

Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials

L. Anthony Sutin *

I. Introduction

Very few public servants would say that they are in their job “for the money.” Nevertheless, for the vast majority, the continued receipt of a paycheck is understandably vital to their support and that of their families. Regular receipt of salary for a public official safeguards not only sustenance but also the independence needed to perform one’s assigned duties in the public interest. Alexander Hamilton observed that giving the legislature discretionary power over a President’s salary “could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.”¹ An opinion of the Attorney General recognizes the same reality in a more understated manner that “a person who is not paid cannot be expected to perform his work zealously, and that he may be subjected to a host of corrupting influences.”²

A small number of public officials, including the President and federal judges, enjoy explicit constitutional protection of their salary from diminution while in office. But in a variety of contexts, federal, state and local government officials who lack such explicit constitutional salary protection have faced statutory and other measures that have suspended or even entirely eliminated their paychecks. No branch of government has been immune from these provisions. In some cases, the clear impetus was an effort to remove the affected official from government service. In others, the motivation appears to be “nothing personal,” but rather to enforce some version of accountability for job performance—be it the timely passage of an annual budget or the prompt disposition of pending judicial business.

How secure against reduction by famine and temptation by largesse, financial peril through accountability, or termination through appropriations provision are the vast legions of government officials who lack the explicit constitutional protections against salary diminution? This article considers from a constitutional perspective the various statutory and other measures, both proposed and enacted, to suspend the pay of public officials in the executive, legislative and judicial branches for some reason arguably related to a principle of public policy. This discussion does not extend to the much more prevalent, but less constitutionally problematic, intrabranched suspension of a government employee from a job without pay as a disciplinary measure for an act of misconduct.³

* Assistant Professor of Law, Appalachian School of Law, J.D., Harvard Law School, 1984.

1. THE FEDERALIST NO. 73, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton did acknowledge that “[t]here are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man’s support is a power over his will.” *Id.*

2. *Recess Appointments*, 41 Op. Att’y Gen. 463, 480 (1960).

3. See, e.g., 29 CFR § 1400.735-60 (1999) (Department of Labor regulations on disciplinary actions), or in certain agencies whenever “necessary in the interest of national security.” 5 U.S.C. §§ 7531-32 (1994). By

Such a disciplinary suspension may implicate constitutional due process rights, but because the disciplinary measure is imposed within a branch of government, separation of powers concerns are not raised. Nor do I address the constitutional implications of the "government shutdown," in which a great many government officials simultaneously lose their pay for a period of time as a result of the failure to adopt a timely budget. In contrast, the measures here represent affirmative acts to deprive a government official of remuneration otherwise due.⁴

Part II examines measures by the Congress and state legislatures to halt the pay of executive branch officials. Some varieties of these "no pay" measures easily violate express constitutional restrictions or basic principles of separation of powers. A prime example is a provision barring appropriated funds from being used to pay the salary of a named or readily identifiable executive branch official when the purpose of such legislation is to remove that person from office. Such a measure likely constitutes a bill of attainder and, at a minimum, represents an unconstitutional intrusion on the President's exclusive power of removal. Other categories of statutes that "defund" a specified position may violate separation of powers principles if they are used to exercise a de facto removal power, but may pass muster if they instead are a bona fide legislative undertaking to reorganize an executive function. In many cases, the legislature may have alternative tools to address the perceived problem that present fewer constitutional complications.

Parts III and IV look at very similar laws affecting the legislative and judicial branches, respectively. The "no budget, no pay" and "no ruling, no pay" laws differ from the executive branch measures discussed in Part I in two principal ways. First, the laws are directed at the entire legislature or judiciary, rather than targeted at a particular official. Second, the laws contain by their terms a trigger for the resumption of pay. For the legislature, the trigger is passing a budget. For the judiciary, the trigger is making an overdue ruling. While the imposition of these restrictions on pay is not tantamount to removal of the affected official, these measures do apply some measure of coercion to the constitutionally assigned functions performed by the affected branch. It is the thesis of this article that the "no ruling, no pay" laws are an unconstitutional erosion of judicial independence, but that the "no budget, no pay" laws are permissible when viewed in the context of the very different decision-making processes employed in the legislative branch. But regardless of their constitutionality, the use of pay suspension is a blunt object to achieve policy objectives that often can be pursued in a more direct manner or one that is less intrusive to the operations of the affected branch of government.

The article draws upon both federal and state sources. Separation of powers principles applicable to the structure of the national government and the interpretive approaches followed by the United States Supreme Court do not necessarily apply to state governments. For purposes of the issues examined here, the similarities far outweigh the differences, and the salient differences are noted and appraised where they appear.

II. Legislative Measures Affecting the Pay of Specific Executive Branch Officials

The Constitution provides for the salary of the President of the United States. Beyond the President, the remainder of the employees of the executive branch depend on Congress for appropriations to pay their salaries. Professor Charles Black wondered how far this congressional power might extend: "To what state could Congress, without vio-

contrast, under the measures and proposals examined here, the government official continues to serve in his or her position but without pay.

4. See generally Alan L. Feld, *Shutting Down the Government*, 69 B.U.L. REV. 971 (1989).

lating the Constitution reduce the President? I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail; that is where one appropriations bill could put him, at the beginning of a new term."⁵

Legislative efforts to halt the pay of executive branch officials are not uncommon. Their most familiar form is a restriction on the use of appropriated funds to pay the salary of an identified position or, in one notorious instance, three specifically named officials. The purpose of such efforts can either be to remove the official from office, or to prevent that official from even being appointed in the first place, or more innocuously to indirectly accomplish a reorganization of an executive branch agency.

Congress has a variety of tools and powers other than a suspension or elimination of pay that can accomplish much the same end. Acting under the Necessary and Proper Clause, the legislative branch can abolish entirely a nonconstitutional position in the executive branch. It can reduce the salary attached to a position and determine the qualifications for appointment. As the Supreme Court noted in 1850, "It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws."⁶ Congress too can legislate mandatory retirement rules that apply to incumbents,⁷ and can impeach and remove from office any civil officer of the United States.⁸ Acting more obliquely, Congress can pass resolutions urging the President to remove an executive official, or precipitate removal or resignation through the discomfort of oversight and investigations.⁹

Nevertheless, in recent history the appropriations power, with its incantation of no funds may be used for purpose/object XYZ, is the frequently chosen path.¹⁰ The reasons for such a strategy are familiar to political scientists. Unlike the more unpredictable paths and timelines of authorizing legislation and other proceedings, appropriations bills make their way through both houses and to the President on a more or less annual basis, except for the still-rare government shutdowns. Appropriations bills cover wide-ranging subject matters and, depending on the predilections of the particular subcommittee and committee chairs, often are more inclusive of the input and concerns of many non-committee members than are other bills.

5. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROB. 87, 89 (1976).

6. *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416-17 (1850). After all, offices in the constitutional sense "are only those established or recognized by the Constitution or by act of Congress." *Inventions International Exposition*, 18 Op. Att'y Gen. 171, 171 (1985). There is no contractual right to the continued occupancy of a position abolished by Congress. See *Lurk v. United States*, 370 U.S. 530, 534 (1962); Richard A. Cirillo, Comment, *Abolition of Federal Offices as an Infringement on the President's Power to Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines*, 42 FORDHAM L. REV. 562 (1974) (suggesting constitutional limitations on the abolition of an office when used a guise to remove a particular official).

7. Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Separation of Powers between the President and Congress* at 54 (May 7, 1996) (visited Nov. 10, 1999) <<http://www.usdoj.gov/olc>>.

8. U.S. CONST. art. I, § 2, cl. 5; art. II, § 4 (impeach); art. I, § 3, cls. 5, 6; art. II, § 4 (remove).

9. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS & THE PRESIDENT 84 (4th ed. 1997). It has been estimated that congressional pressure is responsible for more firings and reassignments of executive branch personnel than presidential actions. *Id.*, citing HAROLD SEIDMAN, POLITICS, POSITION AND POWER 54 (1980).

10. See J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (1990) ("During the Reagan administration, Congress discovered that it could intimidate the executive branch by uttering again and again the same seven words, 'Provided, that no funds shall be spent . . .')."

The "power of the purse," while indisputably broad, is not infinite.¹¹ A purely textual reading of the Appropriations Clause could support a conclusion that Congress enjoys plenary power to appropriate and refuse to appropriate, subject only to the provisions of the Constitution for the salaries of the President, judges, and members of Congress. But a frequently invoked and pithy maxim, though one that is lean on analytical assistance in actually locating those limits, declares that Congress cannot use its appropriations power indirectly to accomplish an unconstitutional objective.¹² But what are those unconstitutional objectives? Under what circumstances can the appropriations power be used to bar salary payments to an executive branch official? Consider the following three examples.

A. Illustration 1: The *Lovett* Case

In 1943, Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett were employed respectively as division chief in the Federal Communications Commission, assistant news editor in the FCC, and executive assistant to the Governor of the Virgin Islands. None of these positions required confirmation by the Senate.¹³ The tranquility of their public service was interrupted by the passage of the Deficiency Appropriation Act of 1943. Section 304 of the Act directed that no salary or compensation be paid Messrs. Watson, Dodd, and Lovett out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate.¹⁴

Chairman Martin Dies of the House Committee on Un-American Activities had identified the three federal employees as among a group of "irresponsible, unrepresentative, crackpot radical bureaucrats" and affiliates of "Communist front organizations."¹⁵ They were the subjects of ensuing secret investigative hearings conducted by a special

11. The appropriations power derives from Article I, section 8 of the Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). See generally Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

12. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.") (citation omitted); *Fairbank v. United States*, 181 U.S. 283, 294 (1901). See also Dellinger Memorandum, *supra* n. 8 at 16 ("Similarly, while Congress has near-plenary authority in deciding to grant, limit or withhold appropriations, the Department of Justice has long contended that the appropriations power may not be used to circumvent the restrictions the Congress places on the modes of legislative action," citing *Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att'y Gen. 230 (1955)).

13. *Lovett v. United States*, 66 F. Supp. 142, 143 (Ct. Cl. 1945).

14. Urgent Deficiency Appropriation Act of 1943 § 304, Act of July 12, 1943, 57 Stat. 431, 450. The full text of the provision reads

No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the consent of the Senate: *Provided*, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or any refund or reimbursement, which have accrued prior to November 15, 1943; *Provided further*, that this section shall not operate to deprive any person of payment for services performed as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

Id.

15. *United States v. Lovett*, 328 U.S. 303, 308-09 (1946).

subcommittee of the Appropriations Committee, which yielded purported "indictments."¹⁶

The report of the special subcommittee stated, as to Mr. Lovett, its "conviction that this official is unfit to hold a position of trust with this Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States."¹⁷ Similar conclusions were expressed as to Messrs. Watson and Dodd. The Committee on Appropriations approved the findings of the special subcommittee and offered what became Section 304 as an amendment to the Urgent Deficiency Appropriation Bill.¹⁸

The debate in the House of Representatives demonstrated that both the proponents and opponents of Section 304 viewed its intent as the removal of the three individuals from government. Congressman Dies, chief advocate for adoption of Section 304, urged the pursuit of "immediate and vigorous steps to eliminate these people from public office."¹⁹ Congressman Coffee, an opponent, criticized the measure as one to "impeach men by methods other than impeachment."²⁰ Their views on the merits of the removal of these officials paralleled their views on the appropriate reaches of the appropriations power. Congressman Dirksen contended that "[t]he real issue is whether or not this body, that is charged under the Constitution as the keeper of the purse, without whose action not one dollar can go out of the Federal Treasury, can, under that authority, spell out that power to determine who shall be on the pay roll and who shall not."²¹

The Senate rejected conference reports containing Section 304 on four different occasions, acquiescing only on the fifth iteration. Senator Barkley stated, "It is unfortunate that we must vote with a pistol held at our heads, because tomorrow at midnight the fiscal year ends and a new one begins."²² The provision ultimately passed and President Roosevelt signed the bill in June of 1943 "to avoid delaying our conduct of the war" because Section 304 was a rider on a larger and more critical bill providing emergency appropriations. The President explained that he regarded Section 304 as "not only unwise and discriminatory, but unconstitutional" as a bill of attainder.²³

B. Illustration 2: "No Confirmation, No Pay" Laws

The power to make recess appointments with a tenure extending until the expiration of the next congressional session is given to the president by the terms of Article II of the United States Constitution.²⁴ But since 1863, reacting to perceptions that Presidents were utilizing constitutional recess appointment authority to sidestep the Senate's confirmation role, a series of laws that bar the payment of funds for the salary of anyone appointed during a Senate recess to fill a preexisting vacancy "until such appointee shall have been confirmed by the Senate."²⁵

16. *Id.* at 309.

17. H.R. Rep. No. 448, at 12 (1943).

18. The House approved an exception to House Rule XXI to permit this sort of legislation to be affixed to an appropriations bill. Petitioner's Brief at 14.

19. *Lovett*, 328 U.S. at 309.

20. These and other excerpts from the debate are reproduced in LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 514-16 (3d ed. 1999).

21. *Id.*

22. 89 CONG. REC. 6693 (1943).

23. *Lovett*, 328 U.S. at 313.

24. "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 3, cl. 3.

25. Act of Feb. 9, 1863, 12 Stat. 646 (making appropriations for the support of the army).

The apparent intent of this legislation was to deter recess appointments. Senator Fessenden stated, "It may not be in our power to prevent the [recess] appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments."²⁶ Attorney General Charles Devens observed that the statute "concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous."²⁷ Contrary to Senator Fessenden's prognostication, recess appointments did not disappear. One such appointee, Federal Trade Commissioner George Rublee, was nominated in March 1915 and served beyond a Senate vote of disapproval until the expiration of his recess commission at the congressional adjournment in September 1916. Mr. Rublee served without pay until Congress passed a special appropriation for the purpose of compensating him.²⁸

Congress also has passed legislation to cover expressly the situation of a recess appointee subsequently disapproved by the Senate. Typical language states:

No part of any appropriation for the current fiscal year contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.²⁹

C. Illustration No. 3: "No Logging, No Pay"

A failed congressional enactment portrayed by its opponents as an attempted "legislative firing" provides another example of the attempted use of the appropriations power to cut off the salary of an executive branch official. Much controversy in the 104th Congress surrounded timber sales and environmental restrictions applicable to logging on public lands. Several Senators singled out one official – James Lyons, Undersecretary of the Department of Agriculture for Natural Resources and Environment – for particular criticism.³⁰ Senator Stevens of Alaska offered an amendment to the Fiscal Year 1996 Agriculture appropriations bill that sought to shift funding for Mr. Lyons' position to the Secretary of Agriculture and also bump responsibility for administering the Forest Service from the Under Secretary to the Secretary.³¹

26. Cong. Globe, 37th Cong., 3d Sess. 565 (1863), quoted in FISHER, *supra* n.10 at 39. The 1863 act was liberalized in 1940 to authorize exceptions, *inter alia*, for vacancies that arise within 30 days of the end of a Senate session. Act of July 11, 1940, Pub. L. No. 76-738, 54 Stat. 751 (1940) (codified as amended at 5 U.S.C. § 5503 (1994)).

27. *Appointments During Recess of the Senate*, 16 Op. Att'y. Gen. 522, 531 (1880).

28. The special appropriation, Act of Sept. 8, 1916, Pub. L. No. 64-272, 39 Stat. 801 (making deficiency appropriations), compensated Mr. Rublee until the date of the Senate vote of disapproval. See FISHER, *supra* n. 10 at 40. In a historical note of interest, Mr. Rublee's law firm (then Covington, Burling & Rublee) went on to serve as counsel for the government employees before the Supreme Court in *United States v. Lovett*, 328 U.S. 303 (1943).

29. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, sec. 610, Pub. L. No. 105-277, 112 Stat. 2681; Treasury, Postal Service, and General Government Appropriations Act of 1990, sec. 606, Pub.L. No. 101-136, 103 Stat. 783, 817 (Nov. 3, 1989); see also Treasury, Postal Service and General Government Appropriations Act of 1979, sec. 604, Pub. L. No. 95-429, 92 Stat. 1001, 1015-1016 (Oct. 10 1978).

30. The Under Secretary is responsible for management of the Forest Service and the Natural Resources Conservation Service. USDA Headquarters Organization Chart, U.S. Dept. of Agriculture website, (visited Sept. 6, 1999) <<http://www.usda.gov/agencies/nre.htm>>. For detailed background on the underlying policy controversy, see generally Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and its Legacy*, 27 ENVTL. L. 1035 (1997).

31. Amendment No. 2696 stated: "For necessary salaries and expenses of the Office of the Under Secretary for Natural Resources and Environment to administer the laws enacted by Congress for the Natural

Senator Stevens assured his colleagues that the dispute with Undersecretary Lyons "has nothing to do with policy," but rather "with the decision of one person of the executive branch not to follow the laws as enacted by Congress and adopted by the President."³² He described in detail several matters on which he believed that Undersecretary Lyons acted contrary to statutory requirements, Congressional directives, or informal agreements. Senator Stevens also identified two precedents for the action that he proposed.³³

Senator Gorton echoed these comments:

We differ with the entire administration on many matters of policy relating to the forests. But in the case of Mr. Lyons, we do not get truthful answers from him on questions of fact, and we get defiance with respect to the law, whether it has been on the law books for an extended period of time or is brand new, consistently. And there is a vindictive attitude toward any of those who disagree with him and toward almost all of those who are engaged in the profession of forestry in the private sector.³⁴

Senator Brown concurred:

If this Congress turns a blind eye to an administration official who comes, testifies and misleads congressional committees, we forfeit our legitimate and important role of overview and oversight of the executive branch. . . . If we are to complete our responsibilities and do our job, we must insist that the Under Secretary either be frank, straightforward, and honest with Congress or we must get a new Under Secretary.³⁵

Senator Murkowski characterized Lyons as "an individual with whom we simply cannot deal."³⁶

Senator Leahy opposed the amendment:

Frankly, if each time we disagree with the Secretary, or anybody else, if we take our disagreement to the floor and try to eliminate that person's job, I agree that is not the precedent to set. I say that again, as one who, over 21 years here, has disagreed with policies set by those in the administration, both Democrat and Republican. But where we have disagreed I have sought ways to change those policies either by going directly to the administration and, when unsuccessful there, to write new legislation that might change the policy. I cannot recall any time that I sought to eliminate the person's job in doing it because I daresay in virtually any policy that is going on in any administration with 100 of us, there are going to be 40 or 50 different disagree-

Resources Conservation Service, \$677,000; Provided, that none of these funds shall be available to administer laws enacted by Congress for the Forest Service; Provided Further, That \$350,000 shall be made available to the Secretary of Agriculture to administer the laws enacted by Congress for the Forest Service; Provided Further, That notwithstanding Section 245(c) of Public Law 103-354 (7 U.S.C. 6961(c)), the Secretary of Agriculture may not delegate any authority to administer laws enacted by Congress, or funds provided by this Act, for the Forest Service to the Under Secretary for Natural Resources and Environment." 141 CONG. REC. S13814, S13820 (daily ed. Sept. 19, 1995).

32. 141 CONG. REC. 13821.

33. He identified a 1948 appropriations provision that "in effect, cut off the salary for the Commissioner for the Bureau of Reclamation, and a provision of Public Law 101-202 that "in effect, defunded the salary of a gentleman named Dunlop. He held the same position in the Department of Agriculture that my amendment applies to." 141 CONG. REC. at 13820-21; see Pub. L. 101-202, 101 Stat. 1329-323 (1987). Senator Stevens stated that his amendment would not result in "totally defunding the function" performed by Undersecretary Lyons, but Senator Murkowski subsequently stated that he understood "that the proposal . . . would be not to fund the Office of Under Secretary for Natural Resources." *Id.* at 13821, 13827. Nor did any of the amendment's proponents take issue with the characterization of its intent as a "legislative firing." For purposes of this analysis, I treat the effect of the provision as if it fully defunded the position.

