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# Executive Power to Provide Material and Financial Support to Foreign Governments and NGOS Linked to Terrorist Groups

## **Cover Page Footnote**

\* Notre Dame Law School, J.D. Candidate, May 2015. I would like to thank Professor Anthony J. Bellia for his support and guidance. I would also like to thank my family and friends for challenging me both personally and professionally.

**EXECUTIVE POWER TO PROVIDE MATERIAL AND  
FINANCIAL SUPPORT TO FOREIGN  
GOVERNMENTS AND NGOS LINKED  
TO TERRORIST GROUPS**

ALEXA E. CRAIG\*

INTRODUCTION

Since the Iran-Contra affair<sup>1</sup> in the 1980s, the President's power in foreign affairs, while questioned, has been constrained very little.<sup>2</sup> Constitutional questions about executive power in the international arena have largely transformed into statutory ones. While statutes are more adaptable to changing circumstances than the Constitution, the statutory questions continue to address the issues generated by the Framers.<sup>3</sup> Uncertainty regarding the scope of executive power has another cause: courts often dismiss cases about the constitutionality of the President's actions for standing reasons. For instance, one of the latest cases that could have precipitated a serious discussion of the President's foreign affairs powers is *Bernstein v. Kerry*.<sup>4</sup> If the court had not dismissed

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1. The Reagan administration covertly facilitated the sale of arms to Iran in order to secure the release of hostages there and to fund the Nicaraguan Contras contrary to the Boland Amendment, Pub. L. No. 98-473, § 8066, 98 Stat. 1904, 1935 (1984). The plan was that Israel would ship weapons to Iran, and the United States would resupply Israel and receive the payment. Many investigations followed these actions, including one by Congress and Reagan's Tower Commission. Five individuals were charged with aiding the Contras, but charges were dismissed. See Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1265 (1988).

2. See Julius Lobel, *Covert War and the Constitution*, 5 *NAT'L SEC. L. & POL'Y* 393 (2012) (commenting on Special Operations Forces that have engaged in "clandestine, anti-terrorist military activities" and Central Intelligence Agency ("CIA") "shadow" was against terrorists). *Id.* at 394. Operation Desert Shield is another recent example. President George H. W. Bush deployed 50,000 ground troops, along with 300 aircraft, to Kuwait to battle the invading Iraqi forces without congressional approval or appropriated funds. See Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 *IOWA L. REV.* 79, 85-86 (1995).

3. See Lobel, *supra* note 2, at 402 (arguing that the Constitution provided discretion for the Executive in certain paramilitary activities but not in "[i]nitiating war").

4. 962 F. Supp. 2d 122 (D.D.C. 2013). Twenty-four American citizens, two injured in terrorist attacks, residing in Israel alleged that John Kerry violated several statutes by

the case for standing reasons, the plaintiffs would have challenged the Secretary of State's decision to send military support to Nicaraguan rebels under the Department of State Foreign Operations and Related Programs Appropriations Act ("SFOAA")<sup>5</sup> and other statutes governing aid to foreign organizations and countries. Congress has developed a complex system for analyzing the Executive Branch's power in this realm by setting up reporting requirements and adding a multitude of riders to bills.<sup>6</sup> It is questionable how effective these statutes are at curbing Executive power-grabs, especially when the Executive has found evasive techniques for accomplishing its goals. For example, the usual statutory definition for "military support" has always included activities such as arming, training, directing, and sending out troops, but now statutory definitions must cover guerilla support and logistics in order to rein in presidential power in those areas.<sup>7</sup> This definition should also include funding, at least when the United States directs the distribution of funds at a micro-level.<sup>8</sup>

From involving the US forces in North-Atlantic-Treaty-Organization-led actions in Haiti and Bosnia,<sup>9</sup> to caring for migrants at Guantanamo,<sup>10</sup> to sending drones to Somalia,<sup>11</sup> the American people, through the structure set up by the Constitution, must decide what the Executive can and cannot do and what Congress's role is in limiting that authority. Unless cases such as *Bernstein* eventually reach the merits, the Judiciary will not be the arbiter in this realm; instead, the political process may be the decision-maker. The cases *United States v. Curtiss-Wright*<sup>12</sup> and *Dames & Moore v. Reagan*<sup>13</sup> affirmed extensive executive power in foreign affairs, meaning that Congress must be careful in wrestling power from the Executive in overseas spending.

This Note argues that the President has broad authority to send financial and material support to foreign governments and non-govern-

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providing money and resources to the Palestinian Authority and non-governmental groups in the West Bank and Gaza Strip. *Id.* For another example from the Obama administration, see Mark Hosenball, *Exclusive: Obama Authorized Secret Help for Libya Rebels*, REUTERS (Mar. 30, 2011, 6:16 PM), <http://www.reuters.com/article/2011/03/30/us-libya-usa-order-idUSTRE72T6H220110330>. In this article, Voice of America intelligence correspondent Gary Thomas described covert action as encompassing "propaganda, covert funding, electoral manipulation, arming and training insurgents, and even encouraging a coup." *Id.*

5. Pub. L. No. 112-74, 125 Stat. 786 (2012).

6. See Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 12 (1998).

7. Lobel, *supra* note 2, at 401.

8. See Koh, *supra* note 1, at 1302-03 (arguing that when the Executive solicits third parties to accomplish its objectives, it escapes Congress's power of the purse so long as it does not exercise control over the third parties).

9. See Rosen, *supra* note 6, at 1-2.

10. *Id.* at 2.

11. Lobel, *supra* note 2, at 407.

12. 299 U.S. 304 (1936) (holding that Congress could delegate to the President the power to ban sales of arms to certain countries).

13. 453 U.S. 654 (1981) (holding that the President could terminate proceedings against Iran in U.S. courts without even implied Congressional approval due to the President's authority in foreign affairs).

mental organizations (“NGOs”) so long as Congress does not statutorily express disapproval. Part I discusses what the Constitution says about military spending abroad, both from a congressional and an executive standpoint. In addition, this part describes the Judicial Branch’s decisions regarding executive power to direct funds abroad. Part II describes the United States’ international spending process, which is now the primary mechanism for curbing executive power. It also discusses how the Executive has managed to evade the control mechanisms set out by Congress, and it elucidates the relevant statutory framework for *Bernstein v. Kerry*, which is then applied to that case. In order to analyze the legality and constitutionality of an executive decision to send financial military support abroad, one must scrutinize the President’s acts through an ordered series of questions.

First, the President must comply with statutes governing funds for overseas spending by either following the written word or by exercising appropriate waivers. If he does not follow all procedures, then we ask if Congress has sufficiently “disapproved” of his action. Looking to the relevant case law, if Congress does not strongly disapprove of a Presidential action in the international arena, then his action is constitutional due to the power vested in him by Article II.<sup>14</sup> When Congress develops a statutory framework with several waivers, it manifests an intent that the President exercise some discretion in the relevant area. This endorsement of executive discretion cannot then be used to show disapproval of an executive action when the waivers are later found to be so muddled and convoluted that they render that discretion meaningless. In *Bernstein*, the relevant statutory framework appears to wholeheartedly endorse executive discretion in spending in the Middle East. Congress probably intended this discretion in anticipation of the need for flexibility in diplomacy. Thus, Congress cannot now claim that it disapproves of the President’s discretionary act to send funds to the Palestinian Authority and non-governmental organizations in the area merely because he made a procedural error in executing the statutes.

## I. INTERNATIONAL MILITARY SPENDING UNDER THE CONSTITUTION

One branch of government rarely, if ever, has the authority to unilaterally fund military operations abroad. The Constitution ensures a drawn-out, scrutinized process for sending funds internationally. This Part spells out congressional and presidential roles in the funding process by presenting various scholarly theories and illuminating the most cogent approach: the Spending and Appropriations Clauses of Article I demonstrate that all spending originates in Congress. When appropriations are made in the international arena, however, the President has discretion, founded in the Vesting Clause, to execute those appropriations as he sees fit, so long as he acts without Congress’s disapproval.

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14. See U.S. CONST. art II, § 2.

### A. Congress's Authority to Regulate Military Funding Abroad

The Constitution grants the Legislature, as the most democratic representative of the People, broad authority in both domestic and foreign affairs. It grants Congress the power of the purse, which influences nearly every other delegated power. The Appropriations Clause further enhances this authority. Congress also has the power to raise and support armies, to declare war, and to grant marques and reprisals—scholars have proposed that these three powers are determinative in the issue at hand, but this Note rejects that premise, as each of those powers is explicitly confined to wartime. Still, it is important to examine each power in order to understand Congress's role in sending funds to foreign countries and non-governmental organizations, as spending questions originate in Congress.

