

2019

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Recommended Citation

Shelby Begany Telle, *The Constitutionality of Appropriations Transfer Authority under the Nondelegation Doctrine*, 68 Cath. U. L. Rev. 575 (2019).

Available at: <https://scholarship.law.edu/lawreview/vol68/iss3/10>

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Cover Page Footnote

J.D. 2019, The Catholic University of America, Columbus School of Law; B.A. 2013, Vanderbilt University. The author would like to thank her family for their support, Bill Duhnke for being a sounding board, and the *Catholic University Law Review* staff and editors for helping edit this Comment.

THE CONSTITUTIONALITY OF APPROPRIATIONS TRANSFER AUTHORITY UNDER THE NONDELEGATION DOCTRINE

Shelby Begany Telle⁺

I. INTRODUCTION

Article I, Section 9 of the U.S. Constitution provides the legislative branch with the power of the purse by granting it the exclusive authority to designate how federal dollars may be spent via appropriations laws.¹ Through the process of developing appropriations laws, Congress carefully balances competing interests within a fixed total annual amount set through a separate budget resolution.² This topline allocation is rarely enough to meet the aspirational funding levels requested by the President,³ individual members of Congress, and their constituencies.⁴ Therefore, every dollar appropriated represents, at best, an expression of the values and priorities of the legislative branch and, at worst, a negotiated settlement between the legislative bodies and the President. Ultimately, however, any appropriation made by law is an exercise of Article I, Section 9 power.

⁺ J.D. 2019, The Catholic University of America, Columbus School of Law; B.A. 2013, Vanderbilt University. The author would like to thank her family for their support, Bill Duhnke for being a sounding board, and the *Catholic University Law Review* staff and editors for helping edit this Comment.

1. U.S. CONST. art. I, § 9, cl. 7 (stating “[n]o 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”).

2. The topline number for the Fiscal Year 2017 omnibus was \$1.163 trillion. Press Release, The U.S. House of Representatives Comm. on Appropriations, Comprehensive Gov’t Funding Bill Released (May 1, 2017), <https://appropriations.house.gov/news/documentsingle.aspx?DocumentID=394859>.

3. U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS I (2005), <https://www.appropriations.senate.gov/imo/media/doc/glossary-of-terms-used-in-the-federal-budget-process.pdf> (stating that “[t]he President’s budget is the Administration’s proposed plan for managing funds, setting levels of spending, and financing the spending of the federal government. It is not only the President’s principal policy statement but is also the starting point for congressional budgetary actions.”) [hereinafter GAO GLOSSARY].

4. See David Reich & Chloe Cho, *House Appropriations Bills Fall Far Short of Meeting National Needs*, CENTER ON BUDGET & POLICY PRIORITIES 1, 3 (July 26, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/7-26-17bud.pdf> (finding that even after sequestration created by the Budget Control Act in 2011 ended, non-defense programs still seem to be taking cuts, with non-defense spending below the Budget Control Act caps).

In fiscal year 2017, the topline section 302(a)⁵ allocation the Appropriations Committees could use to address all federal discretionary spending⁶ was approximately \$1.07 trillion.⁷ The Appropriations Committees spread this funding across twelve separate appropriations subcommittees that recommend funding for everything from food inspections, to enforcing securities laws, to providing for national defense.⁸ Rather than providing funding at the agency level, the appropriations bills originated by these subcommittees often make appropriations in a very specific manner, even by individual project.⁹ Invariably, when allocating over one trillion dollars annually in such a specific manner, Congress cannot predict precisely the future, which results in overfunding some initiatives and underfunding others.¹⁰

To rectify these deviations, Congress almost always includes transfer authority, which provides executive branch recipients of appropriations the ability to shift “all or part of the budget authority in one appropriation or fund account to another.”¹¹ Some appropriations bills set a threshold on the amounts

5. Section 302(a) allocations come from section 302(a) of the Congressional Budget and Impoundment Control Act of 1974 and represent the total limit that the Appropriations Committee has to appropriate in a given fiscal year. Section 302(b) allocations, on the other hand, are the amounts divided up among the subcommittees by the full Appropriations Committees. GAO GLOSSARY, *supra* note 3, at 32–33, 92.

6. “‘Discretionary appropriation’ refers to those budgetary resources that are provided in appropriation acts, other than those that fund mandatory programs,” which funds entitlement programs such as social security. *Id.* at 46.

7. 2 U.S.C. § 901(c)(4) (2012) (\$1.07 trillion does not take into account disaster funding or overseas contingency operations funding). Press Release, *supra* note 2.

8. See generally *Subcommittees*, U.S. SENATE COMM. ON APPROPRIATIONS, <https://www.appropriations.senate.gov/subcommittees> (last visited Mar. 18, 2018) (highlighting that there are 12 subcommittees within the overall appropriations committees).

9. See generally *Committee Jurisdiction*, U.S. SENATE COMM. ON APPROPRIATIONS, <https://www.appropriations.senate.gov/about/jurisdiction> (last visited Mar. 18, 2018).

10. Sometimes a supplemental appropriation is required when there is an otherwise unforeseen situation, such as a natural disaster, that requires funding not contemplated during the regular appropriations process. U.S. SENATE, GLOSSARY, *Supplemental Appropriation*, https://www.senate.gov/reference/glossary_term/supplemental_appropriation.htm.

11. GAO GLOSSARY, *supra* note 3, at 95. Many people mistakenly use “transfer” and “reprogramming” interchangeably. For clarification, a “reprogramming” is

[s]hifting funds within an appropriation or fund account to use them for purposes other than those contemplated at the time of appropriation; it is the shifting of funds from one object class to another within an appropriation or from one program activity to another. While a transfer of funds involves shifting funds from one account to another, reprogramming involves shifting funds within an account Generally agencies may shift funds within an appropriation or fund account as part of their duty to manage their funds. Unlike transfers, agencies may reprogram without additional statutory authority. Nevertheless, reprogramming often involves some form of notification to the congressional appropriations committees, authorizing committees, or both. Sometimes committee oversight of reprogramming actions is prescribed by statute and requires formal notification of one or more committees before a reprogramming action may be implemented.

that can be transferred between appropriations, while others require notification to the Appropriations Committees prior to the transfer, and still others require that the Appropriations Committees “approve” the transfer.¹² In essence, transfer authority allows the executive branch to elect (within certain parameters) to move money between accounts without a prior or subsequent law revising the appropriated dollar amounts. Allowing an agency to transfer funds from one non-specific appropriation to another, however, is arguably an abdication of portions of the legislature’s exclusive power over the purse strings.¹³

