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The New Post 9/11 America or the Making of King George: A Review of Executive Power in the Effort to Combat Global Terrorism as It Relates to the Power of the Purse

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THE NEW POST 9/11 AMERICA OR THE MAKING OF
KING GEORGE: A REVIEW OF EXECUTIVE POWER
IN THE EFFORT TO COMBAT GLOBAL TERRORISM
AS IT RELATES TO THE POWER OF THE PURSE

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Freedom is never more than one generation away from extinction—we didn’t pass it on to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same, or one day we will spend our sunset years telling our children and our children’s children what it was once like in the United States when men were free.¹

I. INTRODUCTION


Americans remember these dates, where they were, and what they were doing when they heard tragic and life changing news. Shortly after the fall of the Twin Towers in New York City, our leaders debated the proper course of action to meet a new transnational threat to our way of life. Part of the congressional reaction to the terrorist attacks of September 11th was to draft legislation providing for the establishment of a new Department of Homeland Security to coordinate planning, preparedness, and reaction to internal strikes against the United States. Language in the House version of the bill gave the President of the United States broad, unlimited discretion to spend funds in the manner that he, and only he, saw fit. These “new powers,” designed to allow for quick decisive actions to meet as of yet undefined attacks on America, would have infringed upon the delicately wrought separation of powers contained in the United States Constitution by usurping Congress’s most effective check on tyranny—the power of the purse—the backbone of any effective legislation.

In contemplating ceding a portion of their “power of the purse” to the executive, Congress, the people’s representatives, continued a pattern of post-crisis responses to both external and internal dangers. All too often in our nation’s history we have seen the pattern of first, a clear threat, and second, reactionary governmental response that threatens our civil liberties or the framework of the Constitution. Fortunately, despite immense growth of executive power in the twentieth century and especially after the September 11th attacks, Congress avoided the dangerous precedent of ceding their power of the purse which would have effectively set the stage for unlimited further executive growth. Although Congress and the American people avoided this constitutional tragedy, Congress manifested a willingness to at least consider abandoning their traditional prerogatives and powers to the President. Congress’s recent contemplation and historical willingness to cede powers to the President shows that the prophetic union of the purse and the sword is indeed upon us and requires judi-

cial action to prevent continued erosion of the separation of powers. Despite judicial reluctance to step in as an enforcer between Congress and the President, an often overlooked string of judicial cases interpreting the nondelegation doctrine can be reinvigorated to force an acquiescing Congress to retain their most powerful check on the executive – the power of the purse.

Part II of this paper will outline the historical infringements on civil liberties and the Constitution in times of real or perceived failure. Part III is a brief synopsis of the executive and legislative events since September 11, 2001, that show that America continues to make the Constitution an expedient target in times of need. A review of the separation of powers doctrine in relation to the executive and legislative functions is examined in Part IV. Part V focuses on the nondelegation history and reach of the nondelegation doctrine. Finally, Part VI examines the doctrine’s potential to combat unfettered delegation of the spending power and proposes that a new reinvigorated nondelegation doctrine could serve the purpose of restraining future delegations of the power of the purse to the executive.

II. HISTORICAL AMERICAN UNPREPAREDNESS FOR CRISIS AND SUBSEQUENT KNEEJERK REACTIONS

The history of our country is filled with examples of adversity thrust onto an unsuspecting and unwilling American populace. Many times, our people and government have been steadfast in their desire to avoid conflict until a foe has drawn American blood giving rise to a distinctive “American Way of War.” Due to a national distaste toward international involvement, our nation

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2 The “American Way of War” as developed over the past 200 years is essentially a dual system of engagement. First, in regards to international threats, the United States has been for a large portion of our history very isolationist. When America is involved in international affairs, the federal government generally attempts to find a negotiated resolution due to internal political differences of opinion and a desire to avoid war, i.e., the classic battle between the hawks and the doves. The second and final stage of the “American Way of War” is essentially the unleashing of the might of the American military machine to an extent only limited by men, machines and money or, in other terms, total war. Since World War II an intermediate step has developed that has stressed international coalitions and gradual force investment. See generally Colonel Lloyd J. Matthews, The Evolution of American Military Ideals, MILITARY REV., Jan.-Feb. 1998, http://www-cgsc.army.mil/milrev/English/JanFeb98/matthews.htm (last updated Sept. 25, 2003).

In essence, US forces are imbued with the spirit of the offensive, characterized by an indomitable will to win and an aggressive determination to carry the battle to the enemy. Their aim is to inflict on the enemy an early and decisive defeat. This spirit, while likely to produce a battlefield success, is often at odds with the instincts of political leaders, who may prefer a more graduated force application concurrent with diplomatic and other pressures. Paradoxically, once diplomacy fails and the Armed Forces are given their head, they may have to move at a pace even faster than their own doctrine would dictate. Political realities militate against protracted hostilities, so campaigns must be concluded in the shortest time possible.

Id.; see also RUSSELL F. WEIGLEY, THE AMERICAN WAY OF WAR, at xix (1973).
has been caught woefully unprepared to meet threats we did not choose.\textsuperscript{3} Subsequently, federal government measures are usually quickly enacted to meet these unforeseen threats head on.

Although these measures have been more or less successful to defeat the current threat against our country and its values, the one consistent target for post-attack government quasi and real legislation has been and continues to be the United States Constitution. A pattern of first, a clear threat, and second, reactionary government response that threatens either civil liberties or the framework of the Constitution, is all too clear from our nation’s history.

Recently, our nation was once again attacked. Our leaders responded in quick and resolute terms. However, as horrible as the World Trade Center towers plummet to earth was, it is imperative to remember that the United States has been down this road before. Just as Rome was not built in a day, our Constitution and civil liberties were not eroded in a day. Looking at the historical crises that America has been confronted with since the time of the revolution to the present day, it is easy to see the steady erosion of our constitutional separation of powers and civil liberties. As such, the post-September 11th reactions of Congress and the President to shift power to the executive were predictable and indeed commonplace.\textsuperscript{4}

The conflict between wartime exigencies and civil liberties began while the guns of the Revolution still raged. During the Revolution, Virginia Gover-

\textsuperscript{3} Historically, America has been an isolationist country opposed to foreign military affairs. Admittedly, this reactive national outlook has changed considerably in the past few decades with American humanitarian and police efforts increasing in the post-Cold War era. America now is applying a proactive anti-terrorist dogma in foreign affairs. See, e.g., Anthony Dworkin, \textit{Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defense}, at http://www.crimesofwar.org/expert/bush-intro.html (Aug. 20, 2002).


nor Thomas Jefferson supported an act to establish internment camps for politically suspect citizens.\(^5\) When Patrick Henry was governor of Virginia, the "Give-Me-Liberty-or-Give-Me-Death" patriot secured the passage of a bill of attainder for the arrest of a Tory leader.\(^6\) These examples show an early tendency for government leaders to infringe upon civil liberties when necessary to meet a threat to America. The actions of Jefferson and Henry also foreshadow subsequent federal reactions in times of war after ratification.

Shortly after the ratification of the Constitution and peace with Britain, the young republic was thrust into world conflict unprepared. Troubles in the Mediterranean Sea with the Barbary pirates led to the reestablishment of the Navy in 1794.\(^7\) Then, the revolutionary government of France discontinued diplomatic relations with the United States over a trade agreement the United States had signed with Britain.\(^8\) French warships began to prey on American trading ships leading to the Quasi-War with France.\(^9\) These threats led Congress to pass the Alien and Sedition Acts and the Naturalization Act.\(^10\) Although the reestablishment of the Navy and building of ships was authorized by acts of Congress,\(^11\) the lack of preparedness for conflict and quick federal onslaughts on civil liberties highlighted by the countries early difficulties with France would


\(^6\) *Id*. A "tory" is defined as "an American upholding the cause of the British Crown against the supporters of colonial independence during the American Revolution." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1246 (Frederick C. Mish ed., 1988).


\(^8\) *Id*.


establish a pattern for American emergency response that we unfortunately still see today.

The first great crisis of the new republic came when the nation was not quite a century old and totally unprepared for an upcoming conflict. The election of Republican Abraham Lincoln from Illinois proved to be the impetus a sectionalized country needed to divide into open secession. Almost immediately, southern states declared the Union dissolved and set out to make a new nation conceivably based upon the United States Constitution that the northern Republicans had allegedly abandoned.¹²

The departure of the southern states coupled with the passage of federal troops through Baltimore created secession fervor in the state of Maryland. These secessionist elements sought to prevent the reinforcement of Washington, D.C. by blocking Union troop movements through the city of Baltimore. Activities by southern sympathizers culminated on the night of April 19, 1861, when they burned the key railroad bridges leading to Washington, D.C.¹³ Subsequently, Lincoln, for the first time in the nation's still young history, suspended the writ of habeas corpus on April 27, 1861, allowing the arrest of an individual and their indefinite imprisonment.¹⁴

The writ of habeas corpus held a special place in the hearts of the American public in the colonial and later antebellum period; the writ was the only common law process expressly mentioned in the United States Constitution.¹⁵ Blackstone stated that habeas corpus is "a great and efficacious writ in cases of illegal confinement."¹⁶ Our Supreme Court held, many years after the Civil War, that the writ of habeas corpus is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."¹⁷ Its purpose is to "provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."¹⁸ In practice, the suspension of the writ of habeas corpus by Lincoln effectively allowed the arrest of an individual and then the indefinite imprisonment of the individual detained. The suspension, along the Washington to Baltimore railway, allowed Lincoln to take steps to guarantee the safe passage of troops to protect Washington, D.C. As dramatic and unconstitutional as this idea sounds, Lincoln's proclamation regarding the suspension of the writ along the military line of the Washington to Baltimore

¹⁴ Id. at 8.
¹⁵ Id. at xiv; see U.S. CONST. art. I, § 9, cl. 2.
railway was not an isolated event during his presidency. During the course of the war, it is estimated that over 13,000 civilians were imprisoned by the Lincoln administration. Lincoln, pro-Union governors and Union supporters used the nationwide suspension to jail pro-Confederate and anti-war elements such as newspaper editors.

Many years later, American entry into World War I precipitated another rapid expansion of executive power to guarantee victory. Congress gave President Woodrow Wilson wide authority to control prices, rents, transportation and manufacturing. Congress also passed various acts to reduce dissent among the American populace. These acts included the Selective Service Act, which authorized the imprisonment of anyone opposing the draft. Also, another Sedition Act was passed during the war which banned undesirable activity. All told, the rapid growth of government, intrinsically necessary to mobilize the American economy and military on a global scale for entry into World War I, provided a precedent for executive growth that continues today – then and now, all in the name of victory and expediency.

The “great peace” following the “great war” was broken by depression and unemployment. Strikes by jobless workers and bombings by Communists, anarchists and others led to widespread government wiretaps and raids leading to over 6,000 arrests. Widespread support for the Constitution and civil liberties followed the Great Depression in the 1930s. However, events in late 1941 brought an abrupt end to peace, new legislation, and exercises of executive power to guarantee a proper wartime response to the Axis threat.

Perhaps nothing from World War II exemplifies the unconstitutional reaction of our government to the Axis threat than the much-maligned decision of Korematsu v. United States. The petitioner in Korematsu was convicted for

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19 NEELEY, supra note 13, at 23.

20 Meistrich, supra note 5, at 52.

21 Id.

22 Id.

23 Inherently, the American experience in World War I showed the American government that extraordinary efforts would be able to have extraordinary results. By shifting power to the President, the United States was able to mobilize an economy, mobilize manpower, and train and provide for an army that distinguished itself against the historically better prepared Continental armies. When the Great Depression threatened America a mere decade later, the men called upon to address the depression were some of the same men who helped guide the country through the Great War. They looked to the model of a wartime executive used in World War I to meet this new contingency and used the model of a powerful wartime executive to pull the country out of recession.

