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## ESSAY

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### APPROPRIATIONS LAW AND THE STATUTORY FOREIGN AFFAIRS PRESIDENCY

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CHRIS MIRASOLA<sup>†</sup>

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#### INTRODUCTION

Congress’s authority over the purse is among its most potent powers. James Madison argued that it was “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

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<sup>†</sup> Climenko Fellow and Lecturer on Law, Harvard Law School. Many thanks to Marco Basile and Andrew Lanham for very helpful early conversations regarding this essay. I also appreciate comments from William Banks, Kyle Jacobson, Peter Raven-Hansen, and Joshua Dickinson which immeasurably improved the piece. All errors are, of course, my own.

every just and salutary measure.”<sup>1</sup> Its political salience continues today; debates over appropriations defined the first year of the 118th Congress,<sup>2</sup> leaving the House Speaker’s chair vacant for the longest stretch of time in over sixty years.<sup>3</sup> It is unsurprising, then, that the executive branch has been clear about the importance of appropriations in the national security context.<sup>4</sup>

Yet appropriations law remains distressingly underappreciated and, at times, outright misunderstood. A Department of Defense (“DOD”) news bulletin, for example, confused the National Defense Authorization Act with the DOD Appropriations Act.<sup>5</sup> The former had recently been enacted and provides positive legal authority for DOD activities, while the latter was (at the time)<sup>6</sup> not yet enacted but now provides the funds necessary to finance DOD activities. Furthermore, the last substantial academic work on appropriations and national security law is nearly three decades old.<sup>7</sup>

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<sup>1</sup> THE FEDERALIST No. 58 (James Madison).

<sup>2</sup> Carle Hulse & Catie Edmondson, *Congress Narrowly Averts Shutdown as House Democrats Help Pass Stopgap Bill*, N.Y. TIMES (Oct. 1, 2023), <https://www.nytimes.com/2023/09/30/us/politics/government-shutdown-house-republicans.html> [perma.cc/BGJ8-YJRD]; see Catie Edmondson, *McCarthy Is Ousted as Speaker, Leaving the House in Chaos*, N.Y. TIMES (Oct. 3, 2023), <https://www.nytimes.com/2023/10/03/us/politics/kevin-mccarthy-speaker.html> [perma.cc/R7KL-NA34] (reporting that Speaker Kevin McCarthy was ousted by far-right Republicans for joining with Democrats to pass a Continuing Resolution); Carle Hulse & Catie Edmondson, *Senate Sends Biden Stopgap Funding Bill, Averting a Government Shutdown*, N.Y. TIMES (Nov. 15, 2023), <https://www.nytimes.com/2023/11/15/us/republicans-house-spending.html> [perma.cc/QVX4-DDFZ] (“The bill, known as a continuing resolution, sets up two deadlines in early 2024, with money for some agencies running out on Jan. 19 and the rest on Feb. 2. It continues funding at current levels and contains no policy conditions—two aspects that pleased Democrats and enraged far-right Republicans who have demanded steep cuts and conservative policy requirements.”); Jacob Bogage, *Government Shutdown in January Looms as Congress Looks to Head Home*, WASH. POST (Dec. 15, 2023), <https://www.washingtonpost.com/business/2023/12/15/congress-government-shutdown-christmas/> [perma.cc/XT76-XML6] (reporting in December of 2023 that both “chambers of Congress” had not passed a bill to fund “crucial government programs”).

<sup>3</sup> Joe Murphy & Catherine Allen, *How Long Was the House Without a Speaker?*, NBC NEWS (Oct. 25, 2023), <https://www.nbcnews.com/data-graphics/speaker-of-the-house-time-tracker-rcna120179> [perma.cc/Z5L5-JPZS].

<sup>4</sup> See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2023 53 (2023) (“The President’s 2023 Budget for DOD [sic] provides the resources necessary to sustain and strengthen U.S. deterrence, advancing our vital national interests through integrated deterrence, campaigning, and investments that build enduring advantages.”).

<sup>5</sup> See C. Todd Lopez, *Congress Passes Fiscal 2024 Defense Spending Bill, Pay Raise for Service Members*, U.S. DEPT. OF DEF. (Dec. 14, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3618367/congress-passes-fiscal-2024-defense-spending-bill-pay-raise-for-service-members/> [perma.cc/ZWG4-6XKT] (claiming that the National Defense Authorization Act supports over \$800 billion in funding for the DOD).

<sup>6</sup> A full-year DOD appropriation for fiscal year 2024 was finally enacted in March 23, 2024 via the Consolidated Appropriations Act, 2024, Pub. L. No. 118-27.

<sup>7</sup> WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994).

Political actors, judges, and scholars should all devote greater attention to the role of appropriations law in debates concerning the separation-of-powers and foreign affairs. To that end, this Essay begins by setting the constitutional baseline for Congress’s appropriations power in the national security context. It outlines the substantial authority that Article I, Section 8 reposes in Congress to direct the nation’s foreign affairs activities through appropriations. The Essay then demonstrates how the practical challenges of national governance have required that the legislative and executive branches cooperate far more flexibly than one might have expected based on constitutional text and founding-era commentary. Over time, more detailed executive budget requests and more exacting congressional appropriations developed alongside a burgeoning body of tools for Presidents to reallocate funds. To illustrate the uneasy mixture of specificity and discretion that characterizes modern appropriations law in the national security context, this essay takes DOD appropriations as a case study.

