Notes

CHECKING THE PURSE: THE PRESIDENT'S LIMITED IMPOUNDMENT POWER

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ABSTRACT

The United States spends well over $700 billion annually on defense, more than the next ten countries combined and roughly half of the discretionary budget. The Department of Defense budget supports critical national security objectives, but even defense stalwarts acknowledge excessive spending, including unneeded military facilities, exponential cost overruns, outmoded weapons systems, and duplicative investments across the military services.

In the face of a congressional budget process distorted by special interest groups, this Note argues that the president possesses the constitutional authority to unilaterally curb some defense spending. In particular, the president may impound—refuse to spend money appropriated by Congress for government programs—in discrete areas of exclusive presidential authority and in three areas of shared responsibility with Congress: appropriations for weapons systems, military personnel, and military construction. To reach this conclusion, this Note analyzes historical practice dating back to President Thomas Jefferson to gloss the meaning of the Appropriations and Commander-in-Chief Clauses as well as a recent Supreme Court decision that implicitly recognizes this constitutional authority.

Unlike prior impoundment scholarship, this Note does not argue for an unlimited national security impoundment power. In the past, government lawyers and scholars have invoked the Jefferson example

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to support a broad claim to constitutional impoundment. Departing from that claim, this Note uncovers a historical account involving President James Madison previously not considered in impoundment scholarship. In short, Madison, an architect of the Constitution, afforded deference to Congress by carrying out a wasteful national security appropriation.

Impoundment may be a powerful tool for monitoring and cutting unnecessary defense spending, but the president's constitutional authority to use it is not unrestricted. This Note develops a framework for a legitimate but limited presidential impoundment by accounting for Madisonian deference and by employing modern gloss analysis to discern impoundment's boundaries. The Note concludes by applying this framework to unilateral actions taken by recent administrations and by assessing their constitutionality.

INTRODUCTION

During a 1973 news conference, President Richard Nixon stated he would "not spend money if the Congress overspends [nor support] programs that will raise the taxes and put a bigger burden on the already overburdened American taxpayer."[1] The president was referring to the practice of *executive impoundment*, whereby the administration withholds congressionally appropriated funding either permanently or by delaying funds.[2] In the 1973 fiscal year alone, Nixon's White House Office of Management and Budget ("OMB") reported to Congress that it was impounding $7.7 billion.[3] Two years earlier, OMB reported that the administration had impounded approximately $12.8 billion.[4]

1. G. CALVIN MACKENZIE, THE IMPERILED PRESIDENCY: LEADERSHIP CHALLENGES IN THE TWENTY-FIRST CENTURY 117 (2017).

2. In modern legal terminology, canceling appropriated funds is referred to as "rescission," whereas delaying funds past a congressionally mandated deadline is referred to as "deferral." Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 683–684 (2018). Both actions are impoundments because they violate the statutory requirements in the appropriation law. *Id.*

3. Office of Management and Budget, Report Under Federal Impoundment and Information Act, 38 Fed. Reg. 19,584 (1973).

4. *Impoundment of Appropriated Funds by the President: J. Hearing on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the S. Comm. on Gov't Operations & the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 877–79 (1973) [hereinafter *Impoundment Hearings*].

The president can exert control over government spending because executive branch agencies do not automatically have access to funding once Congress passes an appropriations law. For agencies to receive money to spend, OMB must first "apportion" funds to the agency.[5] The apportionment process, which is technical and primarily conducted by civil servants,[6] allows OMB to direct to an agency how much of its appropriation it may spend on specific projects, how much it may spend within a certain time period, or both.[7] Apportionment enables OMB to exert quality control over executive branch spending.[8] It also ensures that agencies do not spend all of their appropriation funds too early in a fiscal year, in which case they might return to Congress to request more.[9] Thus, apportionment provides the White House with a platform to interpose itself between Congress and executive agencies.

To justify disobeying congressionally imposed spending levels and deadlines, Nixon claimed a "constitutional right for the President of the United States to impound funds."[10] Senior administration officials clarified that the president's constitutional claim derived primarily from the Take Care Clause.[11] They also cited historical practice. Deputy OMB Director Casper Weinberger defended the Republican administration by noting that Democratic Presidents Franklin Roosevelt, Harry Truman, and Lyndon Johnson each engaged in executive impoundment.[12] Deputy Attorney General Joseph Sneed

5. *See* 31 U.S.C. §§ 1341–1342, 1349–1350, 1511–1519 (2018) (prohibiting agencies from making obligations or expenditures in excess of an apportionment).

6. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2229 & n.204 (2016) (noting that according to OMB career staffers, the apportionment process increased the power of civil servants (citing SHELLEY LYNNE TOMKIN, INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET OFFICE 188 (1998))).

7. 31 U.S.C. § 1512(b)(1).

8. *See* TOMKIN, *supra* note 6, at 187 (noting that OMB uses its "apportionment authorities as a tool to closely scrutinize agency expenditures and policies"); Pasachoff, *supra* note 6, at 2229 ("The apportionment power gives OMB a regular opportunity to control how agencies conduct their operations.").

9. Pasachoff, *supra* note 6, at 2228.

10. MACKENZIE, *supra* note 1.

11. U.S. CONST. art. II, § 3 (stating that the president "shall take Care that the Laws be faithfully executed").

12. *Fund Impounding by Nixon Backed*, N.Y. TIMES (Mar. 25, 1971) [hereinafter *Fund Impounding*], https://www.nytimes.com/1971/03/25/archives/fund-impounding-by-nixon-backed-budget-aide-tells-senators-that.html [https://perma.cc/BH4N-GTZE]. Weinberger, an attorney who would later serve for seven years as President Ronald Reagan's secretary of defense, added

cited an even richer pedigree, noting that disallowing executive impoundment would "reverse 170 years of Presidential practice"[13] and reduce the chief executive to "Chief Clerk."[14] Sneed was referencing the fact that executive impoundment was employed as early as Thomas Jefferson, the nation's third president.[15] Congress rejected Nixon's constitutional arguments, instead rebuking the executive by passing the Congressional Budget and Impoundment Control Act of 1974 ("ICA").[16] The ICA allows the president to merely recommend rescinding funds by delivering a special message to Congress.[17] Congress thus recognized a *statutory* impoundment process but implicitly rejected *executive* impoundment by enacting a statute that purported to limit unilateral presidential action.[18]

Nearly half a century after the passage of the ICA, impoundment has faded from legal scholarship.[19] From a practical standpoint, statutory impoundment is an ineffective tool for controlling federal spending.[20] With the exception of President Donald Trump, whose

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that the president's role as commander-in-chief empowers him to impound military approprations. *Id*.; David Stout, *Obituaries: Caspar W. Weinberger, Reagan's Defense Chief*, N.Y. TIMES (Mar. 29, 2006), https://www.nytimes.com/2006/03/29/world/americas/29iht-web.0329caspar.html [https://perma.cc/E6CW-J7GK].

13. *Impoundment Hearings*, *supra* note 4, at 369 (statement of Joseph T. Sneed, Deputy Att'y Gen. of the United States).

14. *Id.* at 363. Sneed also cited a functional rationale, noting that ending the practice would "undercut the President's existing authority to combat inflation, unemployment and a wide range of economic ills." *Id.*

15. LOUIS FISHER, PRESIDENTIAL SPENDING POWER 150 (1975) [hereinafter PRESIDENTIAL SPENDING POWER].

16. *See* Presidential Statement on Signing the Congressional Budget and Impoundment Control Act of 1974, 10 WEEKLY COMP. PRES. DOC. 800 (July 12, 1974) [hereinafter Congress Passes ICA] ("The impoundment control provisions, in particular, may well limit the ability of the Federal Government to respond promptly and effectively to rapid changes in economic conditions.").

17. *See* 2 U.S.C. § 683 (2018) (requiring the president in a special message to Congress to note "the amount of budget authority which he *proposes* to be rescinded" (emphasis added)).

18. This Note employs the terms "executive impoundment" and "statutory impoundment." Executive impoundment refers to the president's independent constitutional authority to impound. Statutory impoundment refers to impoundments made through the ICA framework. Unless otherwise specified, this Note will use the term "impoundment" to refer to executive impoundment.

19. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 1, reporters' note 3 (AM. L. INST. 1986) ("[T]he President's claim of authority te [sic] impound funds appropriated by Congress apparently has been abandoned in the face of Congressional legislation denying such authority.").

20. Neither President George W. Bush nor President Barack Obama sent Congress a formal statutory impoundment request. U.S. GOV'T ACCOUNTABILITY OFF., B-322906, UPDATED

OMB sent Congress a special message for a rescission request in 2018,[21] recent presidents have not employed statutory impoundment under the ICA.[22]

Executive impoundment, however, may provide a mechanism for the president to monitor and sometimes reduce defense spending. By any measure, the United States spends a vast amount on national security appropriations. The president's 2020 budget requested $718 billion for the Department of Defense ("DoD"), a 5 percent increase over the 2019 enacted level.[23] Whereas the other NATO countries spent an estimated 1.55 percent of GDP on defense spending in 2019, the United States spent 3.42 percent—which represents 70 percent of all NATO defense expenditures.[24] In terms of total discretionary outlays, the United States spent $623 billion on defense in 2018, compared to $639 billion for all nondefense programs.[25]

This Note contends that, notwithstanding executive impoundment's dormancy, the president retains authority to impound funds in certain limited areas of foreign policy, primarily within the realm of national security. Part I asserts that, though the ICA and a subsequent Supreme Court decision[26] closed the book on domestic impoundments, the Court has implicitly recognized that executive

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RESCISSION STATISTICS, FISCAL YEARS 1974–2011, at 1 (2012), https://www.gao.gov/assets/600/592874.pdf [https://perma.cc/N6EH-8PQ8].

21. Russ Vought, *The White House Announces Its Rescission Package*, WHITE HOUSE (May 8, 2018), https://www.whitehouse.gov/articles/white-house-announces-rescission-package [https://perma.cc/H9S8-UWTG].

22. OMB Deputy Director Russ Vought noted that the ICA rescission process "hasn't been used in nearly two decades." *Id.* Moreover, while the 2018 Rescission Package was passed by Congress and cancelled approximately $15 billion in budget authority, the Congressional Budget Office reported that the measure would likely save only $1 billion in actual outlays over a ten-year period. CONG. BUDGET OFF., RE: H.R. 3, THE SPENDING CUTS TO EXPIRED AND UNNECESSARY PROGRAMS ACT, AS INTRODUCED ON MAY 9, 2018 (2018), https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr3mccarthyltr_2.pdf [https://perma.cc/2JSR-DB5R].

23. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2020, at 23 (2019), https://www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf [https://perma.cc/R5UF-HGRF].

24. Press Release, NATO, Defense Expenditure of NATO Countries (2012–2019), at 7–8 (June 25, 2019), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_06/20190625_PR2019-069-EN.pdf [https://perma.cc/Z9NY-S6Q8].

25. CONG. BUDGET OFF., THE FEDERAL BUDGET IN 2018: A CLOSER LOOK AT DISCRETIONARY SPENDING 1 (2019), https://www.cbo.gov/system/files/2019-06/55344-Discretionary.pdf [https://perma.cc/S7XV-2RFL].

26. Train v. City of New York, 420 U.S. 35, 41 (1975).

impoundment is constitutional when Congress appropriates in a manner that intrudes on the president's recognition power.[27] This Part then explains how historical gloss, a modality of constitutional interpretation that focuses on longstanding practice, supports recognition of executive impoundment in the foreign policy context.

Part II next contends that a previous argument for a categorical national security impoundment power is overbroad from the perspective of modern gloss analysis.[28] Part III contributes to impoundment scholarship by applying modern gloss analysis to the Appropriations and Commander-in-Chief Clauses in order to discern the boundaries of executive impoundment. Using gloss analysis, this Note develops an analytical framework to evaluate the constitutionality of certain presidential actions, arguing that there is executive impoundment authority for appropriations related to weapons systems, military personnel, and military construction. Part IV concludes by applying this framework to unilateral actions taken by recent administrations and assesses their constitutionality.

I. BACKGROUND

Executive impoundment began in the early Republic and continued well into the Nixon administration, when the Supreme Court rebuked the president for impounding funds allocated to a domestic policy program. This opinion, however, did not foreclose the possibility of impoundments in the foreign policy context, an inference supported by a more recent Supreme Court decision that implicitly recognized the constitutionality of an impoundment power in certain circumstances. Applying historical gloss, a modality of constitutional interpretation, establishes the contours of the president's independent constitutional authority to impound in the realm of national security.

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27. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2094–95 (2015) (recognizing that the Reception Clause provides the president with exclusive authority to determine the sovereign status of foreign countries, regardless of congressional intent); *infra* notes 77–90 and accompanying text.

28. *See infra* Part III discussing Roy Brownell's scholarship. This contention is bolstered by an historical account involving President James Madison, not previously included in impoundment scholarship, which disrupts the narrative of an unbroken tradition of executive impoundment dating back to Jefferson.

A. Executive Impoundment from Jefferson Through Nixon

Article I, § 9 of the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[29] The Appropriations Clause reflects the Framers' concern that the president would have monarchical power if he could spend more than authorized by Congress.[30] Some Founders believed that Congress might be required to appropriate sufficiently to allow presidents to carry out their constitutional duties under Article II, but there was otherwise a Founding Era consensus that the Appropriations Clause was a "powerful instrument," allowing Congress to set a ceiling on government spending.[31]

Less clear was whether Congress could set a floor. Article I, § 9 provides no textual guidance to answer this question. Nor is there any record of debate from the Constitutional Convention addressing the Appropriation Clause.[32] Other spending provisions such as the Origination Clause and Raise and Support Clause *did* receive considerable attention—as did the two-year limit on army appropriations at ratification.[33] Years after ratification, Alexander Hamilton spoke to the design of the Appropriations Clause, focusing on the imperative that an appropriation law precede an executive branch expenditure.[34]

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29. U.S. CONST. art. I, § 9, cl. 7.