24 Meistrich, supra note 5, at 52.

25 Id.

violating a Civilian Exclusion Order promulgated by the Commanding General of the Western Defense Command under authority of an executive order. The Civilian Exclusion Order prohibited Japanese-Americans in certain west coast military areas so as to prevent espionage and sabotage by Japanese-Americans during the opening months of World War II.

In upholding Korematsu’s conviction for violating the Civilian Exclusion Order, the Court placed great weight on the belief that there were certain disloyal elements of the Japanese population in America. Furthermore, the shores of America were in direct threat of invasion by the Empire of Japan. Therefore, because “hardships are part of war, and war is an aggregation of hardships” the impact of the Order on a group of citizens or a citizen like Korematsu was justified in light of the exigent threat to the American shores.

World War II led directly into a heightened state of national readiness to meet the enduring Soviet threat in the Cold War. To meet the danger the Soviet Union posed to the American way of life, the House of Representatives set up the House Unamerican Activities Committee in 1948, ushering in the age of McCarthyism. Senator Joseph McCarthy from Wisconsin and his roving committee went on a witch-hunt for communists, required loyalty oaths, and proliferated blacklists. The undeclared Cold War from 1945 to the 1980s saw a heightened state of peace that helped cement the figure of a strong executive branch in the American psyche but few dramatic tragedies that gave rise to large-scale infringements on civil liberties. However, this all changed in September 2001 with the terrorist attacks in New York, Washington, D.C., and Pennsylvania.

These snippets of American history show the general pattern of American crises reaction. First, for all of the intellectual think-tanks and government funding, the United States is generally woefully unprepared for a sudden threat or attack. And, second, after an attack, the federal government is quick to pass legislation or issue orders that infringe on the civil liberties of Americans and the delicately wrought separation of powers contained in the Constitution. Anything more than a cursory look at the events subsequent to September 11th shows that the reaction of the American people and Congress was no different now than the reactions of our forefathers many years ago.

685 (2002), for a more detailed analysis of the Korematsu decision and its relevance for the War on Terrorism.

27 Korematsu, 323 U.S. at 216-17.
28 Id. at 217.
29 Id. at 218.
30 Id. at 219.
31 Meistrich, supra note 5, at 55.
32 Id. at 55.
III. POST 9/11 AMERICAN REACTIONS

There can be no doubt that on September 11, 2001, our nation was ruthlessly attacked by extremists "hell-bent" on striking the heart, spirit, and resolve of the American people. The unexpected assault on the American civilian populace immediately threw the entire country into a panic. Subsequent to the terrorist attacks on September 11, 2001, the government of the United States was quick to react to the terrorist threat. On September 14, 2001, President Bush declared a state of emergency and set the stage for the calling of reserve armed forces.\(^{33}\) Shortly after the attacks, President Bush created the Office of Homeland Security by executive order\(^{34}\) and appointed Pennsylvania Governor Tom Ridge to be director of the newly created executive office.\(^{35}\) Later, President Bush used an executive order to declare that noncitizens detained in the War on Terrorism would be tried by military tribunal.\(^{36}\)

Shortly thereafter, the Bush administration scored a major anti-terrorism victory with the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act" or "Act") on October 26, 2001.\(^{37}\) The PATRIOT Act centralizes federal law enforcement authority in the Justice Department.\(^{38}\) It gives the government roving wiretap authority and increases penalties for terrorism-related crimes.\(^{39}\) In addition, the Act removes barriers to the passage of information between law enforcement and intelligence agencies, gives the Attorney General broad powers to detain and deport aliens with suspected terrorist ties, and grants surveillance authority to federal law enforcement agencies.\(^{40}\)


\(^{39}\) Id. at 1105, 1119.

\(^{40}\) See generally Eric L. Mueller, 12/7 and 9/11: War, Liberties, and the Lessons of History, 104 W. VA. L. REV. 571 (2002). It should be noted that the broad discrimination of the World War II era against Japanese-Americans epitomized by the Korematsu case has been somewhat avoided in the War on Terrorism. This includes Muslim-Americans detained under the new legislation in both scope and numbers, treatment of captured Al-Qaeda fighters being given Geneva convention rights, and a civilianized military tribunal system. Id.
After the passage of the PATRIOT Act, the United States government made further strides in the War on Terrorism. United States and coalition military forces began attacking Afghanistan on October 7, 2001.41 Through a series of quick and relatively bloodless military actions, coalition forces succeeded in destroying the terrorist elements controlling the country and establishing an interim government.42 Even though Al-Qaeda was effectively culled from Afghanistan as a terrorist organization, the diffuse nature of terrorist activities and the now obvious weaknesses of the United States government showed the need for permanent changes in government organization and practices to meet continued terrorist threats.43 After much debate, Congress passed a law to create a new Department of Homeland Security.44 President Bush signed the bill to create the new department on November 25, 2002.45

Despite the immense shift in power to the executive in this century and especially the months after the September 11th terrorist attacks, Congress once again passed extraordinary legislation that grants the executive department new tools for the War on Terrorism and arguably infringes upon civil liberties.46

44 The power of the President to reorganize the departments in the executive branch has undergone significant changes during the twentieth century. See CONGRESSIONAL QUARTERLY’S GUIDE TO THE PRESIDENT 990 (Michael Nelson ed., 1989) [hereinafter GUIDE TO THE PRESIDENT]. Originally, executive reorganizations were subject to the approval of Congress. Id. However, three subsequent acts of Congress, the Overman Act, Pub. L. No. 65-152, 40 Stat. 556 (1918), the Reorganization Acts of 1939, ch. 36, 53 Stat. 561 (formerly codified at 5 U.S.C. § 133), and the Reorganization Act of 1949, ch. 226, 63 Stat. 203 (current version as amended at 5 U.S.C. §§ 901-912), gradually gave the President more and more power to reorganize in accordance with presidential prerogatives. See GUIDE TO THE PRESIDENT, supra, at 990. The Reorganization Act of 1949 allowed the President to reorganize the executive department subject to congressional veto. See generally Reorganization Act of 1949, ch. 226, 63 Stat. 203; GUIDE TO THE PRESIDENT, supra, at 990. For a time, the executive was given the authority to reorganize at-will and even create cabinet-level departments unless either house of Congress vetoed the proposed organization within sixty days. See Reorganization Act of 1949, ch. 226, § 6(c), 63 Stat. 203, 205; GUIDE TO THE PRESIDENT, supra, at 990. However, in INS v. Chadha, 462 U.S. 919 (1983), the Supreme Court declared that legislative vetoes, such as the one written by Congress into the Reorganization Act of 1949, were unconstitutional. See id. at 951-59; see also GUIDE TO THE PRESIDENT, supra, at 990. Because of this decision, Congress refused to renew the Reorganization Act of 1949. GUIDE TO THE PRESIDENT, supra, at 990. Now all reorganizations of the executive branch are required to be passed by both houses of Congress and signed by the president into law. See id.; see also 5 U.S.C. §§ 908-912 (2000).
46 See generally Whitehead & Aden, supra note 38, at 1088.
Notwithstanding these statutory grants of power, Congress considered, but managed to avoid, perhaps the most dangerous shift of power contemplated in the wake of September 11th: the express abandonment of Congress's power of the purse to the executive. The bill that passed the House of Representatives was written to give the President broad control over a considerable amount of the proposed department’s budget. During the debates of Congress surrounding


In its pursuit of enemies, the new department would be able to shift money among its various bureaus without the approval of Congress. Its employees would be subject to instant removal, with none of the protections of the civil service system that safeguard other government workers.

The department would be as much on a permanent wartime alert as any of the military services, and would have less congressional oversight that the uniformed forces.


Transfer of Appropriations: Except as otherwise specifically provided by law, not to exceed five percent of any appropriation available to the Secretary in any fiscal year may be transferred between such appropriations, except that not less than fifteen days’ notice shall be given to the Committees on Appropriations of the Senate and House of Representatives before any such transfer is made.


(a) In General – Each budget request submitted to Congress for the Department under section 1105 of title 31, United States Code, shall, at or about the same time, be accompanied by a Future Years Homeland Security Program.

(b) Contents – The Future Years Homeland Security Program under subsection (a) shall be structured, and include the same type of information and level of detail as the Future Years Defense Program submitted to Congress by the Department of Defense under subsection 221 of title 10, United States Code.

(c) Effective Date – This section shall take effect with respect to the preparation and submission of the fiscal year 2005 budget request for the Department and for any subsequent fiscal year, except that the first Future Years Homeland Security Program shall be submitted not later than 90 days after the Department’s fiscal year 2005 budget request is submitted to Congress.

Homeland Security Act of 2002 § 874. See also Section 889(a) amending 31 U.S.C. § 1105(a) by adding the following:

(33)(A)(i) a detailed, separate analysis, by budget function, by agency, and by initiatives area (as determined by the administration) for the prior fiscal year, the current fiscal year, the fiscal years for which the budget is submitted, and the ensuing fiscal year identifying the amounts of gross and net appropriations or obligational authority and outlays that contribute to homeland security, with separate displays for mandatory and discretionary amounts . . . .
the creation of the Department of Homeland Security, Senator Robert C. Byrd stated:

In the name of homeland security, Congress must not be persuaded to grant broad authorities to the administration that, given more careful thought, we would not grant. The House has already passed legislation to grant the President the authority to waive worker protections for Federal employees, to place the new Department's inspector general under the thumb of the Homeland Security Secretary, to exempt the new Department from public disclosure laws, and to chip away at congressional control of the power of the purse. Close examination of the President's plan shows that the administration is seeking more new powers which, unchecked, might be used to compromise the private lives of the American public. Congress must never act so recklessly as to grant such broad statutory powers to any President, even in the quest for something so vital as protection of our own land. So vital, the war on terror. We must exercise great caution. We must operate with the clear knowledge that once such powers are granted, they will reside in the White House with future Presidents – Republican and Democrat – and they will not be easily retrieved.49

Congressional battles spawning from speeches and sentiments such as these from Senator Byrd helped him and other resolute senators from memorializing an express grant of the power of the purse to the President in the wake of September 11th.

However, although the legislative history after September 11th can serve as the present demarcation line in the battle between Congress and the executive, the battle over the power of the purse is not over. To truly understand the future threat of what Senator Byrd was so vehemently warning his fellow senators about, one must understand the separation of powers doctrine as promulgated by the framers and the distinct powers given to each branch of government. Then, a look at how these powers overlap will show that the spending power of Congress, so dearly won by Anglican ancestors, has already

(ii) with respect to subclauses (I) through (IV) of clause (i), amounts shall be provided by account for each program, project and activity.

Homeland Security Act of 2002 § 889(a). This language leaves none of the budgetary discretion contained in the House bill. In regards to transition from pre-Act organization to the new Department of Homeland Security, the Act provides that a reorganization plan must be submitted by the President within sixty days of enactment of the Act that specifies which funds will be transferred to the new department as a result of the organization changes contained in the plan. See Homeland Security Act of 2002 § 1502.

been incrementally forfeited to a large degree by our legislative branch. Indeed, the threat Senator Byrd was warning his peers about has already occurred; the good Senator was merely seeking to prevent the legislative abandonment of the spending power from being etched into law.⁵⁰ In summation, this analysis will show that judicial intervention is needed to (1) force Congress to reassert its historical dominance over the power of the purse and (2) prevent Congress from ever again contemplating an express grant of the power of the purse to the executive in the name of national emergency.

