted in removing another fugitive from Boston. COAKLEY, *supra* note 169, at 132–37.

On the whole, then, although this repellent episode carries ambiguities, it fails to support any unilateral presidential authority to summon outside resources for federal law enforcement, and even with respect to public resources it does more to confirm than undermine Congress's power to control their extent and availability for that purpose.[184]

c. *Rutherford Hayes's Veto Battle over Voting Rights Enforcement*

A third example, this one from Hayes's troubled presidency, shows once more that Congress could limit enforcement resources by law even in an era when Presidents understood themselves to hold an affirmative duty of faithful execution.[185]

A Republican former Governor of Ohio, Hayes seems to have taken office following the disputed election of 1876 only because he gave assurances that vigorous enforcement of Reconstruction would end.[186] Nevertheless, Hayes hoped to maintain federal civil rights protections and sought in particular to enable fair elections.[187] Democrats, however, had other plans: Under their control, the House passed appropriations bills in early 1879 with riders repealing measures allowing use of the army and federal marshals to protect polling places.[188] When Congress then adjourned without enacting appropriations, Hayes called it back into session.[189] At that point, Democrats controlled both houses, so Congress as a whole passed an army appropriations bill forbidding use of the army or marshals at the polls,

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Though one study calls the use of military personnel in this operation "clearly unlawful," WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY 66 (2016), it at least comported with the posse theory endorsed by the Senate committee and to that extent involved no assertion of a preclusive presidential prerogative to defy statutory restraints on military resources.

184. In an impressive study of historical uses of the military for law enforcement, Christopher Mirasola notes that "executive practice between the Fillmore and Hayes administrations" is "difficult to parse." Christopher Mirasola, *Sovereignty, Article II, and the Military During Domestic Unrest*, 15 HARV. NAT'L SEC. J. 199, 231 (2023). Although an Attorney General opinion endorsed Fillmore's posse comitatus theory, *see* Extradition of Fugitives from Service, 6 Op. Att'ys Gen. 466, 473 (1854), presidents employed conflicting theories and made conflicting claims, *see* Mirasola, *supra*, at 231, and Congress eventually restricted the use of the military for law enforcement in the Posse Comitatus Act of 1878, Pub. L. No. 45-263, 20 Stat. 145, 152 (1878). Mirasola persuasively argues that these examples likely do not establish a valid constitutional authority as a matter of historical practice according to accepted standards for practice-based interpretation. Mirasola, *supra*, at 231–32.

185. I previously discussed this episode in Price, *supra* note 9, at 384–85, 441–43; *see also* SIMPSON, *supra* note 138, at 220–24, 226.

186. *See, e.g.*, SIMPSON, *supra* note 138, at 199.

187. *Id.*; *see also* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 184–92 (2011) (arguing that "definitive" abandonment of Reconstruction enforcement did not occur until the 1890s).

188. SIMPSON, *supra* note 138, at 220.

189. *Id.* at 220–21.

but Hayes vetoed it.[190] In his message to Congress, Hayes complained that altering substantive policy through appropriations bills, though a "common practice" employed by "[a]ll parties when in power," gave undue leverage to the House of Representatives (which originated such legislation) and unduly impaired the President's constitutional "share of the legislative power."[191]

Congressional Democrats nevertheless kept trying, and Hayes kept rejecting bills with similar provisions.[192] In vetoing an appropriation for judiciary expenses that forbade any use of the funds to implement certain election laws, Hayes echoed Fillmore's Article II theory, complaining that approving the bill would have meant "participat[ing] in the curtailment of his means of seeing that the law is faithfully executed, while the obligation of the law and of his constitutional duty remained unimpaired."[193] The bill's "effect," in other words, would be "to deprive the executive department of the means to execute laws which are not repealed, which have not been declared invalid, and which it is therefore the duty of the executive and of every other department of Government to obey and to enforce."[194]

Thus, Hayes, like Fillmore, hinted at the possibility that the executive duty of faithful execution might transcend the resources Congress made available for its exercise. To the extent Hayes meant to advance that view, however, he backed down from it in practice. After Hayes signed other appropriations bills but Congress still denied funding for certain marshal's fees,[195] Hayes complained that "the means at the disposal of the executive department for executing the laws through the regular ministerial officers will after to-day be left inadequate."[196] Likewise, Hayes later reported to Congress that, due to the lapse in funding for federal marshals, "the proper execution of the process of the United States failed [in some cases] by reason of the absence of the requisite appropriation."[197] Hayes did indicate

190. *Id*. at 222.

191. Rutherford B. Hayes, Veto Message (Apr. 29, 1879), *in* 9 COMPILATION MPP, *supra* note 139, at 4475, 4480, 4483.

192. SIMPSON, *supra* note 138, at 222–23.

193. Hayes, *supra* note 139, at 4495; *see also* SIMPSON, *supra* note 138, at 223 (discussing this measure's context, including Congress's separation of these judiciary expenses from other appropriations that Hayes finally approved); ARI HOOGENBOOM, RUTHERFORD B. HAYES: WARRIOR AND PRESIDENT 400 (1995) (explaining that by this point Hayes had signed appropriations bills including an army funding bill including "a face-saving, meaningless clause preventing the army from being used as a police force at the polls").

