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Congressional Power To Require Defense Expenditures

Cover Page Footnote

Colonel, U.S. Army; member of the Nebraska Bar.

CONGRESSIONAL POWER TO REQUIRE DEFENSE EXPENDITURES

GERALD W. DAVIS*

I. INTRODUCTION

THE notion that the President's power as Commander in Chief gives him authority to ignore legislation enacted by Congress relating to the armed forces or national defense appears to be of comparatively recent origin. "The first impounding of appropriated funds occurred in 1941, when President Roosevelt ordered the impounding of funds appropriated for public works not thought to be of an essential defense nature."¹ Since that time, Presidents have utilized the impounding technique from time to time to reduce the level of expenditures for an authorized program, invariably accompanied by Congressional protest.

The problem arises when Congress appropriates more funds for specific defense purposes than requested by the President, or authorizes and appropriates funds for defense objectives not considered essential by the Chief Executive. The question then arises as to whether Congress can *require* the Executive Department to expend funds for such defense purposes.

Involved in this controversy is the doctrine of the Separation of Powers, the authority granted Congress and the President over the armed forces by the Constitution of the United States, and the political and practical factors involved in the preparation and execution of defense budgets.

The recent controversy over the B-70 strategic bomber (later called the RS-70 weapon system) highlights the dispute between at least some of the members of Congress and the Executive relative to the expenditure of funds appropriated for defense purposes. This controversy is presented to illustrate the nature of the problem involved.

The discussion in Congress relative to the RS-70 controversy is set forth herein at considerable length to indicate representative views of Congressmen. In this respect, it should be borne in mind that we are concerned with the *power* of Congress to require certain expenditures. The exertion of such power as Congress may possess will depend to a great extent on the individual legislator's concept of Congressional authority in the matter. Although admittedly transient, the individual viewpoint is nonetheless important as a gauge of the near unanimity of opinion required to impose a Congressional mandate in this area.

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1. Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-In-Aid to Segregated Activities*, 11 Am. U.L. Rev. 32, 34 (1962).

The power of Congress to compel expenditures for national defense would technically include the power granted Congress "To provide for organizing, arming, and disciplining, the Militia."² This aspect is excluded from the present discussion which is limited, essentially to the broader aspects of Congressional power to "provide for the common Defence,"³ and the power to "raise and support Armies."⁴

II. THE RS-70 CONTROVERSY

[T]he Secretary of the Air Force is *directed* to utilize . . . an amount not less than \$491,000,000 . . . for an RS-70 weapon system.⁵

The House Committee on Armed Services recommended that the bill to authorize appropriations during fiscal year 1963 for the Armed Forces⁶ include in part, the foregoing provision. The members of the committee wished that there be no misunderstanding as to their choice of terms:

Lest there be any doubt as to what the RS-70 amendment means let it be said that it means exactly what it says; i.e., that the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize the full amount of the \$491 million authority granted ". . . for an RS-70 weapon system."⁷

Why was the Committee so adamant concerning the utilization of this authorization? Its members were concerned over what appeared to be "plans of the Department of Defense . . . toward the ultimate elimination of bomber aircraft," and the placing of sole reliance on the intercontinental ballistic missile.⁸ As a result of this concern, Congress had appropriated for fiscal year 1962 approximately \$695 million, in addition to that requested by the executive branch, for the procurement of bombers and for a more vigorous prosecution of the B-70 program. These funds had not been used by the Defense Department despite a strong expression of congressional desire that the procurement of bombers be continued and that a strategic aircraft system be developed.⁹ The Committee considered this circumstance as "still another rebuff of congressional will," and listed thirteen other recent instances in which appropriations for defense expenditures desired by Congress had been disregarded by the Executive.¹⁰

"[I]s the function of the Congress solely a negative one in that it can

2. U.S. Const. art I, § 8, cl. 16.

3. U.S. Const. art I, § 8, cl. 1.

4. U.S. Const. art. I, § 8, cl. 12.

5. H.R. Rep. No. 1406, 87th Cong., 2d Sess. 1 (1962). (Emphasis added.)

6. H.R. 9751, 87th Cong., 2d Sess. (1962).

7. H.R. Rep. No. 1406, supra note 5, at 9.

8. Id. at 4.

9. Id. at 4-5. See generally Whelan, *Legislative Regulatory Activity in Research and Development Contracting* 59 (1963).

10. H.R. Rep. No. 1406, supra note 5, at 5-6.

withhold authority or funds and *prevent* something from being done? Or can it exercise a positive authority and by affording the means *require* something to be done?"¹¹ Thus the Committee posed the question to be considered in this study.

III. THE DEBATE IN CONGRESS

Discussion of the Armed Forces authorization¹² and appropriation bills for fiscal year 1963 on the floor of the House and Senate revealed a divergence of opinion among Congressmen as to whether Congress could, or should, direct the Executive to expend funds for a purpose desired by the former but not the latter.¹³ This may be illustrated by the following extracts from the Congressional Record:

[T]he Constitution does not give the legislative body direct authority to require expenditures of funds appropriated by that body, but this possibly could be established by the rather dangerous negative approach whereby concessions would have to be made by both sides. The whole matter should be determined on the basis of whether or not this weapons system is needed to protect our country.¹⁴

[I]f I understand the Constitution, . . . the Founding Fathers provided that the Congress as a legislative body had the privilege and the duty to raise and support armies, and otherwise provide for the armed defense of the country. While, on the other hand, the President was set up as the Commander in Chief of the Armed Forces.

Therefore, . . . the Committee on Armed Services is unquestionably within its right in insisting that the moneys it authorizes for particular weapons should be expended by the executive department for that purpose.¹⁵

[W]e have authorized various Presidents, of all types, stripes, and breeds, to do many things that they have failed or refused to do. . . . I know of no particular method or means the Congress . . . has to compel or to force any President to expend any funds which may be authorized and appropriated.¹⁶

11. *Id.* at 8. The Committee recognized that an authorization act without a corresponding appropriations act would be ineffectual, but hoped to express a "unanimity of feeling" with the Appropriations Committee, "backed by the vote of the whole House and the whole Congress . . ." *Id.* at 8-9.