#### 1. The "Spending" and "Appropriations" Clauses

The Constitution provides, "The Congress shall have Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defen[s]e and general Welfare of the United States."<sup>15</sup> While the placement of the "Spending Power" in this clause suggests that it is only connected to money raised through taxes,<sup>16</sup> there is some suggestion that the power is in fact greater.<sup>17</sup> Following this grant of power is the power to borrow money on credit.<sup>18</sup> The Founders broadly understood this portion of the Constitution. First, the "only express boundaries" are very explicit, referring to judicial and presidential salaries and two-year appropriations for the Army.<sup>19</sup> Next, the Appropriations Clause emphasizes congressional control by stating, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>20</sup> Since "[n]o legislative power is given to any other branch of the federal government,"<sup>21</sup> it follows that the spending power is vested in Congress. The ratification debates also demonstrate an understanding of the breadth of this power.<sup>22</sup> With respect to funding military

15. U.S. CONST. art. I, § 8, cl. 1.

16. See *United States v. Butler*, 297 U.S. 1 (1936).

17. While Rosen does not express this view outright, he comments on how the Spending Power is not limited to the enumerated powers and how it is "co-extensive" with the general welfare clause, meaning it was intended to allow Congress to "secure ends it could not otherwise achieve through coercive legislation . . ." Rosen, *supra* note 6, at 23.

18. U.S. CONST. art. I, § 8, cl. 2.

19. Rosen, *supra* note 6, at 19.

20. U.S. CONST. art. I, § 9, cl. 7.

21. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, & FOREIGN AFFAIRS 18 (1990).

22. See Roger Pilon, *Freedom, Responsibility, & The Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 522–32 (1993). Both the Magna Carta and the Charter of Confirmation limited the King's power to raise revenues. When King James tried to raise revenues in creative ways, Parliament continuously curbed his advances. See Rosen, *supra* note 6, at 30–43. "Control over the public purse was the cornerstone of British representative democracy. It served as the instrument for parliamentary supremacy, compelling monarchs to surrender their royal prerogatives . . ." *Id.* at 44. Furthermore, it was the way in which taxpayers would have a "voice in how their money was spent." *Id.* State constitutions also granted the appropriations power to their legislatures. *Id.* at 61. Convention delegates warned of possible encroachments by the

initiatives, Nathaniel Gorham stated, “[T]he means of carrying on the war would not be in the hands of the President, but of the Legislature.”<sup>23</sup>

History and legislative commentary are not the only affirmations of Congress’s power over the purse: custom, too, affirms Congress’s role. Presidents have often “acceded to Congress’s power to dispose of their proposals.”<sup>24</sup> Not seeking to outright deny congressional power, Presidents also have often read restrictive provisions in a narrow way so that their actions do not fall under the statute.<sup>25</sup> Furthermore, when Presidents have spent money contrary to Congress’s will, they have crawled back to Congress asking for ratification to cure the mistake.<sup>26</sup>

At present, some argue that the President requires a minimum amount of spending authority to accomplish his objectives, especially national security or foreign affairs objectives,<sup>27</sup> but this runs contrary to the structure set up by the Constitution.<sup>28</sup> This Note adopts the view that the President must operate under appropriations by Congress, even in the foreign realm. This view is not contrary to the “Take Care” Clause<sup>29</sup> because that clause refers to acts passed by Congress—it is not a blanket power given to the President. Thus, the analytical starting point for questions like the one presented in *Bernstein* is the Appropriations Clause. Congress may even legislate into the specific details of an appropriation, but it must do so overtly in order to comply with the Constitution; otherwise, it begins to infringe on the President’s executive powers.

## 2. Congress’s Power to “Raise and Support Armies,” “Declare War,” and “Grant Marques and Reprisals”

The Constitution grants Congress exclusive control to “raise and support Armies” with only one restriction: each appropriation expires

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Executive Branch. Franklin worried that the President would attempt to “extort” money from the Legislature. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 99 (Max Farrand ed., 1911) (June 4, 1787) (remarks of Benjamin Franklin). Mason expressed similar concerns. *Id.* at 144 (June 6, 1787) (remarks of George Mason).

23. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 540 (M. Farrand ed. 1911).

24. See Rosen, *supra* note 6, at 88 (noting that “presidential objections in such cases are directed towards the offending condition or rider . . . rather than the appropriation itself”). *Id.* at 90.

25. In 1876, President Grant read an appropriation statute that required the closure of certain diplomatic offices as merely expressing a “constitutional prerogative of Congress” for the closures. *Id.* at 91. During Vietnam, the President acquiesced in funding restrictions over national security. *Id.* at 93.

26. See *id.* at 103.

27. See J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1253 (1989). Sidak argues that the Framers would not have given the President responsibilities that could be held “hostage” by Congress. *Id.*

28. See Rosen, *supra* note 6, at 74. Rosen argues that the Framers intended Congress’s “veto” power as an absolute check on the President. *Id.* Other than impeachment, the Appropriations Clause is Congress’s only method of limiting the President’s discretion.

29. U.S. CONST. art. II, § 3.

after two years.<sup>30</sup> As Alexander Hamilton explained, this power enables Congress to “build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation . . . .”<sup>31</sup> The Constitution also grants Congress the power to “declare War” and “grant Letters of Marque and Reprisal.”<sup>32</sup> Since the Framers initially planned to use the word “make” instead of “declare” war, there is some debate as to how great this power truly is,<sup>33</sup> but more troublesome is the language of “marque and reprisal.” Some argue that this term ensures that Congress authorizes all armed hostilities against foreign nations,<sup>34</sup> while others contend that it should be read much more narrowly.<sup>35</sup> Considering that American Presidents have sent military forces and supplies abroad more than 200 times with, in many cases, little repercussion,<sup>36</sup> this Note takes the view that the Executive can initiate hostilities short of war, subject to appropriations limitations.

### B. *The President’s Authority to Send Funds and Military Support Abroad*

While there are fewer clauses granting the Executive, rather than Congress, power in foreign affairs, the ones that do are arguably more extensive. For example, the “Vesting Clause” has an ambiguity that defeats many limitations on presidential power. The separation of powers debate, in the funding context, revolves around whether Congress has most of the power, subject to the President’s enumerated powers as “the Executive” and as Treaty-maker, or whether the President holds the majority of the power, subject to Congress’s enumerated powers. This Note endorses the former idea: after Congress makes an appropriation, the President is vested with the power to “execute” that appropriation. With regard to foreign affairs, the Vesting Clause gives him discretion in that execution, so long as Congress does not manifest its disapproval.

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30. U.S. CONST. art. I, § 8, cl. 12.

31. See THE FEDERALIST NO. 23, 112 (Alexander Hamilton) (Garry Wills ed., 1982).

32. U.S. CONST. art. I, § 8, cl. 11.

33. See Robert F. Turner, *Covert War and the Constitution: A Response*, 5 J. NAT’L SEC. L. & POL’Y 409, 414 (2012) (arguing that the power to declare war should be construed narrowly because the term “declare” came from the law of nations, meaning “large-scale perfect wars”). He claims that the term referred to “all-out ‘offensive’ [ ] wars”). *Id.*

34. See Lobel, *supra* note 2, at 398. In the eighteenth century, this term referred to the governmental license for private use of force; however, its meaning expanded to cover more “general letters.” In some cases, the term referred to an “intermediate state between peace and war” and “imperfect” wars. *Id.* at 397 (quoting 8 ANNALS OF CONG. 1511 (1798) (statement of Rep. Gallatin)); JAMES KENT, COMMENTARIES ON AMERICAN LAW 62 (Oliver Wendell Holmes, Jr. ed., 1873 (1926)).

35. See Turner, *supra* note 33, at 415–16 (pointing out that Lobel is using flawed logic when he says that simply because the term refers to one means of “imperfect war,” it refers to all imperfect wars). He notes that “marque and reprisal” referred to a very specific authorization for private ship owners to redress wrongs, and that even in nations conferring nearly all “war powers” on the King, this grant of power was left to the legislative body. *Id.* at 418.

36. *Id.* at 419.



## 1. The “Vesting” Clause

Article II of the Constitution begins, “The executive Power shall be vested in a President of the United States of America.”<sup>37</sup> While *Youngstown Sheet & Tube Co. v. Sawyer*<sup>38</sup> took a narrow view of this clause,<sup>39</sup> Justice Jackson’s famous tri-step approach suggested a broader interpretation,<sup>40</sup> and *Curtiss-Wright* affirmed that the executive power contains extra-constitutional components.<sup>41</sup> Of course, the approaches in these cases are still quite controversial. While the Vesting Clause provides the President with much ammunition in the foreign affairs debate, both history and custom demonstrate that this Clause does not include a spending power.<sup>42</sup> Thus, some have suggested that the President may authorize “mandatory appropriations,” forcing Congress to appropriate funds when necessary for his presidential prerogatives.<sup>43</sup> However, since Presidents have generally acted at their own risk and then sought *ex post facto* appropriation,<sup>44</sup> it is likely the power of the purse caps the executive power. Still, this should not be read to hamper the President’s power severely; the political process often limits Congress from legislating very far into the details of its appropriations.

## 2. The “Commander in Chief” and “Treaty-Making” Clauses

While the President is the “Commander in Chief of the Army and Navy . . . and of the Militia of the several States,”<sup>45</sup> this power is limited by the fact that he can neither “raise nor support forces by his own authority.”<sup>46</sup> George Nicholas opened the Virginia Convention saying, “Any branch of government that depends on the will of another for

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37. U.S. CONST. art II, § 1.