This Essay can only sketch the outlines of what it would mean to take the appropriations process seriously<sup>8</sup> in the national security and foreign affairs context. Since this Essay can only gesture at the legal principles underpinning the appropriations process,<sup>9</sup> I will mention here just a few essential definitions. First, we must distinguish the authority to “enter into financial obligations that will result in immediate or future outlays of government funds” (budget authority)<sup>10</sup> from an appropriation, which is a “law authorizing the payment of funds from the Treasury.”<sup>11</sup> Budget authority can come in a variety of forms. Sometimes budget authority includes the ability

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<sup>8</sup> See Gillian Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1080, 1084 (2021) (describing the marginalization of appropriations law in public law debates and advocating for reinforcing Congress’s power of the purse). For other important work in this area, see, e.g., Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 837 (1994) (exploring the erosion of Congress’s participation in national security affairs through the appropriations process by examining congressional reaction to the Vietnam War and Iran-Contra Affair); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2186-87 (2016) (demonstrating how the President’s budget acts as a mechanism for White House control of agency behavior); Zachary Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 360 (2019) (illustrating the powerful yet disputed scope of the congressional appropriations power); and Matthew Lawrence, *Congress’s Domain: Appropriations, Time, and Chevron*, 70 DUKE L.J. 1057, 1059-61 (2021) (using the distinction between annual and permanent appropriations to explore the application of *Chevron* deference to appropriations).

<sup>9</sup> The Government Accountability Office provides the definitive compendium of Principles of Federal Appropriations law, in what is known as the Red Book.

<sup>10</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: CHAPTER 2 THE LEGAL FRAMEWORK 2-1 (4th ed., 2016).

<sup>11</sup> *Id.* at 2-3.

to obligate<sup>12</sup> and expend funds.<sup>13</sup> Sometimes it includes the ability to borrow funds and then expend those borrowed funds.<sup>14</sup> Other times, it includes only the power to obligate funds.<sup>15</sup> Most times, budget authority and appropriations are provided in the same statutory enactments.<sup>16</sup>

#### I. CONGRESS AT THE WHEEL: THE CONSTITUTION'S SCHEME FOR FOREIGN AFFAIRS APPROPRIATIONS

The Constitution's appropriations provisions provide Congress with powerful tools to direct the nation's foreign affairs. This authority is grounded in Article I, Section 9, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>17</sup> This power is often seen as among Congress's most important. James Madison, for example, supported an expansive view of the authority<sup>18</sup> that the Supreme Court has echoed over a century later.<sup>19</sup>

The Constitution goes even further in using appropriations to empower Congress vis-à-vis the nation's military establishment. It does so, first, by providing that Congress has the authority to "raise and support Armies"<sup>20</sup> and "provide and maintain a Navy."<sup>21</sup> Enumeration of these authorities is itself noteworthy, as the only other executive department explicitly provided for in Section Eight is the post office.<sup>22</sup> Moreover, the Constitution limits Congress's appropriations power with respect to the Army by providing that "no Appropriation of Money to that Use [to raise and support Armies] shall

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<sup>12</sup> An obligation of funds is "a definite commitment that makes the federal government legally responsible to pay for goods and services ordered or received, either immediately or in the future." U.S. GOV'T ACCOUNTABILITY OFF., TRACKING THE FUNDS: SPECIFIC FY 2023 PROVISIONS FOR FEDERAL AGENCIES 6 (2023). For example, this occurs when the government signs a contract. *Id.*

<sup>13</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: CHAPTER 2 THE LEGAL FRAMEWORK 2-1 (4th ed., 2016).

<sup>14</sup> *Id.* (borrowing authority).

<sup>15</sup> *Id.* (contracting authority).

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>18</sup> *See supra*, Introduction.

<sup>19</sup> *Off. of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990) (citing JOSEPH STORY, 2 COMMENTS. ON THE CONST. OF THE U.S. § 1358 (3d ed., 1858)).

<sup>20</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>21</sup> U.S. CONST. art. I, § 8, cl. 13.

<sup>22</sup> *See* U.S. CONST. art. I, § 8, cl. 7 ("[Congress shall have the Power][t]o establish Post Offices and post Roads[.]"). Up until the Department of Defense was created in the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 496, the Department of War and Department of the Navy were separate cabinet departments. These choices reflect some of the most potent motivating forces behind the effort to draft a new constitution—to create a more integrated national economy and centralize a more potent national defense.

be for a longer Term than two Years.”<sup>23</sup> This time limit is unique—the Constitution sets no other such restriction on Congress’s ability to fund other government activities. Why take this extraordinary step? In short, it was done out of concern that, without this check, a standing army would eviscerate American democracy.

The text first proposed by the Committee of Detail provided that “the Legislature of the United States shall have the right and power to raise armies; to build and equip fleets.”<sup>24</sup> This immediately provoked debate about the dangers of a standing army.<sup>25</sup> Some proposed including a numerical limit on the size of a peacetime army.<sup>26</sup> Others recommended limiting army appropriations to a single year.<sup>27</sup> These calls for strictly limiting Congress’s power to raise and support an army continued in ratification debates.<sup>28</sup> So powerful was this critique that Alexander Hamilton addressed it at length in *Federalist* 26. Calling these more robust measures “an imprudent extreme,” Hamilton argued that the two-year appropriations cycle would provide an adequate check on military authority.<sup>29</sup> The full text of his argument is striking:

“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. They are not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were incautious enough to be willing to repose in it so improper a confidence . . . . As often as the question [of maintaining a standing Army] comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it.”<sup>30</sup>

This understanding of the Army appropriations clause as a mechanism for executive and congressional accountability has had a mixed track record. But,

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<sup>23</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>24</sup> BANKS & RAVEN-HANSEN, *supra* note 7, at 29.

