

The Appropriations Clause: From the Obama and Trump Administrations to Plan Colombia*

La cláusula de apropiaciones presupuestales: de las administraciones Obama y Trump al Plan Colombia

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Abstract:

This paper explores the Appropriations Clause within the American constitutional design, setting out its importance in efficiently constraining and allocating public power. It, therefore, analyzes political disputes that have involved the Obama and Trump presidencies with Congress, unfolding also joint efforts between public branches as with the approval of Plan Colombia. A substantial content focuses on establishing how the appropriations cycle works, along with how legal approaches such as the Chevron Doctrine shed light on the role of the judiciary in solving disputes between Congress and the Executive to control the power of the purse.

Keywords: Constitutional Design, Appropriations Clause, Appropriations Cycle, Separation of Powers, Chevron Doctrine.

Resumen:

Este documento explora la Cláusula de Apropiaciones Presupuestales dentro del diseño constitucional estadounidense, subrayando su importancia para restringir y asignar eficientemente el poder público. Para esto, analiza las disputas políticas que han involucrado a las presidencias de Obama y Trump con el Congreso, desplegando también esfuerzos conjuntos entre poderes públicos, como la aprobación del Plan Colombia. Un contenido sustancial se centra en establecer cómo funciona el ciclo de apropiaciones presupuestales, junto con cómo enfoques jurídicos como la Doctrina Chevron arrojan luz sobre el rol del poder judicial en la solución de disputas entre el Congreso y el Ejecutivo por el control del poder del erario.

Palabras clave: diseño constitucional, cláusula de apropiaciones presupuestales, ciclo de apropiaciones, separación de poderes, doctrina Chevron.

Introduction

As stated by Zachary Elkins, Tom Ginsburg and James Melton, constitutionalism aims to constrain and allocate state power.¹ That has been indeed a prevalent concern to avoid an excessive concentration of public power that is prone to unbalance the separation of powers principle. Thereby, Gillian Metzger and Matthew Lawrence consider that the Appropriations Clause unfolds real effects on controlling government² and enhancing public branches goals.³ McKaye Neumeister explains that it also implies certain control over policies related to National Security matters,⁴ providing an in-depth insight into the American constitutional design.⁵

The Appropriations Clause becomes also relevant to analyze an array of fundamental aspects of law: From constitutional grounds to administrative doctrines to National Security concerns, this power is entrenched in the American Rule of Law. These pivotal aspects are illustrated by analyzing intense political disputes between Congress and the Executive branch. Either to ensure or constrain political purposes, appropriations have been

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at the center of intense battles between Congress and the Obama Administration, as well as during Trump's era, where the dispute scaled until producing the longest government shutdown ever seen in America.

While those episodes show one side of the power of the purse, other ones provide insights into how Congress and the Executive work together for common interests. The Plan Colombia embodies that kind of working-together case, as Dycus et al.⁶ explain that during its approval, the National Security authorities arose in joint endeavors between Congress and the Executive's powers.

The role of the Judiciary, in addition, has been amply discussed within this context, stepping forward to set out whether the budget process involves the Courts. What becomes fundamental is determining whether the judiciary affects the separation of powers principle or preserves the legitimacy of the constitutional design itself. This analysis is relevant because it provides a comprehensive perspective related to National Security Affairs and the separation of powers principle.

This paper, therefore, studies the appropriations power within the U.S. constitutional design. By doing so, Section 2 reviews the appropriations cycle, appropriations in the legal field, and Chevron Doctrine for appropriations. While Section 3 provides details on how the power of the purse was exercised during the Obama administration, Section 4 covers Trump's era, and Section 5 analyzes the appropriations process wielded for approving Plan Colombia. Finally, Section 6 concludes the article.

The Appropriations Power

Concerning the appropriations cycle, Congress has the power to appropriate funds based on the authority granted by the Constitution.⁷ As Sandy Streeter explains, the appropriation process encircles a legislative functioning, which is also granted by the Constitution to Congress.⁸ To support programs and governmental activities, Congress appropriates funds generally each fiscal year to accomplish specific legal procedures. As the author mentions, these procedures embrace the annual appropriations cycle that allows Congress and the Executive to get involved during the process.

As with Tollestrup and Saturno,⁹ Saturno et al.¹⁰ provides insights about such a cycle. First, the authors point out that the process starts when the President submits an initial budget proposal to Congress; hence, the House and Senate initiate the analysis through the appropriations subcommittees that are characterized by jurisdiction regarding specific subjects. Second, Congress must adopt the budget Resolution, which is mandatory regarding "The Congressional Budget and Impoundment Control Act of 1974." Similarly, the authors describe that Resolution is a mechanism but not a law. Regardless of its nature, the entire procedure is important in terms of a methodological path for lawmakers to organize the analysis and to establish specific rules about the appropriations process.

In addition, Saturno et al.¹¹ cover the stages and times that the appropriations process must reach out in each chamber. The authors emphasize that in certain fiscal years the House can conduct the analysis and approvals of some stages faster than the Senate, which does not affect the process because it is possible to enact temporary measures until the process is executed completely. It can happen, as the authors explain, when the entire process—that requires the decisions of both chambers—is not finished before October 1st of each fiscal year.

Saturno et al.¹² also state that the House and the Senate must set their considerations about the appropriations bill. As long as the House Rules Committee deploys a special rule to accelerate the process, the House as a whole tends to adopt that rule, accomplishing the time required to approve the bill. The authors emphasize that the adoption of those rules is granted by Rule XIII of the House, Clause 5, which refers to it as a special rule with a unique procedure related to the appropriations process. The Senate then tends to study the bill without the special rule that implies a full procedure under which it must be analyzed amendments and any consideration.