As the national debt continues to grow and the partisan rancor in Congress becomes more pronounced,¹⁴ it has become increasingly difficult for Congress and the executive branch to reach consensus on appropriations bills, which must pass to keep the government operating.¹⁵ Ironically, the demise of congressional earmarking, a process by which appropriations law directed federal funds to very specific projects at the request of individual members of Congress, and which has been banned in the name of reducing wasteful spending, has only made compromise more elusive.¹⁶ In the absence of legislative concurrence with an executive branch priority, the executive branch could utilize transfer authority from multiple individual appropriations to pool money to fund activities that Congress lacked the ability or consensus to fund. Such maneuvers, enabled by the transfer authority granted by Congress in legislation, may represent a direct interference with Congress’s exclusive Article I, Section 9 authority, as the new spending is not in line with an appropriation “in [c]onsequence of . . . law.”¹⁷

This Comment will examine the constitutionality of executive transfers of appropriations via transfer authority. It will ultimately argue that such transfers

Id. at 85.

12. *See generally* Consolidated Appropriations Act, 2017, Pub. L. No. 115–31, 131 Stat. 135 (2017) (providing appropriations across the federal government for fiscal year 2017).

13. *See generally* U.S. CONST. art. I, § 9, cl. 7.

14. *See* BUREAU OF THE FISCAL SERV., *The Debt to the Penny and Who Holds It*, TREASURY DIRECT (Nov. 9, 2017), <https://www.treasurydirect.gov/NP/debt/current> (using Daily History Search Application, enter “November 9, 2017;” then click Find History) (finding that the national debt in November of 2017 was more than \$20 trillion).

15. *See* JAMES V. SATURNO & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42647, CONTINUING RESOLUTIONS: OVERVIEW OF COMPONENTS AND RECENT PRACTICES 10–11 (2016) (showing that there has been a progressive decrease in the number of regular appropriations bills passed from 13 in 1977 to zero in 2016).

16. Rollcall Staff, *The Congressional Earmark Ban: The Real Bridge to Nowhere*, ROLL CALL (July 30, 2014, 9:59 AM), https://www.rollcall.com/news/the_congressional_earmark_ban_the_real_bridge_to_nowhere_commentary-235380-1.html (reporting that a 2005 earmark for construction of a bridge in Alaska received national attention and led to the reduction of earmarks in 2007 and their end in 2011, yet debt and dysfunction in Congress has persisted).

17. U.S. CONST. art. I, § 9, cl. 7.

are unconstitutional under the nondelegation doctrine¹⁸ and that certain concepts that might alleviate these nondelegation concerns face further constitutional issues by running afoul of the Supreme Court's holding in *INS v. Chadha*.¹⁹ First, this Comment will examine the history and emergence of transfer authority. Next, it will examine the nondelegation doctrine and apply it to the appropriations transfer scenario, a scenario not yet addressed in nondelegation doctrine caselaw. Furthermore, a common means Congress uses to enable needed flexibility while maintaining control of appropriations after the enactment of an appropriations law is to require the Appropriations Committees to preapprove the transfer.²⁰ This Comment will argue that such means are also unconstitutional due to the holding in *INS v. Chadha*, which prohibits the legislative veto.²¹ Finally, this Comment will analyze what parties might be able to bring a challenge to the constitutionality of transfer authority and those parties' ability to gain standing. In conclusion, this Comment will outline several solutions or policy goals intended to assist Congress in maintaining the constitutional integrity of its Article I, Section 9 authority, which is a key legislative branch responsibility in maintaining the balance of power between three separate and equal branches of government.

II. THE GROWTH OF PROBLEMATIC TRANSFER AUTHORITY

A. *The Rise of Transfer Authority*

The inclusion of transfer authority in appropriations bills is a relatively new phenomenon.²² In the early years of the Republic, transfers of funds from one appropriation to another was deemed prohibited because "Congress [had] taken from the department[s] the power to transfer appropriations from one head to another; and a cardinal rule controlling the application of appropriations is, that they must be expended on the objects specified."²³ Furthermore, early opinion

18. "The non-delegation doctrine is a principle in administrative law that Congress cannot delegate its legislative powers to other entities." Rather, when it instructs agencies to regulate, it "must give the agencies an 'intelligible principle' on which to base their regulations." *Nondelegation Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine (last visited Jan. 28, 2019).

19. *INS v. Chadha*, 462 U.S. 919, 954–55 (1983) (holding that a one chamber veto is unconstitutional on the basis that it denies the President the power of presentment).

20. See, e.g., Consolidated Appropriations Act, 2017, Division G § 201.

21. *Chadha*, 462 U.S. 919 at 959.

22. Before the 1950s, "adjustments" and "interchangeability" were used to discuss what is today known as a "transfer." MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., R43098, TRANSFER AND REPROGRAMMING OF APPROPRIATIONS: AN OVERVIEW OF AUTHORITIES, LIMITATIONS, AND PROCEDURES 1, n.5 (2013). Transfers were already established by the mid-1940s because the Central Intelligence Agency (CIA) Act of 1949, which established the CIA, included transfer authority within the organic statute. *Id.* at 5.

23. Transfers of Appropriations, 4 Op. Att'y Gen. 428, 428–29 (1845).

raised concerns that the ability to transfer from one appropriation to another without explicit legislative direction would “derange the system of appropriations contemplated by the constitution, and be placing in the hands of the President, in effect, the appropriating power.”²⁴ Yet, the very “first appropriations act contained only four payments totaling \$639,000 for federal government operations: \$216,000 for the civil list; \$137,000 for the War Department; \$190,000 to discharge warrants from the late Board of Treasury; and \$96,000 for pensions for invalid veterans,” and presented a far simpler landscape than modern practice, which provides hundreds of separate appropriations by law annually.²⁵ Thomas Jefferson, however, is said to have

I have considered the question propounded for my opinion in your letter of the 19th June last. By the act of 17th June, 1844, an appropriation was made for books, maps, charts, and instruments, binding and repairing the same, and all the expenses of the hydrographical office. And you inquire whether a portion of the money thus appropriated may be legally and properly applied to the erection of a house for the superintendent of said office. I think not. I presume the officer alluded to is the superintendent of the depot of charts, and the house to be erected on the grounds connected with that building. Congress have taken from the department the power to transfer appropriations from one head to another; and a cardinal rule controlling the application of appropriations is, that they must be expended on the objects specified. All appropriations for buildings at the depot of charts have been made specifically for that object; and although such a structure as that suggested would conduce very materially to the preservation and security of the valuable public property there stored, it cannot be fairly brought into the category of expenses of the hydrographical office. These embrace the current annual expenses. My opinion is, therefore, that the safer course is not to apply this appropriation to such an object.

