The Duty to Appropriate: Why Congress Has a Constitutional Obligation to Fund Criminal Law Enforcement

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The Duty to Appropriate: Why Congress Has a Constitutional Obligation to Fund Criminal Law Enforcement

Daniel Martin*

In the Federalist Papers, James Madison famously called the power of the purse “the most complete and effectual weapon” of the representatives of the people, as part of his defense of the fledgling Constitution. In practical terms, Madison’s claim has proven true time and time again—with Congress using appropriations bills to assert extensive control over the modern administrative state. In legal terms, however, the power of the purse has received remarkably short shrift in both scholarship and case law, especially regarding the relationship between congressional appropriations and the separation of powers doctrine. Specifically, there is no Supreme Court opinion or body of research that systematically defines how appropriations may influence the President’s independent constitutional functions.
In response to this gap, this Note examines the relationship between appropriations and separation of powers, focusing on criminal law enforcement as a model issue. First, this Note argues that the Appropriations Clause confines spending decisions to Congress but does not give Congress plenary control over spending, requiring Congress to appropriate funds to the Executive and Judiciary for their independent constitutional functions. Second, this Note argues that criminal prosecutions should be considered an exclusive executive function, giving Congress a constitutional duty to fund criminal law enforcement. Congress may breach that duty by refusing to provide funding or by placing impermissible conditions on the use of such funds, both of which would force the President to either violate the Appropriations Clause or the Take Care Clause. Because Congress’s action would result in this unconstitutional outcome, this Note ultimately concludes that Congress has a constitutional obligation to provide funding for criminal law enforcement.

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INTRODUCTION

As part of his defense of the fledgling Constitution, James Madison famously called the power of the purse “the most complete and effectual weapon” of the representatives of the people. Here, Madison was referring to the Origination Clause, which requires that all bills that raise revenue originate in the House of Representatives. The modern power of the purse, however, is much broader than the Origination Clause. Through a combination of constitutional requirement and statutory prohibition, Congress effectively controls all federal government spending, barring a small amount of discreitional funding given to the President.

Because of the massive size of the federal budget, Congress delegates virtually all of its spending decisions to executive agencies, state and local governments, and private parties by issuing block grants of funding tied to specific conditions. Of these grants, most of the Executive’s funds go to government agencies—groups like the Department of Defense, Environmental Protection Agency, and Federal Trade Commission. These agencies, many under the direction and supervision of the President, set the federal government’s policy in myriad areas of law by promulgating regulations, adjudicating claims, and bringing enforcement actions. As a whole, they comprise the administrative state responsible for enforcing federal law.

By issuing block grants and giving agencies discretion over how to spend their budgets, however, Congress is often faced with the problem of political control: how can it ensure that agencies spend funds in a manner consistent with its intent? Enter the appropriation.

The Appropriations Clause provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Accordingly, Congress must pass specific legislation every year that authorizes the government to spend. This type of law is known as an appropriation, and appropriations bills have become one of the dominant methods of congressional control.

1. THE FEDERALIST NO. 58 (James Madison).
3. And even these funds must be appropriated each year by Congress, giving Congress ultimate control.
4. $3,852,612,000,000 in Fiscal Year 2016, according to the Office of Management and Budget. See Historical Tables, OFF. MGMT. & BUDGET, https://www.whitehouse.gov/omb/budget/Historicals [https://perma.cc/LAB5-7VXC].
5. See generally Consolidated Appropriations Act, Pub. L. No. 115-31, 131 Stat. 135 (2017) (granting, for instance, the Agricultural Research Service $1,170,235,000 on condition that limitations shall not apply to “modernization or replacement of existing facilities at Beltsville, Maryland,” or granting the Counter-Islamic State of Iraq and the Levant Train and Equip Fund $626,400,000 on condition that “the President submits a plan in accordance with section 10005 of this Act,” or granting the Indian Health Service $3,694,462,000 on condition that $2,000,000 be spent on “alcohol or drug treatment services”).
6. See id.
control over agencies. For instance, in 1978, the Federal Trade Commission (FTC), which administers the Lanham (Trademark) Act, sought to cancel the Formica trademark for genericness. 8 In response, Congress enacted restrictions in a 1980 appropriations bill that prohibited the FTC from using any funds to cancel trademarks solely on the ground of genericness. 9 The bill stopped the FTC from pursuing its claim against Formica, thereby establishing congressional control over the agency.

Similar examples abound in all areas of law, from forbidding Center for Disease Control research into gun violence, 10 to restricting Office of Management and Budget review over agriculture regulation, 11 to preventing the Department of Transportation from changing fuel efficiency standards. 12 In 2008, the Congressional Research Service conducted a comprehensive review of 2008 appropriations acts and found over sixty instances of these restrictions in that year alone. 13

Despite the important role that appropriations play in managing federal spending, research into the law of appropriations has received comparatively short shrift from both scholars and the courts. 14 While appropriations law is sometimes relevant in assessing some other constitutional matter, 15 rarely has it been the subject of serious constitutional interest. For the most part, this has not been detrimental to understanding appropriations and constitutional law, as there have been few disputes about the constitutionality of any particular laws. In 2014, however, Congress passed an appropriations bill that went further than ever before, triggering a new conflict between Congress and the Executive about the proper scope of the appropriations power.

The dispute began in December 2014, when Congress passed the Consolidated and Further Continuing Appropriations Act of 2015 (CFCAA). 16 The Act, which provided funding for the Department of Justice (DOJ) throughout 2015, included a rider called the “Rohrabacher-Farr Amendment,” which was introduced to limit DOJ’s ability to prosecute violations of the

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12. Id. at 10.
13. Id. at 37–49 (compiling restrictions).
14. See Kate Stith, Congress’ Power of the Purse, 97 YALE L.J. 1343, 1344 (1988) (noting the lack of scholarship and citing to the few works that exist). This Note’s author is unaware of any major scholarship since Stith’s 1988 article.
Controlled Substances Act (CSA).\textsuperscript{17} Codified as Section 538 of the Act, the amendment prohibits the agency from spending any funds “to prevent such States [that have legalized medical marijuana] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”\textsuperscript{18}

The rider’s sponsors and various marijuana-legalization supporters viewed Section 538 as a ban on federal prosecution of marijuana possession and distribution in all states where medical marijuana was legal at the state level.\textsuperscript{19} DOJ, however, interpreted the law differently and has continued to prosecute violations of the CSA related to medical marijuana.\textsuperscript{20} The courts are now deciding how best to interpret Section 538 as a matter of statutory interpretation, but there is another issue lurking just beneath the surface of this litigation: is the Act even constitutional?

Assuming that Section 538 does prohibit all federal prosecutions of the CSA related to medical marijuana, the CFCAA raises novel questions of appropriations law and separation of powers. Specifically, by prohibiting DOJ from engaging in a class of criminal prosecutions, Congress has attempted to use its appropriations power to prevent the Executive from performing its task of criminal law enforcement. Since the Supreme Court has long held that Congress may not pass laws that violate separation of powers by undermining the Executive’s performance of its constitutional duties, the constitutional question is simple: can Congress use appropriations to deny funding for criminal law enforcement?