Having completed the procedures of appropriations separately, the House and Senate start by defining the final text as responding to the required mandate that implies that both chambers must approve the same measure. As Rybicki¹³ remarks on, the appropriations committees negotiate a final resolution to conciliate the final bill and then it is possible to overcome differences. If any prevails, amendments step forward between the committees to adjust the bill. Concerning that procedure of amendments, Rybicki explains:

The amendments of one house to a bill from the other may be amended twice as the bill is sent ("messed") back and forth between the House and Senate. Suppose, for example, that the Senate passes a House bill with amendments. The House can accept (concur in) the Senate amendments, in which case the differences are resolved. Alternatively, the House can amend the Senate amendments (concur in the Senate amendments with amendments). These House amendments are first degree amendments between the houses. The Senate can then accept (concur in) the House amendments to the Senate amendments, which would produce agreement. Or the Senate can concur in the House amendments to the Senate amendments with further Senate amendments, which are amendments in the second degree.¹⁴

When the bill is already reconciled, Congress sends it to the President, who has ten (10) days to accept or veto it. David et al.¹⁵ describe such a procedure as extremely complex due to the technical and implicit calculations that must be accomplished during the making process. The political implications are many and relevant, as during the budget-making, constitutional powers held by Congress and the President alike are often confronted, sometimes even heating the political atmosphere until the government is shut down.¹⁶

These situations could be hardly different, as they involve political interests that arise from constitutional perspectives. Kate Stith explains that although the definition of appropriations is important to understand its core,¹⁷ what is substantial is that appropriations shape the federal government, allowing or constraining public expenditures to support programs. Donald Kettl shares that perspective but adds what he considers a real political process where multiple actors at play.¹⁸

Regarding the scope of the executive powers, Roderick Kiewiet and Mathew McCubbins study the effect of the President's authorities to interfere with the appropriations process executed by Congress.¹⁹ The authors consider that the veto power generates "asymmetrical" outputs, as even when it can constrain Congress' decisions to promote debates for funds approved to agencies, the President cannot ensure higher funds to agencies. By analyzing the veto power itself, Kiewiet and McCubbins conclude that it does not confer authority to modify the annual appropriation process, as it only allows the President to reject Congress' decisions. However, the authors also explain the authority called the "reversionary expenditure", by which an agency gets appropriations when Congress and the President alike do not decide about the required funds for its operations.

After providing a complete landscape of the budgetary process in Congress, Davis et al. differentiate between what they call the aggregate process related to non-defense agencies. Importantly, the authors explain that Congress tends to approve appropriations in aggregate terms as it makes stable and simple rules concerning agencies not related to national defense concerns.²⁰

As with Howard Shuman,²¹ Barry Blechman and Philip Ellis explore the political process that involves national security affairs, emphasizing certain institutional disputes between Congress and the Executive related to the war in Vietnam and the Persian Gulf.²² In a similar vein, Don Lindholm,²³ Joachim Wehner,²⁴ and Robert Heilbroner²⁵ indicate that generally the budget process is based on political interests rather than a rational basis to ensure an efficient allocation of resources. For instance, by considering historical appropriations and their political role during the budgeting process, John Gits²⁶ and Arnold Kanter²⁷ focus on what they consider the most important areas for funding National Defense requirements, such as development, research, and personnel.

Although the battles between Congress and the Executive are illustrated in Sections Section 3 and Section 4, what becomes important is the growing lawsuits disputes regarding the budget process since as Metzger

considers, the separation of power battles have been disentangled in litigation fields.²⁸ As being considered a power with strong political implications, the authority to constrain government and its size embraces a wide spectrum of constitutional views. William Holt²⁹ emphasizes concrete episodes when the President has established constitutional disputes with Congress to conduct foreign relations, along with the role of the appropriations power in trying to control political grounds.

Along with these considerations, the appropriations power shows multiple tensions that have been settled in the legal field rather than in the institutional one. As noted in this Subsection, litigation procedures and legal decision-making have become a fundamental source of interpretation, creating important precedents.

The Procedure, Setting Out the Differences between Authorizations and Appropriations

By distinguishing annual appropriations and permanent appropriations, Matthew Lawrence³⁰ offers insights to determine what he denotes as the contradictory role of such appropriations about the separation of powers. The author notes that Congress has the power to approve annual appropriations, having a direct influence over agencies that depend on funds to operate.

Lawrence³¹ also remarks that there is a constitutional prohibition referring to federal expenditures without appropriations. In fact, appropriation is defined as “legislation specifying an amount and source of funds for an agency to use for a designated purpose.”³² Concomitantly, the Office of the General Counsel has specified that through appropriations, budget authority is exercised by Congress, allowing agencies to acquire financial duties.³³

When addressing the differences between annual and permanent appropriations, and emphasizing legal threats, Matthew Lawrence³⁴ also highlights that permanent appropriations distort Congress’ powers to control and influence agencies functioning. The author suggests a bifurcated application of annual and permanent appropriations, considering that the differences entrenched in these frameworks also undermine administrative law, as the *Chevron Doctrine* application could be weakened.

In the same vein, Dycus et al.³⁵ focus on distinguishing that authorizations refer to the delegation of certain powers to the executive, whereas appropriations imply the required financial support to accomplish the authority delegated. For instance, after the 9/11 attacks, Congress exercised such a constitutional power authorizing the president to use military force to reach out to the terrorists who oversaw the attacks. Concretely, Congress enacted the *Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2 (2001)*, which contains the specific statutory authorizations.