30. Madison stated that:

> Those who are to conduct a war cannot in the nature of things, be proper or safe judges of whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906). Constitutional delegate George Mason likewise stated that the "purse & the sword ought never to get into the same hands (whether legislative or executive)." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139–40 (Max Farrand ed., Yale Univ. Press 1911).

31. Kate Stith, *Appropriations Clause*, NAT'L CONST. CTR., https://www.constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/756 [https://perma.cc/V8LS-CTPV]; *see* THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("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.").

32. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 29 (1994).

33. *See id.* at 28–29 (describing rigorous debate at the Constitutional Convention surrounding specific terms of these spending provisions).

34. Hamilton wrote:

Hamilton's conception of the federal Appropriations Clause tracks the historical practice in Great Britain and the American colonies. Though the power of Parliament "ebbed and flowed," dating as far back as the thirteenth century, the House of Commons asserted the right to specify the uses for revenues.[35] The colonial legislatures, for their part, asserted control over their militaries by enacting detailed appropriations.[36] In fact, by the mid-eighteenth century, the colonial legislatures' power of the purse was stronger than that of the House of Commons.[37]

The lack of relevant debate at the Convention, coupled with English and colonial historical practice, suggests that the Framers included the Appropriations Clause to allow Congress control over the president by predicating executive access to resources on legislative approval. This inference is bolstered by the two-year constitutional limit on army appropriations, which ensures that Congress interstitially fund the military, rather than grant broad deference to the president through multi-year or even permanent appropriations.[38] The inference, however, does not clarify whether the Appropriations Clause itself mandates that appropriations laws impose spending floors.

The Constitution's structure and early post-ratification history are likewise inconclusive. One scholar has noted that the placement of the Appropriations Clause in § 9 rather than § 8—which lists Congress's

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> The design of the constitution in this provision was as I conceive to secure these important ends—that the *purpose* the *limit* and the *fund* of every expenditure should be ascertained by a previous law. The public security is complete in this particular if no money can be expended but for *an object*, to an *extent*, and *out of a fund*, which the laws have prescribed.

Alexander Hamilton, *Explanation. By Mr. Hamilton on the Subject of a Late Attack Upon the President of the United States, and the Former and Present Secretary of the Treasury, in Relation to the Compensation of the President*, DAILY ADVERTISER, Nov. 20, 1795, at supp., https://founders.archives.gov/documents/Hamilton/01-19-02-0077#ARHN-01-19-02-0077-fn-0001 [https://perma.cc/XE9G-PSFT].

35. BANKS & RAVEN-HANSEN, *supra* note 32, at 11–12.

36. *Id.* at 20–21 ("The colonial assemblies effectively usurped the governors' military powers by specifying the purposes for which military appropriations could be spent, including the number, distribution, organization, pay, place and period of service, and supply of the officers and men to be raised.").

37. *Id.* at 21.

38. *See* THE FEDERALIST NO. 26, *supra* note 31, at 171 (Alexander Hamilton) ("The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents.").

enumerated powers—"supports the understanding that it is not a grant of affirmative power . . . but is, rather, a condition or limitation *on the exercise of legislative power*."[39] Additionally, after ratification, the Founders were split on how much flexibility the president should have in executing the federal budget. Whereas Hamilton and the Federalists favored broad appropriation bills lacking specific line-items, known as "lump-sum appropriation[s]," Jeffersonian Republicans favored legislative control and line-itemization.[40] The nation's first three appropriation bills—passed in 1789, 1790, and 1791—granted broad administrative flexibility.[41]

The first clear instance of executive impoundment dates to the Jefferson administration's impoundment of national security appropriations.[42] In 1803, when France refused the United States access to the Port of New Orleans, Congress appropriated funding for fifteen gunboats.[43] The Jefferson administration refused to spend the money out of fear that the purchases would jeopardize secret talks between Napoleon and Secretary of State James Madison, who were attempting to resolve the conflict.[44] In his third annual message to Congress, Jefferson announced that a "favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary."[45]

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39. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349–50 (1988) (emphasis added). Professor Kate Stith notes, however, that the Appropriations Clause can be viewed as a grant of power because of Congress's ability to place conditions on spending. *Id.* at 1350.

40. PRESIDENTIAL SPENDING POWER, *supra* note 15, at 59–61.

41. JAMES P. PFIFFNER, THE PRESIDENT, THE BUDGET, AND CONGRESS: IMPOUNDMENT AND THE 1974 BUDGET ACT 10 (1979); *see also* PRESIDENTIAL SPENDING POWER, *supra* note 15, at 148 ("It has long been the practice of the executive branch to regard appropriations as permissive rather than mandatory. From the days of George Washington, then, impoundments occurred whenever expenditures fell short of appropriations.").

42. PRESIDENTIAL SPENDING POWER, *supra* note 15, at 150. President George Washington may have effectively exercised executive impoundment because, during his presidency, Congress made "lump-sum" appropriations in the areas of defense and foreign policy. *Id.* at 148.

43. *Id.* at 150; Allan L. Damon, *Impoundment*, 25 AM. HERITAGE 1, 1 (1973), https://www.americanheritage.com/impoundment [https://perma.cc/ZY5X-ZNWW].

44. Damon, *supra* note 43, at 1.

45. Thomas Jefferson, Third Annual Message to Congress (Oct. 17, 1803), https://avalon.law.yale.edu/19th_century/jeffmes3.asp [https://perma.cc/EF2G-7RJJ]; Damon, *supra* note 43, at 2. The "peaceable turn of affairs" was the Louisiana Purchase. PRESIDENTIAL SPENDING POWER, *supra* note 15, at 150. A year later, Jefferson announced to Congress that the money was being spent to obtain the gunboats. *Id*. Thus, Jefferson deferred the funding, rather than rescinding it.

There were few documented instances of executive impoundment in the nineteenth century,[46] but this can partly be explained by the executive branch simply transferring money from one appropriation to another.[47] Throughout that century, Congress intermittently enacted and repealed laws granting agencies transfer authority.[48] Against the backdrop of a fluctuating legal scheme, agencies sometimes engaged in transfers absent statutory authority.[49] Yet there are documented examples of impoundments during this period.[50] Presidents James Buchanan and Ulysses S. Grant were among the nineteenth century presidents who impounded funds, and they did so in a domestic policy context.[51] In 1860, President Buchanan impounded funds appropriated for Illinois post offices to punish the representatives of the state.[52] In 1876, President Grant impounded part of an appropriation bill for river and harbor improvements.[53]

As the Appendix shows, executive impoundment continued into the twentieth century, primarily in connection with national security spending rather than domestic policy programs until the Johnson administration.[54] The legal boundaries of impoundment, however, were not precisely defined, as disputes over impoundment were conducted via political negotiations rather than legal challenges. In general, Congress either acquiesced to the impoundment, or placed

46. *See* Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 5 (1974) ("Every President from George Washington to Richard Nixon has almost certainly impounded appropriated funds.").

47. *See* PRESIDENTIAL SPENDING POWER, *supra* note 15, at 101–04 ("Illegal transfers were not a simple matter of executive officials flouting the law. Congress itself contributed to the problem by failing to appropriate on time.").

48. *Id.*

49. *Id*. at 102–04. For analysis of a modern, likely illegal transfer, see *infra* notes 253–68 and accompanying text.

50. *See infra* app.

51. LOUIS FISHER, THE CONSTITUTION BETWEEN FRIENDS: CONGRESS, THE PRESIDENT, AND THE LAW 91 (1978) [hereinafter THE CONSTITUTION BETWEEN FRIENDS]; *see infra* app.

52. THE CONSTITUTION BETWEEN FRIENDS, *supra* note 51, at 91.

53. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1510 (1973) [hereinafter Harvard Note].

54. *See* Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 22 (2001) ("Before the 1970s, the majority of unauthorized impoundments occurred within the realm of national security affairs."); *infra* app.

pressure on the president, causing him to disburse the funds.[55] The constitutional discourse between the two branches dramatically escalated during the Nixon years.

The Nixon administration argued that the president had authority to impound, grounding its argument in an interpretation of the Take Care Clause and historical practice.[56] In his testimony before the Senate Subcommittee on Separation of Powers, Deputy OMB Director Casper Weinberger characterized an appropriations act as "a direction to be followed whenever it's possible to do so," but maintained that the Take Care Clause might require the president to withhold funding in certain contexts for good government purposes.[57] In this instance, Weinberger defended Nixon's impoundments as a means to control federal spending and reduce inflation.[58]

Deputy Attorney General Joseph Sneed provided a second Take Care Clause-based rationale for the president's "implied constitutional right" to impound.[59] Sneed testified that the president is bound to enforce all laws, and executive impoundment is sometimes necessary if the executive is confronted with conflicting statutory demands.[60] Thus, according to Sneed, an appropriation does not take precedence over other laws. Coupling the Take Care Clause reasoning with the longstanding executive branch practice of executive impoundment, Sneed concluded that the use of executive impoundment "to promote fiscal stability is not usurpation; rather it is in the great tradition of checks and balances upon which our Constitution is based."[61]

However, not every executive branch lawyer viewed the president's conduct as legitimate. During his tenure as Nixon's Assistant Attorney General in charge of the Office of Legal Counsel ("OLC"), William Rehnquist penned a memorandum to OMB asserting that executive impoundment was generally

55. Wm. Bradford Middlekauff, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209, 211–12 (1990).

56. *Supra* notes 11–13 and accompanying text.

57. *Fund Impounding*, *supra* note 12.

58. *Id.*

59. *Impoundment Hearings*, *supra* note 4, at 1092.

60. *Id.* at 1099 (referencing laws requiring the president to control the economy, including the Antideficiency Act of 1884 and the Employment Act of 1946).

61. *Id.* at 369 (statement of Joseph T. Sneed, Deputy Att'y Gen. of the United States).

unconstitutional.[62] Rehnquist, however, suggested that two exceptions might exist. He wrote:

> Of course, if a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs . . . a situation would be presented very different from [a domestic impoundment].[63]

Four years after Rehnquist's memorandum, Congress passed the ICA.[64] Critically, the ICA was a congressional reaction to Nixon's executive impoundments of domestic appropriations. In 1973, Nixon slashed billions of dollars in domestic areas such as federal housing, highway safety, and environmental protection.[65] No other president had impounded to such an extent in the domestic policy domain.[66] Congress therefore passed the ICA in response to a president using executive impoundment to obstruct Congress's role in domestic policymaking, a usage that was incongruent with past practice in kind and scope.[67]

A year after the ICA's passage, the administration failed to adhere to the new statutory procedure.[68] Under the Clean Water Act, Congress had allocated funding to help states and localities control water pollution—Nixon refused to spend the entire appropriation.[69] In *Train v. City of New York*,[70] the city of New York and other New York municipalities brought suit seeking their full allotment of funding.[71]

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62. 116 CONG. REC. 343–45 (1970).

63. *Id.* at 345.

64. *See* Congress Passes ICA, *supra* note 16, at 800 (stating that the bill was signed in 1974).

65. *See supra* Introduction (noting, for example, that OMB reported approximately $12.8 billion in impoundments in 1971).

66. *See* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 118 (2000) ("Never before had congressional priorities and prerogatives been so altered and jeopardized."). This may in part be attributed to the fact that the New Deal dramatically increased domestic spending and Nixon was only the second post-New Deal Republican president to hold office.

67. *See* Brownell, *supra* note 54, at 48 ("In response to President Nixon's actions, Congress passed the ICA, an act which comprehensively restructured the federal budget process.").

68. *See* Train v. City of New York, 420 U.S. 35, 41–49 (1975) (explaining the Clean Water Act's Harsha amendments, which related to allocations of funds to states by the EPA administrator).

69. *See id.* at 35 (noting the availability of federal funds for sewers and waste treatment).

70. Train v. City of New York, 420 U.S. 35 (1975).

71. *Id.* at 40.

The Supreme Court ordered the president to disburse the funds but did not address the president's constitutional claim of executive impoundment authority. Rather, the Court stated that "[t]he sole issue before us is whether the 1972 Act permits the [EPA] Administrator to allot to the States . . . less than the entire amounts authorized to be appropriated . . . ."[72] The opinion did not use the terms "Constitution" or "separation of powers." Instead, the Court's focus on statutory interpretation suggests that it sought to avoid ruling directly on the question of executive impoundment—which would have closed the door to all forms of executive impoundment and end the political branches' coordinate construction—and instead ruled solely on the basis of the text of a domestic policy statute.[73] Similar to Congress's passage of the ICA in response to a domestic impoundment, the impoundment the Court ruled on in *Train* was a domestic one. Thus, the Court's ruling may have been prompted by an understanding that the Nixon administration had pushed the boundaries of impoundment too far. The Court's decision to focus on statutory interpretation, rather than issue a constitutional holding, might have been an attempt to reconcile the tension between curbing Nixon's actions with the historical pedigree of executive impoundment, especially in the foreign policy sphere.

Thus, though Congress and the Court may have settled the issue of domestic impoundment, the Court did not necessarily foreclose impoundments relating to foreign affairs.[74] And according to then-

72. *Id.* at 41.