34. *Id.* at 13822.

35. *Id.* at 13823, 13826.

36. *Id.* at 13827.

ments. . . . We can vote to change policies. But I do not ever recall voting to support the legislative firing of any member of any administration, Republican or Democrat.³⁷

Senator Bumpers added:

Whether you like Bill Clinton or not, he is the President. Whether you like the people he hired or not, that is his prerogative. Whether you like the policy or not, they are charged under the last election with the responsibility of setting policy. And if you do not like the way they enforce the law, take them to court [. . .] It is very bad, in my opinion, flailing of the Constitution to say, "Mr. Executive Branch, we will decide who you can hire. We will decide who you can keep." We are the legislative branch. We should recognize it and we ought to honor the Constitution and the legislative branch.³⁸

Senator Baucus stated:

Unfortunately, due to a whole host of things that have occurred, some of which have been referred to tonight, I must say the time has come, in my judgment, for Under Secretary Lyons to gracefully tender his resignation. I do not support the amendment before us, only because I think this is just not good policy. It is not good policy for us by legislation to fire somebody in the executive branch. There are better ways of doing this.³⁹

The amendment passed in the Senate, but was not included in the final version of the appropriations law.⁴⁰

D. Can They Do That? The *Lovett* Limit and Bills of Attainder

One compelling limit on the appropriations power leaps from the text of Article I. The prohibitions of bills of attainder, found at Article I, Section 10, Clause 1 ("No state shall . . . pass any Bill of Attainder") and Section 9, Clause 3 ("No Bill of Attainder . . . shall be passed [by Congress]"), bar legislation singling out one or more executive branch employees for legislative punishment. The provisions proscribe any legislative act "no matter what [its] form, that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."⁴¹

To create a bill of attainder, the specification of individuals by the legislature must be coupled with an infliction of punishment. Under the Supreme Court's most recent formulation, the punishment requirement poses three inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."⁴²

37. *Id.* at 13826.

38. *Id.* at 13828.

39. *Id.* at 13829.

40. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-37, 109 Stat. 299.

41. *United States v. Lovett*, 328 U.S. 303, 315 (1946).

42. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 473, 475-76, 478 (1977).

In the earliest bill of attainder cases, the only prohibited punishment was death. But the protections of the clause have long since been extended to include "bills of pains and penalties," which historically consisted of a wide array of punishments, including imprisonment, banishment, and the punitive confiscation of property. More recently, the category "has expanded to include legislative bars to participation by individuals or groups in specific employments or professions."⁴³ The punishment inflicted constitutes a bill of attainder whether its aim is retributive or preventive.⁴⁴

As is well known, the Supreme Court in the *Lovett v. United States*⁴⁵ case did find that Section 304 was a bill of attainder. The three employees sued in the Court of Claims for their salary for services rendered after November 15, 1943. In finding for the claimants, the court concluded that Section 304 closed one of the avenues for disbursement of compensation, but did not extinguish the legal entitlement to compensation itself. The court reasoned that the provision did not operate to terminate their employment and "[t]here is no logic to the proposition that plaintiffs were to serve the Government for nothing."⁴⁶ The prohibition on payment of salaries did not extend to the payment of judgments by the Court of Claims. In three separate opinions, other judges identified constitutional defects with Section 304, including that it was an impermissible bill of attainder.⁴⁷

On certiorari, Justice Black, writing for the Court, rejected the contention that Section 304 was a routine exercise of Congress' appropriations power ("requiring a mere stoppage of disbursing routine, nothing more") subject to unfettered legislative discretion and thus a political question not appropriate for judicial review.⁴⁸ Rather, the Court recognized that the purpose of Section 304, in light of extensive and revealing expositions of legislative intent, was to permanently bar respondents from government service by "forc[ing] the employing agencies to discharge respondents and to bar their being hired by any other governmental agency."⁴⁹ Such a measure, tantamount to a "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." As applied to particular individuals, it is an impermissible bill of attainder.⁵⁰ "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than it had been done by an Act which designated the conduct as criminal."⁵¹

43. *Id.* at 852.

44. See *United States v. Brown*, 381 U.S. 437, 458 (1965).

45. *Lovett v. United States*, 66 F. Supp. 142 (1945), *aff'd*, *United States v. Lovett*, 328 U.S. 303 (1946).

46. *Id.* at 146-148.

47. *Id.* at 148-52 (concurring opinions of Whitaker, J. and Madden, J.).

48. *Lovett v. United States*, 328 U.S. at 313. In the Court of Claims and the Supreme Court, the Department of Justice declined to defend the constitutionality of the statute. Argument in its defense was presented by special counsel appearing for the Congress. *Id.* at 143-44.

49. *Lovett v. United States*, 328 U.S. at 314. Watson and Dodd continued in their respective positions until November 21, 1943. Lovett resigned on March 13, 1944. Brief for the Petitioner at 6-7, *United States v. Lovett*, 328 U.S. 303 (1943).

50. In concurrence, Justice Frankfurter contended that, while odious, Section 304 lacked the essential declaration of guilt and imposition of punishment in the sense appropriate for bills of attainder. The concurrence also observed that the majority's treatment of Section 304 necessarily raised but did not resolve considerations of Congress' removal power and issues of due process. Justice Frankfurter would treat Section 304 as merely preventing "the ordinary disbursement of money to pay respondents' salaries" and concluded that respondents therefore were entitled to recover judgment in the Court of Claims for services rendered. *Lovett v. United States*, 328 U.S. at 330.

51. *Id.* at 316, citing *Cummings v. State of Missouri*, 71 U.S. (4 Wall.) 277, 325, 329 (1866).

Illustration #1 thus exceeds congressional power. *Lovett* provides ready precedent for the principle that Congress may not enact a “no pay” provision directed at a specifically identified or readily identifiable executive branch official to punish him or her for asserted wrongdoing if the punishment rises to the level protected by the bill of attainder prohibition.⁵² As a permutation of this principle, Professor Tribe suggests that a hypothetical cut-off of funding to the General Accounting Office until a particular Comptroller quits could be challenged as a bill of attainder.⁵³

Appropriations provisions restricting the payment of funds to a named individual were rare prior to *Lovett* and apparently nonexistent thereafter. In 1925, the House defeated a version of the War Department Appropriation bill that provided that no part of the appropriation that it contained should be paid to two named Army officers.⁵⁴ In 1940, the Senate defeated an amendment to the Interior Department Appropriation bill barring use of any part of the appropriation to pay the salary of a named official.⁵⁵ In 1942, the Senate eliminated a similar provision from the 1942 Department of Interior Appropriation bill.⁵⁶ The Senate struck from the Independent Offices Appropriation Bill for 1943 a House provision that no part of the appropriation should be used to pay the compensation of the same Mr. Watson later party to the *Lovett* case.⁵⁷ The Emergency Relief Appropriation Act of 1942 was enacted with a provision forbidding the use of appropriated funds to pay the salary of a named individual. A rider repealing this provision was promptly introduced but succumbed to a point of order.⁵⁸

E. Limits on the *Lovett* Limit

The *Lovett* principle will not convert an appropriations provision eliminating pay for an executive branch official into a bill of attainder unless the requirement “punishment” is met. The Minnesota Supreme Court provides an example of this limitation of *Lovett* in *Starkweather v. Blair*.⁵⁹ Starkweather was employed as Assistant Director of Division of Game and Fish. In 1953, the Minnesota legislature passed an appropriations bill that stipulated that “[o]f the amounts appropriated . . . , no part shall be used to pay the salary of an Assistant Director of the Division of Game and Fish.” Starkweather was notified that his position was to be discontinued because of the restriction in the law. In lieu of being laid off, he accepted a demotion.⁶⁰ He challenged the appropriations provision on several grounds, including a contention that it was an impermissible bill of attainder.

The Minnesota court distinguished *Lovett* in several respects. Of most relevance here, the court suggested as a crucial distinction that the *Lovett* proscription both prevented payment of the salary to the named individuals but also permanently barred them from any federal employment:

52. *Lovett* undoubtedly would have reached the same conclusion if section 304 did not list the three allegedly subversive employees by name, assuming they were readily identifiable. In *United States v. Brown*, 381 U.S. 437 (1965), the Supreme Court invalidated as a bill of attainder a law that prohibited the employment of any member of the Communist Party in a labor union. In *United States v. Robel*, 389 U.S. 258 (1967), the Court struck down on solely first amendment grounds a law barring any member of a Communist action organization from employment in a defense facility.

53. 1 Laurence Tribe, *American Constitutional Law* 709 n.40 (3d ed. 2000).

54. 65 CONG. REC. 4744, 5031-36, 5041-43 (1925).

55. 84 CONG. REC. 4308-4346 (1940).

56. H.R. Rep. No. 773, at 10 (1942).

57. Senator Barkley argued, “It seems brutal and arbitrary to undertake to legislate a man out of office by providing that out of the appropriation he shall not be paid a salary.” 88 CONG. REC. 3997 (1943).

58. Petitioner’s Brief at 47-48, *Lovett*.

59. *Starkweather v. Blair*, 71 N.W.2d 869 (Minn. 1955).

60. *Id.* at 872-73.

Unlike the congressional act involved in the Lovett case, which effectively barred the individuals named from holding any position in the federal service, the act now before us does not prevent plaintiff from holding any position whatsoever. ... Conversely, the act applied as well to anyone else who may have been appointed to the position of assistant director while the act continued in existence.⁶¹

The absence of records of debates in the Minnesota legislature prevents one from determining the precise purpose of the elimination of funds for Mr. Starkweather's position. The court concluded, "It is simply an act refusing to appropriate money for the salary of a named office, no matter who holds the office and nothing more."⁶²

Is the "permanent proscription from any opportunity to serve the Government" detected by Justice Black truly a required element to sustain a *Lovett*-based claim against an appropriations provision prohibiting the payment of salary to a named or easily identified official?⁶³ Probably. The cases in which the Supreme Court has struck down employment bars all have been instances in which the legislature has disqualified someone permanently from all or a large part of an avocation.⁶⁴ As the Minnesota court observes, a typical funding restriction may have the effect of removing a person from a particular government position, but the terms of the provision make it neither permanent (it will expire with the exhaustion of the appropriated funds to which it applies) nor wide-ranging (the affected person can immediately assume another government position).⁶⁵

For this reason, the effort to defund the position occupied by Undersecretary Lyons in Illustration #3, although arguably accompanied by sufficient evidence of an intent to punish, would not have risen to the level of a bill of attainder because Mr. Lyons could have taken another government position.⁶⁶

A decision of the United States Court of Appeals for the Eighth Circuit, while not addressing the issue of the permanence of a proscription, reached an arguably contrary result in considering a local legislative action to reduce the salary of a public official. The City of Mountain Home, Arkansas passed a municipal ordinance (Ordinance No.

61. *Id.* at 879. The court also declined to inquire into the legislature's motives in passing the provision: "As long as the legislature does not transcend the limitations placed upon it by the constitution, its motives in passing legislation are not the subject of proper judicial inquiry. This does not mean that the legislature may use a constitutional power to accomplish an unconstitutional result, but, before it can be held that the latter has been done, it must appear that the end result of the act accomplished some purpose proscribed by the constitution." *Id.* at 876. The court noted that, in any event, the record in the case could not support a finding of improper motive. *Id.* The court also rejected claims that the provision violated the ex post facto prohibition, constitutional provisions forbidding the impairment of contracts, equal protection, and that it unconstitutionally forced the removal of a state officer in the executive branch for reasons other than malfeasance or nonfeasance in the performance of duties. *Id.* at 879-84.

62. *Id.* at 879.

63. The Lovett proscription was permanent because it restricted the monies then appropriated and "hereafter" appropriated under any act and to any agency. The government argued that "[t]he disqualification imposed upon respondents by Section 304 extends throughout their lives. . . . It is evident, moreover, that this legislative proscription impairs the ability of respondents to obtain employment even outside the Government, because of the importance which attaches to Congressional action, whatever its basis." Petitioner's Brief at 67-68.

64. *Brown v. United States*, 381 U.S. 437 (1965) (statute prohibited anyone who is or was a member of the Communist Party from being an officer or nonclerical or custodial employee of a labor union); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (statute required attorneys to take oath that they had not aided the Confederacy before being allowed to practice in federal court); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (amendments to state constitution that barred people from teaching as well as other professions because they had aided or sympathized with the Confederacy).

65. *Cf. Selective Service v. Minn. Public Int. Res. Group.*, 468 U.S. 841 at 853 (1984) ("A statute that leaves open perpetually the possibility of [overcoming a legislative restriction] does not fall within the historical meaning of forbidden legislative punishment.").

66. However, difficulties could be anticipated if he were appointed to another position that required Senate confirmation.

534) that reduced the salary for the position of City Attorney to one dollar per year on the eve of an election in which the incumbent, previously appointed to fill an unexpired term, ran unopposed.⁶⁷ The ordinance also contained a new prohibition on the outside practice of law, and was accompanied by a companion ordinance (Ordinance No. 535) that removed the city attorney from the remainder of the term that he was filling. Relying principally on *Lovett*, the Eighth Circuit concluded that the ordinance directing the attorney's removal "falls squarely within [these] definitions of a bill of attainder."⁶⁸ As to the ordinance reducing salary, the court held that "while facially constitutional, [it] factually constitutes improper action taken by the council in an effort to make Crain forfeit his position since, as a practical matter, its intent was to punish him if he accepted the rights and obligations of his elective position."⁶⁹ Viewed in tandem with the simultaneous ordinance removing him from office, the court concluded that Ordinance 534 was an unconstitutional bill of attainder.

This decision notwithstanding, the *Lovett* limitation generally will not apply to an appropriations limitation that merely defunds a position. It is likely to be of limited utility as a shield against measures curtailing the pay of an executive branch official.

F. Limits Beyond *Lovett*: Encroachment on Executive Duties and Prerogatives

Illustration #2 asks if it is permissible for the legislature to use the appropriations power not to single out one or more executive branch officers for legislative branch punishment but to refuse to pay categories of unnamed officials for policy or other ostensibly non-punitive reasons.⁷⁰ Here, there is no ready evidence of an attempt to convict or punish the official in question, but nevertheless the legislature seeks to accomplish the removal of the official. If a measure like this is not a bill of attainder, does it nonetheless employ the power of the purse to accomplish an unconstitutional objective?

These questions turn on the breadth of the appropriations power operating within the overall framework of the separation of powers, and the approach to be taken when the exercise of that power conflicts with a competing power or interest. Views differ on the scope of the appropriations power and the remedy available to a president in the face of a perceived misuse of that power, but a scholarly consensus holds that the power should not be used to prevent or foreclose the exercise of a presidential duty or prerogative.

J. Gregory Sidak reads *Lovett* to do "more than forbid Congress to use its appropriations power to violate the constitutional rights of individual citizens: It also prohibits Congress from using that authority to achieve *any* unconstitutional end, including the aggrandizement of congressional power at the expense of the Executive or the Judiciary."⁷¹ Sidak argues from the text and history of the appropriations clause that the Fram-

67. *Crain v. City of Mountain Home*, 611 F.2d 726, 727 (8th Cir. 1979).

68. *Id.* at 729.

69. *Id.*

70. Of course, any of these enactments must be signed by the President to take effect. See *INS v. Chadha*, 462 U.S. 919, 952 (1983). These enactments would be an inviting target for a veto. However, as *Lovett* exemplifies, a provision of this nature often takes the form of a rider to a much larger and important (in the macro sense) item of legislation. *Lovett*, 328 U.S. at 305 n.1 ("the President signed the bill because he had to do so since the appropriated funds were imperatively needed to carry on the war").

71. Sidak, *supra* n. 11, at 1206. The "anti-aggrandizement principle" derives primarily from *Metropolitan Washington Airports Authority*, 501 U.S. 252, 274 (1991) (finding aggrandizement), *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (finding no aggrandizement) and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 856 (1986) (finding no aggrandizement). See *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989) (noting "the special danger recognized by the Founders of congressional usurpation of Executive Branch functions). See also John N. Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145-46 (1988) ("In sum, Congress cannot violate either the right to equal protection of the laws or the

ers did not intend to empower Congress with a legislative veto over presidential action.⁷² He contends that the appropriations power cannot be used as a pretext for congressional encroachments that deny the president the funds necessary to perform the duties and exercise the prerogatives conferred on him by Article II. These duties are the mandatory tasks of the Presidency. These duties include the making of appointments, the faithful execution of the laws, the receipt of ambassadors, and the making of recommendations to Congress.⁷³ The prerogatives are the permissive undertakings authorized by the text of the Constitution. The prerogatives include the pardon power, the power to negotiate treaties, and the power to make recess appointments.⁷⁴ The prerogatives are all preceded by the language that the President "shall have Power . . . to" perform the function (as opposed to "the President may"). To avoid being rendered meaningless, Sidak contends that the duties and prerogatives must carry with them a concomitant ability to be exercised.⁷⁵

Sidak concludes that an appropriations restriction that frustrates the President's ability to fulfill a duty or exercise a prerogative exceeds the authority of the appropriations clause and violates the separation of powers. In the face of such an unlawful restriction, a President who acts to discharge his Article II duties (for instance, by appointing and compensating an official in a lawfully created position to assist in the execution of the law) does not violate the appropriations clause.⁷⁶

Under this view, such a boundary to the appropriations power does not authorize an executive spending spree. The President's rejection of an appropriations restriction and corresponding use of unappropriated spending must be grounded in a textually demonstrable Article II duty or prerogative. The unappropriated spending also should be restricted to the minimum amount necessary to successfully produce the desired public good, and the spending should be described, explained, documented and published. If Congress or the public believes that the President's rejection of appropriations restrictions and use of unappropriated spending is excessive, the political process can provide the mechanism for enforcement.⁷⁷

The competing view, principally espoused by Professor Kate Stith, prohibits the President from making any expenditure of public money without legislative authorization. The appropriations power of Article I, Section 8, while not a grant of affirmative power, is both a condition precedent to executive action and a condition subsequent to general legislative directives.⁷⁸ Professor Stith acknowledges that Congress is obliged to provide funds for constitutionally mandated duties and prerogatives and may not exercise the appropriations power to impose bills of attainder or otherwise in a manner in-

principle of separation of powers and then justify it by the concept of "we have an appropriations power," or "there is a necessary and proper clause.").

72. Among other observations, Sidak notes that the placement of the appropriations clause in section 9 of article I suggests that it was not intended to grant affirmative powers to Congress; enumerated powers otherwise are found in section 8. He also suggests that the requirement that public funds be drawn "in Consequence of Appropriations made by Law" (rather than "by Legislation") may be interpreted to establish a rule that when any one of the three branches spends public funds, it must have a legal authorization for doing so. That legal authorization might be found in the Constitution and its articulation of the Executive Branch's duties and prerogatives just as surely as it might be found in statute. Sidak, *supra* n. 11, at 1166-72.

73. *Id.* at 1164.

74. *Id.* at 1188.

75. *Id.* at 1188-89.

76. *Lovett*, 328 U.S. at 318 (the invalidated provision "does not stand as an obstacle to payment of compensation" to Lovett, Watson and Dodd).

77. Sidak, *supra* note 11, at 1195-1201.

78. Stith, *supra* note 12, at 1349-50.

consistent with the direct commands of the Constitution.⁷⁹ A significant departure from Sidak's analysis, however, is her conclusion that a congressional failure to honor a constitutional requirement to appropriate does not empower the President to withdraw funds from the Treasury to finance the activity.⁸⁰

Professors Raven-Hansen and Banks propose a third approach. Their historical reading yields a more muscular view of the appropriations power than that underlying Sidak's analysis. They note that the *Lovett*-derived principle stating "the power of the purse may [not] be constitutionally exercised to produce an unconstitutional result"⁸¹ is easily applied in *Lovett* itself and most of its acknowledged progeny. In those cases, the appropriations limitation trammels upon another explicit constitutional commitment of the power at issue to another branch (such as the power of the judiciary to try and punish).⁸² In those cases, the appropriations limitation is invalid.