There is no Supreme Court case answering this question, nor do any lower courts appear to have addressed it. Scholars have made tentative leaps at understanding appropriations broadly\textsuperscript{21} and in response to specific historic events,\textsuperscript{22} but as far as this author is aware, there is no definitive analysis of the relationship between appropriations and separation of powers.\textsuperscript{23} This Note

\begin{enumerate}
\item In litigation currently before the Ninth Circuit, United States v. Charles Lynch, DOJ has argued that the text of the statute does not purport to limit such prosecutions. However, the bill’s sponsors, Congressmen Dana Rohrabacher (R-CA) and Sam Farr (D-CA), stated on the House floor that this was the amendment’s intent and have subsequently filed amicus briefs arguing for this interpretation. See Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as Amici in Support of Charles C. Lynch’s Motion for Rehearing En Banc, United States v. Lynch, Nos. 10-50219, 10-50264 (9th Cir. May 5, 2015), ECF No. 103 [hereinafter Amicus Brief for Congressmen Dana Rohrabacher and Sam Farr].
\item See, e.g., United States v. Charles Lynch, No. 10-50219 (9th Cir. 2017).
\item See Stith, supra note 14, at 1350–51.
\item Due credit must be given to Stith’s excellent article, “Congress’ Power of the Purse,” which first suggested the proper scope of the appropriations power and laid much of the groundwork for this Note. That article, however, was focused broadly on Congress’s ability to raise revenue and spend,
Attempts to fill that scholarly gap by arguing that Congress cannot use appropriations to prevent the President from fulfilling her independent constitutional functions, that criminal law enforcement is an independent constitutional function, and accordingly that Congress has a duty to appropriate funds for criminal law enforcement.

To make this argument, this Note is divided into three Parts. Part I establishes the analytical framework of the Appropriations Clause as a restriction on Congress. Drawing on Professor Kate Stith’s article, “Congress’ Power of the Purse,” it argues that the Appropriations Clause is a limitation upon Congress that imposes a duty to appropriate funds for constitutional mandates. Though the duty comes with attendant power, the power does not extend so far as to work otherwise unconstitutional results, and accordingly, cannot be used to strike at the Executive’s independent constitutional activities. Based on this argument, Part I argues that the scope of the Appropriations Clause should be coextensive with the limits imposed by the Supreme Court’s “impermissible undermining” analysis, under which Congress can take no action that would impermissibly undermine the Executive’s function. The ultimate rule derived from this analysis is that Congress cannot use the power inherent in the Appropriations Clause to prevent the Executive or Judiciary from accomplishing their constitutionally assigned functions, regardless of whether those functions are granted by the Constitution as a power or imposed as a duty.

Part II next examines whether criminal prosecutions are constitutionally assigned to the Executive, given the lack of a clear textual commitment of prosecutions to any branch. An examination of both post-ratification history and case law demonstrates that there is a tension between history, which suggests that criminal prosecution is not exclusively presidential, and case law, which holds criminal prosecution as the lodestar of a purely executive function. Examining the text and structure of the Constitution, Part II argues that separation of powers contemplates a diffusion of power in the criminal process between the three branches where Congress enacts criminal law, the Executive prosecutes violations, and the Judiciary determines guilt or innocence. It therefore suggests that modern history and case law treating prosecution as exclusively executive should trump the early history of limited executive prosecutions.

Part III examines the ramifications of appropriations laws that purport to limit criminal prosecutions in light of Parts I and II. It argues that Congress’s duty to fund constitutionally mandated activities extends to funding criminal law enforcement, and that interfering with that enforcement would breach that duty. Such a breach would force the President to choose between spending money not appropriated by law and failing to take care that the laws are faithfully executed,

whereas this Note focuses specifically on the relationship between appropriations and criminal law enforcement. See Stith, supra note 14.
either of which would be unconstitutional. Thus, the President could choose to continue prosecutions if she deemed them necessary, incentivizing Congress to substantively amend the criminal law to decisively thwart the President. Thus, my framework would ultimately pressure Congress into drafting criminal laws that better reflect the views of its constituents. Part III also uses Section 538 as an example of Congress going too far and suggests potential remedies.

The Conclusion ends by reflecting on policy reasons for limiting Congress’s power over the Executive’s prosecutorial discretion. This Note ultimately suggests that giving teeth to the Appropriations Clause could force Congress to draft better criminal laws, thereby bringing the law closer to the will of the people and ensuring that the separation of powers continues the constitutional operation of the Republic.

I. THE SCOPE OF CONGRESS’S POWER TO WITHHOLD FUNDS FROM THE EXECUTIVE

A. The Appropriations Clause as a Limit on Congressional Authority

One of the bedrock principles of separation of powers at Founding was separation of the sword and the purse: “the power of executing” laws was to be distinct from “the power of enacting” them. This principle manifests itself in the Constitution, where Congress alone is given the power to “lay and collect Taxes, Duties, Imposts and Excises,” to “borrow Money on the credit of the United States,” to “coin Money, regulate the Value thereof, and of foreign coin, and fix the Standard of Weights and Measures,” and to “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer term than two Years.” Thus, it is often said that Congress possesses a “Power of the Purse” as a general check against the power of the Executive.

The most important aspect of the Power of the Purse is the Appropriations Clause, which provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This clause reflects the Framers’ concern with executive control over the public fisc; the Framers were familiar with efforts by English kings “to rely on extraparliamentary sources of revenue for their military expeditions and other activities” and the political consequences that resulted from them. Charles I, for instance, infamously laid taxes without parliamentary consent and was eventually executed by Oliver

27. See Stith, supra note 14, at 1344 (commenting on the lack of specific scholarly principles guiding the extent of the power).
29. Fisher, supra note 22, at 761.
Cromwell, leading directly to the Third English Civil War. The Framers accordingly sought to keep control over the Treasury in legislative hands, limiting the ability of the Executive to act unilaterally.30

This check on the Executive has become one of Congress’s most important tools for modifying executive agency behavior; restrictions on spending run throughout Congress’s appropriations.31 In that sense, the Appropriations Clause represents a congressional power akin to its power to declare war, lay taxes, and regulate commerce.32

As a matter of constitutional design, however, the Appropriations Clause is only a congressional power because the Constitution imposes the duty of monitoring federal spending on Congress—not the Executive or Judiciary. Whereas Congress’s affirmative powers, such as laying taxes, regulating commerce, and declaring war, are in Article I, Section 8, Congress’s limitations, such as the prohibition on Bills of Attainder, guarantee of the writ of habeas corpus, and rejection of titles of nobility, are in Article I, Section 9.33 The Appropriations Clause appears in Section 9 and is phrased as a prohibition rather than a power.34 This placement within the Constitution, combined with the Framers’ desire to restrain extraparliamentary spending, suggests that the Appropriations Clause is properly viewed as a limitation on Congress not to spend in broad, undifferentiated terms or delegate spending authority to the President.35

Viewed as a constitutional limitation rather than a freestanding congressional power, the Appropriations Clause cannot grant Congress any plenary authority to counteract the Constitution. For instance, Congress may not use appropriations to establish a national religion,36 enact bills of attainder,37 or restrict the President’s pardon power.38 Other clauses in the Constitution

30. Id.; see also THE FEDERALIST NO. 58, supra note 1 (“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.”).
31. See, e.g., supra the limitations discussed in the Introduction, including Congress’s refusal to fund the Federal Trade Commission’s attempt to void Formica’s trademark for genericness and Congress’s limitation on the Center for Disease Control’s ability to study gun-related injuries and deaths.
32. See Stith, supra note 14, at 1350.
34. Compare id. art. I, § 9 cl. 3–6 (“No Bill of Attainder or ex post facto Law shall be passed”; “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken”; “No Tax or Duty shall be laid on Articles exported from any State”; “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another”), with id. art. I, § 9 cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”) (emphasis added).
35. See Stith, supra note 14, at 1345.
expressly contemplate the spending of funds as a constitutional duty and would be rendered void if the Appropriations Clause gave Congress plenary control over federal spending. For instance, Congress should not be able to use appropriations to reduce the salary of the President or of Article III judges.\textsuperscript{39}

This view of the Appropriations Clause is uncontroversial; it is “conventional to say that Congress, in adding conditions and provisos to appropriations bills, may not achieve unconstitutional results.”\textsuperscript{40} But beyond these established instances of unconstitutional appropriations, Congress also cannot use its appropriations power to interfere with the Executive’s exclusive constitutional functions:

Congress is obliged to provide public funds for constitutionally mandated activities—both obligations imposed upon the government generally and independent constitutional activities of the President. For instance, in the area of foreign affairs, Congress itself would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties.\textsuperscript{41} Thus, Congress exceeds the limitations of the Appropriations Clause whenever it attempts to defund the independent constitutional activities of the President because control over spending does not extend to interference with other constitutional mandates.