194. Hayes, *supra* note 139, at 4496.

195. HOOGENBOOM, *supra* note 193, at 400.

196. Rutherford B. Hayes, Special Message (June 30, 1879), *in* 9 COMPILATION MPP, *supra* note 139, at 4474, 4475.

197. Rutherford B. Hayes, Third Annual Message (Dec. 1, 1879), *in* 10 COMPILATION MPP, *supra* note 139, at 4509, 4525.

that the marshals had "continued the performance of their duties without compensation from the Government, taking upon themselves the necessary incidental outlays, as well as rendering their own services."[198] At the time, the Anti-Deficiency Act did not yet prohibit acceptance of such "voluntary services,"[199] and the Attorney General evidently advised the marshals that "they would necessarily have to rely for their compensation upon the prospect of future legislation by Congress."[200] Despite the bluster in his veto statements, however, Hayes apparently did not presume any power in practice to deploy public or private resources beyond existing appropriations so as to ensure faithful execution of substantive statutes.[201]

More generally, resource constraints bedeviled Reconstruction throughout its history. Although Congress created the Justice Department during this period to enforce new federal civil rights laws, the Department, in one historian's assessment, "did not possess sufficient personnel or budgetary resources to prosecute the law effectively,"[202] and Congress's choice to steadily shrink the army following the Civil War removed the only enforcement apparatus that had previously been effective.[203] The failure of political will and state capacity in this period once again confirms, this time in tragic fashion, that Congress may hamstring federal law enforcement with resource limitations if it so chooses.

d. Summary

In three separate nineteenth-century examples, presidents asserted an independent obligation to enforce federal laws, yet in each case they also accepted, at least implicitly, that Congress could undermine that obligation through resource constraints. In moral terms, Monroe's enforcement of the slave trade ban was enlightened, Fillmore's commitment to returning fugitives from enslavement was benighted, and Hayes's effort to maintain Reconstruction policies was tragically insufficient. Then, as now, neither Congress nor the executive branch held a monopoly on virtue and sound policy across the universe of disputes. In part for that reason, however, the pattern of outcomes provides a meaningful indication of operative

198. *Id.*

199. *See supra* note 147.

200. Hayes, *supra* note 197, at 4525–26.

201. *See* HOOGENBOOM, *supra* note 193, at 402 ("Hayes had saved the election laws, but the Democrats had prevented the appropriation of the $600,000 needed for marshals.").

202. SIMPSON, *supra* note 138, at 182.

203. *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR 2 (2015) (discussing the centrality of military authority to civil rights protection during Reconstruction).

constitutional understandings. In effect, all three examples highlight how, just as contemporaneous Attorney General opinions suggested, Congress held ultimate authority to control enforcement functions through appropriations limitations, even in an era when presidents presumed that the Take Care Clause required enforcement of federal laws and over-spending in anticipation of future appropriations was routine.

C. Two Modern Disputes and Some Routine Examples

The pattern of behavior evident in some of these historical examples—spending or obligating funds in excess of appropriations and then asking Congress afterward to make up the shortfall—substantially disappeared in the twentieth century.[204] In consequence, nineteenth-century examples like those just discussed should ultimately carry limited relevance as indications of contemporary constitutional meaning: Far from reflecting some enduring executive prerogative to spend without regard to statutory limitations, they reflect a bygone legal and institutional context that Congress eventually reformed.[205] By rendering Congress's control over resources more potent, this shift has brought into clearer relief the boundary between valid and invalid constitutional objections to spending constraints. Two high-profile examples—once again, one involving foreign affairs and the other law enforcement—show this strengthened congressional power at work, as do some more humdrum examples arising out of the government's routine operations.

1. Iran-Contra

A first example involves the notorious Iran-Contra scandal of the 1980s. During Ronald Reagan's presidency, 190 years after President Washington tangled with the Barbary states, Americans were once again being held hostage in the Mediterranean, this time in Lebanon by the Iran-backed militant group Hezbollah.[206] Seeking to secure these hostages' release, officials on Ronald Reagan's National Security Council concocted a scheme to curry favor with Hezbollah's patron through secret illegal arms sales to Iran.[207] These officials diverted the resulting proceeds to the Contras, an anti-communist rebel group in Nicaragua; at the same time, in a parallel scandal that began somewhat earlier, they also solicited contributions to the

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204. For my account of this transition, see Price, *supra* note 21 (manuscript at 71–75).
205. For my development of this argument, see *id.* (manuscript at 77–79).
206. BRUFF, *supra* note 160, at 368–72.
207. *Id.*

same cause from private parties and foreign governments.[208] Because a recurrent appropriations provision called the Boland Amendment forbade use of government funds to support the Contras, the officials in question generally channeled these funds through an ostensibly private organization called "the Enterprise" that they in fact controlled.[209] As explained later in a joint House-Senate committee's investigative report, these officials believed they could circumvent the Boland Amendment—and with it Congress's power of the purse—by relying on such "contributions" rather than "appropriated funds."[210]

In part, then, the Iran-Contra fiasco involved an effort to employ outside resources (i.e., funds from arms sales, private parties, and foreign governments) to accomplish a public objective (support for the Contras) that Congress had prohibited by law (through the Boland Amendment). The Reagan administration's actions thus threatened to establish a precedent for executive defiance of statutory limitations on even resource-dependent functions.

The escapade's significance, however, ended up being the opposite. In its majority report, the joint House-Senate committee condemned the administration's actions and repudiated its legal theory.[211] Responsible officials faced criminal prosecution, though in the end convictions against the key figures Oliver North and John Poindexter were reversed due to tainting by immunized evidence.[212] As for the President, although some in his administration belatedly claimed that an executive constitutional prerogative supported their actions, Reagan himself made statements recognizing Congress's power over spending.[213] Furthermore, although he encouraged some aspects of the scandal, he seemed to lack full awareness of his administration's actions.[214] Overall, then, the scandal's constitutional significance seems captured not by the perpetrators' bumbling machinations, but instead by the House-Senate committee's assertion that "Congress's exclusive control over the expenditure of funds cannot legally be evaded through use of gifts or donations made to the executive

208. *Id.*; REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 4–5, 6–9 (1987).