38. 343 U.S. 579 (1952).

39. See Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 NOTRE DAME L. REV. 87, 99 (2001).

40. See *id.* at 104. “[T]he President’s foreign affairs powers are not delegated by the Constitution, but are implicit in the nature of sovereignty and inherent in the office itself.” *Id.* This tri-step approach states that when the President acts pursuant to an express or implied authorization of Congress, his authority is at its “maximum” because it includes his constitutionally-granted powers and those authorized by Congress. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). When he acts absent Congress’s authorization or denial of power, he must rely entirely on his constitutionally-granted powers. *Id.* at 637. Lastly, if he takes measures “incompatible with the expressed or implied will of Congress, his power is at its lowest ebb” because he must rely on his constitutionally-granted powers, capped by Congress’s constitutional powers over the matter. *Id.*

41. In *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland refers to the “delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations. . . .” 299 U.S. 304, 320 (1936).

42. See Rosen, *supra* note 6, at 70.

43. See Raven-Hansen & Banks, *supra* note 2, at 127.

44. *Id.* at 131. For instance, when Jefferson ordered the purchase on credit of timber for gunboats, presuming that Congress would sanction it, he made “no claim of ‘law’ for his initiatives.” *Id.*

45. U.S. CONST. art II, § 2.

46. See Rosen, *supra* note 6, at 81 (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93, 258 (Jonathan Elliot ed., 1988) (Ayer Co. 1987)).

supplies or money must be in a state of subordinate dependence.”<sup>47</sup> On the other hand, many argue that “‘Congress cannot impose conditions which invade Presidential prerogatives to which the spending is at most incidental.’”<sup>48</sup> In the latter formulation of the President’s and Congress’s concurrent powers over foreign affairs, these prerogatives are known as “areas of special competence.”<sup>49</sup> Even though the President could in theory veto a statute that invades an area of special competence (and probably has some obligation to do so), he and Congress cannot contract to violate the Constitution.<sup>50</sup>

Another area of special competence is the power to “make Treaties.”<sup>51</sup> At some level, then, the President is “clearly a separate source of law.”<sup>52</sup> Thomas Jefferson emphasized this idea when he remarked that, “the transaction of business with foreign nations is executive altogether . . . . Exceptions are to be construed strictly.”<sup>53</sup> Of course, the President’s duty to obtain the advice and consent of the Senate limits the treaty-making power. Since this condition allows for the separation of powers to keep the President in check when making treaties, a new question appears: does the Appropriations Clause limit the treaty-making power even further, or would this cause an imbalance in favor of Congress? A look to judicial framing of the questions raised in these sections sheds some light on the way the three branches must play off each other to produce an end result that is satisfactory to the American people.

### C. *Judicial Treatment of the Congressional-Presidential Power Struggle*

The Court has been reluctant to take a stance on the separate roles of the respective branches in sending military support abroad. Two strains of cases exist in the Court’s jurisprudence: the first focuses on the constitutional limits placed on Presidential power, while the second greatly expands Presidential power in the foreign affairs arena, focusing on the Vesting Clause and the treaty-making power discussed above.

47. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93, 393 (Jonathan Elliot ed., 1836) (Ayer Co. 1987).

48. See Roy E. Brownell II, *The Constitutional Status of the President’s Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 87 (2001) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 112, 113–115 (1972)). In 1912, Senator Bacon proposed an amendment to the Army Appropriation bill that would prohibit funds for “‘pay or supplies of any part of the army of the United States employed or stationed in any country or territory beyond the jurisdiction of the laws of the United States . . . .’” See Eli Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 286 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 154 (1953) (quoting 48 CONG. REC. 10,921–30 (1912)). This proposal was defeated, and Senator Borah stated, “but if the Army is in existence, if the Navy is in existence, if it is subject to command, he [the President] may send it where he will . . . .” See Bennet N. Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 62 (1966) (quoting 69 CONG. REC. 6760 (1928)).

49. See Brownell, *supra* note 48, at 83.

50. See *id.* at 10.

51. U.S. CONST. art II, § 2, cl. 2.

52. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1, n.2 (1987).

53. 16 THE PAPERS OF THOMAS JEFFERSON 378–79 (J. Boyd ed., 1961).

One of the first cases addressing the Appropriations Clause was *Little v. Barreme*, where the President ordered the capture of an American vessel leaving France, but the statute authorizing him to capture ships only referred to those heading to France.<sup>54</sup> The federal government ordered the return of the ship because the President's act was not explicitly authorized by the statute.<sup>55</sup> Even though this case involved foreign affairs, the court held that the President could not act contrary to a statute prohibiting military expeditions against nations with which the United States was at peace.<sup>56</sup> Similarly, in *Brown v. United States*,<sup>57</sup> the Marshall Court held that the President was not authorized to issue commissions to privateers to capture British subjects on land when the Act passed by Congress referred only to capturing vessels and goods on the high seas. The Court said that a decision to confiscate enemy property was a question only for the Legislature, not for the Executive or the courts, as they only implement the law as expressed.<sup>58</sup> Slightly later cases also followed this view of the Appropriations Clause.<sup>59</sup> Even cases that appeared to favor the President's power were, in fact, never at the expense of congressional powers. For instance, in *Durand v. Hollins*,<sup>60</sup> the plaintiff was unable to recover for damages arising out of a bombardment by a naval vessel, which was authorized by the Executive, because the court found the actions of the vessel to be consistent with general statutes establishing the Departments of Foreign Affairs and Navy.<sup>61</sup> Then came *Curtiss-Wright*, where Congress passed and the President signed a joint resolution authorizing the President to prohibit arms sales to combatants if he found that a prohibition would "contribute to the reestablishment of peace between [the] countries[ ]" of Bolivia and Paraguay.<sup>62</sup> The Court found this joint resolution to be

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54. 6 U.S. 170 (1804).

55. *Id.* Two years later, the Court again confined the President's powers to those approved by Congress when an American colonel attempted to prove that his military actions in Venezuela were authorized by the President and thus not contrary to the laws of the United States. *United States v. Smith*, 27 F. Cas 1192 (C.C.D.N.Y. 1806) (No. 16,342).

56. *Smith*, 27 F. Cas at 1229–30.

57. 12 U.S. 110, 128–29 (1814).

58. *Id.*

59. *See Reeside v. Walker*, 52 U.S. 272, 291 (1850) (holding no officer could draw money from the Treasury without an appropriation made by Congress). In fact, the Court explicitly opined, "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned." *Id.* The Court of Claims applied the same principle over twenty years later when the President attempted to grant a pardon to individuals who had formerly assisted the Confederacy. *Hart v. United States*, 118 U.S. 62 (1886).

60. 8 F. Cas 111 (C.C.S.D.N.Y. 1860) (No. 4186). *See also the Prize Cases*, where the Court upheld President Lincoln's blockade at the beginning of the Civil War, absent an actual declaration of war, because it found that there was a de facto state of war. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863). In any event, Congress ratified the action, so the actual legal issue was never judicially resolved.

61. *See Rosen*, *supra* note 6, at 121.

62. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (1936) (quoting President Franklin). President Franklin Roosevelt then issued an embargo that was violated by Curtiss-Wright, when this corporation and others conspired to sell arms to Bolivia. *Id.*

constitutional, reasoning that Congress had greater flexibility to delegate power outside US boundaries.<sup>63</sup> *Dames & Moore v. Regan* pushed even further for the President, holding that he could suspend American claims against Iran when there was congressional “acquiescence.”<sup>64</sup> Up to this point, however, the Court never held that the President had power to act unilaterally nor contrary to Congress.

Later cases, on the other hand, began to interpret *Curtiss-Wright* and *Dames & Moore* as granting the President new foreign affairs powers. Regarding congressional delegation to the Executive in foreign affairs, *Zemel v. Rusk* reasoned that Congress must “paint with a brush broader than that it customarily wields in domestic areas.”<sup>65</sup> Later, *Clinton v. City of New York*, citing *Curtiss-Wright*, said that the President has “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”<sup>66</sup> Thus, more recent cases have followed the *Youngstown* framework,<sup>67</sup> upholding the President’s actions in foreign affairs when Congress does not “sufficiently” disapprove of the actions.

Therefore, the Court’s jurisprudence has not yet provided us with a solid framework for analyzing the question presented by this Note. It is notable that past cases have dealt either with (1) individual statutes, (2) a small, identifiable number of statutes, or (3) statutes that are painted with a broad brush. In other words, past cases have not addressed the question in this Note: what occurs when Congress’s international powers, embodied primarily in the Appropriations Clause, meet with the President’s international powers, embodied in the Vesting and Treaty-making Clauses? In general, the President cannot act contrary to statute, either explicitly or impliedly. On the other hand, more recently, the Court has been more likely to find congressional approval where there is silence because of a tendency to defer to the Executive in foreign affairs. This Note takes the argument one step further: if Congress legislates ambiguously in foreign affairs, it cannot manifest disapproval of Presidential action in that area. In fact, as we will see in the statutory framework of *Bernstein*, congressional ambiguity

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63. *Id.* at 329.