IV. THE SEPARATION OF POWERS DOCTRINE

A. The Basics

The separation of powers doctrine contained in the Constitution is not, as commonly viewed, three branches of government exercising different powers but rather, as created by the founders of the Constitution, more accurately described as three "separated institutions sharing power."⁵¹ The Constitution, in short, provides a general structure for each of the three branches of government so that each branch co-exists in cooperation and in conflict with the other branches.⁵²

This diffusion of power between the branches is one of the central principles on which our country was founded.⁵³ As declared by our Supreme Court, the purpose of separating the powers of the government was to "diffuse[] power the better to secure liberty."⁵⁴ Separating the powers between the three branches of the government was thought to be one of the strongest safeguards against one of the greatest threats to liberty: the concentration of power in one branch of government.⁵⁵ Because the doctrine is one that shares power rather than dis-

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⁵⁰ See generally id. For a discussion of the spending power and the budget see infra notes 104-159 and accompanying text.
⁵¹ Guide to the President, supra note 44, at 1089.
⁵² Louis Fisher, Constitutional Conflicts Between the Congress and the President 27 (1985) [hereinafter Constitutional Conflicts].
⁵⁵ See The Federalist No. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., 1961) stating, "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny." See also Buckley v. Valeo, 424 U.S. 1, 122 (1976) ("The Framers regarded the checks and balances that they built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.") Other safeguards were thought to be the personal ambitions and motives of each branch and the Constitutional provisions of veto, Congressional override and judicial independence. See, e.g., The Federalist No. 51, at 289-90 (James Madison).
tinctly separating it, the three branches frequently come into conflict. The Supreme Court takes a variety of approaches in deciding separation of powers issues. The first approach is a textual approach, whereby the Court stresses the meaning of the text of the Constitution.56 Second, the Court can decide a case by looking at the original intent of the framers.57 Other approaches include looking at the structure of the Constitution, institutional competencies, historical practices and a value-based approach.58 For the sake of this argument, the reach of the separation of powers doctrine is limited to those instances where the executive and legislative power overlap and come into conflict.59

B. The Executive Power – Somewhat Less than a King

The executive power of the President stems directly from the United States Constitution. The founding fathers had an ingrained fear of an overly powerful executive. As such, they severely limited the power of the executive under the Constitution’s predecessor – the Articles of Confederation. However, these executive limitations proved to be too extensive and the powers given to the legislature proved too unwieldy to maintain a working national government.60 Subsequently, the Constitutional Convention drafted a document that provided for a more powerful executive and a more efficient voting scheme for the Legislature.61

Executive power must stem from the Constitution or from duly enacted laws of Congress.62 Article II of the Constitution states, “The executive power shall be vested in a President of the United States of America.”63 The powers granted to the executive contained in the Constitution include: Commander-in-Chief of the armed forces64 and the power to make treaties.65 In terms of lawmaking powers, the President is limited to giving information of the state of the union and recommending to Congress laws the President thinks “necessary and

57 Id.
58 Id.
59 As such, separation of powers battles between the legislature and the judiciary and the executive and the judiciary are not examined.
60 See Shane & Bruff, supra note 56, at 4-5.
61 See Sofaer, supra note 9, at 36-37.
63 U.S. Const. art. II, § 1, cl. 1. For a complete review of all aspects of executive power, see generally Shane & Bruff, supra note 56.
64 U.S. Const. art. II, § 2, cl. 1.
65 Id. art. II, § 2, cl. 2.
expedient." Despite the fact that the Constitution limits the executive’s lawmaking powers to recommending laws or faithfully enacting the laws duly passed by Congress, the executive has seen an immense gain of power in the twentieth century. One of the most expansive uses of executive power is the use of executive orders to, in essence, make law; to date, executive orders number over 13,000. Although executive orders have been used since the beginning of our country, the abuse of this “lawmaking” method can be traced to this century. For example, during the middle part of this century, President Franklin Delano Roosevelt issued executive orders to the army to seize a steel plant. President Roosevelt based his order not on any statutory authority but on the implied powers given to the President by the Constitution as Commander-in-Chief of the Armed Forces. In theory, executive orders are only a valid source of law when they are issued under powers delegated by Congress in duly passed law or emanated from the constitutional powers of the President contained in the Constitution. In response to these broad executive laws, the courts have, although rarely, seen fit to overturn executive orders that lack statutory or constitutional support.

Another gain in the executive’s power in the last century has been the expansion of executive rulemaking through administrative agencies. In terms

66 Id. art. II, § 3.
67 Id. art I, § 7, cl. 2.
69 See SHANE & BRUFF, supra note 56, at 88-89. Closely related to executive orders are executive proclamations. While it is sometimes difficult to distinguish between executive orders and proclamations, as a general rule, orders apply to the executive’s subordinates and proclamations are given to the public at large. Id. at 88.
71 See CONSTITUTIONAL CONFLICTS, supra note 52, at 128.
72 Id.
73 Id.
74 See id.; see also, e.g., Youngstown v Sawyer, 343 U.S. 579 (1952); Marks v. CIA, 590 F.2d 997, 1003 (D.C. Cir. 1978); Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973).
75 See Nick Smith, Restoration of Congressional Authority and Responsibility over the Regulatory Process, 33 HARV. J. ON LEGIS. 323 (1996). See generally WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 1-31 (1997) (describing administrative law in general, including the functions of executive agencies, which include regulating private conduct, rulemaking, adjudication, and investigations). Additionally, the work describes the provisions of the Administrative Procedure Act (“APA”). See id. at 23-27. Judicial review of agency action is
of congressional oversight of executive agency actions through restrictions of the power of the purse, the increased use of lump sum appropriations by Congress gives the executive branch and its agencies very little guidance to perform the branch’s constitutional duty to execute the laws and promulgate rules. Therefore, Congress has developed procedures to control executive spending and preserve its constitutional spending power. First, Congress provides administrative agencies with detailed committee reports dictating the specific amounts agencies should spend on each program in the lump sum appropriation. Agencies in turn treat these committee reports almost as binding as statutory proscriptions despite their questionable constitutional validity.

Another method that Congress uses to maintain control over the executive branch is through a process called “reprogramming.” Reprogramming is “the use of funds for purposes other than those originally contemplated at the time of appropriation.” This process involves agencies seeking permission somewhat complicated. First, not all administrative actions are subject to judicial review. See infra notes 120-133 and accompanying text.


See Am. Hosp. Ass’n v. NLRB, 499 U.S. 606, 616 (1991) (“Petitioner does not – and obviously could not – contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating.”); Roberts, supra note 77, at 563 (citing the Comptroller General who said “indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements on Federal agencies”). Roberts states that the reason executive agencies treat the Committee Reports with such deference is that agency officials would be foolish to defy Congressional Committees who control later appropriations. See Roberts, supra note 77, at 564. Agencies are also bound by the Chevron Rule. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). This rule, briefly stated, is a two part test that first determines if Congress has directly decided the issue in question. Id. at 842-43. If not, the second inquiry then examines the agency interpretation to determine if it is reasonable. Id. If it is reasonable, the agency determination is upheld. Id.

from congressional committees to spend more or less money than the specific amount the committee detailed to be spent in their reports.\(^80\)

C. Foreign Affairs and Warmaking Powers of the Executive

One of the President’s broadest and most important powers is in the realm of international affairs in his position as Commander-in-Chief; these powers stem from Article II of the Constitution.\(^81\) In *United States v. Curtiss-Wright Export Corp.*,\(^82\) the Supreme Court went into great detail to decide that, in external affairs, the President is the “constitutioinal representative of the United States with regard to foreign nations.”\(^83\) Furthermore, the sovereign power of the United States in international affairs, such as the power to make treaties and negotiate with foreign countries, was vested executive branch of the federal government of the United States.\(^84\) As such, the President, as the “sole organ in the field of international relations,” is given “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”\(^85\) Given this broad reading of presidential authority, *Curtiss-Wright* has become a flagship case for blanket grants of approval by Congress.

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\(^80\) See Roberts, *supra* note 77 at 564.

\(^81\) U.S. CONST. art. II, § 2, cl. 1. The exact scope of the President’s power is hard to accurately define; Congress and presidents have repeatedly fought over the shared power of warmaking. The discussion *infra* discusses a few of the court cases that have helped define the balance between competing congressional and presidential warmaking prerogatives. See Robert F. Turner, *The Constitutional Framework for the Division of National Security Powers Between Congress, the President and the Courts*, in *NATIONAL SECURITY LAW*, *supra* note 2, at 749-892. Conflict between Congress and the President over Vietnam led to the constitutionally suspect War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2000). The War Powers Resolution is beyond the scope of this article; however, a discussion of the act can be found in Turner, *supra*, at 834-45. See also Edward Keynes, *The War Powers Resolution and the Persian Gulf War*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 241-56 (David Grey Adler & Larry N. George eds., 1996).

\(^82\) 299 U.S. 304 (1936).

\(^83\) *Id.* at 319.

\(^84\) See *id.* at 316 stating:

And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, “the Representatives of the United States of America” declared the United [not the several] Colonies to be free and independent states, and as such to have “full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all Acts and Things Independent States may of right do.”

\(^85\) *Id.* at 320.

Although expansive, there are some limits on presidential prerogatives in the international arena under the \textit{Curtiss-Wright} decision. The leading case limiting the President’s war powers is \textit{Youngstown Sheet & Tube Co. v. Sawyer}.\footnote{343 U.S. 579 (1952). For a complete history of the Steel Seizure Case, see generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).} In this case, the threat of a nationwide steel strike in the middle of the Korean War caused President Truman to issue an executive order directing the Secretary of Commerce to take possession of most of the nation’s steel mills.\footnote{\textit{Youngstown}, 343 U.S. at 583.} The Secretary was ordered to keep the steel mills operating and the presidents of the companies were to serve as operating managers of the mills.\footnote{\textit{Id.}} The companies brought suit to declare the President’s order invalid and outside the scope of his authority and for a permanent injunction preventing its enforcement.\footnote{\textit{Id.}} The Supreme Court was called upon to decide if the seizure order was within the constitutional power of the President.\footnote{\textit{Id.} at 584.} In holding that the President had exceeded his constitutional authority, Justice Black, writing for the Court, stated that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”\footnote{\textit{Id.} at 585.} In addition, the Court found that the President’s war powers were not unlimited. The Court held:

[W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.\footnote{\textit{Id.} at 587.}

Finally, the Court stated that the Constitution is “neither silent nor equivocal” and expressly limits the President to executing the laws that Congress makes.\footnote{\textit{Id.} Justice Black ended his opinion by stating, “The Founders of this Nation entrusted the lawmakers power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice.” \textit{Id.} at 589. This comment by the Court could have been made in the wake of the September 11th attacks.}
Judicially limited in Youngstown, the executive branch is also constitutionally limited by the separation of powers etched into the Constitution's text.

D. The Spending Power and the Budget

1. The Power of the Purse

The framers vested the legislative power of the federal government in the legislative branch. The Constitution is very specific and expansive in enumerating the powers of Congress, which include the power to lay and collect taxes, to provide for the general welfare and the common defense, to coin and regulate money, to declare war, to raise and support an army and provide for a navy. In addition, the Constitution provides that Congress shall have all the nation's law-making powers, while the President has the executive duty to see that the laws that Congress enacts are "faithfully executed."

Perhaps the greatest of the legislative powers given to Congress in the Constitution is the spending power or, as it is also known, the "power of the purse." Article I, Section 9 of the Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." By granting the power of the purse to the Congress, the framers separated the spending power from the power to execute the laws, thereby creating a check on the executive's power. Had these two powers been combined in one branch, the potential for tyranny would be great indeed.