12. The Constitution does not speak in terms of authorization of funds. Instead, its pertinent provision is that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." (U.S. Const. art. I, § 9, cl. 7). The requirement that there must be an authorization act before there can be an appropriation stems from the rules of the House and the Senate. E.g., House Rule XXI, H.R. Doc. No. 122, 86th Cong., 1st Sess. 20 (1959). The "legislative" committees consider authorizations and the Committees on Appropriations consider appropriations within limits of the authorization. If an appropriation for which there is no authorization is proposed and becomes law because no successful point of order was made against it, the appropriation act is considered to be sufficient in itself.

13. 108 Cong. Rec. 4645-46, 4689-724, 6303-19, 6836-49, 10342-81, 14832-33, 15244-45 (1962).

14. *Id.* at 4645 (remarks of Senator Goldwater).

15. *Id.* at 4690 (remarks of Representative Colmer).

16. *Id.* at 4692 (remarks of Representative Brown).

I ask you—What is Congress' function in defense? Is it a partner? Does it have a voice? Or is it just Mr. Money-bags, to give or to withhold funds?

That is not what the Constitution says; the Constitution grants the Congress the exclusive power to raise and support and make rules for our military forces. The language of the Constitution is clear.

Congress does not want to run the Department of Defense—Congress just wants to sit at the table and get across an idea once in a while.¹⁷

We make that decision in the exercise of our responsibility under the Constitution as to the size and nature of the Armed Forces we shall have. That is our responsibility and we seek to discharge it. We have no intention to transgress upon the constitutional duties and responsibilities of our President, as Commander in Chief. We shall give him our fullest cooperation. We ask of him and of his Secretary of Defense that they cooperate with us

I, for one, shall insist that . . . [the] President . . . recognize the constitutional responsibility—a right as well as a duty—of the Congress to determine the size and nature of our Armed Forces.¹⁸

Several members of the House of Representatives were of the opinion that Congress clearly did not have the power to, and should not attempt to direct the Chief Executive to expend funds appropriated by Congress for a specific defense project.

The question is this: Can Congress only say that we have too much strength, or can it also say we have too little? . . .

A reading of the language: "Congress shall have the power to raise and support armies" has . . . a fairly clear meaning. Raise means get the men—support means get them the equipment they need. It does not mean to tell them where, or how, or when to use it; that would be the responsibility of the Commander in Chief.¹⁹

[T]he language directing the Secretary of the Air Force, and in effect the Commander in Chief, . . . [would be] . . . an unconstitutional invasion of the responsibilities of the Chief Executive. . . .

I do not want the Congress to usurp and take from the Chief Executive authority that is his.²⁰

Congress should not command nor should the Congress direct the President on how to arm the military forces for the missions the President decides are in the national interest. The President is the one person in government and in the Nation with all of the facts and intelligence at his fingertips. He is the man who has to make the big decisions on weapons. . . .

[C]ongress should carry out the intent of the Founding Fathers who drafted the Constitution, and . . . limit our activity to the traditional and time-tested role of "advise and consent" and "to investigate and propose."²¹

This legislation proposes to direct the executive department to spend money which the president—right or wrongly—had decided not to spend. I do not believe Congress has the right to so direct the executive, nor should it presume to take that right. . . .

It is inconceivable to me that Congress should tell . . . a general in the field which weapons to fire. These are the rights and duties of the Executive. We in

17. *Id.* at 4696 (remarks of Representative Vinson).

18. *Id.* at 4698 (remarks of Representative Arends).

19. *Id.* at 4712 (remarks of Representative Pike).

20. *Id.* at 4714, 4715 (remarks of Representative Ford).

21. *Id.* at 4716 (remarks of Representative Boland).

Congress should neither attempt to assume executive powers nor should we relieve the President of the responsibility for making the right decisions.²²

Several Senators were of the opinion that Congress could and should appropriate funds for a specific defense project which it deemed necessary. However, the Chief Executive possessed the power to ignore Congress and not expend the money appropriated.

I believe it is the responsibility of the executive branch to determine what weapons . . . are to be obtained for American defense. . . . But Congress, too, has constitutional responsibilities in the field of defense, and one of them is to make available moneys to the executive branch to utilize for our Military Establishments. . . .²³

It seems that under the doctrine of the separation of powers, the executive branch can ignore the desires of the legislative branch and refuse to spend the money appropriated for a specific program. . . .

But regardless of the separation of powers doctrine, it seems to me that Congress, as an independent branch of the Federal Government, has a duty to go ahead and reach its own decision on what is or is not wise with respect to the RS-70 program.²⁴

If the situation ever comes that our Nation suffers because of a decision by the Defense Department that we will put all our eggs in one basket and will depend on the long-range missiles, and that decision turns out to be a poor one, they will not be able to put the blame on Congress. . . .

[The Secretary of Defense] does not have to spend the money, but he has the responsibility for not spending it.²⁵

[U]nder article I, section 8, of the Constitution it is our responsibility to decide. It is stated: "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States." What we tried to do was to exercise that responsibility. When there is a difference of opinion in the executive branch as to what may be necessary for the common defense, the argument made appealed to me . . . that we should provide the funds we believe are necessary for national defense, leaving it to the responsibility of the Executive as to whether he wishes to use them all or not.²⁶

The debate in Congress revealed not only differences in opinion as to whether Congress could require the expenditure of funds appropriated for defense purposes, but also some confusion as to applicable grants of power under the Constitution. There appeared to be no doubt in the mind of the Chief Executive. President Kennedy expressed his opinion as follows in a letter to the Chairman of the House Armed Services Committee:

I . . . urge your reconsideration of the language added by your committee to H.R. 9751. The amendment to which I refer states that the Secretary of the Air Force is "directed" to utilize not less than \$491 million of this authorization . . . for an RS-70 weapons system. I would respectfully suggest that, in place of the word "directed," the word "authorized" would be more . . . clearly in line with the spirit of the Constitution.