Id.

24. Transfer of Specific Appropriations of House of Representatives to Contingent Fund, 3 Op. Att’y Gen. 442, 442–43 (1839).

The constitution declares that “no money shall be drawn from the treasury but in consequence of appropriations made by law,” &c. This I consider as an explicit inhibition upon the President and all others to draw from the treasury any portion of the public money, until Congress shall have directed it to be done; and the expression in the clause of the constitution just quoted, “but in consequence of appropriations made by law,” clearly indicates that Congress shall also declare the uses to which the money to be drawn from the treasury is to be applied. The President, therefore, has no power, under the constitution, over the public treasure, except to apply it in the execution of the laws. Whenever he so applies it, he acts within his constitutional authority. Whenever he applies it without the directions of Congress expressed in some legislative act, or against such directions, he assumes upon himself power not conferred by the constitution. If Congress has appropriated money for one use or purpose, and has given no express power or discretion to the President to apply it to another, it seems to me that any act of his, transferring it to another use or purpose, would be wholly unauthorized by the constitution. And, surely, no assumption of power could be more dangerous than that of expending more money upon an object than Congress had appropriated for it.

Id.

25. STAFF OF H.R. COMM. ON APPROPRIATIONS, 111TH CONG., A CONCISE HISTORY OF THE H.R. COMM. ON APPROPRIATIONS 4 (Comm. Print 2010), <https://democrats->

preferred that appropriations be specific sums for specific activities rather than lump sums, helping shift the power and control over federal spending more squarely into the legislative branch's domain.²⁶

Today, the Appropriations Committees in the Senate and the House of Representatives are divided into 12 subcommittees that each recommend funding for numerous departments and agencies, which are each funded through multiple different appropriations.²⁷ As an example, the Department of Justice alone receives appropriations through more than 30 separate and distinct accounts²⁸ and

[e]ach account generally includes similar programs, projects, or items, such as a research and development account or a salaries and expenses account, although a few accounts . . . may fund all of the agency's activities. These acts typically provide a lump-sum amount for each account as well as any conditions, provisos, or specific requirements that apply to that account.²⁹

Generally, agencies may not transfer funds between accounts absent authorization by law to do so.³⁰ Such authorizations may be found in any manner of legislation, but they most commonly are found in the text of the appropriations bills themselves. The fiscal year 2017 omnibus appropriations bill provides numerous examples of how various subcommittees addressed transfer authority.³¹ For example, the Agriculture Appropriations Division prohibited transfers that would create new programs or eliminate others or drastically reorganize offices absent written notification and the Committees' approval.³² But it appears that within those constraints, transfers under \$500,000 or ten percent of the total value of the account, whichever is less, would be permissible, assuming such a transfer does not reduce the funding of the donor account by greater than ten percent.³³

[appropriations.house.gov/sites/democrats.appropriations.house.gov/files/House_Approps_Concise_History.pdf](https://www.congress.gov/appropriations.house.gov/sites/democrats.appropriations.house.gov/files/House_Approps_Concise_History.pdf).

26. *Id.*

27. JAMES V. SATURNO, BILL HENIFF JR. & MEGAN S. LYNCH, CONG. RESEARCH SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 12 (2016), <https://www.senate.gov/CRSPubs/8013e37d-4a09-46f0-b1e2-c14915d498a6.pdf> (highlighting that the accounts lump similar programs and functions together).

28. CHRISTENSEN, *supra* note 22, at 1.

29. SATURNO, HENIFF & LYNCH, *supra* note 27, at 12. The report language from both the House and Senate must also be followed. The report language that accompanies the bills often goes into further detail about how the Committees and Congress intend for funds to be spent or not spent.

Id.

30. *Id.*

31. *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).

32. Consolidated Appropriations Act, 2017, Division A § 717(a).

33. *Id.* at § 717(b).

None of the funds provided by this Act, or provided by previous Appropriations Acts to the agencies funded in this Act that remain available for obligation or expenditure in the

The Homeland Security Appropriations Division on the other hand, deals with transfer authority in a slightly different manner. The subcommittee provides relatively broad transfer authority that does not have many limitations aside from allowing, upon mere notification to the committees, “up to 5 percent of any appropriation made available for the current fiscal year for the Department of Homeland Security” to be transferred so long as the account(s) from which the funds are being transferred to do not increase by more than ten percent.³⁴ Separately, the Secretary of Homeland Security may transfer up to \$20 million into an emergency account to assist with specific unexpected influxes of immigrants into the country.³⁵

As a third example of transfer authority, the State and Foreign Operations Appropriations Division provides that specific accounts, such as the Broadcasting Board of Governors, may transfer funds or receive transferred funds.³⁶ Despite some similarities, there is no uniform treatment for transfers across the government, and agencies must instead look to their specific appropriations bills and other authorizing language.

current fiscal year, or provided from any accounts in the Treasury derived by the collection of fees available to the agencies funded by this Act, shall be available for obligation or expenditure for activities, programs or projects through a reprogramming or use of the authorities referred to in subsection (a) involving funds in excess of \$500,000 or 10 percent, whichever is less, that—(1) augments existing programs, projects, or activities; (2) reduces by 10 percent funding for any existing program, project, or activity, or numbers of personnel by 10 percent as approved by Congress; or (3) results from any general savings from a reduction in personnel which would result in a change in existing programs, activities, or projects as approved by Congress; unless the Secretary of Agriculture or the Secretary of Health and Human Services (as the case may be) notifies in writing and receives approval from the Committees on Appropriations of both Houses of Congress at least 30 days in advance of the reprogramming or transfer of such funds or the use of such authority.

Id.

34. Consolidated Appropriations Act, 2017, Division F § 503(b).

Up to 5 percent of any appropriations made available for the current fiscal year for the Department of Homeland Security by this Act or provided by previous appropriations Acts may be transferred between such appropriations if the Committees on Appropriations of the Senate and the House of Representatives are notified at least 30 days in advance of such transfer, but no such appropriation, except as otherwise specifically provided, shall be increased by more than 10 percent by such transfer.

Id.

35. *Id.* at § 503(e).