73. *Train* did not mark the Court's only intervention in the context of impoundment. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Supreme Court ordered the postmaster general to perform his "purely ministerial" duty to pay a contract claim as required by Congress. *Id.* at 613. Scholars, however, read this decision narrowly as only applying to the payment of claims for services pursuant to a ministerial duty. *See, e.g.*, Louis Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 127 (1969) [hereinafter *Funds Impounded by the President*] (explaining a narrow reading that makes the case "only remotely relevant" to impoundment); Stanton, *supra* note 46, at 5 (arguing *Kendall* does not indicate "a lack of presidential control over appropriated funds").

74. Brownell writes:

> While the Court ruled that the President was required to release the funds earmarked for a domestic program, the Court did not specifically comment on the constitutional issue of impoundment . . . . It is also important to note that the decision in no way involved the President impounding national security funds.

Brownell, *supra* note 54, at 49–50; *see also* Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure To Seek Acknowledgment of "National Security Rescission,"* 47 AM. U. L. REV. 1273, 1276–77 (1998) [hereinafter Brownell, Comment] (arguing that had the Clinton administration restricted its use

Assistant Attorney General Rehnquist, the Court may have lacked a constitutional basis to completely foreclose executive impoundments. If this is the case, the ICA's relationship to the president's constitutional authority to impound certain foreign policy appropriations can be analogized to how some scholars conceptualize the War Powers Resolution's ("WPR") relationship to the president's authority as commander-in-chief. Among other things, the WPR requires the president to withdraw armed forces from a hostility within ninety days absent congressional approval.[75] Some scholars assert that the president may disregard this provision because it impinges on the commander-in-chief authority, pointing to, for instance, when President Clinton exceeded the WPR time limit to withdraw.[76] Similarly, the ICA would be inapplicable to the president in the context of a foreign policy appropriation when he exercises the impoundment power pursuant to his constitutional authority.

B. The Supreme Court's Implicit Recognition of Executive Impoundment

Rehnquist's speculation was answered by the Supreme Court decades later in *Zivotofsky ex rel. Zivotofsky v. Kerry* ("*Zivotofsky II*").[77] In that case, the Court held that the Reception Clause provided the president with exclusive authority to determine the sovereign status of foreign countries.[78] As a general rule, the Court employs Justice Robert Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure Case*)[79] to assess the president's constitutional authority to fly in the teeth of a congressional directive.[80] Jackson's concurrence reasoned that the president's power is at his "lowest ebb" when he acts in contravention of the express will of Congress.[81] Despite this general rule, however, *Zivotofsky II* explicitly

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of cancellations under the Line Item Veto Act to national security provisions, the Court may have upheld the act).

75. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2018).

76. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1070–71, 1090 (2008).

77. Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076 (2015). For further discussion of this case, see *infra* Part III.C.

78. *Zivotofsky II*, 135 S. Ct. at 2094–95.

79. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579 (1952).

80. *Id.* at 634–60 (Jackson, J., concurring).

81. *Id.* at 637–38.

recognized an exclusive area of presidential power in the field of foreign policy, regardless of it contravening congressional intent.

Although the case did not involve impoundment, the majority opinion was grounded in part in historical practice.[82] One historical episode referenced by the Court implicitly recognized impoundment. The Court wrote that "[i]n 1818, Speaker of the House Henry Clay announced he 'intended moving the recognition of Buenos Ayres and probably of Chile'" by passing an appropriation to fund the salary of a minister to Argentina.[83] Clay's plan was defeated because "Congress agreed the recognition power rested solely with the President."[84] Based on the Court's reasoning, if Congress passed such an appropriation, the president could have refused to spend the funds. Yet had Clay succeeded in passing the 1818 appropriation, the law would not necessarily have been unconstitutional. Rather, the president could decide to recognize the sovereignty of Chile and subsequently expend the funds. Thus, the decision whether to execute the appropriation turned on the president's discretion, affording him an impoundment power.[85]

If the president may impound appropriations that invade his recognition power, it follows that he may likewise do so when Congress infringes on other exclusive powers, such as that of chief diplomat.[86] Although the Court has not explicitly recognized a chief diplomat

82. *See Zivotofsky II*, 135 S. Ct. at 2091 (acknowledging that the historical practice was "not all on one side, but on balance it provide[d] strong support for the conclusion that the recognition power is the President's alone").

83. *Id.* at 2092 (quoting JULIUS GOEBEL, THE RECOGNITION POLICY OF THE UNITED STATES 121 (1915)).

84. *Id.*

85. There are some hypothetical situations in which the president would or could not execute an appropriation because he would seemingly lack any incentive to do so, or because the conduct would be unconstitutional. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 739 (2008) ("[T]here is no obvious reason to think Congress can use its spending powers to . . . violate the First Amendment, the Bill of Attainder Clause, or the Due Process Clause, . . . or to prohibit the President from issuing a particular pardon." (footnote omitted)). Because the president has no real choice but to refuse to spend such an appropriation, none of these situations would afford him impoundment power.

86. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 296 (2001) ("Washington, as America's chief diplomat, understood that he possessed broad powers over foreign affairs."). For a critique of Professors Saikrishna Prakash and Michael Ramsey's claim that the president possesses a residual foreign affairs power, see Louis Fisher, *Presidential Residual Power in Foreign Affairs*, 47 CAP. U. L. REV. 491, 495–99 (2019).

power, some scholars maintain that the president has the sole authority to lead treaty negotiations with foreign countries[87] and to keep state secrets from Congress that pertain to diplomatic negotiations.[88] Similarly, the impoundment power may extend to the president's core and exclusive powers as commander-in-chief. The extent to which the president has *exclusive* constitutional authority as commander-in-chief is a matter of intense debate both in and outside the academy.[89] There is agreement, however, that at the core of the Commander-in-Chief Clause is the president's authority to make operational decisions related to the command structure of the armed forces, within the scope of a congressionally authorized conflict.[90] For example, although Congress may authorize or control the scope of a conflict, the legislature cannot dictate tactical military decisions against the president's will.[91] Therefore, if Congress appropriated $500 million to require the president to send the Army's Tenth Mountain Division into an ongoing conflict, then, extending the logic of *Zivotofsky II*, the president would be on strong constitutional grounds to impound the appropriation.

C. Examining the Scope of the Executive Impoundment Power Through Gloss Analysis

Having established that executive impoundment is not unconstitutional in all applications within foreign policy, this Section sets the stage for discerning the scope of the president's impoundment authority by applying gloss analysis to the Appropriations and

87. *See* 74 AM. JUR. 2d *Treaties* § 6 (2020) ("Under the Federal Constitution, the power to negotiate treaties is vested in the President. Congress is powerless to invade the field of international negotiations. However, while the President alone has the authority to negotiate and ratify treaties, he or she cannot act unilaterally."); H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 153 (2002) [hereinafter POWELL, FOREIGN AFFAIRS] ("The president has plenary and exclusive control over negotiation with foreign nations and other entities . . . .").

88. *See* POWELL, FOREIGN AFFAIRS, *supra* note 87, at 153 ("The executive first asserted the power to control the release of diplomatic information and state secrets . . . during the Washington administration.").

89. H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 3 (2014) [hereinafter POWELL, COMMANDER-IN-CHIEF POWER].

90. *See id.* at 121 ("A statute that simply transferred the entire power of command from the president to another officer would clearly be unconstitutional, and [Justice] Jackson clearly thought that the president would be entitled under the bottom tier analysis to disregard a statute that purported to break the chain of command . . . .").

91. *Id.* at 121–22.

Commander-in-Chief Clauses. Although the previous Section addressed impoundments within the exclusive zone of presidential power, this Section asserts that historical gloss helps resolve the scope of the executive impoundment power across national security policy more generally—a policy realm that is concurrently shared with Congress. Part II reviews and critiques another scholar's application of historical practice to support his argument for a broad impoundment power. Part III then applies modern gloss analysis to discern the contours of the president's limited executive impoundment power.

To clarify the meaning of an ambiguous constitutional provision, legal scholars, OLC, and the Supreme Court all frequently employ historical gloss as a modality of constitutional interpretation.[92] Broadly defined, gloss posits that the longstanding historical practice of one branch of government combined with "institutional acquiescence" by another implicated branch of government can clarify constitutional meaning.[93] Institutional acquiescence does not take a particular form and can be hard to identify, but acquiescence may occur when a branch waives its institutional prerogative—for instance, if the legislature does not pass a law on a particular issue.[94] In Supreme Court jurisprudence, historical gloss traces back to at least *McCulloch v. Maryland*[95] and was explicitly articulated by Justice Felix Frankfurter in his concurrence in

92. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012).

93. *See id.* at 412 (defining gloss in the article's abstract). Some originalist scholars have used the term "liquidation" to describe a similar concept. *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019) ("James Madison wrote that the Constitution's meaning could be 'liquidated' and settled by practice."); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–72 (2013) (arguing textual "ambiguity can be liquidated by context"). Unlike gloss, the originalist theory of liquidation focuses primarily on early historical practice. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 8 (2020).

94. Bradley & Morrison, *supra* note 92, at 412; *see, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 526 (2014) (reasoning that the longstanding practice of presidential recess appointments "suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances"). In a rare example of direct evidence of an agreement, "Congress in the 1973 War Powers Resolution expressly agreed with the executive branch that the President had the constitutional authority to use military force in response to 'a national emergency created by attack upon the United States.'" Bradley & Morrison, *supra* note 92, at 433–34 (quoting 50 U.S.C. § 1541(c) (2018)).

95. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) (noting the constitutionality of Congress's power to incorporate a bank "if not put at rest by the practice of the government, ought to receive a considerable impression from that practice").

Youngstown.[96] Justice Frankfurter reasoned that, "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[97]

More recently, the Court applied gloss in *Zivotofsky II*, in which the Court reasoned that the executive branch had consistently exercised the recognition power, and "[f]or the most part, Congress has acquiesced" to the practice.[98] The year before, the Court in *NLRB v. Noel Canning*[99] used gloss to interpret the Constitution's Recess Appointments Clause.[100] In that case, the Court engaged in a thorough historical analysis of presidential appointments during intrasession Senate recesses.[101] The Court noted that its own precedents "treated practice as an important interpretive factor even when the nature or

96. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

97. *Id.*

98. Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2091 (2015). In the October Term 2019 alone, the Court applied historical gloss in at least three cases. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2323, 2326 (2020) (holding that states may enforce their electors' pledges in a presidential election and noting that, "[f]rom the first, States sent [electors] to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment."); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (noting that the "congressional power to obtain information [through subpoenas] is 'broad' and 'indispensable'" (quoting Watkins v. United States, 354 U. S. 178, 187, 215 (1957))); *id.* (acknowledging that "Congress and the Executive have . . . managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from [the Supreme Court,]" and recognizing that "[s]uch longstanding practice . . . imposes on [the Court] a duty of care to ensure that [it does] not needlessly disturb 'the compromises and working arrangements that [those] branches . . . have reached'" (fifth alteration in original) (quoting NLRB v. Noel Canning, 573 U.S. 513, 526 (2014))); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1656, 1659 (2020) (holding that "the Appointments Clause restricts the appointment of all officers of the United States, including those who carry out their powers and duties in or in relation to Puerto Rico" and noting that, "[l]ongstanding practice indicates that a federal law's creation of an office in [the context of Congress legislating for a non-state locality] does not automatically make its holder an 'Officer of the United States'").

99. NLRB v. Noel Canning, 573 U.S. 513 (2014).

100. *See id.* at 524 ("[I]n interpreting the Clause, we put significant weight upon historical practice." (emphasis omitted)). The Court also noted:

> As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them."

Id. at 525.

101. *See id.* at 528–33 (reviewing U.S. history, particularly post-Civil War history, for examples of historical practice supporting the Court's conclusion).

longevity of that practice is subject to dispute, and even when that practice began after the founding era."[102]

Professors Curtis Bradley and Trevor Morrison, observing the surprisingly limited scholarship on gloss, explain its significant role in resolving separation of powers disputes.[103] Gloss is particularly useful for analyzing separation of powers contexts, such as executive impoundment, for both practical and normative reasons. For practical reasons, the Court intervenes less often in disputes involving the political branches.[104] Therefore, the history of the interactions between the political branches may provide the best evidence of constitutional meaning.[105] And on normative grounds, the political branches, which hold their own valid constitutional views, are sometimes better situated to develop constitutional law involving tensions between themselves. Through repeated interactions with each other, the political branches develop and sharpen their understanding of what the best meaning of a constitutional provision may be by repeated application to policy.[106]

Executive impoundment in the area of foreign policy is ripe for historical gloss analysis. The *Train* Court may have avoided issuing a constitutional holding precisely because it recognized a series of complex interactions between the president and Congress in regard to impoundment. Additionally, the constitutional provisions at issue—the Appropriations[107] and Commander-in-Chief Clauses[108] and perhaps the Take Care Clause[109]—lack the textual precision and legislative history

102. *Id.* at 525.

103. Bradley & Morrison, *supra* note 92, at 413.

104. *Id.* at 456–57.

105. *See* Bradley & Siegel, *supra* note 93, at 31 (summarizing Justice Frankfurter's definition of gloss in *Youngstown* as "the actions and interactions of federal government institutions over time can help resolve questions about the constitutional scope of their respective authority").

106. *See* Bradley & Morrison, *supra* note 92, at 434–35 (describing two ways repeated interactions lead to constitutional understanding). Therefore, allowing Congress and the president their own space to discern constitutional meaning may be preferable to the Court's intervention, which, due to stare decisis, can freeze constitutional understanding.

107. *See supra* notes 29–41 and accompanying text (noting the placement of the Appropriations Clause and the Founders' views on presidential administration of the budget).