209. S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 4–5, 6–9.

210. *Id.* at 411. For an account of the scandal focusing on this effort to circumvent appropriations control through use of the Enterprise, see BOBBITT, *supra* note 63, at 69–71.

211. S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 4–5, 6–9.

212. *See* United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991); United States v. North, 910 F.2d 843 (D.C. Cir. 1990), *modified in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990); BRUFF, *supra* note 160, at 532 n.69.

213. S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 406, 412.

214. BRUFF, *supra* note 160, at 369–72.

branch."[215] "Were it otherwise," the committee noted, "a President whose appropriation requests were rejected by Congress could raise money from private sources or third countries for armies, military actions, arms systems, and even domestic programs."[216]

Indeed, the committee reinforced this assertion's credibility by accepting other aspects of executive prerogative. Despite its strong assertion of congressional control over foreign aid, the committee simultaneously acknowledged that "[t]he Constitutional plan did not prohibit the President from urging other countries to give money directly to the Contras."[217] It simply barred "receipt and expenditure of such funds by this government absent an appropriation," even through the subterfuge of "a nominally private entity" that was "in reality an arm of the Government" whose expenditures "the Government is able to direct."[218]

The committee here appeared to distinguish diplomatic communication from provision of aid, a distinction in accord with the established bipartisan practice—one that has since only grown stronger—of disregarding funding limitations on the content of diplomatic communications as well as, to some degree, the President's choice of messengers.[219] Though debatable as a matter of first principles, this practice might reflect an implicit theory that, because the President's own diplomatic communications do not require appropriated resources, limitations on the President's choice of messengers inside or outside the government are equally invalid given their potential to manipulate the messages relayed through the President's exercise of this resource-independent power.[220] At any rate, this theory might help explain—and thus limit—an established executive practice, even if it does not fully justify it.[221]

On the whole, although it did not frame its analysis in these terms, the Iran-Contra committee report ended up recognizing the same distinction between tangible aid and diplomatic communication that President Washington respected in negotiating with the Barbary states some two centuries earlier. Even if presidents may conduct foreign relations by

215. S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 412.

216. *Id.*

217. *Id.* at 413.

218. *Id.* The report observes in a footnote that the administration received this same advice internally. *Id.* at 421 n.11. For a somewhat less optimistic appraisal of the scandal's aftermath, see BRUFF, *supra* note 160, at 373 (suggesting that the subsequent investigations "failed to drive home the fundamental unconstitutionality of the secret policies and operations in a way that the public could understand"); *cf.* BOBBITT, *supra* note 63, at 82 (lamenting inattention to constitutional issues in televised hearings).

219. *See supra* notes 67–69 and accompanying text.

220. Price, *supra* note 9, at 458–62.

221. *Id.* at 454–58.

determining the content of diplomatic messages relayed to foreign sovereigns, they cannot defy limits imposed by law on foreign aid.

2. *Marijuana*

The still more recent controversy over federal marijuana enforcement reflects the same constitutional boundary with respect to domestic administration. Though state and federal laws across the country uniformly banned marijuana earlier in the twentieth century, states began liberalizing their own laws in the 1990s, initially only for medical uses but eventually for recreational consumption as well.[222] After some waffling, the U.S. Justice Department under President Obama adopted an explicit policy of assigning low priority to enforcing federal marijuana prohibitions against parties who possessed or sold marijuana in compliance with state law and posed no threat to interstate interests.[223] Some enforcement efforts against dispensaries nevertheless continued.[224] In response, Congress adopted a recurrent appropriations rider beginning in fiscal year 2015 that forbade use of Justice Department funds to "prevent any of [certain listed states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[225]

Through this rider, Congress employed its power of the purse to control the executive exercise of a resource-dependent power—namely, the authority to enforce federal laws. In response, the Justice Department initially interpreted the rider narrowly, contending that it applied only to prosecutions of state officials (as opposed to private parties).[226] In other words, it read the funding restriction to apply only to prosecutions of those responsible for "implementing [state] laws," as opposed to those subject to them.[227] The Ninth Circuit, however, rejected this view in a 2016 decision,

222. Jonathan H. Adler, *Introduction: Our Federalism on Drugs*, *in* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 1, 1 (Jonathan H. Adler ed., 2020) [hereinafter MARIJUANA FEDERALISM].

223. Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys 1–2 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/ZCL3-F2BW]; Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Attorneys 2 (Feb. 14, 2014), http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf [https://perma.cc/CCT7-HYJR].

224. Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, *in* MARIJUANA FEDERALISM, *supra* note 222, at 123, 125; *see also* United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039, 1046–47 (N.D. Cal. 2015) (discussing congressional concerns about such enforcement).

225. Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, div. B, tit. V, § 538, 128 Stat. 2130, 2217 (2014); *see also* Price, *supra* note 224, at 125.

226. Memorandum from Patty Merkamp Stemler, Chief, Appellate Section, Criminal Div., U.S. Dep't of Just., to All Fed. Prosecutors 1–2 (Feb. 27, 2015), https://www.scribd.com/doc/273620932/Depart-of-Justice-Says-Medical-Marijuana-Law-Doesn-t-Impact-Prosecutions [https://perma.cc/W5BB-A6QD].