Other cases do not represent such a direct assumption by Congress of a power explicitly forbidden to it by the Constitution, but rather involve an indirect increase of the relative power of Congress by restricting the executive branch in some manner. As to this latter category of disputes, Raven-Hansen and Banks suggest that a balancing approach is needed. This balancing approach asks "whether the statute at issue prevents the President 'from accomplishing his constitutionally assigned functions,'" and whether the extent of the intrusion on the President's powers 'is justified by an overriding need to promote objectives within the constitutional authority of Congress.'"⁸³

The views of the Office of Legal Counsel also deserve a place at the table. OLC acknowledges that Congress possesses the "general authority to legislate in ways that in fact terminate an executive branch officer or employee's tenure by defunding a position, for example, or by legislating mandatory retirements rules that apply to incumbents." But, the opinion continues, the executive branch "has long maintained that the Constitution does not permit this legislative authority to be deployed abusively as a de facto removal power."⁸⁴ Presumably, the test of abusiveness is related to whether the defund-

79. *Id.* at 1350-51. Professor Stith does not address specifically the prerogative of making recess appointments.

80. *Id.* at 1345, 1351. See also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 654 n. 522 (1994) ("The President has the power of the sword (e.g., the Commander-in-Chief authority), but Congress may refuse to appropriate funds and thereby keep that sword sheathed."); Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 25 (1998) ("It also would be unconstitutional for Congress to undermine our system of constitutionally imposed checks and balances by willfully denying to the executive branch all appropriations beyond the President's salary.") Cf. 41 Op. Att'y. Gen. 507, 526 ("Conceivably . . . Congress could refuse to appropriate any funds at all to implement legislation, however essential the appropriation might be for the country's welfare. The remedy in such a case would be political.").

81. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 884-88 (1994) (citing *Lovett v. United States*, 66 F. Supp. 142, 152 (Ct. Cl. 1945) (Madden, J., concurring), *aff'd on other grounds* 328 U.S. 303 (1946)).

82. *Id.* at 884-88.

83. *Id.*, at 887, citing *Public Citizen v. DOJ*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring), in turn quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988). Professor Todd Peterson also employs this balancing approach in his analysis of appropriations restrictions affecting the federal judiciary. Todd D. Peterson, *Controlling the Federal Courts through the Appropriations Process*, 1998 WIS. L. REV. 993 (1998).

84. Dellinger Memorandum, *supra* note 8, at 54, citing 35 Op. Att'y Gen. 309, 312-15 (1927). OLC also acknowledges that *Lovett* also bounds Congress' authority to exceed independent constitutional limitations in this regard. *Id.* at note 122. Cf. 41 Op. Att'y. Gen. 507, 526 ("Conceivably . . . Congress could refuse to appropriate any funds at all to implement legislation, however essential the appropriation might be for the country's welfare. The remedy in such a case would be political.").

ing is part of a broader legislative initiative to restructure, merge or wind down an executive branch function.⁸⁵

Fortified with this background, our Illustration #2 involving the recess appointee appropriations restrictions also becomes an easy case. These restrictions transgress an explicit constitutional assignment of power in Article II, Section 3 to the executive branch. Given that the authority to make a recess appointment is an Article II presidential prerogative, an appropriations restriction that frustrates the exercise of that prerogative would appear to be *per se* invalid under the Sidak, Stith or Banks/Raven-Hansen analyses.⁸⁶ The ointment is marred only by the fly of the long history of executive branch acquiescence in the restrictions.

What about defunding Undersecretary Lyons' position (Illustration #3)? This "no pay" provision does not transgress an explicit Article II duty or prerogative. Beyond the recess appointment power and the provision for nomination and confirmation of principal officers of the federal government, the appointment of other officers of the United States is preconditioned on the vesting of appointment authority by Congress in the President.⁸⁷ But halting the pay of the Undersecretary arguably does transgress an *implicit* constitutional prerogative, i.e. the removal power.

With the exception of the provisions for impeachment applicable only to the commission of high crimes and misdemeanors, no constitutional provision explicitly addresses the removal power.⁸⁸ Rather, the Supreme Court has classified it as an "incident of the power of appointment, not to the power of advising and consenting to appointment[.]"⁸⁹ The removal power is "an indispensable aid" to the "effective enforcement of the law,"⁹⁰ one of the core functions of the executive branch arising from Article II, section 1's grant of executive power and Article II, section 3's direction that the President "take [c]are that the [l]aws be faithfully executed."⁹¹ (Similarly, the power to suspend an officer also has been held to be "an incident of the power of removal.")⁹² As the Supreme Court observed as early as 1839, "it was very early adopted, as the practical construction of the Constitution, that this [removal] power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."⁹³ With respect to certain executive branch officers, Congress may be able to condition the exercise of the removal power, but may not usurp it entirely.⁹⁴

As a cousin to the power over subsistence, so too can the power of removal be tethered to the power over will. As the Supreme Court observed, "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon

85. Cirillo, *supra* note 7, at 593-94.

86. Sidak so states explicitly. Sidak, *supra* note 11, at 1208.

87. U.S. CONST. art. II, § 2, cl. 2 ("[T]he Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in Courts of Law, or in the Heads of Departments.") Courts have been critical of undertakings to appoint officers outside of the routes articulated by Article II, § 2, such as through inherent power under Article II, § 3's "Take Care" clause. See *George v. Ishimaru*, 849 F. Supp. 68, 71-72 (D.D.C. 1994), *vacated as moot*, 1994 U.S. App. Lexis 25567 (D.C. Cir. 1994); *Olympic Fed. Sav. & Loan v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1199-1200 (D.D.C. 1990).

88. *Bowsher v. Synar*, 478 U.S. 714, 723 (1986).

89. *Myers v. United States*, 272 U.S. 52, 122 (1926).

90. *Id.* at 132.

91. U.S. Const., art. II § 3.

92. *Burnap v. United States*, 252 U.S. 512, 515 (1920).

93. *Ex parte Hennen*, 38 U.S. 230, 259 (1839).

94. *Bowsher*, 478 U.S. 714. While Congress can place certain conditions on the President's removal of officers of the United States, *Morrison v. Olson*, 487 U.S. 654 (1988), it cannot directly insert itself into the process. *Myers*, 272 U.S. 52 (a statute requiring Senate advice and consent to the president's removal of certain postmasters is unconstitutional).

to maintain an attitude of independence against the latter's will."⁹⁵ In this manner, any threatened or potential exercise of the removal power by the legislative branch interferes in some manner with the executive power and the independence of the executive branch.

A firmly established implied constitutional prerogative should garner as much respect as an explicit constitutional prerogative.⁹⁶ But even assuming that the removal power is just as good as an explicit constitutional prerogative to support a curb on the appropriations power, is stopping pay equivalent to removal -- either in a formal legal sense or in a functional way? The *Lovett* Court seemed to think so, although it declined to decide the issue of the conflict between the appropriations power and the removal power despite elaborate briefing. Justice Black found the statute in *Lovett* was designed to force the discharge of the three employees and it appears to have expeditiously accomplished that as to two of them.⁹⁷ So too did the senators seeking to protect Undersecretary Lyons from a "legislative firing." Moreover, in private sector employment litigation, reduction (not elimination of) in salary is a significant contributor to judicial findings of a constructive discharge.⁹⁸

The Missouri Supreme Court reached the same common-sense conclusion years earlier, in invalidating a legislative attempt to eliminate a state official by denying compensation:

It is not essential to the capture of a city or fort that it should be stormed or taken by force. The same result may be reached and with equal certainty by cutting off supplies, by maintaining a successful blockage or siege. In the Merchant of Venice the leading character is made to say: "You take my house when you do take the prop that doth sustain my house. You take my life when you do take the means by which I live."⁹⁹

Through another more circuitous route, legislation preventing an official from receiving a salary may translate into a legal requirement for removal or discharge of that official. The Antideficiency Act generally bans the acceptance by the federal government of voluntary services.¹⁰⁰ The intent of the voluntary services prohibition was to avoid the acceptance of unauthorized services not intended or agreed to be gratuitous

95. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

96. Counsel for the Congress in *Lovett* did not agree: "This Court is asked to set aside the exercise of an express power [to appropriate] in favor of a claimed implied power." Brief for the Congress of the United States at 45, *Lovett*.

97. *Lovett v. United States*, 328 U.S. 303, 314 (1946). See also *United States v. Lovett*, 66 F. Supp. at 150-52 (Madden, J., concurring) (Section 304 "punishes them by removal from office and income and disqualification from ever again serving their Government for compensation except in military or jury service. It thus imposes the same penalty which the Senate is authorized to impose [after an impeachment trial.]" (emphasis added). The legislative intent also clearly was to remove the three employees. Chairman Cannon of the House Committee on Appropriations, urging adoption of the final conference report, stated, "The House seeks dismissal of these three men. . . . [I]f you agree to this conference report you adopt a plan under which these men will be removed from office[.]" 89 CONG. REC. 7127-28 (1943); see also *Haley v. Pataki*, 883 F. Supp. 816, 823 (N.D.N.Y. 1995) (although principles applicable to request for preliminary injunction in discharge cases do not apply, "the economic results of discharge are the same as those potentially faced by legislative employees" not receiving pay). To be sure, however, the employees in *Lovett* were not expressly terminated by their employing agencies. Brief for the Congress of the United States at 42-43, *Lovett*.

98. See, e.g., *Stephens v. C.I.T. Group/Equipment Financing*, 955 F.2d 1023, 1027 (5th Cir. 1992); *Zabielski v. Montgomery Ward & Co.*, 919 F.2d 1276, 1281 (7th Cir. 1990).

99. *State ex rel. Tolerton v. Gordon*, 139 S.W. 403, 409 (Mo. 1911).

100. 31 U.S.C. § 1342 (1994) ("An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.").

and therefore likely to afford a basis for a future claim upon Congress.¹⁰¹ Since 1913, section 1342 and its predecessors have been interpreted in light of the legislative intent to permit the federal government to accept gratuitous "services (1) rendered in an official capacity under regular appointment to an office and (2) when otherwise permitted by law to be nonsalaried because there is no minimum required salary."¹⁰²

Typical § 1342 issues involve someone who wishes to work for the federal government for free, such Professor Tribe's offer to assist the Iran-Contra independent counsel.¹⁰³ Where the offeror seeks to serve in a position for which there is no prescribed statutory minimum salary, § 1342 poses no barrier. For many offices, however, statutes do specify a minimum salary that cannot be waived absent specific statutory authority.¹⁰⁴ Thus, where a recess appointee or other official subject to a salary cut-off lacks the desire or intent to provide her services gratuitously or otherwise maintains a subjective expectation of being paid at some juncture, an arguable violation of the Antideficiency Act arises if the employee continues to work.¹⁰⁵ The only course for the employer to avoid such a (potentially criminal) violation is to instruct the official in question not to work.¹⁰⁶ In this manner, a "no pay" provision may well work a de jure removal.

The tea leaves do not clearly reveal whether the Executive Branch itself views the effect of a "no confirmation, no pay" statute as a "de facto removal." On the one hand, one Attorney General opinion merely described being required to work without pay as "somewhat onerous."¹⁰⁷ Moreover, there is a long history of executive branch acquiescence in the recess appointee compensation limitations; several Attorney General opinions construe strictly but nevertheless apply without constitutional objections the stat-

101. 30 Op. Att'y Gen. 51, 55 (1913).

102. The Office of Legal Counsel approved Professor Tribe's uncompensated service. See 13 Op. Off. Legal Counsel 135 (1989), citing Memorandum for Francis A. Keating II, Acting Associate Attorney General, re Independent Counsel's Authority to Accept Voluntary Services – Appointment of Laurence H. Tribe, Op. Off. Legal Counsel at 3-4 (May 19, 1988). This OLC opinion and related interpretations of the Antideficiency Act are discussed in Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 125-27 (1992), and in 2 GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 6, pt. C, § 3 at 6 (2d ed. 1992).

103. In other cases, the salary for a position may be set at zero by Congress *ab initio*. See Nolan, *supra* note 103 at 126. In certain states, there may be fewer obstacles to saying "no thanks" to salary. "Governor Bush Waives State Salary for Days He Is on Presidential Campaign Trail," Press Release, Office of the Governor of Texas (July 5, 1999).

104. See, e.g., 5 U.S.C. § 5315 (1994) (fixing the rate of pay for numerous positions). Specific statutory authority is needed for an agency to accept a "gift" of salary waived by an employee otherwise entitled to that minimum salary. GAO, *supra* n. 103, at 6. During the 1995-1996 federal government shutdown, aides to the President "said for days that his staff was researching whether forsaking his salary would be constitutional." Larry Margasak, *Don't Touch Our Pay, House Republicans Say*, THE WASHINGTON POST, January 2, 1996, at A13.

105. See also Stith, *supra* note 12, at 1376 ("Indeed, even when a private person provides personal services or funds to the government, knowing that there exists no legal authority to require that he be compensated, he may plausibly expect the next Congress to appropriate funds necessary to reimburse him").

106. The imperfect analogy here is to situations involving funding gaps or lapses in appropriation. See Comp. Gen. Dec. B-197841 (March 3, 1980) ("During a period of expired appropriations, the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted.") Since 1980, the federal government has expanded somewhat the quantum of activity permitted to continue during a lapse in appropriations. See 5 Op. Off. Legal Counsel 1 (1981). Similarly, the plurality of the Court of Claims in *Lovett* recognized an obligation to pay salary to the three employees irrespective of the statute forbidding disbursement from an otherwise available appropriation. Chief Justice Whaley wrote that "[i]n a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due." *United States v. Lovett*, 66 F. Supp. at 146 (citations omitted).

107. Appointments During Recess of the Senate, 16 Op. Att'y Gen. 522 (1880).

utes restricting the payment of recess appointees.¹⁰⁸ On the other hand, there is an opinion stating that "the exclusivity of the President's removal power cannot be circumvented by . . . cutting off of the salaries of incumbent officials," citing *Lovett*.¹⁰⁹ Indeed, Acting Attorney General Walsh also stated that a Senate vote to deny confirmation to a recess appointee "for all practical purposes force[s] him to resign by cutting off his pay."¹¹⁰

Concluding that stopping pay is legally or functionally equivalent to removal propels one quickly to one of two conclusions. The first conclusion is that the congressional incursion improperly invades the zone of executive authority. The analysis is straightforward: it is an impermissible transgression of an explicit presidential prerogative, and that by causing or coercing the removal or resignation of officers outside through the appropriations route, Congress improperly usurps the President's removal powers.¹¹¹

Beyond concerns about the invasion of the President's removal power, appropriations restrictions that operate to suspend the pay of particular executive branch officials approach the sort of "micromanagement" that strains interbranch comity. As President Wilson stated in 1920 in vetoing an appropriation act on the ground that it contained a proviso that certain documents should not be printed without the approval of the Joint Committee on Printing,

The Congress and the Executive should function within their respective spheres. Otherwise efficient and responsible management will be impossible and progress impeded by wasteful forces of disorganization and obstruction. The congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law; but once an appropriation is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government. In no other way can the Government be efficiently managed and responsibility definitely fixed.¹¹²

Even for those who see the appropriations power as trumping certain species of executive duties and prerogatives, appropriations restrictions seeking to influence the removal

108. See Article II, Section 2, Clause 3 – Recess Appointments – Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314 (1979); Recess Appointments, 41 Op. Atty. Gen. 463, 472-79 (1960) (construing 5 U.S.C. § 56); Payment of Salaries to Recess Appointees, 32 Op. Atty. Gen. 271, 272 (1920) (Rev. Stat. § 1761) ("I think it clear, therefore, that the appointees to whom your question relates can not be paid their respective salaries under recess appointments."); Appointments During Recess of the Senate, 16 Op. Atty. Gen. 522 (1880) (Rev. Stat. § 1768).

109. Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers upon the Expiration of a Presidential Term, 11 Op. O.L.C. 25, 26 (1987). The reach of *Lovett* clearly is overstated by this opinion, which makes no reference to the motivations for the cutting off of salaries.

110. Recess Appointments, 41 Op. Atty. Gen. 463, 477 (1960).

111. "Legislation that can properly be described as exercising the power of removal is unconstitutional, therefore, because it amounts to an attempt on Congress's part 'to gain a role in the removal of executive officials other than its established powers of impeachment and conviction.'" Dellinger Memorandum, *supra* n. 8, at 55, citing *Morrison*, 487 U.S. at 686. The same conclusion has been reached in state court cases invalidating the attempted exercise of removal power by the legislature through provisions withholding money from named officials. *Reid v. Smoulter*, 18 A. 445, 447 (Pa. 1889); *People ex rel. Burby v. Howland*, 49 N.E. 775, 778-79 (N.Y. 1898); *State ex rel. Tolerton v. Gordon*, 139 S.W. 403, 408-09 (Mo. 1911).

112. This statement is quoted in 41 Op. Atty. Gen. 507, 528 (1960). See also RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 5.7 at 467 (2d ed. 1992) (appropriations provisions may violate separation of powers principles if used to "micromanage" the Executive Branch). Not surprisingly, the legislature has a different view. Louis Fisher, the distinguished constitutional law specialist of the Congressional Research Service, writes that "executive officials may object to 'micromanagement' by legislators, but Congress has the constitutional authority to control administrative action in minute detail." LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 232.

of an executive branch official present clear grounds for a "separation of powers policy objection."¹¹³ The impact that a loss of pay can have on a public servant can be drastic. Larger policy differences – whether about the scope of recess appointment authority or about the authority to fill positions on an "acting" basis – should be resolved at the political level, either by amending the operative provisions to eliminate any ambiguities or by other modes of increasing public pressure to change courses of action.¹¹⁴ Senators also retain their right to seek to vindicate their constitutional role by offering advice and consent in court.¹¹⁵ Combating alleged unconstitutional executive action with unconstitutional legislative action is not an optimal remedy.

G. Or Maybe It's OK After All . . .

The second and opposing conclusion takes one to a very different world, where stopping pay is equivalent not to removal, but instead should be equated with the exercise of the accepted legislative power to abolish an executive branch office. The Constitution requires only the president and vice president. Under article I, Congress has the authority to create or not to create "inferior offices" or to vest the authority for appointing their occupants in someone other than the President.¹¹⁶ It is a legitimate objective of Congress to create and abolish offices of the federal government to improve efficiency or to eliminate duplication or obsolescence.¹¹⁷ Given that authority, is it any more constitutionally problematic to permit Congress to act through its appropriations power to "defund" the position? In other words, just as Congress cannot do indirectly what it cannot do directly, presumably it *can* do indirectly what it also can do directly.

A contention was raised in the Starkweather case that the defunding of the position of assistant director was unconstitutional because it forced the removal of a state officer for reasons other than malfeasance or nonfeasance of his duties. The Starkweather case easily labeled the claim an "erroneous premise that the legislature may not interfere with

113. The phrase is appropriated from Dellinger Memorandum, *supra* n. 8, at 12. Examples of subjects appropriate for such objections "may include burdensome reporting requirements, attempts to dictate the processes of executive deliberation, and legislation that has the purpose or would have the effect of 'micromanaging' executive action." *Id.* at 13.