64. 453 U.S. 654, 686 (1981). “Such failure of Congress specifically to delegate authority does not, ‘especially . . . in the areas of foreign policy and national security,’ imply ‘congressional disapproval’ of action taken by the Executive.” *Id.* at 678 (citing *Haig v. Agee*, 453 U.S. 280, 291 (1981)). *Haig* stated that congressional silence could not be equated with disapproval. 453 U.S. at 291. In other words, congressional silence could be interpreted as consent. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 673 (1952) (“[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”); John S. Baker, Jr., *Competing Paradigms of Constitutional Power in “The War on Terrorism,”* 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 5, 14 (2005) (“The Constitution is unusual in that it is to be read not as a list of parchment barriers, but as institutionalizing a system of separated powers.”) (internal citation removed).

65. 381 U.S. 1, 17 (1965).

66. 524 U.S. 417, 445 (1998).

67. See Bellia, *supra* text accompanying note 40.

can actually be interpreted as an endorsement of Presidential discretion.

The issue in this Note arises when several moderately-specific statutes combine to severely limit Presidential discretion, yet they appear, through the placement of waivers, to grant him a great deal of discretion. Congress may not hide its objectives under a muddled framework, rather than allow the political process to see the ultimate spending decisions it has made. When it sets up a framework that seems to allow the President discretion but simultaneously limits his discretion entirely, Congress leads the American people to believe that the President is making decisions that he is not actually able to make.<sup>68</sup> If Congress manifests an intent that the President exercise its discretion in an area of the law, it must live with that manifestation.

## II. FLEXIBILITY OF INTERNATIONAL MILITARY SPENDING UNDER THE STATUTES

### A. *Presidential Discretion in Financing International Operations*

When Congress has appropriated funds during peacetime for overseas spending, the President has a varying amount of discretion, depending on how the relevant statute is written or on different methods of spending that have been developed through custom. Discretionary spending mechanisms include contingency funds, transfers, special authority for emergencies, defense drawdown funds, donated funds (also known as gift authority), and a more complicated technique of negotiating with third parties to give funds where the President sees fit. A brief explanation of each of these methods of spending is useful for understanding when the President has failed to comply with the statutory framework governing his international spending decision.

#### 1. Contingency Funds

The most general mechanism the President may utilize for spending discretion occurs when Congress makes a lump-sum appropriation, meaning the President's spending must comport with the "general purpose" of the appropriation, covering expenses that are "necessary, proper, or incident" to execution of that purpose.<sup>69</sup> A specific type of lump-sum appropriation occurs in a national security setting, where Congress provides the President with separate accounts to cover contingencies.<sup>70</sup> For example, the Foreign Assistance Act ("FAA") was created

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68. See, e.g., Koh, *supra* note 1, at 1302–03 (interpreting *United States v. Lovett*, 328 U.S. 303 (1946) (holding that Congress cannot use the power of purse to effect bill of attainder)).

69. Rosen, *supra* note 6, at 9 (describing 63 Comp. Gen. 800, 804 B-221982 (1986); 63 Comp. Gen. 110, 112 (1983)). The expenditures must bear a "logical relationship" to the appropriation. *Id.* (quoting 63 Comp. Gen. 422, 427–28 (1984)). For instance, military services may not use their Operations and Maintenance accounts to pay for nontraditional missions.

70. See Raven-Hansen & Banks, *supra* note 2, at 99.

as a contingency fund for uses “in the national interest.”<sup>71</sup> While this fund has become less flexible, other contingency funds have appeared on the scene. One of the most famous instances of abuse of a contingency fund occurred in 1981 when President Ronald W. Reagan used a contingency fund hidden in the Central Intelligence Agency (“CIA”) budget to support the Nicaraguan Contras.<sup>72</sup>

## 2. Special Authority and Drawdown Funds

Next, the Executive can ask Congress for special authority for emergency spending when a crisis arises. Of course, agencies may experience difficulty in obtaining their requests, but if their requests are sufficiently broad, this is a useful mechanism for wielding executive discretion. Generally, an agency will ask for a supplemental appropriation in the following year’s appropriation to liquidate obligations incurred during an emergency.<sup>73</sup> For example, Congress established the Feed and Forage Act<sup>74</sup> primarily to finance military essentials under conditions involving remote assignments and slow communications, but through this Act, the Department of Defense (“DOD”) funded Operation Desert Shield/Storm.<sup>75</sup> Additionally, Congress passed the Defense Production Act of 1950 to fund the Korean War, granting the President authority to divert goods and services to military use in an emergency.<sup>76</sup> While this Act has since expired, Congress approved short-term extensions of some provisions in later years.<sup>77</sup> Special authority also flows from provisions in statutes that allow flexibility where “important to the security of the United States.”<sup>78</sup>

Defense “drawdown” authority is granted to the President whenever a statute provides for a specified amount of funds for spending “vital to the security of the United States.”<sup>79</sup> President Nixon used this authority to support the secret war in Cambodia in the 1970s, so in

71. Pub. L. No. 87-195, § 451, 75 Stat. 424 (1961). President John F. Kennedy established the Peace Corps by executive order through this fund, and Presidents Lyndon B. Johnson and Richard M. Nixon utilized it for the President’s Commission on Civil Disorders and the Bahama Livestock and Research Project. From 1973 onward, Congress restricted the FAA fund to “disaster relief purposes.” Raven-Hansen & Banks, *supra* note 2, at 100 (quoting Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 10, 87 Stat. 714, 719 (1973)).

72. See Raven-Hansen & Banks, *supra* note 2, at 101. This contingency fund had only been approved by the intelligence committees, thus President Reagan avoided obtaining explicit congressional approval. *Id.*

73. *Id.* at 102. Without making this request, the agency would be violating the Antideficiency Act, which proscribes deficiency spending. 31 U.S.C. § 1341(a)(1)(A) (1994).

74. 41 U.S.C. § 11 (2009).

75. Raven-Hansen & Banks, *supra* note 2, at 102.

76. *Id.* at 103 (discussing 50 U.S.C. § 2061 (1988) (amended by Pub. L. No. 102-558, 106 Stat. 4198 (1992))).

77. Raven-Hansen & Banks, *supra* note 2, at 103.

78. 22 U.S.C. § 2364(a) (1994).

79. See Raven-Hansen & Banks, *supra* note 2, at 105 (quoting 22 U.S.C. § 2318(a) (1994)).

response, Congress enacted prior notice and finding requirements.<sup>80</sup> President Reagan also employed drawdown authority from a fund earmarked for military emergencies in order to increase military aid to El Salvador in 1981-82.<sup>81</sup> More recently, the President has utilized drawdown funds for counternarcotics, disaster relief, and United Nations peacekeeping efforts under the FAA.<sup>82</sup>

### 3. Transfers and Reprogramming

The President may also utilize transfers and reprogramming in order to fund military initiatives. Transfers occur when the President applies funds from one appropriations account to another appropriations account, whereas reprogramming “constitutes executive shifting of appropriated funds within a single appropriation account, often without specific statutory mandate.”<sup>83</sup> During the Iran-Contra Affair, the 1984 Boland Amendment<sup>84</sup> limiting aid to the Contras was circumvented when President Reagan transferred ships, planes, and weapons to the CIA.<sup>85</sup> While transfers *without* statutory authority are now prohibited, defense and foreign assistance agencies typically obtain this authority, subject to a percentage limit.<sup>86</sup> Since 1974, the President has been prevented from using DOD transfers “where the item for which funds were requested has been denied by Congress.”<sup>87</sup> Reprogramming operates differently from transferring because it occurs through an informal agreement, rather than a statutory provision, between an agency and a congressional committee.<sup>88</sup> So long as it complies with the general purpose of the original appropriation and is not otherwise prohibited by statute, reprogramming is permissible.<sup>89</sup> Initially, congressional review, triggered by reprogramming “thresholds,” was the only limit on the President’s authority, but the flexibility of this system later resulted in Congress limiting reprogramming requests for DOD funds to “higher priority items based on unforeseen military require-

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80. *Id.* at 105. In many cases, the finding requirements are nebulous. See Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 74–75 (1988).

81. He increased military aid by five times the amount appropriated. Koh, *supra* note 1, at 1302 n.217.

82. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 259 (Grimes et al. eds., 2006).

83. Koh, *supra* note 1, at 1302 n.217 (discussing LOUIS FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 110–32 (1972)).

84. See *supra* text accompanying note 1.

85. See Raven-Hansen & Banks, *supra* note 2, at 105.

86. *Id.* at 111 (emphasis added). Abuses of transfer authority run rampant: this authority funded the secret war in Laos from the Agency and International Development fund. President Nixon used the FAA for programs in Greece, Turkey, Taiwan, the Philippines, and Vietnam, later requesting that the transferred funds be restored. *Id.* at 112.