227. *Id.*

holding instead that the rider prohibited prosecution of individual offenders and that such individuals could assert the rider as a defense in any prosecution.[228]

A year later, President Trump appeared to contest this reasoning and question whether the funding restriction was even constitutional. Joining the questionable company of Millard Fillmore, he issued a signing statement in 2017 indicating that he would "treat [the restriction] consistently with my constitutional responsibility to take care that the laws be faithfully executed"[229]—language that seemed to suggest doubts about whether an appropriations rider could limit executive enforcement choices.[230] Trump, however, appeared not to act on any such theory in practice. Indeed, despite revoking the Obama administration's 2013 guidance and allowing individual U.S. Attorneys to set marijuana enforcement policy, the administration did not pursue any systematic crackdown on state-compliant marijuana.[231] On the contrary, Trump himself apparently assured a Colorado senator that he would not interfere with that state's marijuana legalization.[232] In addition, his second Attorney General, William Barr, assured the Senate during his confirmation proceedings that he did "not intend to go after parties who have complied with state law in reliance on" Obama administration policies.[233]

Thus, in this example as in earlier ones, both executive practice and court rulings support what the constitutional structure should dictate in any event: Congress may employ its power of the purse to determine how and even whether executive officials enforce particular federal laws.

3. *Lower-Salience Examples*

The last two examples—Iran-Contra and marijuana enforcement—involved high-salience controversies that drew presidential attention. Yet broader patterns of administrative behavior support the same conclusions. In particular, in contemporaneous legal rulings addressing more routine aspects of modern administration, officials in all three branches of government applied precisely the same principles reflected in these examples.

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228. United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016).

229. Presidential Statement on Signing the Consolidated Appropriations Act, 2017, *supra* note 40.

230. Price, *supra* note 9, at 377–78, 448.

231. Price, *supra* note 224, at 126.

232. *Id.*

233. *Confirmation Hearing on the Nomination of Hon. William Pelham Barr to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 799 (2019) (responses of William P. Barr, nominee to be Att'y Gen., to questions for the record from Sen. Cory Booker).

In a 1984 decision, for example, the Fourth Circuit rejected a creative plan developed by the Federal Aviation Administration (FAA) for financing bus services for the Dulles International Airport outside Washington, D.C.[234] As a condition of waiving certain landing fees, the FAA required airlines to contribute to an ostensibly separate trust fund which then employed those contributions to purchase buses.[235] In a legal challenge to the purchase, the Fourth Circuit held that the FAA could not circumvent appropriations limitations and federal procurement laws by diverting fees in this way.[236] The fees, the court reasoned, belonged to the U.S. treasury, so upholding the bus-supply contract would have enabled an "end-run around normal appropriations channels" and allowed the agency "to supplement its budget by $3 million without congressional action."[237] The Constitution as well as applicable laws foreclosed that result.[238]

To be sure, the FAA's action might suggest that the executive branch contested these constraints, but in fact the Justice Department embraced the same basic principles as well. In a 1980 opinion, the Department's Office of Legal Counsel (OLC) concluded that the government could not forgo damages in an environmental settlement in exchange for a commitment to pay certain sums to an outside conservation group.[239] Because of the miscellaneous receipts statute, the Office reasoned, the damages were owed to the U.S. treasury, and "the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of" the miscellaneous receipts law, so long as "a federal agency could have accepted possession and retains discretion to direct the use of the money."[240] In other words, "money available to the United States and directed to another recipient [was] constructively 'received' for purposes of" the statute, making the proposed settlement unlawful.[241] Some fifteen years later, the Department took the same position in litigation, leading a federal district court to conclude reluctantly that penalties ordered by the court under the Clean Water Act could only be paid into the treasury and not toward outside mitigation

234. Motor Coach Indus., Inc. v. Dole, 725 F.2d 958, 960–61 (4th Cir. 1984).
235. *Id.* at 961.
236. *Id.* at 967.
237. *Id.* at 968.
238. *Id.*; *see also* Scheduled Airlines Traffic Offs., Inc. v. Dep't of Def., 87 F.3d 1356, 1362 (D.C. Cir. 1996) (applying these same principles to require payment into the treasury of fees required from service-providers as a requirement of certain military contracts); SBA's Imposition of Oversight Rev. Fees on PLP Lenders, B-300248, 2004 WL 77801 (Comp. Gen. Jan. 15, 2004) (following *Dole*'s reasoning to invalidate an agency's augmentation of its appropriations through fees retained by agency contractors).
239. Effect of 31 U.S.C. § 484 on the Settlement Auth. of the Att'y Gen., 4B Op. O.L.C. 684, 684 (1980).
240. *Id.* at 688.
241. *Id.*

efforts.[242] Meanwhile, presumably reflecting Congress's view, the Comptroller General applied the same reasoning in other cases,[243] albeit sometimes over the objection of executive agencies that construed applicable statutes more flexibly.[244]

The Justice Department has even applied the miscellaneous receipts statute to require payment into the treasury of earnings from undercover law enforcement operations. In a 1978 opinion (as later summarized by the Comptroller General), OLC determined that "all monies received by the Federal Bureau of Investigation (FBI) during undercover operations," including even winnings from a particular hand in an illegal card game, must "be paid into the Treasury."[245] Indeed, whereas the Comptroller General had accepted that immediate deposits might not be required if making them would jeopardize a law enforcement operation, the Justice Department reasoned that such operations were unauthorized to begin with if expeditious deposits were infeasible.[246] In response, Congress amended the law to grant the FBI and the Drug Enforcement Administration the authority to employ proceeds from undercover operations to offset those operations' necessary and reasonable expenses.[247] Nevertheless, following the Attorney General's reasoning, the Comptroller General later concluded that other agencies such as the Internal Revenue Service still lacked authority to retain earnings from undercover operations.[248] (Granting some commonsense flexibility, the Comptroller General did suggest that an entire card game, as opposed to a single hand, might constitute the relevant transaction for purposes of depositing miscellaneous receipts.)[249]