108. *See infra* note 162 and accompanying text (noting that the clause received almost no attention at the Constitutional Convention).

109. *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2114 (2019) ("Over the centuries, the two Faithful Execution Clauses have produced wide-ranging jurisprudences and have been marshaled in many constitutional debates.").

to answer whether the president may impose a ceiling for certain foreign policy-related appropriations.

The Court has not articulated a methodology for identifying gloss, but Bradley reasons that looking to the justifications for relying on historical practice is a useful starting point. There are at least four: (1) deference to nonjudicial actors; (2) limits on judicial capacity; (3) consequentialist concerns; and (4) reliance interests.[110] These justifications can be employed as factors that support recognition of a gloss on constitutional provisions.

The first factor embodies the notion of coordinate interpretation, which asserts that the political branches, like the judicial branch, are competent interpreters of the Constitution and may, in some cases, be more familiar than the Court with the consequences of an interpretation.[111] The second factor recognizes that, in some cases, the Court may not have adequate tools to interpret the Constitution because of a lack of textual guidance or evidence of original meaning.[112] The third factor, consequentialism, is based on good government considerations.[113] A deep-seated historical practice might indicate what has been demonstrated to work well and might also adapt to changing circumstances.[114] *Zivotofsky II* relied on this factor because the Court emphasized the need for the American government to speak with one voice on the issue of recognition.[115] The fourth factor incorporates both coordinate interpretation and consequentialist rationales. It states that, over a period of time, the political branches may have adjusted their behavior to account for time-honored practice and may have made subsequent decisions and concessions based on that practice.[116]

In addition to these four factors, both institutional practice by one branch and acquiescence by the other must be shown to establish

110. *See* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 64–67 (2017) [hereinafter *Doing Gloss*] (explaining each of these four justifications).

111. *Id.* at 64–65.

112. *See id.* at 65–66 (noting that a lack of textual guidance is especially true of Article II powers).

113. *See id.* at 66 ("These practices reflect the judgments of many actors over time, informed by the realities of governance and changes in the needs of governance, and therefore . . . they have the potential to embody collective wisdom. Under this rationale, the very persistence of a practice is evidence of its utility.").

114. *Id.*

115. Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2086 (2015).

116. *Doing Gloss*, *supra* note 110, at 67.

constitutional gloss.[117] There is no clear standard for how long a practice must continue for it to become gloss.[118] The acquiescence requirement comes directly from Frankfurter's *Youngstown* concurrence.[119] As the deference factor is focused upon intentionality, a heightened showing of acquiescence is necessary when basing gloss on that factor.[120] When gloss is primarily anchored on one or more of the other three factors, which are functional and consequentialist, then a lesser showing of acquiescence may be sufficient.[121]

II. INSUFFICIENT HISTORICAL BASIS FOR A CATEGORICAL NATIONAL SECURITY IMPOUNDMENT POWER

This Note is not the first piece of scholarship to apply historical gloss analysis to the issue of impoundment within the field of foreign policy. In 2001, scholar Roy Brownell argued for a broad national security impoundment power.[122] Although Brownell's article predates the modern intellectual framework for applying gloss, Brownell, like the Nixon administration, uses a similar analytical approach, basing his constitutional argument for impoundment in part on historical practice dating back to Jefferson.[123] This Part asserts that Brownell's claim is overbroad, pointing instead to evidence that President James Madison afforded Congress deference by carrying out a wasteful national security appropriation—a historical episode that Brownell overlooks.

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117. *Id.* at 60.

118. Bradley notes that invoking gloss based on consequentialism and reliance requires longer historical practice, relatively, than gloss based on deference or lack of judicial capacity. *Id.* at 74.

119. *See* Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring) (explaining that "long-continued acquiescence of Congress" can "giv[e] decisive weight to a construction by the Executive of its powers").

120. *See Doing Gloss*, *supra* note 110, at 75 ("The justification that most closely depends on a showing of acquiescence is the deference justification."). *Zivotofsky II* illustrates that a strong showing of acquiescence may not be necessary in all cases. Although the Court found that Congress had acquiesced to presidential control over the recognition power, that finding was disputed. *See* Curtis A. Bradley, *Agora: Reflections on* Zivotofsky v. Kerry*: Historical Gloss, the Recognition Power, and Judicial Review*, 109 AJIL UNBOUND 2, 2 (2015) ("In *Zivotofsky II*, the relevant practice provided clear support only for a power of recognition and was ambiguous about whether this power was concurrent or exclusive.").

121. *See Doing Gloss*, *supra* note 110, at 76–77 ("In short, under many of the potential justifications for gloss, institutional acquiescence is less central than is commonly assumed.").

122. *See* Brownell, *supra* note 54, at 11 ("At the core of the concept of National Security Impoundment is the notion that the President possesses greater constitutional authority in the field of national security affairs than in domestic affairs.").

123. *Id.* at 30.

Additionally, this Part argues that *Zivotofsky II* rebuffs Brownell's claim that the president has primacy over Congress in foreign policy. Accordingly, this Part asserts that a sound account of the president's impoundment power must closely track historical practice rather than relying on a model of presidential supremacy.

A. Brownell's Account of a National Security Impoundment

Brownell correctly observes that the 1801 Jefferson impoundment involved a national security issue, and that many of the recorded instances of impoundments also pertained to national security.[124] Brownell is thus the first scholar to argue that *Train* did not foreclose national security impoundments and does so based on two hundred years of executive branch practice. Although Brownell's intellectual framework is factor based and does not give the president carte blanche to employ national security impoundments,[125] his conception of a national security impoundment power is categorical in nature and far-reaching. For instance, he argues that "[d]uring World War II, President Roosevelt displayed the full measure of [his impoundment] discretion by impounding funds earmarked for a variety of infrastructure projects."[126] Brownell concedes that those impoundments, which totaled hundreds of millions of dollars, "on their face had little to do with military matters."[127] Nevertheless, he claims that when the nation is at war, the president possesses some authority to impound funds "deemed generally to be domestic in nature."[128]

A national security impoundment power, Brownell seems to argue, allows the president to cancel domestic appropriations when it relates to national security based on two claims. First, Jefferson's impoundment marks the beginning of "a long and continuous [custom], thus affirming its status as constitutional."[129] This argument has additional significance, Brownell argues, because practices sanctioned by early administrations are given greater weight as they are suggestive of the Framers' original intent.[130] Second, and relatedly, Brownell

124. *Id.* at 32; *see infra* app.
125. Brownell, *supra* note 54, at 10–11 (listing five factors the president must meet).
126. *Id.* at 106.
127. *Id.*
128. *Id.* at 106–07.
129. *Id.* at 59.
130. POWELL, FOREIGN AFFAIRS, *supra* note 87, at 28.

contends that Congress is constitutionally less competent to legislate in the sphere of foreign policy than in domestic policy—what this Note terms a "primacy approach" to foreign policy legislation.[131]

Yet Brownell's analysis does not accurately describe the scope of executive impoundment. As an initial matter, it cannot be the case that the president can impound domestic appropriations simply because of national security concerns, as Brownell suggests that he can. On its face, the Roosevelt impoundment is nearly indistinguishable from Truman's decision to nationalize the domestic steel mills to support the Korean War effort, which the Supreme Court in *Youngstown* held was unconstitutional.[132] The next Section demonstrates that historical gloss cannot support a categorical national security impoundment for two additional reasons. First, this Note presents evidence that Madison was less certain than his predecessor was that the president has a prerogative to impound. And second, *Zivotofsky II*, though it established the exclusivity of the president's recognition power, also contradicted the primacy approach to foreign policy legislation.

B. James Madison Deferred to Congress Despite a Policy Disagreement

Both Brownell and the Nixon administration referenced the 1801 Jefferson impoundment to support the president's claim to independent constitutional authority to engage in the practice.[133] If Jefferson is the starting point, then a line of over 170 years of executive branch practice can be drawn from Jefferson to the Nixon administration. This Note, however, identifies a second early historical example, which shows that Jefferson's immediate successor, Madison, conscientiously fulfilled the wishes Congress expressed in a defense appropriation.

Jefferson had signed the Embargo Act of 1807, which established American neutrality during the Napoleonic Wars between Great

131. *See* Brownell, *supra* note 54, at 11–18 ("[T]he President possesses greater constitutional authority in the field of national security affairs than in domestic affairs.").

132. *See* Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

133. *See supra* notes 13–15 and accompanying text.

Britain and France,[134] and prohibited commerce with both of those countries.[135] But the embargo increased hostilities with Great Britain, and in response, Congress enacted an appropriation to bolster the American Navy.[136] By late 1809, however, tensions between the United States and Great Britain had momentarily settled, and the two countries anticipated reopening trade in 1810.[137] Accordingly, Albert Gallatin, who served as secretary of the treasury to both Jefferson and Madison, was frustrated with the defense appropriation.[138] In a May 1809 letter to then-President Madison, Gallatin addressed the Navy appropriation:

> Will it not be proper to suggest a reduction, on the grounds both of cessation of the causes which produced the encrease, & of the state of the finances? The navy appropriation was near 3 millions of dollars—the objects, enforcing embargo, employing seamen, protecting commerce—all now at an end—no utility whatever; & no expense less justifiable has ever been authorised since the commencemt. of this Government. All I ask however, is that Congress should repeal the absurd law forced by Giles & Smith on the house; so that the discretion should rest with the President to employ or not to employ the vessels & men; by which we would be enabled at once to get rid of that profligate excrescence. As to the army I feel less anxiety, because there may be some use for the men & because the expense there has always been kept within decent bounds. Yet the encrease is beyond our wants if we have no English war and of no use in case of French war.[139]

The appropriations law Gallatin referenced called for promptly outfitting four frigates and stationing them "and other armed vessels . . . at such ports and places on the sea coast" as the president

134. *Embargo of 1807*, THOMAS JEFFERSON ENCYCLOPEDIA, https://www.monticello.org/site/research-and-collections/embargo-1807 [https://perma.cc/X5NJ-VDDL].

135. *Id.*

136. Act of Nov. 24, 1807, ch. 1, § 1, 1 Stat. 450, 450; *see Embargo of 1807*, *supra* note 134 ("Because the embargo had prompted an increase in smuggling, the enforcement act allowed port authorities to seize cargoes if there was any suspicion of violation of the embargo, and the President himself was empowered to use the Army or the Navy for additional enforcement.").

137. Letter from Albert Gallatin, Sec'y, U.S. Dep't of the Treasury, to President James Madison, (May 18, 1809), https://founders.archives.gov/documents/Madison/03-01-02-0218 [https://perma.cc/GCF3-REXT].

138. *Id.*

139. *Id.*

"may deem most expedient."[140] Five days later, Madison wrote to Congress, updating the legislature on the state of foreign affairs.[141] Madison wrote, "Of the additional Frigates *required* by an Act of the last Session, to be fitted for actual service, two are in readiness; one nearly so, and the fourth is expected to be ready, in the month of July."[142] He continued, "It will rest with the judgment of Congress to decide, how far the change in our external prospects, may authorize any modifications of the laws, relating to the Army and Navy establishments."[143] These two letters suggest that the president and his treasury secretary viewed the appropriation law as mandatory. Although the administration and Congress may have had differing opinions on financial priorities, the president deferred to Congress's legislative mandate.[144]

Scholars such as Brownell must somehow reconcile Jefferson's impoundment with "Madisonian deference" to Congress. Jefferson's actions show that he viewed expenditure of the funds as wasteful and believed that spending on the gunboats might unnecessarily anger France at a time when delicate negotiations were taking place between the two countries. The Madisonian example complicates the picture because the episode shares striking similarities with Jefferson's impoundment. Both situations involved Congress appropriating for an anticipated armed conflict—the first with France, the second with Great Britain—and in both cases, the executive branch viewed the spending as wasteful given the softening of international relations. And finally, Gallatin served as treasury secretary to both presidents.[145]

Madisonian deference shows that early in the Republic, presidents understood appropriations as not only ceilings for spending, but also as floors. That the Madison administration executed the appropriation anyway, despite viewing the frigates as wasteful, cuts against a categorical national security impoundment power. Madison's conduct could possibly be viewed as showing deference to Congress in an area

140. *Id.*

141. Letter from President James Madison to Congress (May 23, 1809) [hereinafter Madison Letter], https://founders.archives.gov/documents/Madison/03-01-02-0227 [https://perma.cc/Q3RH-BUYA].

142. *Id.* (emphasis added).

143. *Id.*

144. What this Note will refer to as "Madisonian deference."

145. *Albert Gallatin (1801–1814)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/about/history/prior-secretaries/albert-gallatin-1801-1814 [https://perma.cc/2XME-74ZQ].

of shared responsibility, still leaving room for categorical national security impoundment authority. He did, for example, impound by reducing the crews of the New Orleans gunboats for economy.[146] But his deference in the frigates example at least muddies the water. Although Jefferson impounded funds, the fourth president—an architect of the Constitution—deferred to Congress.

C. The Court Rejected a Presidential Primacy Approach to Foreign Policy Legislation in Zivotofsky II

In addition to failing to account for Madisonian deference, Brownell's view of the president's preeminence in the domain of foreign policy is overstated. His view was informed by the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*,[147] which is often cited by those favoring broad executive power in foreign policy.[148] *Curtiss-Wright* involved a delegation of legislative power to Roosevelt to establish an arms embargo in South America. The Court upheld the delegation, noting "[t]hat there are differences between [the president's control over internal and external affairs], and that these differences are fundamental, may not be doubted."[149] The Court further stated, in dicta, that "the President is the sole organ of the federal government in the field of international relations."[150] For nearly a century, scholars and executive branch lawyers invoked this erroneous dicta for the proposition that the president holds ultimate power in foreign affairs.[151]

Yet Congress exerts considerable control over foreign policy, particularly regarding national security. The text of the Constitution provides Congress with the power to declare war, to fund armed

146. Madison Letter, *supra* note 141.

147. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

148. Michael J. Glennon, *Recognizable Power: The Supreme Court Deals a Blow to Executive Authority*, FOREIGN AFFS. (June 23, 2015), https://www.foreignaffairs.com/articles/united-states/2015-06-23/recognizable-power [https://perma.cc/NZ9X-VJ4J].

