Everything About the Trump Administration's Impoundment Putsch You Were Too Afraid to Ask

Notes on the Crises

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I was originally planning on my next piece being a long delayed analysis of the Federal Reserve's response to the 1970 Penn Central crisis using the 30,000 pages of Federal Reserve Board minutes I got through FOIA. However, events have overtaken me: the Trump administration's sudden and rapid rollout of spending freezes across the entire federal government requires extensive commentary. It is no exaggeration to say that this is the most dramatic event in the constitutional law of fiscal policy in the United States ever. That may not sound like a five alarm fire to you, but to

me that is **enormously alarming to type out.** Yet, I would be surprised if any constitutional expert would seriously dispute it (outside perhaps the motivated reasoning of law professors who support what the Trump administration is doing) .

So what is so dramatic about this moment? Let's start with the basics. President Trump entered office at the beginning of last week. He launched a raft of executive orders attempting to reshape the federal government according to his priorities root and branch. The Office of Management and Budget memo implementing these executive orders usefully cites the most relevant ones (I've uploaded a copy of the memo to my website for posterity):

> Protecting the American People Against Invasion (Jan. 20, 2025), Reevaluating and Realigning United States Foreign Aid (Jan. 20, 2025), Putting America First in International Environmental Agreements (Jan. 20, 2025), Unleashing American Energy (Jan. 20, 2025), Ending Radical and Wasteful Government DEI Programs and Preferencing (Jan. 20, 2025), Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (Jan. 20, 2025), and Enforcing the Hyde Amendment (Jan. 24, 2025).

These titles provide a good idea of what Trump's ~~first two weeks~~ less than two weeks back in office have been like in the administrative state.

However, the ideological flavor is in some ways **a distraction from the deeper significance.** The rhetorical framing of these executive orders obscure their most urgent goal. That is: taking far greater control over congress's authority to spend. Which brings us back to that OMB order:

> To implement these orders, each agency must complete a comprehensive analysis of all of their Federal financial assistance programs to identify programs, projects, and activities that may be implicated by any of the President's executive orders. In the interim, to the extent permissible under applicable law, Federal agencies **must temporarily pause** all activities related to obligation or disbursement of all Federal financial assistance, and other relevant agency activities that may be implicated by the executive orders, including, but not limited to, financial assistance for foreign aid, nongovernmental organizations, DEI, woke gender ideology, and the green new deal.
>
> This temporary pause will provide the Administration time to review agency programs and determine the best uses of the funding for those programs consistent with the law and the President's priorities. The temporary pause will become effective on January 28, 2025, at 5:00 PM. [emphasis in the original]

A "temporary pause" on all disbursement of "federal financial assistance" is an absolutely astounding step. Let's not forget the scale of US federal funding. As the memo says, this affects appropriations which amounted to **nearly three trillion dollars** in the 2024 fiscal year. This is an enormous act to take with an executive order. In fact, for reasons I'll outline in this post, that is an understatement in crucial ways.

Taking this kind of action with an agency guidance memo implementing executive orders is already extraordinary. But now note when the order was supposed to become effective: "January 28, 2025, at 5:00 PM". But when was this memo issued? It is dated January 27th, with the reporting indicating it reached email inboxes at **5 PM that day**. So not only did they attempt to freeze an enormous part of the federal government's budget, they tried to do so with **exactly 24 hours notice**. The memo is also only two pages long, and its language is broad, vague and sweeping.

In particular, the memo didn't list any programs it applied to (only a couple it didn't apply to, like social security and medicare). It says it doesn't apply to benefits provided "directly to individuals", for starters, but does that include or exclude state administered medicaid or SNAP? How about student loans through student loan servicers? The result was wholly predictable. Payment portals across the Federal government **went down:** from housing assistance through HUD, to nonprofits that provide essential services like the Head Start program, to medicaid portals which went down for all 50 states on Tuesday and into Wednesday.

Reporters are still sorting out all that was affected and what might still be affected. In those circumstances, it was not surprising that about 44 hours after the memo reached administrative agencies throughout the Federal Government, it was rescinded in another terse two sentence memo. Besides the chaos, another reason the OMB guidance was rescinded was that a DC court was in the process of issuing an injunction against the freeze. Why? Because the OMB guidance **was wildly unconstitutional.** The president does not have the authority to pick and choose which laws to implement. As the constitution puts it, the President has the responsibility to "faithfully execute the laws". Congress has the "power of the purse", and this was the president trying to take control of the purse strings. What the OMB guidance did is known in constitutional terms as "impoundment". Impoundment is only constitutional if the legislation "appropriating" funds to be disbursed **authorizes the president to spend less** than what was appropriated.