87. DOD Appropriation Act 1974, Pub. L. No. 93-238, § 735, 87 Stat. 1026, 1044 (1974).

88. See Raven-Hansen & Banks, *supra* note 2, at 108.

89. *Id.* (describing U.S. General Accounting Office, Principles of Federal Appropriations Law, No. 2-25 to 2-27 (2d. ed. 1991)).

ments<sup>90</sup> and prohibiting the practice “where the item for which reprogramming is requested has been denied by Congress,”<sup>91</sup> similar to the transfer prohibition above.

#### 4. Statutory Gift Authority, Third Party Solicitation, and *Quid Pro Quo* Arrangements

If the Executive is unsuccessful in securing finances for its desired initiative, it may instead utilize statutory gift authority to accomplish its goal. Gift authority is an exception to the Miscellaneous Receipts Act,<sup>92</sup> which states that all funds received by the government must be appropriated before they are spent. It operates by permitting agencies to use a subset of lump-sum spending for “national security activities;” however, Congress has mostly closed off this method with a statute requiring Congress to define the spending objects.<sup>93</sup> Congress’s attempts to restrict gift authority spending have caused the President to react in two ways: by “encouraging third parties to pursue the policies he favors”<sup>94</sup> and by forming “quid pro quo spending arrangements.”<sup>95</sup> The problem with the first response is that the act of “encouraging” third parties requires Executive employees to spend their time, and thus the federal payroll, on activities not endorsed, and sometimes explicitly rejected, by Congress. Some argue that the public funds spent for these activities are only “trivial” and are, in a literal sense, only being spent on *communication* with foreign leaders, as opposed to being the actual disbursement of funds into foreign pockets, so they are permissible.<sup>96</sup> Supporting this idea is the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990,<sup>97</sup> which makes no prohibitions on solicitations, but does limit *quid pro quo* arrangements, as discussed below. Based on the current statutory framework, this Note uses a separation-of-powers analysis to determine the legality of Executive solicitation of third party expenditures on foreign soil. In general, mere solicitation is constitutional, so long as it is not excessive, and so long as it follows statutory reporting requirements set up by Con-

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90. DOD Appropriations Act of 1992, Pub. L. No. 102-172, § 8010, 105 Stat. 1150, 1173 (1991).

91. See generally OFFICE OF THE COMPTROLLER OF THE DEP’T OF DEFENSE, BUDGET GUIDANCE MANUAL 7110-1-M, 431-32 (May 1990).

92. 31 U.S.C. § 3302(b) (1994).

93. See Raven-Hansen & Banks, *supra* note 2, at 107 (describing the effect of 10 U.S.C. § 2608(c) (1994)). During the Iran-Contra Affair, Lieutenant Colonel Oliver North created a covert organization called The Enterprise, which solicited contributions from third parties. It received \$32 million from the Saudi Arabian government to support the Contras. *Id.*

94. *Id.* at 136. This power is largely based on practice, rather than the text of the Constitution, and the practice has been supported by dicta in *Curtiss-Wright* and *Dames & Moore*. *Id.*

95. *Id.* at 138.

96. *Id.* at 143.

97. Pub. L. No. 101-167, § 582(a), 103 Stat. 1195, 1251 (1989) (hereinafter Foreign Operations Act).



gress, which must be necessary and proper for carrying into execution the Appropriations Clause and shared foreign relations powers.<sup>98</sup>

*Quid pro quo* arrangements are more complicated. In these, the United States conditions foreign aid on the recipient's promise to donate funds to the object designated by the President. In many cases, the Neutrality Act prohibits these arrangements because it forbids persons within the country from "knowingly. . . furnish[ing] the money for, or tak[ing] part in, any military or naval expedition. . . against a foreign government."<sup>99</sup> Courts have found that this Act applies not only to privateers, but also to the President.<sup>100</sup> On the other hand, no prosecution against the President has taken place since 1806, perhaps because the definition of "arrangement" is unclear: on the one hand, it could refer only to explicit agreements where the U.S. intends to influence the third party, whereas on the other hand, it could refer to any instance in which an organization receives a reward from the U.S. after supporting a cause the U.S. happens to favor.<sup>101</sup> Since these arrangements are rarely reduced to writing and are conducted on a "back channel, deliberately outside the realm of normal diplomacy,"<sup>102</sup> this Note takes the view that the Neutrality Act prohibits most *quid pro quo* arrangements. Furthermore, the Foreign Operations Act mentioned above prohibits circumvention of Congress's spending appropriations through the mechanism of third party funding.

##### 5. Meaning for *Bernstein v. Kerry*

It is with the above mechanisms in mind that one must analyze the legality of the Secretary of State's actions in cases like *Bernstein v. Kerry*.<sup>103</sup> First, he or she must identify the "general appropriations" permitted by each statute in the overall framework and decide whether the expenditure at issue fits within one of those appropriations. If (a) it fits, (b) there are no other prohibitions, and (c) it follows statutory procedures and reporting requirements, then the expenditure is legal. If (a) it does not fit within a relevant statute, (b) it is prohibited by a statute in the overall framework, or (c) it does not follow procedures or reporting requirements, then it must be justified by other provisions in the framework. For example, there may be "contingency fund authority" present in one of the statutes. Subsequently, "special authority" or "drawdown" provisions may allow for Executive expenditures overseas when a "national emergency" arises or when the expenditure is "vital to national security." If the expenditure cannot be justified on these grounds, the President may have transferred or reprogrammed the funds (following the provisions of the statute, or perhaps illegally).

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98. See Raven-Hansen & Banks, *supra* note 2, at 144.

99. 18 U.S.C. § 960 (1994). Some scholars say that these expenditures have the effect of "laundering." Raven-Hansen & Banks, *supra* note 2, at 139.

100. *Dellums v. Smith*, 577 F. Supp. 1449, 1454 (N.D. Cal. 1984), *rev'd on other grounds*, 797 F.2d 817 (9th Cir. 1986).

101. See Raven-Hansen & Banks, *supra* note 2, at 139.

102. *Id.* at 141.

103. 962 F. Supp. 2d 122 (D.D.C. 2013).

Lastly, and only in some cases, the President may have utilized statutory gift authority or third party contributions to accomplish Executive goals.

If the President has violated one or more of the statutes, the next issue is whether Congress has expressed disapproval of his action. Congress's placement of "escape valves" in international spending statutes indicates intent that the President may exercise some discretion over the expenditures. If Congress wishes to limit that discretion, it may do so, but it may not do so covertly. Ultimately, when Congress develops a statutory framework that is overridden with waivers and Presidential reporting requirements, like the one in *Bernstein*, it cannot manifest the level of disapproval required to invalidate Presidential spending decisions in the international arena.

### B. *Legality of the Executive's Actions Under Each Individual Statute*

Before delving into the statutes addressed in the Complaint of *Bernstein v. Kerry*, it is necessary to understand the events that generated the case. The Complaint alleges that defendant Secretary of State Hillary Clinton is responsible for coordinating all federal aid to the Palestinian Authority ("PA") and that it was her decision to allocate roughly \$200 million from the Economic Support Fund ("ESF") to the PA in 2012.<sup>104</sup> Additionally, Clinton was responsible for reporting to appropriate committees of Congress any assistance related to international terrorism.<sup>105</sup> Defendant U.S. Agency for International Development ("USAID"), the principal Executive agency that extends aid to developing nations, was also involved in Clinton's decision, forming contracts with operatives in the West Bank and Gaza.<sup>106</sup> The Complaint also alleges that USAID knew that the State Department recognized Hamas as "foreign terrorists"<sup>107</sup> and that Hamas won a majority of the seats in the Palestinian parliament, meaning it "retained effective control over political decisions" from 2007 to 2011.<sup>108</sup> Next, the Palestine Liberation Organization ("PLO") played a "material role in operating" the PA, and Congress designated it a terrorist organization.<sup>109</sup> Moreover, the second largest party in the PA was Fatah, which supported terror-

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104. Complaint at 6, *Bernstein v. Kerry*, 962 F. Supp. 2d 122 (D.D.C. 2013) No. 12-1906 (ESH). The ESF is intended to promote American foreign policy interests, such as encouraging Middle East peace negotiations, by providing assistance to countries in democratic transition. Usually, the funds are used for infrastructure and development projects, and they are provided on a grant basis. *U.S. Foreign Military Assistance: Program Descriptions*, FEDERATION OF AMERICAN SCIENTISTS, <http://www.fas.org/asmp/profiles/aid/aidindex.htm>. See 22 U.S.C. § 2346(b) (1998).

105. See 22 U.S.C. § 2349aa (1996). This extends to training services and "matters relating to the detection, deterrence, and prevention of acts of terrorism." 22 U.S.C. § 2349aa.

106. Complaint, *supra* note 104, at 9 (analyzing USAID MISSION, BUSINESS FORECAST FY 2012 38-39, available at <http://www.usaid.gov/work-usaid/get-grant-or-contract/business-forecast>).

107. Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

108. Complaint, *supra* note 104, at 9-11.

109. *Id.* at 11; 22 U.S.C. § 5201 (1987).

ism, and another party, the Popular Front for the Liberation of Palestine, was also designated a terrorist organization.<sup>110</sup> Since the PA did not segregate its humanitarian funds from its funds for terrorism at the relevant time, the Complaint alleges that Clinton and USAID were in violation of several statutes prohibiting aid to terrorist organizations.

### 1. State Appropriations Act of 2012

The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012<sup>111</sup> appropriated over \$3 million to the ESF. Section 7036(a) prohibits funds from the ESF “to support a Palestinian state” unless the Secretary of State finds the governing entity (a) has “demonstrated a firm commitment to peaceful co-existence with the State of Israel,” (b) has taken appropriate measures to counter terrorism, and (c) is working with other countries to establish peace.<sup>112</sup> Even though Clinton had not made these findings, the Act has an “escape clause,” allowing the President to waive the prohibition for “national security” interests. President Obama, however, did not exercise the appropriate waiver. Additionally, section 7040(a) prohibits funds from the Foreign Assistance Act of 1961 (“FAA”), which includes the ESF, to be “obligated or expended with respect to providing funds to the [PA].”<sup>113</sup> It offers a similar waiver provision, which President Obama exercised on April 25, 2012.<sup>114</sup> The *Bernstein* Complaint alleges that the “detailed justification” required in the waiver does not exist, could not have been made in good faith, and is not publicly available.<sup>115</sup> Even if the President had complied fully with the above provisions, section 7040(f) prohibits funds from the FAA for assistance to any entity “effectively controlled by Hamas.”<sup>116</sup> That section’s escape valve is slightly different in that the prohibition does not apply to power-sharing governments like the PA “only if the President certifies and reports to the Committees on Appropriations that such government, including all of its ministers or equivalent, has publicly accepted and is complying with the principles contained in [22 U.S.C. §2378B].”<sup>117</sup> President Obama has not issued the required certification.

Section 7040(f) has a second escape valve in order to retain the President’s discretionary authority over funds: he may waive prohibitions to use funds for “administrative and personal security costs of the

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110. Complaint, *supra* note 104, at 14.

111. Pub. L. 112-74, 125 Stat. 786 (2012).

112. § 7036(a), 125 Stat. at 1218.

113. § 7040(a), 125 Stat. at 1221.

114. See White House Office of Press Secretary, *Presidential Memorandum-Waiver of Restriction on Providing Funds to the Palestinian Authority* (Apr. 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/04/25/presidential-memorandum-waiver-restriction-providing-funds-palestinian-a>.

115. See Complaint, *supra* note 104, at 19.

116. § 7040(f), 125 Stat. at 1222.

117. *Id.* at 20. The certification must state that “no ministry, agency, or instrumentality of the Palestinian Authority is effectively controlled by Hamas” unless Hamas has “publicly acknowledged” Israel’s right to exist and committed itself to previous agreements with the U.S. and Government of Israel. 22 U.S.C. § 2378b(b)(1)(A)–(B).

Office of the President of the [PA],” activities of that President to fulfill his duties, and assistance for the judiciary branch of the PA.<sup>118</sup> This limited waiver, however, is conditioned on the President’s consultation with appropriate congressional committees, a written policy justification, certification that the decision is for “national security interests,” and certification that the proposed beneficiary of the assistance is not a member of, or effectively controlled by, Hamas or any other foreign terrorist organization.<sup>119</sup> The President did not exercise this waiver.

Accepting the Complaint as true, President Obama is in violation of the State Appropriations Act of 2012. While the \$200 million from the ESF to the PA and other organizations in the region fits within the “general appropriation” of the Act at issue, the President failed to follow three out of four certification and reporting requirements, and the one certification he made is not publicly available. This statute offered what appears to be “drawdown” authority for the President for “national security” purposes, but he failed to exercise that discretion appropriately. As far as is evident, he did not make any transfers or do any reprogramming, nor did he attempt to use statutory gift authority. Therefore, the President violated this Act.

## 2. Palestinian Anti-Terrorism Act of 2006

Since 2007 and 2008, provisions of the Palestinian Anti-Terrorism Act of 2006 have been in effect, prohibiting funding to certain nongovernmental organizations in the West Bank and Gaza. Specifically, the Secretary of State must “take all appropriate steps to ensure that” these organizations, and their individual members, have not advocated, planned, sponsored, nor engaged in terrorist activity.<sup>120</sup> Taking the plaintiffs’ allegations as true, the Secretary of State violated this Act by failing to take all steps to ensure that the NGOs at issue were not engaged in terrorist activity.

## 3. Provisions Referring Specifically to the PA

The Secretary of State is prohibited from providing U.S. foreign assistance to the “Hamas-controlled Palestinian Authority” except by certification that “no ministry, agency, or instrumentality of the [PA] is effectively controlled by Hamas” or by certification that Hamas-PA has publicly acknowledged Israel’s right to exist.<sup>121</sup> In addition, the President must certify that Hamas-PA has made “demonstrable progress” towards acknowledgement of Israel by (i) purging its security services from individuals tied to terrorism, (ii) dismantling terrorist infrastructure, (iii) halting anti-Israel incitement, (iv) ensuring democracy, and (v) ensuring financial transparency and accountability of all govern-

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118. § 7040(f)(2), 125 Stat. at 1222.

119. § 7040(f)(2), 125 Stat. at 1222.

120. Complaint, *supra* note 104, at 24 (quoting Palestinian Anti-Terrorism Act of 2006, Pub. L. 109-446, § 620L(b)(2), 120 Stat. 3318, 3322 (2006)).

121. 22 U.S.C. § 2378b(b)(1)(A) (2006).

ment ministries and operations.<sup>122</sup> Since the President has not made the required certification and probably cannot do so in good faith,<sup>123</sup> and there are no special authority or drawdown provisions, he is in violation of this statute.

#### 4. Provision Referring to the West Bank and Gaza

The President cannot send U.S. foreign assistance to NGOs in the West Bank and Gaza unless he makes the certifications mentioned above regarding the PA, the exceptions mentioned in the prior provision are met, or the requirements set out in 22 U.S.C. § 2378c are met. This latter provision only allows funding to meet (i) “basic human needs,” (ii) promote democracy, human rights, freedom of the press, and non-violence, (iii) assist members of the Palestinian Legislative Council (“PLC”), or (iv) promote U.S. national security interests.<sup>124</sup> For the third permissible form of funding, the President must determine that the members of the PLC are not members of Hamas or any other terrorist organization. For the fourth, he must consult with appropriate congressional committees regarding specific projects for which the assistance will be used and provide a written memo certifying necessity for national security purposes.<sup>125</sup>

The President appears to be violating this statute because even though the aid given from the ESF to NGOs on the West Bank and Gaza fits within “general” appropriations made by Congress, it is explicitly prohibited by this provision, and the President has not made the appropriate certifications for his action to fit into one of the four exceptions. The fourth exception appears to allow for some special authority or drawdown fund use, but the President chose not to exercise that authority. Again, there is no use of transfers, reprogramming, or gift authority, though the President would perhaps be able to raise these as defenses for his use of the funds from the ESF.

#### 5. Provisions Referring to the PLO

Title 22 U.S.C. § 2227<sup>126</sup> prohibits the provision of federal funds authorized for international development and programs intended to “provide benefits to the [PLO] or entities associated with it.” Additionally, section 5202<sup>127</sup> prohibits cooperation between the United States and the PLO in foreign aid programs. These provisions do not provide the President with contingency, special authority, nor drawdown funds. In fact, they do not even contain much in the way of escape valves.<sup>128</sup> Thus, the fact that the President has sent funds to the PA, which is

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122. 22 U.S.C. § 2378b(b)(2)(A)–(E).

123. Complaint, *supra* note 104, at 26.

124. *Id.* at 15 (quoting 22 U.S.C. § 2378c(b)(1)–(4) (2011)).

125. *Id.* (quoting 22 U.S.C. § 2378c(b)(4) (2011)).

126. § 2227 (1985).

127. 22 U.S.C. § 5202 (1994).

128. There are exceptions for the International Atomic Energy Agency and United Nations Children’s Fund if those funds provide for the discontinuation or safety inspection of nuclear facilities.

composed partially of chief actors in the PLO, indicates that the President is in violation of these two provisions.

## 6. The Anti-Terrorism Act

Title 18 U.S.C. § 2339A<sup>129</sup> prohibits material support of foreign organizations for anyone with the knowledge or intent that the support be used in preparation for, or in carrying out, acts of terrorism.<sup>130</sup> Section 2339B<sup>131</sup> provides for fifteen years' imprisonment if the person has knowledge that the organization is a designated terrorist organization or has engaged in terrorist activity. There is an exception, however, for persons whose actions are approved by the Secretary of State with the concurrence of the Attorney General, meaning that so long as the Attorney General concurs, the Secretary can provide material support contrary to these provisions.<sup>132</sup> On the other hand, the Secretary still may not violate the Immigration and Nationality Act by providing material support that may be used to carry out terrorist activity.<sup>133</sup> *Holder v. Humanitarian Law Project*<sup>134</sup> held that "any contribution" to terrorist organizations violates these statutes because money is fungible.