Consequently, financial support was also provided following the funds required. As Amy Belasco underscores, based on the “FY2014 Consolidated Appropriations Act”, Congress “approved appropriations for the past 13 years of war that total \$1.6 trillion for military operations, base support, weapons maintenance, training of Afghan and Iraq security forces, reconstruction, foreign aid, embassy costs, and veterans’ health care for the war operations initiated since the 9/11 attacks.”³⁶ This example shows how Congress authorizes and approves certain powers, highlighting the legal basis of appropriations regarding national defense matters. Indeed, the Common Defense Clause contained in the US Constitution, art. I, §8, clause 12 states: “[The Congress shall have Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”

Neumeister considers that political disputes have impacted negatively the appropriations power. The author emphasizes the structure of the appropriations destined to support national security affairs, remarking on the low discretion of the President in deciding how expenses can be allocated.³⁷ Reviewing central and historical aspects of the Congress appropriations power, Neumeister also presents relevant ruminations

concerning requirements of practical issues,³⁸ which means that in front of an unplanned emergency, Presidents often must act first without waiting for Congress's approval.³⁹

Similarly, Bruce Ackerman and Oona Hathaway explain that President in current times do not need to wait Congress' appropriations approvals to respond national security threats, as Congress has granted funds under a wide spectrum of possibilities to allow their efficient allocation as required.⁴⁰ The authors then spotlight that

Congress now grants the Defense Department vast sums under very broad categories, giving the president immense discretion to reallocate funds from one activity to another. This permitted President Bush to seize fiscal control at the very outset of the wars in Afghanistan and Iraq. He could finance the initial invasions out of general funds, without seeking any special appropriations for the use of military force.⁴¹

William Banks and Peter Raven-Hansen illustrate how the Executive exercises certain powers related to national security appropriations to respond as fast as demanded by terrorist threats. The authors explain the concept of lump-sum appropriations, which is characterized by having different specific purposes that allow agencies to act with discretion, avoiding approval and limitations.⁴² Although the authors recognize the importance of such a concept to face national security emergencies, they also mention concerns regarding the broad discretion within some categories of lump-sum appropriations.

Banks and Raven-Hansen, therefore, suggest the relevance of balancing appropriation's inflexibility and efficient mechanisms to provide to President discretion to repeal attacks.⁴³ Interestingly, Metzger refers to lump-sum appropriation as an example of "appropriations exceptionalism,"⁴⁴ indicating that when an agency wields that power under a wide form of discretion, it is possible to see a sort of lack of judicial review ability.

In such regards, the reprogramming tool become relevant for this analysis, as the Office of the General Counsel states that agencies have the possibility to move certain amounts of their budget responding to requirements. That is possible either by transferring or reprogramming, which are different concepts. While transferring refers to the possibility to move funds between appropriations, reprogramming implies the option to shift funds within appropriations approved to reach different "purposes other than those contemplated at the time of appropriation. [...] A transfer shifts budget authority from one appropriation to another. In contrast, reprogramming shifts funds within a single appropriation. Agencies generally may transfer funds only with explicit statutory authority."⁴⁵

As noted by Lawrence, transfer and reprogramming also have requirements to be reached, as Congress often establishes requests to ensure that agencies obtain "pre-approval from the relevant appropriations subcommittee before exercising a transfer authority or 'reprogramming' funds."⁴⁶ In addition, the reprogramming tool becomes important because of current debates related to appropriations power; significantly, institutional and political battles that took place during former President Trump's administration (as analyzed in Section 4).

Appropriations in the Legal Field

Greene v. McElroy is fundamental for this paper due to the constitutional analysis deployed by the Supreme Court, which is related to Congress and President's delegation authority. That decision encompasses the appropriation authority and the required approval by Congress.⁴⁷ The issue was whether the Department of Defense had the authority to create security industries even when such actions affect an individual's job or if it can be considered an "unreasonable interference" that constrains liberty and property rights. There, the Supreme Court established that circumstances in the appropriation process require the ratification of Congress regardless of a previous approval, closely related to the executive actions.

The Court analyzed the arguments wielded by William Greene who, after acting as a contractor of the Department of Defense, was fired because he did not get access to confidential information. Although William Greene had been granted access to certain documents, such access was revoked based on security reasons adopted by the Department of Defense. Without that previous job, the petitioner was unable to find a new one in the industry. Therefore, the Supreme Court reasoned that the Department of Defense did not have the authority to deprive a certain set of rights without direct authorization either of the executive or the legislative.

In *Greene v. McElroy* the Supreme Court also indicates that since part of the discussion gravitated around the authorities of the Department of Defense to limit contractors' rights, any program designed for reimbursements to compensate lost wages must be ratified by Congress. The Department of Defense argued that there was an implicit approval by the constant "appropriation of funds to finance aspects of the program [...] under which reimbursement for lost wages would be made to employees of government contractors who were temporarily denied [...]. Although a specific appropriation was eventually made for this purpose, it could not conceivably constitute a ratification of the hearing procedures."⁴⁸ Therefore, it becomes clear that the Supreme Court established explicit ratification by Congress to legitimate any appropriation.

At the same time, Dycus et al. recognize that although in *Greene v. McElroy* the Supreme Court reasoned that the executive decisions regarding appropriations should be ratified by Congress,⁴⁹ the authors point out that the Supreme Court sustains some arguments from *Ex parte Endo*.⁵⁰ Certainly, in *Greene v. McElroy* it is also emphasized that appropriations must be adequately made per the purpose approved by Congress; otherwise, there is a risk to distort the genuine will of the legislative.