<sup>25</sup> *Id.*; Bernard Donahoe & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202, 203 (1971).

<sup>26</sup> BANKS & RAVEN-HANSEN, *supra* note 7, at 29; Donahoe & Smelser, *supra* note 25, at 203.

<sup>27</sup> Donahoe & Smelser, *supra* note 25, at 203.

<sup>28</sup> *See id.* at 210 (finding that “[i]n nearly every state ratifying convention it was proposed either to limit the number of troops which might be raised, or to require a two-thirds vote of the Congress to raise any at all.”).

<sup>29</sup> THE FEDERALIST NO. 26 (Alexander Hamilton).

<sup>30</sup> *Id.* at 167-68 (emphasis in original).

in the context of founding-era debates taken together with the Constitution's text, it creates a firm baseline presumption that Congress was in control of funding, and thereby directing, the nation's foreign affairs activities.

## II. COOPERATIVE SOLUTIONS TO PRACTICAL CHALLENGES: HISTORICAL PRACTICE IMPLEMENTING THE CONSTITUTION'S SCHEME

Even in the first years of the new republic, security challenges frustrated the highest aspirations of Congress's preeminent power to fund what we would now think of as national security activities.<sup>31</sup> The first appropriations act enacted by Congress was two sentences (thirteen lines) long. Although it appropriated funds only for "the present year,"<sup>32</sup> funds were provided as a lump sum. For example, the act appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war."<sup>33</sup> Members of Congress would subsequently criticize these lump sum appropriations as providing too much discretion to the executive.<sup>34</sup> But when Congress changed course in 1797, then-Secretary of the Treasury Oliver Wolcott lamented that "minute" appropriations made managing the Treasury Department "more and more difficult."<sup>35</sup> By modern standards, Secretary Wolcott's complaints are a bit rich. In total, the act had seventeen line items, some quite broad. It appropriated \$256,450, for example, for Army personnel salaries and \$10,000 "[f]or the hospital department."<sup>36</sup> And even its more specific appropriations were still rather amorphous.<sup>37</sup>

The challenges of adapting the Constitution's appropriations framework to lived reality was most starkly on display during an unexpected military conflict. In 1807, President Jefferson purchased timber to build 100 gunboats without congressional authorization after the British warship *Leopard* attacked the American frigate *Chesapeake*.<sup>38</sup> Justifying his actions to Congress

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<sup>31</sup> BANKS & RAVEN-HANSEN, *supra* note 7, at 33.

<sup>32</sup> Act of Sept. 29, 1789, ch. 23, 1 Stat. 95.

<sup>33</sup> *Id.*

<sup>34</sup> BANKS & RAVEN-HANSEN, *supra* note 7, at 34 (recounting debates over military appropriations in 1793, during which one member of Congress argued that military appropriations "in gross would vest too much discretion in the secretary of war and, by keeping expenditures out of public view, make it difficult to require a public accounting.").

<sup>35</sup> *Id.* at 35.

<sup>36</sup> Act of Mar. 3, 1797, ch. 17, 1 Stat. 5008-09.

<sup>37</sup> For example, allocating \$22,816.95 for "general John Sevier and his brigade." *Id.* at 509. In 1793, General Sevier fought the Cherokee as part of a years-long dispute about settler encroachment on lands reserved for the Cherokee under the 1785 Treaty of Hopewell. See Craig Symonds, *The Failure of America's Indian Policy on the Southwestern Frontier, 1785-1793*, 35 TENN. HIST. Q. 29, 39-43 (1976).

<sup>38</sup> BANKS & RAVEN-HANSEN, *supra* note 7, at 38.

three months later,<sup>39</sup> Jefferson argued that “[t]o have awaited a previous and special sanction by law would have lost occasions which might not be retrieved.”<sup>40</sup> He therefore requested that “the Legislature, . . . approve, when done, what they would have seen so important to be done, if then assembled.”<sup>41</sup> Congress provided commensurate retroactive appropriations.<sup>42</sup>

Given this early history, it is perhaps unsurprising that Congress and the President have also narrowly construed the two-year limit on Army appropriations. The Solicitor General, on behalf of the Attorney General in 1904, appears to have been the first to take this view.<sup>43</sup> At issue, in the Solicitor General’s opinion, was a trifecta of appropriations that made funds available “until expended” to “equip” fortifications, among other purposes.<sup>44</sup> The Navy Department’s Chief of Ordnance asked whether he could use these appropriations to pay a British weapons manufacturer when such payments would likely extend for more than two years.<sup>45</sup> The Solicitor General concluded that the two-year limit did not reach these appropriations because “[t]o raise and support an army is one thing. To render it effective, by equipping it with guns, ammunition, and other means for attack and defense, is another.”<sup>46</sup>

To support this conclusion, the Solicitor General made two interpretative moves. First, he looked to constitutional text. The Solicitor General argued that “rais[ing] and support[ing]” an army did not include arming fortifications because to “equip,” in a military context, was a sufficiently well-known term of art, even at the founding.<sup>47</sup> Second, he turned to constitutional structure, arguing that other provisions of Article I authorized Congress to appropriate funds for “means . . . [of] public defense”<sup>48</sup> thereby placing this appropriation outside the strictures of the Army appropriations clause. For example, he pointed to Congress’s power to declare war,<sup>49</sup> to “[e]rect[] forts, [m]agazines, [a]rsenals, dock[y]ards, and other needful buildings,”<sup>50</sup> and to “lay and collect

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<sup>39</sup> Congress, at the time of the attack, was out of session.