If we take the Complaint's allegations as true, then President Obama has probably violated these statutes. The difficulty arises with the term "knowingly." While plaintiffs may easily be able to prove that one *should* know that members of the PA are also chief actors in terrorist organizations such as the PLO and Hamas, they may have trouble demonstrating actual knowledge. Furthermore, these statutes target material support of actual terrorist organizations, not just support of individuals or groups associated with those organizations. For purposes of this Note, though, let us assume that the President is in violation of this statute.

## 7. Provision Referring to the United Nations Relief and Works Agency for Palestine Refugees in the Near East

The *Bernstein* Complaint alleges that part of the ESF funds went to an organization called the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA").<sup>135</sup> Since the United States is the largest single-state donor to UNRWA and contributes 25 percent to UNRWA's total budget,<sup>136</sup> its material support has a substan-

129. § 2339A (1994).

130. There is extraterritorial jurisdiction if the offender is a national, the offense occurs in or affects interstate commerce, or the offender aids or abets any person over whom jurisdiction exists. 22 U.S.C. § 2339B(d)(1)(A)–(F) (1996).

131. § 2339B.

132. § 2339B(j).

133. "Terrorist activity" is defined as any unlawful activity which involves hijacking or sabotage of conveyance, detaining and threatening someone to compel a third person to do an act or abstain from an act, a violent act upon an internationally protected person, an assassination, use of a biological, chemical, or nuclear agent, etc. See 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

134. 561 U.S. 1, 7 (2010).

135. Complaint, *supra* note 104, at 17.

136. *Id.* at 18.

tial effect on UNRWA's activities. Congress has prohibited contributions by the United States to UNRWA unless said organization "take[s] all possible measures to assure that no part of the United States contribution shall be used to furnish assistance to any refugee who is receiving military training as a member of the so-called Palestine Liberation Army or any other guerilla type organization . . ." <sup>137</sup> Since UNRWA did not comply with its statutory duties, in 2011 Congress placed a hold on \$342 million from the ESF that was originally intended to aid the PA. Part of that hold was lifted in 2012, but not the portion from which defendant Secretary of State sent the \$2 million previously discussed. <sup>138</sup> Accepting the Complaint as true, the Executive Branch is in violation of this statute because the requirements for the exception were not fulfilled.

## 8. Statutes Governing Nonfinancial Support

*Bernstein v. Kerry* deals with financial support to foreign governments and NGOs, but in many cases, the President may instead send military resources and services, an act governed by additional, or in some cases entirely different, statutes. In these instances, the President does not have the options of contingency funds, transfers, and reprogramming, as he would with financial support, but he often still has escape valves available to him. For the limited purposes of this Note, I only address certain sections of one of the relevant statutes as an example of the type of analysis required to determine the legality of Executive action. The Arms Export Control Act <sup>139</sup> ("AECA") states that no defense article or service shall be sold or leased unless (1) the President finds that the furnishing strengthens the security of the United States and promotes world peace, (2) the receiving country agrees not to transfer title to anyone not an officer, employee, or agent, (3) said country agrees to provide substantially the same degree of security protection to the arms as the United States gives, and (4) the country is otherwise eligible to purchase defense articles and services. <sup>140</sup> Additionally, the President can only make sales and leases to "friendly" countries for the purposes of internal security, legitimate self-defense, hindering proliferation of weapons of mass destruction, and participation in collective agreements consistent with the Charter of the United Nations. <sup>141</sup>

The AECA grants the President ultimate authority to control the import and export of defense articles and services. <sup>142</sup> He may even

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137. 22 U.S.C. § 2221(c) (2006).

138. Complaint, *supra* note 104, at 18.

139. 22 U.S.C. § 2753 (1976).

140. § 2753(a)(1)–(4). The second condition also requires the receiving country to agree not to use the defense article or service for purposes other than those furnished unless the consent of the President is obtained. Thus, the President's discretion is maintained in this portion of the statute.

141. 22 U.S.C. § 2754 (1976).

142. 22 U.S.C. § 2778(a)(1) (2010). The President is also responsible for licensing exporters. He may disapprove a license application if he finds that an applicant is the

authorize a transfer of defense articles contrary to general prohibitions, but he cannot do so for items on the United States Munitions List unless the receiving country agrees to demilitarize the articles prior to transfer. The statute also allows for discretion by not requiring consent of the President (thus relieving demilitarization duties) whenever a treaty has been signed for the defense articles or if the recipient is not a country.<sup>143</sup> Next, there is a prohibition for cash sales if the recipient country has used defense articles in substantial violation of any agreement entered into pursuant to the Act, and the President must make findings and report on said country.<sup>144</sup> However, an escape clause allows the President to continue cash sales if he certifies that there would be a “significant adverse impact on United States security.”<sup>145</sup>

Other prohibitions, and their respective escape valves, also exist. For instance, the president may not consent to a transfer of any major defense equipment valued at \$14,000,000 or more unless he submits to the Speaker of the House and the Committee on Foreign Relations of the Senate a written certification naming the reasons for such transfer.<sup>146</sup> For an immediate transfer, the President must state in the certification that it is in the “national security interests” of the United States not to delay. The statute also states that the more restrictive subsections do not apply to maintenance, repair, or overhaul defense services, temporary transfers, or arrangements among NATO members.<sup>147</sup> Finally, the statute prohibits sales or leases where *the President* has determined the recipient country is in material breach of its binding commitments concerning nonproliferation of nuclear explosive devices.<sup>148</sup>

In *Bernstein*, no violation of the AECA is evident, but in cases where this statute has been violated, courts will examine its interaction with the other statutes mentioned above.

As we have seen, President Obama and Secretary of State Kerry have failed to comply with the requirements of several statutes governing financial military aid to foreign countries and NGOs. In each statute, Congress expressed disapproval of certain appropriations, but it provided escape valves for the President to exercise in the case of a

subject of certain indictments or if he finds reasonable cause to believe the applicant has violated specified statutes. § 2778(g)(3). He may also authorize licensing exemptions if a bilateral agreement is in place. §§ 2778(f)(2), (j)(1)(A).

143. Other exceptions include: the recipient is a member of NATO, and the military equipment is not “significant.” 22 U.S.C. § 2753(b)(1)–(5) (2002). Perhaps Presidential consent is not required because it is already obtained through the signing of a treaty.

144. § 2753(c)(1)(B).

145. § 2753(c)(3)(B).

146. § 2753(d)(1)(D). The President may not submit such certification unless an “emergency” exists, and the certification does not become effective until thirty days have passed, assuming Congress has not enacted a joint resolution prohibiting the transfer within that time. § 2753(d)(2)(A). The certification must contain a “detailed justification” for the determination, describing the emergency circumstances. § 2753(d)(2)(C).

147. § 2753(d)(4). If the articles are valued at \$100,000,000 or more or considered “major defense equipment” valued at \$25,000,000 or more, then the limitations set out for non-NATO members apply. § 2753(d)(5).

148. § 2753(f).



diplomatic need. Presumably, Congress wished for these escape valves to be effective, so that the U.S. could adapt to the changing global landscape. In the next Part, we examine the statutory framework as a whole, and I conclude that Congress is unclear in its goals regarding financial military appropriations. Congress has not clearly manifested disapproval of the President's action in *Bernstein*.

### C. *The Statutory Framework as a Whole*

This Note has determined that in *Bernstein v. Kerry*, the Executive Branch is in violation of several statutes prohibiting financial military aid to the PA and NGOs due to their connections with terrorists. Each statute, and each of its relevant provisions, manifests congressional approval of some executive actions and disapproval of others. Yet, taking a step back, a question arises: why is the President in violation of so many statutes? Is he intentionally disregarding laws he considers unconstitutional? He is probably not disregarding the laws because he did, in some instances, exercise the waivers. Moreover, in most instances where a President has overstepped his authority, he has then crawled back to Congress asking for ratification of his act, but President Obama has not done so here. It is more likely that the President has not followed procedures to a "T" because they are burdensome and unclear. The President is uncertain whether Congress approves of his action: it has passed statutes with numerous waivers, which suggests it desires Presidential discretion and flexibility, but in practice, those statutes limit his discretion entirely. So which is it? Has Congress denied financial military support to the PA and NGOs in the area, or has it granted flexibility for this decision?

Seven statutes were relevant to the President's decision to send finances abroad: some, such as the State Appropriations Act and the Anti-Terrorism Act, were highly comprehensive. If and when President Obama wishes to send military aid to a foreign country or NGO, he must navigate a complicated web of exceptions and waivers. For instance, he could not send funds to the PA unless he met requirements for:

- 1) State Appropriations Act<sup>149</sup>
  - a. PA must demonstrate firm commitment to peaceful co-existence with Israel
  - b. PA must demonstrate efforts to counter terrorism
  - c. PA must be collaborating to promote world peace
- 2) Palestinian Anti-Terrorism Act of 2006<sup>150</sup>
  - a. PA must show it took all possible steps to ensure no individual member of the PA has advocated, planned, sponsored, or engaged in terrorist activity

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149. Pub. L. 112-74, 125 Stat. 786 (2012). See *supra* Part II.B.1.