114. A related controversy concerns the appointment of executive branch officials in "acting" capacities for lengthy periods of time either without seeking or receiving Senate confirmation. A "no pay" bill of sorts was introduced in the 105th Congress. Under S.1761, "an individual who performs the duties of an office in any Executive agency (other than the General Accounting Office) that has been filled temporarily in excess of any 120-day period time limitation . . . may not receive pay for each day such duties are performed." Such pay "shall be forfeited and may not be paid as backpay." Critics of one such "acting" appointment – that of Bill Lann Lee as the Acting Assistant Attorney General for Civil Rights in the Department of Justice – argued strongly that the appointment was unlawful. See Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of 'Acting' Executive Branch Officials*, 76 WASH. U.L.Q. 1039 (1998); Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 TEX. REV. L. & POL. 335 (1998); Steven J. Duffield & James C. Ho, *The (Still) Illegal Appointment of Bill Lann Lee*, 3 TEX. REV. L. & POL. 403 (1999). The Denning article concludes with three possible "remedies" for the assertedly unlawful appointment: (1) clarifying statutory ambiguities, (2) greater Senate vigilance, and (3) suasion. 76 WASH. U.L.Q. at 1055-60.

115. *Id.* at 1056-57 ("Suing the Administration over a questionable appointment may be just the impetus needed to encourage the Administration to submit the acting official or an alternative nominee for confirmation").

116. This source of this authority is article I, § 8, cl. 18, which authorizes Congress "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."

117. See Cirillo, *supra* note 7 at 586 ("Congress may wish to eliminate an office due to ineffective structuring of the office, or in order to change the division of powers among several similar offices or to offset difficulties flowing from the inability of the officeholder to perform the functions of the office. Congress can abolish offices, transfer functions among offices, or create new offices to cure the first two difficulties. When an office is abolished, the incumbent officer loses his tenure and is de facto removed from office. However, only the President can remedy the last defect.") (citations omitted).

any position in the executive branch of the government.”¹¹⁸ The court noted that “[I]f . . . the legislature may abolish an office which it has created, it is difficult to see how this contention can be sustained.”¹¹⁹

How can these two drastically opposing conclusions coexist? Both are potentially correct. Stopping pay to an executive branch official can be an unconstitutional attempt to coerce removal in derogation of the president’s exclusive removal authority and an unwarranted intrusion into the management of a coordinate branch. Stopping pay to the same official also can be an appropriate and perhaps even necessary consequence of a proper legislative initiative to modify or improve the manner in which the executive branch implements the law.¹²⁰ How do you tell the difference?

One commentator, in the analogous context of analyzing measures to abolish an executive branch office, proposes an objective “good faith” inquiry to discern legitimate purpose (abolish an office pursuant to a power confided in the legislature) from illicit motive (unconstitutional usurpation of the executive’s power of removal).¹²¹ Several state court decisions have used the notion of good faith to evaluate the permissibility of the abolition of an office.¹²² Cirillo concludes that legislatures have powers to terminate officers “pursuant to a valid reorganization plan or other legislative purpose and must operate to abolish completely and perpetually the office involved.”¹²³ On the other hand, “by the terms of the act the office remains in existence, the abolition will be ineffective, and the officers deprived of their positions may challenge their loss of tenure.”¹²⁴ The inquiry should not typically be one into the state of mind of individual legislators; rather “[i]f the end sought is abolition of the structure of the office (as defined by its powers, duties and functions), and the means adopted eradicate the office completely and perpetually, then the action of the legislature will not violate the executive’s power to remove officers.”¹²⁵

This test is not particularly well suited for evaluating appropriations measures that defund a position. A defunding measure presumes that an office will remain extant on

118. *Starkweather v. Blair*, 71 N.W.2d 869, 882.

119. *Id.* Minnesota law tracks federal law insofar as the power of removal is considered an incident of the power of appointment. Edward J. Jennings, *Removal from Public Office in Minnesota*, 20 MINN. L. REV. 721, 736 (1936). The court did not explicitly address the issue of possible usurpation of the executive’s power of removal, but did suggest that the Governor may have waived any possible objection to the “removal.” See *Starkweather*, 71 N.W.2d at 882 (“[T]he governor had the power to strike out any item of the appropriation bill. Ostensibly, he could have vetoed the provision here involved. He did not return the item to the legislature, which he could have done under his constitutional powers. It must therefore be assumed that he concurred in the action of the legislature.”) (emphasis added).

120. Another common example is an appropriations limitation that prohibits funds from being used to implement a particular program. One recent example: “[N]one of the funds made available in this Act may be used to provide assistance to, or to pay the salaries of personnel to carry out a market promotion/market access program pursuant to section 203 of the Agricultural Trade Act of 1978 (7 U.S.C. 5623) that provides assistance to the United States Mink Export Development Council or any mink industry trade association.” Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105-277, § 718, 112 Stat. 2681-27. Or for something closer to the perplexing line of demarcation: “None of the funds in this Act shall be available for salaries and expenses of more than 100 political and Presidential appointees in the Department of Transportation[.]” *Id.*, § 305, 112 Stat. 2681-465.

121. Cirillo, *supra* note 7, at 593-94.

122. *Id.* at 588-93. In *O’Connor v. Greene*, 21 N.Y.S.2d 631 (Sup. Ct. 1940), the court considered the abolition of the office of police judge to which the plaintiff had been elected. The abolition occurred between the time of the election and the date for taking office. The court stated, “The only limitation placed upon the exercise of that abrogating power is that the legislative body using it must act in good faith.” *Id.* at 633.

123. Cirillo, *supra* note 7, at 593

124. *Id.*

125. *Id.* at 593-94.

an organization chart. Thus, its structure is never abolished. Nor do appropriations provisions typically act "perpetually." A provision that says that no funds can be spent on a particular office or position runs with the funds appropriated for that fiscal year or, in the case of a "no-year appropriation" of funds that are available until expended, until those particular funds are spent. In either event, future funds can be appropriated without such a restriction and the office or position could return Phoenix-like.

Thus, a test for the presence of a bona fide legislative reorganization initiative will rarely illuminate whether a defunding provision is lawfully incident to an effort to reorganize the government or illicitly intended to remove a particular official. What else might work? Of course, an appropriations restriction, like any congressional enactment, should enjoy the presumption of constitutionality.¹²⁶ With some regret, it appears that a separation of powers challenge to a restriction that yields the removal of an executive branch official inexorably requires a consideration of legislative state of mind.

Consideration of legislative motivations should not be a favored manner of constitutional adjudication, but it is hardly unprecedented. The validity of legislation ordinarily is assessed solely by reference to its terms¹²⁷ and the courts generally will not strike down an otherwise constitutional statute on the basis of an alleged unconstitutional motive.¹²⁸ But there are exceptions for cases in which the motivation of the legislature is the crux of constitutional validity.¹²⁹ Potential bills of attainder present one such case;¹³⁰ indeed, the *Lovett* court's examination of the manifestations of intent by individual members of Congress was extensive. An improper legislative removal through defunding is merely a bill of attainder absent the intent to punish. If the two species of unconstitutional action differ only by degree, the same methodology for ferreting out their presence is appropriate.

If the record is replete with references akin to those accompanying the excoriation of Undersecretary Lyons, it is proper to conclude that the legislative motivation is not to reorganize the administration of the Forest Service but rather to secure the removal of one particular official. To employ the terminology of the Office of Legal Counsel, such a measure would be an example of "legislative authority . . . deployed abusively as a de facto removal power."¹³¹ If enacted, this provision would have unconstitutionally invaded the prerogatives of the president.

To avoid disputes about congressional authority and intrusive inquiries into motivation, Congress should consider wherever possible keeping executive branch reorganization proposals within the channels for authorizing legislation, rather than the tempting route of appropriations limitation. Despite its prevalence and begrudging respect received from the courts, memorializing substantive legislation in appropriations limitations is "universally recognized as exceedingly bad legislative practice and is forbidden

126. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 579 (1998).

127. *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971). See generally John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

128. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

129. *TRIBE*, *supra* note 54, at 803-04 ("Motive is frequently of greater relevance, however, in assessing whether legislative or administrative action that is concededly within the affirmative reach of government's power transgresses some prohibition on how such power is to be exercised.") (citations omitted). Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871) ("But the language of the proviso plainly shows that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect to which this court had adjudged them to have.").

130. *Tribe*, *supra* note 54, at 804 n.13, citing *Flemming v. Nestor*, 363 U.S. 603 (1960).

131. Dellinger Memorandum, *supra* n. 8, at 54, citing *Civil Service Retirement Act - Postmasters - Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 312-15 (1927). The Office of Legal Counsel memorandum acknowledges that *Lovett* also bounds Congress' authority in this regard. *Id.* at n. 122.

by the rules of the both Houses of Congress."¹³² The legislature may in certain cases do indirectly what it may do directly, but the interests of clarity and avoiding actual or apparent separation of powers clashes counsels strongly in favor of doing directly.

III. Halting the Pay of Legislators

A. Executive Efforts: Coercion and Legislative Independence

Rarely can these particular tables be turned. The pay of the members of the United States Congress is not explicitly protected from diminution by the Constitution, but the Framers nevertheless did dwell considerably on the question of congressional compensation. Some argued no compensation should attach to the office to avoid attracting "vulgar and groveling demagogues, of little talent, and narrow means."¹³³ The debate was settled in favor of compensation, but the question became whether it should be such compensation as fixed by law, allowed by the states (similar to the approach under the Articles of Confederation), or by the constituents (as was the case with the English Parliament for a time). The latter options were seen to yield "a state of slavish dependence."¹³⁴ Here, too, Hamilton observed that "[t]hose who pay are the masters of those who are paid."¹³⁵

Ultimately, the conclusion was Article 6, section 6, clause 1's direction that "Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." From the founding of the Republic until 1967, congressional pay was determined directly by Congress itself, in specific legislation setting specific rates of pay. Since 1967, the Federal Salary Act authorizes a quadrennial commission to review rates of pay for members of Congress and other officials and report to the President. The President recommends new salary rates in the budget transmittal. These recommendations become effective upon congressional approval.¹³⁶

The President has constitutional authority to veto a legislative branch appropriations bill, but has done so very rarely. Since 1789, legislative branch appropriations have been vetoed on six occasions. The first five vetoes occurred between 1879 and 1920, when the legislative, executive, and judicial branch appropriations were combined in a single bill; the vetoes occurred for reasons other than legislative branch appropriations. The sixth, the veto of H.R. 1854 by President Clinton on October 3, 1995, represents the first veto of a freestanding appropriations bill for the legislative branch. Three broad continuing resolutions, which were not freestanding appropriations but included legislative branch funding, were vetoed in 1981, 1986, and 1990. In President Clinton's 1995 veto message, he stated that the bill was "a disciplined bill, one that I would sign under different circumstances." He nevertheless vetoed the bill because Congress passed it while the vast majority of other federal activities remained lacking an appropriations bill as the new fiscal year began. The President stated:

132. *Tayloe v. Kjaer*, 171 F.2d 343, 344 (D.C. Cir. 1948). See Senate Rule XVI.

133. Joseph Story, *Commentaries on the Constitution of the United States* § 431 at 304 (Ronald D. Rotunda & John E. Nowak ed.).

134. *Id.* § 433 at 306; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995) (discussing purposes of article I, section 6).

135. 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed. 1911) 373, quoted in *U.S. Term Limits, Inc.*, 514 U.S. at 809.

136. 2 U.S.C. §§ 351-64 (1994). The Quadrennial Commission is supposed to be replaced by a Citizens' Commission on Public Service and Compensation. *Id.* See also *Humphrey v. Baker*, 848 F.2d 211, 213 (D.C. Cir.), cert. denied, 488 U.S. 966 (1988).

I believe . . . that it would be inappropriate to provide full-year regular funding for Congress and its offices while funding for most other activities of Government remains incomplete, unresolved and uncertain. [I] don't think Congress should take care of its own business before it takes care of the people's business.¹³⁷

The veto power is an explicit constitutional prerogative of the president and the reasons for its exercise are not subject to legal challenge or limitation by Congress, but only to the political review of a congressional vote to override.¹³⁸

In any event, funding for salaries of the elected members of Congress is no longer even part of the legislative branch appropriations bill. Since 1981, these funds are drawn from the Treasury automatically, pursuant to a permanent appropriation, without the necessity for annual action (or opportunity for a veto).¹³⁹ Perhaps a president could seek to withhold payment through an impoundment, but the Congressional Budget and Impoundment Control Act¹⁴⁰ largely has declawed that option.

New York law gives the governor an opportunity to stop legislative paychecks. Under § 40 of the New York State Finance Law, appropriations cease to be effective on March 31 except for payment obligations incurred prior to the end of the fiscal year.¹⁴¹ A new budget often is not in place by April 1. In these circumstances, the governor has submitted special appropriation bills that have provided money for salary payments to state employees until passage of the new budget. In the spring of 1995, Governor Pataki submitted a special appropriation bill to continue the payment of the salaries of almost all state employees, with the conspicuous exception of the state's legislators and most legislative branch employees.¹⁴² Under New York's constitution, the legislature may not consider any appropriation bill in the absence of action on all of the appropriation bills submitted by the governor, "except on message from the governor certifying to the necessity of the immediate passage of such a bill."¹⁴³ Thus, without the governor's consent by way of a message of necessity, the legislature could not appropriate money for its salaries or those of legislative employees. The governor repeatedly stated that he would not request an appropriation for the payment of salaries and would not sign a bill providing for such salaries. In the view of the legislative employees, the governor was able to prevent payment of their salaries through inaction.

The legislative employees (not including the legislators themselves) sought a preliminary injunction requiring the state government to pay them. The federal district court found that the employees demonstrated a likelihood of success on the merits of their claim that the governor's refusal to pay their salaries violated the Contracts Clause of the United States Constitution.¹⁴⁴ The legislative employees, the court concluded, had at least implied contracts that suffered substantial interference through the indefinite withholding of paychecks. Nor was the withholding of pay "reasonable or necessary to

137. *Veto Message to Congress on Legislative Branch Appropriations Bill*, Oct. 3, 1995, available on LEXIS, News Group File.

138. Cf. *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 485 (1989) ("[W]here the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by the Legislative Branch.") (emphasis in original).

139. Pub. L. No. 97-51, § 130(c), 95 Stat. 958, 966 (1981).

140. 31 U.S.C. § 1301 *et seq.* (1994).

141. The description of the budget process and the events of the 1995 budget cycle is drawn from *Haley v. Pataki*, 883 F. Supp. 816 (N.D.N.Y.), *vacated as moot* 60 F.3d 137 (2d Cir. 1995).

142. This refusal to pay members of the legislature and its employees was pursuant to previous statements by the governor regarding the consequences of a failure to timely pass a budget. *Id.* at 820.

143. N.Y. CONST. art. VII, § 5.

144. "No state shall . . . pass any . . . law impairing the obligation of contracts[.]" U.S. CONST. art. I, § 10, cl. 1.

serve an important public purpose.”¹⁴⁵ The court did not find a likelihood of prevailing on the merits of equal protection, separation of powers, and procedural due process claims.¹⁴⁶ In shaping a remedy, the court recognized the limitations on its authority at the preliminary injunctive stage to order the governor to seek the appropriation of funds to pay the legislative workers. Instead, the court ordered that:

insofar as the Governor undertakes to send future appropriation bills and messages of necessity to the legislature for the payment of state workers, he may not exclude payment to legislative employees from such bills, and a portion of these same funds must be allocated for the payment of legislative employees.¹⁴⁷

Governor Pataki complied with the preliminary injunction and submitted interim appropriation bills that provided pay for legislative employees. The bills did not, however, include payment for the legislators themselves. Thus, several legislators commenced a second case in state court seeking similar relief as to themselves and their colleagues. In a brief decision, the court found the claims to be justiciable and the governor's actions to violate the separation of powers:

The clearly stated purpose of withholding Petitioner's [sic] salaries is not because of budgetary constraints requiring the shifting of funds for other purposes, but rather, it is specifically devised to coerce the petitioners to pass a budget within the parameters mandated by the Governor. Such a threat and ultimatum, designed to curtail the Legislature's implied constitutional duty to deliberate over and make changes in the proposed budget submitted by the Governor, constitutes an impermissible invasion into that province of the Legislature. This blatant violation of the separation of powers strikes to the heart of our democratic system.¹⁴⁸

The court further found violations of the state constitution's prohibition of intraterm diminution in salary¹⁴⁹ and a state law providing that legislators be paid their annual salary in biweekly installments. The remedy ordered followed the *Haley* order, requiring that the governor include payment of the legislators in future appropriation bills.¹⁵⁰

To be sure, Governor Pataki's actions were coercive. Just as the robber who says “your money or your life” coerces you to give your money, so too does the presentation of a choice by the governor to an unwilling legislature operate coercively. For reasons discussed more fully below, though, one should be skeptical of the existence in either the Constitution of the United States or of the State of New York of a bar to coercion of a legislature of this nature or of an implied duty or prerogative to deliberate in any par-

145. *Haley*, 883 F. Supp. at 825.

146. *Id.* at 825-26. The court rejected the employees' separation of powers argument because it relied solely on state constitutional principles and, under the Eleventh Amendment, the court could not enjoin the governor based on violations of state law. The court's conclusion is somewhat curious insofar as it holds unlawful the governor's failure to seek appropriations, but presumably would not have found an illegality should the governor have vetoed an appropriations bill on the same grounds. Perhaps the unspoken distinction is the availability of the legislature's power to override the veto and the lack of any remedy or “check” for the refusal to initiate an appropriation.

147. *Id.* at 828.

148. *Dugan v. Pataki*, Index No. 16341/95, mem. op. at 5 (Sup. Ct., Kings County, NY, May 30, 1995).

149. N.Y. Const. art. 3, § 6 provides, in pertinent part: “Each member of the legislature shall receive for his services an annual salary. . . . Neither the salary of any member nor any allowance so fixed may be increased or decreased during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation.”

150. *Dugan*, mem. op. at 7-8.

ticular quantity or quality over proposed legislation.¹⁵¹ Since there is a time value of money and withheld salary paid months from now without interest is not the same as salary paid today, the *Dugan* decision is more easily justified on the "fixed salary" ground.¹⁵² This is precisely the "reduction by famine" of which Alexander Hamilton rightfully warned, and this constitution provides that protection.

But absent a nondiminution clause or another specific constitutional provision rendering an element of the legislative process inviolable, it is unwise to limit the amount of otherwise lawful "coercion" that the executive branch and the legislative branch can unleash on each other. Under the constitutional scheme, each may huff and puff and attempt to blow each other's house down, assuming that the instrumentalities by which the coercion is applied are not themselves unlawful. In other words, seeking to influence legislative action by threatening to release confidential Privacy Act-protected FBI files about a member of Congress would not be permissible, nor would the issuance of an executive order purporting to impose binding deadlines on the Congress for completion of particular legislative projects.)¹⁵³ But the lawful means available to a chief executive are many – the bully pulpit, the decision to campaign for or against a legislator, patronage, discretionary spending, and the threat to exercise a veto, to name a few¹⁵⁴. These may operate more or less coercively than the withholding of pay, but their legality should be assessed by their means and not by the ends of goading the legislature into action.

Why is the executive allowed all these free shots at the legislature, while the conclusion of Part I was to find significant constraints on the legislature's ability to operate on the executive branch? The primary distinction is that the "defunded" executive branch officials in Part I were not being coerced to make a choice; they were not given a choice of acting in a way to restore their salary. In other words, there was no condition precedent to the loss of salary. Thus, it should not be surprising to find more restrictions on actions that directly or indirectly remove an official than actions that seek to coerce the official.

B. The Legislature Halts Its Own Pay: Save Me From Myself?

Whether for symbolic reasons or truly to create incentives for action, members of the United States Congress and state legislatures have introduced - and in the case of New York, passed - bills that provide for the suspension of legislative salaries pending the completion of the annual budget.¹⁵⁵ The New York Court of Appeals correctly re-

151. At this point, it might be useful to observe that there is no obvious distinction between the separation of powers analyses employed by the New York courts under the state's constitution and that followed by the United States Supreme Court under the Constitution of the United States. See, e.g., *Under 21 v. City of New York*, 482 N.E.2d 1 (N.Y. 1985) ("separation of powers does not require the maintenance of three airtight departments of government," citing U.S. Supreme Court cases).