Here, it is important to note the distinction between constitutional duties and constitutional powers as they relate to Congress’s Power of the Purse. Because the Constitution allows for some multiple structures of government,\textsuperscript{42} there are many instances in which the branches have power to act but not an affirmative duty to do so. For instance, Congress has the power to establish district courts and courts of appeals but is under no obligation to do so if it thinks the Supreme Court is sufficient. Similarly, the President has the power to make

\textsuperscript{39} See U.S. CONST. art. II, § 1; id. art. III, § 1; United States v. Will, 449 U.S. 200, 202 (1980).
\textsuperscript{40} Fisher, supra note 22, at 762.
\textsuperscript{41} Stith, supra note 14, at 1350–51. Stith then writes that while Congress could act unconstitutionally by limiting the Executive, the President could act equally unconstitutionally by spending money beyond that appropriated by law. Id. at 1351. With both parties committed to unconstitutional action, Stith suggests that the remedy should be political—in the form of election or impeachment. Id. at 1351–52. However, that remedy would mean that Congress unconstitutionally refuses to appropriate funding, the President unconstitutionally acts without funding, and either the electorate refuses to reelect one or both actors or Congress removes the President from office. See id. at 1351–52. The impeachment scenario seems unsatisfactory, as a sufficiently powerful Congress could unconstitutionally limit the President’s funding and then impeach her as a result of its unconstitutional act. See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); id. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”). The ramifications of this scenario are discussed further in Part III.
\textsuperscript{42} See, e.g., U.S. CONST. art. I, § 8, cl. 9 (“The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court”).
treaties with foreign nations but is not constitutionally obligated to do so.\textsuperscript{43} Thus, it is possible to imagine a system of government in which Congress appropriates no money for inferior courts or for treaty making, as neither exist. In this hypothetical situation, Congress would be obligated at a bare minimum to provide funding only for constitutionally mandated duties—for instance, payment of the President and Supreme Court justices.\textsuperscript{44}

In reality, however, there are inferior courts and treaties, and Congress is obligated to pay for them: powers vested solely in the Executive or Judiciary must be funded whenever those branches opt to wield that power. Any other state of affairs would “impermissibly undermine”\textsuperscript{45} the other branches in the execution of their “constitutionally assigned functions.”\textsuperscript{46}

Accordingly, Stith’s “constitutionally mandated activities”\textsuperscript{47} are not merely the execution of constitutional duties. Congress cannot use the power inherent in the Appropriations clause to prevent the Executive or Judiciary from accomplishing their constitutionally assigned functions, regardless of whether those functions are granted by the Constitution as a power or imposed as a duty.

This reading of the Appropriations Clause circumscribes the outer limits of Congress’s Power of the Purse to neatly align with the Supreme Court’s “impermissible undermining” test. Generally, under that test, a substantive law passed by Congress is unconstitutional if it “impermissibly undermines the powers of the Executive Branch or disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.”\textsuperscript{48} The next Section sketches the history of this test, before explaining how it can be applied to the Appropriations Clause.

\textbf{B. Separation of Powers and the Supreme Court’s “Impermissible Undermining” Rule}

Although the “impermissible undermining” language first appeared in 1986 in \textit{Commodity Futures Trading Commission v. Schor},\textsuperscript{49} the general analysis began in 1977 with \textit{Nixon v. Administrator of General Services}, where the Court held that Congress’s seizure of ex-President Nixon’s personal files for archiving

\begin{itemize}
\item \textsuperscript{43} Compare, e.g., id. art. II, § 3 (“He [the President] shall from time to time give to the Congress Information on the State of the Union . . .”), with id. art. II, § 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ”) (emphasis added).
\item \textsuperscript{44} See id. art. II, § 1; id. art. III, § 1; \textit{Will}, 449 U.S. at 202.
\item \textsuperscript{45} \textit{Morrison v. Olson}, 487 U.S. 654, 695 (1988).
\item \textsuperscript{46} \textit{Nixon v. Adm’r of Gen. Servs. (Nixon II)}, 433 U.S. 425, 443 (1977); see also United States v. Klein, 80 U.S. 128, 129 (1871) (“The proviso in the appropriation act of July 12th, 1870 (16 Stat. at Large, 235), in substance . . . is unconstitutional and void. Its substance being that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court; it invades the powers both of the judicial and of the executive departments of the government.”).
\item \textsuperscript{47} Stith, \textit{supra} note 14, at 150.
\item \textsuperscript{48} \textit{Morrison}, 487 U.S. at 695 (internal quotation marks omitted).
\item \textsuperscript{49} 478 U.S. 833, 856 (1986).
\end{itemize}
did not impermissibly interfere with the actions of the Executive. In that case, following Nixon’s resignation of the Presidency, Congress passed the Presidential Recordings and Materials Preservation Act, which seized Nixon’s personal files stored at the White House and directed the Administrator of General Services to sort them for archiving.

Nixon objected and argued that Congress lacked power to direct how the Executive governs and discloses presidential materials.

The Nixon II Court rejected the ex-President’s argument out of hand, reasoning that it rested on an “archaic view of the separation of powers as requiring three airtight departments of government.” Instead, the Court clarified that the proper test was whether the Act prevented the Executive Branch from accomplishing its constitutionally assigned functions and if so, “whether that impact [was] justified by an overriding need to promote objectives within the constitutional authority of Congress.” Based on that balancing, the Court upheld the law as constitutional because (1) President Ford had signed the bill into law, (2) the Executive Branch retained control over Executive Branch materials, and (3) neither Congress nor the Judiciary generally had access to them. Accordingly, the Act was not “unduly disruptive” of the Executive Branch.