These opinions show the force of the executive branch's resource-dependence in structuring government operations and maintaining effective checks and balances. Much as Alexander Hamilton recognized in the Republic's early days that informant rewards required appropriations from

242. United States v. Smithfield Foods, Inc., 982 F. Supp. 373, 375–76 (E.D. Va. 1997).

243. *See, e.g.*, Nuclear Regul. Comm'n's Auth. to Mitigate Civ. Penalties, 70 Comp. Gen. 17 (1990); Commodity Futures Trading Comm'n—Donations Under Settlement Agreements, B-210210, 1983 WL 197623 (Sept. 14, 1983).

244. *See* Dep't of Energy Use of Consent Ords. to Distribute Petroleum Overcharge Settlement Funds, 62 Comp. Gen. 379, 380 (1983) ("In our opinion, [the Department of] Energy has been using consent orders improperly in a number of cases by making or allowing the oil companies to make distribution of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges.").

245. *See* Requirement to Deposit Receipts from IRS Undercover Operations into the Treasury, 67 Comp. Gen. 353, 354 (1988) (describing OLC opinion).

246. *Id.*

247. *Id.* at 354–55.

248. *Id.* at 356.

249. *Id.*

Congress,[250] government lawyers two centuries later concluded that Congress's power of the purse extended even to secret government efforts to catch lawbreakers in the act. The reasoning in both cases, as in the opinions on penal settlements and the FAA's machinations, provides powerful confirmation of Congress's authority to control resources for law enforcement and other resource-dependent executive functions.[251]

D. The Resource-Dependence Through-Line

A pattern thus emerges from these historical examples (and others like them): Congress may limit the resources available for enforcing federal laws and affording government benefits including foreign aid. As a necessary corollary, moreover, Congress may equally preclude presidents from circumventing such limits by enlisting private aid and assistance.

Though I have held aside here examples involving use of military force, the same principles apply to that resource-dependent power as well.[252] By contrast, presidents often may disregard funding limits on resource-independent powers, as indeed they have done in significant historical examples.[253] Thus, for example, opinions from the Supreme Court have acknowledged that Congress cannot limit the issuance of pardons or impose bills of attainder through funding limitations;[254] President Taft disregarded a ban on use of appropriations to submit a unified budgetary proposal to Congress;[255] later presidents have likewise disregarded limits on

250. *See supra* Section II.A.1.

251. In an arguable counterexample, as Mirasola has documented, presidents since the late nineteenth century have claimed a constitutional "protective power" to defend federal property with military forces, as well as an "emergency authority" to quell major civil disturbances with the military. Mirasola, *supra* note 184, at 207. As Mirasola shows, however, these claimed authorities are questionable not only as a matter of constitutional text and structure but also as a matter of practice. *Id.* at 205. Furthermore, whether these putative presidential powers can override a specific limitation on use of government resources appears untested. In other words, even assuming they are valid, these executive powers might apply only in the absence of specific appropriations limitations, not in the face of them, much as appears to be the case with respect to unilateral executive use of military force. *See* Price, *supra* note 9, at 429 ("[P]resuming front-end initiative [with respect to use of force] absent specific restraints precludes neither back-end congressional authority to terminate an operation by denying funds, nor even front-end authority to deny resources for possible operations looming on the horizon"). In any event, finally, these putative protective and emergency powers involve use of government resources, not any presumed authority to enlist private assistance.

252. Price, *supra* note 9, at 427–32.

253. *Id.* at 394–401, 407–13.

254. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring) (indicating that Congress could not "impair the President's pardon power by denying him appropriations for pen and paper"); United States v. Lovett, 328 U.S. 303, 316 (1946) (deeming a law an unconstitutional bill of attainder even though "the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty").

255. Price, *supra* note 21 (manuscript at 50, 54).

formulating recommended legislation;[256] and numerous presidents have disregarded funding constraints on the content of diplomatic communications.[257] By and large, historical practice confirms the important distinction implicit in the Constitution's structure between powers that do and do not depend on congressionally authorized resources.

III. CONTEMPORARY QUESTIONS

If the Constitution thus grants Congress the power to control some key executive authorities but not others through its power of the purse, what implications should this framework carry in the present? This Article's final Part draws out three points with contemporary relevance: First, presidents must respect resource levels set by law for resource-dependent activities; second, legal limits on public resources apply equally to private resources employed by presidents for public functions; and third, regulatory "deals" may violate the spirit, and at least sometimes the letter, of Congress's authority over spending insofar as such deals expand agencies' effective capacity or coerce private assistance for unrelated tasks.

A. Defying Resource Levels

A first, straightforward implication of certain executive powers' resource-dependence is that Congress may determine the level of authorized resources for such activities. If Congress limits the funds or capacities available for enforcing certain laws, engaging in certain military operations, or dispensing certain benefits, the President lacks any constitutional prerogative to circumvent those limits by repurposing other resources or enlisting outside support. That is a key implication not only of Iran-Contra and the recent marijuana controversy,[258] but also of Congress's rejection of President Monroe's unauthorized shipbuilding and President Fillmore's pretensions to an unlimited law enforcement power.[259] Likewise, by rejecting the FAA's bus-funding scheme, the leveraging of penalties into funding for outside mitigation activities, and even the use of undercover operatives' gambling winnings for further enforcement efforts, the modern cases and opinions discussed above make clear that agencies lack any

256. *See generally* Statutory Mandate to Propose Legis. in Response to Medicare Funding Warning, 40 Op. O.L.C. 66, 66 (2016).