152. That argument is not airtight either. Just as the President has the authority to veto an appropriations bill for the legislative branch, presumably the Governor has the power not to initiate an appropriations bill for the legislative branch. Both powers are subject to a variety of "political" checks, but it is dubious whether they should be subject to judicial review.

153. There also would be limits to intrusion into quasi-judicial processes in the executive branch. See *infra* note 308.

154. Article V, § 10 of the North Dakota Constitution furnishes a rare and fascinating exception. This provision makes it unlawful for a governor to "menace[]" any legislator "by the threatened use of the governor's veto power."

155. The California Constitution Revision Commission recommended the adoption of a "no budget, no pay" amendment to the state constitution. The Commission's Final Report is located at (visited Oct. 31, 1999) <http://www.library.ca.gov/ccrc/reports/html/budget_and_fiscal.html>. The proposed amendment to date has not been approved by the legislature.

versed a trial court's conclusion that New York's enactment of a "no budget, no pay" law violated principles of separation of powers under the state's constitution.

On December 18, 1998, Governor Pataki signed into law a pay raise for members of the state legislature. On the same day, notwithstanding the legislature's victory in the *Dugan* case, the governor signed S. Bill 7880 into law. This bill provided if the state budget was not enacted and approved by the State Comptroller by the start of the fiscal year, the salaries of the legislators would be withheld until a budget is enacted.¹⁵⁶ (Curiously, although the agreement of the governor is a condition precedent to the final adoption of the budget, the bill did not extend the salary withholding to the chief executive.)

Several members of the legislature who opposed the "no budget, no pay" bill sued to challenge the constitutionality of the law. They claimed a constitutional right to be paid for their services and submitted affidavits detailing their financial hardships attributable to the withholding of their salaries.¹⁵⁷ They contended that the pay suspension constituted economic duress that threatened their exercise of independent judgment in voting on a proposed budget. The provision placed them

in the untenable position of either surrendering their conscientiously held beliefs in order to support their families and to receive necessary and in some cases urgent medical care, or, to the detriment of themselves and their families dependent upon their support, refuse to capitulate on a budget they conscientiously believe unsatisfactory.¹⁵⁸

Drawing upon statements in the debate preceding passage of S.6880, the trial court noted that "[t]he withholding of pay is palpably coercive,"¹⁵⁹ and agreed that "the natural and intended consequence of [the law] is to coerce passage of a timely budget by the infliction of personal financial hardship upon some legislators."¹⁶⁰ To do so violated principles of separation of powers by "incapacitat[ing] the Legislature from performing its duty as a representative body"¹⁶¹ and,

impermissibly tip[ping] the fragile balance of powers that is the keystone of our system of government by threatening to impose on the Legislature a budget that is not the product of thoughtful deliberation and debate. To place any legislator or anyone in any branch of government under undue economic pressure in exercising his or her judgment, while expecting that person to act in accordance with his or her oath of office, is illogical, unsound, and unconstitutional.¹⁶²

The court also rested its conclusion on the provisions of Article III, Section 6 of the New York Constitution, which prohibits any increase or decrease in salary or other al-

156. 1998 N.Y. Laws c. h. 635, to be codified at N.Y. LEGIS. LAW § 5 (McKinney 1991 & Supp. 2000). Upon legislative passage of the budget, as defined, the sums withheld "shall be promptly paid to each member."

157. For fifteen consecutive years, the state had not adopted a budget by the April 1 start of its fiscal year. Thus, the salary withholding was activated in 1999. As of the date of the trial court's decision, three paychecks had been withheld. Daniel Wise, *Halting the Pay of Legislators Found Illegal*, NEW YORK LAW JOURNAL, May 24, 1999, at 1.

158. *Cohen v. State*, 694 N.Y.S.2d 840, 842 (N.Y. Sup. Ct.) *rev'd* 720 N.E.2d 850, 698 N.Y.S.2d 574 (N.Y. 1999).

159. *Id.* at 843.

160. *Id.*

161. *Id.*

162. *Id.* at 647-48.

lowances during the term of office.¹⁶³ One of the purposes of this prohibition is to “forestall the possibility of manipulation of legislators’ votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances.”¹⁶⁴ The court concluded that the suspension of salary payments, while not a true decrease in salary, has the same effect of encroachment on legislative independence.

The Court of Appeals reversed, admonishing the trial court that the “daunting words and images” and “flourishes are no substitute for an analytically justified basis to invalidate the law.”¹⁶⁵ The court characterized Chapter 635 as “procedural oil”¹⁶⁶ added to the “delicately calibrated mechanism”¹⁶⁷ of the annual budget formulation process. The measure did not impermissibly shift the *powers* between the legislative and executive branches: “The leverage of negotiating positions is not the theoretical or functional equivalent of lawfully allocated governmental authority.”¹⁶⁸ Nor did the court discern that the “no budget, no pay” law imposed an economic duress substantially different than that “which is inherent in the ordinary lawmaking process, budget-related or otherwise.”¹⁶⁹

Indeed, “the legislative process is *deliberately* exposed to the buffeting and the pressures of outside interests. This lends a responsiveness to the needs of the community as expressed by those interested”. . . . Neither external nor internal pressures carry an inherent constitutional virus. . . . When the plaintiffs object to “economic pressure,” they are essentially attacking the fundamental, albeit rambunctious, realities of the political structure and process, including how public monies shall be allocated.”¹⁷⁰

The court found great significance in the fact that any recalibration in negotiating leverage with the governor occurred as a result of the legislature’s own bicameral action:

The Legislature has decided to restrict itself and discipline its own work and power in this fashion. That is not a cognizable separation of powers problem in these circumstances . . . Rather, we view the adopted control mechanism as a credit to the Legislative Branch’s internal management practices, not a mark of some *ultra vires* surrender of power to any other Branch.¹⁷¹

The court also disagreed that the “no budget, no pay” law violated the constitutional prohibition on increases or diminutions to legislative salary during the term of service. The law presented no risk of “manipulation” of salary because it operates by force of law and off a neutral pivot. “The statutory consequence does not occur by selective whim, or as a constitutionally questionable quid pro quo within the enactment year. . . . [T]he ‘contingent’ nature of its adopted timing-of-payment formula does not ‘un-fix’ the salary, in constitutional terms.”¹⁷²

163. See *supra* note 144. Under this provision, the legislature has the authority to define the amount and the details of salary payments. *New York Public Interest Research Group v. Steingut*, 353 N.E.2d 558, 561 (N.Y. 1976).

164. *Id.* at 562.

165. *Cohen v. State*, 720 N.E.2d 850, 854 (N.Y. 1999).

166. *Id.* at 855.

167. *Id.*

168. *Id.* at 857.

169. *Id.*

170. *Id.* at 857 (quoting BREITEL, *The Lawmakers* in 2 BENJAMIN N. CARDOZO MEMORIAL LECTURES, at 777) (The court also noted in *Cohen* that “despite the purported sledgehammer of . . . [the law], the 1999-2000 budget negotiations were concluded only after the second longest budget delay in the State’s history.” *Id.* at 856.).

171. *Cohen*, 720 N.E.2d at 856.

172. *Id.* at 853-54 (emphasis omitted). One justice dissented, arguing that the law violated article III, § 6 by authorizing one Legislature to decrease the salary paid to another Legislature during its term of office by first

Similar "no budget, no pay" bills have been introduced in Congress, but to date have not received serious consideration. In the 104th Congress, during the protracted government shutdown caused by delays in passage and ensuing vetoes of appropriations bills for Fiscal Year 1996, Representative John Conyers introduced H.R. 2658. This bill provided that the basic pay of Members of Congress would not be disbursed during any period in which there is a lapse of appropriations for any Federal agency or department as a result of a failure to enact a regular appropriations bill or continuing resolution, or in which the federal government is unable to make payments or meet obligations because the public debt limit (under 31 U.S.C. § 3101) has been reached. Rep. Conyers stated that his bill would "force us to play by the same rules as the rest of the Federal Government."¹⁷³ "No budget-no pay" bills were passed three times in the Senate in the 104th Congress, but "sort of got lost when it went to conference," according to one senator.¹⁷⁴

Supporters of the congressional pay suspension relished its potentially coercive effect on adoption of a budget.¹⁷⁵ One senator wondered, if the bill were enacted "how many days we would shut down the Government. I bet the number would approach zero."¹⁷⁶ "If it would pass, this crisis would end."¹⁷⁷

The same sentiments accompanied similar legislation in the 105th Congress. In support of the successor no budget-no pay bill, Senator Durbin stated:

If the goal is to avoid shutting down the Government, I am about to offer a solution. It is one that I guarantee you will make certain that the Federal Government never shuts down again. . . . If members of House of Representatives fail to enact a budget, if Members of the Senate fail to enact a budget, they don't get paid. That will focus the attention of this Chamber and the House on getting its business done in a hurry."¹⁷⁸

Is the conclusion of New York's Cohen court that a "no budget, no pay" law equally compelling under federal law? Absolutely. Passing a "no-budget, no-pay" bill is a self-inflicted wound. Congress would hobble itself in budget negotiations with the President by possibly weakening the resolve of its leaders and negotiators in the waning days be-

giving and then withholding compensation. Justice Smith also stated that the law "reverses the historical will of the People . . . that there be . . . [no] financial incentives provided to the members of the Legislature when decided issues on the merits in accordance with the democratic process." *Id.* at 863.

173. 142 CONG. REC. 86 (1996).

174. 141 CONG. REC. S18906 (daily ed. Dec. 19, 1995) (remarks of Sen. Harkin). Nevertheless, several Members of Congress voluntarily declined to receive their pay during the government shutdown. Senator Leahy stated, "If the Federal workers in my home State cannot receive a paycheck, then I will not receive a paycheck. . . . If the Speaker and his followers would also give up their pay as I am, I believe the House would quickly vote to reopen the Government." 142 CONG. REC. 173-74 (1996).

Also in the 104th Congress, Senator Hank Brown and others offered an amendment to a proposed Balanced Budget Constitutional Amendment. The proffered amendment would suspend pay for Members of Congress, congressional staff, the President and Vice President, and employees of the executive branch subject to Senate confirmation in the event that the Federal budget for Fiscal Year 2000 is not balanced. Amendment No. 271, 141 CONG. REC. S2766. This amendment also authorized a waiver of the pay suspension if a declaration of war is in effect or if the United States is engaged in military conflict which causes an imminent and serious military threat to national security.

175. Other proponents cited notions of equity and fairness. See 141 CONG. REC. S17194 (daily ed. Nov. 16, 1995) (remarks of Sen. Snowe) ("I do not think that we as Members of Congress want to be viewed differently, putting ourselves into another group as we are going through this shutdown. We should not be immune or isolated from those difficulties that Federal employees are now experiencing.").

176. 141 CONG. REC. H15133 (daily ed. Dec. 21, 1995) (statement of Sen. Harkin).

177. 141 CONG. REC. H15133 (daily ed. Dec. 21, 1995) (statement of Representative Durbin).

178. 143 CONG. REC. S3827 (daily ed. April 30, 1997) (statement of Sen. Durbin).

fore a deadline. It would issue to the President a license to coerce.¹⁷⁹ To be sure, constitutional inquiries reach not only to aggrandizement by a branch of government that helps itself to a forkful of power off the plate of a coordinate branch, but also to voluntary undertakings that are the very opposite of aggrandizement. As Justice Kennedy wrote in the line-item veto case, in which the law at issue gave the President new authority to cancel budgetary items contained in appropriations measures passed by Congress:

It is no answer, of course, to say that Congress surrendered its authority by its own hand That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.¹⁸⁰

Of course, giving up power to other parts of the government is not always strictly forbidden. Justice Kennedy's statement presumably was not intended to sweep up the many instances in which the Court has approved arguable Congressional cessions of Article I legislative power by authorizing executive branch and other entities to engage in substantive rulemaking.¹⁸¹ While Congress cannot give up its legislative power wholesale to another branch, the delegation cases justify the cession of power subject to limiting principles as a permissible effort by Congress in "obtaining the assistance of its coordinate Branches" and embark upon a "cooperative venture."¹⁸²

But is turning up the heat even giving away legislative power? It does not seem to be. The sword of Damocles of "no budget, no pay" only intensifies the pressure on the legislative branch to *exercise* its constitutionally granted legislative power. The U.S. Constitution may well prefer but does not require that legislation be the product of "thoughtful deliberation or debate," or render suspect legislative processes or decisions that shortcut or eliminate the opportunity for thoughtful deliberate or debate. After all, the oft-heard popular description attributed to Otto von Bismarck likening the legislative process to the production of sausage seems to capture the common understanding that that is not the norm at all.¹⁸³ Justice Story observed long ago that "measures are often

179. The mere fact that a president might sign a "no budget, no pay" bill into law does not convert it into an executive branch imposition on Congress, any more than President Roosevelt's signature on the bill containing Lovett's section 304 erased the bill of attainder problem by converting their removal into a lawful executive branch action.

180. *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) (citing *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991) and *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983)). In *Freytag*, the Court rejected the notion that the Executive Branch "can be expected to look out for itself" with respect to alleged encroachments on the President's appointment power, noting "[t]he structural interests protected by the Appointments Clause are not those of any branch of government but of the entire Republic." 501 U.S. at 879-880. In *Chadha*, the Court similarly stated, "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." 462 U.S. at 942 n.13.

181. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (approving under the delegation doctrine the creation of the United States Sentencing Commission, empowered by Congress to devise binding sentencing guidelines).

182. *Id.* at 372. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (Constitution permits "interdependence" and flexible relations between branches in order to secure "workable government"). Presumably the timely enactment of the appropriations bills is the sort of "cooperative venture" that ought to be supported. See *Cohen*, 720 N.E.2d at 855 ("The give-and-take compromises . . . by virtue of respective constitutional mandates to them, inextricably intertwines the Legislative and Executive Branches in a system of checks and balances. The objective of this specific constitutional investiture of power in those two Branches clearly contemplates a dynamic process and, ultimately, a joint venture designed to serve the common good.").

183. See LIBRARY OF CONGRESS, *RESPECTFULLY QUOTED* 190 (Suzy Platt ed., 1989). A less carnivorous description summarizes that Congressional enactments are the result of "numerous factors, including

introduced in a hurry, and debated with little care, and examined with less caution."¹⁸⁴ As summarized more recently by Professor Jeremy Waldron, the prevailing image of legislative activity in modern jurisprudence portrays the process as "deal-making, log-rolling, interest-pandering, pork-barrelling, horse-trading, and Arrovian cycling – as anything, in short, except principled political decision-making."¹⁸⁵

This is not to suggest the presence of any venal force. The volume of legislative business alone precludes the sort of careful study and deliberation that even the law-makers themselves might prefer. As one Senator sighed decades ago, "I just don't have time to study bills as I should. . . . I'm just dealing off the top of the deck all the time."¹⁸⁶

Moving beyond the nature of the process itself, it is not difficult to identify several provisions and hypothesize many more provisions that do or could increase the pressure to enact a speedy budget or to succumb to the President's negotiating position. Under the Congressional Budget Act of 1974,¹⁸⁷ Congress annually passes a concurrent budget resolution, an internal agreement between the House and Senate intended to guide deliberations on revenue and spending matters.¹⁸⁸ The existence of these guidelines also serves to limit the range of options that congressional negotiators can pursue. There is a deadline of April 15 to pass the budget resolution itself, and debate in both houses is subject to strict time limitations.¹⁸⁹ The schedule adopted by Congress for recesses also clearly applies pressure to wrap up its business by a certain date.¹⁹⁰ In the Gramm-Rudman-Hollings Act, Congress entirely gave up its prerogative to deliberate over budget matters altogether in the presence of certain fiscal conditions.¹⁹¹ These statutory

persuasive debate, compromises, favors, trades, and political force." ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 70 (1992). *See also* Alan Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171, 216 (1986) (noting that the process of congressional decisionmaking has been analyzed variously as "logrolling, market behavior, or partisan mutual adjustment").

184. STORY, *supra* n. 134, § 273 at 220.

185. Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 640 (1995).

186. Quoted in DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 82 (1960).

187. 2 U.S.C. §§ 601-688 (1994).

188. *See* Congressional Budget Resolutions: Formulation, Content, and Historical Information, Congressional Research Service Report No. 96-934 (Dec. 2, 1996) (visited Nov. 2, 1999) <<http://www.cox.house.gov/rules/96-934.htm>>.

189. The process of considering the budget resolution is described in WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 61-63 (3rd ed. 1989). Even the traditional Senate right to filibuster is not available in consideration of the budget resolution. *See id.* at 62.

190. For example, one Representative complained that, "If we had *enough time to debate* this issue, which our majority is not giving us, if we had *enough time to debate* this, I could make sure my constituents in Rhode Island know what the true facts are about the distribution tables in this tax cut. But we are going to rush this thing through because we have to get out on vacation." 143 CONG. REC. H6628-29 (daily ed. July 31, 1997) (statement of Rep. Kennedy) (debate on Taxpayer Relief Act of 1997) (emphasis added). *See also* Larry Wheeler, *Potential for Political Gridlock over Medicare Reform Package Probable*, GANNETT NEWS SERV., June 30, 1999, at ARC. "October is the time of year when many legislative deals are cut as Congress *rushes* to conclude its business and adjourn for the year." *Id.* (emphasis added).

191. The Balanced Budget and Emergency Deficit Control Act of 1985 provided that in any year that the federal budget deficit exceeds a specified maximum deficit amount by more than a specified sum, across-the-board cuts in federal spending would be made "automatically" to reach the deficit level. *See* *Bowsher v. Synar*, 478 U.S. 714 (1986). The *Bowsher* Court concluded that the Act on the ground that it impermissibly gave a Congressional agent a direct role in the execution of the laws. *See id.* Outside of the budget context, other statutes mandate expedited legislative consideration of other policy matters. The War Powers Resolution requires Congress to act within 60 or 90 days if it wishes to validate a President's introduction of Armed Forces into hostilities. *See* 50 U.S.C. §§ 1541-1548 (1994). The Congressional Review of Agency Rulemaking Act, 5 U.S.C. § 801-808 (1999 & supp.), provides for "fast-tracking" and limited debate on joint resolutions disapproving a rule promulgated by a federal agency.

deadlines can operate to rush decisions and truncate deliberations, at least when they are observed.

In fact, virtually all legislative business in the House of Representatives is conducted under "rules" adopted by majority vote that limit the time for debate of legislation, typically to one hour per side.¹⁹² The Senate has a tradition of unlimited debate, but that right to filibuster does not come from the Constitution and can be limited by statute (such as the limitation governing debate on budget resolutions) or squelched by a cloture vote.¹⁹³ Thus, the time for votes and decisions arrives regardless of whether an individual legislator feels that adequate consideration has been given to the issues before the body.