Nine years later in Commodity Futures Trading Commission v. Schor, the Court held that Congress had not impermissibly undermined the Judiciary by creating a non-Article III administrative body—the Commodities Futures Trading Commission (CFTC)—to handle claims arising under Section 14 of the Commodities Exchange Act. In that case, Schor sued his broker in the CFTC, and his broker brought a state common law counterclaim against him. After the CFTC administrative law judge granted the counterclaim, Schor filed a petition for review in the DC Circuit, alleging that Congress had violated separation of powers by creating a non-Article III court that could hear state common law claims. The Supreme Court upheld the CFTC as constitutional, reasoning that it would decline to adopt formalist rules and would instead focus on preserving checks and balances between the branches. Based on that reasoning, the allowance of a single type of counterclaim which necessarily had to be brought

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51. Id. at 429.
52. Id. at 440.
53. Id. at 443.
54. Id.
55. Id. at 441, 444.
56. Id. at 445.
58. Id. at 837.
59. Id. at 838.
60. Id. at 850–52.
in response to the claims adjudicated in the CFTC did not impermissibly undermine the Judicial Branch.\(^\text{61}\)

Two years later in *Morrison v. Olson*, the Court held that Congress had not impermissibly undermined the Executive when it passed laws providing for an independent prosecutor, appointed by the Judiciary, to investigate crimes committed by executive officers.\(^\text{62}\) In that case, the primary separation of powers dispute was whether Congress could restrict the Attorney General’s power to remove independent counsel with a good cause requirement. However, the Court also addressed whether the Judiciary’s appointment of independent prosecutors violated the Executive’s exclusive power of prosecutorial discretion.\(^\text{63}\) The Court found that while “[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity,” the Act also gave sufficient control to the Attorney General to decide whether to request appointment of the independent counsel in the first place.\(^\text{64}\) The Court accordingly held that “these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”\(^\text{65}\)

Unfortunately, none of these Supreme Court cases fully resolve the question of when Congress has impermissibly undermined the Executive, since none of them have held that it has.\(^\text{66}\) However, these cases suggest that whether an act of Congress has impermissibly undermined the Executive depends on whether the Executive retains sufficient power to carry out its “constitutionally assigned duties,” despite the disruption.\(^\text{67}\) For instance, in *Nixon II*, the Court explicitly reasoned that because the Administrator of General Services was an

\(^{61}\) Id. at 857.


\(^{63}\) Id. at 685.

\(^{64}\) Id. at 695–96.

\(^{65}\) Id. at 696.

\(^{66}\) In *Mistretta v. United States*, the Court wrote that “we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.” 488 U.S. 361, 382 (1989). However, in reality the Court has been far more inclined to invalidate laws for unconstitutionally aggrandizing power in one branch, as opposed to impermissibly undermining another. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (Congress attempting to remove officer of the United States exercising executive power); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (Congress attempting to choose individuals to be deported); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (executive agency attempting to decide common-law legal cases). One notable exception to this trend is over the removal power, where the Court has struck down numerous laws insulating officers from executive control. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (finding that limitations on the removal of board members, as provided for in a congressional act, contravened the Constitution’s separation of powers). However, removal analysis is usually kept distinct from the “impermissible undermining” test. See, e.g., *Morrison*, 487 U.S. at 670–95 (treating the removal analysis separately from the separation of powers analysis, even though removal analysis is at its heart about separation of powers).

\(^{67}\) See *Morrison*, 487 U.S. at 696.
Executive Branch official and neither Congress nor the Judiciary had access to the materials, the Executive retained sufficient control over the sensitive documents to warrant a holding of constitutionality. Similarly, in *Morrison*, the Court explicitly reasoned that the Attorney General’s exclusive authority to call for an independent counsel’s appointment in the first place gave the Executive sufficient control over the independent counsel and by extension, her interference in its prosecutorial discretion.

Under the checks and balances model articulated in *Schor* and *Morrison*, therefore, the main consideration in the “impermissible undermining” analysis is whether the Executive retains sufficient power to fulfill its constitutional duties. If Congress’s action hampers the Executive but does not prevent it from performing a constitutional function, the action is constitutional. If Congress’s action prevents the Executive from performing a constitutional function, it is not.

**C. Aligning Appropriations Clause Analysis with the “Impermissible Undermining” Rule**

Conceiving of the Appropriations Clause as a restriction on Congress, rather than a power, the limits of appropriations align with those discussed under the “impermissible undermining” test. Under that test, Congress may not pass any substantive law that would impermissibly undermine a coordinate branch’s fulfillment of its constitutional functions. Under the Appropriations Clause, Congress must authorize sufficient funds for its coordinate branches to accomplish their constitutional functions. Both analyses therefore turn on the question of whether the Executive and Judiciary have the ability to fulfill their constitutional functions and can be considered as part of the same general rule: Congress may not take any action or inaction that has the effect of preventing a coordinate branch from accomplishing one or more of its constitutionally assigned functions, whether that function is a power or a duty.

The upshot of this unified analysis is the focus on the effect of Congress’s actions, rather than on its type of action. Whereas considering Congress’s control over federal spending as a unilateral power would allow Congress to dominate its coordinate branches simply by refusing to grant them money or by attaching impermissible conditions to that funding, this analysis treats action, inaction, substantive law, and appropriation alike and simply evaluates the effect. If the effect of the action or inaction is to prevent a coordinate branch from fulfilling

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70. See *CFTC v. Schor*, 478 U.S. 833, 850–57 (1986); *Morrison*, 487 U.S. at 693–96. The *Morrison* Court’s use of the word “duties” suggests either that criminal prosecution is a constitutionally assigned legal duty or encompasses faithful performance of powers in addition to duties. This is discussed further in Part II.
71. See supra Part I.B.
72. See supra Part I.A.
one of its constitutionally assigned functions, that action or inaction is unconstitutional.

In line with this analysis, evaluating the constitutionality of Congress’s actions first requires identifying the executive or judicial function potentially undermined and considering whether it is exclusively executive or judicial. As Madison noted in Federalist 48, however, the Constitution does not contemplate completely separate branches of government but instead envisions a system of overlapping checks and balances.\(^\text{73}\) The degree to which Congress can interfere with the function therefore depends not only on the character of the function, but also on the degree to which it is placed solely in the hands of one branch.\(^\text{74}\) Congress has a categorical duty to appropriate only in areas committed solely to a separate branch; in that context, failure to fund by definition prevents the coordinate branch from fulfilling its constitutional function.

Part II therefore considers whether criminal prosecution is a solely executive constitutional function and whether Congress has a duty to appropriate funds to the Executive for its exercise.

II. CRIMINAL LAW ENFORCEMENT AS AN EXCLUSIVELY EXECUTIVE FUNCTION

To evaluate whether Congress may withhold appropriations for criminal law enforcement, it is necessary to examine whether criminal law enforcement is in fact a solely executive function. If it is, then akin to the power “to receive foreign ambassadors or to make treaties,”\(^\text{75}\) Congress should not be allowed to hinder the Executive’s performance of this constitutional function. If it is not, and the power of criminal law enforcement is in fact coextensive with congressional power, Congress could properly refuse to appropriate money, as it does in numerous other areas of shared authority. For instance, while Congress may not withhold funding for the President to make treaties, it may withhold funding to implement them as part of its lawmaking function.\(^\text{76}\) This Section therefore considers to what extent criminal law enforcement should be considered a purely executive function.

A. Case Law Suggests that Prosecutions Are Exclusively Executive

To begin with the courts’ view on prosecution, the Supreme Court has consistently viewed prosecution as a quintessentially executive act, suggesting that prosecution is constitutionally committed to the Executive. The earliest

\(^{73}\) The Federalist No. 48 (James Madison).

\(^{74}\) See Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 279 (1989) (explaining that “the Executive’s power vis-a-vis the other branches rests on a continuum”).

\(^{75}\) See Stith, supra note 14, at 1351.

\(^{76}\) Fisher, supra note 22, at 762 n.28.
expression of this principle is found in *The Confiscation Cases*, where the Court held that a federal prosecutor could dismiss forfeiture actions against ships, notwithstanding a congressional statute directing such actions. In that case, Congress passed a law by which informants could notify the United States of ships violating the Non-Intercourse Act, and the informants would subsequently share in the value of the forfeiture. In one such case, the Attorney General decided not to proceed with forfeiture actions after the informants identified non-conforming ships. The informants then sought to force the actions to judgment to obtain their interest in the forfeiture. Rejecting the informants’ claim, the Court reasoned that an informant “cannot institute the suit, nor move for process, nor join in the pleadings, nor take testimony, nor except to the ruling of the court, nor sue out a writ of error, or take an appeal.”