149. *Curtiss-Wright*, 299 U.S. at 315.

150. *Id.* at 320. The phrase "sole organ" was first uttered by then-Congressman John Marshall. *Id.* at 319.

151. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2089 (2015) ("In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss–Wright Export Corp*. . . ."); Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 154, 211 (2016) (noting that "OLC, reporters, and others" cite *Curtiss-Wright* to support claims of the president's foreign policy power).

conflicts, and to regulate the military.[152] Congress may also oversee military conflicts and may have the power to declare that an armed conflict must come to an end.[153]

Zivotofsky II was written in opposition to the *Curtiss-Wright* view, espoused by Brownell, that the president possesses special authority in foreign affairs relative to Congress. Although *Zivotofsky II* marked the first time that the Court struck down an act of Congress in the field of foreign affairs, the analysis the Court used understood that Congress was a substantial player in foreign policymaking. The Court reasoned that Congress may legislate on foreign affairs issues, as long as it does not do so in a way that interferes with a president's exclusive power.[154]

Justice Anthony Kennedy wrote,

> *Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations . . . . In a world that is ever more compressed and interdependent, it is essential [that] the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue . . . . It is not for the President alone to determine the whole content of the Nation's foreign policy.[155]

The dissenters, Chief Justice John Roberts, Justice Samuel Alito, and Justice Antonin Scalia, did not agree that the president's recognition power was exclusive, arguing instead that it was a shared power with Congress.[156] Like the majority, they also repudiated

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152. Article I, § 8 vests Congress with substantive powers that pertain to national security, including to "provide for the common Defence and general Welfare of the United States," "[t]o declare War," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8. These powers therefore afford Congress a shared role in national security policy.

153. *See* Barron & Lederman, *supra* note 76, at 946–50 (finding that "Congress has been an active participant in setting the terms of battle (and the conduct and organization of the armed forces and militia more generally)"); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Tools*, 44 S. CAL L. REV. 461, 470 (1971) ("Congress may terminate as well as authorize hostilities, *i.e.* declare peace as well as war."); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 87 (1991) (discussing William Blackstone's statement "that under English law," the power to declare war implies the power to declare peace).

154. *Zivotofsky II*, 135 S. Ct. at 2090.

155. *Id.*

156. *Id.* at 2114 (Roberts, C.J., dissenting).

Curtiss-Wright.[157] Only Justice Clarence Thomas clung to a *Curtiss-Wright* conception of presidential power in foreign policy.[158] Therefore, eight Justices agreed that Congress has substantial legislative authority in the foreign policy sphere.

Zivotofsky II thus rejected both the primacy approach and the erroneous dicta of *Curtiss-Wright*. In the words of Justice Kennedy, "[W]hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law."[159] Accordingly, any account of historical gloss must accommodate the Court's view that outside of discrete areas of exclusive presidential power, Congress is just as competent to legislate in foreign affairs as in domestic policy. Brownell's expansive vision of a national security impoundment does not withstand a historical gloss analysis. His categorical approach not only fails to comport with *Youngstown*, but it also does not account for either Madisonian deference or the Supreme Court's recent repudiation of the presidential primacy approach to foreign policy legislation.

III. GLOSS SUPPORTS A NARROW POWER TO IMPOUND APPROPRIATIONS FOR WEAPONS SYSTEMS, MILITARY PERSONNEL, AND MILITARY CONSTRUCTION

Although there is not sufficient evidence for a categorical national security impoundment, historical practice does support discrete executive impoundment authorities within the field of national security. Critically, as discussed in detail above, the Appropriations Clause is silent as to whether Congress may impose a floor on government spending.[160] Standing alone, the Appropriations Clause warrants consideration of longstanding historical practice to inform its meaning. Yet the Commander-in-Chief Clause is also ambiguous and may clarify the meaning of the Appropriations Clause in certain contexts. The former provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United

157. *Id.* at 2115. The majority did, however, bless *Curtiss-Wright*'s dicta that the president "has the sole power to negotiate treaties." *Id.* at 2086 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936)).

158. *Id.* at 2096–2113 (majority opinion).

159. *Id.* at 2090.

160. *See supra* notes 29–41 and accompanying text.

States . . . ."[161] There is no additional text expounding the meaning of the Commander-in-Chief Clause, which received almost no attention at the Constitutional Convention.[162] Thus, neither the text of the Constitution nor the Convention record speak to whether, and to what extent, the Commander-in-Chief Clause colors the meaning of the Appropriations Clause in the domain of national security appropriations.[163]

Thus, only historical practice provides any additional clarification on how these constitutional provisions interact. This Part shows that repeated exchanges between the political branches regarding impoundments for weapon systems, military personnel, and military construction provide a gloss for the Appropriations and Commander-in-Chief Clauses. The deep-seated historical practice and corresponding constitutional dialogue in these domains support the president's authority to execute certain appropriations laws with discretion and sensitivity, based on his role as commander-in-chief.

A. Repeated Exchanges Involving Weapons System, Military Personnel, and Military Construction Impoundments

This Note argues against a categorical form of impoundment for national security, but many executive impoundments did occur in a

161. U.S. CONST. art. II, § 2, cl. 1.

162. *See* POWELL, COMMANDER-IN-CHIEF POWER, *supra* note 89, at 98 (discussing the difficulty—or perhaps impossibility—of determining the precise meaning of the Commander-in-Chief Clause by examining "the brief account in Madison's notes of the Philadelphia framers' discussion of war-making power").

163. The Take Care Clause likewise lacks interpretive guidance. That clause, which states that the president "shall take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, is generally understood to either impose a responsibility or provide an affirmative grant of power. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) ("Through a long and varied course of interpretation, however, the Court has read that vague but modest language, in the alternative, either as a source of vast presidential power or as a sharp limitation on the powers of both the President and the other branches of government."). The Nixon administration's analysis focused on the Take Care Clause, asserting that the president could impound in any context because of his need to enforce laws with conflicting goals, such as implementing costly domestic government programs while enacting a mandate to combat inflation. *See supra* notes 11, 14 and accompanying text. Although the president may need a certain amount of discretion to enforce seemingly conflicting statutory directives, this Note avoids the Take Care Clause debate and primarily focuses on the Appropriations Clause and its interaction with the Commander-in-Chief Clause.

national security context.[164] Repeated exchanges between the political branches suggest that the president may impound appropriations for weapons systems, and, to a lesser extent, appropriations increasing the number of military personnel and providing for military construction projects. Of the thirty-three documented instances of national security impoundments, as the Appendix illustrates, twenty involved weapons systems appropriations, six were for military personnel, and three involved military construction.[165] Thus, the recurrence of weapons system, military personnel, and military construction impoundments ("WPC impoundments") establishes discrete areas of executive branch practice.[166]

Of all forms of impoundments, the strongest case for deep-rooted executive practice exists for weapons systems. The first weapon-system impoundment occurred when Jefferson delayed the gunboat appropriations. Though the next weapons impoundment did not occur until 1949, when Truman impounded funding to build the *USS United States* aircraft carrier,[167] four subsequent presidents, from both political parties, impounded weapons systems over a twenty-year span.[168] President Dwight Eisenhower alone impounded ten weapons systems appropriations.[169] There is also a history of executive impoundments of military personnel, which dates back to Madison and involved four presidents.[170] President Franklin Roosevelt was the first twentieth century president to impound a military personnel appropriation when

164. Of the sixty-four instances of impoundments identified by the Author of this Note, thirty-three pertained to national security, twenty-nine of which were weapons system, military personnel, and military construction impoundments. *See infra* app.

165. *See infra* app.

166. Although this Note argues for a constitutional impoundment authority, there is conceivably also a statutory interpretation argument for presidential impoundment independent of the ICA framework. In light of the historical practice, defense spending appropriations may implicitly confer some discretion on the executive. Congress can presumably choose to confer such discretion, and, if it does, no issue of constitutional impoundment is raised. When taking such an impoundment action, the executive could cite to *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which relied heavily on historical practice to find implicit congressional authorization for settling of American claims with foreign powers. *See id.* at 678 ("Such failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." (quoting Haig v. Agee, 453 U.S. 280, 291 (1981))).

167. Louis Fisher, *The Politics of Impounded Funds*, 15 ADMIN. SCI. Q. 361, 367–68 (1970) [hereinafter *The Politics of Impounded Funds*].

168. *See infra* app.

169. *See infra* app.

170. *See infra* app.

he impounded funding for ROTC units in 1938.[171] Finally, there is a practice of executive branch impoundment of military construction. The first documented impoundment occurred when Jefferson impounded the construction of several navy yards in 1801.[172] But in the twentieth century, Eisenhower alone impounded military construction, once in 1960 and again in 1961.[173]

B. Three Case Studies Demonstrating Congressional Acquiescence

The many WPC impoundments spanning decades—and sometimes centuries—have prompted rich constitutional discussion. The following three examples provide a snapshot of the debate between Congress and the president over such impoundments. This historical record is relatively robust compared to those that the Court reviewed in *Noel Canning* and *Zivotofsky II* because the latter instances did not include extensive dialogue between the political branches or explicit constitutional argumentation by the political actors. Though the majority of WPC impoundments did not appear to create tension between the political branches, this Note highlights three episodes that prompted a reaction from Congress, casting light on the dialogue regarding executive branch practice. These episodes are useful for gloss analysis because they demonstrate congressional acquiescence as well as several presidents' willingness to compromise. Thus, they highlight the coordinate branches' ability to work through WPC impoundment issues without the Court's intervention.

In 1949, Truman requested funding sufficient to maintain only a forty-eight group Air Force.[174] The House, however, passed an appropriation calling for a fifty-eight group Air Force.[175] The Senate sided with the president, creating a standstill.[176] The House and Truman reached an informal agreement in which Congress granted the administration discretion to determine whether to spend the additional

171. ELIAS HUZAR, THE PURSE AND THE SWORD: CONTROL OF THE ARMY BY CONGRESS THROUGH MILITARY APPROPRIATIONS, 1933-1950, at 368 (1950).

172. Thomas Jefferson, *First Annual Message to Congress (Dec. 8, 1801)*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 330 (James D. Richardson ed., Washington, Gov't Printing Off. 1896) [hereinafter 1 MESSAGES AND PAPERS OF THE PRESIDENTS].

173. *Id.*

174. *The Politics of Impounded Funds*, *supra* note 167, at 366.

175. *Id.*

176. *Id.*

funding.[177] The president impounded $735 million, and the funds were never spent.[178] When questioned about his authority to impound, Truman responded, "That is the discretionary power of the President. If he doesn't feel like the money should be spent, I don't think he can be forced to spend it."[179]

Frustrated with Truman's actions, the House Appropriations Committee called Secretary of Defense Louis Johnson in for a hearing.[180] Johnson defended Truman, stating that his actions were based on the "inherent authority vested in the Commander in Chief and the President."[181] He clarified that the president can impound "in the area above what he thinks are the necessary items for the defense or security . . . ."[182] The chair of the committee, George H. Mahon, appears to ultimately have agreed with Johnson. He stated:

> [O]ver the long span of time . . . weight of experience and practice bears out the general proposition that an appropriation does not constitute a mandate to spend every dollar appropriated . . . .
>
> I believe it is fundamentally desirable that the Executive have limited powers of impoundment in the interests of good management and constructive economy in public expenditures.[183]

In earlier congressional sessions, members of Congress signaled that they shared Mahon's perspective. Chairman Elmer Thomas of the Senate Subcommittee on Military Appropriations stated, "I do not think the money should be used. I think it should be impounded, and leave the impression that if the money is appropriated it may not be used."[184] Additionally, Senator Robert Taft stated, "The Appropriations Committee can reduce [military] funds to what it considers a point of safety, but it cannot feel sure about going further.

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177. *Id.*

178. *Id.* at 366–67.

179. Harry S. Truman, *The President's News Conference of September 20, 1950*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1950, at 657, 661 (1979).

180. *See Department of Defense Appropriations for 1951: Hearings Before the H. Comm. on Appropriations*, 81st Cong. 42, 50–54 (1950) (statement of Louis Johnson, Secretary of Defense).

181. *Id.* at 55.

182. HUZAR, *supra* note 171.

183. *Executive Impoundment of Appropriated Funds: Hearing Before the Subcomm. on Separation of Powers of the S. Subcomm. on the Judiciary*, 92d Cong. 501–02 (1971) [hereinafter *1971 Hearings*] (letter from Rep. George H. Mahon, Chairman, H. Comm. on Appropriations).

184. 95 CONG. REC. 14354, 14355 (1949).