<sup>40</sup> BANKS & RAVEN-HANSEN, *supra* note 7, at 38.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 40 Op. Att’y Gen. 555 (1948).

<sup>44</sup> 25 Op. Att’y Gen. 105 (1904).

<sup>45</sup> *Id.* The Solicitor General did not address why a Navy Department official would be concerned with a constitutional restriction on Department of the Army appropriations. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See U.S. CONST. art I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War[.]”).

<sup>50</sup> See U.S. CONST. art. I, § 8, cl. 17 (“The Congress shall have Power . . . to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .”).

[t]axes, [du]ties, [i]mposts and [e]xcises, to pay the [d]ebts and provide for the common [d]efence and general [w]elfare of the United States.”<sup>51</sup> In 1947, the Attorney General reaffirmed this executive branch view,<sup>52</sup> approving a request that Congress appropriate funds, again to be available until expended, for the Air Force to purchase aircraft and aeronautical equipment.<sup>53</sup>

Congress unequivocally endorsed this narrow construction of the two-year army appropriation limit during debates concerning what would become the Lend-Lease Act.<sup>54</sup> At issue was a revolving fund, i.e., an account that would both receive money from the sale of defense equipment and from which the Secretary of War could pay for the purchase of new defense equipment.<sup>55</sup> The House committee report argued that the two-year limit “neither by its terms nor its spirit, applies to appropriations for military equipment or defense articles.”<sup>56</sup> To support this conclusion, the committee cited both the Solicitor General’s opinion and Congress’s history of enacting similar revolving funds, dating back at least to the first World War.<sup>57</sup> The Senate report relied on the same arguments to also conclude that the two-year limit “does not apply, by its terms or interpretation, to the procurement of defense articles.”<sup>58</sup>

### III. CHARACTERIZING MODERN NATIONAL SECURITY APPROPRIATIONS: DEPARTMENT OF DEFENSE APPROPRIATIONS AS A CASE STUDY

Congress has continued to pair granular detail with significant discretion in contemporary national security appropriations. As a case study of this

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<sup>51</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>52</sup> Perhaps unsurprisingly, in both 1904 and 1948 U.S. foreign policy became far more interventionist. In a December 6, 1904, message to Congress, President Roosevelt stated that “in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.” President Theodore Roosevelt, Annual Message of the President to Congress for 1904 (Dec. 5, 1905), *in* HR 58A-K2, at 33. Similarly, on April 3, 1948, President Truman signed the Economic Recovery Act of 1948, now popularly known as the Marshall Plan, which would have appropriated billions of dollars to rebuild Europe after World War II and heralded the beginning of substantial U.S. military deployments to Europe that persist today. Economic Cooperation Act (Marshall Plan) of 1948, Pub. L. No. 472.

<sup>53</sup> 40 Op. Att’y’s Gen. 555 (1948).

<sup>54</sup> The Lend-Lease Act authorized the President to provide military assistance to Great Britain in its fight against Axis Powers before the United States entered World War II a few months later in 1941. Lend-Lease Act, Pub. L. No. 77-11, 55 Stat. 31, § 3.

<sup>55</sup> *Id.* at § 6(b).

<sup>56</sup> H.R. REP. NO. 77-18, at 10 (1941).

<sup>57</sup> *Id.*

<sup>58</sup> S. REP. NO. 77-45, at 7 (1941). The House and Senate reports relied on similar 1940 statutes authorizing revolving funds to provide materiel to countries in the Western Hemisphere. *Id.*



interplay, this section focuses on appropriations for the DOD. DOD appropriations can be confounding. To understand DOD appropriations for fiscal year 2023, for example, one must read relevant portions of the Consolidated Appropriations Act, 2023<sup>59</sup> and the text and tables included in the accompanying congressional explanatory statement.<sup>60</sup> Together, this material extends over hundreds of incredibly detailed pages.

Congress routinely appropriates funds for the DOD at a level of detail far in excess of what was employed during the early republic. The DOD Appropriations Act, for example, provides twenty-four separate line items for the Navy's shipbuilding and conversion appropriation, most dedicated to particular classes of ships.<sup>61</sup> Other DOD appropriations are even more specific, even when at first glance they seem rather broad. For example, the DOD Appropriations Act provides a lump sum of over \$49 billion for "pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel . . . and expenses of temporary duty travel . . . for members of the Army on active duty . . . cadets, and aviation cadets; for members of the Reserve Officers' Training Corps" as well as for other personnel payments.<sup>62</sup> One might think this commits substantial discretion for DOD to determine how to allocate this \$49 billion, so long as it remains within these parameters. One would be wrong. The explanatory statement includes no fewer than twenty-four specific line items directing how DOD may spend its funds, including by directing that no more than \$8.744 million be used for "[n]on-[t]emporary [s]torage" costs.<sup>63</sup> Appropriations for weapons procurement are just as, if not more, detailed. The explanatory statement directs that, of the over \$2.7 billion appropriated for Army ammunition, \$60.189 million may be spent on .50 caliber cartridges and \$18.159 million may be spent on (all forms) of shoulder launched munitions.<sup>64</sup>

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<sup>59</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459. This is not limited to a reading of Division C of the DOD Appropriations Act, 2023 because certain appropriations for the U.S. Army Corps of Engineers are provided in Division D (the Energy and Water Development and Related Agencies Appropriations Act, 2023), appropriations for military construction are provided in Title 1 of Division J (the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2023), and DOD-related appropriations related to Ukraine assistance are provided in Division M (the Additional Ukraine Supplemental Appropriations Act, 2023).