For instance, in *Ex parte Endo* the issue was whether "the War Relocation Authority" conceded the power to detain any citizen regardless of her/his loyalty to the Government, or whether that authority must be balanced with specific considerations. Concretely, due to War World II, "the War Relocation Authority" was approved to control and dismantle reasonable threats. Mitsuye Endo was evacuated from Sacramento and removed to a War Relocation Center, because regardless of being an American citizen she had Japanese ancestry. By recognizing that it was not proven any reasonable threat of espionage or sabotage, the Supreme Court established that the petitioner was "entitled to an unconditional release by the War Relocation Authority."⁵¹

In addition, what is important in *Ex parte Endo* in relation to this paper is the Supreme Court's reasoning about the funds appropriated for the Relocation Centers. Accordingly, it was determined that although Congress approved certain sums to operate "the War Relocation Authority", without determining specific programs to be financially supported. That initial inference means that although Congress appropriates sum in general for programs, it must be cautiously considered the "ratification" of each "phase" within the program. It shows a stricter view than reasoned in *Greene v. McElroy*, not being exclusive between them.

Chevron for Appropriations

The Chevron doctrine makes a considerable difference within this field of study, allowing for a review of classical doctrines and current events that show a growing complexity. It, therefore, drives this paper to explore its effects on the power of the purse.

In hindsight, in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,⁵² the Supreme Court established what has been considered a fundamental principle related to administrative law. There, the Supreme Court reasoned that:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular

question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.⁵³

That reasoning structured the widely known *Chevron Doctrine*. In this case, the issue was whether the Environmental Protection Agency (EPA) was entitled to define the concept of *stationary source* included in The Clean Air Act. The Clean Air Act enacted in 1977 enforced duties to States to guarantee “national air quality standards” or, if such standards are not achieved, it allowed States to include programs regulating “new or modified major stationary sources of air pollution.”⁵⁴ Then, what became problematic was the permit granted in EPA regulations enacted in 1981, which allowed States to decide a certain set of plans based on the definition of *stationary source*. The Supreme Court held that Congress did not intend to determine that definition and its applicability, allowing States to interpret it without restrictions.

Kristin Hickman and Aaron Nielson also point out that when there is ambiguous language in a statute, Congress relies on agencies’ interpretations instead of recurring to judicial instances;⁵⁵ it then allows agencies to act with some discretion based on the delegation they received. Similarly, Merrill and Hickman have considered that the *Chevron Doctrine* allows agencies to decide to overcome ambiguities, but what is relevant is Congress’ presumption since it legitimates agencies’ actions.⁵⁶

Lawrence follows up these views but also considers that “courts may defer to that agency’s interpretation and treat its interpretation as binding under Chevron. Doctrinally, courts decide whether to treat an agency’s interpretation as binding in three steps, though each has substeps and the boundaries between them can blur. The steps are referred to as Chevron Step Zero, Chevron Step One, and Chevron Step Two.”⁵⁷ Lawrence explains that while Step Zero focuses on the nature of the statute and the agency’s interpretation, Step One considers the ambiguity of the statute under discussion and Step Two implies the analysis of the ambiguity and the interpretation itself.

Elizabeth Garret explains some reasons held by Justice Scalia to endorse the *Chevron Doctrine*, stating that interpretative tools like Step One contribute to solving judicial tensions, “avoiding the distasteful prospect of accepting an agency view with which he disagrees.”⁵⁸ The author also indicates that Justice Breyer confirmed that he shared Justice Scalia’s perspective related to the legal fiction that implies the intention of implicit delegation to agencies. Garret hence recognizes the complexities of the budgeting process and the difficulties regarding the decision-making of judicial review that judges must face to determine what was the real purpose of Congress, either to delegate directly or implicitly to agencies.⁵⁹

After analyzing some legal implications of the battle for financing former President Trump’s border wall, Metzger highlights that appropriations have been used either by Congress or the President to control government.⁶⁰ Metzger emphasizes constitutional and administrative perspectives to remark on the central role of the appropriations power. For instance, the author considers that the appropriations power reveals a real tension behind the balance of power since “appropriations play a surprisingly tangential role in cases addressing the scope of congressional and presidential powers.”⁶¹ That constitutional view gained momentum as a matter of fact in the institutional battle between Congress and then-President Trump back in 2019, and as a matter of law in *Sierra Club v. Trump*, as explained in Section 4.

Metzger also analyzes the appropriation power under the Chevron doctrine, pointing out that such a doctrine is wielded in two different scenarios. First, the author notes that “Chevron deference is only applicable when Congress has given an agency distinct responsibility to implement a statute, and Congress has charged multiple actors—agencies, the President and OMB, and GAO—with responsibility for implementing appropriations.”⁶² Second, Metzger⁶³ and Lawrence⁶⁴ set out that usually applying Chevron is a consequence of lacking deference about appropriations power of agencies, which results in the analysis of appropriation from a conventional perspective instead of appropriation exceptionalism.

Metzger also focuses on the differences between permanent and annual appropriations, stating that courts do not address properly issues related to such differences, which generates disorientation.⁶⁵ Nonetheless, Gregory Sidak offers insights about whether permanent appropriations are constitutional, or whether Congress must instruct agencies to spend funds to avoid unconstitutional problems.⁶⁶ Furthermore, Sidak recognizes that “members of Congress routinely insert unconstitutional conditions into annual appropriations bills in a manner that would make the appropriations power an all-purpose legislative veto on actions of the President.”⁶⁷

Stith considers that “whenever Congress authorizes an agency to receive and expend gifts, fees, or other payments-in addition to the agency’s specific appropriations-the legislative authorization constitutes what is known as a permanent and indefinite appropriation.”⁶⁸ These approaches raise considerations about Congress approvals by possible ambiguities in statutes, allowing to differentiate between the provisions included in the constitutional design to accomplish institutional purposes. Indeed, Lawrence underlines that courts must analyze separately permanent and annual appropriations when deciding to avoid affecting Congress’ legitimate purposes.⁶⁹

The Appropriations Clause in Obama’s Period

As a matter of law, the balance of power has been a real concern in US constitutional history. At the center of such concerns, an essential principle takes a privileged position: separation of powers. As Levinson refers to, “we are told by Madison that the accumulation of too much power in the same hands is tantamount to tyranny.”⁷⁰ By having defined concretely a certain set of authorities in each branch of public power, constitutional drafters ensured to avoid concentration of power. The Appropriations Clause shows specific patterns of interest to control government, either by Congress or President. For instance, during the Obama administration, Congress exercised the appropriations power, interfering in some purposes of the Executive branch.