257. *See generally* Prohibition of Spending for Engagement of the Off. of Sci. & Tech. Pol'y with China, 35 Op. O.L.C. 116, 116 (2011).

258. *See supra* Sections II.C.1–2.

259. *See supra* Section II.B.2.

inherent power to exceed their appropriations.[260] As the Comptroller General has put it, "[i]n addition to providing necessary funds, a congressional appropriation establishes a maximum authorized program level," one that the agency "may not circumvent . . . by augmenting its appropriations from sources outside the government."[261]

The reverse is also true. If Congress mandates expenditures for certain tasks, the duty of faithful execution requires presidents to make them.[262] Indeed, even if Congress merely provides appropriations without specifically mandating their expenditure, the duty of faithful execution requires presidents to employ them as necessary to accomplish statutory objectives.[263] Though less squarely presented in the historical examples discussed here, I have elsewhere discussed the general pattern of historical practice refuting any notion of a constitutional prerogative to defy spending mandates for resource-dependent powers.[264] Among other things, Congress forcefully asserted this view in 1974 by enacting the Impoundment Control Act.[265] That law, as amended over time, limits deferrals (that is, delays) of appropriated spending and requires new legislation to rescind (that is, cancel) such spending altogether—twin requirements that contradict any putative executive prerogative to take such actions unilaterally.[266] To quote testimony from the Comptroller General's Government Accountability Office, the statute "operates on the constitutional premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold."[267] In the half century since the law's enactment, a general pattern of presidential compliance has only reinforced this constitutional understanding.[268]

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260. *See supra* Section II.C.3.

261. Hon. Christopher S. Bond, B-300248, 2004 WL 77861, at *3 (Comp. Gen. Jan. 15, 2004); *see also* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 693 (2026) (Kavanaugh, J., dissenting) (noting Congress's authority to halt tariff enforcement "by not approving annual appropriations necessary for the Executive Branch to continue to implement the tariffs").

262. Price, *supra* note 23, at 21.

263. *Id.*

264. Price, *supra* note 9, at 434–37, 446–48.

265. Pub. L. No. 93-344, 88 Stat. 297.

266. Price, *supra* note 23, at 23; *see also* 2 U.S.C. §§ 683–684 (requiring transmission to Congress of a rescission proposal whenever the President determines that "budget authority should be rescinded for fiscal policy or other reasons" and forbidding policy-based deferrals of budget authority absent specific statutory authorization).

267. *Hearing on Protecting Congress' Power of the Purse and the Rule of Law: Hearing Before the H. Comm. on the Budget*, 116th Cong. 87 (2020) (statement of Thomas H. Armstrong, Gen. Couns., Gov't Accountability Off.).

268. *See, e.g.*, CHAFETZ, *supra* note 121, at 65 ("The Impoundment Control Act's checks have generally been effective."); BRUFF, *supra* note 160, at 345 ("Presidents have avoided renewing controversy for fear of being compared to Richard Nixon.").

Despite such overall compliance, adherence to this framework has never been perfect, and recent presidents have generally tended to stretch legal bounds. Even by those standards, however, the second Trump administration has shown particular disdain for Congress's constitutional authority over resource levels. In the administration's early days, Trump's "Department of Government Efficiency" (DOGE) trimmed agency budgets, terminated personnel, and cancelled foreign aid; its then-head Elon Musk bragged that he fed the U.S. Agency for International Development "through the wood-chipper."[269] In addition, at least initially, the administration cancelled grants and contracts, paused government assistance, and otherwise asserted policy control over spending in ways that appeared to defy legal limits on impoundments.[270] Later, it announced plans for a dramatic reduction in Department of Education staffing,[271] and during one recent government shutdown, in an apparent attempt to pressure Democratic legislators, it halted food assistance to some states, paused construction projects in key senators' jurisdictions, and announced plans to cut even more staff.[272]

Even as it trimmed expenditures in these ways for some government functions, the administration sought to expand resources for accomplishing its priorities. It employed the military inventively to aid border enforcement, assigned immigration cases to law enforcement personnel from agencies with other functions, and deployed the national guard to maintain order in certain cities.[273] During the shutdown, it transferred funds creatively between accounts, tapped military research funds for salaries, and apparently accepted a private donation for military pay.[274] As discussed below in Section C, it also constructed regulatory deals to compel private spending or support for key administration priorities.

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269. Jonathan Swan et al., *Inside Musk's Aggressive Incursion into the Federal Government*, N.Y. TIMES (Feb. 4, 2025), https://www.nytimes.com/2025/02/03/us/politics/musk-federal-government.html [https://perma.cc/3GDL-CC99].

270. *See* Lawrence, Pasachoff & Price., *supra* note 2, at 3–5; Samuel R. Bagenstos, *The Crisis of Appropriations Law*, 103 WASH. U. L. REV. 1719 (2026).

271. Ken Thomas & Matt Barnum, *Trump Signs Order to Begin Dismantling Education Department. Here's What to Know.*, WALL ST. J. (Mar. 20, 2025), https://www.wsj.com/politics/policy/trump-education-department-executive-order-e88561b5 [https://perma.cc/MRR6-TM59].