It might be destroying a department's effective work. Only the department itself can make the additional saving necessary over what Congress has done."[185]

President John F. Kennedy's foray into impoundment was perhaps the most visible episode of executive impoundment involving weapons systems in the twentieth century. In 1961, OMB requested $200 million to procure B-70 strategic bombers.[186] Notwithstanding the president's request, Congress appropriated $380 million.[187] Kennedy impounded the additional $180 million because he believed that the DoD's intercontinental ballistic missile technology reduced the need for additional bombers.[188]

The chairman of the House Armed Services Committee, Carl Vinson, responded fiercely. Vinson drafted language for the next year's appropriation, which stated, "Lest there be any doubt as to what the RS-70 amendment means let it be said that it means exactly what it says, i.e., that the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize the full amount of the $491 million authority granted . . . 'for an RS-70 weapon system.'"[189] The Committee Report further stated, "[i]f this language constitutes a test as to whether Congress has the power to so mandate, let the test be made and let this important weapon system be the field of trial."[190]

Kennedy wrote to Vinson, expressing his opinion that the mandatory language should be removed based on "the full powers and discretions essential to the faithful execution of my responsibilities as President and Commander in Chief . . . ."[191] Kennedy wrote, "I would respectfully suggest that, in place of the word 'directed,' the word 'authorized' would be more suitable to an authorizing bill (which is not an appropriation of funds) and more clearly in line with the spirit of the Constitution."[192]

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185. *Id.* at 12388, 12410.

186. *The Politics of Impounded Funds*, *supra* note 167, at 369.

187. *Id.*

188. *Id.*

189. H.R. REP. NO. 87-1406, at 9 (1962).

190. *Id.*

191. *1971 Hearings*, *supra* note 183, at 526 (letter from President John F. Kennedy to Rep. Carl Vinson, Chairman, H. Armed Servs. Comm. (Mar. 20, 1962)).

192. *Id.*

Kennedy got his way—the full House sided with the president, not Vinson.[193] Then-Representative Gerald Ford stated that the language "invaded the responsibilities and the jurisdiction of . . . the President . . . usurped the appropriating authority of the Committee on Appropriations . . . [and] created inflexibility in the management of the RS–70 program. . . ."[194] In a meeting at the White House, Vinson agreed to replace the mandatory language with the word "authorized."[195] As an olive branch, Kennedy ordered the secretary of defense to conduct a study of the RS-70 Program.[196] Only two prototypes were ever built.[197]

The Truman and Kennedy examples demonstrate congressional acquiescence. Tension between the political branches provides stronger support for a showing of acquiescence than situations that lack debate because they reveal that the branches considered and resolved the issues. Here, the episodes are particularly useful because the president and significant congressional players voiced their constitutional views that the president *did* have authority under the commander-in-chief power to impound. Significantly, Congress yielded in both situations.

Although the executive branch prevailed in the two previous examples, a dispute during President Lyndon Johnson's administration illustrates that a president might comply with a congressional defense appropriation, against his wish to impound, when under sufficient congressional pressure. In 1965, the Department of the Navy desired an additional nuclear-powered guided missile ship, the DLGN-36.[198] Although the DoD opposed the request, Congress appropriated for the

193. *See id.* at 38–39 ("[I]t was clearly a victory for the White House.").

194. 108 CONG. REC. 4687, 4714 (1962). Representative Perkins Bass expressed a similar sentiment—through an unconvincing analogy—when he stated, "It is inconceivable to me that Congress should tell a Commander in Chief what weapons system to develop any more than it should attempt to tell a general in the field which weapons to fire." *Id.* at 4719 (statement of Rep. Perkins Bass).

195. *Funds Impounded by the President*, *supra* note 73, at 128–29; John H. Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 GEO. L.J. 1159, 1166–67 (1969).

196. PFIFFNER, *supra* note 41, at 38–39.

197. *Id.* at 39.

198. Stassen, *supra* note 195, at 1169, 1173.

DLGN-36.[199] The DoD, however, refused to release the funds necessary to build the DLGN-36 in fiscal year 1966.[200]

In response, Congress appropriated for a second nuclear-powered guided missile ship, the DLGN-37, and passed appropriation language stating that "[t]he contract for the construction of the nuclear powered guided missile frigate . . . shall be entered into as soon as practicable unless the President fully advises the Congress that its construction is not in the national interest."[201] The DoD did subsequently release the funds for the DLGN-36—thus deferring, rather than rescinding the funds—but it did not release the funds for the DLGN-37.[202] The House Armed Services Committee, however, was adamant that the funds be released, and drafted language preparing to appropriate for a third ship in the next fiscal year.[203] When it became apparent that another committee, the Joint Atomic Energy Committee, was also supportive of a third ship, Johnson released the funding for the second ship.[204]

The Johnson example demonstrates that the political branches are capable of coordinate constitutional construction because of their ability to resolve disputes without involving the Supreme Court as a referee. Brownell views the Johnson administration's concession as undercutting the President's impoundment authority.[205] Yet modern gloss analysis does not require the political branches to be in perpetual, total accord to establish gloss.[206] In fact, occasional disagreement is a feature, not a bug. The WPC impoundment episodes show that the president will not inevitably win out over Congress when the legislature has a true collective interest in a given appropriation.

C. Applying Gloss Factors to WPC Impoundments

This Note adds to impoundment scholarship by applying modern gloss analysis to constitutional provisions relevant to executive

199. *Id.* at 1169–70.

200. *Id.* at 1170.

201. *Id.* at 1171 (emphasis omitted).

202. *Id.* at 1173.

203. *Id.* at 1170.

204. *Id.* at 1174.

205. Brownell, *supra* note 54, at 46. Brownell seems to argue that the more instances of unchallenged impoundment, and the more "continuous" the use, the stronger the president's claim. *Id.* at 59.

206. *See* Bradley & Siegel, *supra* note 93, at 22–31 (describing how the justifications for historical gloss do not require interbranch agreement).

impoundments, specifically, to WPC impoundments. This Section will show that the first three gloss factors—deference to nonjudicial actors, limits on judicial capacity, and consequentialist concerns—support using longstanding executive branch practice to gloss the meaning of the Appropriations and Commander-in-Chief Clauses to recognize the legitimacy of WPC impoundments.

To begin, the "deference to nonjudicial actors" factor is supported by a robust record of constitutional exchange between the president and Congress regarding WPC impoundments. The Court "do[es] not have a monopoly on constitutional interpretation,"[207] and, as to impoundments involving weapons systems and military personnel in particular, the political branches have exchanged their views and seemingly agreed to permit presidential flexibility to impound such appropriations.

Second, in terms of "limits on judicial capacity," courts lack useful tools to ascribe meaning to the Appropriations and Commander-in-Chief Clauses. Neither the text of the Constitution nor founding era records clarify the extent of the president's role as commander-in-chief, or whether the Appropriations Clause imposes a spending floor on the executive branch. Well-established executive branch practice and congressional acquiescence have brought the clauses together within the limited scope of WPC impoundments, so there is a particularly strong argument to allow gloss to infuse meaning into these constitutional provisions.

Of all the factors, the third factor, "consequentialism," most supports glossing the clauses to permit WPC impoundments, as the president occupies a superior vantage point to Congress for reducing wasteful defense spending.[208] The consequentialist rationale for retaining a qualified executive impoundment power is bolstered by the sheer magnitude of U.S. defense spending. The DoD budget supports U.S. defense objectives, such as limiting the spread of nuclear weapons, protecting air and maritime space for trade and travel, deterring the rise of global powers that might disrupt a stable international order, and preventing small conflicts from escalating into regional wars.[209]

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207. *Doing Gloss*, *supra* note 110, at 64.

208. *See supra* Part I.

209. Michael O'Hanlon, *U.S. Defense Strategy and the Defense Budget*, BROOKINGS INST. 1, 3 (2016) [hereinafter O'Hanlon, *U.S. Defense Strategy*], https://www.brookings.edu/wp-content/uploads/2016/07/OHanlon_FINAL.pdf [https://perma.cc/8L5B-W4L4].

Even so, the defense budget is of such a scale that defense stalwarts and government analysts acknowledge excessive DoD spending, including unneeded military facilities,[210] exponential cost overruns (the F-35 Joint Strike Fighter, for example),[211] outmoded weapons systems,[212] and duplicative investments across the military services.[213] Additionally, out of fear that Congress would appropriate less in the future if the Department fails to spend its entire appropriation, DoD engages in "use-it or lose-it" spending sprees at the end of the fiscal year.[214]

Defense Secretary Robert Gates notably called for reducing the defense budget in 2010.[215] That year, on the sixty-fifth anniversary of Victory in Europe Day, Gates noted that since the terror attacks on 9/11, the DoD budget had nearly doubled. He vowed that "military spending on things large and small can and should expect closer, harsher scrutiny."[216] Yet despite Gates's efforts, the defense budget's top line remained roughly the same for the next five years.[217]

Therefore, executive impoundment provides the president with a valuable tool to curtail wasteful defense spending. Moreover, for several reasons, the president is better positioned than Congress to

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210. Christopher Preble, *The Right Way To Cut Wasteful Defense Spending*, POLITICO (Jan. 18, 2017), https://www.politico.com/agenda/story/2017/01/the-right-way-to-cut-wasteful-defense-spending-000282 [https://perma.cc/S5ZK-UMBF].

211. DEP'T OF DEF., COMPREHENSIVE SELECTED ACQUISITION REPORTS FOR THE ANNUAL 2018 REPORTING REQUIREMENT AS UPDATED BY THE PRESIDENT'S FISCAL YEAR 2020 BUDGET 5–6 (2019), https://media.defense.gov/2019/Aug/01/2002165676/-1/-1/1/DEPARTMENT-OF-DEFENSE-SELECTED-ACQUISITION-REPORTS-(SARS)-DECEMBER-2018.PDF [https://perma.cc/NV7B-DNK9].

212. Leo Blanken, Jason Lepore & Stephen Rodriguez, *America's Military Is Choking on Old Technology*, FOREIGN POL'Y (Jan. 29, 2018, 3:01 PM), https://foreignpolicy.com/2018/01/29/americas-military-is-choking-on-old-technology/# [https://perma.cc/7EGR-LT3B].

213. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-466, WEAPONS SYSTEMS ACQUISITIONS 1 (2015), https://www.gao.gov/assets/680/672205.pdf [https://perma.cc/4VGD-A89P].

214. Kyle Rempfer, *Use-it or Lose-it: DoD Dropped $4.6 Million on Crab and Lobster, and $9,000 on a Chair in Last-Minute Spending Spree*, MIL. TIMES (Mar. 12, 2019), https://www.militarytimes.com/news/your-military/2019/03/12/use-it-or-lose-it-dod-dropped-46-million-on-crab-and-lobster-and-9000-on-a-chair-in-last-minute-spending-spree [https://perma.cc/6D7U-FDRJ].

215. Press Release, Dep't of Def., Gates Calls for Significant Cuts in Defense Overhead (May 8, 2010), https://archive.defense.gov/news/newsarticle.aspx?id=59082k [https://perma.cc/Q5BJ-DQ6V].

216. *Id.*

217. Michael E. O'Hanlon, *How, and Where, To Cut Defense Spending*, BROOKINGS INST. (May 19, 2011), https://www.brookings.edu/opinions/how-and-where-to-cut-defense-spending/amp/ [https://perma.cc/4DFM-93BT].

make spending cuts. First, the president's larger staff and greater access to intelligence allows him to adjust to changing financial and security circumstances. Second, the Pentagon routinely underestimates costs for weapons systems and military construction, and frequently encounters design flaws that prevent execution, potentially rendering appropriations impractical.[218] And third, Congress, as an institution, may not actually wish to spend on certain military projects. Rather, lobbying exerts an undue influence on the congressional budget process.[219] By contrast, special interests exert a relatively weak influence on OMB.[220]

Although consequentialist analysis highlights the potential for immense budgetary savings, a limited WPC impoundment power would not give the president unbounded influence over Congress. Lengthy history has established only three narrow areas within the broad zone of national security spending: appropriations for weapons systems, uniformed military personnel, and military construction. Recognizing executive impoundment in these discrete fields would not lead to the kind of amorphous national security impoundment in which Roosevelt engaged.

Additionally, a president would not likely take the decision to impound lightly.[221] One former senior OMB national security official interviewed for this Note emphasized that he would only recommend that a president impound if the spending was of great magnitude, truly wasteful, and if DoD endorsed the measure.[222] He further stated that the Pentagon would not unnecessarily provoke Congress.[223] Another OMB official clarified this last point:

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218. O'Hanlon, *U.S. Defense Strategy*, *supra* note 209, at 5.

219. In a telephone interview, one OMB national security official stated:

> The lobbying associated with the military industrial complex is very robust. The professional staff in Congress is closer to that lobbying and more susceptible to it. A lobbyist calls and says "put money in this appropriation"–it's an endless stream. The OMB budget process on the other hand, as dysfunctional as it seems, is as close to analytical rigor as you can get.

Telephone Interview with OMB National Security Official #1 (Jan. 4, 2020) (on file with author) [hereinafter OMB Interview 1].

220. *See* Pasachoff, *supra* note 6, at 2286–87 ("OMB budget review is an insider's game. There is a small group of D.C. lobbyists with specialties in OMB . . . .").

221. This, of course, presumes a rational actor being advised by other rational actors.

222. Telephone Interview with OMB National Security Official #2 (Oct. 27, 2019) (on file with author) [hereinafter OMB Interview 2].

