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APPROPRIATIONS OF POWER\*

*Gerhard Casper\*\**

The Virginia Constitution of 1776 expressed its commitment to the separation of powers in the following words: "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercises the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time . . . ." This commitment to the separation of powers doctrine was shared by most of the original states. It is implicit in the structure of the federal Constitution.

Historical discussions of the separation of powers doctrine generally focus on broad and tall questions about what the doctrine entailed and how it resolved — or did not resolve — specific conflicts between the branches of government.<sup>2</sup> Under the federal Constitution, one of

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1. 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3815 (1909).

2. See Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

the most famous early examples in the latter category of questions is provided by the debate over the President's power to remove cabinet officers in the summer of 1789. Another example would be the controversy, in the spring of 1793, over President Washington's neutrality proclamation in the war between England and France. These are what one might refer to as the heroic dimensions of separation of powers. In this article I should like to turn from the heroic to the mundane, that is: the worldliest of subjects — money. I hope, though, that by the time I shall have finished you will be able to discern the heroic in the mundane.

Much of what I will place before you has, at least in the past, not stirred up much interest as a matter of separation of powers notions or constitutional law. At present, perhaps because of the Iran-Contra Affair, this benign neglect seems to be decreasing some.<sup>3</sup> However, you should not misunderstand my modest effort as a contribution, in historical disguise, to a contemporary controversy. I have, for quite a while, worked on separation of powers theory and practice in the last quarter of the 18th century. My primary concern is to understand better the reactions and thoughts of those individuals who reflected about separation of powers as they implemented the new Constitution. As courts were largely irrelevant to this enterprise, I hope I can demonstrate to you the importance of nonjudicial materials for a more complete understanding of separation of powers. I hope I can also show you how separation of powers notions find expression in legislative drafting techniques.

The appropriations clause of article I, section 7 ("No money shall be drawn from the Treasury but in consequence of appropriations made by law . . .") is neither self-defining nor self-executing.<sup>4</sup> Nevertheless, few doubt the function of the clause as a prophylactic provision that reinforces the Constitution's version of separation of powers by thwarting potential claims of inherent power: the fact that there is a surplus in the treasury and a good reason, even a reason authorized by law, to spend the money does not empower the executive branch to "draw from

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3. See, e.g., Stith, *Congresses' Power of the Purse*, 97 YALE L.J. 1343 (1988); Stith, *Re-writing the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593 (1988) (hereinafter Stith, *Gramm-Rudman*); For a criticism of Stith, see Sidak, *The President's Power of The Purse*, 1989 DUKE L.J. 1162. See also Fisher, *How Tightly Can Congress Draw The Purse Strings*, 83 AM. J. INT'L L. 758 (1989).

4. Stith, *Gramm-Rudman*, *supra* note 3, at 600.

the Treasury.”<sup>5</sup> Legislative control of money is well nigh absolute. If it goes uncontrolled then only because the legislature itself is out of control.

It took the English Constitution many centuries of advances and retreats to get to this point of legislative supremacy. As Maitland puts it: “We have to remember that throughout the Middle Ages the king’s revenue had been in a very true sense the king’s revenue, and parliament had but seldom attempted to give him orders as to what he should do with it.”<sup>6</sup> As late as 1765 Blackstone still distinguished between the king’s “ordinary” and the king’s “extraordinary” revenue. The former was “the proper patrimony of the crown,” while the latter was the supplies granted “by the commons of Great Britain, in parliament assembled.” By the time of Blackstone the “extraordinary” grants had, however, become the ordinary source of revenue for the royal household and the operations of the government. Blackstone viewed this development as fortunate “for the liberty of the subject.”<sup>7</sup>

Extraordinary needs of the crown in times of war led to the refinement of appropriations law. Two statutes from the reign of Charles II enacted within a short period of one another illustrate the development in capsule form. At the beginning of the second of the Dutch Wars, Parliament granted a “royal aid” in the amount of nearly two and a half million pounds: the amount to be “raised, leavyed and paid unto your Majestie” within a period of three years. The preamble of the “Act for granting a Royall Ayd” conceptualized the grant as a reimbursement for “vast expenses” incurred by Charles II in preparation for war. The Crown had done what was necessary and the grateful Commons did what was fair.<sup>8</sup>

When the war continued (Louis XIV joined the Dutch side in January 1666), considerably more money was needed. Parliament levied a new tax but this time provided for the segregation of these funds as they came into and as they went out of the Exchequer. The “Act for raising Moneys by a Toll and otherwise toward the Maintenance of the present Warr” prohibited the spending of these revenues other than by warrant mentioning that “the Moneyes payable . . . are for the service

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5. The proposition is disputed by Sidak in his attack on Stith. Most of Sidak’s historical arguments rest on exceedingly slender reeds. For a recent affirmation of the proposition by the Supreme Court see *Office of Personnel Management v. Richmond*, 110 S. Ct. 2465 (1990).

6. F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 309 (1926).

7. I W. BLACKSTONE, *COMMENTARIES* 296-97 (1765-1769 & photo reprint 1979).

8. An Act for Granting Royall Ayd, 1664 & 1665, 16 & 17 Car. 2, ch. 1.

of Your Majestie in the said Warr respectively."<sup>9</sup> Parliament did what was necessary and made sure that the Crown would do what was fair.