150. Pub. L. 109-446, § 620L, 120 Stat. 3318 (2006) (current version at 22 U.S.C. § 2378). See *supra* Part II.B.2-3.

- 3) Provisions Relating to Hamas and the PLO<sup>151</sup>
  - a. neither may be in effective control of the PA
  - b. the PLO may not be receiving any benefits from the funds given to the PA
- 4) Anti-Terrorism Act<sup>152</sup>
  - a. no executive actor can have knowledge that any portion of the funds will be used in preparation for, or to carry out, acts of terrorism

There are several problems with this list of requirements set out by Congress. First, they appear in four different statutes, meaning the ultimate result never stood up to the tests of the political process. If these requirements were set out in one consolidated statute, would the statute still obtain sufficient votes? Would the American people's representatives entirely withhold funds from the PA and NGOs in the West Bank and Gaza? Or would they prefer some adaptability to changing global circumstances? We must not speculate, so we instead return to the overarching question: has Congress manifested disapproval of the President's decision to send military aid from the Economic Support Fund to the PA?

Congress has not. By creating a statutory framework overridden with waivers and exceptions, it has manifested approval of Presidential discretion in decisions to send financial military support abroad. Thus, let us turn to the exception and waiver clauses.

If the President does find exceptional circumstances that justify sending financial support to the PA, then he must: (1) comply with waiver provisions in the State Appropriations Act of 2012,<sup>153</sup> (2) look to an exception in section 7040(f) of the State Appropriations Act of 2012<sup>154</sup> for the Executive and Judicial Branches of the PA, (3) exercise waivers in reference to Hamas,<sup>155</sup> (4) ensure that the end result does not benefit the PLO under 22 U.S.C. § 2227,<sup>156</sup> (5) ensure that the U.S. and PLO are not cooperating in foreign aid programs under 22 U.S.C.

151. Pub. L. 109-446, § 620L, 120 Stat. 3318 (2006) (current version at 22 U.S.C. § 2378c); 22 U.S.C. § 2227 (1985), § 5202 (1994). See *supra* Part II.B.4–5.

152. 18 U.S.C. § 2339A. See *supra* Part II.B.6.

153. Pub. L. 112-74, 125 Stat. 786 (2012). The President must: (a) waive the prohibition on funding to the PA for “national security” purposes, (b) waive the prohibition set out by section 7040(a) referring to ESF funds, and (c) ensure Hamas is not in effective control of the PA, unless it has complied with certain standards set out in 22 U.S.C. § 2378B, in which case the President must issue the required certification. See *supra* Part II.B.1.

154. Pub. L. 112-74, 125 Stat. 786 (2012). Here, the President must: (a) consult with appropriate congressional committees, (b) certify that the act is in the “national security interests” of the U.S., and (c) demonstrate the recipient is not effectively controlled by Hamas. See *supra* Part II.B.1.

155. Pub. L. 109-446, § 620L, 120 Stat. 3318 (2006). In this case, he must: (a) certify that no instrumentality of the PA is effectively controlled by Hamas, unless the President can certify that Hamas has made demonstrable progress towards acknowledgement of Israel, following very detailed requirements or (b) determine that Hamas is not a terrorist organization. See *supra* Part II.B.4.

156. See *supra* Part II.B.5.

§ 5202,<sup>157</sup> and (6) exercise a waiver set out in 18 U.S.C. § 2339B (if the President has knowledge that the support will be used in preparation for, or in carrying out, acts of terrorism).<sup>158</sup>

In order for the President to send funds to the PA in its current status, he must follow a long, detailed waiver process. In fact, he must not only exercise four waivers, but he must also make two certifications and ensure several factors set out by Congress. Congress is circumscribing the President's decision-making process with this statutory framework: it is setting out detailed instructions on how the President should make one decision relating to foreign affairs. Even if he makes an honest attempt to follow all procedures, it is likely that in the short timeframe in which he must act, he will make a mistake. If Congress wished to manifest disapproval of the decision to send funds to the PA, it should have stated as much in plain terms, rather than develop a convoluted statutory framework with numerous, yet as a practical matter, ineffective, waivers.

Nor has Congress expressed disapproval of the President's decision to send financial aid to NGOs on the West Bank and Gaza Strip. Again, it has developed a convoluted statutory framework with several futile waivers. For example, in order to "legally" send financial aid to these NGOs, the President must: (1) exercise the waivers in the State Appropriations Act<sup>159</sup> mentioned above, (2) fit the funding into one of the exceptions of 22 U.S.C. § 2378c,<sup>160</sup> (3) comply with the requirements of the Anti-Terrorism Act<sup>161</sup> set out above, and (4) comply with any holds Congress has placed on appropriations. If the organization is UNRWA, then the President must find that said organization has taken all possible measures to assure that no part of the funding will furnish assistance for guerilla military training of refugees.<sup>162</sup>

The framework governing foreign-NGO-funding is essentially the same as the framework for funding foreign countries. The President must exercise many of the same statutory waivers, and executive agents must make similar findings. The end result is the same: the President appears to have discretion that he, in fact, cannot really exercise as a practical matter. Thus, Congress failed to manifest disapproval of the President's decision to send funds to NGOs on the West Bank and Gaza Strip. Since he is vested with all "Executive" authority and was acting in foreign affairs, he had the constitutional authority to make this funding decision, absent congressional disapproval.

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157. Or he must determine that the PLO is not a terrorist organization. *Id.*

158. *See supra* Part II.B.8. Or he must obtain the Attorney General's concurrence for acting contrary to the prohibition but still be sure to comply with the Immigration and Nationality Act.

159. Pub. L. 112-74, 125 Stat. 786 (2012). *See supra* Part II.B.1.

160. If the President is utilizing the PLC exception, he must determine that no PLC members are also members of Hamas or any other terrorist organization. If he is instead utilizing the "national security interests" exception, he must consult with appropriate committees and issue a written memo.

161. *See supra* Part II.B.8. 18 U.S.C. § 2339A.

162. *See supra* Part II.C.

### III. CONCLUSION

When it comes to sending military support abroad, various constitutional and statutory elements are at play. It is out of this separation of powers struggle that the Founders hoped to achieve balance. First, they gave Congress the power of the purse through the Spending and Appropriations Clauses, avoiding many of the negative consequences experienced by the British government when the King seized the finances. Second, they gave Congress limited power in the arena of foreign affairs through the power to raise and support armies, the power to declare war, and the power to grant marques and reprisals. On the other side of the balancing equation, they vested “Executive” power in the President, making sure not to define the term. This power has been interpreted by the courts as extensive, especially with regard to foreign relations. Thus, when the President wishes to send financial military support to a foreign country or an NGO, his Executive and Treaty-making powers are in tension with Congress’s power to appropriate funds.

This Note, by digging into Secretary of State Clinton’s decision to send \$200 million to the Palestinian Authority and NGOs on the West Bank and Gaza Strip in *Bernstein v. Kerry*, has set out a framework for analyzing situations in which such a conflict arises. First, the President must comply with general appropriations made by Congress because Congress holds the power of the purse. Next, the President must comply with the procedures of that appropriation, which could be found in several different statutes. In other words, if he strayed from the general appropriation by utilizing contingency or drawdown funds, or if he exercised a waiver, we must determine if he did so appropriately. If he complied with procedures, then his decision was legal and constitutional. If, however, he failed to follow procedures, we must justify his act on other grounds, namely, by demonstrating that (1) he acted of his own “Executive” authority and (2) Congress did not clearly manifest disapproval of his action.

Even if Congress manifests disapproval of a particular foreign funding decision in a particular statute, it may fail to manifest disapproval in the overall statutory framework. When that framework contains numerous waivers that appear effective on an individual level but conflict with each other in the grand scheme of things, Congress cannot claim that it has manifested disapproval of a Presidential decision that failed to comply with all the waivers. In the absence of congressional disapproval, the President is empowered by the Vesting Clause to act in foreign affairs.

None of these issues, however, will be fully addressed until courts are able to hear cases such as *Bernstein v. Kerry*.<sup>163</sup> If at some point a case gets past the standing roadblocks, a judge will have to determine the result of this separation of powers struggle. In the case of *Bernstein*, a judge might decide that the President’s acts, while seemingly illegal

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163. 962 F. Supp. 2d 122 (D.D.C. 2013).

based on the statutory framework, are actually permissible based on constitutional powers vested in him. In a case where the overall statutory framework manifests clear congressional disapproval of a decision, though, the President will not be able to rely on the Vesting Clause for his illegal acts. It is in these instances that the courts truly must act; otherwise, the President may continue to engage in illegal activities, placing the entire country at risk.