22. *Id.* at 4719 (remarks of Representative Bass).

23. *Id.* at 10376 (remarks of Senator Kuchel).

24. *Id.* at 10378 (remarks of Senator Miller).

25. *Id.* at 15244 (remarks of Senator Robertson).

26. *Id.* at 15245 (remarks of Senator Saltonstall).

Each branch of the Government has a responsibility to "preserve, protect and defend" the Constitution and the clear separation of legislative and executive powers it requires. I must therefore insist upon the full powers and discretions essential to the faithful execution of my responsibilities as President and Commander in Chief, under article II, sections 2 and 3, of the Constitution.

Additionally implicit in the Constitution, of course, is the intent that a spirit of comity govern relations between the executive and legislative. And while this makes unwise if not impossible any legislative effort to "direct" the Executive on matters within the latter's jurisdiction, it also makes it incumbent upon the Executive to give every possible consideration in such matters to the views of Congress. For that reason, Secretary [of Defense] McNamara has indicated to you in a separate letter his willingness to reexamine the RS-70 program and related technological possibilities.²⁷

A companion letter from the Secretary of Defense stated that a new study of the RS-70 program would be initiated "in the light of recommendations and the representations of the Armed Services Committee," and that if technological developments advanced more rapidly than anticipated "we would then wish to expend whatever proportions of any increase voted by the Congress, these advances . . . would warrant."²⁸

The Committee then withdrew its proposed "mandate" to the Secretary of the Air Force.²⁹ Mr. Vinson, the chairman of the House Armed Services Committee, explained on the floor of the House that the word "directed" had been inserted in the bill to show the intent of Congress and to force the Department of Defense to take some action. Once assured that action would be taken, the Committee wished to delete this word and substitute "authorized."³⁰ Or as expressed by another Congressman: [Y]esterday two of the most distinguished Americans of our time met together and took a little stroll in the Rose Garden behind the White House . . . and discussed some of the provisions of this bill.

As a result, the Committee . . . agreed to . . . change the wording . . . so as to eliminate the word "directed" and to substitute therefor the word "authorized."³¹

IV. HISTORICAL CONCEPT OF CONTROL OVER THE ARMED FORCES

Control over the armed forces is divided between the Executive and the Congress by the Constitution of the United States.³² Experience in England and the Colonies had convinced the framers of the Constitution that exclusive control should be vested in neither the executive nor the

27. *Id.* at 4694. It will be noted that the President did not explicitly deny the power of Congress to "direct" the use of funds for the purpose stated, although he suggested that the point was doubtful. The fact that such a strenuous, and successful, effort was made to delete the term "directed" carries an implied recognition that the Executive would not be free to ignore such a mandate, as it has felt free to do in the case of appropriations.

28. *Ibid.*

29. *Id.* at 4692-724.

30. *Id.* at 4693.

31. *Id.* at 4691 (remarks of Representative Brown).

32. U.S. Const. art. I, § 8, cl. 14, art. II, § 2, cl. 1.

legislative branches of the government.³³ The Constitution thus declares that "the President shall be Commander in Chief of the Army and Navy of the United States"³⁴ Congress is empowered:

To lay and collect Taxes . . . to . . . provide for the common defence . . . ;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a navy;

To make Rules for the Government and Regulation of the land and naval Forces; [and]

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.³⁵

The powers which were to flow from these provisions of the Constitution were discussed by its proponents. An examination of such explanatory documents sheds some light on the authority to be exercised by the President and by Congress with respect to the armed forces.

First, the powers intrusted to the Federal Government "to provide for the common defence" were to exist without limitation "because it is impossible to foresee or define the extent and variety . . . of the means which may be necessary to satisfy them."³⁶ Therefore no "constitutional shackles" were to be imposed, at least upon the Federal Government as a whole, in the exercise of the authorities to raise armies, to build and equip fleets, to prescribe rules for the government of both, to direct their operations, and to provide for their support.³⁷

One of the arguments against the new Constitution was that "provision has not been made against the existence of standing armies in time of peace."³⁸ In answer, it was pointed out that "the whole power of raising armies was lodged in the *legislature*, not in the *executive*; [and there was] . . . an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years"³⁹ Further, "restraints upon the discretion of the Legislature in respect to military establishments in time of peace would be improper to be imposed, and if imposed, from the necessities of society would be unlikely to be observed."⁴⁰ The danger from other countries, and from Indians on the western frontier, showed

33. See generally May, *The Ultimate Decision: The President as Commander in Chief* 3-19 (1960).

34. U.S. Const. art. II, § 2, cl. 1.

35. U.S. Const. art. I, § 8.

36. *The Federalist* No. 23, at 147 (Cooke ed. 1961) (Hamilton). Cf. Corwin, *The Spending Power of Congress*, 36 *Harv. L. Rev.* 548 (1923).

37. *The Federalist*, op. cit. supra note 36, at 147.

38. *Id.* No. 24, at 152 (Hamilton).

39. *Id.* at 153. (Emphasis added.)

40. *Id.* at 155.

the "necessity of leaving the matter [of a standing army] to the discretion and prudence of the legislature."⁴¹

It was intended that restraint on the exercise of legislative authority, in the means of providing for the national defense, would be two-fold. First, the legislature would be obliged to deliberate upon the propriety of keeping a military force at least once in every two years, due to provision limiting appropriations for military purposes to that period of time. If the majority should be disposed to exceed the proper limits, public attention would be roused and measures would be taken by the community to guard against the danger. Second, successive variations in the representative body, produced by biennial elections in both houses, would defeat an attempt to sustain an unwarranted build-up of the armed forces.⁴²

With respect to the President, as Commander in Chief of the army and navy, his authority "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy . . ."⁴³

It appears, then, that at the time of the adoption of the Constitution, the power to establish the size and nature of the armed forces was considered to reside in Congress. It was recognized that the President has a qualified negative upon the acts of the legislature,⁴⁴ "calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."⁴⁵ Specific control over the exercise of legislative authority concerning the armed forces, however, was considered to be in their constituents and not in the President.