According to Maitland this precedent was not followed by the Parliament of James II, but it generated the rule after the Glorious Revolution. As John Brewer summarizes, "the reign of James II had demonstrated that disastrous and divisive policies could easily be pursued by a monarch unconstrained by the need to consult 'the representatives of the people.'" A member of Parliament from the period formulated the crucial insight "'tis money that makes a Parliament considerable & nothing else."<sup>10</sup>

While not too much should be made of it, I note that the new rigor in appropriations was displayed even before enactment of the English Bill of Rights in 1689 — symbolically suggesting Blackstone's point that there was a relation to the "liberty of the subject." An elaborate act that was passed at the very beginning of the reign of William and Mary levied a tax and appropriated the first 400,000 pounds to be collected for the service of the navy. This amount was broken down further into expenditure categories of one hundred thousand pounds each. The statute said expressly that the sum appropriated to these uses "may not be diverted or applyed to any other Purpose," required a separate account, specific warrants, and forfeiture of the like amount on the part of those who might divert any of these funds.<sup>11</sup> After 1691 the 1688 statute was supplemented by so-called Commissions of Public Accounts for the purpose of scrutinizing government revenue and expenditure.<sup>12</sup>

The Glorious Revolution confirmed the principle that Parliament controlled not only the raising of revenues by means of taxation but also the expenditure of these moneys. As one turns to ask what the implications of this approach might have been for the governance of the North American colonies, one must first of all keep in mind that

9. An Act for Raising Moneys, 1666, 18 & 19 Car. 2, ch. 1, § 33.

10. J. BREWER, *THE SINEWS OF POWER* 143 (1989).

11. An Act for a Grant, 1688, 1 W. & M., Sess. 2, ch. 1, § 45 ff.

12. J. BREWER, *supra* note 10, at 151. In assessing these developments it is important to keep in mind that, while Parliament constantly thwarted fiscal policy under William, parliamentary opposition rarely succeeded after 1702. *Id.* at 149. The point is made polemically by Albert Gallatin in a speech to the House of Representatives in March 1798: "It is during that period [i.e., after the Revolution of 1688] that a progressive patronage, and a systematic, corrupting influence have sunk Parliament to a nominal representation, a mere machine, the convenience used by Government for the purpose of raising up supplies; the medium through which the Executive reaches with ease the purse of the people." 7 ANNALS OF CONG. 1133 (1798).

what — after 1787 — we have come to call “dual sovereignty,” de facto prevailed even before the Revolution. The American colonists actually lived under two governments: the government in London and that of their colony which, while not in possession of complete authority, managed “internal police” and levied taxes for local purposes.<sup>13</sup> Purposes for which taxes were levied were fairly limited. As Edwin Perkins has stressed, in normal years, salaries for the appointed governor, for a few judges, and in some provinces for the recognized clergy, plus compensation for their own legislative expenses, were typically major items in the annual budget.<sup>14</sup> One of the means employed to keep a firm grasp over government officials was to limit appropriations for these purposes to one year’s duration and to distinguish between authorizations to spend money and actual spending bills. In addition colonial legislatures developed ways to control disbursements and audit accounts. Indeed some elected their own treasurers to reduce executive influence.<sup>15</sup>

There were, of course, expenditures for purposes other than what in England had become identified as the “civil list.” Military campaigns against the French, the Spanish, and the Indians were often financed by postponing taxes through the creation of paper currency (under legislative control). In part this debt was undertaken in the hope that Parliament would eventually reimburse the colonists for a substantial share of these expenses.<sup>16</sup> When towards the end of the colonial period the king’s ministers adopted new policies designed to shift more of the tax burden for defending North America and the Atlantic shipping lanes to the colonies themselves and to restrict, and perhaps even outlaw, the use of paper money,<sup>17</sup> the War of Independence resulted.

As the newly independent states began the enterprise of constitution-making, there could be little doubt that the new constitutions would be based on the separation of powers doctrine (though opinions on what it entailed differed widely). There could also be little doubt that the new constitutions would continue and further strengthen the basic features of the fiscal constitution<sup>18</sup> that had emerged in England

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13. See A. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 15 (1936).

14. E. PERKINS, *THE ECONOMY OF COLONIAL AMERICA 190* (2d ed. 1988).

15. D. DEWEY, *FINANCIAL HISTORY OF THE UNITED STATES 17-18* (1924).

16. E. PERKINS, *supra* note 14, at 161-62.

17. *Id.* at 162.

18. For the term see Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).

and in the colonies. The unquestioned rule was that of legislative supremacy.

The rule was unquestioned, though in the postrevolutionary American context, not necessarily obvious. Remember that the rule had developed under the conditions of mixed government where king, aristocracy, and commons were differently based powers with different interests, including different economic interests. After the Declaration of Independence the issue was no longer the separation and balancing of differently based powers, but the separation of power (in the singular) flowing from one source — the people. Yet in the eyes of many the fact that legislature and executive derived their legitimacy from the same source did not dispose of the ever present danger of waste and corruption. As Herbert Storing has said: "Through limited grants of power, tight responsibility, and internal checks, the few may be prevented from doing much harm. . . ."<sup>19</sup> Put differently, even after the Revolution, appropriations were seen as appropriations of power.

The fiscal provisions of the new state constitutions adopted between 1776 and 1787 differed, of course, from state to state, and in most instances, were surprisingly rudimentary. We may attribute this mostly to the fact that essential elements, as mentioned, had been worked out during the colonial period and were not questioned as to their basic soundness. Many of the first state constitutions contained more or less elaborate provisions about taxation that I shall ignore here. The most intriguing of these was section 41 of the Pennsylvania Constitution of 1776 which prohibited taxation except if it led to a better deployment of resources — almost a public goods approach to taxation: "[T]he purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burthens."<sup>20</sup>

As to the mechanisms for controlling expenditures, many of the constitutions contained an origination clause of the kind we also find, for revenue measures, in article I section 7 of the United States Constitution and that in English constitutional history dates back as far as the beginning of the 15th century.<sup>21</sup> "Money bills" were to originate in the more popular of the legislative chambers. This approach which was

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19. I H. STORING, *THE COMPLETE ANTI-FEDERALIST* 53 (1981).