The Court linked the lack of the informants’ power to executive power, reasoning that:

Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress . . . Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office.

Accordingly, the Court held that the informants’ interest granted by Congress was conditional on the Attorney General completing the suit and a court entering a judgment of forfeiture, and neither Congress nor the informants could force the Executive to prosecute.

Interestingly, the Court suggested that Congress could modify the federal prosecutors’ power with the dicta: “except in cases where it is otherwise provided in some act of Congress.” But that early view on congressional authority seemed to give way in the twentieth century, as the Court began shifting toward a view of prosecutions as being exclusively executive. Such language, committing prosecutions solely to the Executive, began in 1974 with *United States v. Nixon*, where the Court described the Executive Branch as

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77. 74 U.S. 454 (1868).
78. *Id.* at 462.
79. *Id.* at 459.
80. *Id.*
81. *Id.*
82. *Id.* at 462.
83. *Id.* at 457.
84. *Id.* at 462.
85. *See id.* at 457.
having “exclusive authority and absolute discretion to decide whether to prosecute a case.”  

The Court cited *The Confiscation Cases* for this proposition but made no mention of the dicta about congressional interference, suggesting that it has been abandoned. 

After *Nixon I*, the Court continued to place prosecutions solely in the hands of the Executive. In *Heckler v. Chaney*, the Court even found a textual home for the power, writing that “the decision of a prosecutor in the Executive Branch not to indict [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” The *Chaney* Court’s comment on the “special province” of the Executive Branch subsequently informed dozens of lower court opinions agreeing that prosecution belonged solely to the Executive Branch. Most forcefully, in *Riley v. St. Luke’s Episcopal Hospital*, the Fifth Circuit wrote that “[n]o function cuts more to the heart of the Executive’s constitutional duty to take care that the laws are faithfully executed than criminal prosecution.”

Cutting against this judicial tradition, however, the Court in *Morrison v. Olson* did not take such an expansive view of exclusive executive authority. In that case, the Court seemingly refused to engage in any historical analysis, commenting only that “[t]here is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.” The majority’s use of “typically” as opposed to “always” suggested that the Court thought officials within other branches could perform such functions, but it is hard to divine the Court’s exact meaning; the Court skirted the question of whether it is an exclusive executive function because it did “not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”

In the lone *Morrison* dissent, Justice Scalia advanced the view that criminal prosecution was a solely executive function. Taking the majority’s use of “typically” head on, he wrote:

The qualifier adds nothing but atmosphere. In what other sense can one identify “the executive Power” that is supposed to be vested in the

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87. See id.
89. Id. at 832 (citing U.S. CONST. art. II, § 3).
91. 252 F.3d. at 755.
93. See id. at 693.
President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel’s functions fit this description. Continuing Chaney’s view of prosecution as exclusive, Justice Scalia wrote, “Governmental investigation and prosecution of crimes is a quintessentially executive function.” The Morrison majority never responded to Justice Scalia’s claims here, and while it is dangerous to read into silence, the failure to respond suggests that either the Court did not have a unified view on the veracity of Scalia’s opinion, or it was too uncertain to make it a constitutional holding.

Even if the Morrison Court was not willing to place prosecution solely in the hands of the Executive, however, its comment that “law enforcement functions . . . typically have been undertaken by officials within the Executive Branch” observed that the Executive has historically controlled criminal prosecutions. While not willing to place prosecution solely in the Executive’s hands, as Justice Scalia would have, the Court clearly thought of prosecutions as a predominantly executive function. This suggests that the Court’s view on history and separation of powers is that prosecutions have always been executive and should be viewed as such now. Because no cases have treated the issue since Morrison, however, case law is insufficient for a definitive answer. Thus, to understand the constitutional nature of criminal law enforcement, it is necessary to turn to other sources, including an originalist understanding of the text, the text itself, and modern practice. Of these, this Note first addresses the argument from history.

**B. Practice in the Early Republic Suggests the Power is Not Exclusively Presidential**

History suggests that criminal law enforcement was not committed solely to the Executive at the founding of the republic. Following Morrison v. Olson, several commentators reviewed the history of executive prosecutions and concluded that preratification practice showed that prosecution was not exclusively executive. However, this history is of limited value to

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94. Id. at 705–06 (Scalia, J., dissenting) (emphasis omitted).
95. Id. at 706 (citing Chaney and Nixon I).
96. See Morrison, 487 U.S. at 691.
97. This Note does not take the view that an originalist understanding of the Constitution can solely resolve this question. Rather, the original understanding, subsequent history, patterns and practices of behavior, structural textualism, and case law are all tools that can be used to functionally assess whether a constitutional function is solely legislative, executive, or judicial.
understanding the Constitution because the separation of powers form of
government was not pervasive in state and colonial governments.\textsuperscript{100} Instead,
early American government was more limited and monolithic, leaving
prosecutions largely to private citizens.\textsuperscript{101} The federal government rejected this
model, instead reserving the power to institute federal prosecutions to the
government. Thus, preratification private prosecutions are a poor source for an
original understanding of the Constitution.

The early years of the new federal government, however, do provide a
historical vantage point for examining whether the founding generation viewed
prosecution as exclusively executive, because in those years Americans
explicitly understood themselves as operating under the new separation of
powers model of government. This history, while murky, suggests that
prosecutions were thought of as executive, in the sense that prosecutors enforced
the law, but not as exclusively within the control of the President.\textsuperscript{102}

The primary clues to this history are the postratification functions and
powers of the Attorney General and the US Attorneys—two positions now
synonymous with the Executive Branch and criminal law enforcement. Initial
drafts of the Judiciary Act of 1789 vested the appointment of the Attorney
General in the Supreme Court, and the appointment of US Attorneys in the
district courts.\textsuperscript{103} These early versions suggest that the founding generation did
not think of law enforcement as necessarily belonging under presidential control.
Indeed, while the Attorney General was eventually moved to presidential
appointment, the final draft of the Judiciary Act did not specify who should
appoint US Attorneys, and the President took control of these appointments
without a clear textual dictate.\textsuperscript{104} Thus, the best reading of the Judiciary Act
would seem to be that criminal law enforcement was just another component of
the administrative state’s general law enforcement duties, rather than a
specifically presidential function.

The early structural role of the US Attorneys confirms this view. While the
first Attorney General, Edmund Randolph, sought to gain control of the

\textsuperscript{100} See Dangel, supra note 98, at 1075.
\textsuperscript{101} Id. at 1071; Krent, supra note 74, at 290–303.
\textsuperscript{102} The Executive Branch can be thought of as two, sometimes overlapping, portions of the
government. On the one hand, there is the Executive Branch that enforces the law. This “Executive”
comprises all parts of the government that ensure the law is followed through civil, criminal, and
administrative means, regardless of their degree of control and supervision by the President. On the other
hand, there is the Executive Branch that carries out the functions vested in the President by Article II,
Section 2. This “Executive” is the President and all members of the Executive Branch that accomplish
constitutional duties on her behalf. Because one of the constitutional duties of the President is to “take
Care that the Laws be faithfully executed,” as enumerated in Article II, Section 3, some legal theorists
consider the entire administrative arm of the government as being synonymous with the President—the
(Scalia, J., dissenting). However, when speaking of exclusively executive constitutional functions, this
Note only concerns the latter Executive.
\textsuperscript{103} Dangel, supra note 98, at 1084.
\textsuperscript{104} Id. at 1084–85.
Attorneys, they initially were placed under the Secretary of State, and contacts between individual Attorneys and the Department were “largely fortuitous.”