<sup>60</sup> As is common practice, Congress incorporated these by reference into the DOD Appropriations Act. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 8006(a), 136 Stat. 4459, 4586 (2022).

<sup>61</sup> *Id.* at 4578 (discussing Shipbuilding and Conversion, Navy).

<sup>62</sup> *Id.* at 4566 (discussing Military Personnel, Army).

<sup>63</sup> STAFF OF H.R. COMM. ON APPROPRIATIONS, 117TH CONG., CONSOLIDATED APPROPRIATIONS ACT, 2023, LEGISLATIVE TEXT AND EXPLANATORY STATEMENT 504-05 (Comm. Print 2022).

<sup>64</sup> *Id.* at 592-93.

Congress is similarly directive in how the DOD may use appropriations for activities that more directly affect military operations. The 2023 explanatory statement, for example, provides that \$101.049 million may be used to support the Navy Cyber Mission Forces,<sup>65</sup> the Navy's contribution to the joint operational arm of U.S. Cyber Command.<sup>66</sup> Perhaps even more consequential, it also provides the total number of authorized military personnel that may be enrolled in the active and reserve forces.<sup>67</sup>

Yet, for all this level of detail, Congress has also built in substantial latitude for the DOD to repurpose funds. Let us take, for example, the Department's counterdrug appropriation. On its face, the appropriation is just as detailed as that for the Navy Cyber Mission Forces. In fiscal year 2023, for example, Congress appropriated \$970.764 million for the "Drug Interdiction and Counter-Drug Activities, Defense" account.<sup>68</sup> Congress specified four permissible uses of these funds—counter-narcotics support (\$614.51 million),<sup>69</sup> drug demand reduction (\$130.06 million),<sup>70</sup> the National Guard counter-drug program (\$200.316 million),<sup>71</sup> and the National Guard counter-drug schools program (\$25.878 million).<sup>72</sup> Putting aside the requirements of the underlying statutes that authorize these DOD counterdrug activities, these appropriation headings do comparatively little to restrict the permissible range of DOD counterdrug activities. The

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<sup>65</sup> *Id.* at 541.

<sup>66</sup> See Cyber Nat'l Mission Force Pub. Aff., *About the Cyber National Mission Forces*, U.S. CYBER COMMAND (Dec. 6, 2023), <https://www.cybercom.mil/Media/News/Article/3610711/about-the-cyber-national-mission-forces/> [perma.cc/L4UZ-GGY7] ("The Cyber National Mission Force is the U.S. military's joint cyber force charged with defending the nation in cyberspace through full-spectrum operations to deter, disrupt, and, if necessary, defeat adversary cyber and malign influence actors.").

<sup>67</sup> STAFF OF H.R. COMM. ON APPROPRIATIONS, 117TH CONG., CONSOLIDATED APPROPRIATIONS ACT, 2023, LEGISLATIVE TEXT AND EXPLANATORY STATEMENT 500 (Comm. Print 2022).

<sup>68</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4583 (2022). For comparison, this is about 38.8 percent of the entire budget Congress allocated for the salaries and expenses of the Drug Enforcement Administration (just over \$2.56 billion). *Id.* at 4527.

<sup>69</sup> *Id.* at 4583. This includes such DOD activities as those authorized under 10 U.S.C. § 284 (2017).

<sup>70</sup> *Id.* First mandated in 1981, the Drug Demand Reduction Program is a program to deter illicit drug use by DOD personnel. *Office of Force Resiliency (OFR)*, OFF. OF THE UNDER SEC'Y OF DEF. FOR PERS. & READINESS, [https://prhome.defense.gov/PR\\_ARCHIV/PR\\_Home\\_2022/Home\\_2022/Organization/OFR/D/DRP/](https://prhome.defense.gov/PR_ARCHIV/PR_Home_2022/Home_2022/Organization/OFR/D/DRP/) [perma.cc/76P3-MVKY].

<sup>71</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4583 (2022). This includes a range of counterdrug activities performed by National Guard personnel pursuant to, among other authorities, 32 U.S.C. § 112 (2018).

<sup>72</sup> *Id.* There are five counterdrug schools operated by the National Guard. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-27, DRUG CONTROL: DOD SHOULD IMPROVE ITS OVERSIGHT OF THE NATIONAL GUARD COUNTERDRUG PROGRAM 1 (Jan. 2019).

explanatory statement is similarly deferential, other than its direction that additional funding within the overall appropriated fund be used for counterdrug activities in the Americas.<sup>73</sup>

The text of this appropriation, however, makes it an even more flexible tool for discretionary activity. The counterdrug account is one of a number that authorizes the transfer of funds. For example, when the DOD wants to use some of the funds allocated to this account for counter-narcotics support, it is authorized to move that money to the relevant military personnel or operations account for obligation.<sup>74</sup> Once the funds are moved, they are available “for the same time period and for the same purpose as the appropriation to which transferred.”<sup>75</sup> A similar authority to transfer funds is provided in appropriations to remediate former DOD buildings,<sup>76</sup> a \$49 million defense wide appropriation for “expenses relating to certain classified activities,”<sup>77</sup> and a \$47 million allocation for the Sexual Assault Special Victims’ Counsel Program<sup>78</sup> (among many others).