20. S F. THORPE, *supra* note 1, at 3090-91.

21. F. MAITLAND, *supra* note 6, at 182, 247.

meant to assure that the frugality and economic interests of the common people were given their proper weight, can be found in most of the new constitutions, though only New Jersey, South Carolina, and Virginia continued the roughly one hundred years old English rule<sup>22</sup> of prohibiting upper house amendments to such bills.

Second, the treasurer, or treasurers, were usually "appointed" by the legislature. In Maryland this power was reserved to the lower house.<sup>23</sup> It is worth recalling that the various drafts of the United States Constitution provided for appointment of the Treasurer by joint ballot of both houses as late as September 14, 1787, when, in the interest of conformity, this appointment was subjected to the general approach of presidential nomination and Senate advice and consent.<sup>24</sup>

Third, as to the matter of appropriations more specifically, only the constitutions of Maryland and Pennsylvania used the very word. Section 20 of the 1776 Pennsylvania Constitution gave the Supreme Executive Council the power to "draw upon the treasury for such sums as shall be appropriated by the house."<sup>25</sup> Article 16 of the South Carolina Constitution employed negative phrasing to the same effect, as did the federal Constitution a decade later. South Carolina ordained that "no money shall be drawn out of the public treasury but by the legislative authority of the State."<sup>26</sup> Other constitutions subjected gubernatorial spending to a warrant requirement. Still others were silent on the matter.

Fourth, the Maryland Constitution of 1776 went beyond all sister states by imposing procedural rules to limit trade offs between fiscal and other policies. Article 11 of the Maryland Constitution contained an admissibility rule of the kind that interests modern public choice theorists:

[T]he House of Delegates shall not, on any occasion, or under any pretence, annex to, or blend with a money bill, any matter, clause, or thing, not immediately relating to, and necessary for the imposing, assessing, levying, or applying the taxes or supplies, to be raised for the support of the government, or the current expenses of the State: . . . every bill, assessing, levying, or applying taxes or supplies, for the support of government, or the current expenses of the

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22. *See id.* at 310.

23. 3 F. THORPE, *supra* note 1, at 1692.

24. *See* Casper, *supra* note 2, at 223.

25. 5 F. THORPE, *supra* note 1, at 3088.

26. 6 F. THORPE, *supra* note 1, at 3252.



State, or appropriating money in the treasury, shall be deemed a money bill.<sup>27</sup>

This "germaneness" requirement displays a high degree of sophistication concerning opportunities for manipulation of the legislative process. I remind you that among the original states only Massachusetts and New York recognized an overrideable veto.

On the whole, the fiscal provisions of the state constitutions confirm our understanding that during the founding period money matters were primarily thought of as a legislative prerogative. The reason for this was not simply the insight that appropriations were appropriations of power. It was also the — for us perhaps counterintuitive — hope that assuring legislative supremacy in fiscal matters would bring about the moderation, temperance, and frugality without which free government would be endangered.<sup>28</sup> The New Hampshire Bill of Rights of 1784, in a limitation on the appropriations power, referred to "economy" as "a most essential virtue in all states."<sup>29</sup> James McHenry, a delegate to the Constitutional Convention from Maryland and in the last years of the 18th century Washington's and Adams's Secretary of War, neatly summarized these considerations. McHenry explained the appropriations clause of the federal Constitution to the Maryland House of Delegates in November of 1787:

When the Public Money is lodged in its Treasury there can be no regulation more consistant with the Spirit of Economy and free Government that it shall only be drawn forth under appropriation by law and this part of the proposed Constitution could meet with no opposition as the People who give their Money ought to know in what manner it is expended.<sup>30</sup>

Organization and control of "the public's treasury" had been among the most contested issues in the congress of state delegates that served as the central law-making and governing institution of the Confederation.<sup>31</sup> In Philadelphia these matters remained essentially unresolved. It was left to the first Congress to determine the exact structure of the treasury. As I have recently emphasized in a different

27. 3 F. THORPE, *supra* note 1, at 1692-93.

28. See VA. BILL OF RIGHTS § 15, *reprinted in* 7 F. THORPE, *supra* note 1, at 3814.

29. 4 F. THORPE, *supra* note 1, at 2457 (1784 N.H. CONST. art. XXXVI).

30. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 149-50 (M. Farrand ed. 1966).

31. See J. SANDERS, *EVOLUTION OF THE EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS, 1774-1789* 50-74, 126-152 (1935).

context, the legislation establishing the Department of the Treasury placed the department in a class by itself. As distinguished from the acts concerning the departments of State and War, it did not refer to the Treasury as an "executive" department even though the Secretary was removable by the President. An elaborate set of officers was spelled out in detail. The officers included an assistant secretary, a comptroller, an auditor, a treasurer, and a register, who were subject to a detailed system of controls. For instance, disbursements could be made only by the Treasurer, upon warrants signed by the Secretary, countersigned by the Comptroller, and recorded by the Register.<sup>32</sup> In contrast to the other two statutes, the treasury legislation was silent as to a presidential power of directing the Secretary. Section 2 of the legislation listed, among the duties of the Secretary, the duties "to prepare and report estimates of public revenue, and the public expenditures" and "to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appropriations by law."<sup>33</sup>

The Congress saw the Secretary of the Treasury as an indispensable, direct arm of the House in regard to its responsibilities for revenues and appropriations. This reflected the incapacity of the House in the spring and summer of 1789 to come to grips with the questions of what expenditures (especially as to the war debt) would be necessary and what revenues might be available. The House had appointed a committee to look into these matters as early as April of that year.<sup>34</sup> When its report raised more questions than it answered, a committee referred to as a "Committee of Ways and Means" took its place "to consider the report of a committee appointed to prepare an estimate of supplies requisite for the services of the United States for the current year, and to report thereon."<sup>35</sup> This second committee was discharged and its business referred to the Secretary of the Treasury as soon as the latter had been appointed.<sup>36</sup> The House ordered that "the Secretary of the Treasury do report to this House an estimate of the sums requisite to be appropriated during the present session of Congress, towards defraying the expenses of the Civil List, and of the Department of War,

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32. See Casper, *supra* note 2, at 240.