Nor does our political or constitutional system envision Pennsylvania Avenue as a coercion-free zone. An array of sources of pressure on the legislative process emanates from the executive branch, any of which in the eye of the beholder might well be perceived as coercive. Walter Oleszek writes that "[t]he executive branch constitutes one of the most important sources of external pressure exerted on Congress . . . [T]he president is able to influence congressional action through the manipulation of patronage, the allocation of federal funds and projects that may be vital to the reelection of certain members of Congress, and the handling of constituents' cases in which senators and representatives are interested."¹⁹⁴ The President may presumably rev up without a constitutional maximum his bargaining power through the strategic use of these resources.¹⁹⁵

This is not to say that the Constitution is entirely oblivious to the need to protect legislators from influences emanating from the executive branch or elsewhere that divert them from the "deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."¹⁹⁶ Underlying the Speech and Debate Clause¹⁹⁷ is a concern for the protection of the integrity of the legislative process by preserving the independence of individual legislators.¹⁹⁸ As Professor Brudney writes,

From a substantive perspective, absolute immunity protects against possible distortion in the exercise or expression of legislative judgment. By ensuring that members need not answer for their performance except to the voters at election time, the Clause encourages legislators to fulfill their Article I responsibilities in a manner that is at once deliberative and robust.¹⁹⁹

But, significantly, the clause by its terms protects legislators from being required to answer "in any other place," which has been interpreted thus far only to civil and criminal proceedings. In other words, the Constitution reflects an appropriate concern with

192. See U.S. CONST. art. I, § 5 ("Each House may determine the Rules of its Proceedings, . . ."). The adoption of "rules" governing debate is discussed in detail in OLESZEK, *supra* note 190, at 144-45.

193. See Senate Rule XXII (cloture); OLESZEK, *supra* note 190, at 220-34 (filibusters).

194. OLESZEK, *supra* note 190, at 36.

195. The veto can be coercive too. In vetoing the Legislative Branch Appropriations bill, President Clinton explicitly stated that he had no particular objection to the bill before him but his intention was to goad Congress into action on the other spending bills. See *supra* note 138.

196. *United States v. Gravel*, 408 U.S. 606, 625 (1972).

197. U.S. CONST., art. I, § 6. "[F]or any Speech or Debate in either House, they shall not be questioned in any other place."

198. *United States v. Gravel*, 408 U.S. at 621; *United States v. Brewer*, 408 U.S. 501, 507 (1972).

199. James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 25 (1999).

"the historic role played by executive intimidation," but the scope of the "intimidation" has never been extended to anything akin to the exercise of leverage, no matter how great, within the back-and-forth negotiations of the legislative process itself.²⁰⁰ Thus, the textual constitutional protection against the distortion of legislative judgment is a limited one.

Does the fact that money is involved change this analysis? The bribery laws (and aspects of the campaign finance laws) are premised on the notion that money can skew the behavior of elected officials and that the law should prohibit the giving of money in exchange for official action. But those laws are concerned with actual or apparent corruption that subverts the political process, inducing elected officials to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.²⁰¹ In contrast, the alleged distortion from a "no budget, no pay" law comes from inside the process, rather than from outside it. The influence is directed to focusing the time and attention toward what should be the job of the legislator, rather than away from it. And the mechanism is to reduce (temporarily) the flow of money, rather than supplement it. While neither the letter or the spirit of the anticorruption laws bear on a "no budget, no pay" law, they reinforce the view traceable back through the centuries that money is a powerful influence on governmental processes that should be deployed with great caution.

One who sees less sausage and more truffles in the legislative process might quarrel with an analysis that confers no specific constitutional protection to thoughtful legislative deliberation. As Judge Posner has observed in the context of considering the analytical importance of legislative history, how one views the legislative process and how it should and does work will guide how one views a product of that process:

Those who believe that legislatures embody the popular will and who venerate popular democracy are likely to attach great weight to any indications of how a majority of the legislature might have answered the interpretive question that has arisen. Those who regard the impediments to the legislative process as salutary checks on the excesses of democracy are likely to be distrustful of any expressions of legislative preference that have not run the gauntlet. There is no basis in law – maybe no basis, period, in current political theory – for choosing between these positions.²⁰²

It is true, as Judge Mikva and Professor Lane have contended, that "deliberativeness" is an essential ingredient of the legitimacy of any legislative process.²⁰³ "Deliberativeness," they write, "is not a synonym for debate, although debate may be one of its elements. Rather, the term defines those structures and steps of the legislative process (for example, bicameralism and the executive veto) that slow decision making and distance it from the passions and immediacy of individual legislators and of various constituencies."²⁰⁴

200. *Id.* citing *United States v. Helstoski*, 442 U.S. 477, 491 (1979) (noting that the Clause's purpose was to "preserve the constitutional structure of separate, coequal, and independent branches of government" in light of the English and colonial experience of executive power). See also *Gravel*, 408 U.S. at 616. "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Id.*

201. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENTARY 127, 131 (1997).

202. Richard A. Posner, *The Problems of Jurisprudence* 292 (1990).

203. MIKVA & LANE, *supra* note 184, at 69-70.

204. *Id.* at 69. So too advocated Justice Story that the protections against hasty and rash legislative action were the constitutional structure of the legislative process itself. See STORY, *supra* note 134, at § 275.

Judicial conclusions of insufficient deliberativeness in the Mikva-Lane sense have not strayed far from only ensuring that the legislative power is "exercised in accord with a single, finely wrought and exhaustively considered, procedure."²⁰⁵ Thus, the Supreme Court invalidated the legislative veto for want of bicameralism, and the line-item veto for bestowing legislative authority on the President.²⁰⁶ In both of these cases, there was an objectively ascertainable chunk of *structural* deliberativeness missing from the constitutionally prescribed legislative process.

Indeed, the *Chadha* court observed that the presentment and bicameralism requirements were designed to "protect the Executive Branch from Congress and to protect the whole people from improvident laws."²⁰⁷ But the Court also was well aware of the absence of debate and other indicia of legislative study of the House of Representatives' resolution to "veto" the Attorney General's suspension of deportation of Mr. Chadha. Chief Justice Burger noted that the House resolution "had not been printed and was not made available to other Members of the House prior to or at the time it was voted on," and that there was no debate prior to the unrecorded vote.²⁰⁸ But other than pointing out those facts that apparently distressed the Court, no suggestion was made that that aspect of Congress' treatment of Mr. Chadha posed any constitutional problem.²⁰⁹

Thus, the claim that a law was improvidently enacted, while a rationale supporting judicial review based upon the failure to observe independent structural requirements, cannot itself be an independent ground for judicial review. If it were, it quickly would become the most frequently invoked argument for invalidation of a statute.

Congress also always retains the authority to repeal a "no budget, no pay" law and can specify that it shall not apply in a particular year, or extend the effective date of the pay suspension pending the termination of ongoing negotiations. Given this ability to remove the coercive influence and free the deliberations from the pressure of an impending pay suspension, "one cannot say that the Act 'encroaches' upon Congress' power . . ."²¹⁰

Finally, a "no budget, no pay" law is consistent with Article I, section six's ascertainment clause. The Constitution merely requires that Congress itself should determine by law what the compensation of its members should be. Other statutes may govern the circumstances under which that fixed compensation will be paid. For instance, the United States Code long has provided for deductions from congressional pay for ab-

205. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

206. *See id.*; *Clinton v. City of New York*, 524 U.S. 417 (1998).

207. *Chadha*, 462 U.S. at 951.

208. *Id.* at 926.

209. One of the preeminent legal scholars of the Congress was distressed at the Court's distress. Louis Fisher writes: "What legislature is the Court describing? Certainly not Congress, where even the most casual observer can watch proceedings that fall short of being finely wrought and exhaustively considered. There is nothing unconstitutional about Congress's passing bills that have never been sent to committee. Both houses regularly use shortcuts: suspending the rules in the House of Representatives, asking for unanimous consent in the Senate, and attaching legislative riders to appropriations bills. Not pretty, *but not unconstitutional either.*" (Emphasis added). Louis Fisher, *Micromanagement by Congress: Reality and Mythology*, *THE FETTERED PRESIDENCY* 142 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989). In the context of *Chadha* and other recent separation of powers cases, Brian Murchison posits convincingly that "perceived abuse by Congress of its legislative independence has the effect of hardening the judicial mind, as if its own independence from present-day politics had been called into question." Brian C. Murchison, *The Concept of Independence in Public Law*, 41 *EMORY L. J.* 961, 1009 (1992).

210. *Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (Breyer, J., dissenting).

sences from the Senate or House.²¹¹ If Congress itself elects to fix its compensation with a condition of payment that a budget is passed, so be it.²¹²

Even if there were a constitutional objection to the coercive effect of a federal "no budget, no pay" law, it may well be a nonjusticiable one. In *Harrington v. Bush*,²¹³ Congressman Michael Harrington challenged the use of the secret funding and reporting provisions of the Central Intelligence Agency Act of 1949 to conceal illegal activities. Congressman Harrington argued in part that the use or misuse of the statute diminished his overall effectiveness in Congress and his ability to make fully informed judgments about legislation.²¹⁴ In the context of analyzing Congressman Harrington's standing to bring suit, the court rejected this alleged injury as "too subjective" and which, if accepted as the premise of judicial intervention, would allow the courts to serve "as a forum for the vindication of value preferences with respect to the quality of legislation."²¹⁵ So too should courts be wary of claims of a diminution of effectiveness based upon the coercive effect of a threatened or operative suspension of pay.

The pure standing element of *Harrington* probably would not preclude a member of Congress challenging a federal "no budget, no pay" law on separation of powers grounds likely would be found to have standing to maintain the suit. The Court concluded in *Raines v. Byrd* that legislators who voted in opposition to the Line Item Veto Act lacked standing to challenge its constitutionality, despite statutory language providing that any member of Congress may bring such a suit.²¹⁶ Chief Justice Rehnquist noted that the nondiscriminatory, official-capacity injury or loss of political power resulting from the Line Item Veto Act was insufficiently concrete to confer Article III standing—"[t]hey simply lost that vote."²¹⁷ However, the Court distinguished the case from *Powell v. McCormack*, in which standing was found in a member of Congress' constitutional challenge to his exclusion from the House of Representatives "and his consequent loss of salary."²¹⁸ The deprivation of salary from a "no budget, no pay" law likely would represent the sort of loss of private right sufficient to confer standing.²¹⁹

But *Harrington's* observation of the subjectivity of any judicial analysis into the quality of the process underlying the consideration of legislation carries forth, if not into considerations of standing, into the political question doctrine. Courts generally (although not universally) approach challenges to matters of internal legislative governance

211. See 2 U.S.C. § 39 (1994). The deductions are to be made "unless such Member or Delegate assigns as the reason for such absence the sickness of himself or of some member of his family." *Id.* Despite considerable congressional absenteeism, especially during campaign season, this provision rarely has been enforced. See James P. Hill, *Ethics for the Unelected*, 68 A.B.A.J. 950 (1982).

212. After all, the Framers did consider having salary fluctuate depending on the average market value of a bushel of wheat. See *Pressler v. Simon*, 428 F. Supp. 302, 306 (D.D.C. 1976), *aff'd*, 434 U.S. 1028 (1978).

213. *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977).

214. 553 F.2d at 211-13. The specific thrust of Congressman Harrington's complaint apparently was that he could not vote intelligently on appropriations legislation without knowing the extent to which funds were being used for illegal CIA activities. *Id.* at 202-03; Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1639 n.48 (1977).

215. 553 F.2d at 212-13; n.114; *Metcalf v. National Petroleum Council*, 553 F.2d 176, 188 (D.C. Cir. 1977) (companion case to *Harrington*).

216. *Raines v. Byrd*, 521 U.S. 811 (1997).

217. *Id.* at 812.

218. *Id.* at 821. On the other hand, this hypothetical case could be distinguished from *Powell*, and is more like *Raines*, in that it does not involve the singling out of certain Members for unfavorable treatment. See *Powell v. McCormack*, 395 U.S. 486, 496, 512-14 (1969).

219. See also *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994) (finding standing for Member of Congress to challenge allegedly unconstitutional pay increase).

as political questions.²²⁰ Employing the Supreme Court's rubric announced in *Baker v. Carr*, such assessments of the quality or correctness of a congressional self-disciplinary procedure either lack "judicially discoverable and manageable standards" for resolution or would involve an inexorable expression of "lack of the respect due coordinate branches of government."²²¹

In conclusion, depriving legislators of their paychecks because they have not enacted a budget in a timely fashion is unquestionably coercive. When initiated by the executive, as in New York's *Dugan* case, this coercion may violate a specific constitutional protection for legislative compensation as is found in New York's Constitution. Absent such a specific constitutional protection, this coercion is but one example of a larger universe of coercive interbranch influences that are part and parcel of the American political dynamic. When imposed by the legislature itself, the constitutional concerns are even fewer because many other facets of internal legislative governance are equally likely to produce similar pressures on the deliberative process and the legislature retains the right to repeal or amend the source of the coercion at any time. Moreover, because of the likelihood that any challenge to a federal "no budget, no pay" law would be deemed nonjusticiable, the judgment exercised by Congress in passing the law would stand as the conclusive constitutional interpretation.

IV. Legislative Measures to Suspend Judicial Pay: Coercion and Judicial Independence

A "no ruling, no pay" law suspends the pay of a judge who has not issued a ruling in a pending case after the expiration of a specified period of time. Several states have enacted "no ruling, no pay" laws (and the constitution of one state imposes the same rule), but the federal government has not done so. The motivation for these provisions is straightforward – to expedite court business. After all, lawyers are under rigid, legislatively-imposed timelines to file pleadings, complete discovery, file briefs, and other tasks that require careful thought and analysis. Is there anything wrong with a legislature requiring that judges also discharge their responsibility to expedite litigation by seasonably deciding matters submitted to them for resolution? And, if prompt decision-making is a core element of a judge's job, is there anything wrong with conditioning payment for services rendered on the satisfactory rendering of those services?²²² Or do

220. 3 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 46.07 at 391 (1997); cf. *Coate v. Omholt*, 662 P.2d 591, 597 (1983) (finding constitutionally repugnant any effort of the judiciary to interfere with internal legislative functions, "such as the number of committees, the time within which a committee must act, the time each legislator must attend the sessions, limiting the time of discussion, limiting the time one bill must pass from one house to the other and the like"). The history of the invocation of the political question doctrine in cases involving challenges to congressional processes is admittedly mixed. See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 130 (1997).

221. *Baker v. Carr*, 369 U.S. 186 (1962).

222. Of course, "the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments," *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957), and specifically "[t]he functions that a state court shall perform within the structure of state government are unquestionably matters of state law." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 481 (1981) (Stevens, J., dissenting). For purposes of this analysis, however, the underlying principles regarding the protection of judicial independence and the integrity of judicial decisionmaking appear to be consistent across the states that have addressed these issues. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 SO. CAL. L. REV. 315, 349 (1999) ("Comparative evaluation of federal and state judicial independence suggests fundamental agreement at the core."); Shane, *supra* note 81. ("[A] robust conception of judicial independence is a mandatory feature for every judicial system in the United States."); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U.L. REV. 761, 801-02 note 187 (1997) ("The decisions of the above-mentioned [state] courts are nonetheless based on separation of powers principles that informed the vision of the Framers and that continue to influence modern commentators.").

principles of separation of powers forbid a statutory encroachment of this nature into the core of judicial decisionmaking?

The separation of powers principle centrally implicated here is, of course, the protection of judicial independence from encroachment by the political branches. The term "judicial independence" is the beneficiary of many definitions offered by preeminent scholars. Archibald Cox phrases it this way:

To my mind the idea of judicial independence implies: (1) that judges shall decide lawsuits free from any outside pressure: personal, economic, or political, including any fear of reprisal; (2) that the courts' decisions shall be final in all cases except as changed by general, prospective legislation, and final upon constitutional questions except as changed by constitutional amendment; and (3) that there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.²²³

Stephen Burbank locates the core of judicial independence in "the freedom of the courts to make decisions without control by the executive or legislative branches or by the people."²²⁴

In most of its iterations, judicial independence is an umbrella term that embraces both concepts of "decisional independence," i.e. the ability of courts to decide individual disputes based solely on the applicable law and the facts presented, without regard to external intimidation or other impermissible influences, and "institutional (or administrative) independence," that vests the judiciary with the discretion to manage its own affairs, within reasonable limits and with appropriate accountability.²²⁵ Judge Clifford Wallace's formulation adds also "procedural independence" to connote the judicial branch's authority to devise the rules of procedure by which the judicial process operates.²²⁶ "Branch independence" is a useful term that aggregates concerns about administrative and procedural independence.²²⁷

As Gordon Bermant and Russell Wheeler write, "Decisional independence is the *sine qua non* of judicial independence. . . . As decisional independence exists to serve the impartial administration of justice, so do procedural and administrative independence exist to serve decisional independence."²²⁸

A. Judicial Independence and Salaries in the Federal Courts

Ensuring the decisional independence of federal judges was a central concern of the Framers. The Framers assumed that the constitutional protections of Article III guaranteed life tenure²²⁹ and protection of judicial salaries from diminution²³⁰ were adequate to

223. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565 (1996). Professor Cox also cautions that the notion of judicial independence "[o]nce loosed . . . is not easily cabined." Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1996).

224. Burbank, *supra* note 223, at 335.

225. Shane, *supra* note 81, at 21 note 1.

226. J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with only Chiefs*, 1978 BYU L. REV. 39, 55-58 (1978). Judge Wallace has an additional category of no particular relevance to this discussion—"personal independence," describing the measure of a judge's freedom to participate in the normal activities of social intercourse.

227. Gordon Bermant and Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 844-45 (1995).

228. *Id.* at 838.

229. U.S. CONST., art. III, § 1.

230. *Id.*; see also CAL. CONST. art. III, § 4(b) ("The Legislature . . . shall not reduce the salary of a judge during a term of office below the highest level paid during that term of office.").

this task. Given the historical backdrop against which they were proceeding, those provisions did address the most apparent perils. In colonial times, the King appointed the American judges, could remove them at will, and Parliament could withhold their pay if displeased by a judicial action.²³¹ The Declaration of Independence included among the grievances against the King that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."²³²

Alexander Hamilton emphasized that "there is no liberty, if not the power of judging be not separated from the legislative and executive powers. . . . The complete independence of the courts of justice is . . . essential [.]"²³³ To accomplish that preservation of liberty, "Next to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support."²³⁴

Frontal assaults on the independence of the federal judiciary through unvarnished manipulation of judicial salaries have been quite rare.²³⁵ But the fiscal relationship between the legislative and judicial branches is not free of residual separation of powers concerns. Article III does not foreclose all possible salary-related mischief. In 1964, Congress gave smaller raises to Supreme Court Justices than they approved for themselves. Some suggested punitive motives, but there are other possible explanations.²³⁶ Federal judges also contend that the failure of Congress to keep judicial salaries in pace with inflation, and the resulting need for judges to implore Congress for fair compensation, raises judicial independence concerns.²³⁷

The protection of branch independence received comparatively skimpy attention from the Framers.²³⁸ Judith Resnik notes that

[I]n terms of separation of powers, Article III looks thin. It provides *only* for life tenure and individual salary protection, and misses the institutional needs of a judiciary, functioning in an administrative state either as a branch of government or as a provider of services to the millions of litigants that seek its attention.²³⁹

231. Hon. Robert N. Wilentz, *Separation of Powers – Judicial Independence in the 1980s*, 49 *RUTGERS L. REV.* 835, 836-37 (1997). More traditional judicial protections were in place for colonial judges prior to 1761. W. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 2-3 (1918).

232. Declaration of Independence, para. 11 (1776).

233. *THE FEDERALIST* NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

234. *THE FEDERALIST* NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961). A ruling finding federal judges entitled to cost-of-living adjustments summarized the constitutional history linking compensation and judicial independence and concluded that "[t]here is no doubt but that those words based on experience and sound judgment over the centuries and the words written and uttered by the Founding Fathers are just as relevant and important today as they were at the dawn of this nation." *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995) (Compensation Clause bars imposition of social security taxes on a judge's pay after taking office).

235. This is perhaps attributable to "the admirable self-restraint hitherto exercised by the legislature and the executive." Irving R. Kaufman, *The Essence of Judicial Independence*, 80 *COLUM. L. REV.* 671, 697 (1980). About the only proposal for suspending pay of federal judges that has seen the light of day was a bill introduced in 1995 that would suspend the pay of judges convicted of a felony. S. 52, 104th Cong., 1st Sess. (1995).