V. SEPARATION OF POWERS AND EXECUTION OF THE LAWS

The doctrine of the Separation of Powers comprises . . . one of the two great structural principles⁴⁶ of the American constitutional system. . . . [F]rom it certain other ideas follow fairly logically: First, that the three functions of government are reciprocally limiting; Secondly, that each department should be able to defend its characteristic function from intrusion by either of the other departments; Thirdly, that none of the departments may abdicate its powers to either of the others.⁴⁷

The division of authority and responsibility among the three branches of the Government was described by Chief Justice John Marshall early in the Nation's history: "The difference between the departments un-

41. *Id.* at 157. See *Id.* No. 25 (Hamilton).

42. *Id.* No. 26 (Hamilton); *id.* No. 41 (Madison).

43. *Id.* No. 69, at 465. See 2 Story, *Commentaries* § 1492 (5th ed. 1891); cf. *Fleming v. Page*, 50 U.S. (9 How.) 602 (1850).

44. The power of veto contained in U.S. Const. art. I, § 7, cl. 2.

45. *The Federalist* No. 73, at 495 (Cooke ed. 1961) (Hamilton).

46. The other is the doctrine of Dual Federalism. (Footnote added.)

47. Corwin & Koenig, *The Presidency Today* 8 (1956).

doubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law"⁴⁸ Over 100 years later the Supreme Court reaffirmed this basic constitutional division between the three branches of the Government.⁴⁹ This decision has never been qualified by the Supreme Court or by the lower Federal courts.⁵⁰

Disputes as to the respective powers of Congress and the President seldom resolve themselves into issues that can be settled in the courts. Accordingly there are few authoritative decisions to be found on the point.

In theory, the Executive power and the Legislative power are independent and separate, but it is not always easy to draw the line and to say where Legislative control and direction to the Executive must cease, and where his independent discretion begins. In theory all the Executive officers appointed by the President are his subordinates, yet Congress can undoubtedly pass laws limiting their discretion and commanding a certain course by them which is not within the power of the Executive to vary. Fixing the method in which Executive power shall be exercised is perhaps one of the chief functions of Congress. By its legislation it often creates a duty in the Executive which did not previously exist. Then in prescribing how that duty is to be carried out, it imposes restrictions that the Executive is bound to observe.⁵¹

Sometimes it is hard to remember, but under our system of government it is the legislative branch which is to make and decide policy. The executive branch "is supposed to carry out the policies declared by Congress."⁵²

There is no provision of the Constitution which specifically requires the Executive Branch to spend money appropriated by Congress. The President is required, however, to "take Care that the Laws be faithfully executed."⁵³ Whether this Constitutional provision vested in him discretion as to the execution of acts of Congress was argued in *Kendall v. United States ex rel. Stokes*.⁵⁴ Postmaster Kendall had disallowed claims of Stokes for carrying the mail. Congress passed an act directing Kendall to credit Stokes with the amount due. Kendall again refused to pay the claim, contending that only the President, under the power to see that the laws are executed, could require that he pay the claims. The Supreme Court upheld a mandamus ordering the payment, holding that the Pres-

48. *Wayman v. Southard*, 23 U.S. 1, 44 (1825).

49. *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

50. Brownell, Separation of Powers: Executive and Legislative Branches, 60 Dick. L. Rev. 1 (1955).

51. Taft, *Our Chief Magistrate and His Powers* 125 (1925).

52. 31 Cong. Dig., No. 1, p. 1, at 2 (1952). See MacLean, *President and Congress: The Conflict of Powers* 61 (1955).

53. U.S. Const. art. II, § 3.

54. 37 U.S. (12 Pet.) 524 (1838).

ident was not impowered to dispense with the operation of law upon a subordinate executive officer. When Congress imposes

upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution . . . in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. . . .⁵⁵

To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.⁵⁶

To avert a nation-wide strike of steel workers in April, 1952, which he believed would jeopardize national defense, President Truman issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills.⁵⁷ According to the Government's argument in *Youngstown Sheet & Tube Co. v. Sawyer*,⁵⁸ the directive was not founded on any specific statutory authority, but upon "the aggregate of [the President's] . . . constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces"⁵⁹ The Secretary of Commerce issued an order seizing the steel mills and the President promptly reported these events to Congress, but Congress took no action. It had provided other methods of dealing with such situations and had refused to authorize governmental seizures of property to settle labor disputes. The steel companies sued the Secretary and the Supreme Court rejected the broad claim of power asserted by the Chief Executive, holding that "the order could not properly be sustained as an exercise of the President's military power as Commander in Chief . . . nor . . . because of the several constitutional provisions that grant executive power to the President."⁶⁰

The *Youngstown* case is readily distinguishable on its facts from the problem of appropriations for defense purposes desired by Congress but not the President. Pertinent portions are set forth herein at length, however, since the opinions of members of the Court appear applicable to the matter at hand.

Mr. Justice Black, who delivered the opinion of the Court, noted:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted

55. *Id.* at 610.

56. *Id.* at 613.

57. Exec. Order No. 10340, 17 Fed. Reg. 3139 (1952).

58. 343 U.S. 579 (1952).

59. *Id.* at 582.

60. *Id.* at 587.

shall be vested in a Congress of the United States . . .” After granting many powers to the Congress, Article I goes on to provide that Congress may “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.”