By 2008, when then-Senator Obama started running for office, closing the prison at Guantánamo was amongst his main political promises. As Hafetz explains, after very few days since President Obama had sworn in his presidential ceremony, he issued the executive order 13492, designing a strategy to implement the transfer of detainees and describing the specific conditions of every one of them.⁷¹ Nevertheless, closing a prison facility requires the appropriation of funds to cover expenditures to reallocate detainees and other financial requirements. As the appropriation clause is in Congress’ reign, which is autonomous to assign funds as institutional convenience, then-President Obama struggled to get the required appropriations to accomplish what he had campaigned for.

As Neumeister clarifies, Congress disregarded the President’s agenda concerning national security affairs, deciding to obstruct the Obama Administration promises for the prison at Guantánamo by “passing a series of appropriations restrictions to block construction of an alternative detainee facility and to prevent the transfer of detainees into the United States or to other countries without following notification and certification procedures.”⁷² This episode sheds light on how power can be balanced from different branches; particularly, how the U.S. constitutional design provides authorities which effects interfere or facilitate government purposes.

Far from ending up the political turmoil, there was a decision that then-President Obama made seeking and arguing national security purposes that yielded more disputes. Sergeant Bergdahl had been captured by the Taliban in Afghanistan, and his liberation came out as a deal: Five Taliban prisoners at Guantánamo were exchanged for him. However, unless specific provisions had been met (the National Defense Authorization

Act of 2014, as well as section 8111 of the DoD Appropriations Act of 2014), then-President Obama's decision would not have been at the center of a vivid constitutional discussion.

As Neumeister analyzes, it meant that "President Obama secretly transferred five Guantanamo detainees from the facility, without properly notifying Congress thirty days in advance [...] (and) spending \$988,400 to effectuate the transfer, contrary to an express appropriations restriction, the Executive also violated the Appropriations Clause."⁷³ This breach had legal implications, as Congress could not exercise the constitutional powers to constrain President's actions.

The Obama Administration also faced other legal challenges regarding War powers and then regarding the appropriations authority. Samuel Howe considers that in *Smith v. Obama*, the D.C. Circuit decision constrained Congress authorities,⁷⁴ as was reasoned that war powers can be interpreted through the political question doctrine. What becomes fundamental from that case is the arguments presented by the Executive; notably, it argued that if Congress appropriates funds to support military interventions, there is an authorization of its war powers.

In *Smith v. Obama*, the issue was whether President Obama's declaration of war on terror in Iraq and Syria in 2014 was illegal considering if it was authorized by the Constitution or Congress. While the President argued that the military operations deployed were approved by Congress upon the Public Laws 107-40 (2001) and 107-243 (2002), the plaintiff considered that Congress did not approve it, nor the Constitution grant powers to the president to declare wars.⁷⁵ However, the District Court of Columbia held that the plaintiff did not have standing to invoke that violation because he did not suffer an injury and that under the political question doctrine was possible to dismiss the complaints.

As such, the political question doctrine implies that the judicial review cannot be wielded around disputes between Congress and the President, as stated in *Smith v. Obama*. The Court of the District of Columbia reasoned that controversies around foreign policy matters are directly related to political questions, which are "quintessential" in such regards. Nevertheless, the Court also emphasized that it would be a mistake to dismiss cases because they involve foreign relations per se. Hence, it becomes necessary to determine each case under the analysis conducted in *Tel-Oren v. Libyan Arab Republic*, which presents six factors to conclude whether a case involves a political question.⁷⁶ By following them, the Court in *Smith v. Obama* studied their implications and concluded that the Plaintiff's claims did not sustain properly the political question doctrine.

As a matter of law, in *Smith v. Obama* the Court based part of the analysis on the appropriations circles and the power of the Congress. That leads this paper to understand how the judiciary recognizes that the executive requires Congress' appropriations approval even for military interventions. Specifically, the Court established:

In fact, Congress has repeatedly provided funding for the effort against ISIL. For example, on November 10, 2014, President Obama sent a letter to the Speaker of the House of Representatives requesting that Congress consider proposed amendments to the 2015 Budget to provide funding for Operation Inherent Resolve. The letter explained that "[t]hese amendments would provide \$5.6 billion for OCO activities [...]." In December 2014, Congress passed the Consolidated and Further Continuing Appropriations Acts of 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014), in which it appropriated the funds the President had sought.⁷⁷

This reasoning reinforced the linkage between the appropriations power and certain Presidential authorities. Although the President can conduct and deploy his war powers, Congress holds the constitutional power to authorize such operations. And what is more importantly, the President heavily depends on the Appropriations Clause exercises by Congress to accomplish a certain set of functions.

The Appropriations Power in Trump's Era

As stated above, the rigidity of appropriations power has been modified in favor of national security requirements. Nevertheless, there have been recent episodes under which appropriations power has been at the center of intense debates. During Trump's presidency, disputes arose generating constitutional reflections around legislative and executive powers in such regards. Widely known, former President Trump campaigned promising the construction of a wall on the border with Mexico.

Officially serving as President, the executive began requesting funds to build the wall border. Being a constitutional authority of Congress, there was a confrontation to appropriate such funds, resulting not only in an institutional battle between Congress and the President but on legal grounds as well. Finally, the case was decided in *Sierra Club v. Trump*,⁷⁸ whose factual background is explained as follows.