272. Zachary S. Price, *Trump's Power Grab Over the Budget Is Breaking the Constitutional Design*, ATLANTIC (Dec. 20, 2025), https://www.theatlantic.com/ideas/2025/12/trump-government-spending-congress/685337/ [https://perma.cc/3E38-L3TP].

273. *Id.*

274. *Id.* In a later shutdown that took place as this Article was going to press, the administration again interpreted applicable statutes creatively to shift funds and pay certain government employees. *See* Zachary S. Price, *A Tale of Two Shutdowns and Growing Presidential Power*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 31, 2026), https://www.yalejreg.com/nc/a-tale-of-two-shutdowns-and-growing-presidential-power/ [https://perma.cc/D4JU-K7LY] (discussing relevant actions and legal questions).

The administration's legal justifications for these actions were not always clear, and some may have comported with statutory authorities regarding gifts, transfers, and funding cancellations. Congress, moreover, ratified some of the administration's actions. Following procedures afforded by the Impoundment Control Act, it enacted legislation rescinding funds for foreign aid, public broadcasting, and other purposes.[275] In a major tax and spending bill, it also authorized massive spending on immigration enforcement, including use of certain military resources.[276] Overall, however, the administration's pattern of behavior was difficult to explain without some presumed constitutional prerogative to determine funding levels even for resource-dependent executive functions, yet no such prerogative exists.

B. Defying Resource Constraints

A second, related implication is that private funds applied by the President to public purposes fall subject to legal limits by virtue of the President's control. This principle is a necessary corollary of Congress's authority to control public resources, and in her contemporaneous article Kate Stith correctly identified it as a central lesson of Iran-Contra's repudiation.[277] As the joint House-Senate committee investigating the scandal observed, allowing the President to evade expenditure limits "through gifts and donations" would undermine "Congress's exclusive control over the expenditure of funds."[278] More broadly, as Stith noted, the miscellaneous receipts statute reflects the same understanding as well.[279]

Summing up the applicable framework, Stith observed that the Constitution reflects both "a *Principle of the Public Fisc*, asserting that all monies received from whatever source by any part of the government are public funds, and . . . a *Principle of Appropriations Control*, prohibiting expenditure of any public money without legislative authorization."[280] Although Stith failed to recognize that resource-independent functions require a different analysis, her twin principles capture the correct framework for executive powers that do depend on congressionally

275. Rescissions Act of 2025, Pub. L. No. 119-28, 139 Stat. 467.

276. Act of July 4, 2025, Pub. L. No. 119-21, tit. II, § 20011, 139 Stat. 72, 125.

277. Stith, *supra* note 55, at 1345.

278. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 412 (1987).

279. Stith, *supra* note 55, at 1364.

280. *Id.* at 1345; *see also* BOBBITT, *supra* note 63, at 72–81 (discussing multiple constitutional reasons to reject use of private resources as a means of circumventing public oversight in the Iran-Contra scandal).

controlled resources. As historical support for this view, furthermore, we can add the analysis in the nineteenth-century Attorney General opinions recognizing that Congress may assign functions to particular offices and then disable those functions with lack of funding,[281] as well as the modern Justice Department's conclusion that undercover operatives cannot even spend gambling winnings on further law enforcement efforts without some statutory authority to do so.[282]

This principle bears importantly on recent efforts to accomplish presidential goals with funds placed under executive control by private parties. As a component of his administration's tariff deal with Japan, President Trump apparently obtained commitments for large investments in the United States in accordance with presidential directions.[283] Similarly, in the apparent belief that it could circumvent an absence of appropriations by obtaining private contributions, the administration sought to pay military salaries during a government shutdown with funds from a donation.[284] Likewise, President Trump sought donations for a major White House renovation.[285] And following the United States's capture of Venezuelan leader Nicolas Maduro in a military operation, Trump issued an executive order asserting control over Venezuelan oil revenues, although the precise structure and mechanics of his plans were unclear.[286]

These arrangements, again, may or may not comply with applicable laws regarding gift acceptance and expenditure of donated funds. As a constitutional matter, however, any laws limiting government expenditures in general, let alone any laws governing these particular expenditures, are binding on the President. Once funds are under executive control, the fact that outside parties originally provided them does not afford any lawful basis for disregarding applicable legal restraints.

C. Deals and Capacities

A last application relates to the emerging practice of "regulation by deal" or "transactional administration"—the practice, characteristic of both the first and second Trump administrations, of threatening regulatory penalties

281. *See supra* Section II.B.1.
282. *See supra* Section II.C.3.
283. Davis & Swanson, *supra* note 5. The status of this deal following the Supreme Court's rejection of tariff authority under one statute was unclear as this Article was finalized.
284. Slattery & Renshaw, *supra* note 7.
285. Edwards & Diamond, *supra* note 8.
286. Anderson & Zerden, *supra* note 6.

or withdrawing (sometimes unlawfully) certain government benefits so as to induce a settlement that effectuates desired regulatory objectives.[287]

Though mimicking bare-knuckle business tactics common in some industries, this approach, as critics have noted, circumvents procedural limitations and substantive constraints that aim to discipline and legitimate administrative actions.[288] The administration has nevertheless employed it across a range of regulatory contexts. In the first Trump administration, such deals enabled the government to advance industrial policy goals such as retaining manufacturing jobs and building domestic infrastructure.[289] Still more brazenly, the second Trump administration induced settlements with universities that required large penalty payments, internal measures to combat campus antisemitism, and adherence to colorblind standards for admissions and hiring.[290] Likewise, by threatening to launch civil rights investigations, revoke lawyers' security clearances, and terminate clients' government contracts, the administration induced settlements with law firms requiring, among other things, extensive investments in pro bono support for causes favored by the administration.[291] In some cases, firms ended up providing free services to the Commerce Department.[292]