95 U.S. CONST. art I, § 1.
96 Id. art I, § 8.
97 Id. art I, § 8, cl. 18. The Constitution states that Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Id.
98 Id. art II, § 3.
99 See THE FEDERALIST NO. 58 (James Madison). Madison wrote, "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." THE FEDERALIST NO. 58, at 391 (James Madison) (Benjamin Fletcher Wright ed., 1961).
100 U.S. CONST. art I, § 9, cl. 7. Although the power to appropriate money is very broad, the power is not unlimited. Indeed, the Supreme Court has struck down congressional appropriations when they conflict with the Constitution. See, e.g., Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).
102 See THE FEDERALIST NO. 47 (James Madison).
Antiquity provides a glaring example of the damage the union of the power of the purse and the executive can have. During much of the period of the Roman Republic, the Senate exercised unchallenged domination over all spending matters.  However, the rise of Julius Caesar saw the Senate cede control of the Roman treasury to the newly anointed Roman Dictator.  This was a power the Senate never regained, and the next five hundred years saw Roman dictators exercise the warmaking, spending, and taxation powers without restraint from a now powerless Senate.  Continual taxation and war by an all-powerful executive played a large role in the fall of the Roman Empire.

Revolutionary framers knew of Roman history and of similar battles over the power of the purse in England.  By vesting the power of the purse in the legislative branch, the framers assured that the purse would give Congress an effective means of checking executive power and that the spending power would be in the hands of the most responsive branch of government.  Congress exercises its spending power through the budget process.

2. The Budget Process

The power of the purse is exercised through spending laws, which are developed during the budget process. The development of the federal budget begins when the executive submits his budget estimates. Congress then deliberates the executive’s proposal, accepting part of it and rejecting others by incorporating their own policy decisions, and passes the first of two legislative requirements for budgetary authority.  This first step is an authorization. Authorization laws are those laws that "establish and regulate spending programs." The purpose of authorization laws are to define the nature of a program, indicate its purpose, describe under which circumstances money is to spent, and what methods should be used in operating the program.

103 Byrd, supra note 101, at 301.
104 Id.
105 Id.
106 Id. at 301-02.
107 Id. at 306; see also THE FEDERALIST NO. 58 (James Madison).
109 Id. at 315-16.
110 Id. at 315-16.
After authorization, Congress enacts a separate appropriation legislation. Appropriation laws authorize the President to withdraw money from the treasury. These laws state where in the treasury the money comes from, the purpose of the appropriation and limits the money provided. Finally, the President will dutifully spend the authorized and appropriated funds in accordance with congressional policy choices.

Perhaps simple on its face, the separation of the power of the purse and the executive power has caused conflict between the two branches of government since the republic began. The fundamental shift in congressional spending power occurred in 1921 with the passage of the Budget and Accounting Act. First, this Act established the Bureau of the Budget. Initially part of the Treasury Department, in 1970 the Bureau of the Budget’s name and functions were substantially changed when the Bureau became part of the highly influential Office of Management and Budgeting (“OMB”). In accordance with the provisions of the Act, the President was given broad managerial controls over the budget process and now submits a proposed budget estimate to Congress.

As federal budgets grew and became increasingly complex, practices and procedures have developed that allow considerable discretion in budget allocation to the President. The most deferential of congressional appropriations are historically those where the President has his greatest authority – na-
tional security and defense appropriations. In general, Congress grants presidential discretion in four categories: lump-sum appropriations, reprogramming, impoundments, and budget transfers. For an understanding of the considerable discretion the President already has over spending power, these categories are discussed below.

Lump-sum appropriations are appropriations made for more than one specific object. This allows funds appropriated for one budget request to be shifted to a different project. Although the first budget approved by Congress was passed in a lump-sum format, within a few years, Congress reasserted its spending power and, in most cases, appropriations were made with line items of minute appropriations. One exception to this practice was during times of war when lump-sum appropriations were "expendied as the exigencies . . . may require" at the discretion of the President. These practices continued until the presidency of Franklin D. Roosevelt when the sheer size of the federal budget due to wartime appropriations and government programs necessitated Congress's shift to the current practice of "lump-sum" appropriations.

One type of lump-sum appropriations is contingency funds such as the Foreign Assistance Act. As can be anticipated, the discretion granted to the President in contingency funds has allowed spending not imagined or sometimes even prohibited by Congress. Other types of lump-sum appropriations are emergency spending and drawdown spending. Perhaps one of the most

123 Budget transfers are defined as "the shifting of funds between appropriations." Peter Ravn-Hansen & William C. Banks, From Vietnam to Desert Shield: The Commander in Chief's Spending Power, 81 IOWA L. REV. 79, 110 (1995). This type of discretionary presidential spending authority is only allowed with express congressional enabling language. See id. at 111. For a complete discussion of budget transfers, see generally id. at 110-14.
124 Banks & Ravn-Hansen, supra note 77, at 69.
125 Id.; see also Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is . . . committed to agency discretion . . . [T]he very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.").
126 Spending Power, supra note 121, at xx.
127 Banks & Ravn-Hansen, supra note 77, at 70 (citing Act of Feb. 22, 1862, 12 Stat. 344 (appropriations for the Civil War); Act of Mar. 9, 1898, 30 Stat. 274 (appropriations for the Spanish American War)).
128 See Roberts, supra note 77, at 563-64.
128 See generally Banks & Ravn-Hansen, supra note 77, at 70 (describing the use of contingency funds to found the Peace Corps, give a helicopter to then Egyptian President Anwar Sadat, and the use of CIA contingency funds to fund the Contras).
121 Id. at 71-73.
readily exploitable types of presidential discretionary funding was "gift authority."

Under the Miscellaneous Receipts statute, all monies collected by the government must be placed in the treasury absent a statutory exception such as the gift exception. Under this exception, the Secretary of the Treasury was allowed to accept gifts from private parties and foreign governments to be used for national security. After acceptance of the gift, the government could use the funds for previously unappropriated activities.

Another discretionary method of appropriations is known as reprogramming. This occurs when an agency asks for item A, and then through a complicated informal method of gaining congressional approval, uses the funds to pay for item B. Budget transfers are also allowed between accounts and agencies if allowed by statutory authority. President Nixon used account transfers to fund Cambodian bombing by "borrowing" funds from aid programs and allocating the "borrowed" funds to the bombing campaign. Nixon then used Department of Defense ("DOD") transfer authority to fund the bombing after the United States' withdrawal from Vietnam.

Finally, the President has, at times, spent less than the amount appropriated by Congress for a given period. This is known as impoundment. There are two types of impoundments: programmatic and policy-based. Programmatic impoundments are looked upon with favor by Congress as these impoundments are part of the executive's duty to faithfully execute the laws. An early programmatic impoundment was when President Jefferson saved $50,000

\[\text{Id.}\]
\[\text{Id. at 74.}\]
\[31\text{ U.S.C. § 3302(b) (2000).}\]
\[\text{See, e.g., id. § 1321; 5 U.S.C.A. § 7342 (2003).}\]
\[\text{See BANKS & RAVEN-HANSEN, supra note 77, at 74-75.}\]
\[\text{Lt. Col. Oliver North used the gift authority to solicit gifts from foreign governments to fund the Contras contrary to at least the spirit of the Boland Amendments. Id. at 75. The gift exception has since been repealed. Id.}\]
\[\text{Id. at 76-77.}\]
\[\text{Id. at 77.}\]
\[\text{Id. at 77-78.}\]
\[\text{Id. at 77-78. Due to Nixon's use of the transfers, Congress enacted explicit statutory language to prohibit transfer of funds to spending that had previously been denied by Congress in 1974. Id. at 78.}\]
\[\text{Id. at 79.}\]
\[\text{Id.}\]
\[\text{Id.}\]
Congress had appropriated for Mississippi River gunboats after the Louisiana Purchase ended the French threat to our western border. 145

Policy-based impoundments occur when the President refuses to spend appropriated funds, not because of a desire to save money, but because of disagreement with Congress's program. 146 It is probably safe to say that Presidents have disagreed with congressional spending prerogatives since our Constitution was formed. William Banks and Peter Raven-Hansen, in their book National Security Law and the Power of the Purse, illustrate examples of policy-based impoundment controversies during the Truman, 147 Eisenhower, Kennedy, 148 and Johnson 149 administrations. These examples of the President and Congress clashing over impoundments were resolved with relatively little fallout. However, the election of President Nixon would soon change this uneasy constitutional balance.

Almost immediately, President Nixon and his political agenda began to come into conflict with the Democratically controlled Congress. Nixon used the power of impoundment to set aside funds Congress appropriated in bills in an attempt to balance the budget and instead used the funds for programs he thought should Congress should have funded. 150 This led to the passage of the Congressional Budget and Impoundment Control Act of 1974 ("Act"). 151 This Act established two permissible types of impoundments the President may make: rescissions and deferrals. 152 First, the President can rescind, or refuse to spend, appropriated funds for any reason. 153 However, Congress must approve this rescission within forty-five days for the rescission to take effect. 154 Second, the Act allows the President to defer spending appropriated funds for up to one fiscal year in limited circumstances. 155

145 Id. (citing 8 ANNALS OF CONG. 11, 14 (1803) (statement of President Jefferson)).
146 Id.
147 Id. at 80. President Truman impounded funds to pay for additional Air Force groups. Id.
148 Id. at 81. Both Eisenhower and Kennedy impounded funds in disagreement over the B-70 bomber program. Id.
149 Id. Similarly, Johnson and Congress had a dispute over construction of nuclear-powered frigates. Id.
154 See id.
155 Id. at 74-75.
Since the time of the revolution, Congress and the President have consistently fought over the power of the purse. The constitutional provision giving Congress the spending power has been repeatedly encroached upon by Presidents seeking easier avenues to enact policies and support their unilateral decisions. Usually, presidential intrusions into the spending power have been met with congressional reactions to reassert control over the nation’s purse strings. However, in spite of congressional efforts, the executive continues to have broad abilities to circumvent congressional spending prerogatives.

3. The Iran-Contra Affair – A Look at Presidential Assertion of the Spending Power

The Iran-Contra affair is an illuminating example of congressional and presidential battles over the power of the purse and gives a clear glimpse into the mechanics of national security funding. The United States’ support of the Contras began in 1981 after the Nicaraguan Civil War when the Sandinistas gained control of the country. Subsequently, however, congressional support for the Contras began to wane. Beginning in 1982, Congress enacted the first of the Boland Amendments, restricting support that could be given to the Contras. Subsequent Boland Amendments to DOD appropriation bills prohibited the support of any group or individual for the purpose of overthrowing the Sandinista government. The history of the whole affair is very complex as evidenced by the three-volume report; Volume I alone contains over 500 pages. However, for purposes of this discussion, the relevant point is that Congress severely limited – and actually prohibited – all support of the Contras from late 1984 until mid-1985.

Congressional restrictions were not in line with President Reagan’s idea of Contra support. President Reagan wanted the Contras supported “body and soul” regardless of the Boland Amendments. To accomplish this end, executive agencies and the DOD ran a variety of budgetary “end-arounds” to circumvent Congressional restrictions placed upon United States policy.