The President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or any Department or Officer thereof.”⁶¹

Mr. Justice Douglas, in a concurring opinion, noted that “the power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, Section 3 also provides that the President ‘shall take Care that the Laws be faithfully executed.’ But . . . the power to execute the laws starts and ends with the laws Congress has enacted.”⁶²

The three dissenting Justices did not assert that the President could act contrary to a statute enacted by Congress. They argued that there was no statute which prohibited the seizure and that there was “no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.”⁶³

Mr. Justice Jackson, concurring with the majority opinion, remarked on the “poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”⁶⁴ He suggested that “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”⁶⁵ Justice Jackson then listed the situations in which a President may doubt, or others may challenge, his powers and indicated the legal consequences of the factor of relativity to the powers of Congress:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

2. When the President acts in absence of either a congressional grant or denial

61. *Id.* at 587-89.

62. *Id.* at 632-33 (concurring opinion).

63. *Id.* at 703 (Vinson, C.J., dissenting).

64. *Id.* at 634 (concurring opinion).

65. *Id.* at 635 (concurring opinion).

of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional 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.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁶⁶

The latter situation (3), as discussed by Mr. Justice Jackson, more nearly relates to the RS-70 and similar controversies.

Mr. Justice Jackson then noted that "the Constitution expressly places in Congress power 'to raise and support Armies' and 'to provide and maintain a Navy.' . . . This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement."⁶⁷

The issues considered in the *Youngstown* case are similar in many respects to the issue involved in the matter of utilizing funds to implement Congressional defense policies. Without doubt Congress is empowered to appropriate funds for defense purposes.⁶⁸ This is the same basic consideration involved in the *Youngstown* case, wherein Congress had provided methods other than those employed by the President for the settlement of labor disputes. Once Congress has enacted laws relative to the utilization of appropriated funds for defense purposes, it is the President's duty to see that they are "faithfully executed." The Constitution does not subject the law-making power of Congress to presidential control, except for the veto process. The fact that Presidents in the past may have overridden congressional appropriations does not deprive Congress of its constitutional authority.

The matter of Congressional appropriations for defense purposes lies in the third category of congressional-presidential relationships set forth by Justice Jackson. "Exclusive presidential control" cannot be sustained and the President is not empowered to impose conditions upon the exercise of congressional authority in this field.⁶⁹ The weight of authority is

66. *Id.* at 635-38 (concurring opinion).

67. *Id.* at 643 (concurring opinion). (Emphasis omitted.)

68. Corwin, *The Constitution and What it Means Today* 30 (1st Anthencum ed. 1963).

69. See Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 *Mich. L. Rev.* 141 (1952).

against the existence of an inherent presidential power to impound appropriated funds.⁷⁰

VI. THE AUTHORIZATION AND APPROPRIATION OF FUNDS

The general theory underlying the Constitution is that Congress shall be responsible for the determination and approval of the fiscal policies of the Nation and that the Executive shall be responsible for their faithful execution.⁷¹ This division of authority was well stated by President Wilson in a message to Congress on May 13, 1920:

The Congress and the Executive should function within their respective spheres 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 passed, the appropriation should be administered or the law executed by the executive branch of the Government.⁷²

Congress then, has the final responsibility, subject to Constitutional limitations and the President's veto power, for deciding which activities are to be undertaken by the Government and the amount of money to be spent on each. The President's role is to recommend to Congress a unified and comprehensive budget and to administer the budget as finally enacted.⁷³

A distinction must be made between the authorization and the actual appropriation of funds for a specified purpose. As indicated previously,⁷⁴ an act appropriating funds for defense purposes serves to implement a preceding authorization act passed by Congress.

Because of some extremely broad authorizations of appropriations for the procurement of aircraft, missiles, and vessels that were granted in the 1940's, the Committee on Armed Services came close to legislating away their major responsibilities in the shaping of defense legislation.⁷⁵ While the Committees on Armed Services retained jurisdiction over manpower legislation, military pay measures, and military construction authorizations, only a small part of the defense program for a fiscal year came before these Committees for legislative review.⁷⁶ As a result, the Appropriations Committees alone gave substantial consideration to the over-all defense budget.⁷⁷

70. Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-In-Aid to Segregated Activities*, 11 *Am. U.L. Rev.* 32, 42 (1962).

71. Report of the President's Committee on Administrative Management at 15 (1937).

72. *Ibid.*

73. Committee on Organization of the Executive Branch of the Government Report on Budget and Accounting in the U.S. Government at 12-13 (1955).

74. See note 12 *supra*.

75. 108 Cong. Rec. 6303 (1962) (remarks of Senator Russell).

76. See generally Whelan, *Legislative and Regulatory Activity in Research and Development Contracting* 59 (1963).

77. For an exhaustive study on the consideration of defense budgets by the Appropriations Committees, see Huzar, *The Purse and the Sword* (1950).

In the realization that a preponderant part of the defense program was based on major weapons, the Committee proposed that appropriations for procurement of major weapons should be subject to new authorizations.⁷⁸

Public Law 86-149⁷⁹ was the first law requiring congressional authorization for appropriations for the procurement of aircraft, missiles, and naval vessels. This law was subsequently modified by Public Law 87-436⁸⁰ to require similar authorization for the research, development, test, and evaluation associated with aircraft, missiles and naval vessels.