Critics are right to fault these tactics for circumventing legal limits on administration. By undermining constraints on administrative remedies, these tactics may violate agency organic statutes.[293] Indeed, sometimes the steps taken to induce the deals were not even lawful in the first place: For instance, the administration unilaterally suspended universities' federal grants and contracts without regard to procedural and substantive limitations on such funding cutoffs,[294] and it suspended security clearances in apparent retaliation for expressive activities protected by the First Amendment.[295]

Once again, however, a focus on federal administration's resource-dependence should sharpen these critiques. In charging federal agencies with enforcing civil rights, administering subsidies and tax breaks, and protecting national security information, Congress was not authorizing unbounded application of legal tools to achieve executive policy aims. It

287. Solomon & Zaring, *supra* note 29, at 1099.
288. *Id.* at 1102–03.
289. *Id.* at 1101.
290. Pozen, *supra* note 30.
291. Dayal, *supra* note 3.
292. *Id.*
293. Solomon & Zaring, *supra* note 29, at 1102–03.
294. Pozen, *supra* note 30.
295. Ryan Lucas, *Federal Judge Strikes Down Trump Order Targeting the Law Firm Perkins Coie*, NPR (May 2, 2025), https://www.npr.org/2025/05/02/nx-s1-5385355/perkins-coie-trump-executive-order-law-firms [https://perma.cc/DXC5-522Y].

was instead providing a set of calibrated resources and capacities for accomplishing statutory objectives. From that point of view, violating procedural constraints on administrative action not only violates the laws imposing those constraints, but also expands the government's enforcement capacity beyond what would be possible with appropriated resources if applicable procedural requirements were respected. In that sense, it violates the resource-dependence of these functions just as much as unlawfully enlisting outside assistance or transferring resources between agencies.

The violation, furthermore, is doubly concerning when the resulting deals' terms involve enhancing government capacity in other areas. In its law firm deals, again, the administration generally obtained commitments to provide pro bono services for favored causes, and some deals apparently resulted in firms providing free services to the Commerce Department.[296] Assuming these firms waived any expectation of compensation for their work, the administration may argue that it could accept this help notwithstanding the Anti-Deficiency Act's prohibition on "voluntary services."[297] Yet the services were not in reality uncompensated: They were apparently part of the consideration for a settlement of regulatory threats and penalties. And while the firms in question may have had legal exposure due to violations of civil rights statutes or other laws, Congress enacted those laws to induce compliance with their terms, not to give the executive branch leverage for achieving unrelated policy goals. To the extent the deals involved leveraging statutes in this manner, they were analogous to the proposed settlements discussed earlier that sought to convert penalties owed to the treasury into donations to outside organizations—settlements that the Justice Department and Comptroller General deemed unlawful.[298]

In all these ways, even if they were somehow technically lawful, these arrangements thwart key goals of the ADA and other applicable statutes. In particular, they threaten Congress's authority to determine the effective capacity and relative funding of different government agencies and functions. In any judicial review of these settlements, courts should closely scrutinize the legality of any free services provided to the government, as well as the legal validity of any conditions unrelated to the statutory policies being enforced.[299]

296. Dayal, *supra* note 3.

297. *See supra* notes 87–89 and accompanying text.

298. *See supra* Section II.C.3.

299. *See* Nicole Huberfeld & Matthew B. Lawrence, *The Missing Constitutional Law of Executive Conditions*, 103 WASH. U. L. REV. 1767, 1809 (2026) (likewise arguing that funding conditions imposed by the executive branch that "induce[] states or private parties to provide resources to the executive in excess or contravention of those provided by Congress" warrant "more searching scrutiny"). I have

In sum, regulation by deal poses threats not only to administrative regularity but also to congressional authority over agency resources and capacities. Such deals should be suspect when they involve either an unlawful streamlining of agency procedures or the extraction of resources for achieving unrelated executive policy goals.

CONCLUSION

Although U.S. presidents have often wished to escape their dependence on congressionally appropriated resources, no consistent historical practice has developed of evading limitations on funding for enforcing federal laws or providing federal benefits. These powers are properly resource-dependent under the Constitution's text and structure, and Congress's resulting authority over their exercise through its appropriations power has had real bite across American history. In the handful of examples discussed here, George Washington recognized his dependence on congressional appropriations for informant rewards and diplomatic payoffs; nineteenth-century officials recognized that incurring "coercive deficiencies" through enforcement activities in excess of appropriations still left them vulnerable to Congress's eventual funding choices; and Reagan and Trump (in his first administration) both backed down from suggestions that they could maneuver around restrictions on government funds to aid foreign militants or enforce federal laws. In more routine cases, all three branches have applied these same principles to bar agencies from expanding their own effective capacity through outside contributions or diversion of funds owed to the treasury.

This historical pattern should now afford critical perspective on recent executive actions raising or lowering statutory funding levels for government activities, employing private resources to evade limits on public spending, and leveraging regulatory authorities to induce private actions. In an age of government austerity, presidents may well find themselves seeking ways like these to accomplish public functions with private resources, but the legality of such options is a matter for Congress and not the President alone.

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elsewhere made analogous arguments that waiver conditions should relate closely to policy goals reflected in the statutory provisions being waived, *see* Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 268–69 (2016), and that conditions in deferred prosecution agreements should relate closely to the underlying criminal charges, *see* Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1633–36 (2016).