33. An Act to Establish the Treasury Department, 1 Stat. 65 (1789).

34. 1 ANNALS OF CONG. 231-32 (J. Gales ed. 1789).

35. *Id.* at 670-71.

36. The House did not establish a standing Committee on Ways and Means until 1795.

to the end of the present year . . . ."<sup>37</sup>

Alexander Hamilton was more than ready. Within days of his appointment, the Secretary reported a detailed estimate accompanied by four schedules covering everything, including the prorated salaries of various doorkeepers.<sup>38</sup> The appropriations act that followed on September 29 essentially adopted Hamilton's estimates and aggregated expenditures into the four categories Hamilton had employed. The first act "making Appropriations for the Service of the present year" consisted of one single section and read as follows:

That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids.<sup>39</sup>

In separation of powers terms, these developments during the first session of the first Congress are of considerable moment. First of all, for purposes of developing estimates for appropriations, the House views the Treasury Secretary as its own agent. Second, while the supremacy of Congress is not in question, *de facto* only the executive branch develops and indeed has the capacity to digest and prepare the necessary information. As early as 1789 the basic pattern of interaction gets established with the Secretary responsible for "estimates" of how much needs to be appropriated. Third, the first appropriations act continues to employ the concept of a "civil list" and distinguishes from that civil list the expenditures necessary for the War Department — a matter of considerable consequence later on. Fourth, the act, by aggregating expenditures into lump sums raises the important separation of powers question of what legal significance the underlying detail has.

37. 1 ANNALS OF CONG., *supra* note 34, at 894-95.

38. 5 THE PAPERS OF ALEXANDER HAMILTON 381-92 (H. Syrett ed. 1962).

39. 1 Stat. 95 (1789). In this article I am focusing exclusively on the annual appropriations. In addition to appropriations for the ongoing operations of government, there were special appropriations, supplemental appropriations, and legislation dealing with government debt.

Finally, it brings to the fore the equally noteworthy question as to the significance for the operations of the government of the formula "a sum not exceeding."<sup>40</sup>

In January 1790, as part of his larger Report relative to a Provision for the Support of Public Credit, Hamilton gave his estimates for the year 1790.<sup>41</sup> He submitted a supplementary report in early March.<sup>42</sup> The "Act making appropriations for the support of government for the year one thousand seven hundred and ninety," dated March 26, once again distinguished between civil list, war department and invalid pensioners, and employed aggregate figures. This time, however, the legislation specifically incorporated the estimates. For instance, as to the civil list the act appropriated a sum not exceeding \$141,492.73 "for defraying the expenses of the civil list, as estimated by the Secretary of the Treasury." Where estimates were beside the point, as in an appropriation of \$10,000 for "contingencies of the government," the President was asked to account for expenditures by the end of the year.

The legislation also made clear that Congress ordinarily distinguished between authorizing legislation and appropriations by a separate provision authorizing the payment of various specified debts to individuals "not heretofore provided for by law, and estimated in the . . . report of the Secretary."<sup>43</sup> This distinction had previously figured in the House debates when an attempt was made from the floor to reimburse lighthouse expenses for Charleston, South Carolina — the attempt was rebuffed as this was "a bill of appropriations, and not of grants." Porkbarrel had raised its ugly head: "Should this be granted, every member in this House will come forward with proposals for clearing rivers, and opening canals to the source of rivers."<sup>44</sup>

The acerbic Senator William Maclay from Pennsylvania complained bitterly about the manner in which the 1790 appropriations act had been pushed through the Senate without his even being able to get a copy of the bill. Failing to appreciate that, from his vantage point, the bill actually represented a technical advance, he thought that the lump sum appropriations gave the Secretary the money "for him to

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40. The classic treatment of these matters in the literature is found in L. WILMERDING, JR., *THE SPENDING POWER* (1943). I refer especially to Wilmerding's chapter II.

41. 6 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 38, at 129-36.

42. *Id.* at 280.

43. 1 Stat. 104-05 (1790).

44. 2 *ANNALS OF CONG.* 1450 (1790) (statement of Rep. Bland).

account for as he pleases."<sup>45</sup> In reality no such power had been appropriated. As Lucius Wilmerding points out,<sup>46</sup> Hamilton, at the beginning of the month, had asked the House to provide rewards for the apprehension of counterfeiters: "The Secretary further begs leave to observe, that occasions occur from time to time, which fall under no stated head of expenditure, for which provision in some mode or other is necessary."<sup>47</sup> This is hardly the language of an executive branch considering itself free of constraints.

The 1791 appropriations act took essentially the same approach as that of the prior year.<sup>48</sup> By the end of 1791, however, attitudes began to change as the partisan tensions that had been generated by the controversy over the Bank of the United States lingered on and the Republicans began to emerge as a more or less organized faction led by Jefferson and Madison.<sup>49</sup> Hamilton had conveyed his estimates for 1792 in November 1791. The total of a little more than \$1 million included about \$50,000 "to make good deficiencies" in prior estimates — an indication that the government had exceeded its authority.<sup>50</sup> When one examines the list of deficiencies in detail, one finds that most items pertain to expenditures authorized by law in the course of 1791 but lacking appropriations. Deficiency appropriations in practice covered advances made in anticipation of appropriations.<sup>51</sup> Anticipation of appropriations more generally was due to the fact that annual appropriations were frequently delayed until well after the new year. Indeed, as Hamilton pointed out after leaving office, advances had been made to members of Congress "in anticipation of their respective compensations."<sup>52</sup>

The House debate on a committee bill for the 1792 appropriations led to a fair amount of acrimony over whether the committee should first have inquired into the expenditures under previous appropriations. James Madison:

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45. 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 226 (K. Bowling & H. Veit ed. 1988).