Instead, the Attorneys primarily worked for the Comptroller General and Postmaster General to prosecute crimes arising from customs, taxation, and mail. These officials, while executive insofar as they enforced the law, were insulated from direct presidential control, thereby keeping the US Attorneys from acting as agents of the President.

Informed by this early postratification practice, an originalist understanding of the Constitution does not suggest that the Framers intended the President to have exclusive control over criminal law enforcement. Thus, the Morrison Court may have meant far more than “atmosphere” when it wrote that “the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.” Instead, prosecutors could have been quasi-executive, quasi-judicial officers who operated as agents of the Court.

That, however, is not what happened. The President did receive control over appointment and removal of both the Attorney General and US Attorneys, and the first Attorney General, Edmund Randolph, saw the latter as properly under his control from the beginning of the republic. Eventually, Randolph’s view won out after the creation of the Department of Justice in 1870, and from there, the Court began imagining prosecution as inherently presidential, linking control over prosecutions to the Take Care Clause and Pardon Clause. Thus, while the history of the early republic suggests that criminal law enforcement is not an exclusively executive function, that early history on its own is not strong enough to decide the issue. Instead, this Note next turns to the text of the Constitution itself.

C. The Structure of the Constitution Suggests Presidential Control

Unlike other duties of the President, criminal law enforcement is not specifically committed to presidential control in the Constitution. However, there is a colorable argument that the text entrusts the Executive with prosecutions through the Take Care Clause.

As an initial matter, the Constitution assumes that criminal laws will be enacted. Article I, Section 3 provides that “Judgment in Cases of Impeachment shall not extend further than to removal from Office... but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and

105. Id. at 1085.
106. Id.
107. Id.
108. Morrison, 487 U.S. at 691.
109. See An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).
110. See infra Part II.C.
Punishment, according to Law."\textsuperscript{111} Similarly, Section 6 provides that all senators and representatives “shall in all Cases, \textit{except Treason, Felony and Breach of the Peace}, be privileged from Arrest.”\textsuperscript{112} Other parts of Article I give Congress explicit authority to define illegal conduct. For example, Section 8 provides that Congress has the power to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States” and to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”\textsuperscript{113} By placing these clauses in Article I, the Constitution entrusts Congress with the ability to define criminal law.

Article III provides for the trial of cases by the Judiciary, entrusting courts with the ability to try violators of criminal law. Article III, Section 2 provides that the “judicial Power” shall extend to all cases and controversies within the subject matter jurisdiction of the courts.\textsuperscript{114} Section 2 also provides for “The Trial of all Crimes,”\textsuperscript{115} confirming that trial is within the province of the Judiciary.

The structure of crime in Articles I and III thus leaves Congress the power to criminalize and the Judiciary the power to try. Between those two, a gap exists between when Congress defines a crime and when the Judiciary tries it. This gap may be of no significance, as at the time of the founding it was common for private parties to initiate prosecutions.\textsuperscript{116} However, given that the federal government conceived of state power in a fundamentally different way from local police power, it seems necessary for some federal officer to take charge of conducting criminal prosecutions. The only textual basis for such a role is the Take Care Clause.

Article II provides that the President “shall take Care that the Laws be faithfully executed,” but the exact meaning of this clause remains indeterminate.\textsuperscript{117} Many scholars and jurists argue that the clause is only a limitation on what could otherwise be unbridled executive power and is therefore best understood as a duty. For instance, the \textit{Morrison} Court described the Take Care Clause as giving the President “a constitutionally appointed duty,”\textsuperscript{118} suggesting a minimal Article II duty to enforce criminal laws. However, some scholars and presidents have argued that the clause is a power because it gives the President discretion to determine how to execute the laws.\textsuperscript{119} Whether duty,

\begin{footnotesize}
\begin{enumerate}
\item U.S. CONST. art. I, § 3 (emphasis added).
\item Id. art. I, § 6 (emphasis added).
\item Id. art. I, § 8.
\item Id. art. III, § 2; see also William A. Fletcher, \textit{The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions}, 78 CALIF. L. REV. 263, 266 (1990) (quoting \textit{William Blackstone, Commentaries} app. note E, at 420 (St. George Tucker ed., 1803)) (explaining that “case” means a criminal or civil dispute).
\item U.S. CONST. art. III, § 2.
\item Dangel, \textit{supra} note 98, at 1071–72.
\item Morrison v. Olson, 487 U.S. 654, 690 (1988).
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discretion, or both, however, the Take Care Clause commits law enforcement to the President. By inserting this general duty/power of law enforcement into the gap between Article I criminal lawmaker and Article III criminal trials, the structure of the Constitution suggests that the Executive should serve as the prosecutor in federal criminal cases.

D. Text, Modern Practice, and Case Law Together Show Exclusive Executive Control

Postratification history notwithstanding, modern practice and case law reflect an understanding of Article II as encompassing exclusive executive control over prosecutions that has been the dominant American viewpoint since at least the Civil War. Thus, when it comes to assessing whether prosecutions are exclusively executive in 2018, opinions like Chaney and Riley may be more important than early federal practice. As Professor Stephen Carter has described, the Supreme Court would be justified if it determined that

[t]hese tiny bites of history . . . are not enough to overcome the plain historical tradition that the President has always retained effective, ultimate control over criminal prosecution for the violation of federal law. First principles of separation of powers . . . hold that if one branch makes the laws and a second determines guilt or innocence, a third must be vested with the discretion whether to prosecute or not.

This idea that Article II encompasses executive control over prosecutions is consonant with both the textual reading of the Take Care Clause as a source of prosecution authority and the basic separation of powers principles that the Framers drew on. As Montesquieu wrote: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can then be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”

Accounting Oversight Bd., 561 U.S. 477, 484 (2010) (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”); Buckley v. Valeo, 424 U.S. 1, 138 (1976) (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”) (quoting U.S. CONST. art. II, § 3); Nixon I, 418 U.S. 683, 693 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”); United States v. Armstrong, 517 U.S. 456, 464 (1996) (“They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”); The Confiscation Cases, 74 U.S. 454, 457 (1868).

120. Garvey summarizes court decisions taking both perspectives, suggesting that the Take Care Clause has a dual function. See Garvey, supra note 119, at 3–10.

121. At that point, the Attorney General took control of unified federal prosecutions. See Dangel, supra note 98, at 1084.

122. Carter, supra note 117, at 127.

Thus, while a more faithful understanding of the Constitution at the time it was enacted suggests that criminal prosecutions are not exclusively presidential, modern practice demonstrates that criminal law enforcement is an independent constitutional activity of the President. Part III examines the consequences of this feature on Congress’s Power of the Purse and the possible remedies for political branch conflict over such prosecutions.

III.
THE DEGREE TO WHICH CONGRESS MAY INTERFERE WITH THE CONSTITUTIONAL FUNCTION

Assuming that criminal prosecution is an exclusively executive constitutional function, as argued in Part II, the “impermissible undermining” and Appropriations Clause analyses described in Part I suggest that Congress cannot use appropriations bills to interfere with that function. Courts have already come to this conclusion when the Appropriations Clause is not in play; the Supreme Court has presumed the lack of a justiciable case when the Executive declines to prosecute.124

Introducing the Appropriations Clause, however, does add a novel problem to this analysis. Chaney and cases like it are unanimously concerned with executive under prosecution, which is justified by the idea that “[t]he discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.”125 In contrast, there is usually no interbranch conflict when the President seeks to enforce a statute passed by Congress.