156 See GUIDE TO THE PRESIDENCY, supra note 44, at 1108.
157 Id.
158 BANKS & RAVEN-HANSEN, supra note 77, at 137.
160 See BANKS & RAVEN-HANSEN, supra note 77, at 139.
161 Id. at 159.
162 Id. at 73-79.
One of the methods the Reagan administration used to circumvent the Boland Amendments was to solicit contributions from at least ten different foreign countries which was then channeled to the Contras.\textsuperscript{163} Arms sales to Iran gained over $3 million in funds for the Contras.\textsuperscript{164} By the time the dust settled surrounding the Iran-Contra affair, the President and his followers had used almost every tool in the colloquial bag to circumvent Congress’s policy limitations including: use of the CIA contingency fund, low oversight black budget programs, drawdown, reprogramming, and DOD operation and maintenance accounts to build an airstrip and base.\textsuperscript{165} Last but not least, transfer authority under the Economy Act permitted military equipment to be transferred to the Contras as “surplus.”\textsuperscript{166} The clear message of the Iran-Contra affair is this: the current loopholes in the budget process allow the President much discretion in national security spending to take almost any action he deems necessary. Even in cases where Congress makes explicit national security restrictions in conflict with Presidential prerogatives, our elected Presidents have shown utter disregard for their coequal branch of government.

As seen through this history, the power of the purse in the hands of the people’s representatives has lived a circular life. Early on, through the English and colonial experiences, the legislatures used military emergencies and appropriations to wrest civil liberty concessions and control over the power of the purse from the king. As time progressed into the modern era, military emergencies and national security have been used to retake the power of the purse away from the Legislature and consolidate that power in the executive and his agencies. Because of this shift in the balance of who controls the spending power, some judicial measure must be taken to force Congress to reassert its historical responsibility. Perhaps the best judicial doctrine to force this move is the nondelegation doctrine or a modern day modification of it.

V. THE NONDELEGATION DOCTRINE

Before beginning an in-depth discussion of the nondelegation doctrine, it might be helpful to clearly state the doctrine at the outset. The nondelegation doctrine states that Congress may not delegate its legislative power to any other branch of government without an intelligible principle to which the person or agency exercising the delegated authority is directed to conform.\textsuperscript{167}

\textsuperscript{163} Id. These solicitations raised approximately $34 million for the Contras. Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 170.
\textsuperscript{166} Id. at 79.
\textsuperscript{167} J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
A. Origins of the Doctrine

The Constitution of the United States provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."\(^{168}\) The legislative powers carved out in the Constitution were taken from the general mass of legislative powers, leaving those not enumerated in the Constitution to the several states.\(^{169}\) These words either prohibit, limit the extent of, or place conditions on where Congress may delegate its legislative power depending on how much strength one allows the doctrine.\(^{170}\) This segment of the separation of powers stems from the theories of John Locke, who stated that "[t]he power of the legislative, being derived from the people by a positive voluntary grant ... [as such] the legislative can have no power to transfer their authority of making laws and place it in other hands."\(^{171}\)

Early cases assessing the extent and conditions under which Congress could delegate its powers centered on two trains of thought. The first allowed delegation where Congress granted authority on a preordained condition – the "contingency theory."\(^{172}\) As such, Congress allows the President to take a specific action upon the happening of a specific event.

The second theory that developed permitted legislative delegation to fill gaps left in statutory language – "the gap filling theory."\(^{173}\) As succinctly stated by the Supreme Court, the gap filling theory of permissible delegation was defined by Justice Taft in *J.W. Hampton, Jr. & Co. v. United States*\(^{174}\) where he penned:

\(^{168}\) U.S. CONST. art I, § 1.


\(^{170}\) See Mistretta v. United States, 488 U.S. 361, 372 (1989); Field v. Clark, 143 U.S. 649, 692 (1892); *CONSTITUTIONAL CONFLICTS*, supra note 52, at 100. Why Congress would want to give away its legislative powers is a very good question. Some reasons that have been forwarded for why Congress would want to take these self-deprecating acts are worries about making tough policy decisions that may affect re-election chances, legislative efficiency, and conflict avoidance. See Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 ADMIN. L. REV. 907, 917-28 (2002).


\(^{172}\) See, e.g., *Field*, 143 U.S. 649; Brig Aurora v. United States, 11 U.S. 382 (1813).


\(^{174}\) 276 U.S. 394 (1928).
“The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” . . . [Therefore] if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise [delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.175

Thereafter, the Court had a defined Constitutional doctrine limiting the ability of Congress to delegate its power; however, the doctrine had yet to be applied and given real force. This would change a few years later. The doctrine taken from the pages of Locke and theoretically discussed by Justice Taft in J.W. Hampton was given teeth in two cases decided by the Supreme Court in 1935.

B. High Water Mark of the Doctrine

In 1933, President Franklin D. Roosevelt made a series of executive orders pursuant to the National Industrial Recovery Act (“Act”).176 These executive orders tasked the Secretary of the Interior with issuing regulations to carry out the President’s orders.177 These regulations provided, in part, that producers would have to file a monthly statement under oath concerning the location and amount of petroleum production, requiring shippers to file an oath declaring particulars as to deliveries and that all persons under the terms of the Act would have to make their books and records available for inspection by the Department of the Interior.178 The Panama Refining Company, among other oil producers, filed suit to restrain federal officials from enforcing the Department of the Interior regulations and challenged the Act as an unconstitutional delegation of the legislative power to the President.179

The Court found that the subject of the Act was clearly defined,180 therefore, the questions to be answered to determine if the Act was an unconstitutional delegation of the legislative power to the president were “whether the

175 Id. at 407-09 (quoting Cincinnati Soap Co. v. United States, 301 U.S. 308, 312 (1937); Wilmington & Zanesville R.R. v. Comm’rs of Clinton County, 1 Ohio St. 77, 88 (1852)).
177 See Panama Ref., 293 U.S. at 407.
178 Id. at 408.
179 See id. at 410-11.
180 In the words of the Court, the Act related to the “transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority.” Id. at 414-15.
Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President’s action; [and] whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.”¹⁸¹ In holding the Act an unconstitutional delegation of the legislative power, the Court found that the Act established “no criterion to govern the President’s course.”¹⁸² Furthermore, the Court stated that “as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.”¹⁸³

The Court also addressed the argument that a delegation of legislative power is to be assumed constitutional by the assumption that the President has acted and will act for the public good.¹⁸⁴ Assuming that the President did in fact or would act for the public good is of no consequence; the correct question is whether there is constitutional authority for the delegation.¹⁸⁵ After reviewing the founding precepts of the doctrine,¹⁸⁶ the Court found that, in every lawful delegation that was challenged, there was an intelligible principle that Congress had laid out either by (1) requiring a finding of fact before the executive may carry out the legislative policy (the contingency theory) or (2) requiring that the executive official make regulations to administer the laws Congress has effected and the policies that Congress has declared (the gap filling theory).¹⁸⁷

The second case the Court decided, A.L.A. Schechter Poultry Corp. v. United States,¹⁸⁸ further defined the boundaries of the nondelegation doctrine. The facts surrounding the case involved alleged violations of the Live Poultry Code (“Code”), promulgated under section 3 of the National Industrial Recovery Act, by a New York poultry slaughterhouse.¹⁸⁹ The Code was approved by the President on April 13, 1934, by executive order and set forth the rules and regulations concerning the regulation of the poultry trade.¹⁹⁰ After indictment, the poultry slaughterhouse challenged the constitutionality of the Code as an unlawful delegation of Congress’s legislative power.¹⁹¹

¹⁸¹ Id. at 415.
¹⁸² Id.
¹⁸³ Id.
¹⁸⁴ Id. at 420.
¹⁸⁵ Id.
¹⁸⁶ See supra notes 136-143 and accompanying text.
¹⁸⁷ See Panama Ref., 293 U.S. at 420-30 (discussing United States v. Grimaud, 220 U.S. 506 (1911); Field v. Clark, 143 U.S. 649 (1892); Brig Aurora v. United States, 11 U.S. 382 (1813)).
¹⁸⁹ Id. at 519-22.
¹⁹⁰ Id. at 523.
¹⁹¹ Id. at 519.
The Supreme Court again examined the nondelegation doctrine and alluded to the holding of *Panama Refining* stating:

The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the *Panama Company Case* that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.\(^{192}\)

In this vein, the Court had to look at the challenged statute to determine if Congress had established "standards of legal obligation, thus performing its essential legislative function," or transferred this responsibility to others.\(^{193}\) A close examination of the Recovery Act on which the Code was based led the court to hold that the Recovery Act was without precedent in its broad delegation of the legislative function to industry leaders on whose opinion the President based his Code.\(^{194}\) In short, neither the (1) contingency theory nor the (2) gap filling the-

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\(^{192}\) *Id.* at 529-30 (citing *Panama Ref.*, 293 U.S. at 421).

\(^{193}\) *Id.* at 530.

\(^{194}\) See *id.* at 541-42 stating:

To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.
ory of permissible delegation was met by the Industrial Recovery Act. 195 What the Recovery Act did was delegate the task of making the legislative framework – the intelligible principle – to industry leaders outside the government; because the intelligible principle was not *set by Congress*, the Act was unconstitutional under either the contingency or gap filling theory. 196

Together, these two cases set the boundaries of the nondelegation doctrine aptly stated by Justice Taft when he wrote that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” 197

C. Modern Delegation Theory

Despite these strong holdings defining the boundaries of the nondelegation doctrine, the Court has refused to utilize these cases to overturn challenged congressional legislation since 1935. With no constitutional principle to limit delegation, the twentieth century saw an immense rise in the number and reach of executive agencies to “fill up the details” left unmentioned by Congress. These include, but are in no way limited to, the Interstate Commerce Commission, the Federal Trade Commission, and the Securities and Exchange Commission. The Court has consistently upheld challenges to the broad mandates of Congress granting authority to these powerful agencies as constitutional in spite of the nondelegation doctrine. 198

One such modern case involved a law that granted authority to the Environmental Protection Agency to promulgate national ambient air quality standards for pollutants “requisite to protect the public health.” 199 On appeal, the Court assessed the issue by the conventional delegation doctrine as advanced by *J.W. Hampton* and its progeny. First, the majority paid homage to the rule that congressional grants of authority without intelligible principles are unconstitutional. 200 Then, the Court held that the legislative framework in question was “requisite to protect the public health,” forwarded a sufficient intelligible principle, and thereby upheld the delegation. 201

195 *See id.*

196 *See id.*


200 *Id.* at 472.

201 *Id.* at 474. Justice Scalia, writing for the majority, found the intelligible principle by comparing the language of the Act to previous allowable delegations. *See id.* at 473-74. Justice Tho-
Instead of an anomaly, this case illustrates present-day constitutional nondelegation interpretation – known as the “intelligible principle test.” The modern doctrine only requires Congress to lay down a very minimal intelligible principle such as “in the public interest.” This gundeck language will then pass constitutional muster and be upheld if challenged on nondelegation grounds. Similarly, agency rulemaking under the broad grant of delegation is then usually upheld.

Because of the very low hurdle needed to pass constitutional muster, some commentators have remarked that the doctrine is all but dead. True, the practical needs of government demand that the nondelegation doctrine not be an inflexible one. As such, a need for flexibility has hastened the doctrine’s demise. This flexibility needed for an operative government was understood by the framers and the Supreme Court early on in our nation’s history. The difficulty in balancing the necessary flexibility and the doctrine was adequately stated by Chief Justice Taft in 1928:

Although this Court since 1928 has treated the “intelligible principle” requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of “intelligible principles.” Rather, it speaks in much simpler terms: “All legislative Powers herein granted shall be vested in a Congress.” I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative.” As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.

See NBC, 319 U.S. at 190.

See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 132-33 (1980).

THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961) (stating “the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained”).