236. 110 *CONG. REC.* 17912, 18032-33 (1964). Louis Fisher suggests that the smaller raise could be justified by the more generous retirement system for the courts, the need for members of Congress to maintain two residences, and the extra costs they bear in traveling home to see constituents. FISHER, *supra* n. 21, at 147.

237. Judge John M. Walker, Jr., *Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association*, 12 *ST. JOHN'S J. LEGAL COMMENT.* 45, 54-56 (1996).

238. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 *CORNELL L. REV.* 1045, 1128 (1994) (arguing that at the time of the drafting of the Constitution, "the idea that the judiciary was a wholly independent and coequal department with the other two did not have deep roots in America").

239. Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 *S. CAL. L. REV.* 657, 668 (1999).

Thus, the judiciary with some regularity expresses the concern that the failure of the Congress to timely pass the appropriations bill that includes adequate funding for the overall operations of the judicial branch threatens judicial independence.²⁴⁰ And one judicial objection expressed to the enactment of the line-item veto law (moot for now) was the concern that the President, at the head of the most active litigant in the federal courts, might be able to retaliate for adverse rulings by actual or threatened use of the veto power.²⁴¹

Whether by reason of constitutional interpretation, institutional restraint, or lack of good cause, a "no ruling, no pay" proposal has not surfaced on the federal level. It is to the states that we must turn. By and large, state judiciaries lack the built-in safeguards of independence enjoyed by their federal counterparts. With a very few exceptions, state judges usually serve for limited terms and salaries generally are vulnerable to legislative reduction.²⁴²

B. "No Ruling, No Pay" Statutes in the States

Several states have enacted statutes that require judges to decide cases within a time specified by the legislature. Some of these statutes impose the sanction of a suspension of pay if the deadline is not met. The three state courts that have assessed the constitutionality of "no ruling, no pay" statutes conclude that the laws violate separation of powers principles.²⁴³ Do these statutes threaten decisional or institutional aspects of judicial independence, neither, or both?

The answer is not entirely clear and sashes a bit from analytical box to box. These laws do not imperil decisional independence in the sense that the term typically is employed. They threaten or impose no retribution or retaliation for a judge's decision. They favor no party or class of parties over another, and do not seek to contaminate the deci-

240. *Administrative Office of U.S. Courts, Federal Courts Face Catastrophic Funding Scenario in FY 2000*, (visited Oct. 12, 1999) <http://www.uscourts.gov/Press_Releases/fundscenario.htm>.

241. Line-Item Veto, Joint Hearing Before the House Comm. on Government Reform and Oversight and the Senate Comm. on Governmental Affairs, 104th Cong., 85 (1995) (statement of Judge Gilbert S. Merritt, Chair, Executive Committee of the Judicial Conference of the United States), available at 1995 WL 10418.

242. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1779-80 (1992).

243. Several other states have "no ruling, no pay" statutes that apparently have not been the subject of constitutional challenge. Alaska law provides,

A salary warrant may not be issued to a justice of the supreme court until the justice has filed with the state officer designated to issue salary warrants an affidavit that no matter referred to the justice for opinion or decision has been uncompleted or undecided by the justice for a period of more than six months.

ALASKA STAT. § 22.05.140(b) (Lexis 1998).

In practice, this statute has been interpreted to require the assigned justice to circulate a draft opinion within the specified time period. ALASKA SUPREME COURT ATTORNEY'S HANDBOOK 30 (1988). Identical provisions apply to court of appeals judges, ALASKA STAT. § 22.07.090(b) (Lexis 1998), superior court judges, *id.* § 22.10.190(b), and to district court judges and magistrates. *Id.* § 22.15.220(c). Arizona superior court judges or commissioners cannot receive their salary unless they certify that no cause remains pending and undetermined for sixty days after it has been submitted for decision or, in the alternative, if the chief justice certifies that such judge or commissioner was physically disabled during the period or that "good and sufficient cause exists" to excuse the application of the statute in a particular case. ARIZ. REV. STAT. § 12-128.01 (1992). The issuance of a salary check in violation of the prohibition is a misdemeanor. *Id.* Minnesota tax court judges must decide all matters within three months of submission, "unless sickness or casualty shall prevent, or the time be extended by written consent of the parties." Salary may not be paid without the judge's certificate of full compliance with the statutory requirements. MINN. STAT. ANN. § 271.20 (1999). A Washington state judge may not receive salary until the judge files with the state treasurer an affidavit that no matter pending for decision has been uncompleted for more than six months. REV. CODE WASH. ANN. 2.06.062 (West 1988).

sion-making process with the majoritarian considerations of the political branches. They lack any design to skew the result of any case in any particular direction. They do not render the adjudication process any less impartial. These laws operate on "a neutral pivot," to borrow the phrase from New York's *Cohen* decision.²⁴⁴

But while not compromising impartiality, "no ruling, no pay" laws nevertheless can affect judicial decision-making in particular cases to the extent that they affect not the "what" but the "when" of a judge's ruling.²⁴⁵ One commentator argues that this aspect of interference with the decisional function becomes undue and constitutionally problematic when it increases the risk of arbitrary decisions.²⁴⁶ Statutes that require judges to decide cases within specified time limits, with or without the sanction of a suspension of pay, can increase this risk to the extent that they reduce the amount of time that judges otherwise would devote to cases.²⁴⁷ Ryan observes that this can occur in one or both of two situations:

This reduction in consideration can be the result of (1) a time limit that is too short for certain complex cases, (2) a time limit that, although sufficiently long to permit an unhurried decision in any given case, is applicable to so many cases that a judge will be forced to devote less time to some of them than she otherwise would, or (3) a combination of (1) and (2), that is, a time limit that is insufficiently long for some cases and is applied to a great number of cases.²⁴⁸

In other words, Ryan posits that legislatively imposed time limits for decisions can be unconstitutional when they make a difference in how a case is decided, but are permissible when they do not affect the overall level of consideration given to cases on the court's docket.

Taking the time to produce a careful and polished ruling reduces the risk of an arbitrary decision. The act of writing can refine or modify thinking. Israeli jurist Aharon Barak writes,

An idea that takes over a person's thinking is one thing. Quite another thing altogether is putting it into words. Many are the ideas whose downfall was brought about by the need to explain them, since they contained only external force for which it proved impossible to find a foundation.²⁴⁹

A hurried opinion may skimp on the opportunity to provide a full explanation of the exercise of judicial discretion and judgment.²⁵⁰

244. Cohen, *supra* note 159 at 851.

245. Ryan, *supra* note 223, at 788-89.

246. *Id.* at 798.

247. The sanction of the salary suspension adds to the visceral perception of the legislative incursion, but its only analytical significance is that it prevents a court from credibly interpreting a legislatively imposed time limit as aspirational rather than mandatory. See William H. Adkins, II, *Could He Go Faster Than He Could? Ruminations on the Time Lapse from Oral Argument to Opinion Filing in the Court of Appeals of Maryland*, 51 MD. L. REV. 205, 216-18 (1992) (discussing how courts have interpreted various state constitutional provisions and court rules ostensibly imposing time limits for decision as not mandatory). Indeed, the courts striking down "no ruling, no pay" statutes rely primarily on the precedents striking down time limits for decisions without salary sanctions.

248. Ryan, *supra* note 223 at 801.

249. AHARON BARAK, JUDICIAL DISCRETION 22-23 (Yadin Kaufmann trans., Yale Univ. Press 1987).

250. See *Houston v. Williams*, 13 Cal. 24, 25 (1859), where the court struck down a law requiring the court to render a written opinion with reasons in all cases. The court noted, "If the legislature can require the reasons for our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used." *Id.*

Courts undeniably have an interest in reducing the risk of arbitrary decisions that are the product of frenetic consideration of a case.²⁵¹ Public confidence in the judicial process depends in some measure on the assumption that judges decide cases not only impartially and on their merits, but with care. All other things being equal, quicker rulings are better than slower rulings, but judges should not sacrifice the quality of a decision because of the fear that the next paycheck will be withheld.²⁵² The parties to the case want all of their contentions fully considered, and the public and the bar have an interest in as full an exposition of the developing law as the particular case may merit.

But the finest of lines separates taking enough time to create a well-reasoned opinion and undue delay. Unlike core aspects of decisional independence (there is no such thing as "too much impartiality"), this line can be policed. The law long has recognized that there are outside limits to how much time a judge legitimately can have a matter under advisement.²⁵³ The time for the issuance of a ruling is not simply up to the unfettered discretion of an individual judge. Notions of decisional independence do not reach that far. The central question then becomes who can undertake the task of balancing between rushing a decision and protecting litigants from excessive delay and setting the boundaries of the individual judge's discretion – the legislature or the judiciary itself.

Held to the light at a different angle, perhaps the time limits can best be viewed as a resource question. To produce a quality product, judges need a range of resources from an adequate library, law clerks to assist with research, and space in which to work. The judiciary typically is dependent on the legislative branch to make provision for these inputs, subject to certain formulations of the "inherent powers" doctrine under which the judiciary unilaterally can seek to rectify undue resource shortfalls.²⁵⁴ Time within which to work also can be considered a resource that is an ingredient in careful judicial decision-making. Is it within the inherent powers of the court to ensure sufficient access to this resource?

The three courts that have considered the constitutionality of "no ruling, no pay" laws have decided emphatically that these legislative undertakings to require judges to decide cases within fixed time limits or face suspension of salary are undue encroachments on judicial branch independence. The reasons are similar but not identical. The

251. *Pepe v. Urban*, 78 A.2d 406, 408 (N.J. Super. App. Div. 1951) ("We must never forget that courts exist for the sole purpose of rendering justice according to law. No eagerness to expedite business . . . should be permitted to interfere with our high duty of administering justice in the individual case.").

252. During congressional consideration of the Civil Justice Reform Act's provisions requiring public reporting of judges' caseloads and pending matters (far removed from any question of salary suspension), a federal judge testified on behalf of the Judicial Conference that the "artificial deadlines" created by the reporting system can have "untoward effects" on "the quality of judicial work and on the morale of the conscientious." Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 530 (1993).

253. Appellate courts occasionally issue a writ of mandamus directing a lower court judge to issue a ruling. See, e.g., *McClellan v. Young*, 421 F.2d 690 (6th Cir. 1970) (stating that in light of appellate decision directly on point, four month *delay* in issuing order on petition for habeas corpus warranted *mandamus* directing district *judge* to issue order within 10 days) (emphasis added); *Hall v. West*, 335 F.2d 481 (5th Cir. 1964) (stating that two and one half *delay* in issuing order to desegregate public school system warranted *mandamus* directing *judge* to order defendants to submit desegregation plan) (emphasis added).

254. There are many descriptions of the "inherent powers" concept. See generally FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* 3-5 (1994). For starters: "The doctrine of inherent power runs essentially as follows: The courts are a constitutionally created branch of government whose continued effective functioning is indispensable; performance of that constitutional function is a responsibility committed to the courts; this responsibility implies the authority to raise money to sustain their essential functions." Geoffrey C. Hazard, Jr., et. al., *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1287 (1972).

easiest case is one where the legislature has no constitutional role in regulating the conduct of business in the judicial branch and thus usurps an exclusive judicial function by imposing a time limit on judicial decisions, regardless of the reasonableness of the time limit.

An example of a "no ruling, no pay" statute in this category dispatched with great speed was a Nevada statute requiring, as a condition of receiving monthly salary, that district judges file an affidavit stating that no matters remain undecided for more than ninety days.²⁵⁵ The Nevada Constitution provides:

The powers of the government of the State of Nevada shall be divided into three separate departments – the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.²⁵⁶

The Nevada Supreme Court quoted with approval from prior cases invalidating statutes imposing time limits for decision and stated that "[n]othing can be clearer than that, under our constitutional provision, our courts 'possess the entire body of the intrinsic judicial power of the state.'"²⁵⁷ The precedents "deplore any attempt that might 'bend the judiciary into mere instruments' of the will of the legislature or might 'drive or de-grade judges from the bench' by depriving them of parts of their compensation."²⁵⁸ The court concluded that the matter of time limits for decisions by a judge "is as much a matter of judicial discretion and judgment as the matter of how he may decide it."²⁵⁹

The Nevada court also rejected a contention that the statute should be upheld because it did not directly require a forfeiture of salary and merely delayed receipt of salary for a period solely within the control of the judge. The court was not convinced: "The withholding of a judge's salary for weeks or months might indeed be just as embarrassing and detrimental as an actual forfeiture of a part of such salary."²⁶⁰ Also unavailing was an argument that counsel could stipulate to resubmit a case to stop the further running of the ninety day calendar: "This does not remove the onus of the statute. Counsel may refuse to stipulate, and an order of resubmission may not be made . . . without written stipulation."²⁶¹ Finally, the court rejected a contention that the statute was valid because it did not actually command that a decision be rendered within ninety days: "The coercive means employed by the statute approach so closely to the actual command, however, that we do not consider the distinction important."²⁶²

255. *State v. Meriardo*, 268 P.2d 922 (Nev. 1954). The statute in question stated:

Each district judge shall, before receiving any monthly salary, file with the clerk of each county within his district and with the state controller, an affidavit in which shall be set forth the number of cases, motions or other matters submitted to him as district judge, regardless of the district in which he was sitting at the time of the submission of said cases, motions or other matters which remain undecided, and that no such case, motion or matter remains undecided which has been submitted for a period of more than ninety days.

Sec. 8433, N.C.L. 1929, as amended by Stats. 1953, ch. 54, p. 49 (quoted in *Meriardo*, 268 P.2d at 924).

256. NEV. CONST. art. III, § 1.

257. *Meriardo*, 268 P.2d at 925 (quoting *State v. Johnson*, 69 N.E.2d 592, 594 (Ind. 1946)). Under the Nevada Constitution, the legislature lacks even overlapping authority to prescribe rules of procedure for the courts. *Goldberg v. Eighth Judicial District Court*, 572 P.2d 521, 522-23 (Nev. 1977).

258. *Meriardo*, 268 P.2d at 925 (quotations in original, but sources of quotes not apparent).

259. *Id.*, (quoting *Wyatt v. Arnot*, 94 P. 86, 89 (Cal. Ct. App. 1907)).

260. *Id.* at 925.

261. *Id.*

262. *Id.* at 925-26.

But as Professors Levin and Amsterdam emphasize, "even under constitutions which make no express grant of rule-making power to the judiciary and which have been held to sanction extensive and overruling legislative control of court practice and procedure, an area of strict judicial immunity has been consistently recognized."²⁶³ The other two state courts that have considered "no ruling, no pay" statutes have treated the consideration of when cases are to be decided as falling within a zone of institutional independence guarded by an electrified fence past which the legislature may not venture.

Prior to 1983, Montana law provided for the potential forfeiture of one month's salary of a judge before whom a matter awaited decision for 90 days after submission. Upon filing of an affidavit by the judge setting forth the reasons for delay, the judge could receive an additional thirty days for decision.²⁶⁴ A district court judge challenged the constitutionality of the statute.

The Montana Constitution provides:

The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.²⁶⁵

The Montana Supreme Court noted that this provision does not require "absolute independence because 'absolute independence' cannot exist in our form of government."²⁶⁶ The Montana Constitution also vests procedural rule-making authority in the Supreme Court, subject to legislative veto.²⁶⁷

After surveying decisions from other states, the court concluded that "the essential nature of a constitutional court encompasses the right to determine when a judicial decision will be made." The court drew extensively from the article by Professors Levin and Amsterdam:

What the holdings do suggest is that there is a third realm of judicial activity, neither subjective nor adjective law, a realm of 'proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power.' This is the area of minimal functional integrity of the courts, 'what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.' Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself in judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation of powers and will be held invalid.²⁶⁸

263. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958).

264. MONT. CODE ANN. §§ 3-2-104, 3-5-212 (1983), reprinted in *Coate v. Omholt*, 662 P.2d 591 app. A (Mont. 1983).

265. MONT. CONST. art. III, § 1.

266. *Coate v. Omholt*, 662 P.2d 591, 594 (Mont. 1983).

267. MONT. CONST. art. VII, § 2(3).

268. *Id.* (quoting Levin & Amsterdam, *supra* note 264, at 31-32). The Coate court also cited with approval several cases that struck down on separation of powers grounds state statutes requiring judicial decisions within fixed periods of time. *See* *Resolute Ins. Co. v. Seventh Jud. Dist. Ct. of Okl. Co.*, 336 F. Supp. 497 (W.D. Okla. 1971) (requirement that judge hear motion to set aside bail bond forfeiture within 30 days of motion); *Sands v. Albert Pike Motor Hotel*, 434 S.W.2d 288 (Ark. 1968) (statute required trial court to affirm workmen's compensation decision after being on file for 60 days); *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592, 596 (Ind. 1946) (statute deprived court of jurisdiction if no decision was reached within 90 days; "The court and not the Legislature must be the judge of the order in which it will dispose of cases and what period

The question of when cases shall be decided is within the "spheres of activity so fundamental and necessary to a court, so inherent in its very nature as a court that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*."²⁶⁹

The Montana court also concluded that the "no ruling, no pay" statute violated the state constitutional prohibition against diminution of judicial salaries during terms of office, and the federal and state constitutional prohibitions against impairment of contracts. The court rejected an argument that the legislature was authorized to condition payment of salary on performance of all services required as may be specified by the legislature or, more specifically, on timely filing of affidavits and judicial decisions.²⁷⁰

The Wisconsin "no ruling, no pay" statute also was found to violate separation of powers principles. The statute provided that no judge may receive any salary "unless he or she first executes an affidavit stating that no cause or matter which has been submitted in final form to his or her court remains undecided that has been submitted for 90 days, exclusive of the time that he or she has been actually disabled by sickness or unless extended by the judge under sub. (2)."²⁷¹ Subsection 2 allows a judge who is unable to complete a decision within the 90-day period to "so certify in the record and the period is thereupon extended for one additional period of not to exceed 90 days."²⁷² The constitutionality of the statute was tested in a judicial disciplinary proceeding brought against a circuit judge for his alleged persistent failure to perform official duties, including the alleged willful or persistent failure to render decisions in cases within the period required by the statute.²⁷³

The Wisconsin Constitution "creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another."²⁷⁴ Like the federal version, the Wisconsin separation of powers doctrine is not absolute, and recognizes the principle of "shared, rather than completely separated powers"²⁷⁵ under which "one branch may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power."²⁷⁶ Nevertheless, there remain "zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding."²⁷⁷

of time proper disposition shall require"); *Shario v. State*, 138 N.E. 63, 64 (Ohio 1922) ("the legislative branch of the government is without constitutional authority to limit the judicial branch of the government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction"); *State v. Merialdo*, 268 P.2d 922, 925 (Nevada 1954) (discussed *supra* at 74-76).

269. *Id.* (quoting Levin & Amsterdam, *supra* note 264, at 29-30).

270. 662 P.2d at 597-99. Some state statutes authorize deductions from the pay of judges who are absent from court without sufficient justification. For example, section 25-3-57 of the Mississippi Code requires the deduction from pay of twice the number of days of unexcused absences. Grounds for excusable absences are "sickness of himself or his family, or that his attendance was prevented by high water, the prevalence of an epidemic or contagious disease, or by accident not within his control." Such a statute does not link a salary sanction to any aspect of the process of judicial decision-making and thus raises little constitutional concern.

271. WIS. STAT. ANN. § 757.025(1) (West 1991). The affidavit shall be presented to and filed with every official who certifies in whole or in part the judge's salary. *Id.* A predecessor statute, enacted in 1959, specified a one year period for disposition of pending matters. In the Matter of the Complaint Against Judge Warren A. Grady, 348 N.W.2d 559, 566 (Wis. 1984).