Which brings me to a new angle to a well worn topic in this newsletter: the debt ceiling. The topic of impoundment might seem far afield from the debt ceiling, but it is not. Impoundment in fact plays a key analytical part of the debt ceiling conversation. In Neil Buchanan and Michael Dorf's 2012 Columbia law review article "How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff", they proposed that the debt ceiling brought forward a constitutional "trilemma". As the 2011 Federal Reserve memo I obtained through FOIA concisely states:

> "With the federal debt ceiling binding and the Treasury running out of the additional borrowing capacity it can achieve under various accounting procedures, a technical default on Treasury securities cannot be ruled out".

In other words, the debt ceiling superficially seems to **create a mismatch between spending and the executive's legal authority to finance** said spending. It's crucial to emphasize that this is a

fairly **unique** feature of our constitutional system. In parliamentary systems, legislation which authorizes spending **automatically** authorizes financing. It is not possible to create a legal mismatch between budgetary authority and financing authority in those constitutional systems. According to Buchanan and Dorf, there are three ways to resolve this alleged "Trilemma".

The first way is to violate the debt ceiling law and simply issue more treasury securities. This is unconstitutional because it's unconstitutional to plainly and intentionally violate a statute passed by congress (we'll get back to that…) However, Buchanan and Dorf argue that this is the "least unconstitutional option" because plainly violating a statute is a **lesser offense** than the other two options. The second option is obviously for the treasury to default on its debt. I've spent so much time in this newsletter focusing on default's consequences as well as its unconstitutionality, that I feel no need to belabor the point here.

This, however, leads to the third point in the Buchanan and Dorf trilemma. This point is increasing taxes or cutting spending without congressional authorization. Putting aside the idea of unconstitutionally raising taxes, this point of the trilemma essentially **is impoundment**. Thus, truly and fully understanding the debt ceiling and its constitutional implications also involves understanding impoundment. Indeed, we may be in an impoundment trilemma where the debt ceiling is one of the points on the triangle rather than the other way around.

The possibility of impoundment being a serious solution to the debt ceiling trilemma was so unlikely to Buchanan and Dorf that they quickly disposed of it in their 70 page article. The core of their analysis is laid out in three paragraphs worth quoting in full:

> Regarding the spending power, the picture is a bit more nuanced. In the early years of the Republic, Congress passed laws that authorized the president to spend "up to" certain sums of money, and the president was accordingly able to carry out his constitutional duties while spending money in amounts not precisely specified by Congress.
>
> In most areas of the federal budget, however, that practice has long since ended. Congress now typically specifies **precise amounts of money** (or, in the case of so-called entitlement programs, precise formulae to determine amounts of money) that the president must spend for each authorized program. When Congress appropriates the money necessary to fund those authorized programs, it effectively orders the president to spend no more and no less than those amounts. **It would be odd, indeed, if a president were to assert that he could choose to, say, send Medicare beneficiaries (or their medical care providers) less money than they would be entitled to receive under the relevant statute.**
>
> Moreover, we need not speculate about what would happen if a president were to assert such authority. The impoundment controversy during the Nixon Administration involved a direct confrontation between the executive and legislative branches, with Congress objecting to

> Nixon's theory of an "imperial presidency," in which the president would have the power to selectively reduce certain spending programs at his discretion. [emphasis added]

Note the way they ridicule (at least by the subtle standard of legal academia) the idea that a president could simply **choose** to send medical care providers less money than statutorily required. Spending less than authorized was seen as **so obviously and clearly unconstitutional** to them (and indeed to a panoply of legal experts) that it felt easy to dispose of.

Predictably, the major episode that presaged the current one was when Nixon tried to claim expansive authority to impound. He claimed this right on the basis of the constitution's "executive power" clause in the service of preserving "fiscal integrity". As President Nixon stated at a press conference 52 years ago (to the day!):

> The constitutional right for the President of the United States to impound funds and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people, that right is absolutely clear.

Clearly, these kinds of sweeping claims did not pass muster. When forced to try to come up with alternative legal authority to impound, a number of statutes were invoked but it is most notable that the Nixon administration itself also invoked the debt ceiling during its impoundment episode. Even at the time, this was seen as the administration's most plausible rationale.

Yet, the Nixonian approach to impoundment was widely rejected and resulted in the Impoundment Control Act of 1974. That statute established a process to freeze appropriations for certain particular, specified reasons for 45 days while the President notifies congress of his desire for the appropriations to be rescinded. If congress does not pass a law rescinding the spending, the president is obliged to follow through on that congressionally mandated disbursement. Thus the ICA's "rescission" power is extraordinarily limited. Which is likely why the Trump administration did **not try to use it.**

It's important to underscore that impounding unconditionally mandated appropriations was **already quite unconstitutional.** The statute merely created a process to manage impoundment emanating from narrow, legitimate reasons. There is a reason that scholars like Buchanan and Dorf treat it as otherwise unconstitutional. For them, Congress spoke loudly and clearly in 1974. Case closed, impoundment is more unconstitutional than violating the debt ceiling.