Congress’s decision to pass a law but then withhold appropriations for its execution is therefore a strange state of affairs: the President has a duty to enforce the law but no funding to do so. In the civil context, this give-and-take has become accepted, as Congress routinely delegates power in broad swaths and then walks back that power through appropriations that restrain agency behavior.126 This route presents fewer constitutional problems because civil law enforcement is generally not considered an exclusive presidential function. Accordingly, in these instances, Congress cannot use the Appropriations Clause to achieve an unconstitutional result.127

In the criminal context, however, criminal law enforcement is an exclusive presidential function,128 and statutes apply directly to individual conduct without

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125. United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935 (1965). In other words, prosecutors must decide whether each prosecution is an efficient use of government resources, rather than prosecute every case with probable cause. See id.
126. See supra Introduction.
127. See Stith, supra note 14, at 1350–51.
128. See supra Part II.
delegation to an agency’s rulemaking process. The constitutional question, therefore, is whether Congress works an unconstitutional result by passing laws for the Executive to enforce and then refusing to appropriate funding for that task.

Whether Congress acts unconstitutionally in such a scenario is primarily a question of degree, as “[m]ost commentators agree that the Executive’s power vis-a-vis the other branches rests on a continuum.”129 As Professor Harold Krent describes: “At one end is the discharge of ministerial duties in civil matters, a function subject to considerable congressional and judicial intrusion. . . . At the other end of the spectrum are the discretionary conduct of foreign relations and authority to grant pardons, powers with which Congress and the Judiciary can only minimally interfere.”130 Krent, writing before Zivotofsky v. Kerry,131 also suggests that “there is probably no presidential task completely immune from congressional regulation.”132 In Zivotofsky, however, the Court held that Congress could not even direct an American Consulate to write “Jerusalem, Israel” on a birth report because it would conflict with the President’s recognition power.133 This opinion strongly suggests that some executive powers are wholly beyond congressional regulation; accordingly, the main inquiry is whether conditioning funding for criminal law enforcement intrudes too far on the Executive’s prerogative.

A. When Congress Breaches its Duty

Based on Part I’s conclusion that Congress has a duty to fund the President’s independent constitutional activities and Part II’s conclusion that criminal law enforcement is such an independent activity, the conclusion here must be that Congress has a constitutional duty to appropriate funds for executive prosecutions. There is likely no formula that can precisely define how much funding is sufficient to satisfy this duty, but the amount should be sufficient for the President to fulfill the constitutional duty to take care that the laws are executed. In some cases, this amount may not meet the expectations of the President, but if the Executive believes there is insufficient funding to fulfill its constitutional aims, it can request greater appropriations from Congress. Such a political remedy would be appropriate, as enjoining Congress to spend money is generally beyond the ken of the Judiciary.134

129. Krent, supra note 74, at 279.
130. Id.
132. Krent, supra note 74, at 280.
133. 135 S. Ct. at 2109–10.
134. Stith, supra note 14, at 1351 n.34 (“If a court determines that Congress’ failure to provide funds is unconstitutional, one would expect Congress to abide by this judicial decision and appropriate funds accordingly. If Congress fails to do so, however, a court has no more constitutional authority than does the President to mandate withdrawal from the Treasury.”).
This test therefore defines how appropriations and criminal law enforcement interact as a bare minimum: Congress may not entirely refuse to appropriate funding for executive prosecutions. Even when Congress provides sufficient funding, however, it may breach its constitutional duty if it attempts to dominate prosecutorial practices by attaching conditions to the spending. This would be akin to passing a substantive law regulating the President’s exclusive constitutional functions, which the Zivotofsky Court made clear was impermissible. Accordingly, Congress breaches its constitutional duty to fund the Executive’s independent constitutional activities whenever it (1) entirely refuses to appropriate funding for prosecutions, or (2) conditions funding for criminal law enforcement in a way that eliminates executive control over prosecutions.

Because Congress’s Power of the Purse is such a potent weapon, however, there have been and likely will be more instances where Congress breaches its duty and refuses to fund the President. This leads to the question of remedy.

B. Remedies for the Breach

Where an appropriations bill contains impermissible conditions on the Executive’s prosecutorial discretion, the Judiciary can provide the remedy by striking down the unconstitutional provisions. The Court has not hesitated to invalidate appropriations laws that led to an unconstitutional result. Thus, appropriations bills with impermissible conditions, like the CFCAA, could have the offensive condition severed and invalidated, leaving the general grant of funding intact.

Congress’s refusal to appropriate any funding at all presents a more difficult question. The Appropriations Clause is clear and unambiguous: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Accordingly, “[i]f Congress fails to [appropriate,] a court has no more constitutional authority than does the President to mandate withdrawal from the Treasury.” This impasse would not necessarily render a dispute between the President and Congress over whether Congress breached its Appropriations Clause duty nonjusticiable. But it would severely limit the

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136. Section 538 of the CFCAA being a prime example. See CFCAA, supra note 16, § 538.
139. Stith, supra note 14, at 1351 n.34.
140. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178–80 (1803) (reasoning that judicial review exists in part because there must be a third body to resolve disputes between Congress and the President).
scope of the judicial remedy, as the President could not enjoin Congress to appropriate through the courts.\footnote{See Reeside v. Walker, 52 U.S. (11 How.) 272, 290–91 (1850) (holding that the United States cannot be compelled to pay court costs absent authorizing statute); Nat’l Ass’n of Reg’l Councils v. Costle, 564 F.2d 583, 589 (D.C. Cir. 1977) (“[A]ny order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress.”).}

Therefore, even if a court held that Congress breached its duty by providing insufficient funds, the ultimate remedy would be political, rather than legal. By breaching its constitutional duty to fund the President’s other constitutional mandates, Congress would in effect force the President to choose between illegally withdrawing money from the Treasury and failing in her duty to take care that the laws are faithfully executed. Confronted with this dilemma, the President would violate the Constitution by taking either path\footnote{One “out” for the President would be to use her exclusive prosecutorial discretion to coincidentally abide by the congressionally dictated appropriations condition. Some members of Congress might complain that the President was abdicating her responsibility to execute the law, but presumably these members would be in the minority, as their number would have been insufficient to prevent the bill’s passage. Their minority status would shield the President from impeachment.} and be subject to impeachment if she attempted to spend beyond what Congress appropriated.\footnote{See Stith, supra note 14, at 1352 n.36.}

Ultimately, however, the dilemma would more likely be dealt with by election than impeachment, as it would take an inordinately powerful Congress to place the President in this bind, impeach her, and survive the political ramifications.\footnote{See U.S. CONST. art. I, § 3 (“[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.”).} In most scenarios, therefore, the President could determine that it was her constitutional duty to continue prosecuting federal criminal law and force Congress into a political response, for instance by denying funding in other areas or thwarting the President’s policy agenda with legislation. If neither side backed down, the next election cycle would presumably replace one or both branches, with the electorate eventually determining that it favored one side or the other, or that it thought the entire dispute had gotten out of hand.

Given the pressure such interbranch battling would place on reelection campaigns, Congress would likely respond to continued prosecutions by evaluating its priorities and deciding how to substantively amend the law. This analysis applies to both the refusal to fund and funding with impermissible conditions: in either case Congress could completely remove the President’s ability to prosecute by substantively amending the criminal offense at issue.\footnote{See Stop H-3 Ass’n v. Dole, 870 F.2d 1419, 1437 (9th Cir. 1989) (explaining that no separation of powers violation occurs when Congress amends a law removing a duty previously performed by the Executive, as the removal merely leaves the Executive with nothing to execute).} And of course, Congress could prefer the criminal law as written and provide the Executive with funding to continue prosecutions.