See Brig Aurora v. United States, 11 U.S. 382 (1813).
The rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.\textsuperscript{208}

It may appear that a working government's need for flexibility and the rigidity of the nondelegation doctrine are in irreconcilable conflict with each other. Commentaries have alluded to a type of constitutional tightrope-walk when dealing with cases of legislative delegation.\textsuperscript{209} Despite the conflict between the two principles, a working system evolved almost from the beginning of our country that allows Congress to pass broad legislation and then allows agencies and other branches of government to "fill up the details."\textsuperscript{210} Similarly stated is the constitutional maxim that Congress can obtain assistance from the other coordinate branches of government.\textsuperscript{211} With the growth of executive agencies in the twentieth century, Congress has increasingly looked to the agencies for help filling in the details due to the sheer size of government and a perceived lack of expertise in technical or complex areas. However, this perceived necessity should not dispense with the previously stated constitutional requirement that Congress "lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform."\textsuperscript{212}

On multiple occasions, lawyers or judges have attempted to use or revive the nondelegation doctrine to force Congress to pass legislation with true

\textsuperscript{208} J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

\textsuperscript{209} CONSTITUTIONAL CONFLICTS, supra note 52, at 100.

\textsuperscript{210} Wayman v. Southard, 23 U.S. 1, 43 (1825).


\textsuperscript{212} J.W. Hampton, 276 U.S. at 409.
intelligible principles, to no avail.\textsuperscript{213} In addition, the doctrine has had some effect in lower-level federal courts overturning broad delegations of the legislative power.\textsuperscript{214}

Even assuming that the doctrine has been weakened to near extinction and thus has limited application in the present day, a reinvigorated doctrine could perform three vital functions. First, the doctrine would ensure that important social policy decisions are made by the branch of government most responsive to the American people, the Congress.\textsuperscript{215} Second, as stated above, the doctrine would ensure that when Congress does find it necessary to delegate authority, Congress itself would lay down an "intelligible principle" to guide the exercise of its delegated powers.\textsuperscript{216} Last, the nondelegation doctrine ensures that courts charged with reviewing exercises of congressional delegation will be able to "test that exercise against ascertainable standards."\textsuperscript{217}

VI. DELEGATION OF THE SPENDING POWER? SOMETHING HAS TO BE UNCONSTITUTIONAL SOME TIME!

In today’s modern age, spending is equivalent to making laws.\textsuperscript{218} Since the executive branch can make no laws,\textsuperscript{219} the test to determine if an executive action is equivalent to making law is whether the action has the purpose and


\textsuperscript{214} See, e.g., Franklin Township v. Tugwell, 85 F.2d 208 (D.C. Cir. 1936). In this case, a federal court struck down an emergency appropriations bill because it unconstitutionally delegated legislative power to the President. See id. at 222.

\textsuperscript{215} See Indus. Union, 448 U.S. at 685 (Rehnquist, J., concurring).

\textsuperscript{216} See id. at 685-86 (citing J.W. Hampton, 276 U.S. at 409; Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935)).

\textsuperscript{217} Id. at 686.

\textsuperscript{218} See Louis Fisher, The Spending Power, in The Constitution and the Conduct of American Foreign Policy, supra note 81, at 228, quoting James Madison and stating:

Madison and other delegates wanted to keep the power of commander-in-chief separate from the power to finance a war. To protect constitutional liberties, that liberty had to be reserved to Congress: "Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter 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 the laws."

\textsuperscript{219} For a discussion of executive and legislative powers in relation to lawmaking functions, see Myers v. United States, 272 U.S. 52 (1926).
effect of altering "the legal rights, duties and relations of persons."  Although the nondelegation doctrine is seemingly dead for all but its most resolute supporters, the time may soon be approaching that the doctrine may have to be revived to prevent Congress from further delegating its power of the purse.

In the haste to create a Department of Homeland Security, the House of Representatives passed language that would allow the President to transfer up to five percent of any appropriation in any year between appropriations. This language shows that Congress stands poised to surrender more of their power of the purse if confronted with an appropriate threat in the future. Coupled with present congressional budgetary processes such as lump-sum appropriations, reprogramming, and contingency funds that show that Congress to a large extent has already ceded a large portion of their power of the purse to the executive branch, the union of the executive and legislative power is an increasing threat. All told, the present state of affairs in Washington, D.C. shows a Congress increasingly willing to give the spending power away and an executive who will surely not abandon newfound power and right. If the prophetic union of the sword and the purse is indeed upon us, the only recourse to somewhat reset the separation of powers is the judiciary. The nondelegation doctrine could serve as an efficient tool to serve this purpose.

Even though the doctrine could serve as the tool needed to force Congress to make meaningful spending decisions, the Supreme Court has been reluctant to utilize the nondelegation doctrine in spending cases in the past. Only a short time after the 1935 Panama Refining/Schetcher decisions, the Court upheld a delegation challenge to a statute that gave the President almost unlimited spending discretion. The Court stated,

This Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are prelate with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies . . . . The constitutionality of this delegation of authority has never been seriously questioned.  


222 Cincinnati Soap Co. v. United States, 301 U.S. 308, 312 (1937).
Similarly, the *J.W. Hampton* court recognized that the delegation went beyond "fact-finding" and allowed the President to make discretionary economic judgments and upheld the delegation.\(^{223}\)

Although the Supreme Court has been reluctant to do so, there is some authority from lower courts to use the conventional nondelegation doctrine to prevent congressional delegation of the spending power.\(^{224}\) In *Franklin Township v. Tugwell*,\(^{225}\) the United States Court of Appeals for the District of Columbia struck down legislation delegating the power of the purse to the executive.\(^{226}\) At issue in *Tugwell* was the constitutionality of provisions of the Emergency Relief Provisions Act of 1935.\(^{227}\) The Act authorized the President to increase no more than twenty percent "any one or more of the foregoing limitations if he finds it necessary to do so in order to effectuate the purpose of this joint resolution."\(^{228}\)

It is not surprising that *Tugwell*, decided shortly after the *Panama Refining* and *Schechter*, based its reasoning and holding on these two cases. The appellate court measured the Act against the test formulated in *Panama Refining*: "whether Congress has declared a policy with respect to the subject; whether Congress has set up a standard for the President's action; [and] whether Congress has required any finding by the President in the exercise of the authority conferred."\(^{229}\) The court found that the Act was clearly an unconstitutional delegation of the legislative power.\(^{230}\) In writing the Act, Congress had not prescribed the duties or responsibilities of the President.\(^{231}\) He was free to spend or

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\(^{223}\) See 276 U.S. 394, 410-11 (1928).

\(^{224}\) See Nat'l Cable Ass'n v. United States, 415 U.S. 336, 342 (1974). In this case, the Court found it unnecessary to use the delegation doctrine per se; however, it used the principles of the doctrine to read the challenged statutory language narrowly and avoid a constitutional problem. "[I]t would be a sharp break with our traditions to conclude the Congress has bestowed on a federal agency the taxing power." Id. at 341.

\(^{225}\) 85 F.2d 208 (D.C. Cir. 1936). But see Cincinnati Soap., 301 U.S. 308. In Cincinnati Soap, the Court invalidated a delegation challenge of executive authority over spending. The act in question allowed the entire proceeds to go to the Philippines "with no direction as to the expenditure thereof." Id. at 312. In *Gratiot v. United States*, 45 U.S. 80 (1846), the Court stated that "[a] specific appropriation could not be diverted from its object, but general appropriations necessarily implied an application according to the discretion of the department." Id. at 114 (emphasis added).

\(^{226}\) Tugwell, 85 F.2d at 218 (stating "there is a clearly unconstitutional delegation of legislative power").


\(^{228}\) Tugwell, 85 F.2d at 216 (citation omitted).

\(^{229}\) Id. at 217.

\(^{230}\) Id. at 218.

\(^{231}\) See id.
not spend funds as he saw fit. Furthermore, the court went to great length to show that it was the President, not the legislature, who was given the power to set up government agencies, prescribe regulations and rules of conduct, and to decide "where and when and how, if at all, this enormous sum of money is to be expended for 'housing.'"\textsuperscript{232}

The Tugwell case, although dealing with the delegation of the spending power, is weak precedent at best because it was decided only one year after the Supreme Court used the nondelegation doctrine to invalidate congressional delegations and, of course, it is only a circuit court opinion. Coupled with the Supreme Court's holding in Cincinnati Soap a year after Tugwell, Tugwell makes it no easier to apply the doctrine to compel Congress to set meaningful budgetary limitations for the executive and reassert its spending prerogatives. Therefore, some change to the doctrine is necessary to reinvigorate it so that the doctrine can limit congressional budgetary delegations while at the same time maintain the flexibility needed to deal with unforeseen and complex problems in the modern world.

Before any proposed test can be evaluated as being an improvement to the existing doctrine, there must be some overriding purposes that the doctrine attempts to reinforce. The nondelegation doctrine's purposes are generally the three principles forwarded by Justice Rehnquist in his Industrial Union concurring opinion coupled with a few others. Categorized, these standards should be used to judge any proposed reinvigorated nondelegation doctrine. First and foremost, any reinvigorated doctrine must reinforce political accountability.\textsuperscript{233} Second, a reinvigorated doctrine must provide guidance for executive/agency action.\textsuperscript{234} Third, a new doctrine must provide adequate direction for courts charged with reviewing exercises of congressional delegation to assess congressional delegations against "ascertainable standards."\textsuperscript{235} In addition to these purposes of the nondelegation doctrine, any proposed doctrine must also act as a safeguard of liberty and advance the rule of law.\textsuperscript{236} Last, but certainly not least, any doctrine must allow for continued survival of the modern administrative state at some level and, in the domestic security arena, allow for protection of state secrets and defense and law enforcement activities.

\textsuperscript{232} Id. at 219.


\textsuperscript{234} See id.

\textsuperscript{235} See id. at 686.

A. Intelligible Principles with a Twist

1. The Schoenbrod Doctrine

The rise of the administrative state has seen a resurgence of scholarly support for a renewed nondelegation doctrine. One of the most vehement proponents of the nondelegation doctrine is Professor David Schoenbrod. He supports a doctrine that would prohibit delegation of legislative powers granted in Article I of the Constitution. According to Schoenbrod, the legislative power is the power to make rules of private conduct. Schoenbrod implies that the current "intelligible principle" test allows congressional delegations by differences of degree. In contrast, his test is one that tests delegations as differences of kind so that permissive congressional delegation would occur when Congress enacts laws with a clear understanding of their meaning. Ergo, unconstitutional delegation would occur if Congress enacted statutes that affect private conduct with no clear understanding or customary meaning. For all of Schoenbrod's arguments, his theory amounts to little more than a slightly different rule with slightly stricter enforcement of the "intelligible principle" standard; as such, Schoenbrod's doctrine, much like any proposed reassertion of the con-


238 See DAVID Schoenbrod, POWER WITHOUT RESPONSIBILITY (1993).

239 See id. at 181.

240 See id.

241 See id.

242 See id. at 181-82. Schoenbrod describes his test in action when he writes that [a] statutory law will always require interpretation. The need for interpretation comes not just from the ambiguity of language but also from the need to read statutes in context. As noted in Chapter 1, a statute that outlawed "unreasonable" pollution would state a law in a society with a clear understanding of what constituted unreasonable pollution, because that shared connotation would provide a basis for interpretation. While statutory laws that require interpretation do not delegate legislative power, Congress would delegate legislative power if it enacted language in the form of a law, but which in fact left an agency or the courts to decide what conduct was prohibited. For example, a statute that prohibited "unreasonable" pollution when that term had no customary meaning would, functionally, require the courts to develop the law case by case.

Id. at 182.