272. WIS. STAT. ANN. § 757.025(2) (West 1991).

273. In the Matter of Grady, 348 N.W.2d at 561-62.

274. *State v. Holmes*, 315 N.W.2d 703, 709 (Wis. 1981).

275. *Id.*

276. In the Matter of Grady, 348 N.W.2d at 566.

277. *Id.* The Wisconsin court previously found within this exclusive zone of authority an attempt to remove and replace a court janitor, an attempt to dictate the physical facilities in which a court was to exercise its

Within this rubric, the court determined that the setting and enforcement of time periods for judges to decide a case lies within an area of authority exclusively reposed in the judicial branch. Legislative intrusion into this exclusively judicial area was unconstitutional.²⁷⁸ Shifting from concerns of branch independence to decisional independence, the element of salary suspension "constitutes an attempt by the legislature to coerce judges in their exercise of the essential case-deciding function of the judiciary. In so doing, the legislature violates the well-established policy that the judicial branch of government must be independent in the fulfillment of its constitutional responsibilities."²⁷⁹ Significantly, though, the court noted that the time period for decision-making in the statute did not seem unreasonable.²⁸⁰

An Oregon case upholding a statutory time limit for judicial decision without an attached pay sanction illustrates a contrary conclusion about the appropriate role for the legislature in this area.²⁸¹ The Oregon Constitution provides for a separation of powers in terms identical to the Montana Constitution.²⁸² The statute in question provided that an appeal from a special proceeding "must be heard and determined within three months from the time of taking of such appeal."²⁸³ After the plaintiff asked to expedite the briefing schedule to accommodate the statutory requirement, the court of appeals advised counsel for the parties:

The Court of Appeals expressly wants you to know that it has been the practice of the Court of Appeals to deny such motions in the absence of a showing of exceptional circumstances over and above a legislative direction as to how the judiciary should conduct its business.²⁸⁴

The supreme court was less dismissive of the statute's requirements, noting that it previously upheld other legislation affecting judicial power. The statute did not on its face

judicial functions, an attempt to legislate what constitutes the legal sufficiency of evidence, an attempt to regulate trials in the conduct of court business, and bar admission and regulation of attorneys. *Id.* at 567 (citations omitted).

278. *Id.* at 569.

279. *Id.* Justice Abrahamson, concurring, concluded that the statute fell within an area of shared authority between the judicial and legislative branches. She stated that the statute had not proven an undue burden on the judiciary and thus was constitutional. *Id.* at 574.

280. *Id.* at 570.

281. As noted, the "no ruling, no pay" cases are a subset of a larger universe of cases examining time limits for judicial action, many of which do not involve a salary sanction. Federal statutes have imposed time limits for judicial decisions without a salary sanction. Ryan, *supra* n. 223, focuses on the habeas corpus reforms enacted in the Antiterrorism and Effective Death Penalty Act of 1996 that require a court of appeals to take no more than thirty days to dispose of a prisoner's motion seeking authorization to file a second or successive habeas petition. In certain circumstances, the Act also requires a district court to render a final determination on any habeas applications within 180 days, with any appeal to be resolved in 120 days. *Id.* at 763-64. Ryan concludes that an inflexible application of these time limits would unduly interfere with judicial decisionmaking. He also identifies as another example 28 U.S.C. § 1826(b), which requires courts of appeals to dispose of a recalcitrant witness's appeal from an order of confinement "as soon as practicable, but not later than thirty days from the filing of such an appeal." Most courts have fashioned exceptions to this requirement, but the Tenth Circuit enforced it by its terms and could "do no more than hurriedly review the transcript and the complex briefs." *Id.* at 803-04, citing *In re Berry*, 521 F.2d 179, 181 (10th Cir. 1975). See also cases cited *supra* n. 269; *Rijlander v. Star Co.*, 90 N.Y.S. 772 (1st Dept. 1904), *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905) (rule specifying when certain cases were to be tried was unconstitutional deprivation of right of courts to exercise inherent judicial discretion). The presence or absence of the salary sanction does not appear to be outcome-determinative.

282. OR. CONST. art. III, § 1.

283. OR. REV. STAT. ANN. § 261.615 (1998). The special proceeding at issue in this case was an action challenging the validity of a revenue bond election.

284. *State ex rel. Emerald People's Utility District v. Joseph*, 640 P.2d 1011, 1012 (Or. 1982).

"unduly burden[] or unduly interfere[] with the judicia[ry] [department] in the exercise of its judicial functions."²⁸⁵ The court reasoned that it was not impossible within the statutory deadline "for counsel to complete proper briefing or other documentation adequate for a responsible judicial decision, and for the court to arrive at a reasoned decision consistent with the judicial responsibility imposed by Art VII."²⁸⁶ The court declined to infer such impossibility in the abstract, presumably but skeptically preserving the possibility for a subsequent "as applied" challenge.²⁸⁷

A dissenting justice perceived the issue to be one of institutional autonomy and considered it largely irrelevant that an appeal could be disposed of within three months. While it could well do so and do so well, Justice Peterson observed that so doing will require the court to set aside other important cases. Under separation of powers principles, "[p]ermitting the legislature to tell us when and how to hear and determine cases will impermissibly affect judicial functions – the manner in which cases are prepared, argued, considered and determined."²⁸⁸ The quality of such determinations may well suffer in the process: "For as this opinion may reflect, opinions spurred by a sense of urgency, with adrenalin flowing, the banner of advocacy waving, a opportunity for detached consideration lacking, often result in passionate statements of position reflective of advocacy more than reason."²⁸⁹

Particularly given the stipulation of the Wisconsin court that the legislative time limit for judicial decisions was not an unreasonable one, why should this territory be so forbidden to the legislature in states where the constitution itself does not commit all rulemaking authority to the courts? A visceral explanation is that the extent of the legislative intrusion is so sweeping, applying directly to the work of every judge every day in every case. It is micromanagement on a macro scale. Another and related possible explanation is that the appropriateness of the imposition of a time limit for decision turns on subtle and varying considerations. As Professor Charles Gardner Geyh has usefully categorized, judicial delay either may be defensible and wholly or largely out of the judge's control (excessive caseload, insufficient numbers of judges, structural inefficiencies, case complexity) or indefensible (a judge's own inefficiency, belligerence, indecisiveness, disability, sloth or neglect).²⁹⁰ The Montana and Wisconsin statutes impose an across-the-board time limit to all types of pending matters, regardless of subject matter or complexity or whether it is within a judge's control to meet the deadline. The reasonableness of such a statute can only be judged in hindsight. That reasonableness will turn on the number and complexity of cases ripe for a decision on a judge's docket at any given time. Some matters can be resolved in thirty minutes. For others, ninety days still would not be sufficient to address with the clarity necessary a novel theory in a complex and technical area of the law. An individual judge, much less a legislature, typically cannot state with precision how much time she will need to resolve a particular case when that answer depends on the balancing of a docket packed with competing cases.²⁹¹

285. *Id.* at 1013, (quoting *State ex rel. Acocella v. Allen*, 604 P.2d 391 (Or. 1979)).

286. *Id.* at 1014.

287. The emphasis should be on "skeptically," since the court also observed that "[w]e know it is possible to have a case briefed, heard and decided by an appellate court" in six days. 640 P.2d at 1014.

288. *Id.* at 1018 (Peterson, J., dissenting).

289. *Id.* at 1018-19. Not surprisingly, Oregon has a very conservative view of the inherent power doctrine, authorizing the judiciary "in rare instances, to act contrary to the dictates of the legislative branch." *Ortwein v. Schwab*, 498 P.2d 757, 762 (Or. 1972).

290. Geyh, *supra* note 253, at 513-20.

291. The author's experience predicting the completion date for this article is sufficient proof for him.

But what about the indefensible delays? Far too many litigators have encountered a judge who delays ruling in a routine case for years, and who makes the foregoing discussion seem naïve and idealistic. Surely judicial independence is not so unflinching that it must shelter from remedy pure delay. How should that legitimate concern be dealt with in a way that is compatible with the preserving institutional autonomy, particularly in the cases of chronic delays?

Without purporting to vouch for its efficacy, judicial self-regulation is one approach. The courts presumably can impose similar time limits on themselves, enforceable if not by salary sanction then by professional discipline.²⁹² Contemporaneously with the invalidation of the "no ruling, no pay" statute, the Wisconsin Supreme Court invoked its administrative authority over the state court system and adopted Supreme Court Rule 70.36 as a substitute. The new rule mirrored the legislature's 90-day time limit for rulings. Circuit court judges are directed to decide pending matters within 90 days, with an automatic extension of 90 days available when a judge certifies that he is unable to meet the deadline. The court stated that the purpose of the certification and accompanying notification to the chief judge is to alert the judicial administrative offices "of a need for additional judicial personnel or other steps to ensure the prompt disposition of judicial business in those courts."²⁹³ Further extensions are available for decision in specific matters as exigent circumstances may require. A judge's failure to comply with the rule, however, does not carry a salary-related sanction. Instead, violators are subject to a change of assignment, referral to the supreme court for contempt proceedings, or referral to the judicial commission for investigation of possible misconduct.²⁹⁴

Self-regulation does not imperil institutional judicial independence. There is no interference by the political branches. Thus, when it comes to setting the time for the disposition of a case, the Supreme Court can on its own initiative dramatically accelerate its customary time frame when forced with critical cases and pressure itself collectively for a quick ruling. However, presumably the Supreme Court would hold unconstitutional a congressional directive to do so.²⁹⁵ While the imposition of "administrative" rules may have a comparable potential for coercive effect on individual judges, the judicial branch can be assumed to be acting with the judiciary's institutional interests in avoiding arbitrary decision-making in mind. The unquestioned good of quicker rulings

292. Ryan discusses time limits imposed by an appellate court for action by a lower court in a particular case and pronounces them "unproblematic" because of the rarity of their invocation. He further states:

[t]he dispositive reason why time limits set by appellate courts do not offend separation of powers principles is that, in establishing such limits, the court is performing an adjudicative—not a legislative—function. . . . Because it is addressing only one case at a time, the threat of interfering with the lower court's decisionmaking function is greatly reduced.

Ryan, *supra* note 223, at 809. Ryan's analysis focused on the federal courts, but the Grady decision illustrates that these time limits can be legislative. The sounder reason such limits do not offend separation of powers principles in any case is that the origin and object of the action is solely internal to one branch of government.

293. Complaint Against Grady, 348 N.W.2d 559, 570 (Wis. 1984).

294. Complaint Against Grady, 348 N.W.2d at 571. The Wisconsin rule, unlike the blunter legislative measures, recognizes that there may be varying causes and thus, varying solutions to judicial delay.

295. For instance, in the Pentagon Papers case, the New York Times' petitions and motions were filed with the Supreme Court on June 24, 1971. The record arrived on the evening of June 25. Briefs were filed and oral argument took place on June 26. The Court announced its decision four days later. *New York Times v. United States*, 403 U.S. 713 (1971).

can be pursued in a more balanced and nuanced manner when directed from within through the redirection of resources and consideration of when exigent circumstances justify a longer time for consideration.²⁹⁶

To be sure, judicial self-regulation does affect yet another offshoot of judicial independence—"the independence of judges." As described by one federal district judge and his co-author:

Structural definitions of judicial independence are mainly negative. They tell us what judicial independence is not, rather than what it is. By looking at what members of the executive or legislative branches of government cannot do, a structural approach indicates what is inconsistent with independence. . . . A structural approach is, however, likely to include only bits and pieces of what it is to be independent to a judge because it is inherently concerned only with the relationships between the branches of government. Consequently, it obscures the constraints on independence imposed on judges from within the judiciary. Even if the other branches of government cannot remove a judge from a case or mandate a certain decision's outcome, other judges may be able to do just that, either through disqualification or normal appellate proceedings. . . . It doesn't much matter to the judge who restrains him, he is restrained.²⁹⁷

But in those states with a unified judiciary, no judge is an island. To draw upon a federal analogy, the United States Supreme Court recognized this distinction in considering the appropriateness of the supervisory and management roles of a circuit Judicial Council:

There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to . . . how long a case may be delayed in decision . . . and many other routine matters. As to these things – and indeed an almost infinite variety of others of an administrative nature – can each judge be an absolute monarch and yet have a complex judicial system function efficiently?²⁹⁸

Of course, separation of powers objections to "no ruling, no pay" provisions also can be obviated through constitutional amendment. Article VI, section 19 of the California Constitution states that "a judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending

296. There is not unanimous sentiment that judiciary-imposed restraints on individual judges pose a lesser threat to judicial independence. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 700 (1980) (commenting that a proposed legislation creating a system for judicial discipline poses "the extraordinary danger of erosion of the impartiality that is the essence of the judicial role"). The legislative setting of time limits also can be seen to violate separation of powers principles through excessive micromanagement of a coordinate branch. One federal judge identified the Civil Justice Reform Act as an example of congressional micromanagement. He argued that the judicial branch, not Congress, "should actually be managing the affairs of the judiciary in terms of how the judiciary should function, meet its caseload requirements, manage itself," and that it exemplifies "bad management" for Congress to set "time frames for deciding particular cases, trying to determine . . . how fast a civil docket of a particular judge should move." *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence*, (visited Oct. 24, 1999) <<http://www.abanet.org/govaffairs/judiciary/r4b.html>>.

297. James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795, 798-99 (1995). Zagel and Winkler argue for incorporating "introspective" visions into discussions of the meaning of judicial independence. See also John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 79 S. CAL. L. REV. 353 (1999).

298. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85 (1969). Justice Douglas dissented, asserting that maintenance of an independent judiciary requires each judge to be protected from "censor or discipline" by other judges. 398 U.S. at 136-37.

and undetermined for 90 days after it has been submitted for decision." An implementing statute provides that: "No judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision."²⁹⁹ Upon issuance of the decision, the salary withheld is restored to the judge.³⁰⁰ This constitutional amendment, in effect since 1879, and the companion statutory provision are said to reflect the judgment of the legislature and the electorate that the 90-day period "affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases."³⁰¹

As with the "no pay" measures directed at the executive and legislative branches, there exist alternative mechanisms to address concerns of docket congestion or perceived delay in resolution of judicial proceedings.³⁰² The requirement in the Civil Justice Reform Act for federal judges to report the status of pending cases was one approach.³⁰³ For those states with an elected judiciary, there is an obvious political remedy. For other states, Ryan suggests that a legislature has a host of options that pose less constitutional peril to judicial independence, including imposing requirements that parties complete discovery within a shorter period of time or that a given class of cases go to trial within a certain amount of time.³⁰⁴ Within the framework of existing law, delay in judicial decisionmaking can be attacked through existing formal and informal judicial disciplinary processes, mandamus remedies, or publicity.³⁰⁵

Having surveyed "no budget, no pay" and "no ruling, no pay" laws, this is an appropriate point to confront the obvious asymmetry in the conclusions that a legislative body can be pummeled into accelerating its deliberations by a coordinate branch, but the judiciary cannot be.³⁰⁶ The explanations are obvious. As Judge Kaufman wrote, "[t]he three branches may be co-equal, but they are surely not identical. . . . [A] statute designed to bolster the political accountability of government officials may offend article III by exposing a judge to undue public pressure, though it is entirely consistent with articles I and II."³⁰⁷ While there are established notions of "legislative independence," the institutional design of American legislatures is to embrace external input on legislative issues.

299. CAL. GOV'T CODE § 68210 (West 1997).

300. *Wyatt v. Arnot*, 94 P. 86 (Cal. Ct. App. 1907).

301. *Mardikian v. Commission on Judicial Performance*, 709 P.2d 854 n.4 (Cal. 1985). California judges occasionally have sought to evade the salary suspension by the device of "resubmitting" the case shortly before or after the running of the statutory period. The California Court of Appeals brands this practice improper where not justified by unusual circumstances. *Hassanally v. Firestone*, 59 Cal. Rptr. 2d 625, 627 (Cal. Ct. App. 1996) ("Only the boldest of counsel is likely to protest while the case remains undecided in the hands of the trial judge.").

302. Professor Lawrence Dessem observes that "there is really no way to require [federal] judges to resolve cases and decide motions expeditiously." R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 708 (1993). He notes that tardiness in deciding civil motions or bench trials is not likely to lead to discipline under the Judicial Discipline and Removal Reform Act of 1990, nor to impeachment. *Id.* at 709.

303. 28 U.S.C. § 476 (1994).

304. Ryan, *supra* note 223, at 813.

305. Geyh, *supra* note 253, at 520-28. See also Robert E. Litan, *Speeding Up Civil Justice*, 73 JUDICATURE 162 (1989).

306. The same asymmetry could be illustrated in terms of the permissible levels of public criticism of the decisionmakers. Criticizing the legislature knows no limits, while there is a substantial body of scholarly writing urging limits to public criticism of judges. There is an e-mail alert service that is dedicated solely to upholding judicial independence by reporting instances of perceived inappropriate public criticisms of judges. (The Court Pester E-let is managed by the Brennan Center for Justice at the New York University School of Law.).

307. Kaufman, *supra* note 236, at 697 n.156.

Decisions on the timing and merits of legislative decisions are not to be made solely on the basis of a closed record, and interested persons regardless of their standing can provide views. The decisionmakers are expected to address their thinking, through television talk shows or other fora, while the matter is pending. The process of judicial decisionmaking is of course the opposite.³⁰⁸

Moreover, the judiciary as an institution needs a different quantity of protection from the coordinate political branches. As Alexander Hamilton noted in *Federalist No. 78*, the judiciary lacking force and will from its "natural feebleness . . . [will be] in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches. . . ."³⁰⁹ Given its status as the "least dangerous branch," "[e]ven relatively minor and remote threats to impartial decision-making" are to be avoided to preserve judicial independence.³¹⁰

V. Conclusion

The power over a person's subsistence is indeed substantial. Suspending or halting the salary of a public official is a blunt instrument in the arsenal of public policy. Existing principles of constitutional law provide some protection to public officials. The bans on bills of attainder in the United States Constitution protect public officials from legislative forfeiture of salary amounting to a permanent proscription on government employment when imposed purely as a punishment. When imposed by the legislature to prompt the removal of an executive branch official, principles of separation of powers should intervene to protect the executive's power of removal. But the same result can be reached without constitutional concern when the legislature acts through an "impersonal" and bona fide effort to restructure executive branch operations.

Suspending the pay of legislators as an inducement to enact a timely budget and suspending the pay of judges as an inducement to issue timely opinions raise similar issues but yield opposite conclusions. Coercing legislative action through means that are themselves lawful is not inconsistent with the structure and functioning of legislatures, but when imposed externally such coercion is antithetical to judicial independence.

In all cases, however, the manipulation of salaries is too powerful a tool, and in certain cases can have too devastating a personal impact. In each of the contexts in which salary suspensions have been attempted, there exist alternative means to accomplish the same objective. As Peter Shane has persuasively written in a related context, each branch of government ought to conduct itself with some measure of restraint:

Each branch has the power to make life more difficult for the others, and probably could do so with relative impunity, legally speaking. But each branch should follow a rule of necessity before risking the efficacy of any other branch. . . . Except as the conscientious performance of constitutional duty compels otherwise, the branches' common commitment to shared governance should animate their interactions.³¹¹

Despite its symbolic appeal, mutual disarmament would benefit the public sector and a nation reliant on the willingness of people with talent and commitment to serve their country. Even though they are not in it for the money, the money should not be used by a coordinate branch of government as a lever to direct their work.

308. Note that when one of the political branches functions in an adjudicative capacity, a greater level of insulation from political coercion attaches. An administrative adjudication is "invalid if based in whole or in part on . . . [congressional] pressures. . . ." *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.).

309. *THE FEDERALIST NO. 78* at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

310. Kaufman, *supra* note 236, at 697.

311. Shane, *supra* note 81, at 23-24.