If only it were that simple.

As a famous twentieth century statesman might have said in this situation **"...and how many divisions does the Constitution have?"**

Buchanan and Dorf's paper envisioned congress passing legislation clarifying that what the president is doing is unconstitutional, thus retaining tight legislative control over the "power of the purse". This is, to say the least, unlikely when the president is Donald Trump and the 2025 Republican Party

has majorities in both the house and senate. Without congress or the president preventing grossly unconstitutional activities, we are left with the judiciary. While as of this writing, one DC judge issued an injunction against Trump's executive orders directing sweeping impoundments, it would be foolish to think this is the end of the road.

White House Press Secretary Karoline Leavitt was quick to clarify that the executive orders remain in effect, it's only the OMB guidance that has been rescinded. Meanwhile Trump's OMB nominee Russell Vought is on record about his belief that the president has sweeping impoundment powers, whereas the Impoundment Control Act of 1974 is unconstitutional. The think tank he founded in 2021 and serves as president of, the Center for Renewing America, has released multiple white papers and an op ed explicitly making the case that expansive impoundment is constitutional, while the Impoundment Control Act of 1974 is the **actual** unconstitutional part of the impoundment story. Mark Paoletta, first author on those white papers and that Op Ed, is now the Office of Management and Budget's general counsel.

Trump's inner circle has been talking about expansively using impoundment for a while. Jeff Stein & Jacob Bogage at the Washington Post covered their desire to pick a fight over impoundment (albeit not necessarily this fight in this fashion) in June of last year. The Trump administration looks poised to regroup and come up with a number of approaches to getting the impoundment they want. Reporting as of yesterday suggests funds are still being frozen at the National Science Foundation, for example. We are still on track for a speedy constitutional confrontation over these executive orders, OMB guidance or not.

Given the precedent of the Nixon administration (and admittedly the bias of my research interests), I can't help but think about the possibility that they may leverage the debt ceiling to pursue impoundment. The debt ceiling is indeed back in the news and as we speak the Treasury is using "extraordinary measures" to avoid the limit. There is also recent legal research that challenges Buchanan and Dorf's assessment that violating the debt ceiling is the "least unconstitutional option". Lawrence Rosenthal argues in an article in a specialist NYU Law journal simply titled "The Debt Ceiling is Constitutional" that not following through on congressionally mandated spending is allowed when the debt ceiling is binding (because, he argues, it has created an "operational factor".)

As the Government Accountability Office has stated on numerous occasions: "Programmatic delays occur when an agency is taking reasonable and necessary steps to implement a program or activity, but the obligation or expenditure of funds is unavoidably delayed". The legal significance of this is that it makes these spending "delays" not impoundments, and not subject to the Impoundment Control Act. A significant amount of what the GAO does is make rulings on whether congressional appropriations are experiencing legal "programmatic delays", or unconstitutional impoundments. Under Rosenthal's line of thinking, the debt ceiling creates a legal way to "freeze" spending by making potentially trillions of dollars of spending subject to "programmatic delays".

Of course, Rosenthal did not claim that what the Trump administration is trying to do, pick and choose the spending it likes, is constitutional. He analogizes his "solution" to a government shutdown, that is when congress fails to appropriate the spending needed for normal functioning of government. This would be a "programmatic delay" across the board, with possibly a carveout for non-annual appropriations like social security and medicare, that would likely be treated as "harmlessly unconstitutional" by judges. But just because he is not defending the executive's authority to "pick and choose" to avoid the debt ceiling, doesn't mean these arguments can't be marshalled in that direction. Imagine the havoc that could be reached if congressional Republicans decided to go back to raising the debt ceiling, rather than suspending it, in order to repeatedly stop the types of appropriations out of favor with the new administration.

The elephant in the room of all this is that the judiciary currently appears to be the most significant constraint on the Trump administration's impoundment maneuvers. If you do not support President Trump's agenda, this is not a comforting thought for a number of reasons. Not least of which is that **three** of the nine justices were appointed by Trump in his last term. Nevertheless, there are reasons to think this is a particular issue where the Republican appointee dominated court might part ways with Trump. For one thing, their decisions in recent years have targeted the discretion of the administrative state, particularly over budgetary issues as an improper delegation of Congress's "power of the purse". Their zealous targeting of a lack of sufficiently tight congressional control over administrative agencies' conduct, even over the intentions of congress itself, cuts into the opposite direction of granting the executive branch increasing discretion over spending. That could stand even if they like it better when it's in the president's direct purview.