36. Consolidated Appropriations Act, 2017, Division J § 7009 (a)(2).

Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Broadcasting Board of Governors under title I of this Act may be transferred between, and merged with, such appropriations, but no such appropriation, except as otherwise specifically provided, shall be increased by more than 10 percent by any such transfers.

Id.

Such transfer authority is justified functionally by the growing complexity of the federal bureaucracy and therefore the appropriations process. For example, “[i]n simpler times, Congress often made appropriations in the form of a single, consolidated appropriation act. The most recent *regular* consolidated appropriation act was [in] . . . 1951.”³⁷ Transfers allow both Congress and the executive branch to make adjustments and address unplanned situations that may arise in the middle of a fiscal year.³⁸ Yet, providing for such flexibility and efficiency may very well be an unconstitutional delegation of Congress’s Article I, Section 9 powers to the executive branch agencies.

B. A Historical Look at Delegation

The nondelegation doctrine stems from the Constitution itself, in that it vests “all legislative powers” with Congress under Article I.³⁹ *A.L.A. Schechter Poultry Corp. v. United States*,⁴⁰ is the predominate historical case in studying the nondelegation doctrine. There, petitioner-defendant Schechter Poultry Corporation, a New York City slaughterhouse, was convicted of violating the Live Poultry Code, which was aimed at promoting fair competition within the poultry industry. According to the government, the defendant violated the minimum wage requirement, the maximum work hour limitations, and guidelines on the methodology of selling butchered chicken to retailers.⁴¹ The defendant argued, in part, that the code was an unconstitutional delegation of Congress’ legislative authority because the President was charged with enacting policy to promote the vaguely defined concept of “fair” competition, prompting the Supreme Court to grant certiorari.⁴²

On the issue of potential improper delegation of power, the Court held that “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”⁴³ Congress may still need to adapt to complex and dynamic situations, and the Constitution does not prohibit Congress from developing creative ways to do so, but “the wide range of administrative authority which has been developed . . . cannot be allowed to

37. U.S. GOV’T ACCOUNTABILITY OFF., OFF. OF THE GENERAL COUNSEL, GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, CHAPTER 2: THE LEGAL FRAMEWORK 2–17 (4th ed. 2016), <https://www.gao.gov/assets/680/675709.pdf> [hereinafter GAO LEGAL FRAMEWORK]. This report, commonly referred to as the “Red Book” serves as a reference for how GAO’s Comptroller General issues opinions on questions related to appropriations. *Id.* at 2-1.

38. CHRISTENSEN, *supra* note 22, at 1.

39. Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling “No Law to Apply” with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1048 (2006) (examining the nondelegation doctrine through the lens of the Administrative Procedures Act).

40. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

41. *Id.* at 519–22, 527–28.

42. *Id.* at 519–21.

43. *Id.* at 529.

obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.”⁴⁴

In *Schechter*, the Court considered “fair competition” overbroad as it applied to the extent of the authorities delegated to the executive branch.⁴⁵ The Court held that the President cannot be allowed nearly unfettered authority to develop law that should be squarely within Congress’ bandwidth and responsibility.⁴⁶ As such, the delegation of the code-making authority to regulate the poultry industry with such nebulous guidance was an unconstitutional delegation of Congress’s legislative authority.⁴⁷

C. *Changing the Field with Chadha*

Also relevant to the proper exercise of constitutional authority is the Court’s holding on the use of the legislative veto in *INS v. Chadha*, in which an alien immigrant, Chadha, overstayed his visa and was ordered to be deported by the Immigration and Naturalization Service.⁴⁸ Chadha filed a petition to suspend his deportation, and the “[i]mmigration judge . . . ordered that Chadha’s deportation be suspended . . . [on the basis that] . . . he had resided continuously in the United States for over seven years, was of good moral character, and would suffer ‘extreme hardship’ if deported.”⁴⁹ The attorney general, as then required by the statute, sent a report to Congress recommending that Chadha remain in the United States, upon which the House of Representatives voted against the attorney general’s decision, thus reinstating Chadha’s deportation.⁵⁰ Chadha challenged the reinstatement of the deportation, arguing that the ability for one chamber of Congress to veto the actions of the attorney general was unconstitutional because it represented a one-house veto, which violated the separation of powers.⁵¹

According to the *Chadha* Court’s dicta,

the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing

44. *Id.* at 530.

45. *Id.* at 531.

46. *Id.* at 537–38.

47. *Id.* at 542.

48. *Chadha*, 462 U.S. 919 at 923.

49. *Id.* at 924. The Immigration and Nationality Act provided specific categories of immigrants that may be able to suspend their deportation for good behavior over a continuous period in the United States who would be severely harmed if they were deported. Immigration and Nationality Act § 244(a)(2), 8 U.S.C. § 1254a(c)(1)(A) (repealed 1996).

50. *Chadha*, 462 U.S. at 924–27.

51. *Id.* at 928.

frequency in statutes which delegate authority to executive and independent agencies.⁵²

The statute in *Chadha* was found to be unconstitutional on the basis of denying the President his power of presentment, or the concept that legislation must be presented to the President for his signature prior to effectuation.⁵³ The Court held that “[p]resentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented.”⁵⁴ Instead, the Court held that:

[T]he Constitutional Convention impose[d] burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of [the] Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.⁵⁵

III. THE NONDELEGATION DOCTRINE IN AN ERA OF APPROPRIATIONS TRANSFER AUTHORITY

A. Transfer Authority and the Nondelegation Doctrine

The nondelegation doctrine is well demonstrated by *Schechter*.⁵⁶ There, the Court determined that the use of the phrase “methods of unfair competition” and the lack of a clear definition of how to apply that principle represented a delegation of too much authority to the executive branch for which the legislative branch “is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”⁵⁷ When “the discretion of the President in approving or prescribing codes, and thus enacting laws . . . is virtually unfettered . . . the code-making authority thus conferred is an unconstitutional delegation of legislative power.”⁵⁸

52. *Id.* at 944.

53. *Id.* at 959.

54. *Id.* at 946–47.

55. *Id.* at 959.

56. *Schechter*, 295 U.S. at 549–51 (holding that A.L.A. Schechter Poultry’s conviction for violations of the Live Poultry Code should be overturned because Congress had provided too much authority under the National Industry Recovery to interpret the statute with limited restraints or guidelines, so Congress had transferred too much of its legislative authority).

57. *Id.* at 529.

58. *Id.* at 542.