Back in 2018 then-President Trump requested the approval of \$ 2.6 billion on different occasions in Congress to build the wall barrier on the southern border with Mexico. Congress initially appropriated \$ 1.5 billion in the FY2018 Consolidated Appropriation Act. However, after some congressional discussions to increase the amount approved, President Trump announced that he was ready to exercise his presidential powers to ensure the funds demanded, even declaring a national emergency if required to get them.

Although the House of Representatives approved in December 2018 a continuing resolution that contained \$ 5.7 billion for the border barrier, the Senate rejected it. Then, a shutdown arose for 35 days, which ended without an official agreement; nonetheless, Congress approved the Consolidated Appropriations Act of 2019, including \$1.375 billion of the \$5.7 billion requested by President Trump.

Although then-President Trump signed the bill, he declared a national emergency related to the southern border with Mexico. The arguments that supported the emergency stated "a border security and humanitarian crisis that threatens core national security interests because the border served as a major entry point for criminals, gang members, and illicit narcotics and the number of family units entering the United States had recently increased."⁷⁹ In addition, the emergency identified \$8.1 billion to build the border wall.

As a response, the House and Senate signed a resolution to terminate the declaration of national emergency, which was vetoed by the President. Nonetheless, the veto power was not rejected by the House, allowing the executive to start expending the funds appropriated. About the funds appropriated to the Department of Defense and trying to reprogram \$1 billion, the Secretary of Defense based his arguments on section §8005 of the Consolidated Appropriations Act of 2019 (CAA) and section 1001 of the John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019. As a result, some House Committees did not approve the decision to reprogram such an amount.

In February 2019, the Sierra Club and Southern Border Communities Coalition filed a lawsuit against then-President Trump and some members of his Cabinet. In *Sierra Club v. Trump*, the issue was whether the President of the United States and part of his cabinet members unobserved their statutory authority under §8005 (CAA) when decided to reprogram funds appropriated by Congress, changing the purpose initially approved to support the construction of a barrier on the southern border. There, the Court of Appeals of California determined that §8005 (CAA) did not provide authorizations to the Department of Defense to reprogram funds. Concretely, the Court reasoned:

Because section 8005 did not authorize DoD to reprogram the funds—and Defendants do not and cannot argue that any other statutory or constitutional provision authorized the reprogramming—the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress.⁸⁰

Although In *Sierra Club v. Trump* the defendants did not wield *Chevron doctrine*, the Ninth Circuit emphasized that Congress did not try to delegate to the Department of Defense the interpretation of any part of the Consolidated Appropriations Act of 2019 (CAA). The Court focused on the Steps threshold framework, reasoning that to determine whether Congress had delegated authority to the Department of

Defense (DoD) under §8005 (CAA), it must review the step zero as follows: (1) If it was deferred to DoD the interpretation of an ambiguous statute, (2) if the agency decided to wield such an interpretative tool and if it was promulgated under that authority.⁸¹ Therefore, the Court established that DoD did not act under *Chevron*, and for that, it was not warranted.

By analyzing the implications of *Sierra Club v. Trump*, Lawrence points out that the Ninth Circuit did cover directly the issue of whether *Chevron* should have been warranted based on the Step Zero review. The author confronts the outputs if Courts decide to follow up the same analysis considering literal and uniquely the Sept Zero test. Therefore, concludes that the reasoning is limited, as it does not take into study the specific context of the discussion, being only an advantage if Courts do not want to interfere in legislative and executive confrontations.⁸²

As a discussion reinforcement, the Supreme Court granted certiorari under *California v. Trump*. Amongst other considerations, there the Supreme Court determined that the DoD reprogram had not been authorized under §8005 (CAA). The Supreme Court emphasized that §8005 had not provided explicit authorization from Congress since it has been predominantly a “gentleman’s agreement,”⁸³ allowing transfer by asking for approval before doing it. However, in this case, DoD changed such a traditional practice, even when DoD received several letters from Congress Committees mentioning that they did not have approval to transfer funds to build the border wall with Mexico.⁸⁴

Based on the constitutional precedents analyzed, what becomes important for this paper is the arguments deployed about the reprogramming of funds intended by the Department of Defense. As stated in Subsection 2.3, *Chevron* doctrine leads to determine that silence or ambiguity also implies Congress authorization.⁸⁵ However, as reasoned in *Sierra Club v. Trump* and *California v. Trump*, it is also relevant to consider that some cases cannot be signed under ambiguity concerns because Congress manifestation is clear and must be followed up by agencies. Closely related to the constitutional design itself (*Common Defense Clause, US Constitution, art. I, §8, clause 12*), the authority exercised by Congress delimits the separation of powers, denoting that the executive faces boundaries to achieve its purposes that involve funding support.

Plan Colombia Appropriations

Plan Colombia is considered an effective bilateral mechanism of the war on drugs (e.g. Veillette;⁸⁶ Mejía;⁸⁷ Petras⁸⁸). As explained by Luis Alberto Moreno, the U.S. Government has been supporting the Colombian war on drugs and terrorism from different perspectives such as economic affairs, human rights guidance, institutional cooperation, and national security matters.⁸⁹ Military assistance has also been a fundamental pillar of Plan Colombia and there are multiple episodes related to National Security matters that involve American and Colombian military strategies.