223. *Id.*

> When you talk to budget officers within DoD, when you talk to congressional liaisons, they speak about Congress in personal terms. They refer to a particular professional staff member, who is very powerful, and how *that* person will respond to a decision. It distills down, not necessarily to DoD as a whole not wanting to provoke Congress, but rather, individuals within one institution not wanting to upset individuals in the other institution.[224]

Furthermore, of the three OMB officials interviewed for this Note, all stated that they would favor "reprogramming" wasteful appropriations, if legally possible, before impounding them.[225] Although appropriations are usually detailed and specify spending items, the Supreme Court has held that agencies may shift funds from one purpose to another within the same appropriation, absent a statutory prohibition.[226] Given the breadth of items within a single appropriation, reprogramming creates flexibility. In contrast, an agency may generally not "transfer" funds—that is, shift funds from one appropriation to another.[227] Thus, while theoretically a powerful tool for checking wasteful defense spending, the use of executive impoundment would be tempered by a desire for DoD input, good relations with Congress, and a preference not to lose budget authority that could be shifted within an appropriation. Accordingly, recognizing

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224. OMB Interview 1, *supra* note 219 (emphasis added). A third OMB official agreed that OMB would consult closely with DoD. Telephone Interview with OMB National Security Official #3 (Dec. 31, 2019) (on file with author) [hereinafter OMB Interview 3].

225. OMB Interview 1, *supra* note 219; OMB Interview 2, *supra* note 222; OMB Interview 3, *supra* note 224.

226. *See* Lincoln v. Vigil, 508 U.S. 182, 183 (1993) ("It is a fundamental principle of appropriations law that where Congress merely appropriates lump-sum amounts without statutory restriction . . . indicia in committee reports and other legislative history . . . do not establish any legal requirements on the agency.").

227. *See* 31 U.S.C. § 1532 (2018) ("An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law."). The distinction between a reprogramming and a transfer can be subtle. The Congressional Research Service provides the following example:

> [I]n FY2013 there were more than 30 accounts within the Department of Justice Appropriations Act, including an account for "Federal Bureau of Investigation (FBI), Salaries and Expenses" and an account for "Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Salaries and Expenses." Given the range of activities typically funded by these two accounts, a *transfer* would occur if funds originally appropriated for FBI salaries and expenses were moved and then used to pay for ATF salaries and expenses.

CONG. RSCH. SERV., R43098, TRANSFER AND REPROGRAMMING OF APPROPRIATIONS: AN OVERVIEW OF AUTHORITIES, LIMITATIONS, AND PROCEDURES 1 (2013); *see also infra* notes 253–68 and accompanying text.

a constitutional impoundment power in the national security context is not likely to greatly alter the budget-making relationship between Congress and the president.

D. Avoiding "Counter-Gloss": Disrupted Historical Practice

The final hurdle for establishing gloss-based WPC impoundments is also a potentially novel question in legal scholarship involving gloss: How does one treat Supreme Court intervention that chills custom? Although the *Train* Court did not address the constitutionality of executive impoundment, the Supreme Court would not have ordered the executive to disburse the appropriation had the Court recognized the president as possessing an unlimited, inherent constitutional authority to impound. The *Train* decision, however, should not be construed as creating a "counter-gloss" ending the impoundment power. *Train* can be read as not covering all executive impoundment, since it only addressed a domestic appropriation. Moreover, from a normative standpoint, judicial intrusions are not always welcome in separation of powers disputes because they can disrupt the healthy development of custom that evolves through repeated interactions between the political branches.[228] The best way to explain the dearth of executive impoundment over the forty-five years since *Train* is that the decision has had too great an influence on the interaction between the two political branches.

In fact, Congress attempted to restore a functional equivalent of executive impoundment by enacting the Line Item Veto Act.[229] This

228. This iterative approach to developing constitutional law is in contrast to the Court's practice of stare decisis, which freezes the development of constitutional law and leads to path dependency. *See* Bradley & Siegel, *supra* note 93, at 11 ("[T]he counter-majoritarian difficulty is especially acute when courts seek to overturn longstanding practices accepted and relied upon by both coordinate branches of the government, which may justify particular judicial deference to such practices in constitutional interpretation.").

229. The law allowed the president to cancel what he deemed wasteful tax and spending provisions within five days of presentment. *See* Line Item Veto Act, Pub. L. No. 104-130, § 2, 110 Stat. 1200, 1200 (1996), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998). The Line Item Veto Act was signed into law on April 9, 1996, and amended Title X of the Congressional Budget and Impoundment Control Act of 1974. *Id.* The act attempted to accomplish a similar goal to executive impoundment: members of Congress have an incentive to create wasteful defense programs for their districts, so it is functionally desirable for presidents to be able to decide not to spend the money, despite a statutory mandate. The act is distinguishable from executive impoundment in at least three ways. First, there is no temporal limitation on when the president can impound. Second, the act purported to cover *all* spending provisions—as well as tax provisions—deemed wasteful by the president. *Id.* By contrast, this Note argues that executive

suggests that Congress recognizes that it has difficulty checking its own power of the purse and would like to return some form of executive impoundment to the president. The takeaway is that *Train* does not signify a settlement between the executive and legislative branches on the issue of executive impoundment. The intervention of the Supreme Court chilled executive branch practice, but the Court avoided the constitutional question.

IV. THE CONSTITUTIONALITY OF FOUR POST-ICA EXECUTIVE ACTIONS

The above analysis points to a limited impoundment domain that survives the ICA and *Train*. First, statutory impoundment—a weak mechanism for checking the purse—is explicitly authorized under the ICA. Second, *Zivotofsky II* recognizes executive impoundment in the discrete areas of exclusive executive authority. And perhaps most significantly, glossing the Appropriations and Commander-in-Chief Clauses in the context of congressional defense spending supports executive impoundment authority for WPC appropriations. This Part applies this Note's impoundment framework to four relatively recent examples of presidents engaging in impoundment-related activities and assesses the constitutionality of each action.

As a first example, the George H.W. Bush administration canceled a weapon system without congressional approval.[230] In that instance, DoD ended production of the Navy's A-12 Stealth aircraft.[231] Defense Secretary Dick Cheney announced that DoD cancelled the $57 billion program because the builders failed to "design, develop, fabricate, assemble and test the A-12 aircraft within the contract

impoundment is limited by the relevant historical practice. And third, executive impoundment derives from the president's constitutional—rather than statutory—authority. That is not to say that the two concepts do not overlap. In fact, Brownell has argued that the Clinton administration made a "grave error" in how it employed the Line Item Veto Act. *See* Brownell, Comment, *supra* note 74, at 1276–77 (arguing that the administration should have only cancelled provisions relating to national security "because that is where the President's constitutional authority is greatest. In so doing, the Administration would have ensured that the inevitable constitutional challenge would have been brought on the terms most favorable to the Executive branch." (footnote omitted)).

230. Eric Schmitt, *Pentagon Scraps $57 Billion Order for Attack Plane*, N.Y. TIMES (Jan. 8, 1991), https://www.nytimes.com/1991/01/08/us/pentagon-scraps-57-billion-order-for-attack-plane.html [https://perma.cc/J46J-TPBR].

231. *Id.*

schedule."[232] In language that echoed Nixon, Cheney stated, "If we cannot spend the taxpayers' money wisely, we will not spend it."[233] Unlike Nixon's impoundments, however, this impoundment was constitutional under the WPC impoundment framework. Despite contravening the ICA, the impoundment was of a weapons system, an area that this Note asserts is within the president's impoundment authority.

President George W. Bush also engaged in a form of impoundment, though his action was likely unconstitutional under the WPC framework. In October 2005, OMB sent a letter to Congress proposing cancellation of budget authority but specifically noted that the proposal was not a "special message" rescission proposal pursuant to the ICA.[234] Notwithstanding inaction from Congress, seven agencies withheld budget authority from twelve domestic policy programs.[235] The Government Accountability Office ("GAO") subsequently found that the agencies had violated the ICA.[236] These impoundments were likely unconstitutional because they fell outside the WPC framework and did not pertain to exclusive areas of presidential authority. This example also illustrates how presidential action can still be monitored even if one endorses the WPC impoundment framework. GAO is authorized to bring suit to compel spending when the executive branch violates the ICA.[237] Accordingly, if an impoundment falls outside the scope of WPC appropriation or another area pertaining to exclusive presidential power, the GAO could sue OMB.[238]

A third example of impoundment involves the Trump administration's withholding of $391 million in military assistance to

232. *Id.*

233. *Id.*

234. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-320T, IMPOUNDMENT CONTROL ACT: USE AND IMPACT OF RESCISSION PROCEDURES 4–5 (2009) [hereinafter USE AND IMPACT OF RESCISSION PROCEDURES], https://www.gao.gov/assets/130/123935.pdf [https://perma.cc/26AL-E99A].

235. *Id.* at 4.

236. *Id.* at 5.

237. 2 U.S.C. § 687 (2018).

238. *Id.* It appears, however, that the GAO rarely proactively monitors the executive branch for violations of the ICA. This raises the question as to whether executive branch agencies de facto impound by failing to spend all appropriated dollars. *See* USE AND IMPACT OF RESCISSION PROCEDURES, *supra* note 234, at 1–2.

the Ukraine.[239] In that instance, the assistant director of OMB for National Security (a political appointee), acting on orders from the West Wing, withdrew the apportionment authority from the career staff and subsequently directed the Pentagon to delay disbursing the aid.[240] In addition to corresponding with senior Pentagon officials, the appointee attached a footnote to the OMB apportionment that specified that the funding was to be temporarily withheld.[241] In testimony before the House Impeachment Committee, the chief career OMB national security official, Mark Sandy, stated that he was concerned that the hold would violate the ICA.[242] The freeze was lifted on September 9, 2019, a few weeks shy of the September 30 fiscal year deadline.[243] Sandy was correct that delaying the funds beyond the end of the fiscal year would violate the ICA, constituting unauthorized statutory impoundment.

Moreover, such a delay would also represent unauthorized executive impoundment and thus would likely be unconstitutional notwithstanding OMB's argument to the contrary. In a letter to the GAO, OMB—as it had under past presidents—asserted a Take Care Clause rationale to defend its withholding.[244] The memo stated that:

> The President of the United States is required to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, Sec. 3. As part of carrying out this duty, the Executive branch must ensure that Federal agencies spend appropriated funds in an efficient and effective manner, consistent with the purpose for which the funds were appropriated.[245]

Further along, the memo stated, "In other words, it is inherent to OMB's apportionment authority that not all appropriated funds must be immediately available for obligation. Pauses in obligational

239. Eric Lipton, Maggie Haberman & Mark Mazzetti, *Behind the Ukraine Aid Freeze: 84 Days of Conflict and Confusion*, N.Y. TIMES (Dec. 29, 2019) [hereinafter *Behind the Ukraine Aid Freeze*], https://nyti.ms/39qrLdQ [https://perma.cc/UE6J-DHSP].

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Letter from Mark R. Paoletta, Gen. Couns., Off. of Mgmt. & Budget, to Tom Armstrong, Gen. Couns., Gov't Accountability Off., 3 (Dec. 11, 2019), https://context-cdn.washingtonpost.com/notes/prod/default/documents/5dbd9f69-2537-4272-bd5d-60c94d3843b6/note/112b1caa-763c-4c4c-a5bb-0a04f7962d2c.pdf [https://perma.cc/P75G-45HV].

245. *Id.*

authority are necessary for proper stewardship of taxpayer funds."[246] Thus, "OMB took appropriate action, in light of a pending policy process, to ensure that funds were not obligated prematurely in a manner that could conflict with the President's foreign policy."[247]

Pursuant to its ICA authority, the GAO issued a decision condemning OMB's impoundment.[248] In its nine-page opinion, the GAO straightforwardly assessed OMB's conduct under the ICA, rejecting the explanation that the hold was necessary to avoid a conflict with the president's foreign policy.[249] The GAO's constitutional analysis, however, was somewhat conclusory. The decision stated in part that "[t]he Constitution grants the President no unilateral authority to withhold funds from obligation,"[250] "[a]n appropriations act is a law like any other,"[251] and "once [an appropriations law is] enacted, the President must 'take care that the laws be faithfully executed.'"[252] The opinion neglected to reference *Train*, let alone account for centuries of historical practice.

Despite a lack of thorough constitutional treatment, the GAO's conclusion was likely correct, at least according to this Note's framework. The hold on aid neither fell within an area of exclusive presidential authority, nor constituted a WPC impoundment. Although the president may be the nation's chief diplomat, his exclusive powers are limited to the recognition power, leading treaty negotiations, and maintaining secrets related to treaty making. Withholding military aid duly appropriated by Congress falls outside the impoundment power incidental to the president's role as chief diplomat.

Finally, the WPC framework is helpful for assessing the constitutionality of Trump's attempt to divert defense spending to build a wall between the United States and Mexico. In February 2019—shortly after Trump declared a national emergency at the southern border under the National Emergencies Act—the Department of

246. *Id.* at 4.

247. *Id.* at 9.

248. U.S. GOV'T ACCOUNTABILITY OFF., B-331564, MATTER OF OFFICE OF MANAGEMENT AND BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE 4–8 (2020), https://www.gao.gov/assets/710/703909.pdf [https://perma.cc/M9BS-AZ95].

249. *Id.* at 6.

250. *Id.* at 5.

251. *Id.*

252. *Id.* at 6 (quoting U.S. CONST., art. II, § 3).