1. *Nondelegation Challenges May Still Prevail*

Some argue that the Court has spoken definitively on delegation, by rejecting every challenge since *Schechter* in 1935.⁵⁹ From that time on, the Court has looked for merely an “intelligible principle” to determine whether Congress has provided enough direction to agencies as they implement laws or effectuate changes.⁶⁰ According to *Mistretta v. United States*,⁶¹ in “[a]pplying [the] ‘intelligible principle’⁶² test to congressional delegations, [the] jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁶³

While the Court has refrained from finding violations of the nondelegation doctrine since *Schechter* in 1935, the remaining embers of the nondelegation flames continue to glow. Justice Thomas, in his concurrence in *Whitman v. American Trucking Association*, suggests that the issue over delegation is not quite as defunct as recent case law suggests.⁶⁴ Justice Thomas states that issues may be

wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although [the] Court since 1928 has treated the “intelligible principle” requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of “intelligible principles.” Rather, it speaks in much simpler terms. “All legislative Powers herein granted shall be vested in a Congress.” I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative . . .” On a future day . . . I would be willing to address the question whether our

59. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (2002).

60. *Id.*

61. *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (finding that when Congress delegates authority to the Sentencing Commission to establish sentencing guidelines for federal crimes, there is no delegation issue since Congress provided the Sentencing Commission with guidelines and factors to consider when promulgating sentences).

62. *Id.* at 372–73. An “intelligible principle” has come to mean any form of guidance that agencies should operate under as directed by Congress that makes logical sense. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001).

63. *Mistretta*, 488 U.S. 361 at 372 (holding that establishing sentencing guidelines is not a violation of the delegation doctrine and is also not a violation of the separation of powers because Congress and the statute provided the sentencing commission with an intelligible principle as guidance).

64. *Whitman*, 531 U.S. 457, 487 (Thomas, J., concurring) (holding in part that the Clean Air Act’s delegation of authority to the Environmental Protection Agency to set levels for national ambient air quality standards was not a violation of the nondelegation doctrine).

delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.⁶⁵

2. *Nondelegation Analysis Should Be Applied to Appropriations Law*

Some scholars contend that the nondelegation doctrine does not apply to spending laws.⁶⁶ They argue that Congress is not prohibited from allowing agencies and the executive branch to decide how to spend some of their appropriation.⁶⁷ They further argue that the “nondelegation doctrine does not require that Congress pass detailed appropriations each year when it passes the budget, a requirement that would have imposed an extremely burdensome task on the Congress and might have led to the abandonment of the traditional practice of passing annual appropriations.”⁶⁸ It is true that the language of the Constitution is broad and does not direct how narrowly and specifically appropriations must be written.⁶⁹ Should Congress elect to provide larger, lump sum appropriations that lack today’s specificity and instead give the executive branch and its agencies the ability and discretion to spend funds as they see fit, there would be no constitutional question or nondelegation doctrine issue.⁷⁰ That is not the question posed by this Comment, however. The question here is whether, *after* Congress *specifically* directs how funds are to be spent, a transfer of funds away from a specific account and into another account poses a nondelegation doctrine question in that it enables the executive branch direct use of the legislative branch’s Article I, Section 9 spending power.

In *Cincinnati Soap Co. v. United States*, the Court rejected the idea that Congress violated the nondelegation doctrine when it decided to pay the Treasury of the Philippines, a U.S. territory at the time, tax revenues collected from the Philippines and then allow the Philippines government to expend the funds as they saw fit.⁷¹ Here again, the issue addressed was whether Congress needed to specify how funds should be spent, not whether, in the absence of specification, the executive branch was authorized to make its own determination and transfer funds as it saw fit.⁷² There appears to be no case law

65. *Id.* at 487 (Thomas, J., concurring).

66. Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 273 (2001).

67. *Id.* at 272.

68. *Id.*

69. *See generally* U.S. CONST. art. I, § 9, cl. 7.

70. In the absence of specific direction, funds can still only be spent on programs and purposes that have previously been authorized in other bills and which are still subject to the nondelegation doctrine analysis. Rappaport, *supra* note 67, at 319.

71. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321–22 (1937) (holding in part that a tax on coconut oil was not invalid simply because the funds were then given to the Philippines without a clear purpose, because Congress did appropriate the funds for the Philippines to use with limited conditions).

72. *Id.* at 322–23.

that has specifically challenged the constitutionality of transfers between appropriations.

While a number of the transfer authority provisions included in the fiscal year 2017 omnibus (the Consolidated Appropriations Act of 2017) place restrictions on the amounts that may be transferred, in reality, there is very little restriction on the accounts to or from which appropriations may be transferred.⁷³ Further, transfer authority could enable the executive branch to transfer money after enactment to projects for which the current Congress specifically could not reach consensus, and in doing so, transfer funds away from projects upon which Congress could and did reach consensus. The current debate on U.S. border security⁷⁴ serves as an example of this theory. Hypothetically, the Secretary of Homeland Security could siphon off funds from a variety of other appropriations to provide funding for controversial projects, such as the southwest border wall, that Congress lacked consensus to fund at the additional enhanced level. If the Department of Homeland Security operated under a lump sum appropriation, the Department could easily make its own assessments of how to spend its annual appropriation.⁷⁵ But, in an era of multiple accounts and specific appropriations, such a transfer would deny Congress as a body and, in many cases, individual members whose original vote may have depended on specific funding levels, the ability to have the same influence on a process that circumvents Article I, Section 9. Further, it would deny American taxpayers the protections inherent in the process of Congress' consideration of spending requests, development of legislation, and debate on the floors of both chambers of Congress.⁷⁶

73. See, e.g., Consolidated Appropriations Act, 2017, Division A § 717, Division F § 503, Division J § 7009(2).

74. Jacob Soboroff & Adam Edelman, *See All 8 Prototypes for Trump's 'Big, Beautiful' Border Wall*, NBC NEWS (Oct. 23, 2017, 3:32 PM), <https://www.nbcnews.com/politics/immigration/see-all-8-prototypes-trump-s-big-beautiful-border-wall-n813346> (explaining an ongoing debate regarding how a border wall between the U.S. and Mexico will be paid for when the entire project could run upwards of \$21 billion to complete, with U.S. President Donald Trump requesting an initial \$1.8 billion for fiscal year 2018).