This kind of transfer authority is distinct from DOD’s more general authority to repurpose funds. A recurring provision of the DOD appropriations acts authorizes the Secretary of Defense to move up to \$6 billion<sup>79</sup> between appropriations subject to three limitations. First, the funds must be moved in pursuit of a “higher priority item.”<sup>80</sup> Second, the transfer must be motivated by “unforeseen military requirements, than those for

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<sup>73</sup> STAFF OF H.R. COMM. ON APPROPRIATIONS, 117TH CONG., CONSOLIDATED APPROPRIATIONS ACT, 2023, LEGISLATIVE TEXT AND EXPLANATORY STATEMENT 749 (Comm. Print 2022) (allocating an additional \$1.68 million above the President’s budget request specifically for counterdrug activities in the U.S. Northern Command and U.S. Southern Command areas of responsibility).

<sup>74</sup> See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4583 (2022) (“For drug interdiction and counter-drug activities of the Department of Defense, for transfer to appropriations available to the Department of Defense for military personnel of the reserve components . . . for operation and maintenance; for procurement; and for research, development, test and evaluation . . .”).

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 4573 (providing for, *inter alia*, the Department of the Army to transfer funds for environmental restoration).

<sup>77</sup> See *id.* at 4570 (discussing Operation and Maintenance, Defense-Wide funding, which includes the transfer of funds).

<sup>78</sup> *Id.* at 4596.

<sup>79</sup> *Id.* at 4585 (2022). This amount of total transfer authority has been consistent since 2019 but has fluctuated over time. For example, in 2010 Congress provided a total of \$8.5 billion in transfer authority. BRENDAN MCGARRY, CONG. RSCH. SERV., R46421, DOD TRANSFER AND REPROGRAMMING AUTHORITIES: BACKGROUND, STATUS, AND ISSUES FOR CONGRESS 41 (2020).

<sup>80</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4585 (2022).

which originally appropriated.”<sup>81</sup> And third, the purpose for which the funds are being transferred cannot have been “denied by the Congress.”<sup>82</sup>

To appreciate the amount of discretion committed to the DOD through transfer authorities, let us consider President Trump’s construction of a southern border wall. In 2019 and 2020, DOD used its transfer authorities to move a total of \$5.3 billion from various sources for these projects.<sup>83</sup> Unsurprisingly, the ensuing border wall litigation focused primarily on whether the initial transfer of funds under Section 8005 was truly for a “higher priority item[], based on unforeseen military requirements” not otherwise “denied by Congress.”<sup>84</sup> There is no binding judicial decision on the matter because a change in administration mooted the relevant cases.<sup>85</sup> But it is notable that lawyers for the General Accountability Office (GAO), a congressional agency dedicated to addressing appropriations law questions, agreed with the DOD’s broad construction of its Section 8005 authority.<sup>86</sup> It noted, for example, a long string of opinions holding that, for an item to be “denied” by Congress, the denial must occur through “explicit statutory language.”<sup>87</sup> And it was similarly deferential to the DOD determinations concerning what constituted a “higher priority” military requirement.<sup>88</sup> Notwithstanding the fact that the House of Representatives, institutionally, took the opposite view during litigation<sup>89</sup> and engaged in widespread,

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> BRENDAN MCGARRY, CONG. RSCH. SERV., R46421, DOD TRANSFER AND REPROGRAMMING AUTHORITIES: BACKGROUND, STATUS, AND ISSUES FOR CONGRESS 32-33 (2020). The Secretary of Defense relied on Section 284(b)(7) as authority for this construction—it authorizes the DOD to support Federal or State law enforcement agencies through the “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” 10 U.S.C. § 284(b)(7).

<sup>84</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4585 (2022); see JENNIFER ELSEA & EDWARD LIU, CONG. RSCH. SERV., R45908, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION 15 (2019) (“[O]ne of the issues presented by the plaintiffs’ motion [was] whether Sections 8005 and 9002 of the 2019 DOD Appropriations Act authorized the transfer of funds for border barrier construction.”).

<sup>85</sup> Todd Richmond, *Court Battle Over Trump-era Border Wall Funding Is Over, as Last State Ends Lawsuit*, AP NEWS (July 25, 2023), <https://apnews.com/article/trump-border-wall-lawsuit-wisconsin-eff57d04ec65a2fe39470e8530aa5c1> [perma.cc/ACF9-S6BP].

<sup>86</sup> U.S. GOV’T ACCOUNTABILITY OFF., B-330862, DEPARTMENT OF DEFENSE—AVAILABILITY OF APPROPRIATIONS FOR BORDER FENCE CONSTRUCTION 1 (Sept. 5, 2019) (finding that the DOD’s transfer of funds under Section 8005 was legal).

<sup>87</sup> *Id.* at 9.

<sup>88</sup> *Id.* at 8-9.

<sup>89</sup> Todd Ruger, *Supreme Court Ends Legal Clash over Border Wall Spending*, ROLL CALL (Oct. 12, 2012), <https://rollcall.com/2021/10/12/supreme-court-ends-legal-clash-over-border-wall-spending/#:~:text=The%20brief%20order%20means%20the,lasting%20mark%20in%20the%20law&text=The%20Supreme%20Court%20wiped%20out,on%20the%20U.S.%2DMexico%20border> [perma.cc/WA32-AGU7].

bipartisan condemnation of the manner in which President Trump decided to build a wall,<sup>90</sup> multiple attempts to introduce more restrictive language into DOD Appropriations Acts have failed.<sup>91</sup>

#### IV. IMPLICATIONS: THE ROLE OF APPROPRIATIONS LAW IN THE FOREIGN AFFAIRS PRESIDENCY AND BEYOND

The lion's share of presidential foreign affairs activities is now conducted pursuant to statute.<sup>92</sup> Yet even for those that rest primarily or solely on constitutional authority, appropriations are still needed. Unlike in the early republic, there are now statutory checks on executive branch officials expending funds in excess of available appropriations. The Antideficiency Act, for example, prohibits any government officer from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”<sup>93</sup> Government officers and employees that violate this prohibition are subject to up to a \$5,000 fine, two years in prison, or both.<sup>94</sup> So, taken from the perspective of funding, the modern foreign affairs presidency is, and always has been, statutory.