243 Id. at 182.
ventional nondelegation doctrine, has been challenged as too radical and impossible to implement and still maintain the administrative state.\textsuperscript{244} 

Furthermore, the Court recently declined to adopt Schoenbrod’s principles when it refused to utilize its best chance to reinvigorate the nondelegation doctrine in decades in \textit{Clinton v. City of New York}.\textsuperscript{245} Debates raged throughout much of the 1990s over the deficit and pork spending. One common solution to these problems was thought to be to grant the President a line item veto, which the Republican Congress did by passing the Line Item Veto Act of 1996 ("LIVA").\textsuperscript{246} Attacked from the start, LIVA was challenged by scholars and lawyers alike as an unconstitutional delegation of power to the executive.\textsuperscript{247} However, when the Supreme Court decision of \textit{Clinton v. City of New York} came out, LIVA was overturned on Presentment Clause reasoning.\textsuperscript{248}

LIVA allowed the President to cancel three types of provisions: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."\textsuperscript{249} On August 11, 1997, President Clinton used the new provisions of LIVA to cancel one item of direct spending affecting a New York City Health Corporation and a limited tax benefit affect-


\textsuperscript{245} 524 U.S. 417 (1998).


\textsuperscript{247} See Heufner, \textit{supra} note 237, at 377.

\textsuperscript{248} 524 U.S. at 423-25. The Supreme Court declined to address the delegation issues of the Act; however, the district court used the nondelegation doctrine to overturn the Act at trial. The district court started with the presumption that the Act was constitutional and then found that the Act violated the Presentment Clause and the doctrine of separation of powers. \textit{See City of New York v. Clinton}, 985 F. Supp. 168, 171 (D.D.C.), \textit{aff’d}, 524 U.S. 417 (1998). Specifically, the district court held that

\[ \text{[t]he Line Item Veto Act impermissibly crosses the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation. The Act enables the President, in his discretion, to pick and choose among portions of an enacted law to determine which ones will remain valid. . . . Any subsequent amendment of a statute falls under Congress’ responsibility to legislate. The President cannot take this duty upon himself; nor can Congress relinquish that power to the Executive Branch.} \]

\textit{Id.} at 181.

ing a group of potato growers in Idaho. These two groups filed separate suits challenging the cancellations. The cases were consolidated into one action and the Supreme Court examined the case under the expedited appeal provisions of LIVA.

Since the Court struck down LIVA on Presentment Clause grounds, the Court declined to address whether the Act was an unconstitutional delegation of power. Considering that the Court declined to utilize the doctrine in City of New York, and that only one of the present justices currently subscribes to a powerful nondelegation doctrine, the Court will probably not begin to use the existing “intelligible principle” test or Schoenbrod’s theories to strike down congressional delegations of power. At least, it is clear that, as presently defined, the nondelegation doctrine has failed to fulfill any of the three purposes espoused by Justice Rehnquist in his Industrial Union concurring opinion.

2. An Agency Formatted Intelligible Principle?

Another new approach to the conventional intelligible principle test was advanced by the Circuit Court of the District of Columbia in American Trucking Associations, Inc. v. EPA. The court found that the statute violated the nondelegation doctrine. In reviewing the challenged statute, the court first found that the statute did not contain an intelligible principle. Then, instead of striking down the statute as unconstitutional, the court looked at the agency’s regulation to see if the agency was able to “extract a determinate standard on its own”

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250 City of New York, 524 U.S. at 423-25.
251 Id. at 425. The constitutionality of LIVA had previously been challenged by six members of Congress, who had voted against the Act; however, the Supreme Court remanded the case to the district court with orders to dismiss because the members of Congress lacked standing due to a lack of sufficient injury. See Raines v. Byrd, 521 U.S. 811, 830 (1997).
253 Id. at 448.
255 Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). As discussed supra, Chief Justice Rehnquist’s three functions of the nondelegation doctrine are (1) to ensure that important policy decisions are made by Congress, (2) to ensure that Congress provides the recipient of delegated authority an intelligible principle to guide the exercise of delegated power, and (3) to ensure that courts charged with reviewing congressional delegations will be able to review the exercise of delegated power against ascertainable standards. Id. Clearly, the long list of broad congressional delegations to the executive show that the current doctrine has failed to fulfill any of Justice Rehnquist’s functions.
257 Id. at 1033, 1038.
258 Id. at 1034.
before striking down the agency rule and not the law. In addition to being overruled by the Supreme Court, this method of assessing delegation cases is problematic for a renewed nondelegation doctrine. First, the decision does not place the power to make laws back in the hands of Congress and increase responsibility in government. Instead of striking down the law, the court allowed the legislation to stand and merely struck down the rule leaving the executive agency in the position to interpret the ambiguous language. Second, rules promulgated under agency direction are subject to the Administrative Procedure Act's high standards of judicial deference and would limit opportunities for judicial redress. Last, the method does not help assess conflicts when Congress delegates legislative power – such as the power of the purse – directly to the President instead of one of his agencies.

B. State Nondelegation Doctrines

The Constitution guarantees that all fifty states will have a republican form of government although the exact form of republican government can and does differ. Each state, in turn, has their own constitutional provisions governing the separation of powers on a state level. Unlike the federal government, most states impose substantially more limitations on legislative delegation. Therefore, an examination of state decisions applying the nondelegation doctrine may provide a helpful test to determine the boundaries for a new federal doctrine.

Increased enforcement of the nondelegation doctrine in the states is due in large part to express separation of powers clauses incorporated into state constitutions. The principles of separation of powers are expressed in three basic approaches. A majority, thirty-five states, have strict separation of power

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259 Id. at 1038. The reasoning of this case is somewhat in conflict with the holding of AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999). In AT&T Corp., while not assessing the rule under the nondelegation doctrine, the Court let stand the questioned statute and ruled the agency interpretation and subsequent rule promulgation unreasonable under the two-part Chevron test. Id. at 397; see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that the proper test for assessing agency interpretations of legislation was to first determine if a provision is ambiguous and then, if so, to ascertain if the agency's interpretation was reasonable).


261 U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . . ").


263 Id. at 1190. Rossi also attributes increased enforcement of the nondelegation doctrine to lingering antifederalist feelings. Id.

264 Id.
clauses in their constitutions. The minority of states have only a general separation of powers clause or none at all.

While strict separation of power clauses in state constitutions may provide a reason for increased influence of the nondelegation doctrine in state courts, there is no real connection between the enforcement of the doctrine and the type of separation of powers clause in the state constitution. Very few states follow a weak delegation model that upholds legislative delegations so long as there are agency procedural safeguards to prevent unrestrained exercise of delegated power. Conversely, most states either follow a moderate or strong nondelegation doctrine. Many of the moderate states, like the federal "intelligible principle" test, allow delegations so long as there is some combination of general legislative policy and/or procedural safeguards to limit the scope of the delegation. Strong states on the other hand usually require some level of specific standards to guide the delegate.

Despite the fact that state courts are more inclined than federal courts to overturn legislation as an overbroad delegation of the legislative power, the state doctrines do not supply a realistic test for the federal courts to adopt because states that use a moderate approach to delegation challenges usually apply some variation of the failed "intelligible principle" test utilized by the federal government. Conversely, the strong state nondelegation doctrines lack the flexibility required to maintain a large and diverse federal government.

C. Delegation Canons

The decline of the nondelegation doctrine since its zenith in the 1930s has not reduced the doctrine to a mere nullity. Rather, the doctrine has been and is still used in a very diminished capacity as a judicial canon. By using the doctrine as a canon, the Court gives challenged statutes a narrow construction to avoid constitutional conflicts.

265 Id. at 1191; see, e.g., CAL. CONST. art. III, § 3; W. VA. CONST. art. V, § 1.
266 Rossi, supra note 262, at 1191 (noting five states have general clauses).
267 Id. (noting ten states have no separation of powers clauses).
268 Id. ("The approaches of the state courts vary, even where constitutional texts are sometimes similar or identical.").
269 Id. at 1191-92 (six states follow such an approach).
270 Id. at 1192-1201.
271 Id. at 1201; see, e.g., Dep’t of Transp. v. City of Atlanta, 398 S.E.2d 567, 571-72 (Ga. 1990) (upholding “public interest” as a sufficient standard for constitutional delegation).
272 Rossi, supra note 262, at 1193-98.
prohibition of congressional delegations, the doctrine, when used as a canon, is more aptly viewed as a broad category of judicially imposed limitations based on specific examples. Some of these guiding judicial principles are that agencies are not permitted to interpret statutes so that they would raise constitutional concerns or in such a way as to preempt state law. In the realm of criminal law, criminal statutes are construed in favor of the criminal defendant in accordance with the rule of lenity. Other principles limiting interpretation of congressional delegations include a prohibition on agencies from applying statutes outside the territorial borders of the United States or unfavorably to Native Americans. Finally, there are a few public policy based canons invoking nondelegation principles including the narrow construction of exemptions from taxation.

In other cases, courts use nondelegation canons to limit congressional delegations. An example case from the Fifth Circuit shows this type of use of the nondelegation doctrine as a general canon. In the early 1980s the Interstate Commerce Commission modified the Motor Carrier Fuel Surcharge Program to require carriers to reimburse owner-operators for their fuel costs. When challenged, the Commission defended the rule based upon a broad reading of the Interstate Commerce Act ("Act") while ignoring other provisions of the Act. The Court examined the agency interpretation and found that, although Congress had delegated considerable powers to enforce the provisions of the Act, the Act was not a general grant of authority to regulate all motor carrier

of the statute that avoids this kind of open-ended grant should certainly be favored."); FUNK ET AL., supra note 75, at 481. Another work advocates using canons somewhat differently to reformulate the intelligible principles doctrine. The forwarded canons are: (1) intelligible principles should be present in the language of the statute itself; (2) if possible, the court should interpret statutory language in a way that renders the statute constitutional; (3) Congress should establish a baseline to measure agency action; and (4) standards should be as reasonably precise as the subject matter requires or permits. See Jeffery A. Wertkin, Note, Reintroducing Compromise to the Nondelegation Doctrine, 90 GEO. L.J. 1055, 1081 (2002). The work also addresses potential problems with this method. Id. at 1085.

275 See generally Sunstein, supra note 236.
276 Id. at 331.
277 Id. at 332.
278 Id. at 333.
279 Id. at 334.
280 See Cent. Forwarding, Inc. v. ICC, 698 F.2d 1266, 1269 (5th Cir. 1983).
282 See Cent. Forwarding, 698 F.2d at 1274. Agencies frequently emphasize broad readings of rule enabling acts while ignoring the detailed provisions. See AMAN, JR. & MAYTON, supra note 273, at 28.
affairs. To read the Act in accord with the agency interpretation "would make superfluous much of the rest of the . . . Act, with its detailed guidelines and delegations of authority."284

The use of the nondelegation doctrine as a canon in this case shows that the nondelegation canon does not place a limit on permissible congressional delegation; rather, the nondelegation canon would require that, upon challenge, a reviewing court would read the challenged legislation in whatever way necessary to avoid running afoul of the nondelegation doctrine.