46. L. WILMERDING, JR., *supra* note 40, at 22.

47. 6 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 282.

48. 1 Stat. 190 (1791).

49. For an account from a Hamiltonian perspective see F. McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 237 (1979).

50. 9 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 456-75.

51. For a description of the practices see L. WILMERDING, JR., *supra* note 40, at 26.

52. 19 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 402. The observation is a part of Hamilton's elaborate "explanation" of the system of anticipations. *Id.* at 400-27.

[C]onsidered the present a good opportunity to determine how far the House could go into an examination of the accounts of public officers. It was true, that the Representatives of the people were the guardians of the public money, and consequently it was their duty to satisfy themselves as far as possible of the sources from which money flowed into the Treasury — how that money was applied — under what authority — and to inquire, at different times what balance remained in the Treasury.<sup>53</sup>

As is so often the case, good republican principles were rediscovered when they also served partisan purposes. Any attempt to understand the development of the appropriations process in the last decade of the eighteenth century must appreciate that it coincided with the emergence of parties.

The 1792 Appropriations Act was actually the rare example of one that became law before the beginning of the year to which it applied. While, in all important respects it followed Hamilton's estimates to a fraction of a penny, the statute appropriated aggregate amounts of money, followed by the formula "that is to say" and lists of expenditures that had either been lifted from Hamilton's "General Estimate for the Services of the Ensuing Year"<sup>54</sup> or adapted from his more detailed estimates. The language now ran along the following lines: for the service of the year and the support of the civil list, there shall be appropriated a sum of money not exceeding x dollars, "that is to say" for the compensation granted by law to the district judges so many dollars, for some other group of officials y dollars, for some third purpose z dollars.<sup>55</sup> The principle of appropriations specificity was being incorporated into the statutory text.

The following year appropriations specificity was carried one step further by eliminating the distinction between civil and military expenditures as separate heads and by reducing the dollar amounts attached to each specific item. When the original House bill reached the Senate, the Senate aggregated all War Department items into one sum. The subsequent House debate on the amended bill stressed separation of powers issues and is of great interest even though the reporter unfortunately provided only the most general summary. It was argued that the Senate approach left too much discretion in the department head who "might apply the whole to a few of the objects . . . and leave all

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53. 3 ANNALS OF CONG. 221-29 (1792).

54. 9 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 475.

55. 1 Stat. 226-29 (1791).

the other unsupported"; the argument suggests that there was doubt about the legal force of the underlying estimates.<sup>56</sup> The House defeated the Senate amendment by one vote, and, for 1793, the Senate yielded. The 1793 Appropriations Act contained one unwieldy appropriations section consisting of a single paragraph that covers almost three pages in the Statutes at Large.<sup>57</sup>

The House took no action on the proposal to lodge some discretionary power in the President to meet contingencies: "[F]or instance, it may be found expedient to mount the militia . . . and therefore in some cases to apply the money, specifically appropriated for some of the objects which might upon trial be discovered unnecessary, to other objects of real utility."<sup>58</sup> This indicates some understanding of the need for executive discretion, though apparently predicated on the notion that without a specific grant of authority there might be no power to shift funds from one purpose to another, even in the military arena. After all, as President Jefferson asked about a decade later, "where is the rule of legal construction to be found which ascribes less effect to the words of an appropriation law, than of any other law."<sup>59</sup>

The Appropriations Act for 1793 was approved on February 28 of that year. At the same time Jefferson and the Republicans pursued their full-fledged personal attack on Secretary Hamilton who by now had become their favorite *bete noire*, suspected at all times of sinister schemes and purposes as he shuffled funds from one continent to another. The issue chosen involved two loans floated in Amsterdam and Antwerp on the basis of two acts of Congress. The charge was that Hamilton had intermingled these two loans though one had the purpose of servicing only the domestic debt of the United States and the other the purpose of paying the foreign debt.<sup>60</sup> The details are too complex to be rehearsed here and, in any event, are well known. Albert Gallatin, who in 1795 following his election to the House became the Republicans' financial expert, in his 1796 "Sketch of the Finances of the United States" concluded that the charge was "strictly and literally true," but "rather a want of form than a substantial violation of the

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56. This issue was still debated by Jefferson as late as 1804. See Letter from Thomas Jefferson to Albert Gallatin (February 19, 1804), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON 4-13 (A. Lipscomb, ed. 1905) (hereinafter JEFFERSON).

57. 1 Stat. 325-28 (1793).

58. 3 ANNALS OF CONG., *supra* note 53, at 890.

59. JEFFERSON, *supra* note 56, at 13.

60. See the detailed account in 13 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 532 (introductory note).

appropriation law."<sup>61</sup> Hamilton, on the other hand, thought that he had had "considerable latitude of discretion" in "the business of the loans"<sup>62</sup> and justified himself in an astonishing number of reports produced "by virtue of demonic labor"<sup>63</sup> between February 4 and February 19, 1793.<sup>64</sup>

On February 27 Representative William Giles of Virginia, Jefferson's floorleader for this purpose, introduced nine resolutions of censure, all of which were extensively debated the following two days and all of which were overwhelmingly defeated. The resolutions raise a host of fascinating separation of powers questions. I shall refer here only to the first of the resolutions which read: "1. *Resolved*, That it is essential to the due administration of the Government of the United States, that laws making specific appropriations of money should be strictly observed by the administrator of the finances thereof."<sup>65</sup> The ensuing debate was on the question whether this resolution should be sent to the Committee of the Whole House. The able William Loughton Smith, of South Carolina, opened the debate by saying that this late in the session was no time to discuss "theoretic principles of Government"; however, the future Federalist also argued: "Though the position contained in the first resolution, as a general rule, was not to be denied; yet it must be admitted, that there may be cases of sufficient urgency to justify a departure from it, and to make it the duty of the legislature to indemnify an officer. . . ."<sup>66</sup> Smith thus focused the controversy on what afterward became understood as a central question: should there only be one rigid rule or should exceptions to the rule be recognized?