Regardless of its choice Congress would be forced to clarify its view of the contested criminal law. Presumably, as most representatives seek reelection,
Congress would define the law to reflect its constituents’ views. Thus, interpreting the Appropriations Clause as laying a duty on Congress to fund criminal law enforcement has the potential to make federal criminal law closer to the people, rather than further away.

C. Section 538 as an Example of Breach

This analysis becomes more concrete in the context of Section 538. As a reminder, Section 538 purports to remove a class of prosecutions from executive control by prohibiting DOJ from spending any funds “to prevent such States [that have legalized medical marijuana] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”146 The Controlled Substances Act and Section 538 together give the Executive the duty to take care that violators of the Act are prosecuted, while providing no funds to accomplish these prosecutions. This situation violates the “impermissible undermining” test set forth in Part I.C. Therefore, Section 538 represents a breach of Congress’s duty to appropriate.

Because the Act contains an impermissible condition on the Executive’s prosecutorial discretion, rather than an absence of funding for criminal law enforcement, the courts are an appropriate forum for resolving the constitutional dispute.147 Therefore, if DOJ opts to challenge the constitutionality of Section 538 in currently ongoing prosecutions, courts could properly sever and strike down Section 538 while upholding the rest of the CFCAA. Alternatively, if DOJ does not ask the courts to strike down Section 538, it will be forced to choose between using funding that Congress did not appropriate for CSA prosecutions and halting all prosecutions of medical marijuana distribution and possession until the CFCAA expires.148 Given this constitutional dilemma between violating the Appropriations Clause and violating the Take Care Clause, it would be within the Executive’s prerogative to determine that the duty of the latter outweighed the constitutional mandate to comport with an unconstitutional law. Thus, the Executive could continue prosecuting medical marijuana violations, regardless of Section 538 and force a congressional reaction.

Accordingly, the end result of Section 538 litigation should be that DOJ may continue prosecuting violations of the CSA. Indeed, this is precisely what the Department has done, and Congress has refused to back down. Congress repassed Section 538, as Section 542 in the Consolidated Appropriations Act of

146. CFCAA, supra note 16, § 538.
147. See supra Part III.A (noting that the Judiciary may invalidate laws that use appropriations to impermissibly undermine the Executive).
148. The latter option may not be in Congress’s best interests, as the President could only justify such a move by claiming that it comported with the Take Care Clause. In other words, the President could claim that in spite of her constitutional duty to take care that the laws be faithfully executed, it is within her prerogative to decide not to prosecute for any reason. Given that Congress has fought to have the President enforce all laws that she does not constitutionally object to, an expansion of her abilities here might not be its preferred outcome.
2016\textsuperscript{149} and as Section 537 in the Consolidated Appropriations Act of 2017\textsuperscript{150}. The interbranch conflict may well continue until the Judiciary resolves the statutory interpretation question, or until Congress makes a final determination about how the CSA should treat medical marijuana. Indeed, based on this analysis, even if the Supreme Court resolved the statutory interpretation question against DOJ, DOJ could force the issue by continuing to initiate prosecutions and then raising the constitutional argument at the motion to dismiss stage.

Unless and until that happens, however, we may receive no definitive answer on the fate of Section 538. Still, the broader question of appropriations, separation of powers, and criminal law enforcement that Section 538 raises will not disappear with this case. That question will linger on, and this Note offers one constitutional method of answering it.

**CONCLUSION**

Neither the Supreme Court nor the field of legal scholarship has sufficiently examined the scope of Congress’s Power of the Purse. Generally, this power is broad, and the failure to critically examine it has not had serious consequences for our constitutional system. In December 2014, however, Congress took an action that brought appropriations and separation of powers back into the constitutional spotlight when it passed an appropriations bill that removed a class of criminal prosecutions from executive control. This action raised questions of how far Congress’s powers under the Appropriations Clause extend, and whether Congress can use appropriations bills to interfere with the President’s criminal law enforcement efforts.

No court or researcher has answered this question. This Note has argued that the Appropriations Clause is a limitation upon Congress that imposes a duty to appropriate funds for constitutional mandates. Though the duty comes with attendant power, the power does not extend so far as to work otherwise unconstitutional results. Accordingly, Congress cannot use that power to strike at the Executive’s independent constitutional activities. Put simply, Congress cannot use the power inherent in the Appropriations Clause to prevent the Executive or Judiciary from accomplishing their constitutionally assigned functions, regardless of whether the Constitution grants those functions as a power or imposes them as a duty.

Whether Congress can use appropriations bills to interfere with the President’s criminal law enforcement efforts therefore turns on whether criminal prosecutions are constitutionally assigned to the Executive. Here again, there is a lack of scholarly and judicial consensus, given the absence of a clear textual commitment of prosecutions to any branch. By independently examining case law, history, and the text and structure of the Constitution, however, this Note

concluded that criminal law enforcement is an independent constitutional function of the President.

Because Congress has a duty to fund the President’s independent constitutional activities, and criminal law enforcement is such an activity, Congress has a constitutional obligation to fund criminal law enforcement. Accordingly, Congress may not use appropriations bills to interfere with the President’s criminal law enforcement efforts.

Generally, this analysis makes sense for the proper functioning of the republic, as it preserves the vitality of each individual branch and promotes democratic accountability in criminal law. If Congress could hold the decisions of its coordinate branches hostage to appropriations, it could completely erode the system of separation of powers that the Constitution establishes.

However, there is a strangeness to this result when applied to criminal law enforcement: Congress could accomplish an identical outcome by repealing all criminal laws entirely, thereby leaving the President with no laws to enforce. When applied to the specific case of Section 538, which sought to limit executive prosecutions based on possession and distribution of medical marijuana, this means that Congress could have accomplished its goal of legalizing medical marijuana by amending the Controlled Substances Act, even while it is prohibited from doing so through appropriations. Why should there be such a divide in constitutional law?

For those who favor repeal of all crimes whenever possible, there is perhaps no justification for this divide. However, as long as the federal criminal code is meant to represent Congress’s majority consensus about the social harms worthy of punishment in this country, appropriations that dictate the Executive’s prosecutorial discretion threaten the democratic will of the people. In today’s legislative environment, “must-pass” omnibus appropriations bills come into being at the end of every fiscal year, and allowing riders that undermine the Executive to pass through this process often leaves the President with no political option other than to sign it or risk government shutdown. Thus, appropriations are fundamentally different from substantive laws because they all but ensure that the President will acquiesce to laws she does not agree with.

Furthermore, keeping a wall between executive prosecution and congressional appropriations may ultimately inspire better criminal laws, with more stability than the fluctuation of changing law each fiscal year. By forcing Congress to work through the substantive lawmaking process when it wishes to decriminalize an activity, Congress must define what is criminal according to what its constituents believe is morally blameworthy, thus leaving the criminal code a more accurate reflection of current social thought. And if Congress ultimately determines that the repeal of a crime is necessary, nothing in this analysis would alter the scope of Congress’s power to define the criminal law as
it preferred. As Abraham Lincoln is famously paraphrased as saying, “The best way to get a bad law repealed is to enforce it strictly.”¹⁵¹

¹⁵¹ Actual quote: “When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws . . . . But I do mean to say that although bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example they should be religiously observed.” Abraham Lincoln, Address to the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838).