Public Law 88-174 extended this authority to require authorization of appropriations for *all* research, development, test, and evaluation carried on by the Department of Defense. The law today reads as follows:

No funds may be appropriated after December 31, 1960, to or for the use of any armed force of the United States for the procurement of aircraft, missiles, or naval vessels, or after December 31, 1962, to or for the use of any armed force of the United States for the research, development, test, or evaluation of aircraft, missiles, or naval vessels, or after December 31, 1963, to or for the use of any armed force of the United States for any research, development, test, or evaluation, unless the appropriation of such funds has been authorized by legislation enacted after such dates.⁸¹

It seems clear that an *authorization* of funds for a specific defense purpose is not considered to eliminate the exercise of discretion as to either the appropriation or the expenditure of funds for that purpose. The meaning that Congress attaches to the term is indicated in the following colloquy which occurred on the floor of the House when it was determined to "authorize" funds for the RS-70:

Mr. Brown: . . . there has been a great deal of discussion throughout the years as to what the word "authorized" really means, in connection with legislation, when the President is authorized to do something. But the usual conclusion is that the will of the Congress is expressed in using the word "authorized," and it also expresses the desire of the Congress. . . .⁸²

Mrs. St. George: In other words, it means a pious hope—and sometimes—"Hope deferred, maketh the heart sick"; is that correct?⁸³

Mr. Brown: It goes a little further than that. I would suggest, if you check the records, that while we authorize many expenditures, the money is not always appropriated, and even if so, the expenditures are not always made by the President. But usually when the word "authorized" is used in legislation, the Chief Executive accepts it as more or less expressing the desire and the will of the Congress, and quite often he goes along with that. . . .⁸⁴

78. H.R. Rep. No. 1138, 88th Cong., 2d Sess. (1963).

79. Act of Aug. 10, 1959, § 412(b), 73 Stat. 322.

80. Act of April 27, 1962, § 2, 76 Stat. 55.

81. 77 Stat. 329, 5 U.S.C. § 171a note (Supp. V, 1963).

82. 108 Cong. Rec. 4691 (1962) (remarks of Representative Brown).

83. *Ibid* (remarks of Representative St. George).

84. *Ibid* (remarks of Representative Brown).

Mr. Cannon: . . . All Members of the House understand that the word "authorized," as used in this connotation, means "permitted"—and nothing more.⁸⁵

Although an authorization may be considered as only constituting permission to expend funds for a particular purpose, an appropriation of funds implies a directive that such funds be expended to effect the purpose indicated.

An argument that the President's authority as Commander in Chief gives him power to disregard a legislative mandate to use appropriated funds for specified purposes which Congress has found necessary for national defense, would seem equally applicable to any other legislation relating to the armed forces. Yet Congress has enacted an enormous amount of legislation on the subject and the Supreme Court has, from time to time, struck down executive action found to be in conflict with statutory provisions.⁸⁶ "It is recognized that Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided that the conditions do not require operation of the Government in a way forbidden by the Constitution. . . ."⁸⁷ The executive branch is limited by the appropriation with respect to the amount, purpose and period of availability of the money made available for obligation and expenditure.⁸⁸

The Naval Appropriation Act of March 3, 1909, provided that no part of the appropriations therein made for the Marine Corps would be expended unless officers and enlisted men of that Corps served on board certain vessels in detachments of not less than eight percent of the enlisted men of the Navy on such vessels.⁸⁹

Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations. . . .

The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a plain invasion of the powers of said body conferred upon it by the Constitution of the United States.⁹⁰

85. *Ibid* (remarks of Representative Cannon).

86. See, e.g., *Harman v. Brucker*, 355 U.S. 579 (1958), where the action of the Secretary of the Army in issuing less than honorable discharge to two soldiers was held inconsistent with law.

87. Brownell, *supra* note 50, at 3.

88. Chermak, *Financial Control: Congress and the Executive Branch*, 17 *Mil. L. Rev.* 83 (1962).

89. Act of March 3, 1909, ch. 255, 35 Stat. 773. This provision was considered constitutional. 27 *Ops. Att'y Gen.* 259 (1909).

90. *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946).

The Supreme Court has also held that when Congress makes an appropriation in terms which constitute a direction to pay a sum of money to a particular person, the officers of the Treasury cannot refuse to make the payment.⁹¹

Although none of these decisions squarely decide the point, they do not lend any countenance to the proposition that the President can lawfully disregard a direction embodied in law that certain measures be taken for national defense and that specified appropriations be spent for that purpose.

It may be claimed that Congress, by statute, has authorized the President to exercise discretion as to whether funds appropriated for particular defense purposes should be expended or impounded. An examination of legislation pertaining to appropriations does not support this contention.

The Anti-Deficiency Acts of 1905 and 1906 established the requirement of agency apportionment of total appropriations into quarterly amounts, providing that no more than one-fourth of the total appropriation might be expended in any quarter of the fiscal year.⁹² This device was later used to effect savings when the required purpose was accomplished for a sum less than the amount of the appropriation.

The Budget and Accounting Act of 1921 provided for presidential control over requests for funds for activities of the executive branch.⁹³ No provision was made, however, for such presidential control over the expenditure of appropriated funds, regardless of whether such funds were requested or were in excess of presidential requests.

Impounding of appropriated funds to prevent deficiencies and to effect economies in governmental operations was authorized by the General Appropriations Act of 1951.⁹⁴ This Act provided, in part, as follows: "In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available. . . ."⁹⁵

Since this section appears to grant the Executive great latitude with respect to the impounding of appropriated funds, inquiry should be made as to legislative intent. The House Committee on Appropriations stated that the "appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for

91. See, e.g., *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Price*, 116 U.S. 43 (1885). Compare 22 Ops. Att'y Gen. 295 (1902).

92. Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 49.

93. Ch. 18, 42 Stat. 20 (1921) (codified in scattered sections of 31 U.S.C.).

94. Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765, 31 U.S.C. § 665(c) (1958).