The question grew into an exceedingly practical one the following year when the militia hypothetical from the debate over 1793 appropriations turned into a real case. In 1794 annual appropriations were not enacted before March. Civil and military appropriations were, for the first time, covered by two separate bills.<sup>67</sup> Both bills used the "that is to say" formula, though the one "making appropriations for the support of the military establishment of the United States" employed much more general categories than had been the case in 1793.

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61. 3 THE WRITINGS OF ALBERT GALLATIN 111 (H. Adams ed. 1879 & photo reprint 1960).

62. 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 27.

63. F. McDONALD, *supra* note 49, at 260.

64. 13 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 541 n.20.

65. 3 ANNALS OF CONG., *supra* note 53, at 899.

66. *Id.* at 901.

67. For an explanation see L. WHITE, THE FEDERALISTS 328 n.18 (1978).



The legislation could not and did not foresee the most significant military expenditures of the year created by Hamilton's and Washington's decision "to call forth" the militia against the Whiskey Rebellion.<sup>68</sup> On a provisional basis expenses were defrayed out of the money appropriated for the military establishment until Congress, after the fact, made the necessary appropriations.<sup>69</sup> In his "Sketch of the Finances" Gallatin took the position that this approach had been illegal: "The necessity of the measure may in the mind of the Executive have superseded every other consideration. The popularity of the Transaction may have thrown a veil over its illegality. But it should by no means be drawn hereafter as a precedent."<sup>70</sup>

In the next six years, before he himself became the longest serving Treasury Secretary in American History, Albert Gallatin played the role of the Republican gadfly stinging the Federalists. One of his purposes was the pursuit of frugality.<sup>71</sup> A Genevan by birth and upbringing, he reflected the puritanism, plain living, and frugality of Geneva.<sup>72</sup> His other purpose was to implement his views of separation of powers—views that were predicated on legislative supremacy in money matters.<sup>73</sup>

Gallatin's attempt to prevent any blending of powers employed several strategies. First, immediately upon taking his seat in the House, Gallatin saw to it that the chamber establish a Committee on Ways and Means as he had known it in the Pennsylvania legislature.<sup>74</sup> Second, he fought for appropriations specificity by getting the Congress to amend the 1797 civil and military appropriations bills through tightening the statutory appropriations formula. It now read that for the expenditure of the civil list, etc., "the following sums be respectively appropriated; that is to say" and this formula was followed by the individual items without any aggregation. The appropriations act "for the military and naval establishments"<sup>75</sup> was constructed according to

68. For a critical assessment of this move see 3 D. MALONE, *JEFFERSON AND HIS TIME* 188-90 (1974).

69. 3 *THE WRITINGS OF ALBERT GALLATIN*, *supra* note 61 at 117. *See also* 1 Stat. 404 (1793).

70. 3 *THE WRITINGS OF ALBERT GALLATIN*, *supra* note 61, at 118.

71. *See* E. BURROWS, *ALBERT GALLATIN AND THE POLITICAL ECONOMY OF REPUBLICANS, 1761-1800* 452 (1986).

72. R. WALTERS, *ALBERT GALLATIN* 3-4 (1957).

73. *See* the excellent account in E. BURROWS, *supra* note 71, at 467-93.

74. R. WALTERS, *supra* note 72, at 89.

75. 1 Stat. 498-501 (1797).

the same model, except that it added the further stricture "which sums shall be solely applied to the objects for which they are respectively appropriated."<sup>76</sup>

Gallatin said:

[H]is object in this amendment was, that each appropriation should be specific; that it might not be supposed to be in the power of the Treasury Department to appropriate to one object money which had been specifically appropriated for any other object. He did not know. . . whether, as to the Civil List, appropriations had ever been mixed, or whether it was understood that they might be so mixed; but they knew it had been officially declared that so far as related to the Military Department, the items had been totally mixed: for instance, if the estimate for clothing or any other item fell short, the officers of the Treasury did not think themselves bound by the particular appropriation, but had recourse to other items, for which larger sums were granted than there was occasion for. Such construction of the law. . . totally defeated the object of appropriation, and it was necessary therefore, so to express the law that no color for such a construction should be given.<sup>77</sup>

Gallatin was concerned with what he saw as Federalist abuses and feared a "general relaxation" that placed the executive branch beyond the law.

Though Gallatin won the 1797 battle, he lost the war for the remainder of the Federalist period. The 1798 and 1799 civil appropriations acts retained Gallatin's specificity formula.<sup>78</sup> As concerns the military, however, the Senate reverted to the old system. The 1798 act which was not passed before June gave a lump sum appropriation of \$1.4 million; subcategories were introduced by using only the words "that is to say," and the "shall be solely applied" stricture was

76. 1 Stat. 508-09 (1797). The adverb "respectively" is the very term employed by the 1666 Act of Parliament quoted above. See *supra* text accompanying note 9.