And yet, we have seen that the realities of governance limit the extent to which Congress is willing to tie the President's hands through appropriations. This was no less true in 1789 than it is in 2023, though the statutory framework has become more complex. To understand how Congress has balanced direction with discretion in the foreign affairs context, we must consider the effect of appropriations law. This is becoming only more urgent as the number of statutes enacted on an annual basis diminishes.<sup>95</sup>

Moreover, to the extent that the Supreme Court is interested in renewing the non-delegation doctrine by scrutinizing “major questions,”<sup>96</sup> it also cannot

<sup>90</sup> Alex Rogers & Ted Barrett, *Senate Again Fails to Override Trump's Border Wall Emergency Declaration*, CNN (Oct. 17, 2019), <https://www.cnn.com/2019/10/17/politics/senate-fails-veto-override-vote/index.html> [perma.cc/V9JS-49UW].

<sup>91</sup> Jennifer Elsea, CONG. RSCH. SERV., R45908, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION 34-35 (2019).

<sup>92</sup> See Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. (forthcoming 2024) (“[M]ost important actions that presidents take today, including in foreign affairs, rest at least in part on statutory authorization.”).

<sup>93</sup> 31 U.S.C. § 1341(a)(1)(A) (2023).

<sup>94</sup> *Id.* § 1350 (2023).

<sup>95</sup> See Annie Karni, *House Dysfunction by the Numbers: 724 Votes, Only 27 Laws Enacted*, N.Y. TIMES (Dec. 19, 2023), <https://www.nytimes.com/2023/12/19/us/politics/house-republicans-laws-year.html#:~:text=But%20as%20the%20first%20year,a%20total%20of%20724%20votes> [perma.cc/LW33-CBVD] (noting that the current Congress has held more votes but passed fewer bills than any other Congress in the past decade).

<sup>96</sup> See *West Virginia v. Env't. Prot. Agency*, 142 S. Ct. 2587, 2595 (2022) (addressing a “major questions” doctrine case).

ignore the role of appropriations. However, there is no space here to develop in full how the appropriations process might inform an understanding of the major questions doctrine. So, I will cautiously venture just a few initial thoughts.

The major questions doctrine requires “clear congressional authorization” for agency actions asserting “highly consequential power beyond what Congress could reasonably be understood to have granted.”<sup>97</sup> To discern what constitutes a “highly consequential power,” the Court looks to context, including the “history and the breadth of the [asserted] authority” and its “economic and political significance.”<sup>98</sup> The Court also considers whether Congress has had an opportunity to address the matter through legislation.<sup>99</sup> The major questions doctrine is necessary, we are told, to promote “separation of powers principles” and to reflect “a practical understanding of legislative intent.”<sup>100</sup>

The appropriations process speaks to the justifications for the major questions doctrine and the Court’s contextual approach to determining whether an action is *major*. First, if the doctrine is designed to “protect the Constitution’s separation of powers,”<sup>101</sup> we cannot avoid considering how, each year, Congress asserts its legislative prerogative through the appropriations process.<sup>102</sup> Congress, for example, regularly uses appropriations to mandate executive branch action. Some such directives fly under the mainstream political radar, like requiring that the Secretary of Agriculture provide a one-time assistance payment to “each producer of rice on a farm in the United States with respect to the 2022 crop year.”<sup>103</sup> Others grab national attention, like a fiscal year 2021 Department of Homeland Security appropriation that required that the Biden administration build

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<sup>97</sup> *Id.* at 2609.

<sup>98</sup> *Id.* at 2608, 2609.

<sup>99</sup> See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (citation omitted) (“The Secretary’s assertion of . . . authority has . . . ‘enabled [him] to enact a program’ that Congress has not chosen to enact itself. Congress is not unaware of the challenges facing student borrowers. ‘More than 80 student loan forgiveness bills and other student loan legislation’ were considered by Congress during its 116<sup>th</sup> session alone.”).

<sup>100</sup> *West Virginia*, 142 S. Ct. at 2609.

<sup>101</sup> *Id.* at 2617 (Gorsuch, J., concurring).

<sup>102</sup> This observation is an extension of a more general argument that Gillian Metzger makes concerning the importance of considering appropriations in the nondelegation context. See Metzger, *supra* note 8, at 1106-09 (arguing that the Supreme Court should have considered appropriations when addressing the delegation concerns central to *Gundy v. United States*, 139 S. Ct. 3116 (2019), which held that the Sex Offender Registration and Notification Act did not violate the nondelegation doctrine by authorizing the Attorney General to determine application of its registration requirements).