95. *Ibid.*

that activity.⁹⁶ Officials responsible for the administration of an activity for which an appropriation was made "bear the final burden for rendering all necessary service with the smallest amount possible within the ceiling figure fixed by the Congress."⁹⁷ The purpose of the Act is to "require careful apportionment of all types of funds expended by Federal agencies and efficient administration of the Government's business."⁹⁸

The Committee noted that in signing the National Military Appropriations Act for 1950, the President issued a statement indicating objections to the action of Congress in increasing funds for the Air Force, and directing the Secretary of Defense to place in reserve the amounts provided by Congress for increasing the Air Force structure. In this regard it was stated that "it was not the purpose of the Congress in providing funds for the Air Force . . . in excess of budget estimates to establish or permit the President or the Secretary of Defense to establish reserves. . . ."⁹⁹ In the minds of the Committee, this action "amounted to an item veto, a power not possessed by the President."¹⁰⁰

It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds. If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate of providing for the defense of the Nation.¹⁰¹

Certainly it was not the intent of Congress that the Executive should be enabled to impound funds appropriated by Congress for defense purposes. There appears to be no statutory authority for the impounding of appropriated funds, except for purposes of economy and efficiency *in executing the purposes for which the appropriation is made*.¹⁰²

An appropriation act may delegate discretion to the President or another executive officer in regard to expenditure. Where no such delegation exists, however, the appropriation should be considered a mandate, rather than mere permission to spend.

The President cannot dispense with the execution of the laws, under the duty to see that they are executed. To hold otherwise would be to confer upon him a veto power over laws duly passed and enrolled. To accord discretion to a President as to what laws should be enforced and how much, would enable him to interpose a veto retroactively.

96. H.R. Rep. No. 1797, 81st Cong., 2d Sess. 1, 9 (1950).

97. *Ibid.*

98. *Ibid.*

99. *Id.* at 309.

100. *Id.* at 310.

101. *Id.* at 311.

102. Goostree, *supra* note 70, at 47.

VII. ENFORCING CONGRESSIONAL AUTHORITY

If we may conclude that Congress has the constitutional right to require the Defense Department to expend appropriated funds for specified defense purposes, the question remains as to how that requirement can be enforced. Merely having the right is not sufficient if it cannot be effectively exercised.

It is doubtful that enforcement could be had through the courts. The fact that no suit has been instituted as a result of the many recent instances of the impounding of funds indicates a lack of standing to sue. The nature of acts appropriating funds for defense purposes is seldom such as to give rise to a justiciable controversy.

The executive veto does not include the power to veto a part of a bill. The lack of such a power in the President has enabled Congress at times to bring pressure on a president, thus enabling the enactment of legislation that the President might otherwise veto. That is, a measure desired by Congress may be included as a proviso, or attached as a rider, to a bill desired by the executive branch.¹⁰³ The undesired portion of the act must then be accepted, or the entire measure rejected by the President. In this manner, Congress may on occasion enforce the expenditure of funds for a particular purpose. This procedure is, of course, subject to acquiescence on the part of the President. If the President vetoed the bill because of the objectionable portion, it might be difficult to obtain sufficient support in Congress to override the veto. This, then, is not a very adequate means whereby Congress may require certain expenditures, particularly if the matter of defeating the measure is of sufficient importance to the Executive.

The strongest check which the legislative branch holds on the executive branch is, of course, impeachment. The Constitution provides that "the President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."¹⁰⁴

Throughout the history of the Nation only twelve impeachment trials have been held, resulting in the conviction of four members of the judiciary but not one executive officer.¹⁰⁵ In the only case of the impeachment of a President, that of President Johnson in 1868, the Senate declined to convict by a margin of one vote.

103. See, e.g., Act of July 13, 1955, ch. 358, 69 Stat. 304, which appropriated funds for army maintenance and operations and contained the following proviso: "Provided, That during the fiscal year 1956 the maintenance, operation, and availability of the Army-Navy Hospital at Hot Springs National Park, Arkansas, and the Murphy General Hospital in Boston, Massachusetts, to meet requirements of the military and naval forces shall be continued."

104. U.S. Const. art. II, § 4.

105. Staff of House Comm. on Gov't Operations, 87th Cong., 2d Sess., *Extent of the Control of the Executive by the Congress of the United States* at 27 (Comm. Print 1962).

A problem would be to determine whether the refusal to expend funds in implementation of a defense measure enacted by Congress could be considered a "high crime" or "misdemeanor." The manager of the impeachment of President Johnson contended that "an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of a duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."¹⁰⁶ Failure to expend funds under some circumstances could well fit within this definition.

Actually, the impeachment of a President will probably never again be attempted except under the most aggravated circumstances. In fact, it has been predicted that the next President to be impeached "will have asked for the extreme medicine by committing a low personal rather than a high political crime—by shooting a Senator, for example."¹⁰⁷

As a practical matter, Congress would never attempt to force its will as to the expenditure of funds through the power of impeachment. If feeling ran that high in Congress over the matter, the political pressures and public feeling would undoubtedly be sufficient to force the issue.

While the *threat* of impeachment might compel desired expenditures, it should be noted that *impeachment* does not accomplish this result, since failure to so act would be the basis for the action itself. All in all, Congress' power of impeachment cannot be considered as a means of requiring defense expenditures.

VIII. POLITICAL CONSIDERATIONS

Certain acts of Congress, such as the Budget and Accounting Act of 1921,¹⁰⁸ invite presidential leadership. When Congress gave up primary responsibility for preparing the budget it gave a tremendous boost to the power of the President, not only to control his administration, but to influence the legislative process.¹⁰⁹

The President's role is to recommend to Congress a unified and comprehensive budget, and to administer the budget as finally enacted. The Executive Budget, with its accompanying message, constitutes a systematic and detailed statement of objectives and means for the guidance of the legislature. With respect to the administration of the budget, the

106. Corwin, *The President—Office and Powers* 351-52 (rev. ed. 1957). See generally *Concerning the Removal of Officers*, 30 Cong. Dig. No. 2, p. 40 (1951).

107. Rossiter, *The American Presidency* 35 (1956).

108. 42 Stat. 20 (1921) (codified in scattered sections of 31 U.S.C.).

109. See generally Rossiter, *op. cit. supra* note 107, at 65-66.

President is the manager of the executive branch. He is responsible for its efficient operation within the framework laid down by Congress.