77. 6 ANNALS OF CONG. 2040 (1797); cf. 3 THE WRITINGS OF ALBERT GALLATIN, *supra* note 61, at 116. For a detailed account of Gallatin's struggle with the new Treasury Secretary, Oliver Wolcott, see L. WILMERDING, JR., *supra* note 40, at 28-49. It is important to keep in mind that Gallatin was not a zealot on any of these matters and understood the need for a reasonable discretion: "The most proper way would perhaps be not to enter so many details . . . but to divide the general appropriation under a few general heads only, allowing thereby sufficient latitude to the executive officers of government, but confining them strictly, in the expenditure under each of those general heads, to the sum appropriated by law." 3 THE WRITINGS OF ALBERT GALLATIN, *supra* note 61, at 117. See also House Report on Applications of Public Money (April 29, 1802); 1 AMERICAN STATE PAPERS: FINANCE 752-57 (R.H. Kohn eds. 1861).

78. See 1 Stat. 542 (1798) and 1 Stat. 717 (1799).

dropped.<sup>79</sup> In light of the changes in legislative style that had been introduced in prior years this must be interpreted as a congressional ratification of executive branch discretion in the military field. For the years 1800 and 1801 the "respectively appropriated" language disappeared even from the civil appropriations.<sup>80</sup>

In separation of powers terms there are two different ways of looking at these developments. On the one hand, they may be viewed as a battle over the power to disburse funds between legislative and executive elements that was won by the executive. While the constitutional allocation of powers in the field of appropriations was accepted in principle, in practice exceptions were recognized that responded to the perceived need to anticipate appropriations and that gave the executive branch wide discretion in the field of military appropriations.

On the other hand, and in my view more appropriately, these developments may be seen as an ongoing process of shaping governmental structures in the absence of clear and convincing customs. Congress and the executive branch were influenced by considerations of principle and practical considerations of statecraft.<sup>81</sup> They were also influenced by considerations of political partisanship that increased as a confluence of ideological, economic and organizational factors led to the emergence of identifiable political parties.

The "discovery" of appropriations specificity as a separation of powers concept was furthered by partisanship. Yet appropriations specificity and its refinement through legislative drafting techniques also attempted to implement the rule of law in the area of government spending. One might indeed argue that the very return to prior legislative styles after 1797 reflected the acceptance rather than the rejection of the principle. By expressly choosing the old formula, Congress implicitly conferred discretion on the executive branch to shift funds from one head to another, at least in the military arena. The answer to Jefferson's rhetorical question, "where is the rule of legal construction to be found which ascribes less effect to the words of an appropriation law, than of any other law?", was that such rules of construction followed from the words employed by a knowing legislator who appropriated power in addition to money.

The spring of 1798, a period when the fever of partisan politics

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79. 1 Stat. 563 (1798).

80. See 2 Stat. 62 (1800) and 2 Stat. 117 (1801). See also L. WHITE, *supra* note 67, at 329.

81. See Casper, *supra* note 2, at 260.

over France had reached its pitch and Congress had become unconstrained in spending on defense and foreign relations, opened other fronts where Gallatin could fight for legislative supremacy. His address of March 1, 1798, "in many respects the high point of Gallatin's legislative career,"<sup>82</sup> summed up his views on the role of appropriations in the constitutional separation of powers system. The argument had been advanced that Congress had an obligation to support financially the diplomatic establishment that the President thought was necessary. Gallatin answered:

This doctrine is as novel as it is absurd. We have always been taught to believe, that in all mixed Governments, and especially in our own, the different departments mutually operated as checks one upon the other. It is a principle incident to the very nature of those governments; it is a principle which flows from the distribution and separation of Legislative and Executive powers, by which the same act, in many instances, instead of belonging exclusively to either, falls under the discretionary and partial authority of both; it is a principle of all our state constitutions; it is a principle of the Constitution under which we now act. . . . [A]lthough there is no clause which directs that Congress shall be bound to appropriate money in order to carry into effect any of the Executive powers, some gentlemen, recurring to metaphysical subtleties, and abandoning the literal and plain sense of the Constitution, say that . . . we . . . are under a moral obligation in this instance to grant the money. It is evident that where the Constitution has lodged the power, there exists the right of acting, and the right of discretion.<sup>83</sup>

In evaluating Gallatin's position, one should keep in mind that his reference point was the constitutional framework, not some procrustean theory:

The opinion of the Executive, and where he has a partial power, the application of that power to a certain object, will ever operate as powerful motives upon our deliberations. I wish it to have its full weight; but I feel averse to a doctrine which would place us under the sole control of a single force impelling us in a certain direction, to the exclusion of all the other motives of action which should also influence us.<sup>84</sup>

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82. E. BURROWS, *supra* note 71, at 486.

83. 7 ANNALS OF CONG. 1121-22 (1798).

84. *Id.*

These remarks represented more than a conciliatory gesture. Gallatin was neither obstinate nor impractical.

A few weeks after the March 1 speech, the House debated a \$50,000 deficiency in the 1797 contingency expenditures of the Quartermaster's Department. Gallatin argued that the deficiency should not have been allowed to occur:

The Secretary of War was not justified in expending more in these contingencies than was appropriated, (except in case of necessity,) otherwise the Secretary of War, and not Congress, regulated the expenditure of money. It would be necessary to inquire into this business, and except some pressing necessity could be shown for going beyond the appropriation, he should consider the Secretary of War as highly blameable for having done so, as the appropriation is the only check which the Legislature has over the contingent expenses.<sup>85</sup>

In short, in spite of the categorical nature of what he had to say about the "illegal" militia expenditures against the Whiskey Rebellion, Gallatin allowed for "pressing necessities." In this sense his view was not dramatically different from Hamilton's, who in a 1799 letter to Secretary of War James McHenry commented:

[D]isbursements finally must no doubt be regulated by the laws of appropriation. But provisory measures will often be unavoidable. And confidence must sometimes be reposed in after Legislative sanction and Provision. . . . I would rather be responsible on proper occasions for formal deviations than for a feeble insufficient and unprosperous course of public business proceeding from an over-scrupulous adherence to general rules.<sup>86</sup>

If one gives due weight to the adjective "proper" in "on proper occasions," the main difference between Hamilton and Gallatin may lie in the adverb "often." While Gallatin understood that a responsible official may sometimes have to act *ultra vires*, such acts were to be rare exceptions to the rule. He was not willing to develop a metatheory to account for exceptions since otherwise the exceptions might swallow up the rule. He feared a "general relaxation."