Homeland Security submitted a funding request to DoD.[253] According to the administration, the requested funds were for "replacing existing pedestrian fencing or vehicle barriers that had proven to be ineffective with 30-foot-high steel bollard fencing."[254]

Acting Secretary of Defense Patrick Shanahan approved the request, invoking his authority under § 8005 of the 2019 National Defense Appropriations Act to transfer funds between DoD appropriations.[255] Section 8005 authorizes the secretary of defense, "[u]pon determination . . . that such action is necessary in the national interest," to transfer up to $4 billion between DoD appropriations.[256] The provision additionally requires that the transfer be "for higher priority items, based on unforeseen military requirements," and "in no case where the item for which funds are requested has been denied by the Congress."[257] Shanahan executed two transfers totaling $2.5 billion, shifting the money to the DoD "Drug Interdiction and Counter-Drug Activities" appropriation.[258]

In June 2020, the Ninth Circuit held that the acting secretary exceeded his statutory authority under § 8005 and that "[a]bsent such statutory authority, the Executive Branch lacked independent constitutional authority to transfer the funds at issue here."[259] In October 2020, the Supreme Court granted certiorari to hear the case.[260] The issue pending before the Court is whether the acting secretary of defense exceeded his statutory authority in making the transfers—a question of statutory interpretation beyond the scope of this Note.[261]

The case, however, necessarily raises an important constitutional question which the Court could possibly answer. Though not the approach taken by the Ninth Circuit, one way of analyzing the transfer's legality is by deconstructing it into its component parts. A

253. Petition for Writ of Certiorari at 7, Trump v. Sierra Club, No. 20-138 (Aug. 2020), 2020 WL 4586169.

254. *Id.*

255. *Id.* at 7–8.

256. Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, div. A, tit. VIII, 132 Stat. 2999.

257. *Id.*

258. Petition for Writ of Certiorari, *supra* note 253, at 8.

259. California v. Trump, 963 F.3d 926, 949 (9th Cir. 2020), *cert. granted sub nom* Trump v. Sierra Club, No. 20-138, 2020 WL 6121565 (U.S. Oct. 19, 2020).

260. *Sierra Club*, 2020 WL 6121565 at *1.

261. Petition for Writ of Certiorari, *supra* note 253, at I.

transfer untethered from a statute involves both an executive impoundment of one account and a reappropriation of the impounded funds into a second account. Thus, whether or not the administration explicitly claimed constitutional authority to execute the transfer, the first step of such a transfer action raises a constitutional question because it implicates the president's independent impoundment authority. In other words, if the president exceeded his statutory authority under § 8005, he unilaterally impounded funds.

In order to assess the legality of such an action, the first question is whether the step one impoundment action was constitutional. In the first transfer, the acting secretary withdrew $993,627,000 from the "Military Personnel, Army" appropriation and $6,373,000 from the "Reserve Personnel, Army" appropriation.[262] In the second transfer, he withdrew $604,000,000 from the "Afghanistan Security Forces Fund" appropriation, $77,535,000 from the "Operation and Maintenance, Defense-Wide" appropriation, and $818,465,000 from 12 other DoD appropriations.[263] At first blush, it appears that the administration satisfied the initial inquiry under this Note's WPC framework by restricting its impoundment to what it describes as "personnel accounts."[264] The actual details of those appropriations prove otherwise.

The cancellation of "Military Personnel, Army" and "Reserve Personnel, Army" funds appear to be WPC impoundments because they are labeled as personnel appropriations. Yet those appropriations fund more than basic pay, also covering retirement pay, matching savings contributions, housing allowances, educational programming, and incentives programs, among other things.[265] Given that the two appropriations fund far more than the number of uniformed troops, for them to qualify as WPC impoundments the administration must demarcate the withdrawn money as coming directly from personnel costs and ensure that the other items remain funded.

The other two appropriations also fall squarely outside of the WPC framework. The "Afghanistan Security Forces Fund" does not

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262. *California v. Trump*, 963 F.3d at 951.

263. *Id.* at 951–52.

264. Petition for Writ of Certiorari, *supra* note 253, at 8.

265. H.R. REP. NO. 115-952, at 162–163 (2018) (Conf. Rep.); Petition for Writ of Certiorari, *supra* note 253, at 5 (noting that "legislators . . . commonly use committee reports to memorialize their expectations about how appropriated funds will be used for particular items in DoD's budget").

fund U.S. troops, but rather is money made available to the "security forces of Afghanistan" for "equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funding."[266] The appropriation is thus a form of foreign aid rather than a funding vehicle for defense personnel. Finally, the "Operation and Maintenance, Defense" fund does not relate to personnel appropriations at all. Operations and maintenance appropriations fund the "[c]ost of ground, sea, and air operations, equipment repair, and maintenance of defense facilities, healthcare costs, and administration."[267]

Simply put, longstanding executive branch practice does not support the administration's transfers to fund the border wall. Even if the administration impounded only personnel appropriations, the transfer includes not only an impoundment, but also a reappropriation. Thus, step two of the legality inquiry requires the president to point to an authority that allows him to repurpose the impounded funds. If § 8005 does not provide that mechanism, the president must identify another statute granting him the authority. Otherwise, the president's conduct was unconstitutional because the Appropriations Clause prevents the president from originating spending on his own.[268]

CONCLUSION

Although the president may no longer employ executive impoundment for domestic policy appropriations in the wake of the ICA and *Train*, he retains narrow independent authority to impound in discrete areas of foreign affairs, based on his exclusive authority in substantive areas of policy and as shaped through the political branches' coordinate construction of the Constitution's Appropriations and Commander-in-Chief Clauses. *Train* may have chilled the political branches' coordinate construction of the Constitution in regard to executive impoundment, but the issue is not settled. Rather, rich historical practice, repeated congressional acquiescence, and myriad functional justifications point toward the existence of a limited form of executive impoundment.

266. H.R. REP. NO. 115-952, at 56–57.

267. CONG. RSCH. SERV., DEFENSE PRIMER: THE NATIONAL DEFENSE BUDGET FUNCTION 2 (2017).

268. *See supra* notes 29–41 and accompanying text.

APPENDIX

To date, there is no catalog of executive impoundments, though Professor Louis Fisher has identified many impoundments in his numerous works on the subject. This Appendix begins to create that catalog by listing all documented instances of impoundments known to the Author at the time of publication. An asterisk appears next to each WPC impoundment. This catalog is by no means exhaustive, but the continued digitalization of presidential records and newspaper articles should faciliate future research to complete this record.

Year	**President**	**Impoundment**
1801	Thomas Jefferson	*Several navy yards[269]
1802	Thomas Jefferson	*Gunboats[270]
1809	James Madison	*Reduction of gunboat crews[271]
1838	Andrew Jackson	Contract claim for mail delivery services[272]
1840	Martin Van Buren	Refusal to pay widow's claim under Navy pension fund[273]
1860	James Buchanan	Post offices and other public buildings[274]
1876	Ulysses S. Grant	River and harbor improvements[275]
1916	Woodrow Wilson	Mediation and arbitration to end World War I[276]
1921	Warren G. Harding	Issued a Bureau of the Budget circular treating all appropriations as ceilings and requiring each executive deparment to determine the portion of its appropriation deemed essential for carrying out its mission[277]
1931	Herbert Hoover	Achieved a ten percent cut in government expenditures during the Great Depression by ordering administrators to create a budget reserve[278]

269. 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 172.
270. PRESIDENTIAL SPENDING POWER, *supra* note 15, at 150.
271. Madison Letter, *supra* note 141.
272. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 527 (1838).
273. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 498–99 (1840).
274. THE CONSTITUTION BETWEEN FRIENDS, *supra* note 51, at 91.
275. Harvard Note, *supra* note 53, at 1510.
276. 39 Stat. 618 (1916).
277. *The Politics of Impounded Funds*, *supra* note 167, at 362.
278. Harvard Note, *supra* note 53, at 1510–11.

1938	Franklin Roosevelt	*Reserve Officers' Training Corps units[279]
1940–1943	Franklin Roosevelt	Various public works projects[280]
1946	Harry Truman	The Kings River Project in California's Central Valley Basin[281]
1946–1947	Harry Truman	*Half of the National Guard's appropriation[282]
1949	Harry Truman	*Air Force-related spending[283]
1949	Harry Truman	*Ten Air Force groups above the president's request[284]
1949	Harry Truman	*Aircraft carrier *USS United States*[285]
1949	Harry Truman	*Aircraft carrier *USS Forrestal*[286]
1950	Harry Truman	Deferring civil programs that did not contribute to the Korean War effort[287]
1956	Dwight Eisenhower	*Marine Corps personnel[288]
1956	Dwight Eisenhower	*20 superfort bombers[289]
1958	Dwight Eisenhower	*Army Nike-Zeus antimissile system[290]
1959	Dwight Eisenhower	*Army modernization[291]
1959	Dwight Eisenhower	*Regulus submarines[292]
1959	Dwight Eisenhower	*Hound Dog missile program[293]
1959	Dwight Eisenhower	*Minuteman program[294]
1959	Dwight Eisenhower	*KC-135 tankers[295]

279. HUZAR, *supra* note 171.

280. PFIFFNER, *supra* note 41, at 33; *The Politics of Impounded Funds*, *supra* note 167, at 364.

281. Louis Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFF. L. REV. 141, 165–66 (1973) [hereinafter *Uses and Abuses*].

282. HUZAR, *supra* note 171, at 276.

283. *The Politics of Impounded Funds*, *supra* note 167, at 366.

284. *Id.*

285. *Id.* at 367.

286. *National Military Establishment Bill for 1950: Hearing Before the H. Comm. on Appropriations*, 81st Cong. 328 (1949).

287. *Id.* at 370.

288. *1971 Hearings*, *supra* note 183, at 301.

289. *Impoundment Hearings*, *supra* note 4, at 98.

290. *The Politics of Impounded Funds*, *supra* note 167, at 368–69.

291. *1971 Hearings*, *supra* note 183, at 301.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

1959	Dwight Eisenhower	*Strategic airlift aircraft[296]
1960	Dwight Eisenhower	*Marine Corps personnel strength[297]
1960	Dwight Eisenhower	*Advance procurement for nuclear-powered carrier[298]
1960	Dwight Eisenhower	*National Guard construction[299]
1960	Dwight Eisenhower	*Aircraft for air defense[300]
1961	Dwight Eisenhower	*Army reserve construction[301]
1961	John F. Kennedy	*B-70 Strategic Bomber[302]
1965	Lyndon Johnson	Small watershed projects[303]
1965–1966	Lyndon Johnson	*DLGN-36 (nuclear-powered guided missile ship)[304]
1966	Lyndon Johnson	Agriculture appropriation[305]
1966	Lyndon Johnson	Highway trust fund appropriation[306]
1966	Lyndon Johnson	Low-cost housing funding[307]
1966	Lyndon Johnson	Appropriation for the Department of Health, Education, and Welfare[308]
1966	Lyndon Johnson	Education funds for the Elementary and Secondary Education Act[309]
1966	Lyndon Johnson	Construction of a national aquarium[310]
1967	Lyndon Johnson	Federal aid to highway construction projects[311]
1968	Richard Nixon	Contract authority issued to the Federal-aid Highway Program[312]

296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *The Politics of Impounded Funds*, *supra* note 167, at 369.
303. *Uses and Abuses*, *supra* note 281, at 166.
304. Stassen, *supra* note 195; *The Politics of Impounded Funds*, *supra* note 167, at 369.
305. *The Politics of Impounded Funds*, *supra* note 167, at 371.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Uses and Abuses*, *supra* note 281, at 166.
311. Federal-Aid Highway Act of 1956—Power of the President to Impound Funds, 42 Op. Att'y Gen. 350 (1967).
312. Harvard Note, *supra* note 53, at 1511.

1969	Richard Nixon	Directed all departments and agencies to reduce spending by $3.5 billion to stay within his budget target[313]
1971	Richard Nixon	Highway funding[314]
1971	Richard Nixon	Urban community development programs[315]
1971	Richard Nixon	Funds for a federal drug rehabilitation program[316]
1971	Richard Nixon	Funds to complete the Cross-Florida Barge Canal[317]
1972	Richard Nixon	Grants for water treatment systems[318]
1972	Richard Nixon	Water Bank Program[319]
1972	Richard Nixon	Farmers Home Administration Emergency Disaster Loan Program[320]
1972	Richard Nixon	Funds to help states control water pollution[321]
1973	Richard Nixon	Rural Environmental Assistance Program[322]
1973	Richard Nixon	Low-rent public housing construction subsidies[323]
1973	Richard Nixon	Model cities and urban renewal programs[324]
1973	Richard Nixon	Funds to support the Indian Education Act[325]
1977	Jimmy Carter	*B-1 Bomber[326]
1978	Jimmy Carter	*Minuteman III missile program[327]
1989	George H.W. Bush	*Navy V-22 Osprey helicopter[328]

313. *The Politics of Impounded Funds*, *supra* note 167, at 372.
314. *Uses and Abuses*, *supra* note 281, at 169.
315. *Id.* at 186.
316. *Id.* at 146.
317. Stanton, *supra* note 46, at 2 n.9.
318. *Id.* at 2 n.4.
319. *Uses and Abuses*, *supra* note 281, at 171.
320. *Id.*
321. Train v. City of New York, 420 U.S. 35, 41–49 (1975).
322. Harvard Note, *supra* note 53, at 1512.
323. *Id.*
324. *Id.*
325. Stanton, *supra* note 46, at 2 n.9.
326. Louis Fisher, *Effect of the Budget Act of 1974 on Agency Operations*, *in* THE CONGRESSIONAL BUDGET PROCESS AFTER FIVE YEARS 154 (Rudolph G. Penner ed., Am. Enter. Inst. 1981).
327. *Id.*
328. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY SPENDING AND THE CONSTITUTION 84 (1994).

1991	George H.W. Bush	*Navy A-12 Stealth aircraft[329]
2005	George W. Bush	Cancellation of budget authority for twelve domestic programs[330]
2019	Donald Trump	Military assistance to Ukraine[331]
2019	Donald Trump	Funding from various defense appropriation accounts transferred for border wall construction[332]

329. Schmitt, *supra* note 230.

330. USE AND IMPACT OF RESCISSION PROCEDURES, *supra* note 234.

331. *Behind the Ukraine Aid Freeze*, *supra* note 239.

332. *Supra* notes 253–68 and accompanying text.