75. See STAFF OF H.R. COMM. ON APPROPRIATIONS, 111TH CONG., *supra* note 25, at 9–10.

76. See SATURNO, HENIFF & LYNCH, *supra* note 27, at 3–4.

The annual appropriations cycle is initiated with the President's budget submission, which is due on the first Monday in February. This is followed by congressional consideration of a budget resolution that, in part, sets spending ceilings for the upcoming fiscal year. The target date for completion of the budget resolution is April 15. Committee and floor consideration of the annual appropriations bills occurs during the spring and summer months and may continue through the fall and winter until annual appropriations are enacted. Floor consideration of appropriations measures is subject to procedural rules that may limit the content of those measures and any amendments thereto.

Id. at summary page.

A. Further Roadblocks: The Legislative Veto

Congress has a history of seeking ways to maintain control of executive decisions on policy implementation even after relevant legislation has been passed.⁷⁷ To avoid potential nondelegation doctrine issues associated with transfers in violation of Article I, Section 9, an obvious solution would be for Congress to allow transfers only with the approval of the committees of jurisdiction. The Appropriations Committees already attempt to require some agencies to obtain the committee's approval prior to transferring funds.⁷⁸ Such language would seem to assist in avoiding a question of delegation, because no delegation can occur if Congress remains a custodian of such transfers by requiring prior approval. But in reality, these solutions also run afoul of the Constitution because they represent an unconstitutional legislative veto.

At the time of *Chadha*, 295 congressional veto provisions existed in 196 statutes.⁷⁹ The practice continues today.⁸⁰ The *Chadha* analysis has been applied to appropriations language as well.⁸¹ Thus, any attempt to avoid a nondelegation doctrine challenge while still providing some level of congressional control by requiring prior committee approval for a transfer would violate the holding in *Chadha* by denying the President the power of presentment. While agencies may still seek approval as a matter of custom,

77. See, e.g., 5 U.S.C. § 801 (2012) (codifying the Congressional Review Act, which gives Congress the ability to review and overrule new regulations promulgated by executive branch agencies if Congress passes a joint resolution).

78. Consolidated Appropriations Act, 2017, Division A § 717(b).

None of the funds provided by this Act, . . . shall be available for [transfer] . . . unless the Secretary of Agriculture or the Secretary of Health and Human Services (as the case may be) notifies in writing and receives approval from the Committees on Appropriations of both Houses of Congress at least 30 days in advance of the . . . transfer of such funds or the use of such authority.

Id.

79. *Chadha*, 462 U.S. 919 at 944.

80. LOUIS FISHER, CONG. RESEARCH SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA, 5-6 (2005), <http://www.loufisher.org/docs/lv/4116.pdf>.

Congress continues to add legislative vetoes to bills and Presidents continue to sign them into law, although often in their signing statements they object to these legislative vetoes and regard them as unconstitutional under the Supreme Court's ruling Although Presidents have treated committee vetoes after *Chadha* as having no legally binding value, agencies often adopt a different attitude. They have to work closely with their review committees, year after year, and have a much greater need to devise practical accommodations and honor them.

Id. (emphasis in original).

81. *Id.* at 4 (explaining that if spending caps are placed within the report language rather than the actual statute, agencies such as NASA, that seek to move money around contrary to the guidelines in the report language, have not created a statutory violation).

deference, or fear of retribution, they could credibly make the argument that they are not required by law to obtain such approval.⁸²

B. Standing: Challenging a Transfer

As articulated above, transfer authority is likely unconstitutional. Bringing a case before the courts to actually challenge the constitutionality of transfer authority, however, would require a specific plaintiff to have a specific claim.⁸³ In order to establish standing, an individual or entity would need to demonstrate a real, concrete, and particularized injury, rather than some abstract harm.⁸⁴

Plaintiffs in the context of the question contemplated by this Comment would need to show that the transfer of funds from one account to another directly caused them harm and that such harm constitutes more than an abstract, theoretical injury.⁸⁵ As such, plaintiffs would likely need to prove that they have been harmed by an activity to which appropriations were transferred or that they would have been a direct recipient or beneficiary of funds had those funds not been transferred to another appropriation.

1. Finding a plaintiff absent congressional earmarks is challenging.

Finding a plaintiff who could argue credibly that he or she would be the direct recipient of a specific appropriations poses a challenge in the modern era. Historically, congressionally-directed spending, or earmarks, occurred when funds were designated for a specific purpose and often a specific recipient.⁸⁶ Earmarking traditionally meant that individual members of Congress could ensure that specific funds went to specific projects by including language that directed certain funds to go directly to activities like research at home state universities or for the construction of specific roads within specific jurisdictions.⁸⁷ Efforts to reign in “pork barrel” spending, however, have led to self-imposed earmark bans.⁸⁸ Before their demise, earmarks provided some level of transparency, because Congress and the public could see who requested

82. *Id.* at 3. But “[o]ne effect of *Chadha* has been to drive some legislative vetoes underground, where they operate on the basis of informal and nonstatutory understandings” as demonstrated by Reagan’s objections in 1984 to language that he deemed a committee-veto clause that violated *Chadha*. *Id.*

83. FED. R. CIV. P. 17(a) (stating that a “real party in interest” is required to sue or be sued).

84. *Crawford v. U.S. Dep’t of Treasury*, 868 F.3d 438, 453, 458 (6th Cir. 2017) (holding plaintiffs challenging the Foreign Account Tax Compliance Act and Bank Secrecy Act lacked standing to bring such a claim).

85. *Id.* at 460–61.

86. See GAO GLOSSARY, *supra* note 3, at 44–45.

87. Rollcall Staff, *supra* note 16.

88. Stephen Dinan, *Senate Votes to Keep Ban on Earmark Spending*, WASH. TIMES (Jan. 10, 2017), <https://www.washingtontimes.com/news/2017/jan/10/senate-votes-keep-ban-earmark-spending/>. The Senate Republican conference voted again in 2017 to extend the GOP’s ban on earmark spending, a decision that had already been in place for six years. *Id.*

an earmark, for how much, and to whom those funds were directed.⁸⁹ Without earmarks, determining who might be the actual recipient of funding when a bill is enacted is more difficult because the decision-making lies with the “federal agency bureaucrats.”⁹⁰

2. *Congressional parties might be able to gain standing.*

If it is difficult to determine a party who would have otherwise received funds that were transferred, then the question turns to who else might have standing to bring a case challenging the constitutionality of a transfer. At various times, members of Congress have turned to the courts to assert what they believe to be their constitutional rights as members of the legislative branch.⁹¹ Such was the case in *Raines v. Byrd*, in which individual members of Congress challenged the constitutionality of the President’s line item veto authority.⁹² But the Court refused to find they had standing on the basis that, “the institutional injury they allege[d] [was] wholly abstract and widely dispersed . . . , and their attempt to litigate the dispute at [that] time and in [that] form [was] contrary to historical experience.”⁹³