This then is the point where we come to the "heroic" dimensions of my mundane subject. Even in the business of appropriations it may, at times, be unavoidable to make the sacrifice of risking one's career so that one may act "responsibly." In taking responsibility one cannot be

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85. 8 ANNALS OF CONG. 1317-18 (1800).

86. 24 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 38, at 31.

sure of the concurrence of one's contemporaries, or the judgment of history. The Whiskey Rebellion provides an illustration. As Gallatin suggested, the popularity of the transaction "may have thrown a veil over its illegality."<sup>87</sup> In the court of history, however, the transaction has met with less approval. The judgment of at least one historian differs substantially. This is how it looks to Jefferson's biographer, Dumas Malone:

[The armament] was represented by the government as a sign of the majesty of the law, and Hamilton's interpretation of it as a timely manifestation of the power of the young federal government was taken up by his partisans and afterwards commanded wide acceptance among historians. Since no opposition was encountered, this ostentatious military display now appears disproportionate if not ridiculous

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Thomas Jefferson, the President, and Albert Gallatin, the Treasury Secretary, deserve praise for not changing their views about the need for appropriations specificity once they switched sides and were in charge of the executive branch. In his first Annual Message Jefferson called for "appropriating specific sums to every specific purpose susceptible of definition," opposed intermingling of funds, and wanted "the undefined field of contingencies" reduced.<sup>89</sup> Nevertheless, it took all of Jefferson's presidency before framework legislation<sup>90</sup> on the subject was enacted.<sup>91</sup> The 1809 statute postulated that "the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated." It also conferred limited authority on the President to shift funds within departments "if in his opinion necessary," but only during the recess of Congress.<sup>92</sup> Of course, given the Republicans' more or less complete control of Congress, virtue was made somewhat easy.

Yet even Jefferson could not avoid heroism in the appropriations field. When, in June 1807, the British ship "Leopard" attacked the American frigate "Chesapeake" in Hampton Roads to force the sur-

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87. See 3 THE WRITINGS OF ALBERT GALLATIN, *supra* note 61, at 118.

88. 3 D. MALONE, *supra* note 68, at 188.

89. 8 THE WRITINGS OF THOMAS JEFFERSON 121 (P. Ford, ed. 1897).

90. For an explanation of this term see Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976).

91. For a short account see N. CUNNINGHAM, *THE PROCESS OF GOVERNMENT UNDER JEFFERSON* 114-17 (1978).

92. 2 Stat. 535 (1809).

render of four seamen claimed to be British, the President had to start preparing for the worst. Four months later, on October 27, he sent a message to Congress in which he wrote as follows:

The moment our peace was threatened I deemed it indispensable to secure a greater provision of those military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagement for such supplements to our existing stock as would render it adequate to the emergencies threatening us, and I trust that the Legislature, feeling the same anxiety for the safety of our country . . . will approve, when done, what they would have seen so important to be done if then assembled.<sup>93</sup>

This Presidential heroism was a little cheap as the Chesapeake incident had, according to Attorney General Rodney, "excited the spirit of 76 and the whole country is literally in arms."<sup>94</sup> Even so, when Congress gathered in October, John Randolph of Roanoke, by now a gadfly, "allowed that the crisis which occasioned the extraordinary expenses in question, was an imminent one. It was so critical, that Congress ought to have been immediately convened, in order that they might have given authority by law for these extraordinary expenses, and for adopting such measures, as national feeling and national honor called for."<sup>95</sup>

Randolph went on pressing his advantage rather ruthlessly:

He confessed he felt extremely reluctant to vote large sums for the support of our degraded and disgraced Navy, for expenses, too, that had been illegally incurred. He had endeavored in vain to procure Gallatin on Finance . . . . In that book he recollected a case exactly opposite to the present, where the President of the United States during the Pennsylvania insurrection, made use of money to defray the expenses incurred, which had been appropriated for a different object; but not having the book in his possession he would not venture to quote it, lest he should not do it correctly.<sup>96</sup>

Well, John Randolph should have trusted his memory. But then, maybe his lawyer's point was beside the point. Had Jefferson done as

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93. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 425-30 (J. D. Richardson ed. 1897).

94. N. CUNNINGHAM, *supra* note 91, at 56 (quoting Attorney General Rodney).

95. 17 ANNALS OF CONG. 818-30 (1807) (statement of Rep. Randolph).

96. *Id.* The additional appropriations were voted. 2 Stat. 450 (1807).

Randolph thought he should have, who will doubt that Congress would have done what “national feeling and honor” called for? Maybe more, maybe too much. Maybe that is what Jefferson wanted to avoid. Maybe that is what was heroic about his failure to convene Congress. At the end of the debate in which Randolph was so critical of his erstwhile hero, a Congressman from Pennsylvania by the name of John Smilie rose and invoked the example of an ancient nation “who were wont to discuss great national questions twice, once when they were drunk, that they might not want spirit, and once when they were sober, that they might not be deficient in prudence.”<sup>97</sup> As our generation knows only too well, prudence in appropriations is perhaps the most desirable of all virtues in a legislator.

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97. 17 ANNALS OF CONG., *supra* note 95, at 830 (statement of Rep. Smilie).