Furthermore, chief justice John Roberts is on record on this issue in a number of places. One of the most interesting sources is one recently unearthed by Lever News. In a cover letter to a White House memo in 1985, then associate White House counsel wrote:

> The attached memorandum simply outlines the requirements of the Impoundment Control Act of 1974, 2 u.s.c. §§ 681-688, touches upon the unresolved Chadha issue presented by that Act, and attempts to dampen any hopes that inherent constitutional impoundment authority may be invoked to achieve budget goals. As noted in the memorandum, the question of whether the President has such authority is not free from doubt, but I think it clear that **he has none in normal situations, and we should discourage Chew and others from considering impoundment as a viable budget planning option**. Our institutional vigilance with respect to the constitutional prerogatives of the presidency requires appropriate deference to the constitutional prerogatives of the other branches, and **no area seems more clearly the province of Congress than the power of the purse**. [emphasis added]

Of course, a lot has changed in forty years. Yet Roberts' 1985 statement still reflects the overwhelmingly dominant legal opinion today, including from the Supreme Court itself. But those are the famous last words of a graveyard of commentators seeking to predict the outer limits of the

recent Supreme Court's willingness to invent doctrine to reach a predetermined conclusion, facilitating a recently formulated agenda.

In my view, the only way to truly close the door on the impoundment question in these circumstances is a Supreme Court decision which explicitly and clearly affirms that the president has an affirmative obligation to pursue any mechanism which narrows the mismatch between budgetary and financing authority. This includes accounting gimmicks they have used in the past like "warehousing" foreign currency reserves at the Federal Reserve and, yes, the trillion dollar platinum coin. Without having an explicit, absolute and affirmative obligation to seek out any possible financing authority necessary to faithfully execute the laws, including wonkier options like "low face value, high coupon bonds" and bonds that pay interest but have no principal ("consols"), the possibility arises that the President could do the legal equivalent of "taking a dive". That is, knowingly behave unconstitutionally, when the debt ceiling is close to binding and a number of the "conventional" extraordinary measures have been "exhausted". It would still be unconstitutional, but plenty of unconstitutional things pass by without censure when objectors lack standing to sue, or the courts decline to provide relief. "Taking a dive" at least has enough sheen of constitutionality that it could plausibly pass muster in this era of the Supreme Court's history.

This is the real legal import of my colleague Rohan Grey's argument in his fantastic paper "Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy". It is not simply that the monetary power is missing from the Buchanan and Dorf trilemma. Nor even that Rohan's arguments, in combination with the dramatic and flashy trillion dollar platinum coin transforms the trilemma into a demi-quadrilecta (okay, I might go back to the portmanteau drawing board on that one….) It's that an **affirmative obligation** of the executive to squeeze out every last financing authority is the only satisfactory, and not wildly disruptive, way out of what Buchanan and Dorf frame as an unavoidable trilemma. Hence Rohan's provocative but quite strong argument that not only is minting a trillion dollar platinum coin legal, the president has an outright **legal obligation** to "mint the coin" if that is truly the last financing authority left at their disposal.

In the meantime, we are going to be hearing a lot more about impoundment. If things keep going at this pace, it will be a long four years. And of course, there are many ways to peel an onion. The debt ceiling is not the only way to try to pursue a strategy of indefinite "programmatic delays". Last week, before this week's chaos emerged, I spent a significant amount of time contemplating the climate executive order targeting the ~~"Green New Deal"~~ Inflation Reduction Act. If Trump freezes those tax credits, do those who qualify for them have standing to sue? If they do gain standing, will the Trump administration fall back on arguments about whether the plaintiffs **truly qualify** for the tax credits? Or even that it is legitimate for them to freeze the tax credits indefinitely, while they look over the criteria and potential beneficiaries have no recourse?

There's a lot of levers to pull, but the Trump administration does not seem to have the patience for aiming to win lesser victories. Over the coming weeks, ordinary Americans are in danger of learning

a lot more about the "legal plumbing" of fiscal policy—far more than they could ever have the perverse desire to know. That's not a circumstance that you want to be in, just like you may remember: many of you who started reading me five years ago, just to keep up with the monetary plumbing of our economy. Ordinary Americans are now in danger of learning a lot more about the "legal plumbing" of fiscal policy; far more than they could ever imagine wanting to know. When everything is going well, **most people don't have to think about the plumbing going through their walls.** Things aren't going well.