The Court may be more inclined to find that members of Congress have standing when they bring an action on behalf of an entire chamber, as was the case in *United States House of Representatives v. Burwell*.⁹⁴ There, the House argued, in part, that the Secretary of the Treasury and the Secretary of Health and Human Services used federal funds that had not been appropriated to implement the Patient Protection and Affordable Care Act, in violation of Article

89. Rollcall Staff, *supra* note 16. The lack of earmarks actually may have made appropriating and “passing legislation through both chambers, already a herculean task in a Washington mired in partisan gridlock, a virtual impossibility.” *Id.*

90. *Id.*; see also Eric Pierce, *Congress Keeps Ceding Power to the President*, THE DOWNEY PATRIOT (Dec. 23, 2010), <https://www.thedowneypatriot.com/articles/congress-keeps-ceding-power-to-the-president?rq=congress%20keeps%20ceding%20power%20to%20the%20president> (arguing that while Congress should seek transparency, it should also keep earmarks and require an up or down vote on each, rather than outright eliminate the earmark, which would instead limit congressional power).

91. See generally *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that individual members of Congress may not have standing as individuals to advocate for the rights of the legislative branch as a whole).

92. *Id.* at 816.

93. *Id.* at 829.

[The Court] attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).

Id. (internal citations omitted).

94. *U.S. House of Reps. v. Burwell*, 130 F. Supp. 3d 53, 57–58 (D.D.C. 2015).

I, Section 9.⁹⁵ The Secretaries argued that the House of Representatives did not have standing to bring such a case, but the “House oppose[d], adamant that it ha[d] been injured in several concrete ways, none of which can be ameliorated through the usual political processes.”⁹⁶ On the question of whether the House could sue the Secretaries, the court agreed that the House had standing, because the “House sue[d], as an institutional plaintiff, to preserve its power of the purse and to maintain constitutional equilibrium between the Executive and the Legislative. If its non-appropriation claims have merit, . . . the House has been injured in a concrete and particular way that is . . . remediable in court.”⁹⁷

Based on *House v. Burwell*, entire chambers of Congress appear to be able to obtain standing more readily.⁹⁸ Because of the challenges a non-congressional entity would find in attempting to establish standing, the Houses of Congress are among the few entities that might be able to bring a claim successfully against the constitutionality of transfer authority. It seems unlikely that a chamber would pursue such action, however, when instead, it could simply seek to eliminate or modify the transfer authority included in the annual appropriations bills it helps develop and enact.

Because it is likely that only a few individual litigants are capable of challenging transfer authority, any future action to moderate transfer authority would likely be a political action rather than a response to a judicial decision.

IV. RESOLVING THE NONDELEGATION DOCTRINE AND TRANSFER AUTHORITY CONUNDRUM

A. Returning to Lump Sum Appropriations

One possible solution to avoid constitutional issues associated with transfer authority, the nondelegation doctrine, and *Chadha*'s holding on the legislative veto, would be for appropriations bills to return to a broader form, including higher-level, lump sum appropriations.⁹⁹ Doing so could provide the executive branch agencies with more flexibility to make assessments throughout the year and fund activities based on an agency's changing needs, rather than adhere to a more specific, prearranged spending plan.

Such a solution can be illustrated by the following hypothetical.¹⁰⁰ Assume that a department is funded through three separate appropriations: (1) a salaries

95. *Id.* at 57.

96. *Id.*

97. *Id.* at 57–58.

98. *See id.* at 81.

99. “[T]he very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective and desirable way.” *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

100. As an actual real-life occurrence,

the then Department of Health, Education, and Welfare received a lump-sum appropriation covering several grant programs, it could set aside a portion of each

account, (2) a procurement account, and (3) a research account. Each account is funded at \$3 billion, for a total of \$9 billion. In light of the likely unconstitutionality of transfer authority, if the department experiences a major cybersecurity attack that requires additional funding, the department decides that it should procure immediately new information technology systems through its procurement account and pay for it by deferring some low priority research projects, the agency would be limited from using funds from the research account to supplement the procurement account absent new appropriations made by law even if Congress and the agency both agree that doing so would be prudent.

In this hypothetical, however, if the entire department was funded at \$9 billion through one single account, the department could make its own assessments about how to address most prudently the cybersecurity challenge without running afoul of constitutional issues. It could elect to amend its own internal spending plans with greater efficiency without the need to involve Congress at all.

While this solution may address the constitutional issues posed by the nondelegation doctrine and legislative veto, it cedes congressional power to the executive branch by placing greater discretion in the hands of the unelected employees of the department. While this solution adheres more faithfully than current practice to the letter of the Constitution's legislative power over spending,¹⁰¹ it arguably abdicates more authority to the growing bureaucratic state that "may or may not be familiar with the communities they're affecting," and therefore perhaps would offend Jefferson's sensibilities by eroding the Constitution's intent that the power of the purse belongs with Congress.¹⁰² Instead of lump sum appropriations, Congress should move to change the rules of debate surrounding appropriations bills.

B. Creating Expedited Rules of Debate

Rather than resolving the Constitutional issues discussed above by minimizing congressional power with lump sum appropriations, Congress should act to strengthen that power by incentivizing the timely consideration and passage of appropriations bills. One of the difficulties in passing any piece of legislation, appropriations bills included, lies in the speed with which Congress can move to address issues that arise. Congress, specifically the Senate, is

program's allocation for a single fund to be used for "cross-cutting" grants intended to serve more than one target population, as long as the grants were for projects within the scope or purpose of the lump-sum appropriation.

GAO LEGAL FRAMEWORK, *supra* note 38, at 2–39.

101. See U.S. CONST. art. I, § 9, cl. 7.

102. Pierce, *supra* note 93; see also Sarah Binder, *Power of the Purse in Peril?*, WASH. POST (Sept. 19, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/09/19/power-of-the-purse-in-peril/?utm_term=.8eb52ff9c85e (reporting that lawmakers "pay a price" when they give up spending power to bureaucrats).

designed to move very deliberately absent unanimous consent, where every member agrees to set aside procedural roadblocks.¹⁰³ When an agency experiences an exigent or unexpected budgetary circumstance in the middle of a fiscal year, rather than employ transfer authority schemes, Congress should be more readily able to enact new appropriations bills to specifically address the changed circumstance.