A recent episode happened on June 15, 2021, when a terrorist attack took place inside a Colombian military base. A dozen people were injured, but a small group of American Soldiers was not affected. Therefore, questions about the presence of American Soldiers in the Colombian territory arose to understand either the military strategies or the constitutional mechanisms by which such presence is possible. It promoted a constitutional debate about the legality of foreign troops in Colombia; nevertheless, the Colombian Government stated that the American troops were part of a “counter-narcotics strategy in the Caribbean.”⁹⁰

Regardless of the particular and episodic military strategy, the presence of American Troops in Colombia shows certain patterns of interest. The war on drugs has been followed by the US National Government as a matter of national security. For instance, on October 18, 2024, the Office on Drugs and Crime of the United Nations reported that the estimation of coca cultivation in Colombia in 2023 reached 253,000 hectares,⁹¹ the largest number ever reported.

Serving as a senator back in 2000, President Biden vigorously advocated to support the Colombian war on terrorism. Then-Senator Biden remarked that besides coca production, Colombia was leading the illegal trafficking of heroin in the US, as well as the dominant role of drug cartels, left-wing guerrillas, and right-wing paramilitaries in such activities.⁹² Then-Senator Biden led in the US Congress the quick approval of Plan Colombia, considering that “helping Colombia is squarely in America’s national interest.”⁹³

Considered as one of the most successful bipartisan agendas, the political endeavors of the then-senator Biden and other congressmen resulted in the Plan Colombia. Moreno indicates that Plan Colombia was structured under four premises: economic matters, institutional efforts, national security and the war on drugs, and the Colombian peace process.⁹⁴ Plan Colombia was cautiously designed to embrace more than military support, considering the importance of promoting economic growth and protecting human rights.

Delacour considers that the biggest obstacle of Plan Colombia was human rights violations, by which human rights activists pushed for the inclusion of provisions to protect rights.⁹⁵ By that time, the crimes that involved the Colombian Army were common, underlying illegal alliances with paramilitary groups. As Delacour summarizes, Clinton’s administration faced those critics, focusing on military strategies as a matter of US National Security.⁹⁶

Plan Colombia Within the U.S. Constitutional Design

Thomas Pickering explains that the Colombian and American administrations alike engaged easily to establish a foreign strategy based on cooperative support. The author refers to the Clinton Administration’s appropriations strategy, remarking that “supplemental appropriation” was taken into consideration rather than a formal appropriation procedure, as it facilitates conventional confrontations in Congress’ domain.⁹⁷ After institutional details were on track, the White House designed and submitted an initial budget proposal of \$1.3 billion to Congress, which was approved in 2000.

In hindsight, Forrest Hylton describes Plan Colombia by pointing out its exceptional adaption to violent circumstances, describing it as an efficient model of cooperation.⁹⁸ The author compares the Plan Colombia budget with Afghanistan’s aid that back in 2010 received \$7 billion per month. Concomitantly, Shifter explains that after Iraq and Afghanistan, the U.S. cooperation has been focused on Colombia under high priority, as back in 2012 the expenditure reached \$8 billion.⁹⁹

By wielding the Appropriation Clause, Congress enacted the *Public Law 106-246; 114 Stat. 511* on July 13th, 2000, by which under *General Provisions - Chapter 1; Department of Defense - Section 3101 (a) Authority to Provide Support* there was appropriated \$45 million to support the counter-drug fight in Colombia. In addition, under *Bilateral Economic Assistance - Chapter 2; Funds Appropriated to the President, Assistance for Counter-narcotics Activities* Congress also appropriated \$60 million to support the purchase of “UH-1H Huey II helicopters for the Colombian Army” and \$234 million for “UH-60 Blackhawk helicopters for use by the Colombian Army and the Colombian National Police” (114 Stat. 572).

Congress then established specific conditions to approve those appropriations. The conditions were stated under *Section 3201*, which required that the Secretary of State should have certified to the appropriate congressional committees “prior to the initial obligation of such assistance” some conditions such as legal criminal procedures against Colombian Armed forces members because of Human Rights Violations, amongst others.

Based on the appropriations power described, it becomes relevant the detailed descriptions regarding authorities and limitations to transfer funds to Plan Colombia. It then shows no ambiguity in the statute, in terms of *Chevron*, which allows seeing a clear Congress’ purpose to control the government. Although back in 2000 President Clinton achieved an important goal by designing Plan Colombia that was approved by

Congress, it is also true that Congress included provisions with enough clarity either to avoid discussions or to exercise direct control over such funds and objectives.

June Beittel describes that, although in November 2019 Congress appropriated and approved the same sums of the fiscal year 2019 for Plan Colombia, then-President Trump tried to reduce such an amount 11 %.¹⁰⁰ Nevertheless, Congress as a whole—the House and Senate—showed strong support for Plan Colombia, approving higher amounts than the Trump Administration had designed. It also shows the independence of Congress in exercising the Appropriations Clause because regardless of the political control in Congress and the Executive branch's purposes, foreign agendas can remain unaltered.

Even though it has been argued that the appropriations power entails institutional control of the government, it has been also exercised beyond bipartisan and executive tensions, following national interests. For instance, at the beginning of Plan Colombia's design, the escalation of drug plantations was considered as American National Security priority. However, it also included tools to balance the war on terror and drugs with human rights purposes. As described, Congress wielded its Appropriation Clause to oblige DoD to follow up on human rights issues in Colombia; alternatively, Congress has antagonized with public policy agendas deployed by the Colombian government and then restricted funds for some subjects.

Strategies based on glyphosate aspersion have been openly discussed because of their impacts on human well-being. Sheridan Pauker analyzes some issues related to these mechanisms, focusing on congressional appropriations to support instruments that include the use of pesticides. The author describes the effects of the Andean Counterdrug Initiative (ACI), promoted by then-President Bush and approved by Congress back in 2002, by which the use of chemicals to reduce drug plantations was approved and financially supported to operate in countries like Colombia.¹⁰¹

As summarized by Sheridan Pauker, although Congress tried to control those chemicals and even included provisions in the Foreign Operations, Export Related Programs Appropriations Act of 2002, the endeavors were not enough because of the lack of legal enforcement.¹⁰² In addition, as denoted by Marchall LLOYD, during the Bush administration the U.S. Government started supporting the use of "mycoherbicides to eradicate illicit-drug crops, but it is unclear if any studies have been conducted."¹⁰³ This point embodies important considerations, as even arguing that the initial chemical uses approval was not based on scientific evidence, subsequent appropriations allowed chemicals when complaints were at the center of debates.