This use of the nondelegation "canon" is a second best option if the only other option is the current "intelligible principle" test. First, the nondelegation "canons" test is scattered and forwards no sustainable overarching analysis to employ. Instead, the "canons" are at best very limited constraints on congressional delegations in specific areas of the law. Second, the use of the doctrine as a canon lacks the strength to force Congress to make meaningful policy choices, thereby increasing political accountability and protecting civil liberties. Finally, the "canon" test approach is limited by merely being a discretionary canon that judges can choose to use or not to use and therefore does not adequately protect the power of the purse.285

D. A New Standard

It has been argued that all levels of congressional delegation should be measured against the same standard. In accord with the post New Deal delegation decisions, courts have applied the same "intelligible principle" test to delegations of congressional spending power. However, a heightened standard for cases involving the delegation of Congress's most important check on executive power – control over the nation's purse strings – is necessary to ensure the democratic framework on which our country was founded. This is based upon the very real maxim that the ability to appropriate is the power to

283 Cent. Forwarding, 698 F.2d at 1277.
284 Id. at 1284.
285 A "canon," or more specifically, a "canon of construction" is defined as "[a] rule used in construing legal instruments, esp[ecially] contracts and statutes." BLACK'S LAW DICTIONARY 198 (7th ed. 1999). A few jurisdictions have codified the canons of construction; however, "most jurisdictions treat the canons as mere customs not having the force of law." Id. As such canons are merely discretionary and judges can pick and choose between competing canons in making their decisions. See generally, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950).
286 See Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-23 (1989) ("We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").
287 See, e.g., Cincinnati Soap Co. v. United States, 301 U.S. 308, 312 (1937).
make laws.\textsuperscript{288} Money is the backbone of any legislation, especially in the national security arena. Whereas legislation in arenas like civil rights can legitimately change laws and the rights and responsibilities of people, national security laws, policy, and programs are driven by the need for money to pay for personnel, equipment, and operations. As seen in historical examples like the close of the Vietnam conflict, when Congress cuts off funding the troops will soon come home.\textsuperscript{289}

If one accepts the proposition that a new nondelegation standard is needed for certain arenas, a working model must be developed for courts to apply. A well-defined constitutional model with tiered approaches is found in the numerous Supreme Court cases dealing with equal protection. As identified by the Court in equal protection cases, there are three levels of review: strict scrutiny, middle-level review, and rational basis review.\textsuperscript{290} Strict scrutiny applies to suspect classifications\textsuperscript{291} or statutes that impair fundamental rights.\textsuperscript{292} When interpreting these types of cases, the government must have a compelling government purpose; in practice, when the Court applies strict scrutiny the statute is almost always found unconstitutional.\textsuperscript{293}

Middle-level review has only been applied in a few cases where the classification is "semi-suspect."\textsuperscript{294} When a classification is categorized as such the Supreme Court has required the means utilized by the government to be substantially related to an important governmental objective.\textsuperscript{295}

The lowest level of classification review is ordinary or "rational basis" review.\textsuperscript{296} The Court applies this standard to all classifications that are not suspect or semi-suspect and statutes that do not infringe on fundamental rights.\textsuperscript{297} As such, to pass constitutional scrutiny, the test only requires that the classifica-

\textsuperscript{288} Cf. Fisher, \textit{supra} note 218, at 228 (citing 6 \textit{THE WRITINGS OF JAMES MADISON} 148 (Galliard Hunt, ed. 1900)) ("They are barred from the latter by a great principle in free government, analogous to that which separate the sword from the purse, or the power of executing from the power of enacting laws.").

\textsuperscript{289} See \textit{id.} at 231.

\textsuperscript{290} See \textit{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW} 529 (2001).

\textsuperscript{291} See, \textit{e.g.}, Hernandez v. Texas, 347 U.S. 475 (1954) (national origin); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (race).


\textsuperscript{293} See \textit{CHEMERINSKY, supra} note 290, at 529.


\textsuperscript{295} See \textit{CHEMERINSKY, supra} note 290, at 529.

\textsuperscript{296} See \textit{id.}

\textsuperscript{297} See \textit{id.} at 529-530.
tion bear a rational relationship to a legitimate governmental interest.\footnote{See, e.g., Pennell v. City of San Jose, 485 U.S. 1 (1988); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); City of New Orleans v. Dukes, 427 U.S. 297 (1976).} When the courts apply this test the government action is almost always upheld as constitutional.\footnote{See CHEMERINSKY, supra note 290, at 530.}

Applying these levels of scrutiny to delegations of congressional power would be relatively easy. First, an ordinary review could be applied to most cases of congressional delegation of legislative power. This test would be very deferential to congressional delegations and would fundamentally be the same "intelligible principle" test that the court currently applies. Together with present delegation canons, this standard would uphold most congressional delegations and serve as adequate protection in necessary areas.\footnote{See supra notes 273-285 and accompanying text.}

A middle-level of review should then be applied to cases where Congress delegates its spending power except for those cases where the spending relates to domestic security. This heightened level of review is necessary to ensure the perpetual separation of the power of the purse from the power to execute the laws in accordance with the framers' constitutional mandates necessary to preserve liberty. The Court should only uphold those cases where the delegation is coupled with a substantially defined intelligible principle, which provides the executive branch with boundaries within which it could permissively operate.

Finally, in cases involving delegation of the "domestic security" power of the purse, the Court should support a test akin to the strict scrutiny test

\footnote{"National Security" is hard to define; however, one of the classical conceptions of national security is "safety from foreign coercion or intimidation." Frederick S. Tipson, National Security and the Role of Law, in NATIONAL SECURITY LAW, supra note 2, at 3, 3; see also THE FEDERALIST No. 23, at 200 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("The circumstances that endanger the safety of nations are infinite."). "Domestic Security" may be even harder to define since it blends all aspects of National Security with the purely domestic missions of law enforcement such as crime prevention. In addition, "Domestic Security" includes protection of critical infrastructure and key resources. See, e.g., 6 U.S.C.A. § 101 (West Supp. 2003). The federal government has defined "Homeland Security" as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." See HOMELAND SECURITY, supra note 221, at 48. "Terrorism" is further defined as an act that is dangerous to human life or potentially destructive of critical infrastructure or key resources; and is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.}

6 U.S.C.A. § 101. "Domestic Security" as used in this paper is defined as safety of the American population and government from coercion from domestic attacks of terrorism designed to coerce or intimidate the government and citizens of the United States.
applied in equal protection cases. This near fatal level of review is necessary because of the dire consequences to liberty that unrestrained delegation of the domestic security power of the purse to the executive might have. Where most delegations will allow for new regulations to be promulgated to "promote the public welfare," the union of the domestic security power of the purse with the executive power can have immediate consequences to civil liberties on a nationwide scale. Therefore, the domestic security power of the purse should remain in the most open and politically divisive branch of government to prevent reactionary restraints on liberty rather in the hands of a single executive.

However, in examining delegations of domestic security spending prerogatives, any test will have to safeguard the inherent secrecy necessary for the common defense. Therefore, this highest level of scrutiny would allow Congress two acceptable avenues of appropriation. First, Congress could write specific statutory language or, second, Congress, for operations and agencies in need of the highest level of security, could saddle executive agencies with strict reporting requirements that would both increase executive accountability and preserve congressional control over the power of the purse.

This standard is also more in line with constitutional provisions separating the war making powers between the branches. The President is given the duty of acting as the Commander-in-Chief impliedly resting on the proposition of standing and fully funded armed services. Congress, on the other hand, is given the authority to declare war and to provide for the Army and Navy. By requiring a higher standard for delegation of the domestic security power of the purse, the courts could set limitations on what Congress is allowed to abdicate and protect American civil liberties.

302 There is nothing more basic to the proper functions of national security and the armed forces than secrecy. Hence the maxim, "Loose lips sink ships." To protect the veil of secrecy, presidents have resisted both public disclosure and disclosure to Congress. See generally SHANE & BRUFF, supra note 56, at 137-84.

303 Such as "$55 million for U.S. Coast Guard Patrol Boat replacement."

304 An example of this type of allowable language would read as follows: "all funds allocated and unspecified in this Act shall be subject to review by the Senate Armed Forces Committee." This type of oversight by Congress is already in place in the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. See SHANE & BRUFF, supra note 56, at 923-24.

305 U.S. CONST. art. II, § 2, cl. 1.

306 Id. art. I, § 8, cl. 11.

307 Id. art. I, § 8, cl. 11-12.

308 Despite the dramatic shift in civil liberties that occurred with the passage of the PATRIOT Act, the administration is seeking more power including a review, and possible change, of the laws regarding the use of military personnel to enforce law enforcement, more commonly known as the posse comitatus. See HOMELAND SECURITY, supra note 221, at 48.
Furthermore, a heightened standard for measuring the constitutionality of spending power delegation cases would allow for continued acceptance of broad delegations of congressional power that would sustain the modern administrative state while at the same time forcing a pressed or unwilling Congress to protect its own power of the purse. The new standard would only apply to cases where, in the language of a statute, Congress grants the President spending authority in the domestic security arena leaving the President "an unlimited authority to determine the policy . . . as he may see fit."\(^{309}\)

The proposed test applied to the controversial House language contained in the draft PATRIOT Act could be assessed as follows. Someday in response to a future catastrophe or attack, the President establishes a new agency within the Department of Homeland Security and, in response to the attack, Congress amends the Homeland Security Act of 2002 to reincorporate the proposed House language that would have allowed the President to shift up to five percent of the appropriated amounts between appropriations. Shock and anger to the future attack precipitates Congress's increasing counter-terrorism funding to unprecedented levels hypothetically doubling the Fiscal Year 2003 funding of $38 billion. This would leave the President the authority to shift almost $4 billion between executive prerogatives.

Similar to the Iran-Contra affair, the President then follows a course of action either expressly or impliedly prohibited by Congress such as implementation of a National ID card.\(^{310}\) By diverting funds under the transfer authority, the President provides funding to implement the National ID card. Since, the establishment of the ID card infringes upon the civil liberties of the American citizenry, the amended Homeland Security Act and the ID program, when challenged, would be declared an unconstitutional delegation of Congress's spending power due to the absence of specific congressional language authorizing this expenditure or language providing for congressional oversight.\(^{311}\)

VII. CONCLUSION

The history of our country is replete with conflict – both on the fields of war and in our courts. All too frequently war, or a national emergency, causes the fight at the front to merge with the fight in front of the bench. Time has seen the steady erosion of the delicately wrought separation of powers crafted by the framers and the encroachment of guaranteed civil liberties by an ever-expanding federal government. This steady march has progressed to the point where, in the name of national security and expediency, the Congress, the people's represen-


\(^{310}\) The establishment of a National ID card was expressly prohibited in the Homeland Security Act.

\(^{311}\) Though rough, this example serves merely as a skeleton of constitutional analysis. Further boundaries and actual application would be left to later authors.
tatives, have seriously considered an express delegation to the President of the United States their most dearly won and effective check on executive tyranny—a the spending power. But for the fighting of a few resolute senators, such as Robert C. Byrd, the President would have been given the discretion to transfer funds between agencies, departments and programs at will. Truly, as Justice Cardozo prophetically said so many years ago, "The delegated power of legislation which [would have] found expression in this code [the proposed Homeland Security Act] is not canalized within banks that keep it from overflowing. It is unconfined and vagrant."³¹²

The Senate's changes deleted the offending provisions in the House Homeland Security bill; however, the next time, our Constitution may not be so lucky. Someday, probably not today, and probably not tomorrow, America will be attacked again. Again, a President will denounce the attacks and ask for measures to combat the next Hitler, Saddam or Bin Laden. And once again, in a moving display of unilateral patriotism, our Congress will cede more discretion, more power to the executive branch at the expense of our civil liberties and/or our Constitution. Considering the real threats to domestic civil liberties and constitutional balance posed by unlimited presidential spending to combat transnational threats, some sort of reinvigoration of the nondelegation doctrine is not too much to ask. If nothing else, history has taught us that national emergencies are when liberty needs to be most vigilantly defended. For as Benjamin Franklin warned, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."³¹³ When the choice is made, America should stand prepared to choose liberty.

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