Under the current model and procedure for debate of such bills, doing so would be arduous, and the lack of time on the legislative calendar would simply prevent the consideration of numerous new appropriations bills throughout the year. But, if the speed with which the committees and both chambers could address emerging needs throughout the year were expedited, then Congress could revise the funds available for specific projects on an as needed basis, all the while avoiding problematic transfers.

Currently, in the Senate alone, floor debate is “governed by a set of standing rules, a body of precedents created by rulings of presiding officers or by votes of the Senate, a variety of established and customary practices, and ad hoc arrangements the Senate makes to meet specific parliamentary and political circumstances.”¹⁰⁴ Further, the length of debate in the Senate is open ended by design, with almost no limit on the number of Senators that may speak on an issue or for how long they may speak.¹⁰⁵ For example, “[w]hen Senators are recognized by the presiding officer, the rules normally permit them to speak for as long as they wish, and questions generally cannot be put to a vote as long as there are Senators who still wish to make the speeches they are permitted to make.”¹⁰⁶ To invoke cloture¹⁰⁷ in the Senate, or end debate on a matter on which just one individual Senator seeks to continue, three-fifths of the Senate must vote to do so, and even once cloture is invoked, 30 hours of debate must take place before the matter can be resolved.¹⁰⁸ Similarly, bills or joint resolutions relating to congressionally directed spending must be available to members and the general public for at least 48 hours before they can be voted on.¹⁰⁹ This creates a potentially lengthy process of approval.

103. U.S. SENATE, GLOSSARY, *Unanimous Consent*, https://www.senate.gov/reference/glossary_term/unanimous_consent.htm (last visited Mar. 18, 2018).

104. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 96–548, *THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION I* (2017), <https://www.senate.gov/CRSpubs/5c970bdd-ed33-446c-a646-cda331d7b108.pdf>.

105. *Id.* at 2.

106. *Id.*

107. Cloture is the closure of debate and requires the vote of 3/5 of the Senate. WATER J. OLESZEK, CONG. RESEARCH SERV., 98–780, *CLOTURE: ITS EFFECT ON SENATE PROCEEDINGS I* (2008), <https://www.senate.gov/CRSpubs/271e65d0-6862-4e62-938c-8e65249ae391.pdf>.

108. HEITSCHUSEN, *supra* note 107, at 3.

109. STANDING RULES OF THE SENATE, *Rule 44*, <https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf#page=20>.

All of these rules are, in fact, just the Senate's own rules. The Constitution is silent on how long or through what procedures Congress should consider spending bills. Instead, the chambers, through the precedents and rules the members themselves have created and modified over the years, dictate the speed with which Congress can consider appropriations bills.¹¹⁰ As such, the members of Congress should move to change their own rules to expedite and simplify consideration of spending bills outside of the regular, annual appropriations process.

The treatment of debate and the processes of considering executive branch and judicial appointments in the Senate is a prime example of the Senate changing its own rules to expedite debate.¹¹¹ Prior to January 2013, it could take up to a week for the Senate to consider a nomination.¹¹² In January 2013, however, then Majority Leader Harry Reid led an effort to expedite their consideration by changing the Senate the precedent that requires three-fifths of Senators to invoke cloture and then 30 hours of post-cloture debate, instead enabling the Senate to call up a nomination, formally move to debate that nomination four hours later, and then pass the nomination by a mere majority vote.¹¹³

If the Senate, and Congress as a whole, can change its own procedures for something as significant as such nominations, then it certainly should explore the idea of changing the procedures for consideration of appropriations matters that arise outside the regular annual appropriations process. Congress could set guidelines for what types of appropriations modifications are eligible for this expedited debate, perhaps even imposing the same monetary and other limits it is already using in the context of transfer authority. Anything beyond those limits would not be eligible for the expedited procedure, ensuring that major spending changes still receive the requisite attention and debate currently required. Expedited procedures would enable Congress to place its stamp of approval or disapproval on updates to previously passed appropriations bills, avoiding the Constitutional questions transfer authority invites.

V. CONCLUSION

Appropriations bills give life to trillions of dollars annually. Such sums should not be disbursed lackadaisically on a whim or handed over to someone

110. HEITSCHUSEN, *supra* note 107 at 1–3, 5.

111. See Jonathan Weisman, *New Senate Rules Designed to Speed Things Up*, N.Y. TIMES (Jan. 24, 2013, 4:59 PM), <https://thecaucus.blogs.nytimes.com/2013/01/24/new-senate-rules-designed-to-speed-things-up/>.

112. *Id.*

113. *Id.* The 115th Congress employed a similar “nuclear option” by changing the Senate rules to change the number of votes required to confirm a Supreme Court nomination from 60 to a simple majority. Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

else to handle. Yet that is exactly what Congress does every time it provides executive branch agencies the authority to transfer funds between appropriations. Congress, as the exclusive custodian of the power of the purse, must not absolve itself of its Constitutional prerogative and obligation by giving bureaucrats the ability to move money around as they see fit in contravention of appropriations made by law. Doing so is a violation of the non-delegation doctrine.

Congress has limited options to ameliorate this situation: if Congress tries to prevent delegating away its appropriations authority by only allowing transfers subject to the Appropriations Committees' preapproval, Congress will violate *Chadha*. Additionally, most plaintiffs challenging transfer authority will struggle to gain standing. Instead, the likelihood of addressing the constitutionality of transfer authority will require Congress acting on its own to reclaim its authority. Procedural rule changes to expedite Congress' ability to consider emerging appropriations mid-year, outside the regular, annual appropriations process, would enable Congress to follow the letter and the spirit of the Constitution.

Absent Congress taking the first move to confront its adherence to the Constitution seriously, transfer authority will represent just one of many ways Congress whittles away its authorities and threatens the separation of power that our country is built upon.¹¹⁴

114. Some members of Congress stand ready to defend their Constitutional prerogatives. For example, former Congressman Lee Hamilton stated:

I've never been able to figure out why Congress seems so interested in giving up power. When you're sworn in as a member on Capitol Hill, you take an oath to uphold the Constitution, which places Congress first in the firmament of national governance and makes it coequal to the presidency. Yet over the years, members of Congress have repeatedly handed the executive branch more power, in everything from going to war to budget-making to designing the specifics of financial-industry reform.

Pierce, *supra* note 93.