Keith Storrs and Connie Veillette describe certain concerns of the U.S. Government concerning aerial aspersion and its potential negative impacts on human health.¹⁰⁴ The authors explain that Congress included provisions to ensure that the Secretary of State would certify using of health guidelines to avoid human affectations. Congress then approved amendments stating that "every reasonable precaution will be taken in the aerial fumigation program to ensure that the exposure to humans and the environment in Colombia meets Environmental Protection Agency standards for comparable use in the United States."¹⁰⁵

Villette and Navarrete-Frías analyze the strategies adopted to reduce drug crops in Colombia and other Andean countries. The authors highlight that back in 2005 one main concern was related to the territories under the control of illegal groups and the boundaries to eradicate drug plantations.¹⁰⁶ That perspective heavily relies on military concerns rather than reasonable human health risks, which arose after providing funds to cut illegal profits from trafficking, as well as to control the demand side drug consumption in America. The bilateral agenda was designed originally as a fundamental counter-narcotic instrument, which derived from other issues considering human health affectations. Nonetheless, even in these collateral results, Congress has exercised its power of the purse, constraining state power.

Joseph Weir emphasizes the role of Congress when regulating the funds approved for Plan Colombia to avoid health consequences. The author analyzes the mandates of Congress constraining the use of such products when they generate unreasonable risks to human beings, remarking on the regulatory controls to spread chemicals.¹⁰⁷ Nevertheless, scientists and advocacy groups reacted to these mandates, which were

adopted by the U.S. Government to fund chemical aspersions in Colombia. Beyond the scientific and policy controversy, what is relevant for this paper is the claims aimed at “the 2002 Foreign Appropriations Act.”¹⁰⁸ Indeed, the appropriations power was targeted, as regardless of the Executive decisions, advocacy groups recognized that the central power to constrain functions is at the Congress’ domain.

On September 14, 2021, the debate about glyphosate took place again in the U.S. Congress when Representative Alexandra Ocasio-Cortez argued to restrict the funds of Plan Colombia to spread chemicals in aerial fumigation. The Lawmaker Ocasio-Cortez presented an amendment to the National Defense Authorization Act (NDAA). After congressional discussions, the Act was approved with the explicit restriction to use chemicals in aerial aspersions, wielding the appropriations power granted by the Constitution in the sense of allowing or constraining government.¹⁰⁹

Conclusions

The Appropriations Power granted by the U.S. Constitution to Congress is a fundamental authority to balance and control government. Having provided the constitutional and legal frameworks related to this power, it becomes clear how Congress has exercised its authority to constrain state power during specific periods and what are the growing threats around its effectiveness. From the prison at Guantánamo to the border wall with Mexico to Plan Colombia appropriations, this paper addresses how Congress’s Constitutional powers tend to override Presidential authorities regarding National Security affairs. It does not entail, however, that under specific circumstances Presidents tend to exercise their powers from a wide spectrum of independence, constraining Congress’ power of the purse. Thereby, the efficient equilibrium between Congress and the Executive will ensure the preservation of the separation of powers principle in favor of efficiently constraining and allocating public power.

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Notes

* Research paper

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- 5 *Id.* For a further approach, see also *infra* note 69 accompanying this paper.
- 6 Stephen Dycus et al., *National Security Law* (2022).
- 7 Neumeister, *supra* note 5. For an in-depth approach, see the Constitution of the United States of America, Article I, Section §9, Clause 7, which entails that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”
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- 33 3 United States. General Accounting Office. Office of the General Counsel, Principles of Federal Appropriations Law (1991).
- 34 Lawrence, *supra* note 31.
- 35 Dycus et al., *supra* note 7.
- 36 Amy Belasco, *Cost of Iraq, Afghanistan, and Other Global War on Terror Operations since 9/11*, 2 (2014).
- 37 Neumeister, *supra* note 5.
- 38 *Id.* By focusing on historical sources to explain the changing views of the appropriations power, Neumeister draws on what the American Framers envisioned. For instance, the author quotes The Federalist No. 58, at 357 (James Madison), indicating: “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure”. The author also cites a letter written by Thomas Jefferson (the source wielded by the author is: “Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397”), which notes: “We have already given [...] one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.” These historical sources entail the nature of the appropriations provisions included in the constitutional design and the original purposes of the drafters.
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- 45 3 United States. General Accounting Office. Office of the General Counsel, *supra* note 34 at 44.
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- 50 *Ex parte Endo*, 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243, (1944).
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- 64 Lawrence, *supra* note 31.
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- 78 *Sierra Club v. Trump*. 929 F.3d 670 (9th Cir. 2019).
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- 80 *Id.*, at 677.
- 81 *Id.*, at 693.
- 82 Lawrence, *supra* note 31.
- 83 *California v. Trump*, 963 F.3d 926 (9th Cir. 2020). cert. granted sub nom. *Trump v. Sierra Club*, 141 S. Ct. 618, 208 L. Ed. 2d 227 (2020).
- 84 *Id.*, at 935.
- 85 Garrett, *supra* note 59 at 2643. [arguing that “Chevron can be understood as adopting a rule-like presumption that statutory silence or ambiguity should be read as an implicit delegation to agencies. The rule-like quality of Chevron was in part a reaction to the complex, multifactor approach to judicial deference used in the pre-Chevron era”].
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