<sup>103</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 § 602(a), 136 Stat. 4459, 5995 (2022).

portions of a southern border wall.<sup>104</sup> Congress can just as easily end executive branch programs by withdrawing appropriations, as it did for additional Supplemental Nutrition Assistance Program (SNAP) benefits authorized during the COVID-19 pandemic.<sup>105</sup> And it can direct executive branch policy in innumerable other ways, such as by prohibiting the executive from using funds to pay for an abortion or federal employee health plans which cover an abortion.<sup>106</sup> Indeed, as Gillian Metzger argues,<sup>107</sup> these routine uses of Congress's appropriations authority might even call into question whether a major questions doctrine is needed to vindicate legislative prerogatives.<sup>108</sup>

This pattern of congressional practice might also shape how we think about congressional intent to delegate authority through statutory text. Congress might well be more at ease with broad delegations, for example, because it can always check the executive's excesses in the appropriations process. To be sure, there is no guarantee that such attempts will be successful. The congressional record is littered with failed attempts to restrain the executive through limitations on appropriations.<sup>109</sup> And there are ongoing

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<sup>104</sup> U.S. DEP'T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY BORDER WALL PLAN PURSUANT TO PRESIDENTIAL PROCLAMATION 10142 (2021), [www.dhs.gov/sites/default/files/publications/21\\_0611\\_dhs\\_security\\_border\\_wall\\_plan.pdf](https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_plan.pdf) [perma.cc/QEM8-4LWR]. The Biden administration was clear in pinning the blame for this politically unpalatable project squarely on congressional appropriations:

The construction project reported today was appropriated during the prior administration in 2019 and the law requires the government to use these funds for this purpose, which we announced earlier this year. We have repeatedly asked Congress to rescind this money but it has not done so and we are compelled to follow the law.

Press Release, U.S. Dep't of Homeland Sec., Statement from Secretary Mayorkas on Recent News Reports (Oct. 5, 2023), <https://www.dhs.gov/news/2023/10/05/statement-secretary-mayorkas-recent-news-reports> [perma.cc/D5QZ-CPSX].

<sup>105</sup> U.S. DEP'T OF AGRIC., FOOD AND NUTRITION SERV., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) – SNAP EMERGENCY ALLOTMENTS (EA) PROVISION IN THE CONSOLIDATED APPROPRIATIONS ACT, 2023 (Jan. 6, 2023), <https://www.fns.usda.gov/snap/ea-provision-consolidated-appropriations-act-2023> [perma.cc/6LQV-LNJR]; Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 § 503, 136 Stat. 4459, 5994 (2022).

<sup>106</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 613, 136 Stat. 4459, 4699 (2022).

<sup>107</sup> See Metzger, *supra* note 8, at 1157-58 (arguing that Congress's "ongoing control" of the executive through appropriations may account for the "moribund state of the nondelegation doctrine" and should matter in "assessing the constitutionality of delegations across a range of interpretive methods.").

<sup>108</sup> See, e.g., *West Virginia v. Env't. Prot. Agency*, 142 S. Ct. 2587, 2619 (2022)

(Gorsuch, J., concurring) (noting that the major questions doctrine protects Congress's authority as provided in the legislative vesting clause).

<sup>109</sup> In 2021, for example, a number of representatives sponsored legislation providing that "no funds authorized or appropriated by Federal law may be made available for any purpose to Planned Parenthood Federation of America, Inc., or any affiliate or clinic of Planned Parenthood Federation of America, Inc." absent a certification that the entity would not perform an abortion. Defund

constitutional law debates, particularly between the executive and legislative branches, about the extent to which Congress is able to check executive authority through the appropriations process.<sup>110</sup> Nevertheless, Congress cannot avoid appropriations in a way that is not true for most any other form of statutory lawmaking. Indeed, since 1995 Congress has, on average, enacted five Continuing Resolutions a year,<sup>111</sup> meaning that questions of appropriations law are almost always continuously up for congressional consideration.

There are undoubtedly other challenges to how much the appropriations process can add to our understanding of legislative context. For example, Congress necessarily reacts to the President's proposed budget (even if it usually deviates from such proposals). Even though some of the reports that underlie these proposals are reflected publicly, many are not. It is no surprise, then, that some textualists have noted discomfort with some of the more substantive articulations of the major questions doctrine.<sup>112</sup>

#### CONCLUSION

Driven by the challenges of governance, Congress has consistently crafted appropriations that pair minute direction with significant grants of policy discretion. Just as it narrowly construed constitutional limits on its ability to appropriate funds, Congress has also enacted a bevy of appropriation vehicles and transfer authorities that impose few immediate checks on executive action. This practice of constraint and delegation defies simple characterization. But, if we are to account for context, whether as it pertains to foreign affairs powers or otherwise, we cannot ignore the appropriations process.

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Planned Parenthood Act of 2021, H.R. 541, 117th Cong. § 3(a) (2021). In 2013, the House of Representatives passed a bill that would have defunded the executive's implementation of the Affordable Care Act, enacted three years prior. Lori Montgomery & Philip Rucker, *House passes GOP Spending Plan that Defunds Obamacare*, WASH. POST (Sept. 20, 2013), [https://www.washingtonpost.com/politics/house-passes-gop-spending-plan-that-defunds-obamacare/2013/09/20/4019117c-21fe-11e3-b73c-aab60bf735do\\_story.html](https://www.washingtonpost.com/politics/house-passes-gop-spending-plan-that-defunds-obamacare/2013/09/20/4019117c-21fe-11e3-b73c-aab60bf735do_story.html) [perma.cc/ZLD9-PFJV].

<sup>110</sup> See, e.g., Price, *supra* note 8, at 360-61, 365 (describing these disagreements and proposing an analytical framework for delimiting the scope of Congress's power to curb executive power through limitations on appropriations).

<sup>111</sup> *Continuing Resolutions Were Designed to be Stopgap Measures—But Now We Average Five a Year*, PETER G. PETERSON FOUND. (Nov. 17, 2023), <https://www.pgpf.org/blog/2023/11/continuing-resolutions-were-designed-to-be-stopgap-measures-but-now-we-average-five-a-year> [perma.cc/BN5C-HMLF].

<sup>112</sup> See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (“I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.”).