The President must evolve his program for national defense through the integration of military, budgetary, and diplomatic factors. The President, in whom are combined the roles of chief executive, commander in chief, and conductor of foreign relations, declares to Congress that a given military force, constituted and balanced in a particular fashion, is essential for national security and the support of foreign policy. The great powers of the President must be recognized and vast discretion must be accorded him in their exercise. But at the same time, Congress is clearly within its constitutional rights in exercising finality of decision in regard to the nature and size of the military force. As a general rule, however, Congress should show restraint in this role. It should establish within the executive branch the most effective agencies possible for overall planning and follow their recommendations. For Congress, for all its powers of raising and supporting armies, cannot function as a military staff or as the agency for originating overall plans for national security.¹¹⁰

The difficulty in securing a large increase in the President's budget for a particular defense purpose is that those who advocate it must also advocate either an increase in taxes, deficit financing, or a drastic cut somewhere else in the budget. None of these alternatives will normally be seen by others as especially attractive.

Should the advocates of a large increase succeed in persuading their colleagues that it is desirable—and this must be done in the face of expert testimony that it is not necessary—and should Congress duly appropriate the sum, there still remains the problem of getting the President to spend it. Congress has no formal power to secure his compliance, and can only hope to build a powerful consensus in support of the increase. If the President has the support of the "experts," Congress has little prospect of effecting major changes in the President's budget.¹¹¹

It has been suggested that, in order to help resolve conflict between Congress and the President over responsibility for the making of military policy, "the purposes for which the armed forces [are] . . . used might be divided into those of a long-term character and those which are immediate and of a very temporary effect."¹¹² The former permits delibera-

110. See generally L. Smith, *American Democracy and Military Power* (1951).

111. See generally Schilling, Hammond & Snyder, *Strategy Politics, and Defense Budgets* (1962), for an analysis of the interplay of different interests in the preparation of a defense budget, with emphasis on the budget for the 1950 fiscal year.

112. Koenig, *The Presidency and the Crisis* 53 (1944). See H.R. Doc. No. 443, 84th Cong., 2d Sess. 16 (1956), which contains a chronological listing of actions related to the exercise of the powers of the President as Commander in Chief from 1789-1955, and excerpts from sources dealing with the exercise of these powers in the period 1935-1955, and therefore proves a convenient reference for such material.

tion, a quality in which the Legislature excels, and the latter requires celerity of action, which the Executive is best able to supply. Considerations of administrative convenience would assign the long-term determinations to Congress acting in conjunction with the President, and reserve the temporary matters for the independent action of the President.

Warner Schilling discusses five problems connected with the defense budget which make it extremely difficult to determine how much to spend:

First is the problem of purpose. Defense preparations have no meaning except in their relationship to the foreign policy purposes of the nation.

The second is that posed by the existence of alternative means. And if it is not always easy to identify the foreign policy purposes for which preparations may be required, it is even more difficult to specify the means which will best serve those purposes.

The determination of the size and kind of forces required would be easier if it were not for the third problem: that caused by the fact that the future is normally uncertain and indeterminate. It is impossible to predict with assurance which of the nation's purposes will be challenged, or how and when.

The kind of armament a nation carries may have a most significant influence on the course of its political life. The need to estimate this influence in advance constitutes the fourth major problem in defense budgeting. Nor is it always an easy matter to tell whether additional arms will have a provocative or a deterrent effect, whether they will serve to ease or to exacerbate security problems with other nations.

Last but not least, there is the problem of cost. Security is not the only national goal, nor is defense the only activity that lays claim to the government's budget. Resources allocated to defense are resources no longer available for the satisfaction of other values. Where is the balance to be struck; what constitutes a rational allocation of national resources?

The questions of value involved are, in the final analysis, matters of personal preference. Inevitably, then, there will be differences and uncertainty—regarding the foreign policy goals to be served; regarding the relative utility of the various means available to implement those goals; regarding the shape of the future; regarding the impact on that future of the means under consideration; and regarding the costs it is desirable to incur for defense.

Mr. Schilling concludes that uncertainties and differences of this order can have but one result. Good, intelligent, and dedicated men will be found on all sides of the question of how much and what kind of defense the nation should buy. The fact that questions of value are at stake insures that there can be no one determinate answer to the problem of how much to spend for defense.

There are, accordingly, no individuals who can provide determinate

answers: not in the Defense Department, in the State Department, in Congress, or in the Office of the President. Choice is unavoidable: choice among the values to be served, and choice among the divergent conceptions of what will happen if such and such is done.

It is for this reason, says Mr. Schilling, that the defense budget, while susceptible to rational analysis, remains a matter for political resolution. Choices of this order can be made in only one place: the political arena. There the relative importance of values can be decided by the relative power brought to bear on their behalf.

The central fact about the defense budget is that it is a political problem. It turns on the desire and ability of the administration and Congress to undertake the necessary tasks of persuasion.¹¹³

XI. CONCLUSIONS AND RECOMMENDATIONS

It is concluded that Congress does have the authority to determine the size and nature of the armed forces, and to require the expenditure of funds authorized and appropriated for particular defense purposes. Congress does not have, however, adequate power or means to enforce its authority against unyielding opposition on the part of the President.

The problem of an adequate defense budget and appropriate defense expenditures is primarily political in nature and should be determined on that basis.

It is recommended that the power of Congress, in voting on the Executive Budget, be limited so that it might appropriate no more than the Executive requested to run the Government, as organized by Congress through general laws. Congress would retain control over appropriations within the ceiling set by the Executive and could thus reduce or eliminate certain activities as deemed appropriate.

Separate and apart from the Executive Budget, Congress could authorize and appropriate funds for added programs desired by Congress but not requested by the Executive. The President could veto such bills, if he so desired. If Congress should override his veto, then the President should carry such programs into effect. This would eliminate undesirable riders to essential appropriations acts and the dubious practice of impounding funds. It would also give the President and Congress an opportunity to resolve disputed matters outside normal budget procedures.

113. Schilling, Hammond & Snyder, *supra* note 111, at 10-15, 214, 233.